

Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee — Double Taxation in the Single Market’

COM(2011) 712 final

(2012/C 181/08)

Rapporteur: **Mr FARRUGIA**

On 11 November 2011 the European Commission decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee — Double Taxation in the Single Market

COM(2011) 712 final.

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 7 March 2012.

At its 479th plenary session, held on 28 and 29 March 2012 (meeting of 28 March 2012), the European Economic and Social Committee adopted the following opinion by 135 votes to 1 with 10 abstentions.

1. Conclusions and recommendations

1.1 Double taxation is a serious obstacle to cross-border activity impeding the effective functioning of the Single Market with negative economic implications on investment and employment. Double taxation discourages investment and jeopardises competitiveness thus impinging negatively on economic growth and the attainment of the EU2020 targets.

1.2 The EESC has through a number of opinion papers stressed the importance of the removal of double taxation. It has supported proposals aimed at speeding up measures to avoid double taxation as well as the enhancement of administrative simplification in cross-border situations, and towards encouraging an internal market where fair competition prevails.

1.3 In consideration of this, the EESC is in favour of initiatives towards the removal of double taxation as outlined in the communication by the Commission ⁽¹⁾ by promoting the efficient interfacing of different tax regimes.

1.4 The EESC is also of the opinion that the removal of double taxation should be undertaken in a manner which is proportional to the objectives being sought and respects the fiscal sovereignty of individual Member States.

1.5 The EESC is furthermore of the opinion that issues which arise from double taxation have a disproportionately higher impact on individuals and small and medium sized

firms which typically do not have the resources to deal with such problems. As a result, while the EESC is in favour of the communication, it stresses that proposals aimed at dealing with double taxation need to be coherent with measures which deal with double taxation for citizens as well as encompass solutions for individuals and SMEs.

1.6 The EESC agrees that the establishment of the EU Forum on Double Taxation is based on the same principles on the effective Joint Transfer Pricing Forum. It however proposes that the forum is considered as a first step towards the establishment of an EU Commission observatory which the EESC has already recommended as a means of dealing with the removal of cross-border obstacles for citizens ⁽²⁾. Towards this end, the functions of the observatory could be extended further to include an investigative role on the on-going effectiveness of efforts to remove double taxation for citizens, SMEs as well as large businesses.

1.7 The EESC recommends that the EU Forum on Double Taxation also includes representation from organised civil society.

1.8 The EESC also supports the establishment of a code of conduct which would allow for a common understanding and application of tax concepts between different Member States, so as to avoid situations of double taxation and reduce instances where DTC are not effective. In turn, this would also avert the resort to arbitration.

⁽¹⁾ COM(2011) 712 final.

⁽²⁾ See EESC Opinion on *Removing Cross Border Tax Obstacles for EU Citizens*, OJ C 318, 29.10.2011, p. 95.

1.9 While the EESC is in favour of studying the feasibility of an efficient dispute resolution, it highlights the importance of ensuring that efforts should be aimed at ensuring limited need for arbitration.

1.10 The EESC is in favour of studying the full scale of the double non-taxation phenomenon and its economic and social implications, as well as those that would potentially occur through measures aiming at its removal.

1.11 Finally, the EESC stresses that all proposals should be assessed by means of thorough social and economic assessments and that such assessments should present impacts on each Member State.

2. Content and background of the proposal

2.1 Double taxation results in legal uncertainty impeding economic activity by citizens and businesses. It results in a higher overall tax burden and deadweight welfare losses, unnecessarily high administrative burden and renders a negative impact on investment and the operation of the Single Market which in turn dent competitiveness and employment. Consultation by the Commission reveals the significance of the problem of double taxation, as more than 20 % of the reported cases are above EUR 1 million for corporate taxpayers and more than 35 % of the cases are above EUR 100 000 for individuals.

2.2 The communication⁽³⁾ presented by the Commission underlines the importance of tackling double taxation⁽⁴⁾ as a means of ensuring the effectiveness of the Single Market and as a means of ensuring that the goals outlined in the Europe 2020 strategy are reached.

2.3 The communication calls for greater coordination in taxation as a means of ensuring a stronger economic policy framework in the euro area. This is outlined in the Single Market Act⁽⁵⁾ which highlights the importance of removing cross-border obstacles for EU citizens as well as the tax administrative burden for businesses. The latter challenge is currently being addressed through the Commissions proposal for a common consolidated corporate tax base for business (CCCTB)⁽⁶⁾. The Communication also refers to the need for an effective network of Double Tax Conventions between Member States and to the importance of addressing issues related to double taxation on inheritance.

2.4 The communication focuses on addressing obstacles related to double taxation noting that this issue is even more

important during a period of economic crisis. The communication notes that the removal of double taxation and targeting double non-taxation, may, from a dynamic perspective, be a source of taxation revenue for governments.

2.5 The communication acknowledges that while a number of Member States (MS) already address the issue of double taxation through the operation of unilateral, bilateral and multi-lateral agreements, the EU Treaty does not oblige MS to eliminate double taxation.

2.6 The communication lists a number of areas which have already been explored by the Commission as a means of dealing with double taxation including the Parent Subsidiary Directive, the Interest and Royalties Directive, the Arbitration Convention (AC), the Joint Transfer Pricing Forum (JTPF), recommendations on withholding tax relief procedures and the proposal on the Common Consolidated Corporate Tax Base (CCCTB).

2.7 The communication also notes that while these efforts have been relevant, they do not operate in a sufficiently effective manner. As a result, the communication refers to the following possible solutions without however delving into detail in any of these proposals:

- Strengthening existing instruments particularly in terms of the interest and royalties directive. The Commission has proposed a recast of the Directive simultaneously with COM(2011) 712 suggesting for the treatment of withholding tax to reduce double taxation on such payments. The EESC has just adopted an opinion on the recast of the directive⁽⁷⁾.

- Extension of the coverage and the scope of double tax conventions in terms of addressing triangular solutions and how to treat entities and taxes not covered by Double Tax Conventions (DTC) within the EU, with a proposal for enhanced dialogue between MS in case of disputes.

- Steps intended to come to a more consistent interpretation and application of DTC provisions between MS. This refers to the potential adoption of an EU Forum on Double Taxation which develops a code of conduct on taxation to address interpretation conflicts of concepts contained in the DTC applicable between MS.

⁽³⁾ COM(2011) 712 final.

⁽⁴⁾ Double taxation is defined as the imposition of comparable taxes by two or more tax jurisdictions in respect of the same taxable income or capital.

⁽⁵⁾ COM(2011) 206 final.

⁽⁶⁾ COM(2011) 121 final.

⁽⁷⁾ See EESC opinion (OJ C 143 of 22.05.2002, p. 46) on the *Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (recast)*, COM(2011) 714 final.

— To address the lack of an overall binding dispute mechanism, the Commission proposes a solution contained in the latest version of Article 25 of the OECD Model Tax conventions (2008) which refers for a mutual agreement procedure with a binding dispute resolution procedure for all unresolved double taxation procedures.

2.8 Finally the communication outlines further steps to be undertaken including:

- work to develop the options presented in the communication mainly the establishment of a forum, the development of a code of conduct and determining the feasibility of an efficient dispute resolving mechanism;
- presentation of possible solutions to tackle cross-border inheritance tax obstacles within the EU which has been recently launched by the Commission ⁽⁸⁾;
- continue to make use of the recently renewed JTPF to address transfer pricing double taxation issues;
- present solutions throughout the year on cross-border double taxation of dividends paid to portfolio investors;
- launch a fact finding mission to establish the magnitude of double non-taxation.

3. General comments

3.1 The EESC is in favour of addressing double taxation, which is considered as a detriment to investment and thus the generation of jobs and economic activity. Indeed, the EESC has through a number of opinion papers stressed the importance of the removal of double taxation. It has supported proposals aimed at speeding up measures to avoid double taxation as well as the enhancement of administrative simplification in cross-border situations ⁽⁹⁾, and towards establishing common principles to encourage an internal market where fair competition prevails ⁽¹⁰⁾.

3.2 The EESC has also endorsed the Commission's efforts aimed at eliminating, or at least reducing the legal and economic double or multiple taxation of profits distributed by

subsidiaries in the country in which the parent company is established ⁽¹¹⁾. This is further substantiated the EESC through its support for the proposal for a CCCTB as a means of an alignment of principles in corporate taxes noting however that the draft directive requires further clarification in its details ⁽¹²⁾.

3.3 The EESC also stresses the importance for a revenue neutral approach on a country-by-country basis in the application of the CCCTB and stresses that the adoption of the CCCTB should not make Europe less flexible and less competitive in attracting FDI. These issues are to be backed by impact assessments as appropriate.

3.4 The EESC recommends that these goals are to be achieved, in the first place, by means of enhanced co-ordination and more effective interfacing between different national tax jurisdictions, including through better communication between tax authorities themselves and between tax authorities and taxpayers. Progress on these fronts is considered to be proportional to the goals being pursued and does not impinge on the sovereignty of different national tax jurisdictions. These considerations are in line with the EU Communication on coordinating Member States' direct tax systems in the Internal Market ⁽¹³⁾.

3.5 As a result, the EESC is in favour of attempts at strengthening existing instruments and further efforts aimed at the removal of double taxation as outlined in the communication in order to ensure the efficient interfacing of different tax regimes and to certify that the tax burden impinges only once on economic operators and in a manner which is expected by the same economic operators.

3.6 The EESC further highlights that while the removal of double taxation is an essential requisite to ensure the effectiveness of the Single Market any proposals should focus on the efficient removal of tax barriers and ensuring the effectiveness of DTC within the confines of the legal basis available in the Treaty of the Functioning of the EU. Indeed, efforts aimed at the removal of double taxation should be undertaken in a manner which respects the fiscal sovereignty of individual Member States.

4. Specific comments

4.1 The EESC highlights that issues which arise from double taxation have a strong impact on individuals and small and medium sized firms. Large businesses typically have the

⁽⁸⁾ Commission Recommendation of 15 December 2011 regarding relief for double taxation of inheritances (2011/856/EU).

⁽⁹⁾ See footnote 2.

⁽¹⁰⁾ See EESC Opinion on *Direct company taxation*, OJ C 241 of 7.10.2002, p. 75.

⁽¹¹⁾ See EESC Opinion on the *Proposal for a Council Directive amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States*, OJ C 32 of 5.2.2004, p. 118.

⁽¹²⁾ See EESC Opinion on the *Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, OJ C 24 of 28.1.2012, p. 63.

⁽¹³⁾ COM(2006) 823 final.

financial and human resources to deal with double taxation and related arbitration but individuals and SMEs lack such resources, often in particular with respect to information and knowledge of legal and administrative practices⁽¹⁴⁾. Inheritance taxes impose special problems on citizens associated with double taxation. The communication presented by the Commission focuses on the removal of double taxation for business, mainly large businesses, but could go further to address specific issues faced by citizens and SMEs.

4.2 The EESC recognises the effectiveness of the Joint Transfer Pricing Forum (JTPF) in seeking to address transfer pricing double taxation and augurs that the EU Forum on Double Taxation will operate in a similar manner. The JTPF which works within the framework of the OECD Transfer Pricing Guidelines and operates on the basis of consensus to propose to the Commission non-legislative solutions to practical problems posed by transfer pricing practices in the EU has achieved a number of achievements including a code of conduct on transfer pricing documentation for associated enterprises in the EU, guidelines for advance pricing agreements in the EU, as well as guidelines on low value added intra group services. The effectiveness of this forum is partly based on the wide representation on the forum by Member States as well as by business.

4.3 The EESC thus augurs that the establishment of an EU Forum on Double Taxation is also based on the same principle ensuring effective representation from all vested stakeholders including organised civil society.

4.4 The EESC supports the establishment of an EU Forum on Double Taxation but notes that little detail is provided in the communication on the functions of the forum. The EESC proposes that the EU Forum on Double Taxation be considered as a first step and precedent to an observatory. The establishment of the forum into an observatory ties in with the recommendations made by the EESC on the removal of cross-border obstacles whereby the EESC referred to the development of an EU Observatory, the aims of which would be to gain, on an on-going basis, a detailed and practical understanding of existing tax obstacles including double taxation and their evolutions⁽¹⁵⁾.

4.5 The functions of the Taxation Observatory, under the auspice of the EU Commission, could be extended further to include the investigation of tax obstacles for businesses, both SMEs and large businesses, as well as an investigative role on the on-going effectiveness of efforts to remove double taxation. Towards this end, the observatory could have an important role

to play in the extension of the coverage and scope of DTCs as well as in examining ways of dealing with triangular solutions and encouraging Governments to develop double taxations relief without the loss of tax sovereignty.

4.6 The EESC also supports the establishment of a code of conduct which outlines principles on which Governments can a priori agree to. The code of conduct will allow for a common understanding of concepts outlined in DTC applicable between MS which often leads to misinterpretation and to disputes.

4.7 The EESC however is of the opinion that the code of conduct can in practice be considered effective if it operates through peer pressure, with Member States cautious of implications associated with name and shame.

4.8 The EESC is also in favour of studying the feasibility of an efficient dispute resolution mechanism, with a view to determining the most effective ways for removing double taxation. It recognises that mutual assistance procedures where countries meet to resolve issues take a significantly long period of time to be determined and that there is room for improvement of the Arbitration Convention which is also characterised by a lengthy process. This in turn creates excessive costs and uncertainty on business.

4.9 However, the EESC stresses that efforts should be aimed at ensuring that there is limited need for arbitration and that emphasis should thus be placed on the development of a code of conduct, as outlined in the communication, as well as on the provision of clear and transparent guidelines, which would thus serve as the first and effective lines of resort to the solution of disputes.

4.10 The EU Forum on Double Taxation has an important role to play in this regard in terms of encouraging tax conventions which provide for a mutual agreement procedure with a bonding dispute resolution procedure for all unresolved double taxation cases.

4.11 The EESC is in favour of the Commission proposal to study the full scale of the double non-taxation phenomenon. The EESC further recommends a study of its economic and social implications, as well as those that would potentially occur through measures aiming at its removal.

4.12 The EESC reiterates the importance of a thorough social and economic impact assessment to determine the extent to which the adoption of any of the proposals outlined in the

⁽¹⁴⁾ According to the Summary Report by the EU Commission on the Consultation on Double Taxation Conventions and the Internal Market, 69 % of individuals who encountered double taxation issues have sought remedies to eliminate double taxation compared to 85 % in the case of corporations.

⁽¹⁵⁾ See footnote 2.

communication may result in adverse economic and social consequences ⁽¹⁶⁾. Such an assessment should be exhaustive and include all Member States affected by the proposals.

4.13 In conclusion, the EESC looks forward to additional proposals to be studied and presented by the Commission in terms of double taxation including:

— recommendations on cross-border inheritance taxes which has been recently published by the Commission;

— the presentation of solutions on cross-border double taxation of dividends to portfolio investors;

— the provision of further information on the creation of the Forum, Code of Conduct and the feasibility of a binding resolution mechanism;

— an assessment on the extent and implications of double non-taxation.

Brussels, 28 March 2012.

The President
of the European Economic and Social Committee
Staffan NILSSON

⁽¹⁶⁾ See footnote 12.