QUALIFIED MAJORITY VOTING ON TAX ISSUES
DETAILED ARGUMENTS AND SPECIFIC EXAMPLES BY SECTOR

The purpose of this paper is to reiterate the Commission's recommendations regarding qualified majority voting (QMV) on tax issues and set out the reasoning behind them. It includes examples to illustrate the limitations of the unanimity principle in the various areas of taxation in which the Commission wants to see an extension of QMV.

THE COMMISSION'S OPINION ON THE IGC

In its Opinion on the IGC [COM(2003)548], the Commission states that "the progress made [on QMV] is not enough to enable the Union to attain all the aims set by the draft Constitution". It goes on to put forward various proposals to extend the scope of QMV.

On tax the Commission suggests that "more precise demarcation" could make it possible to extend the scope of QMV, for instance to "taxation in connection with the operation of the internal market, i.e. modernising and simplifying existing legislation, administrative cooperation, combating fraud or tax evasion, measures relating to tax bases for companies, but not including tax rates; the aspects of free circulation of capital linked to the fight against fraud; taxation in respect of the environment".

INDIRECT TAXATION

Qualified majority voting is necessary for measures relating to VAT, excise duties and other indirect taxes the purpose of which is to modernise or simplify existing Community rules.

On VAT a certain amount of progress has recently been achieved under the new VAT strategy notwithstanding the unanimity rule. Elsewhere, however, there is little prospect of a solution under the present decision-making arrangements. Enlargement and the need for regular adjustments to the rules imply the need for greater flexibility in the decision-making machinery.

> The current VAT system dates back more than twenty years and is inadequate to cope with technical, economic and social change.
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> Example 1: Travel agencies: This is a prime example of a sector where modernisation is needed because of developments in e-commerce and their growing use in the tourist industry. In addition, differences in the way the Member States apply the special VAT scheme for travel agents are causing distortions of trade, so that there is a pressing need to secure more uniform EU-wide application of that scheme. Some countries only apply the margin scheme where the service is sold to the traveller/end consumer while others apply it also to transactions between tour operators and travel agencies. This discrepancy can result in double taxation. In 2002 the Commission presented a proposal (COM(2002)64 final), subsequently amended (COM(2003) 73 final), designed to streamline and modernise the scheme and ensure more uniform application. Discussions in the Council have been going on for a year, but the proposal has still not been approved because a minority of Member States is digging its heels in over points of detail - a good example of the drawbacks of a decision-making system relying on unanimous voting.

Example 2: Telecommunications. By 1995, the increasing liberalisation of the telecommunications market started to make it possible for third-country telecommunications operators to provide VAT-free services to European business and consumers. On the other hand, telecommunication services provided by European operators for third country customers were taxable. It was clear that there was a rapid need to amend the common rules on those operations in order to level the playing field between EU and third country operators. However, because the unanimity requirement makes approval of an amendment to the Sixth VAT Directive a lengthy and slow process, instead of a proposal being presented to the Council all Member States obtained derogations in 1997 which allowed (but in no way obliged) them to derogate from existing rules. However, since those derogations did not ensure uniform application of the rules in question throughout the Community, a Directive governing the subject was approved two years later.

Example 3: Invoicing. To keep pace with changing technology, it proved necessary to amend the rules of the Sixth Directive to allow electronic invoices to be accepted throughout the EU. But the necessary unanimity was secured only at the cost of almost 20 opt-outs that considerably impair the potential benefit of the harmonisation to businesses.

These three examples clearly show the difficulties of amending VAT legislation under the current unanimity rule in order to make it more Internal Market friendly .

VAT-related business costs can be huge

Example: Despite the existence of the Eight VAT Directive [79/1072/CEE] which harmonised the rules on VAT refunds for non-established taxable persons at Community level, the Commission still gets complaints from businesses about delays in obtaining VAT refunds from other Member States. The Council's unfortunate inability to approve a 1998 Commission proposal [COM(98)377] to replace the refund procedure by a system of cross-border deduction is a prime instance of the limitations of decision-making on the basis of unanimity.

Implementation of the rules is neither uniform nor transparent

Example: The Sixth Directive [77/388/EEC] allows VAT exemptions for most financial services, though permitting Member States to tax them if they wish. Insurance services are also VAT-exempt, but in this case the Member States do not have the option to tax. Only three Member States (Germany, France and Belgium) have made use, to differing extents, of the facility to tax financial services, and this has given rise to certain distortions of competition. This makes it necessary to adjust the common system of VAT to take account of changes in the financial sector, where consumers are increasingly able to purchase cross-border services.

Qualified majority voting is also needed in the case of environmental measures relating to several Member States.

Environmental protection is a fundamental objective of the EU (Articles 2 and 6 of the Treaty) and one effective way of pursuing that goal is via tax measures, in line with the polluter-pays principle enshrined in Article 174 of the Treaty. The use of economic instruments, including taxation, is also consistent with the strategic guidelines set out in the European Commission's Sixth Action Programme for the environment. Unlike regulatory instruments pursuing similar goals, however, tax measures which are mainly designed to protect the environment, and have a direct and significant environmental effect, must be approved unanimously. Environmental issues are therefore a particularly good example of an area in which the Commission, given the limitations of the unanimity rule, simply refrains from putting forward proposals likely to encounter opposition from any one Member State - especially as this is a field in which it may be possible to find alternative approaches with a broadly comparable effect (e.g. a system of tradable permits rather than tax), without falling foul of the unanimity rule.

There are many environmental issues for which tax measures at Community level would be desirable

Example 1: Packaging and packaging waste. Art. 15 of directive 94/62 foresees the possibility for the Council to adopt economic instruments to help with the reduction of packaging waste. While some Member States have introduced taxes on packaging in general or on specific types of packages, no Commission proposal has been made so far.

Example 2: Taxation of vehicles. The Commission's 2002 communication suggests that Member States restructure their Annual Circulation Tax (annual road tax) and Registration Tax to take account of the different CO_2 emissions of cars and thus provide an incentive for the environmental impact to be taken into account even at the purchasing stage. The Commission foresees to propose a directive on the taxation of vehicles in 2004.

Example 3: Air pollution. Given that many air pollution problems are of a transboundary nature there is a clear justification for action at Community level in this area to ensure that fiscal policy favours emission reductions, particularly in the case of pollutants covered by the national emission ceilings directive 2001/81/EC as well as particulate matter, which causes significant and well-substantiated damage to public health. In the context of the thematic strategy on air pollution being prepared by the Directorate-General Environment of the

European Commission on the basis of the 6th Environmental Action programme, discussions have been started with stakeholders on how to make the polluter-pays principle operational in that field. The Commission might consider making a tax proposal in that area if the political/institutional environment was more amenable. Taxes on NOx and VOCs as ozone precursors and on particulate matter come to mind.

In the context of the thematic strategy on resources being prepared by the Commission on the basis of the 6th Environmental Action programme, thought is being given to the use of environmental taxes, where the tax rates would depend on the environmental impact of the specific use of the resource. The tax could fall on the use of inputs with an environmental impact, e.g. energy products, water, waste water, pesticides, fertiliser. Alternatively, one could aim for differentiated tax rates on products depending on their environmental impact, e.g. agricultural products or cadmium-containing batteries, combined with a certification system to define more environmentally friendly products.

DIRECT TAXATION

Qualified majority voting is necessary for measures to modernise or simplify existing Community rules and measures relating to the tax base for companies.

The incompatibility of different Member States' tax systems frequently leads to double taxation. QMV would make it easier to bring in the necessary Community rules to coordinate the situation.

The existing rules should be modernised to eliminate certain instances of double taxation

Example: In the field of company taxation problems arise in maintaining a restrictive list of the entities subject to the Parent-Subsidiary [90/435/EEC] and Merger [90/434/EEC] Directives. The fact that some types of corporate entity are excluded from the scope of the Directives, coupled with the appearance in the 1990s of new forms of corporate entity, leads to many cases of double taxation (see the study on corporate taxation in COM(2001)582 final). There is a need to review both the lists annexed to the directives and the holding thresholds. The proposals currently under discussion in the Council are less ambitious than earlier versions, e.g. those put forward in 1993, which did not provide for restrictive lists annexed to the directives. In other words, the prospect of a Member State using its veto has resulted in the Commission exercising a form of self-censorship.

PREVENTION OF FRAUD AND TAX EVASION

Qualified majority voting is necessary for measures solely intended to prevent fraud, tax evasion or avoidance of rules on cross-border transactions.

Tax fraud, affecting both direct and indirect taxation, is causing increasing concern not only in EU Member States but throughout the world. By its very nature fraud is hard to quantify but a number of studies carried out in different countries give estimates of the scale of the problem. In its Special Report 6/98 the Court of Auditors estimated the gap between collected and theoretical VAT receipts in the range of ECU 70 billion. It is therefore desirable to bring in QMV for Community coordinating measures to deal with

either double non-taxation or tax fraud. However, such a rule should be limited proposals designed to fight serious types of fraud.

Huge amounts are lost to tax fraud in the EU

Example: As far as VAT is concerned carousel and acquisition fraud is the most serious type of fraud. This fraud is made possible because of the exemption mechanism of intra-community trade transactions. By abusing the system taxable persons can acquire tax free goods from another Member State and sell them to another domestic trader, who gets the input tax refunded while the seller disappears (missing trader) without paying the tax due. By circulating the goods several refunds can be generated in such a "carousel" in complex networks involving many Member States. Even if there is no certain figure for carousel fraud in the Community, it is clear that defrauded amounts are very high with estimated average losses of €10,000.000 per case but there are several cases with defrauded amounts between €100,000.000 and €400,000.000. Several Member States have fraud figures at national level which may be as much as 10% of VAT receipts. Because of continuous changes in the fraud patterns, the tax losses will differ within a given period.

It goes without saying that fraud on such a scale creates significant distortions in the internal market, damages legitimate trade and undermines confidence in the Community's taxation systems.

Qualified majority voting is necessary for provisions governing mutual assistance, exchanges of information and cooperation between tax authorities within the Community, notably to curb fraud and tax evasion and facilitate the recovery of tax due.

As Community-based tax fraud is to a large extent a cross-border issue, administrative cooperation and mutual assistance are among the tools necessary to fight against it. Strong and rapid cooperation arrangements therefore need to be implemented in order for Member States to have the information about fraudulent transactions that would make it possible to undertake appropriate actions. The objective of these legal acts is not the harmonisation of fiscal provisions, but to provide the exchange of information between Member States. Therefore such legislation under QMV could be defined in a restricted way that would not have any impact on the 6th VAT directive or tax obligations in general.

Arrangements for mutual assistance and cooperation between tax authorities should in the Commission's view be based on the generic provision in Article 95 of the EC Treaty and as such already be subject to QMV. The Fiscalis programme, for instance, was adopted under Article 95. However, there is a degree of legal uncertainty in this area. The Commission has appealed to the Court of Justice over the correct legal basis to be used for extending the Directive on the recovery of claims to certain levies, duties taxes and other measures, since the Council having Article 95 (the legal basis proposed by the Commission) with Articles 93 and 94 (see the opinion of Advocate General Alber in case c-338/01, dated 9 September 2003). In order both to enhance legal certainty and to clarify understanding of the provisions concerned, the Commission would therefore prefer to bring these measures under a single chapter of the Treaty dealing both with tax measures and assistance/cooperation between tax authorities.