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COMMITTEE**

Double Taxation in the Single Market

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1. INTRODUCTION

Promoting a more competitive economy as a driver of smart and sustainable growth is a real need, especially in this period of crisis which has made clear just how interdependent the EU Member States (MS)' economies are. The Commission underlined this as part of its Europe 2020 strategy¹, adding that the full range of EU policies, and in particular the single market, must be used more effectively, removing the remaining obstacles, to achieve these goals.

In particular, the European Council conclusions of 24/25 March and 24th June 2011 underlined the need for pragmatic coordination of tax policies as an element of a stronger economic policy coordination in the euro area to support fiscal consolidation and economic growth.

Growth depends mainly on healthy markets, where competition stimulates business. Several obstacles have still to be addressed to deepen the single market, including obstacles to cross-border activity and the legal complexity from having up to 27 different sets of rules for some transactions.

Tax systems in the EU do not contribute to simplify the present legal framework. Almost 20 years after the creation of the single market, business and individuals operating in the EU market risk being taxed by more than one MS on the same revenue as soon as they cross an internal border while, in some cases, they could escape all taxation². In a period when MS are looking for secure and additional tax revenues, it is important for their credibility towards their taxpayers that they take the necessary measures to remove double taxation and double non-taxation. Besides, both situations can jeopardize the genuine idea of the single market and are therefore absolutely unacceptable.

The exercising of the fundamental freedoms to cross-border activities in the EU internal market by business and citizens should never in itself lead to increased taxation in comparison with the taxation of similar taxpayers within their own MS. Double taxation in a cross-border context as a result of inconsistent interaction of different domestic tax systems, is a major impediment and a real challenge for the internal market³. The principle that double taxation resulting from uncoordinated tax policies ought to be removed should be a key element of every long-term strategy of the Commission.

Both the negative role played by double taxation and the need for improving the functioning of the internal market through enhanced tax policy coordination have

¹ COM(2010) 2020, 3.3.2010.

² The Commission is concerned by current situations of *double non-taxation* within the EU. The Commission is considering a public consultation in the area of corporate double non-taxation, as also recently suggested by MEP, Ms Bowles, Chair of the Economic and Monetary Affairs Committee of the EU Parliament (Brussels Tax Forum 2011).

³ COM(2006)823, 19.12.2006, point 1.

been variously underlined.⁴ Moreover, evidence⁵ shows that many EU taxpayers are concerned by double taxation issues.

As previously announced⁶ this Communication identifies cross-border double taxation problems⁷ and their impact on the internal market. It explains which solutions have already been explored by the MS and the EU institutions and which areas need further coordinated actions firstly to prevent double taxation cases and then to ensure an effective, quick and low-cost method to solve disputes in double taxation conflicts.

Such successful actions would make the EU a more attractive place to operate a business and fair competition in the internal market would be enhanced. This would contribute to the objective of exploiting the full potential of an integrated EU Market as advocated in the Single Market Act⁸ and to removing obstacles to the effective exercise of EU citizens' rights as highlighted in the EU Citizenship report 2010.⁹

2. WHAT IS DOUBLE TAXATION?

Double taxation, in the sense discussed here, may be described as the imposition of comparable taxes by two (or more) tax jurisdictions in respect of the same taxable income or capital¹⁰. Although double taxation can also occur in purely domestic situations, in particular as far as it concerns economic double taxation, this Communication focuses on cross-border situations only.

In an international context, double taxation may arise as a consequence of dual residence or of taxation in both the State of residence and the State of source.

The following examples illustrate both situations.

Example 1. As regards dual tax residence, double taxation may be generated by the application of diverging criteria. For example, a company may be considered resident for tax purposes in the MS in which it is legally registered and, simultaneously, in a different MS in which it develops its main activity. In that situation the company could potentially be obliged to pay corporation tax on a worldwide basis in both MS and consequently pay tax on the same income twice.

⁴ See, for instance, the Conclusions of the Heads of State or Government of the Euro Area of 11 March 2011.

⁵ See Commission public consultation http://ec.europa.eu/taxation_customs/common/consultations/tax/2010_04_doubletax_en.htm and footnotes 25 and 26.

⁶ COM(2010)769, 20.12.2010, point 4.1.

⁷ Purely domestic double taxation, whenever it occurs, it is a matter for national legislator to regulate. COM(2011)206, 13.4.2011.

⁹ Commission's EU Citizenship Report 2010 'Dismantling the obstacles to EU citizens rights' COM(2010)603, 27.10.2010.

¹⁰ See, IBFD Tax Glossary, entry "*double taxation*". Traditionally it is divided into two kinds, juridical double taxation and economic double taxation. In the case of *juridical double taxation* two comparable taxes are applied to the same taxpayer in respect of the same income or capital. Generally the expression *economic double taxation* is used when different taxpayers are taxed in respect of the same income or capital.

Example 2. MS usually tax non-resident taxpayers in respect of income from sources in that State. This source taxation may overlap with the worldwide taxation in the State of residence of the taxpayer. For example an artist, resident of a MS, signs a comprehensive contract to perform concerts in several MS, authorizing the radio broadcast of the concerts and also the feature of a live album from the tour. The income deriving from that contract might be taxed twice or more (in the State of residence and in the States of the performances) and also copyright royalties of the artist might be taxed twice.

Generally MS already relieve double taxation through unilateral¹¹, bilateral¹² or even multilateral measures.¹³ However, at the present stage of EU law, they are not obliged to eliminate double taxation as a general rule. It is true that MS rules that give preference to domestic situations as opposed to cross-border situations, for example in the area of economic double taxation, are contrary to the fundamental freedoms, in the absence of pertinent justifications.¹⁴ However, double taxation is not contrary to the treaties, as long as it results from the parallel exercise of tax sovereignty by the MS concerned.¹⁵

In conclusion, in the current state of EU law, in the absence of an EU initiative, MS are not obliged to prevent double taxation of the latter type, which one could also call "non-discriminatory" double taxation, since this phenomenon falls outside the scope of the fundamental freedoms¹⁶.

Mr Damseaux, a Belgian resident, received dividends from 2005 to 2007 from a French company. Those dividends were subject in France to a withholding tax of 15%. The amount remaining after that taxation (85% of the dividends) was subject to an additional 15% withholding tax in Belgium. The total taxation of those dividends was therefore 27.75%.

On the other hand, dividends paid by Belgian companies to a Belgian resident were solely taxed at the rate of 15% under Belgian law.

The ECJ ruled that, in so far as EU law does not lay down any general criteria for the attribution of areas of competence between the MS in relation to the elimination of double taxation within the Community, MS are not obliged to prevent the resulting juridical double taxation.¹⁷

¹¹ E.g. by exempting the foreign income of a resident taxpayer or by granting a foreign tax credit.

¹² Bilateral measures provided by double tax conventions (DTC) on which basis two countries agree how and to what extent double taxation between their residents is relieved.

¹³ E.g. the Convention between the Nordic Countries for the avoidance of double taxation with respect to taxes on income and on capital or the so-called "Arbitration Convention" (AC): Convention on the elimination of double taxation in connection with the adjustment of associated enterprises (90/436/EEC), OJ L 225, 20.8.1990.

¹⁴ E.g. ECJ, 12 December 2002, C-324/00 (*Lankhorst-Hohorst*), para. 32; ECJ, 14 December 2006, C-170/05 (*Denkavit Internationaal*), para. 39; ECJ, 8 November 2007, C-379/05 (*Amurta*), para. 28; ECJ, 1 July 2010, C-233/09 (*Dijkman*), para. 23; ECJ, 22 December 2010 C-287/10 (*Tankreederei I*), para 15.

¹⁵ ECJ, 14 November 2006 (*Kerckhaert-Morres*); 12 February 2009 (*Block*); 16 July 2009 (*Damseaux*).

¹⁶ Opinion of the A.G. Geelhoed in *Kerckhaert-Morres*, para.38.

¹⁷ ECJ, *Damseaux*, cit.

3. IS DOUBLE TAXATION A PROBLEM?

MS understand the importance of the elimination of double taxation and avoid it in most cases. However some double taxation still remains and creates barriers to cross-border establishment, activity and investment in the EU which it is in the interest of business and citizens to remove, as mentioned in the recent Monti report¹⁸.

Double taxation is one of the issues of most concern for EU citizens and business. In the EU Citizenship report 2010, problems related to double taxation were identified amongst the main obstacles encountered by citizens in cross-border situations. Evidence suggests that, according to public opinion, double taxation is a pressing issue.¹⁹ Moreover, double taxation is in itself a source of legal uncertainty for taxpayers as frequently pointed out by business associations and representatives of taxpayers.²⁰

Indeed, the results of three recent Commission public consultations²¹ confirm that EU taxpayers remain significantly concerned by double taxation issues.

In particular, in the specific public consultation on double taxation, it was said that the problem was significant: on average more than 20% of the reported cases were above 1 million € for corporate taxpayers and more than 35% were above 100.000 € for individuals.

It is also important to ensure that the set of rules intended to prevent double taxation be transparent, in order to avoid diverging interpretations and thus achieve the intended result. In addition, lack of transparency can in itself be detrimental to cross-border activity.²²

Unrelieved double taxation increases the overall tax burden and therefore can have a negative impact on capital investment. Empirical research suggests that corporate taxation has a non-negligible impact on foreign direct investment location decisions²³. This suggests that double taxation within the EU may discourage non-EU investments and jeopardize the competitiveness of EU enterprises.

In the absence of actual tax data provided by national administrations, it is difficult to obtain completely reliable estimates of the direct impact of double taxation.²⁴ In fact,

¹⁸ Report to the President of the European Commission (by former EU Commissioner Monti), "A New Strategy for the Single Market", 9 May 2010, para.3.5., 83.

¹⁹ For example, during the Meeting of the Committee on Petitions of the European Parliament held last 14 and 15 June 2011, 4 of the 11 Petitions included in the Taxation chapter referred to double taxation. See also September 2011 Eurobarometer study on obstacles citizens face in the Internal Market http://ec.europa.eu/public_opinion/archives/quali/ql_obstacles_en.pdf

²⁰ MEDEF comments on *Proposed changes in article 15 § 2 of the OECD model convention*, 2007, in <http://www.oecd.org/dataoecd/14/62/39547932.pdf>.

²¹ http://ec.europa.eu/taxation_customs/common/consultations/tax/2010_04_doubletax_en.htm;
http://ec.europa.eu/taxation_customs/common/consultations/tax/2010_06_inheritance_en.htm;
http://ec.europa.eu/taxation_customs/common/consultations/tax/2010_08_royalty_en.htm.

²² OECD. *Tax Effects on Foreign Direct Investment*, 2007, 33.

²³ See, for instance, Hajkova, D. et al., "Taxation, Business Environment and FDI Location in OECD Countries", OECD Economics Department Working Papers, No. 502, 2006, in <http://dx.doi.org/10.1787/874058477248>.

²⁴ Impact Assessment of the proposal for a Council Directive on a CCCTB, 16.3.2011.

taxpayers, if they have the choice, will avoid double taxation by adapting their conduct to the actual circumstances. Therefore, double taxation becomes not just a burden but even a barrier to economic activity.²⁵

This indirect impact is even more difficult to measure. Nevertheless, a recent publication estimates that after the adoption of a double tax convention (DTC), bilateral portfolio investment flows between the treaty countries can increase by up to 50%. DTC are also associated with an increase in equity valuation, and appear to be a factor in lowering the cost of equity capital in the treaty countries by approximately 0.24% per annum.²⁶

Sometimes the elimination of double taxation, even when legally possible, would involve an excessive burden both in time and administrative costs. The results of a 2007 survey carried out by a major tax firm²⁷ showed an average cost of tax compliance for corporate income taxation of 2.2% of taxes paid. Around 15% of the time spent on compliance activities related to the international aspects of corporate taxation. Moreover 14.6% of the companies and 31.0% of the individuals who answered on this point in the Public Consultation on Double Taxation decided not to seek any remedy to eliminate the double taxation.

The 2010 EU Citizenship report mentions the inadequacy of "existing mechanisms to avoid double taxation".

It may also be observed that the accumulation of taxes imposed by more than one State might lead to results that, in some Member States at least, would be considered as confiscatory and thus unlawful, had these results been brought about by the provisions of that State alone.

Some specific examples highlight the current situation where citizens and business are in practice likely to encounter important practical obstacles to the effective exercise of their rights and the smooth functioning of the internal market.

In a petition addressed to the European Parliament²⁸ a German citizen reported that he used to live in France and to work in Germany as a free-lancer for some German hospitals. As a result of divergent interpretations of the DTC between France and Germany he was taxed by both MS. He had to move to Germany to solve his problem.

An Italian citizen²⁹ lives in Germany and works for an Italian transport company. He drives a truck through several countries of the European Union. As a result of divergent interpretations of the DTC between Italy and Germany he has been taxed

²⁵ The distinction between burden and barrier as regards double taxation was already mentioned in 1923 by the League of Nations. See for instance, Economic and Financial Commission, *Report on Double Taxation submitted to the Financial Committee*, Document E.F.S.73. F.19, p.11, April 5th 1923.

²⁶ Parkih, Jain and Spahr, *The impact of Double Taxation on Cross Border Equity Flows, Valuations and Cost of Capital*, 2011, EFMA, Braga Meeting.

²⁷ PWC LLP, *Total Tax Contribution*, 2007 Survey of the Hundred Group of Finance UK Directors (the association of the 100 largest listed UK companies).

²⁸ EP, Committee of Petitions, Petition 1404/2010.

²⁹ EP, Committee of Petitions, Petition 1053/2010.

both by Germany and Italy. The mutual agreement procedure, initiated in 2005, did not end until 2010.

The Commission is also concerned about double non-taxation and is currently reviewing the situation with a view to propose appropriate action.

4. CURRENT RESPONSES AND THEIR LIMITATION TO SOLVING THE MAIN PROBLEMS

Double taxation has already been addressed at the EU level. The Parent Subsidiary directive³⁰, the Interest and Royalties directive³¹, the Arbitration Convention (AC)³², the achievements of the Joint Transfer Pricing Forum (JTPF) - notably the Code of conduct on the effective implementation of the AC³³ -, and the Recommendation on withholding tax relief procedures³⁴ are relevant examples of these efforts.

The Commission recently proposed a directive for a Common Consolidated Corporate Tax Base (CCCTB)³⁵. Once adopted, it will solve double taxation problems, at EU level, for the multinational groups which decide to opt for this instrument.

However, as the scope of this proposal is limited, not all cases of double taxation will be addressed: only *eligible companies* opting for the system can benefit from the CCCTB regime (articles 2 and 6 of the Proposal)³⁶.

Existing instruments are insufficient to address many of the remaining double taxation situations. In particular, the Interest and Royalties directive is limited in scope; DTC do not cover all taxes relevant from a Single Market perspective (e.g. registration duties), do not provide for the full removal of double taxation and, notably, do not provide any uniform solution for triangular and multilateral relations between MS; the time needed to conclude mutual agreement procedures in case of double taxation disputes, in both the AC and the DTC, is too long and these procedures often do not succeed in solving the problems submitted.

In addition, the existing instruments to relieve double taxation do not always function in an effective manner. In particular, DTC provisions are not interpreted and implemented consistently by the MS concerned. Such conflicting practices mainly concern the definition of notions of such as royalties, business income, dividends and permanent establishment. As a result, taxpayers may suffer double taxation, contrary to the objective pursued by the DTC.

³⁰ Council Directive of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different MS (90/435/EEC).

³¹ Council Directive of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different MS (2003/49/EC).

³² Convention on the elimination of double taxation in connection with the adjustment of associated enterprises (90/436/EEC), OJ L 225, 20.8.1990.

³³ http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/index_en.htm

³⁴ C/2009/7924,

[http://ec.europa.eu/taxation_customs/resources/documents/common/whats_new/c\(2009\)7924_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/whats_new/c(2009)7924_en.pdf)

³⁵ COM(2011)121; 16.3.2011.

³⁶ The Proposal for a directive establishes only a system for a common base for the taxation of certain companies and groups of companies (article 1 of the Proposal).

Moreover, EU citizens receiving inheritances across borders may also face a disadvantage that is an inheritance tax burden higher than it would have been in a purely domestic situation in any of the Member States concerned.

There are strong expectations that these problems, often complex from the taxpayer's perspective, should be addressed through solutions at EU level, where possible. For its part, the OECD (of which 21 EU MS are members) explicitly recognises the need to tackle obstacles resulting from double taxation³⁷. Moreover, the Monti Report recommends further work on eliminating tax barriers caused by double taxation suffered by individuals. Therefore, there seems to be a genuine desire among taxpayers and also MS that cross-border double taxation be tackled.

5. POSSIBLE SOLUTIONS

The problems that have been identified could be dealt with by improving the existing instruments to address double taxation situations or by proposing new instruments and solutions.

Different double taxation problems may be addressed differently, some through bilateral tax conventions, some possibly through EU legislation (within the limits of the legal basis available in the Treaty on the Functioning of the EU (TFEU), or in other ways through specific solutions and instruments.

These possible solutions include:

5.1. Strengthening of existing instruments

A proposal for a recast of the Interest and Royalties Directive is presented simultaneously with this communication. The proposed amendments to the existing text intend to reduce the number of cases where double taxation can occur as a result of one MS applying a withholding tax on a payment and another taxing that same payment.

5.2. Extension of the coverage and the scope of double tax conventions

The Commission considers that there is a need to complete the framework of DTC between the 27 MS³⁸ and will encourage dialogue between MS in case of a dispute impeding the conclusion of a DTC.

The Commission intends to examine with MS and experts ways of addressing triangular situations³⁹, and how to treat entities and taxes not covered by DTC within the EU. It will take appropriate initiatives, in particular for inheritance taxes.

³⁷ See *supra*, note 3.

³⁸ On 1.1.2011, 10 bilateral relations between EU MS were not covered by DTC.

³⁹ In the area of transfer pricing, some work was undertaken by the JTPF; see the following footnote.

5.3. Steps intended to come to a more consistent interpretation and application of DTC provisions between the EU MS

Double taxation often results from interpretation conflicts. There is a need to assess the scope for developing in the EU, where possible, a common understanding of some concepts contained in DTC applicable between MS (e.g. royalties, business income, dividends, permanent establishments, tax residence, cross-border workers...). Depending on the case, it may be appropriate to have regard to identical or similar notions contained in EU law, as a specific EU dimension to the problem. Because of their importance for the internal market, it is appropriate to discuss these issues at EU level. However, such coordination may also contribute to the discussions held by international bodies such as the OECD and the UN, including when it comes to developing wider international standards. Building on the positive JTPF experience, there is scope to examine the potential benefits of setting up a forum for MS' representatives (EU Forum on double taxation). On the basis of the discussions to be held in this forum, the Commission will consider the elaboration of a Code of Conduct on double taxation.

5.4. Ease and accelerate dispute resolution within the EU

The AC was designed to provide a method for the resolution of disputes arising mainly from transfer pricing. However, despite the adoption (and the revision) of a Code of Conduct, the proper functioning of the AC could be further improved, as shown by the length, in general, of Mutual Agreement Procedures (MAP)⁴⁰. With regard to the AC, over the last 5 years for which figures are available, half of the outstanding disputes at the end of each year have been in dispute for more than two years⁴¹.

Contributions to the 2010 public consultations criticise the fact that DTC do not allow timely dispute resolutions. Taxpayers usually only rely on the dispute resolution mechanism provided by the relevant DTC, based on the old article 25 of the OECD Model Tax Convention. However this is not fully efficient: contracting States are merely required to endeavour to find a solution. The taxpayer has no guarantee that double taxation will be eliminated, nor that the tax administrations will proceed swiftly. The OECD recognises the number of unresolved cases (21.3 % increase from 2008 to 2009) as a major concern⁴².

From an EU perspective, the lack of an overall binding dispute resolution procedure is therefore an issue to be addressed, both for single market reasons and because of broader global competitiveness motivations (relating to the attractiveness of the EU to foreign investors). Neither the AC nor MS' DTC provide a completely successful method.

⁴⁰ http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2010/jtpf_2010_06_08_number_open_cases_en.pdf

⁴¹ http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2010/jtpf_2010_06_08_number_open_cases_en.pdf

⁴² http://www.oecd.org/document/11/0,3746,en_2649_33747_46499831_1_1_1_1,00.html; 63.4 % increase compared from 2006 to 2009.

A possible solution is contained in the latest version of Article 25 of the OECD Model Tax Convention (2008), which provides for a mutual agreement procedure with a binding dispute resolution procedure for all unresolved double taxation cases, if the taxpayer so requests. However, such provisions have so far been included only in a small number of DTCs concluded between MS.⁴³

The Commission sees a need to analyse the improvements that can be made to the procedures for the resolution of double taxation disputes within the EU. In particular, the possibility of a mechanism to effectively and swiftly resolve these disputes in all areas of direct taxation should be explored.

6. FURTHER STEPS AND CONCLUSIONS

The Commission is determined to address relevant double taxation problems in the EU and to present initiatives. Two proposals lead the way. Those are:

- The proposal for a common consolidated corporate tax base – adopted in March 2011;
- The proposal for a recast of the interest and royalties directive, presented simultaneously with this Communication.

In addition to these proposals, the Commission will:

- Present, shortly, possible solutions to tackle cross-border inheritance tax obstacles within the EU;
- Continue to make use of the recently renewed JTPF to address transfer pricing double taxation issues;
- Present solutions in 2012 on cross-border double taxation of dividends paid to portfolio investors;
- Work on developing the options set out in this Communication, in particular the creation of a Forum on double taxation for purely EU tax matters, a proposal for a code of conduct on double taxation and the feasibility of an efficient dispute resolution mechanism, with a view to determining the most effective ways for removing double taxation;
- As regards double non-taxation, launch a fact-finding consultation procedure in order to establish the full scale of this phenomenon. The results of this consultation will be used to identify and develop the appropriate policy response.

The Commission invites the European Parliament, the Council and the European Economic and Social Committee to discuss and support these orientations.

All interested stakeholders are invited to express their views on this initiative and inform the Commission of the specific actions which they recommend.

⁴³ e.g. FR and UK (19/6/2008), NL and UK (26/9/2008), DE and UK (30/3/2010).