



*Committee on Legal Affairs
The Chair*

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Mr Roberto Gualtieri
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Subject: Opinion on the legal basis of the Commission proposal for a directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (COM(2016)0198 – C8-0146/2016 – 2016/0107(COD))

Dear Mr Chair,

On 10 January 2017, the Committee on Legal Affairs decided of its own motion, pursuant to Rule 39(3) of the Rules of Procedure, to provide an opinion as to whether the legal basis proposed by the Commission, namely Article 50(1) TFEU, constitutes the correct legal basis of the proposal for a directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches or, on the contrary, the proposal should have been based on a different legal basis such as Article 115 TFEU.

I. Background

On 12 April 2016, the Commission adopted a proposal for an amendment to Directive

2013/34/EU ('the Accounting Directive')¹. The proposal imposes on EU and non-EU multinational groups with global revenues exceeding 750 million euros a year an obligation to draw up and publish annual income tax reports.

According to the Explanatory Memorandum to the proposal, a healthy Single Market requires that companies should pay taxes in the country where profits are generated. The phenomenon of aggressive tax planning undermines this principle. The Commission considers that public scrutiny can help to combat this practice. Furthermore, the Commission explains that the proposal complements undertakings' current financial reporting requirements and does not interfere with these requirements in relation to their financial statements.

II. The relevant Treaty Articles

The legal basis proposed by the Commission is Article 50(1) TFEU. Articles 50(1) and 50(2)(g) TFEU read as follows:

Article 50 (ex Article 44 TEC)

1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

(...)

(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;(...)

Article 115 TFEU reads as follows:

Article 115 (ex Article 94 TEC)

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

¹ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p.19).

Member States as directly affect the establishment or functioning of the internal market.

III. The case law on legal basis

The choice of legal basis is important because the Union is constitutionally founded upon the principle of conferral of competences and its institutions can only act in a manner consistent with the mandate provided to them by the Treaty¹. Therefore, the choice of a legal basis is not discretionary.

Certain principles emerge from the case law of the Court of Justice as regards the choice of legal bases. First, in view of the consequences of the legal basis in terms of substantive competence and the procedure, the choice of the correct legal basis is of constitutional importance². Secondly, the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include, in particular, the aim and content of that measure³. The fact that an institution wishes to participate more fully in the adoption of a given measure, the work carried out in other respects in the sphere of action covered by the measure and the context in which the measure was adopted are all irrelevant.⁴

The choice of an incorrect legal basis may therefore justify the annulment of the act in question⁵.

IV. The aim and content of the proposed regulation

It is clear from the recitals to the proposal that its aim is to enhance transparency and public scrutiny of corporate income tax and to foster corporate responsibility by imposing disclosure requirements on certain companies regarding their income tax.

Recital 12 to the proposal states that the directive aims to enhance transparency and public scrutiny of corporate income tax by adapting the existing legal framework concerning the obligations imposed on companies and firms in respect of the publication of reports, for the protection of the interest of members and others, within the meaning of Article 50(2)(g) TFEU.

Pursuant to recital 5, enhanced public scrutiny of corporate income taxes borne by multinational undertakings carrying out activities in the Union is an essential element further to foster corporate responsibility, to contribute to welfare through taxes, to promote fairer tax competition within the Union through better informed public debate and to restore public trust in the fairness of the national tax systems. Such public scrutiny can be achieved by means of a

¹ Opinion 2/00 of 6 December 2001, *Cartagena Protocol*, EU:C:2001:664, para. 3; Opinion 1/08 of 30 November 2009, *General Agreement on Trade in Services*, EU:C:2009:739, para. 110.

² Opinion 2/00 of 6 December 2001, *Cartagena Protocol*, EU:C:2001:664, para. 5; Opinion 1/08 of 30 November 2009, *General Agreement on Trade in Services*, EU:C:2009:739, para. 110.

³ See, among others, judgment of 25 February 1999, *European Parliament v Council*, Joined Cases C-164/97 and C-165/97, EU:C:1999:99, para 16; judgment of 30 January 2001, *Spain v Council*, Case C-36/98, EU:C:2001:64, para 59; judgment of 12 December 2002, *Commission v Council*, Case C-281/01, EU:C:2002:761, paras 33-49; judgment of 29 April 2004, *Commission v Council*, Case C-338/01, EU:C:2004:253, para 55.

⁴ See judgment of 4 April 2000, *Commission v Council*, Case C-269/97, EU:C:2000:183, para 44.

⁵ Opinion 2/00 of 6 December 2001, *Cartagena Protocol*, EU:C:2001:664, para. 5.

report on income tax information.

Recital 9 explains how the information provided in the report should be broken down by Member States in order to ensure a level of detail that enables citizens better to assess the contribution of multinational undertakings to welfare in each Member State.

Recital 10 explains the responsibility regime of the members of the administrative, management and supervisory bodies established in the proposed directive in order to strengthen responsibility vis-à-vis third parties and to ensure appropriate governance.

Recital 11 establishes an obligation for the auditors or audit firms regarding the verification of whether the report was submitted and presented in accordance with the requirements of the proposed directive, with the aim of ensuring that cases of non-compliance are disclosed to the public.

The content of the proposed directive primarily consists of an obligation for large companies and branches to draw up a report on income tax information containing general information broken down by country, which is to be published in a register and on the website of the company. The content of the proposal confirms its aim of enhancing transparency, public scrutiny and corporate responsibility.

In order to achieve the aim mentioned above, the Commission proposes to insert a new chapter in the Accounting Directive (Chapter 10a). It requires all EU undertakings and branches of non-EU undertakings operating in the EU having a consolidated turnover exceeding EUR 750 000 000 to draw up and publish a report on income tax information on an annual basis (Article 48b).

The information to be included in the report concerns the nature of the activities, the number of employees, the net turnover made (including turnover made with third parties and between companies within a group), the profit or loss made before income tax, the amount of corporation tax due on the profits made in the current year, the amount of corporation tax already paid during that year, and the accumulated earnings (Article 48c (2)).

The information provided must be broken down on a country-by-country basis for each Member State in which the undertaking operates and each jurisdiction that is listed on a “Common Union list of certain tax jurisdictions”, and on an aggregated basis for the rest of the world (Article 48c(3) and Article 48g).

The report is to be published in a business register and remain accessible on the website of the undertaking for at least five consecutive years (Article 48d).

V. Determination of the appropriate legal basis

Article 50(1) TFEU provides the legislature with a legal basis to adopt, through the ordinary legislative procedure, directives to attain freedom of establishment as regards a particular activity. Article 50(2) TFEU contains a non-exhaustive list of instances where, in particular, this legal basis applies. For the present purposes, Article 50(2)(g) TFEU is of interest, as it provides that the legislature shall carry out the duties devolving upon them as regards the right of establishment, “(...) by coordinating to the necessary extent the safeguards which, for

the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 TFEU with a view to making such safeguards equivalent throughout the Union.”

A significant number of company law directives have been adopted on that legal basis, with the aim of protecting the interests of members and others¹, including where this involves disclosure requirements, and more particularly public disclosure².

In a similar vein, and as it has already been described in detail in section IV of this note, the aim and content of this proposal is essentially to enhance public scrutiny of corporate income taxes borne by multinational undertakings carrying out activities in the Union by requiring companies as of a certain annual turnover threshold to draw up and make public annual income tax reports.

More specifically, according to recital 12, the aim of the proposal is “to enhance transparency and public scrutiny of corporate income tax by adapting the existing legal framework concerning the obligations imposed on companies and firms in respect of the publication of reports, for the protection of the interests of members and others, within the meaning of Article 50(2)(g) TFEU”.

The proposed directive thus considers that a link exists between transparency and public scrutiny, which are the aims it pursues, and the interests of “members and others”, which are the beneficiaries of the safeguards to be adopted on the basis of Article 50(2)(g) TFEU. This suggests (i) that the terms “members and others” extends to the public at large and thus beyond those specifically in contractual or pre-contractual relations with a company, or directly affected by its business, and (ii) that the proposal indeed serves interests of those “members and others”. In doing so, the proposed directive remains fully in harmony with the disclosure requirements already laid down in Directive 2013/34.

It should be then examined in light of the above (i) whether the terms “members and others” in Article 50(2)(g) TFEU can extend to the public and (ii) whether the proposal protects in fact the interest of members and others thus defined.

As to the first question, it can be concluded that, according to the case law of the Court of Justice, the concept of “others” as used in Article 50(2)(g) is not restricted to persons in direct contractual or pre-contractual relations with a company, but that it extends, inter alia, to competitors of the companies or firms in question, and more broadly to the public.

In accordance with the Court’s judgment in the case *Verband deutscher Daihatsu-Händler*, to

¹ See, in particular, the sixth, eleventh and twelfth company law Directives 82/891/EEC (OJ L 378, 31.12.1982, p. 47), 89/666/EEC (OJ L 395, 30.12.1989, p. 36) and 89/667/EEC (OJ L 395, 30.12.1989, p.40) respectively; Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts (OJ L 157, 9.6.2006, p. 87); Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies (OJ L 184, 14.7.2007, p. 17), Directive 2011/35/EU concerning mergers of public limited liability companies (OJ L 110, 29.4.2011, p.1), Directive 2012/30/EU on coordination of safeguards concerning capital requirements for public companies (OJ L 315, 14.11.2012, p. 74).

² Directive 2009/101/EC on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent (OJ L 258, 1.10.2009, p. 11).

which recital 12 of the proposed directive refers, the term “others” is to be understood widely:

“[The very wording of] Article 50(2)(g) TFEU refers to the need to protect the interests of ‘others’ generally, without distinguishing or excluding any categories falling within the ambit of that terms” (emphasis added).¹

The Court added that this literal interpretation was confirmed by the objective of abolishing restrictions of freedom of establishment “which is assigned in very broad terms (...)” by the Treaty.²

In that judgment, the Court held that Article 50(2)(g) TFEU was an appropriate legal basis to require provision of information for all third parties who do not know or cannot obtain sufficient knowledge of the company’s accounting and financial situation.³

In *Axel Springer* the Court stated that “[T]he ‘others’ referred to in that Article includes all third parties.”⁴

In its judgment in the case *Texdata Software GmbH*, the Court further recognised that there is no requirement that the protection of “others” be somehow subsidiary or ancillary to those of “members”. Thus even disclosure provisions “(...) primarily designed to provide information for third parties who do not know or cannot obtain sufficient knowledge of the company’s accounting and financial situation” come within the scope of Article 50(2)(g) TFEU.⁵

With regard to the issue whether the proposal protects in fact the interest of the public, it should be recalled in the first place that the public is the beneficiary of companies’ compliance with tax laws and avoidance of undue profit shifting, as welfare and security for the public is implemented through public policies largely financed by taxes.

Secondly, public availability of corporate income tax information in each Member State will enable public scrutiny of compliance with tax laws, as well as a societal and political debate on the proper tax levels (base and rate), including when comparing rates to those in other tax jurisdiction in the Union. This in turn, arguably, is likely to dissuade in particular large companies that depend on their reputation as part of their brand name from contravening or otherwise avoiding tax laws.

The protection thus afforded to the public also come within the range of the term “interest” within the meaning of Article 50(2)(g) which the Court, following the same logic as for the definition of “others”, considers widely. In particular, the term does not require a right, nor a specific interest of a third party directly in relation to a company’s business or activities, to be affected.⁶

¹ Judgment of 4 December 1997, *Verband deutscher Daihatsu-Händler v Daihatsu Deutschland GmbH*, Case C-97/96, EU:C:1997:581, para 19.

² *Ibid.*, para 21.

³ *Ibid.*, para 20.

⁴ Order of 23 September 2004, *Axel Springer AG*, Joined Cases C-435/02 and C-103/03, EU:C:2004:552, para 34.

⁵ Judgement of 26 September 2013, *Texdata Software GmbH*, Case C-418/11, EU:C:2013:588, para 54.

⁶ *Axel Springer AG*, *supra*, para 35.

It thus appears to be a consistent proposition that the public's interests would also be protected by availability to them of large companies' income tax information in the Member States, within the scope of Article 50(2)(g) TFEU.

It must therefore be concluded that, in coordinating the existing legal framework concerning the obligations imposed on companies and branches in respect of the publication of income tax information for the protection of the interest of members and others, the proposal's aim and content correspond to Article 50(1) TFEU. This conclusion is not undermined by the fact that tax authorities will indirectly benefit from this transparency obligation. In any event, contrary to Article 114(2) TFEU, Articles 50 et seq. TFEU do not contain a carve-out for fiscal provisions.

There is, moreover, no more specific legal basis than Article 50(1) TFEU in the light of Article 50(2)(g) TFEU available in the Treaties. In particular, the entire system of general internal market harmonisation constituted by Articles 114 and 115 TFEU is explicitly made subsidiary to other applicable legal bases and therefore does not apply here, regardless of whether the carve-out clause of Article 114(2) TFEU would otherwise allow recourse to Article 115 TFEU (Article 115 TFEU is “without prejudice to Article 114”, which in turn applies “save where otherwise provided in the Treaties”).¹

The availability of Article 50(1) TFEU as a legal basis excludes Articles 114 and 115 TFEU, but, for the sake of completeness, it seems convenient to provide a brief analysis of the proposal in light of Article 115 TFEU. Article 115 TFEU empowers the Council to 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 contrast to Article 114 TFEU it contains no exclusion of fiscal provisions. It may therefore be used as legal basis for legislative acts in the field of direct taxation,² provided that the national laws to be harmonised have a direct impact on the internal market so as to make the harmonisation necessary.

Although the current proposal is politically linked to Council Directive (EU) 2016/881 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation³, adopted by the Council on 25 May 2016, the aim and content of both instruments are different. Directive 2016/881 is based on Articles 113 and 115 TFEU. It is apparent that its purpose is to improve cooperation between the tax authorities of the Member States. It coordinates the transfer of information between the competent authorities by imposing certain obligations on Member States.⁴ In addition, it requires EU tax authorities to exchange 12 pieces of information, some of which contain confidential business information. In contrast with this, the purpose of the current proposal of the Commission is not to improve administrative cooperation of tax authorities but to enhance transparency and public scrutiny on corporate income tax and to foster corporate responsibility by imposing on certain companies disclosure requirements regarding their income tax. Apart from the amount of taxes paid, the proposal for public country-by-country reporting requires that MNEs disclose six other pieces of information in order to ensure a level of detail that will enable citizens to

¹ See judgment of 29 April 2004, *Commission v Council*, Case C-338/01, EU:C:2004:253, paras 59-60.

² For matters of indirect taxation, Article 113 TFEU is the more specific legal basis.

³ OJ L 146, 3.6.2016, p. 8.

⁴ In this respect, see judgment of 27 September 2007, *Twoh International*, Case C-184/05, EU:C:2007:550, para 31.

better assess how MNEs contribute to welfare in each Member State.

VI. Conclusion

In the light of the foregoing analysis, Article 50(1) TFEU constitutes the appropriate legal basis for the proposal for a directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches.

At its meeting of 12 January 2017 the Committee on Legal Affairs accordingly decided, by 10 votes in favour and one abstention¹, that Article 50(1) TFEU constitutes the appropriate legal basis for the proposal for a directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches.

Yours sincerely,

Pavel Svoboda

¹ The following were present for the final vote: Joëlle Bergeron, Daniel Buda, Jean-Marie Cavada (rapporteur), Sergio Gaetano Cofferati, Therese Comodini Cachia, Angel Dzhambazki, Heidi Hautala, Constance Le Grip, Gilles Lebreton, Evelyn Regner, Tadeusz Zwiefka .