CONFEDERATION FISCALE EUROPEENNE

CFE Opinion Statement on the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)

Submitted to the European Institutions in November 2011

This is an Opinion Statement prepared by the Fiscal Committee -Direct Tax Sub-Committee- of the CFE (Confédération Fiscale Européenne).

CFE is the umbrella organisation representing the tax profession in Europe. Our members are 33 professional organisations from 24 European countries (21 EU member states) with 180,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.

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One upfront comment: A missed chance of coordination between CCCTB and accounting rules

CFE regrets that there has been, to our knowledge, little collaboration between the Directorates-General *Taxation and Customs Union* and *Internal Market and Services* within the European Commission regarding the work on the CCCTB proposal and the revision of the EU Accounting Directives. Trade balance sheets and tax balance sheets serve different purposes but contain many common elements. If these areas were better coordinated, a larger part of the trade balance sheet data could also be used for tax purposes which would reduce costs for the enterprise. We consider this a missed opportunity of facilitation for all companies that do not use IFRS. These are in particular SMEs.

CFE Comments relating to specific elements of the proposal:

Recital 5: No harmonisation of tax rates

We support the Commission in its approach that any CCCTB should refrain from harmonising corporation tax rates. This should be left to the Member States, respecting their sovereignty.

Article 2: Eligible companies

The European Institutions should be open to consider extending a CCCTB to other entities than corporations but this should only be done at a later stage and not delay the adoption of a CCCTB.

The reason for this is that in some countries, a great number of enterprises take the form of a partnership. In Germany, commercial partnerships with a limited liability company as general partner are the most common forms that enterprises have adopted. It would be of real benefit if these enterprises could be fully included in a CCCTB.
The inclusion of partnerships is only reasonable if partnerships are treated as non-transparent entities. This is done already in a number of countries, e.g. the Czech Republic, Spain, Belgium and optional in France. The Directive could determine that any partnership being part of a CCCTB group is mandatorily treated as non-transparent.

Article 3: Eligible third country company forms

Art 3 (2) states that the fact that a third country company form is not contained in the list still to be compiled, this will not preclude the application of the Directive. We find this surprising and difficult to handle in practice as the actual procedure related to non/acceptance of an unlisted company form is not specified (who is responsible to decide, is such decision obligatory and applicable to all entities or just to that individual case...).

Article 4: Definitions

We see a need for further clarity on interpretation of the definitions and obligations of the taxpayer.
Any unclarity represents a potential tax risk for the taxpayer. This may limit the advantages of the CCCTB´s application. The Directive indicates that further guidelines will also be issued but this is mentioned only in a few cases (e.g. leasing). We are wondering whether the Commission has any intention to implement an institute comparable to advance agreements with the tax authorities which will help to provide more clarifications than the definitions contained in Art.4 can deliver.

Both in Art 4 and the further text, the Directive works often with general economic terms which are neither clearly determined nor is it referred to internationally used definition (IFRS, GAAP or OECD Model Tax Convention). Definitions contained in the local tax and accounting legislations may differ, and, of course, these may also not follow the internationally used terminology. For instance, the Directive defines revenues as proceeds including gifts but excluding equity. In the Czech Republic, gifts received are not subject to corporate tax but are taxed by a special gift tax. In

accounting books, gifts received are regarded as a part of equity. Thus, the proper tax treatment of gifts under the CCCTB is not clear for Czech entities.

Just a few examples of further potentially unclear areas in the opening articles of the Directive are mentioned below:

- The Directive stipulates that expenses incurred to obtain non-taxable revenues are non-deductible at the lower amount of (i) 5% of the revenues and (ii) actually incurred expenses proved by the taxpayer. It appears that the Directive does not determine non-deductibility of the expenses exceeding the 5% rate.
- The Directive e.g. determines limits for deductibility of entertainment expenses but no definition of such expenses is provided.
- Art. 15 does not give any guideline how it should be proved that a benefit would also be provided to an unrelated party (in another way than by the actual provision of it).
- Art. 22 does not provide any definition or reference regarding the valuation through the "fair value" and the "market value". What currency should be used and the conversion to the used currency is also not clear for countries which have not adopted the EUR.
- Art. 23 does not provide any guidance regarding how the intention of the taxpayer in respect of trading with the securities will be proved (particularly situations if trading with the securities have stopped in the market or the intentions of the taxpayer have changed).
- Art. 5 provides a definition of a permanent establishment (PE), a service PE is not covered. The service PE is covered by both the Czech tax legislation and certain Czech bilateral tax treaties. Therefore, a service PE may exist which will not be recognized by the Directive. It is a question whether Art. 7 and Art. 8 prevent from creation and taxation of such PE as this may be viewed as the area neither covered by the Directive nor in discrepancy as it is just not covered.
- It is e.g. not clear how the effectiveness of hedging is to be proved etc.

We believe that non-deductibility of expenses and the valuation of assets represent crucial areas of tax law and, therefore, should be as clear as possible.

Under the Directive, tax treatment of many issues depends on the taxpayer´s declarations and intentions. The tax authorities may take a different opinion on the economic substance of the transactions and the taxpayer's intentions, mainly where the taxpayer relies on predictions and expectations while the tax authorities review the tax periods backward.

Article 6: Optionality

We would strongly agree with the Commission proposal that any CCCTB would have to be optional, for two reasons:
Firstly, a mandatory CCCTB would significantly increase compliance costs for many companies as companies would be forced to adapt their tax accounting even if they are SMEs which never operate cross-border. The CCCTB may be very different from the tax system they are used to. It is unlikely that this will be a one-time adjustment, as the CCCTB is a new regime and changes in the future are to be expected.
In some countries, companies that do not have to make IFRS accounting can use (with some modifications) their trade balance sheet data for tax purposes. If this advantage is lost, these companies would have to draw up a second, completely different set of accounts for tax purposes.

Secondly, it is not recommendable to make a system mandatory before any practical experience has been gathered:

- If the CCCTB is to become a workable system, it will have to stand the test of practice and this can be better done if its effects and functioning can be compared against the national corporation tax systems.
- At least for the first couple of years, companies will be facing legal uncertainty due to the lack of administrative practice and case-law.
- Practice may reveal unpredicted shortcomings of the CCCTB but given the unanimity required in the Council (Art. 115 TFEU), one country alone could block any amendments, forcing all EU companies to continue with a not workable corporation tax system.

Article 9: Calculation of the tax base (Chapter IV)

The general rules of revenue recognition and the list of exempt income are within the scope of what is common in Europe, except for the exemption for the disposal of goods subject to the pooling concept. Remarkably, the disposition of shares is also exempt. This would mean that companies opting for the CCCTB may be used for managing portfolios or trading on the stock exchange.
On the other hand, the potential losses would be likely non-deductible (which also means that capital losses would not be carried forward). In fact, the Directive is not clear in respect of tax

treatment of the expenses incurred to obtain non-taxable revenues exceeding the 5% threshold. Nevertheless, it is reasonable to expect that they are to be treated as non-deductible.

Article 17: Timing and Quantification (Chapter V)

Interestingly, revenue recognition for long-term contracts shall be executed within the principle of percentage of completion. This concept is not common in European tax laws, except for Italy for companies that have to apply the IFRS in which this concept is inherent.

Pensions have to be accrued without limits as well as bad debt deductions are treated more generously than laid down in the corporation tax laws of the Member States. Nevertheless, despite this generous approach the Directive does not enable deduction of receivables arisen before the taxpayer´s opting for the CCCTB and, at the same time, disables applicability of the local rules regarding the receivables´ write-offs.

Moreover, although a symmetrical approach may reasonably be expected, the Directive does not explicitly determine tax treatment of future revenues resulting from release of deductible/non-deductible provisions either created under the local or CCCTB´s rules. It appears that no sanctions are imposed if the deducted provisions are found to be inadequate in future and just the general anti-abuse rule applies. It is strange why sanctions are only imposed on the assets replacement.

In addition, the Directive does not deal with the tax consequences of the provisions created under the Directive but used/released in the periods after leaving the CCCTB system (e.g. the moment of release of the provision, taxability of the related revenue, deductibility of the covered expense (Art. 52) etc.

Article 39: Depreciation

The proposal divides assets into those which have to be depreciated item by item and those which are eligible to be bundled in a pooling concept. For the first the straight line method is obligatory while for the pooled assets the declining balance method shall be applied obligatory. Goods which are eligible for a pooling are those which have a useful lifetime of less than 15 years. Buildings have to be depreciated in 40 years, the pooling bulk with 25% from the underlying basis.

Rollover reliefs are in place for those assets not included in the asset pool. If once the CCCTB can be used for all purposes a pool concept would not fit except for real low value goods.

A guideline regarding the assets classification would be very helpful. Otherwise, this would represent a potentially risky area for the taxpayers (and an area for abuse on the other hand).

Regarding depreciation of pooled assets, a 35% rate could be adequate for specific items like computers and similar technology. Apart from this, we consider a 25% rate justified.

Regarding intangibles, the pooling concept appears not to be applicable and the asset will likely be amortized over 15 years if the right to use it will not be granted for a specified period. In the Czech Republic, the periods over which the intangibles are amortized are significantly shorter. Considering the rapid development in the area of IT, a 15 year period is rather long.

Under certain circumstances, deferral or interruption of tax depreciation may be economically relevant (e.g. asset is not used temporarily). As the taxpayer must apply tax depreciation, it is a question whether such depreciation is also deductible. Or, it is a question whether such assets should be regarded as temporarily un-depreciable under Art. 40.

Regarding improvement costs, the Directive does not stipulate whether the economic ownership of the improvement can be separated from the related asset. In the Czech Republic, such separation is possible in case of operational leasing of business premises.

In practice, licenses may be granted for periods exceeding 12 months but the licence fee is due yearly, based on the actual turnover. Considering the definition of fixed assets, it is a question whether such licences should not be recognized and amortized as there is likely a way how to determine their price (e.g. a market value).

It is strange why a sanction is imposed if the intended replacement of an asset does not take place but no sanction is due if value of an impaired asset increases during future periods.

Article 43: Loss carry forward (Chapter VII)

The loss can be carried forward regardless of the change in the shareholder structure and significant change in business activities. Moreover, no time limit is determined. It appears that just the general anti-abuse rule covers this.

It is also not stipulated how the transactions with businesses (sale of shares, sale of business or a part of it, mergers) should be dealt with. In case of group members, no tax loss incurred over the existence of the group will be transferred to the member leaving the group, although the leaving member might have had a crucial share in generating the tax loss. Only when the group is

dissolved, the tax loss is distributed to the leaving members. It is also likely that the Directive will be interpreted that the loss incurred by a PE in a third country will be non-deductible (i.e. non-forwardable). In the Czech Republic e.g., if tax loss is generated, the tax year is not closed until the tax loss is utilizable, i.e. tax loss calculation may be audited. For groups, it appears that this is covered just by the general anti-avoidance rule.

At the moment of leaving the CCCTB system, it is not clear whether the tax loss reported under the Directive will be carried forward in the amount reported or if there is any space left for the Member States to require tax loss recalculations to correspond to the local rules.

Article 54: Consolidation (Chapter IX)

Without the element of consolidation the problems related to transfer pricing and cross-border loss relief would not be resolved. Thus, CFE would not favour the idea of introducing a "double-C-TB" in lieu of a "triple-C-TB".

a) Article 54: Qualifying subsidiaries

The test to be undertaken to determine whether a limb of a group is eligible to be consolidated refers to facts, more than 50% voting rights and additionally more than 75% of the rights giving entitlement of profits or the capital of a company. The latter threshold is crucial since it does not rely solely on the interest as such but it requires also the right to obtain the profits. Consequently, also a company in which only a minority capital share is held can become a group member by simply attributing both voting rights and the right to obtain 75% of the dividends.

b) Mutual responsibility of the group members

The Directive does not deal with the mutual responsibility of the group members. Groups are strictly defined; the members join automatically. Due to the strict definition of the group, the practical risk will not likely be significant as the parent will probably have strong influence, however, should the member not cooperate or breach the Directive´s rules, it is not clear whether the tax authorities will consider the individual member´s responsibility. It is e.g. a question whether the sanction imposed if a long-term asset is not replaced in the two-year period due to the taxpayer´s leaving the group should be borne by the taxpayer or the group member who made the

relevant investment decisions. However, this will likely have to be solved through private proceedings.

On the other hand, the CFO and statutory representatives of the local entities are responsible for both the entity´s compliance with tax legislation (they may be criminally liable for the tax issues) and are also liable to perform their duties with the due managerial care (due diligence). If a consolidated tax return is prepared for the whole group, they will lose their ability to review and verify the tax calculation and the consolidated tax base apportionment. They may become responsible for areas on which they would not able to exercise the sufficient influence. This may be viewed as the essential disadvantage of the CCCTB from by the representatives of the individual local companies.

Article 58: Timing

The taxpayer becomes a member of a group at the moment when the defined thresholds are reached but when these are not met for at least nine months, the taxpayer is treated as if it had never become a group member. This period corresponds with the deadline for the group´s tax return filing but will likely not correspond with the individual taxpayer´s deadline. Moreover, if the potentially-new group member has opted for the CCCTB, at the moment of joining the group, the taxpayer´s tax year is ended. The nine-month test may, thus, have tax and administrative consequences. Moreover, the mutual transaction must properly be recorded so that the tax return can be prepared regardless of whether the company eventually becomes a new group member or not.

Article 59: Intra-group transactions

a) Elimination of intra-group transactions

Intra-group transactions are not subject of revenue recognition. The Directive stipulates that they should be ignored when calculating the CCCTB (Art. 59 (1)).

It has been argued that although the transfer pricing issues (and risks) may decrease significantly for certain companies, the strict definition of the CCCTB group means that related party transactions will likely still be performed with companies outside the group (51% subsidiaries and transactions with third countries). It remains to be seen whether transfer pricing issues will have an impact on business restructurings.

Technically, the impact of the implementation of the CCCTB on existing Advance Pricing Agreements should be dealt with.

b) Recording of intra-group transactions: Art. 59 (3) and (4)

It is being discussed to delete paragraphs (3) and (4). We would support such deletion as we find that they are a source of unclarity and therefore difficult to comply with:
It is not clear whether (and how, at what price, by whom) the intra-group expenses/revenues should be recognized and documented. The Directive only gives an implicit clue that this might be fulfilled by using the externally incurred costs, but pricing at common market prices (including the transfer price documentation) is also not excluded.

Article 61: Entering and leaving the group (Chapter X)

Regarding joining the group, tax treatment of the long-term contracts, provisions and intangibles (etc.) is covered, but the general business operations appear to be not. A more detailed guideline may be provided regarding recognition of the transactions which started (but not finished) before joining the group (due to the consolidation of just the intra-group transactions) as well as the recognition of the intra-group transactions (due to the issue of the intra-group profit/loss not-recognition).

Article 86: Apportionment of the CCCTB (Chapter XVI)

The formula of apportionment relies on the factors, sales, payrolls, numbers of employees and assets. The sales figure follows the principle of destination meaning those figures weigh on the formula which includes the last point of sale within the group.
We consider that an exclusion of sales from this formula which is currently being discussed would create a distortion of the scheme, keeping the tax base high for net exporting countries to the disadvantage of net importers.

Article 104, 4 (22): One-stop-shop concept

Responsibility lies with the tax authority in the Member State in which the principal company of the group is located. This principal tax authority is responsible for the assessment of all limbs and fixing

the apportionment. Although this appears ambitious looking at the necessary coordination technicalities and efforts to overcome language barriers the concept of the principal tax authority acting as one stop shop is a central element of facilitation and should not be abandoned.

Article 105: Term when opting for the CCCTB

In the interest of stability of the CCCTB, the period for opting should remain five years although it has been pointed out be some of our members that a five-year-period would be too stringent especially directly after introduction of a system, before a case law and administrative practices have been established.
It appears that the possibility remains for group companies to shorten this time period by leaving (or joining) the group.

Article 117: Record-keeping

Beyond Art. 117, companies will have to keep further sets of records, be it for accounting purposes or because of local rules on tax record-keeping.
Coordination technicalities need to be put in place in order to create “bridges” from those local books for the CCCTB. The IT systems of companies would need to be adapted to capture the CCCTB data.
After leaving the CCCTB system, the specific CCCTB treatment of certain issues may still have an impact (valuation of assets, valuation of inventory and work-in-progress etc). Although the Directive states that value of assets and liabilities should be taken over, there will likely arise many further issues requiring potential need of further records (economic ownership, fixed assets registers and depreciation, provisions).

Article 123: Dispute resolution mechanism

It seems strange that in cases where a tax authority of a Member State in which one group member is established disagree with the assessment of the principal tax authority, the decision can only be challenged at the court of the principal tax authority. This move excludes the tax authorities of the other MS involved from any kind of participation in a dispute settling process.

Instead, we suggest that a permanent body for CCCTB-related out-of-court dispute settling with participation of all Member States be set up. This body should be able to ask the ECJ for rulings. Appeals could also be made to the ECJ. The legal basis for this could be Article 273 TFEU.

We would favour this for the following reasons:
A significant problem of the CCCTB regime is legal certainty as there is no case law or established practices yet. If there would be a dispute settling process in which all Member States involved in the case could present their views on the matter -and not just the Member State of the principal tax authority and the Member State that disagrees- the development of generally accepted common practices would be accelerated.
Cases where no agreement can be reached could quickly be referred to the ECJ, advancing the creation of a coherent CCCTB case law.

Treatment of research and development

A declared aim of the Directive is to support research and development activities. If a more beneficial treatment in this area is provided by the MS (which is the case e.g. in the Czech Republic), the result may be a competitive disadvantage in the form of (i) either the administrative/tax burden in case of the expansion abroad (as CCCTB will not be used) or (ii) loss of the locally available tax benefits achievable to the other local companies.