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SUMMARY RECORD OF THE MEETING OF THE COMMON CONSOLIDATED CORPORATE TAX BASE WORKING GROUP

Held in Brussels on 12 December 2007

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I. OPENING OF THE MEETING

1. The twelfth meeting of the Commission Working Group on the Common Consolidated Corporate Tax Base (hereafter the 'WG') was attended by experts from all Member States (hereafter MS) and was chaired by the CS (Commission Services). The Chair welcomed the participants and opened the meeting.

II. ADOPTION OF AGENDA

2. The Chair presented the draft agenda to the Members[1] of the WG.

3. The agenda was adopted by consensus.

III. DISCUSSION ON WORKING DOCUMENT 'CCCTB: POSSIBLE ELEMENTS OF THE ADMINISTRATIVE FRAMEWORK' (CCCTB/WP/061)

4. The Chair asked the Members of the Group if they wished to react on the document itself and /or on the discussion held in this respect the day before during the session in extended format. The CS (Commission Services) stressed that input from MS experts would be particularly important since the Commission is not a tax administration, has no practical experience in this area and is therefore especially relying on MS expertise in this area.

5. As a preliminary remark, many MS committed themselves to comment in writing but gave some preliminary comments on the working document.

6. **As general remarks**, a few experts stressed that they do not favour an optional CCCTB: having two separate systems running side by side (one for CCCTB companies and another for companies outside of the scope of the directive with potentially different tax rates) could be unsustainable and difficult to manage for tax authorities. Furthermore, this situation would be unfair for certain taxpayers, particularly SME as only large companies would in practice have the resources to simulate and analyse the potential benefits that may arise from the CCCTB option.

7. In response to one expert's request for clarification on the legal basis for the administrative framework, the CS confirmed that the administrative framework provisions would be included in the CCCTB directive and not adopted through a soft law instrument. The Chair invited MS experts to comment on possible advantages of having a separate instrument for the administrative framework.

8. A general question was also raised as to how the system would deliver openness and transparency and what evidence there would be that the rules are applied commonly. The CS answered that one can assume that since the base would be consolidated, MS administrations would be working more closely together than perhaps they are at the moment. Furthermore, the directive will provide sufficient

[1] Throughout the document the terms 'members', 'experts', and 'Member States' (MS) are used. In common with other documents these should be understood to refer to individual experts participating in the meeting. They do not indicate any formal position or view of a MS.

detail and clear rules including details on which implementing measures would be issued through the Comitology process.

9. **More specific concerns were expressed**. The first one related to the choice of the PTP (principal taxpayer) and the PTA (principal tax authority). Some experts favoured an approach including economic activity criteria for the definition of the PTP. Otherwise one might fear a potential concentration of PTP without economic substance in some tax jurisdictions which become automatically PTA and thus could leave room for a kind of "PTA shopping" since all aspects of the administrative framework will not be harmonised (penalties, judicial appeals, …). Some experts were specifically concerned about having a holding company (not undertaking much economic activity) based in small MS where the resources could potentially be insufficient to deal with a pan European group. The CS answered that paragraph 25 of the working documents already covers the situation where, in exceptional circumstances, another PTP could be designated by tax authorities. They invited MS experts to further comment on the need to also include economic criteria in the definition of the PTP. More specifically on how to define those criteria and in which cases they should be applied. They also reminded MS experts that during the meeting in extended format a business expert specifically took the floor in order to welcome the absence of such economic criteria in the definition, but no MS expert had commented.

10. As regards penalties and interest charges, some experts would favour a common approach since maintaining such regimes at national level could be a source of undesirable competition between MS and therefore lead to some kind of penalties shopping. The CS answered that it emerged from the Joint Transfer Pricing Forum that the actual source of legislation for penalties in many MS does not necessarily come straight from tax legislation and arriving at a common approach on interest for instance would be too complicated and therefore not feasible. In addition, the CS are not convinced a common approach is necessary and also wondered whether all MS would be willing and prepared to adopt new common rules since they might currently have the same regime for individuals as they have for companies. Rather than a common penalty regime, some clear rules on the sharing of the responsibility within the group might be worth examining.

11. As regards the responsibility of the payment of penalties, many experts pointed out that the division of responsibilities between the PTP and subsidiaries is not clear enough to know which national legislation has to be applied. Could a subsidiary suffer penalties? How would the penalty apply to subsidiaries that fail to meet their responsibilities since no tax return is filed domestically? Why should the PTP incur penalties on behalf of the group if for example subsidiaries are responsible for incorrect information in the consolidated return ? The CS answered that subsidiaries would be potentially incurring penalties as far as their liability to payments of the tax is concerned. Even if the PTP is doing the administration on behalf of the group companies, the actual liability to pay the tax remains at the individual group companies and therefore if an error were discovered, the amount of tax that is due for a particular subsidiary would be subject to national penalties. However, the principal

taxpayer should be held responsible for the correct consolidated tax return since it is controlling the consolidated companies. That is one of the reasons why the definition of the consolidated group is important.

12. A concern was similarly raised as to the possible conflict between the option made by the PTP on behalf of the group and possible adverse decisions or necessity of confirmation from subsidiaries. The CS answered that tax administrations would not be involved in such issue since the PTP would have the responsibility of ensuring that all the group's subsidiaries have followed all the formalities and are able and willing to opt. In case this requirement is not fulfilled, the option for CCCTB would potentially not be valid.

13. As regards connections between personal income tax and corporate income tax, one expert stated that he understood that the Commission did not intend to deal with personal income tax issues. However it was stressed that for the purpose of auditing personal income tax issues, information on wages and benefits in kind had in some countries to be systematically passed on from all companies to tax authorities. If that obligation were not to be met, then a penalising system applied: non deductibility of wages at corporate income tax level or, even worse in recent developments, separate taxation of wages at corporate tax level at a higher rate of 300 %. This expert was wondering whether this penalising system would still be applicable at corporate tax level in the context of a CCCTB.

14. As regards thresholds for consolidation, all speakers agreed that one single threshold for both opting and consolidation would be preferable. One expert stressed that it is not desirable to lower the suggested 75 % threshold taking into consideration the importance of the issue of minority shareholders interest, unless this problem is resolved by for instance a kind of compensation for losses which would be offset by the group and benefit other group companies.

15. As regards the various bodies outlined in the document (arbitration panel, administrative appeals body, the Comitology procedure and a possible central body for interpretation), some experts were concerned about the absence of details on the administrative functioning of those bodies and possible interactions between them and suggested such rules should be included in the directive and not be dealt with by Comitology. One expert suggested all bodies should be designed within the same common framework so as to ensure better communication between themselves and consistency in their decisions. Another expert asked whether decisions of the various bodies would be binding and for which parties.

16. As regards the panel dealing with disputes between MS one expert suggested that all MS should be involved in the decision not only three or five MS. The Chair answered that since the panel would deal with individual cases, it would be difficult to imagine all 27 MS discussing the case of a multinational group, all the more if it operates in only 3 or 5 MS. The role of this panel should not be confused with the committee set up under Comitology procedure, which would be in charge of the general implementing rules and where all MS would participate.

17. As regards the centralised data base, one expert suggested implementing the functioning of the system under the Comitology procedure underlining that Europe has already an experience in building such data base in the field of VAT and Customs. Another expert raised the question of disclosure of information through possible exchange of information provision in a DTA (Double Tax Arrangement) with a third State. The CS acknowledged that the problem has to be carefully considered and invited MS to react if in signing a Treaty with a third country they have in fact laid themselves open to having to provide data from any source of data base.

18. Many questions were raised about tax audits. What if a national authority wished to launch an enquiry into companies based on their territory without agreement or even referring to the principal tax authority? Which MS would do the risk assessment? Has the Commission considered that getting auditors together might be time consuming because of language and travelling issues? What would be the incentive for tax authorities to audit and adjust minor errors since the base is consolidated and shared between all MS? The CS answered that even if the audit program is jointly determined, in principle, a tax authority should remain able to make particular enquiries. However, it is difficult to envisage why a tax authority would be willing to launch an enquiry without referring to the other tax authorities or at least advise them. The CS acknowledged the potential risk that "non-material" mistakes and errors would no longer be audited and therefore not adjusted but pointed out that random audits might resolve this. Furthermore, assuming that Member States are prepared to support a consolidated tax base, they should also be prepared to support a greater level of coordination with each other.

19. One expert referred to the deadlines for assessments (3, 6 or 12 years). Firstly, in his state, the deadlines are the same for individuals as for companies. They would therefore have to adjust their legislation (procedure) dealing with the taxation of individuals. Secondly, the expert was concerned about the 12 years deadline for criminal proceedings since experience has shown that one never knows how long it takes for Courts to issue their verdict and no one can therefore guarantee that it will be within twelve years. In his country, this problem has been addressed by having a special time period where the clock starts again (for a 12 months period) from the date of the final Court ruling. Another expert drew attention to potential tensions in the system because of disparities between participating MS legal systems in the definition of what is a civil or criminal issue and because the rules on evidence differ across MS.

20. As regards appeals, one expert was concerned about the absence of "national" appeals. The CS recalled that the idea of having a PTP and having an appeal against the consolidated assessment before the courts of the State of the PTP with final resort to the ECJ is specifically designed to avoid national appeals and stressed that the CCCTB would not be workable with different appeals by the same group of companies in different states. Another expert wondered what would prevent a group from arbitraging between different appeals systems, and thus between MS depending on which appeal process they actually prefer. The CS acknowledged that there could be situations where the PTP might change but not on a regular basis. Furthermore, it

is not likely that a group would reorganise simply to put itself under a different appeal system. Finally, although the mechanics in each country concerning the number of appeals might be different, there should not be too many differences, having in mind that at least the administrative appeal would be common and the ultimate appeal would be to the European Court of Justice.

21. Other questions and remarks were as follows: one expert objected to the fact that a taxpayer could always appeal against any request for information because that really could, if repeated, prevent tax authorities from effectively carrying out audits in a timely manner. Another expert mentioned that in his country consolidation has been made compatible with tax returns having different time limits since fixing a common time limit for all tax returns (common closing date for all financial accounts) would have raised constitutional problems. The CS invited that expert to comment in writing on the aspects that could be unconstitutional. Other experts pointed out that the auditing process of a company may involve other taxes (VAT, etc). It was also mentioned that one should foresee the possibility to immediately collect tax rebates that have been unduly refunded to the taxpayers as a result of a mistake made by tax authorities in the calculation of the tax due (e.g. one zero too many). Finally an expert stressed that it would be difficult to envisage that the new system would provide less protection for the taxpayer that the one it currently enjoys.

22. Before opening the discussion on the sharing mechanism, the CS invited MS to comment in writing on the proposed administrative framework and more specifically on the following open questions: the possibility of including economic criteria in the definition of principal taxpayers and the question of how to define such criteria, the extent to which MS experts are willing to have a common penalty regime and the question of how it would fit with their existing domestic penalty regimes, the problem of minority shareholders interest as a consequence of a lower threshold for consolidation and the extent to which the perceived problem with domestic company law is a real one, the necessity therefore of making compensation payments for the use of losses by the group, the number of States which use company tax returns for other taxes purposes (VAT, …) and finally the possible link between the different suggested panels.

IV. DISCUSSION ON WORKING DOCUMENT 'CCCTB: POSSIBLE ELEMENTS OF THE SHARING MECHANISM' (CCCTB/WP/060)

23. Many experts thanked the Commission for having organised the very interesting debate held during the meeting in extended format with US experts.

24. One expert pointed out that the comments from US experts were reassuring for MS and the CS (Commission Services) since they support the three-factor approach, the idea of having sales by destination rather than by origin, not including intangible in the asset factor and allocating all income without any distinction. The US system could be used as starting point in order to design the EU sharing mechanism since it has been working properly for decades. However, the expert stressed that one should

try to work out exactly how the US system is transferable to the EU, having in mind that the US situation is not exactly comparable: VAT is higher than the US tax on consumption, CCCTB will not be compulsory, a PE (permanent establishment) is required in the EU in order to allocate income to a market State (nexus) and the difference in corporate tax rates is higher in the EU. The CS should therefore flag up all potential differences between the US and the EU needs and adapt and improve the US system to suit the EU situation, rather than simply importing and adopting the US system as it is.

25. In response to comments from some MS experts on the weighting of factors by different MS, the Chair recalled that the working document clearly suggested a uniform weight of factors throughout the EU (contrary to the US situation) and a stable formula subject only to change with further agreement.

26. As regards the labour factor some experts expressed concern about including the number of staff members as a factor. Firstly, economic value is always measured in terms of monetary value and not in terms of number of items whatever these items are (assets, employees). Secondly, if one takes "head counts" into consideration, one could also similarly include the number of assets as an additional factor. However, one expert pointed out the "number" factor could correct differences in salaries between MS but only during a transitional period.

27. As regards the sales factor, a few experts did not favour including this factor in the formula. Sales by origin would not be a significant factor with respect to what the other factors already bring to the formula and would be under groups' control. Sales by destination would also be subject to manipulation and not in line with the current attribution of profits' power of taxation at international level. However, some experts were also of the opinion that having a third factor would be better in that it made manipulation more difficult.

28. As regards, the asset factor, many experts argued that since intangible assets are increasingly important in our economies in generating profit, they should be included in the formula. The Chair shared the view that theoretically it actually should but reminded the experts who took the floor that since the valuation of intangibles is too problematic and their location is subject to manipulation, for reasons of practicalities, it should be left out unless a proper way of dealing with those practical problems is found. Besides, the CS, together with some experts, stressed that the value of such assets would probably already be reflected in the value of the other factors (level of wages, price of sales, value of the other assets).

29. Another expert was concerned that the asset factor would be included at tax written down value since the purpose of depreciation is to spread costs and not profits over time. The Chair answered that the purpose was to approximate the market value of assets.

30. Regarding the safeguard clause, some more clarification was requested especially on the practical functioning of this clause: how the notion of an unfair result would be defined, which replacement method would be suggested when the

result of the regular and agreed apportionment is deemed to be unfair and what would happen if this safeguard clause would need to be applied rather often in terms of review / improvement of the regular apportionment system. The Chair answered that the safeguard clause had been strongly and unanimously recommended by US and Canadian tax administrations since one cannot foresee all future circumstances. However, the Chair acknowledged that systematic problems would need a review of the formula.

31. As regards specific sector formulas, one expert was struck by the lack of detail in the paper. The Chair reminded that this issue had already been examined by the subgroup n° 6 of the Working Group and unfortunately, the CS had not received many suggestions from MS experts. The subgroup concluded that we should design as few specific formulas as possible and the Chair explained that one of the purposes of the working documents was precisely to identify industries where such formulas might be necessary. Furthermore, the Chair pointed out that work on that issue had already started internally but was not at a stage yet where a concrete suggestion could be proposed.

V. DISCUSSION ON WORKING DOCUMENT 'CCCTB: POSSIBLE ELEMENTS OF A TECHNICAL OUTLINE ' (CCCTB/WP/057)

Comitology

32. The Chair recalled that a background paper on Comitology had been sent to MS experts before the meeting and invited experts that wished to comment on that issue to specify concretely where the application of Comitology as foreseen in the working documents CCCTB/WP/057 would raise concern or legal problems.

33. One expert suggested that any provision that would impact the total tax liability of a group or influence the level of any company's tax liability should be included in the directive and not left to the Comitology procedure. Another expert referred to an example in the outline paper where common criteria on charities would be laid down by the Comitology procedure and was concerned since donations by companies to charities would have a significant effect on companies' tax bases in their MS.

34. Another expert stressed that Comitology was simply neither appropriate nor politically acceptable as it could be a way to shift the boundaries of what has to be agreed unanimously and what is in the scope of qualified majority voting. Another expert reiterated that it could raise (unspecified) constitutional problems.

35. The chair took the floor to make clear that a distinction should be made between political and legal issues. As regards political issues, if some powers were to be delegated to the Commission in terms of implementing measures, this would have to be part of the CCCTB directive and thus to be agreed unanimously (both on the principle and in terms of areas to be covered by Comitology implementing rules). Moreover, in terms of technical and legal issues, these implementing measures adopted by the Comitology committee could take the form of a Commission directive,

which would need to be transposed by the national parliaments to become applicable. Therefore, the Chair did not understand the constitutional problems raised by MS experts and reassured the meeting that Comitology is technically and legally possible.

Foreign income

36. An expert raised some concern on how the CCCTB rules on foreign income would work in practical terms having in mind that some derogation would apply when bilateral arrangements between an involved EU State and a third state would conflict with the rules provided by the CCCTB. The expert wondered whether the CS (Commission Services) had carefully envisaged the potential for facilitating strategic tax planning and creating double taxation.

VI. ANY OTHER BUSINESS

37. Some comments were made on the request for tax data in relation to the impact assessment exercise. They revealed that the access at national level to tax data might be restricted to the tax income of the entities located on the territory of these states and the respective tax administrations would not have any access to the tax income of the foreign subsidiaries of their taxpayers.

38. The Chair acknowledged that the best option would need companies to provide tax data on cross-border consolidation and factors in the apportionment formula. However, it would not only be costly for companies collecting that information but also raise possible confidentiality problems. Furthermore, since it would involve companies only on a voluntary basis, it might also raise the problem of having a representative sample for the assessment. Another option would be to use financial accounts.

39. The chair concluded the meeting by reminding experts that written comments on the working documents tabled for this WG meeting were requested by the end of January.

40. A tentative date for the next WG meeting was suggested: 14 & 15 April 2008.