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V.A. Fiscalité directe

HARMONIZATION OF CORPORATE TAX IN THE EU

THE CCCTB PROPOSALS (FIRST PART)



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At the end of 2016, the European Commission proposed to re-launch the common consolidated corporate tax base project (hereafter the “CCCTB”). For a few years now, there has indeed been much politics involved with international companies low effective tax rate: from Brussels, the CCCTB would be a way to fix the international tax system. The CCCTB is indeed expected to contribute to efforts to tackle base erosion and profit shifting (“BEPS”).⁽¹⁾ To keep it simple, it would render more difficult for a multinational corporation to take its profit away from one European Member State and hide it in a tax heaven inside the European Union. This would put an end to the profit shifting going on within Europe. Because when European corporations do not pay taxes, which means for the EU citizens to pay more taxes; alternatively, failing to pay their shares of taxes means less money for hospitals, schools, or research incentives. But probably in order to “sell the project” to multinationals, it also benefit to some extent to this category of tax payers.

Also known as “triple CTB”, the CCCTB was initiated in 2001, pushed forward in 2011, and recently rebooted by a communication dated June 17, 2015 already analysed in these columns.⁽²⁾ This June 2015 action plan has since given birth to new transparency rules for tax rulings,⁽³⁾ and reporting on multinationals’ tax-related activities.⁽⁴⁾ Furthermore, the anti-tax avoidance

directive, aka ATAD, set legally-binding rules to spur global efforts to clamp down on aggressive tax planning. Finally, the Commission has started to work on a new EU list of third countries that refuse to respect tax good governance standards.⁽⁵⁾ The aim of this Commission’s scoreboard is to help Member States to determine which countries the EU should first start a dialogue regarding tax good governance issues.

In this already rich context, the Commission presented on October 25, 2016, a new package of corporate tax reforms. This package is threefold: first a new version of the CCCTB embodied in two directives (as compared to the 2011 one); second improved mechanisms to resolve double taxation disputes; and third a new proposal also known as ATAD 2 to build upon the ATAD in order to tackle tax loopholes with non-EU countries. ATAD 2 has been politically adopted on the ECOFIN Council dated February 21st, 2017. The present article will focus on the CCCTB which should even more that the last two revolutionize corporate taxation in Europe. It is made of two directive proposals: one on common corporate tax base (“double CTB”),⁽⁶⁾ and the other on consolidation (“triple CTB”).⁽⁷⁾

These interconnected draft directives should reach unanimous approval by the member states for adoption. They should therefore be highly debated politically. Although the UK, through the Brexit, should no longer be outright hostile to the idea of a common corporate tax base, Ireland may oppose. However, it would remain isolated in arguing that the CCCTB would make its tax system less competitive and violate some of the fundamental principle underpinning the UE, i.e., national tax sovereignty.⁽⁸⁾ Indeed, as CCCTB

1. See, in the French language, G. CAVALIER, “*Les recommandations BEPS de septembre 2014 : un aboutissement ou un commencement*”, *R.I.S.F.*, 2014/4, p. 124 (première partie) et *R.I.S.F.*, 2015/1, p. 126 (deuxième partie).
2. See, in the French language, G. CAVALIER, “*La version européenne du projet BEPS – La Communication de la Commission du 17 juin 2015 ou les jalons d’une nouvelle fiscalité européenne en matière d’imposition directe des entreprises*”, *R.I.S.F.*, 2015/3, p. 113-117.
3. See State aid: Ireland gave illegal tax benefits to Apple worth up to EUR 13 billion, Comm. UE, No. IP/16/2923, Aug. 30, 2016.
4. A public country-by-country reporting is currently discussed at the EU level for largest companies. A pro-

- positional has been made to amend the accounting directive 2013/32/EU to ensure that large groups publish annually a report disclosing the profit and the tax accrued and paid in each Member State on a country-by-country basis. In France, see CGI, art. 223quinquies C.; Law No. 2015-1785, Dec. 29 2015, art. 121: *Dr. fisc.* 2016, No. 1, comm. 50, obs. N. SABIN & B. DELAIGUE.
5. See Questions and Answers on the common EU list of non-cooperative tax jurisdictions, available at http://europa.eu/rapid/press-release_MEMO-16-2997_en.htm.
6. COM(2016) 685 final.
7. COM(2016) 683 final.
8. The triple CTB directive expressly explains how its initiative complies with the principle of subsidiarity: see its explanatory memorandum, p. 4; see also recital 18 of the triple CTB directive.

is not about tax rates, Irish 12.5% corporate tax rate would thus be preserved. If a consensus is reached, Member States would be required to adopt and publish legislation by December 31, 2018 for the CCTB for an application as of January 1st 2019,⁽⁹⁾ and by December 31, 2020 for the CCCTB for an application as of January 1st 2021.⁽¹⁰⁾

The idea behind the CCCTB is that one single set of EU rules would decide how much of a company's profit will be taxed, once various exemptions and income deductions have been accounted for. Suppose that a Member State A allows assets to be depreciated over eight years, for tax purposes, while Member State B allows a quicker depreciation over a four-year period. Or Member State A might allow all entertaining expenses to be tax deductible, whereas Member State B might not. A common corporate tax base would mean that these rules would be the same throughout the EU, and companies only need to do their calculations based on a common set of tax rules. The directive however does not address accounting rules (apart incidentally for defining its scope,⁽¹¹⁾ or consolidated group for financial accounting purposes.⁽¹²⁾ Then an immediate question appears: would the objective be attainable without common accounting rules, since there is no requirement in Europe that a group use IFRS in all subsidiaries, and many do not? The alternative generally accepted accounting principles ("GAAP") available in the EU offer substantial differences in the recognition and valuation of critical revenues and expenses, e.g., in long-term contracting and transactions requiring mark to market approximations. As argued by some authors,⁽¹³⁾ the consequence may well be that, despite common tax rules, there may be double or non-taxation of some transactions depending on the various GAAPs a group may use in the calculation of its triple CTB tax base even if it applies the double CTB consistently.

Indeed, the CCCTB goes further than establishing common rules. It ambitions to consolidate the tax calculation. Without such consolidation, the company would need to do a separate calculation and tax return for each Member State in which it has a taxable presence. However, this would still be easier than today, as the rules for this calculation would be uniform across all Member States. With consolidation first, all profits and losses from the companies of a group in different Member States would be added up, to reach a net profit or loss for the group's entire EU activity. Today indeed, it is difficult, if not impossible, to put these profits and losses together.⁽¹⁴⁾ Based on the new set of

consolidated rules, multinationals could more easily implement cross-border set off of losses.⁽¹⁵⁾ Suppose a group consisting of companies A, B, and C, each in a different Member State. Companies A has profits equal to EUR 100 million; company B has profits equal to EUR 10 million; company C has losses equal to EUR 20 million. The consolidated tax base (net profit) for this group is $A+B-C = \text{EUR } 90 \text{ million}$.

This tax base (i.e. the company's taxable profits) would then be shared out between the Member States in which the company is active, according to an agreed formula. This formula overturns French traditional conception of corporate tax territoriality:⁽¹⁶⁾ is based on three equally weighted factors (i.e. assets, labour, and sales).⁽¹⁷⁾ Since "these factors are attached to where a company earns its profits, they are more resilient to aggressive tax planning practices than the widespread transfer pricing methods for allocating profit."⁽¹⁸⁾ In transfer pricing indeed, intangibles (which consists in most, if not all, assets of some companies), and financial assets, are taken into account while they are both excluded from the formula due to their mobile nature and the risks of circumventing the system.⁽¹⁹⁾

(for a comment in the French language, see J. ARDOUIN, F. SICARD, "L'arrêt Commission c/ Royaume-Uni : consécration ou enterrement de l'exception Marks & Spencer ?", *Dr. fisc.* 2015, comm. No. 263, April 9, 2015.)

15. However, this benefit is tied to consolidation and will only apply in the second step of the CCCTB, i.e. when consolidation has been implemented. Therefore, the Commission has proposed a temporary system of cross border offset, which will apply until consolidation is in force. With cross-border loss offset, a parent company in one Member State will be able to receive temporary tax relief for the losses of a subsidiary in another Member State. Once that subsidiary becomes profitable, the Member State in which the parent company is established will "recapture" the taxes that it relieved during the loss phase. As such, no Member State would have to carry the long-term burden of an unprofitable company in another Member State.
16. French corporate tax is currently only assessed on earnings from enterprises engaged in business in France and those earnings attributed to France by a tax treaty (French general tax code, art. 209 I).
17. Once a company's consolidated tax base has been established, each Member State in which the company has activities will have the right to tax part of this base. The proportion of the company's base that a Member State can tax will be decided based on 3 equally weighted factors:
 - the **assets** the company has in that Member State (e.g. buildings, machinery);
 - the **labour** the company has in that Member State (i.e. the number of employees and employment costs);
 - the **sales** that the company made in that Member State. The sales factor will be calculated on the basis of destination (i.e. where the goods are sold/dispatched to or where the service is carried out).
18. Explanatory Memorandum, triple CTB directive.
19. *Id.* p. 10.

9. Double CTB directive, art. 70.

10. Triple CTB directive, art. 80.

11. See *infra* p. XXX.

12. Triple CTB directive, art. 3(12).

13. P. SIKKA, R. MURPHY, *Unitary Taxation: Tax Base and the Role of Accounting*, ICTD Working Paper 34 (2015).

14. See however, *Marks & Spencer case*, and the last developments in ECJ Feb. 3, 2015, *Commission c/ Royaume-Uni*

This consolidated approach would second promote the “one stop shop” advocated by large companies: they should only file one tax income statement in one country and its tax administration will discuss the ongoing issue with other tax administrations in Europe. The compliance costs should then be reduced substantially. In the impact assessment (hereafter the “Staff Working Document” or “SWD”) accompanying the CCCTB proposals released by the Commission,⁽²⁰⁾ administrative burdens, compliance costs and tax obstacles for cross-border companies in the EU will be reduced: time spent on annual compliance activities should decrease by 8% while the time spent for setting up a new subsidiary in a Member State would decrease by up to 67%.⁽²¹⁾ If this assessment was confirmed, this would make it easier for companies, including SMEs, to set up abroad. No doubt that the European States ranking in the *Paying Taxes* section of the *Doing Business* Reports could improve.⁽²²⁾ Although this presentation is seducing, it should not hide the drawback of the previous attempts.

“In the impact assessment (hereafter the ‘Staff Working Document’ or ‘SWD’) accompanying the CCCTB proposals released by the Commission.”

One of these handicaps which explain why the Commission decided to re-launch the CCTB four years after the 2011 CCCTB scenario was that this last proposal needed to be adjusted. Several new features are thus contained in the new CCCTB. One of these have to be treated separately, namely research and development (R&D) incentive, because these spending are crucial for future growth. For this reason alone, this article first analyses the new proposals’ features (I), as compared to the ones in the 2011 proposal, and second offers a focus on the R&D tax treatment (II).

20. SWD(2016) 341 final.

21. *Id.* p. 38.

22. See G. CAVALIER, “Paying Taxes 2017: France still on the rise?”, *R.I.S.F.* 2017/1, p. XXX.

I. New proposals’ features

The new proposals’ features formally split the 2011 layout into two directives so that they can be implemented in two stages. Member States will be able to agree on the common base (Common Corporate Tax Base – CCTB) before working on the more complex consolidation aspect (CCCTB). This is to make the negotiation process more manageable, facilitating more constructive discussions and quicker agreement, without reducing the overall level of ambition. From a more substantial point of view,⁽²³⁾ and contrary to the 2011 proposal where the CCCTB was optional, the 2016 version provides that it will be mandatory for the largest companies (A). Even more materially, the new proposals – double CTB specifically – remove incentive for debt accumulation (B).

A. Mandatory for Largest Companies

The proposals will be mandatory for all groups with global consolidated revenues of more than EUR 750 million.⁽²⁴⁾ So the question is no longer whether French or European large groups will have interest in opting in the CCCTB system,⁽²⁵⁾ but rather how SMEs should opt in or reject it politely. For large group first, this mandatory application should help to maximise the CCCTB potential as an anti-avoidance tool. The criterion for fixing a size-related threshold refers to the total consolidated revenue of the group which files consolidated financial statements and to which a company belongs. The definition of the group is unchanged compared to the 2011 proposal:

“Eligibility for the consolidated tax group will be determined in accordance with a two-part test based on (i) control (more than 50 percent of voting rights) and (ii) ownership (more than 75 percent of equity) or rights to profits (more than 75 percent of rights giving entitlement to profit). The two thresholds for control and ownership or profit rights shall be met throughout the tax year; otherwise, the failing company will have to leave the group immediately. There will also be a

23. One should also note a definition of a permanent establishment align with the BEPS recommendations: on these, see in the French language, G. CAVALIER, “Action 7 du projet BEPS : une révolution ? – Les travaux internationaux visant à enrayer l’évitement artificiel du statut d’établissement stable”, *R.I.S.F.* 2016/1, p. 160.

24. Double CTB directive, art. 2 limits the compulsory application to accounting groups with a group consolidated turnover above EUR 750 million. See also triple CTB directive, art. 2 (c).

25. D. GUTMANN, “Les enjeux de l’ACCIS pour les groupes français”, *Dr. fisc.* 2012.

minimum requirement of nine consecutive months for establishing group membership.”⁽²⁶⁾

To prevent aggressive tax planning, these groups will no longer be able to opt out of the completely sealed CCCTB system.

However and second, SMEs will fall below the threshold: they will still be able to opt in to the CCCTB, in order to avail of the greater simplicity, certainty and cost-savings it advocates to bring. This is the “commercials” accompanying the CCCTB proposals. But in practice, a comparison of the CCCTB rules – double CTB specifically – with the national ones will be made by companies so that they can effectively check whether the CCCTB system would be effectively cost saving and more simple. The tax base is designed broadly as all revenues will be taxable unless expressly exempted (article 7, double CTB directive). But compared to French current tax law which avails a participation exemption regime for shares held for at least 24 months,⁽²⁷⁾ dividends or capital gains from the disposal of shares held in a company outside the group will be exempt for participations maintained during 12 consecutive months (article 8 (c) and (d)). The French rule appear less favourable and the CCTB more favourable. However, the CCTB characterization of participation requires 10% whereas France legislation only requires 5% in line with the parent-subsidiary directive.⁽²⁸⁾ Moreover,

26. Triple CTB directive, explanatory memorandum, p. 9.
 27. French general tax code, art. 145.1.c (for dividend) and 219 I, *aquinquies* (for capital gains).
 28. Directiv 90/435/CEE dated July 23, 1990. In fact, the participation characterization is more complex under French law.

a switch-over clause is introduced (article 53).⁽²⁹⁾ And when looking at the deduction of entertainment costs, only 50% are deductible in the CCTB proposal “up to an amount that does not exceed [x]% of revenues in the tax year” (article 12 (b)) whereas French law provides for a deductibility in full. But conversely, the CCTB stipulates that “Member States may provide for the deduction of pension provisions” (article 24) and that “losses incurred in a tax year (...) may be carried forward and deducted in subsequent tax years” (article 41) whereas French tax law provides for limitations on tax losses deduction.⁽³⁰⁾ Therefore, one may not say “in general” that the CCTB will result in less tax for companies, as all will depend on facts and circumstances. This is partly true for the other main feature of the proposals aiming to remove incentive for debt accumulation.

(To be continued in next issue)

29. The substitution of the exemption method by the tax credit method (“switch-over”) when the tax regime existing in the third country is subject to a statutory corporate tax rate lower than half of the statutory tax rate existing in the Member State (subject to double tax treaty).
 30. Ordinary losses generally may be carried forward indefinitely, but may be offset against taxable profit of a given year only up to an amount equal to EUR 1 million, plus 50% of the taxable result in excess of the EUR 1 million threshold. Under certain conditions, losses also may be carried back to the previous year but only up to an amount of EUR 1 million (French general tax code, art. 209 I 3rd paragraph).