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

Held in Brussels on 14-15 April 2008

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I. OPENING OF THE MEETING

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

II. ADOPTION OF THE AGENDA

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

3. The agenda was adopted by consensus.

III. UPDATE FROM THE COMMISSION SERVICES ON THE PROGRESS MADE

4. The CS gave an update on the progress to date and on the future development of the work.

5. The basic reference working documents remain CCCTBWP57 (outline of the tax base and the consolidation), CCCTBWP060 (sharing mechanism) and CCCTBWP061 (administrative framework). The CS currently intend to elaborate their legislative proposal (which is underway) on the basis of these working documents and the oral and written comments made on those. Moreover, since the work is based on a dynamic process, the views of the CS have sometimes changed or developed further.

6. The work on the Impact Assessment has also been progressing, notably in connection with some of the tax base implications, and compliance costs.

7. The CS outlined, in the following five headings, the areas where their work has further developed. This has been the result of internal work and new insights and input coming from WG experts, business experts and academics (notably a conference attended in February in Vienna University) as well as of bilateral meetings with MS' experts: (i) areas of misunderstanding; (ii) areas not covered in the technical outline WP/057; (iii) areas where the CS views are likely to change; or (iv) could possibly change; and finally (v) the areas where more detail will be needed, in order to draft the proposal.

8. (i) As regards the areas of misunderstanding, the CS made it clear that they have no intention to harmonize accounting rules. Thus, no formal link will be established between the tax base and the accounting standards (since not every company in every MS is able to use the IFRS as accounting standards). However, some concepts or treatments currently provided by the International Accounting Standards could form the basis of rules in the tax base.

[1] Throughout the document the terms 'members', 'experts', and 'Member States' (MS) are used. In conformity 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.

9. Regarding double tax conventions between MS, the CS's view is that the directive would override the relevant parts of treaty agreements between EU states. Conversely, the CCCTB directive would enable the EU states to continue to apply their bilateral arrangements with third States if the clauses of these arrangements contradict the CCCTB rules.

10. (ii) Three areas that had not been covered (in much detail) in the technical outline and were discussed in the meeting are: anti-abuse measures, the treatment of financial institutions and hidden reserves. Regarding financial institutions, it was emphasized that the intention was to include these institutions in the initial proposal, provided the technical work could be completed in time. Irrespective of whether the tax treatment for this specific sector is included in the initial proposal, the aim is to make them part of the CCCTB project. However, for practical reasons, they might be incorporated by virtue of a separate proposal, to be tabled a couple of months after the initial one. Nevertheless, the implementation date for the rules on the financial institutions would be the same as for all other companies.

11. (iii) As regards the areas where the current CS's position is likely to change: on assets and depreciation, the price criterion for long-term individually depreciable assets (€5 million) will not be used any longer. Further, the useful life of the individually depreciable assets, initially envisaged for 25 years, will be reduced to 15 years. Similarly, in the pool system, it has been considered to potentially increase the depreciation rate to 25% but the CS are keen on the idea of a broad base which suggests that the rate should be left at 20%. The double threshold initially envisaged (50 % for opting and 75 % for consolidating) is likely to be abandoned for the sake of simplicity. Namely, only one threshold (i.e. 75 % for consolidation) will stand in the proposal. The use of the national GAAP (Generally Accepted Accounting Principles) as a fallback rule should not appear in the proposal. As a last resort, the directive should refer to the general tax principles set out in its text for assistance in interpretation in case the directive is incomplete or insufficiently clear.

12. (iv) Possible changes. Some further consideration might be given to the definition of the ownership threshold. More specifically, the question is whether the ownership of voting rights would, as such, be sufficient or a combination of these rights, together with other criteria, is needed. Possible examples are the entitlement to annual distributed profits and / or the ownership of capital (i.e. entitlement to winding up, liquidation). As regards the balance sheet versus profit and loss account approach, the CS still believe that the latter is preferable but the advantages of the balance sheet approach will also be assessed.

13. (v) Finally, the areas where more detail will be necessary when drafting the proposal: Where some powers could be delegated by the Council to the CS under the Comitology procedure, this will have to be precisely identified and defined in adequate detail in the draft directive. To date, the CS have received no written details on any constitutional issues concerning the Comitology. In the field of the administration, more detail has been requested. For example, the Principal Taxpayer definition might benefit from more detail, although very few comments have been received on this topic. The same will apply to the rulings on interpretation, to be

issued either by a central body or at local level by individual states. More details have also been requested about the definition of a specific tax regime with a substantially lower level of taxation (combated through the switch-over clause). Another issue involved the deductibility of entertainment and representation costs.

14. The CS concluded their initial presentation by confirming that the work on the legislative drafting is in progress (on the technicalities of the proposal). This does not mean that the technical work is complete; work is also progressing on the impact assessment. As a logical next step, when both the legislative proposal and the impact assessment are completed, they will be submitted to the College for approval before they reach the European Parliament and the Council.

IV. DISCUSSION OF THE WORKING DOCUMENT 'Anti-abuse rules' (CCCTB/WP/065)

15. The CS introduced the working document. The presentation was divided into 6 parts: (i) a general anti-abuse clause and/or specific measures, (ii) deductibility of interest, (iii) switch-over and/or CFC (controlled foreign corporations) rules, (iv) the so-called "sandwich" situations, (v) sales of shares qualified as sales of assets and finally, (vi) the manipulation of the factors in the FA.

16. **On a general anti-abuse clause,** several experts commented on the need for such a measure in addition to the specific clauses, as the latter might not cover all possible situations. This is namely so for the situations not envisaged when drafting the legislation and also those to develop in the future. Therefore, areas not caught by a specific provision would still be covered by the general anti-abuse clause.

17. One expert added that an appropriate balance has to be struck between legal certainty for taxpayers, on the one hand, and the intention of the legislator, on the other. A taxpayer having a choice between different transactions should always be free to choose the most beneficial route in terms of taxation. On this topic, another expert took the floor to point out that, in his national legislation, a distinction is drawn between avoidance and evasion. He wondered whether that distinction had properly been captured by the CS and would be applied consistently across the whole of the EU.

18. The CS confirmed that a clear distinction between evasion and avoidance would be drawn.

19. Other questions raised were as follows: whether the general anti-abuse clause was proposed for all corporate tax purposes or to cover cross-border transactions only; whether the CS envisaged practical difficulties in having different sets of anti-abuse rules for CCCTB companies and for opting-out companies.

20. The CS confirmed that it was their intention that anti-abuse measures would be applied to all transactions. That is, both to cross-border and to those within one MS;

further, those would be in line with the EU Treaty. The CS do not envisage any problem of discrimination since the CCCTB would be optional.

21. **On rules aimed at limiting the deductibility of interest,** in general, the experts that took the floor considered both earning-stripping rules based on EBIT/EBITDA and thin capitalization rules as appropriate. Some experts even advocated in favour of going further since those rules would not cover all cases of abuse. According to them, one should also examine the assets financed by debts (for example, loans taken out to finance shares, holdings) and where those are situated in the EU.

22. One expert mentioned (on thin capitalisation) that the interest deduction should not be calculated on an arm's length basis but, instead, be limited according to a fixed debt-to-equity ratio.

23. Another expert took the view that rules aimed at limiting the deduction of interest are not purely anti-abuse rules but simply arise as a result of drawing a line between distribution of profit (non-deductible) and interest (deductible).

24. Some experts supported the prospect for a general non-deductibility of interest paid to such a company resident in a low tax country in line with the oral suggestion of the CS for a possible tax treatment.

25. **On switch-over**, one expert wondered whether the carrying on of a genuine activity in a very low tax country would actually qualify as abuse. Another expert pointed out that, in practice, this mechanism may anyway not be applied often since the directive will be overridden by conflicting provisions in DTCs (double tax conventions) with third countries where the switch over may not allowed.

26. **On CFC rules**, the real economic activity threshold (less than 80 % of its income is passive income) was considered by some experts to be too high. One expert suggested capturing only passive income instead of all types of income (pro-rata calculation).

27. According to one expert, no CFC rules would be needed if the test for the switch-over were structured to depend not exclusively on the level of taxation of the subsidiary company but also on an additional passive income test. However, another expert stressed that both CFC rules and the switch-over mechanism are necessary. Thus, the scope of CFC rules may be broader (if it includes non-distributed income untaxed in the source country) or narrower (if control is needed to apply CFC). One expert welcomed the proposal that considers indirect control when determining whether a company is controlled (owned by more than 50 %). Another expert expressed doubt about the effectiveness of CFC measures if CFCs are established in countries that have not committed to sufficient exchange of information.

28. On **sales of shares as sales of assets,** those experts that took the floor were of the opinion that the two-year period is too short. One expert proposed that no time limit is set for intangible assets.

29. On **the so-called 'sandwich' situations**, the CS asked the experts whether an anti-abuse measure should be included in the directive. If so, whether a general or a specific clause would best fit. The CS also addressed themselves to the MS currently applying tax consolidation at domestic level to be informed about how they solved the problem and which available solutions would fit the CCCTB consolidation. All experts agreed that double deductions (losses considered twice) should be avoided in the CCCTB. However, most experts stressed that group companies should not be forced to exit consolidation in that situation. Some suggested that bad debt relief should not be allowed between related parties - with some specific exceptions.

30. On the **manipulation of the factors used in the FA (formulary apportionment)**, two experts expressed the view that, in order to avoid manipulation, the formula should take account of the actual place of use of the assets instead of the balance sheet in which they are recognised. The CS answered that this is precisely what the proposal suggests.

31. However, another expert pointed out that looking at financial statements would be a simpler way of deciding on the location of the assets. Further, this would also be appropriate since they would be recognized where risk is located.

32. One expert highlighted that, if deductions (relief) after apportionment were to be permitted (at national level), MS might also play a role in decisions on locating business, through offering various investment incentives to encourage companies to buy or transfer assets. The CS replied that it is the current intention that the directive offers no scope for special incentives after apportionment at national level (rather than against the consolidated base). Only one possible exception to this approach of limiting tax deductions after consolidation has been identified, that of local taxes. However, since the proposal deals with the tax base only and the tax rates remain for the MS to decide, incentives in the form of rate reliefs or tax credits would still be possible.

33. One expert raised points in two **other areas**, which deserve attention: the first is about the calculation of losses in the case of a takeover (to prevent the trade in loss-making companies) and the second concerns reorganisations (tax exemption not granted in the case of abuse).

34. The chair invited all MS experts to comment in writing on the suggested anti-abuse rules and noted that the CS would also welcome comments on possible further anti-abuse measures and, in particular, in relation to loss-making companies and reorganisations.

IV. DISCUSSION ON THE FINANCIAL SECTOR: TAX BASE RULES AND THE SHARING MECHANISM

Tax base of credit and insurance institutions

35. In general, the CS proposal was considered to make sense.

36. The following comments were made: - (i) although no formal link is envisaged by the CS between the tax base and accounting profit, accounting rules are more harmonised for banks than for other companies, since all banks apply IFRS in the EU; - (ii) one should also take account of definitions appearing in other community legal instruments to maintain consistency; - (iii) in terms of supervision, the banking and insurance sector is heavily regulated; - (iv) specific tax treatment should be designed for this sector which should not expand beyond banking and insurance; - (v) bad debt relief needs to be considered.

37. On anti-abuse measures, according to one expert, bank and insurance companies should not benefit from a more favourable treatment, in order to achieve consistency. They should actually be subject to the same anti-abuse rules as those applied to other types of consolidated group companies. As otherwise (for example, on CFC rules), a group could take advantage of the fact that two different set of rules are applied within the same consolidated group and create a structure outside the EU, so that the group can benefit from the most beneficial set of CFC rules. One should therefore design common rules that would be applied consistently to all consolidated group companies.

38. However, two other experts suggested that stricter CFC rules should be applied to banks, even if they carry on a genuine economic activity, because banks can very easily relocate to very low tax countries.

39. On the deductibility of interest, according to one expert, a deduction should be refused when loans are used to finance the acquisition of assets that generate tax-free income. For example, when a bank buys another bank and inbound dividends are exempt from taxation.

40. On the technical provisions for insurance companies, some concern was expressed as regards the deductibility of such provisions when linked to exempt income. An example was given of a tax-free capital gain on shares and of a corresponding technical provision recognizing that the gains in question actually belong to customers. Another alternative which would fit a "broad base" concept, would be that all income earned by insurance companies is taxable income.

41. According to another expert, one should consider some kind of limitation since technical provisions might provide for future risks.

Sharing mechanism for bank and insurance companies

42. One expert did not support the inclusion of sales (by destination) as a factor in the apportionment formula applicable to the sector of financial services. The reasoning was that such a specific sector cannot easily define what a sale is. That expert also asked the CS whether the European banking industry had been consulted on that issue.

43. The CS answered that they had met the EBF (European Banking Federation). On this point, it is possible that a sales-by-destination factor may not have an impact because a large part of the business of banks is carried out locally. So, in that sense,

sales by destination would equal sales by origin. Furthermore, a-sales-by origin factor would not be relevant either. It would thus duplicate the assets and payroll factors. A sales factor should therefore not be included at all. However, the CS are in favour of applying a three-factor formula to all sectors. The aim is to consolidate and apportion banks' profit consistently with the profit of other types of companies.

44. While one expert was favourable to sales by destination as a compromise for not having a CFC clause for banks, some others maintained their opposition.

45. One expert took the view that, in an industry as complex as the financial services sector, the apportionment should not simply be a mere adjustment of a generally-construed formula (for example, applicable to manufacturing companies). He thus suggested that financial assets should be included whereas non-financial assets excluded.

46. The CS explained that the rationale behind the inclusion of non-financial assets of banks is based on the assumption that as few disparities as possible should exist in the factors between all companies in the CCCTB group.

47. On **sector-specific formulae**, the CS suggested that a specific formula should be devised for oil and gas extracting companies. According to this, profit would be attributed to the country of origin through using a sales-by-origin factor.

48. One expert asked the CS to explain why they favour a switch from sales by destination to sales by origin for that particular sector. The CS replied that extracting the oil is not a trading activity and should be treated on an origin basis.

49. Some concern was expressed that other natural resources such as minerals are not covered by the formula. The CS explained that oil and gas seems to be a material natural resource for the industry and an issue for several MS. The CS are not convinced that any other extracted product would be sufficiently material to justify taxation in the state of origin. The MS concerned were invited to comment in writing.

50. One expert suggested that taxation in the state of origin should be applied to raw materials as well.

V. DISCUSSION ON VARIOUS DETAILED ASPECTS OF THE CCCTB 'VARIOUS DETAILED ASPECTS OF THE CCCTB' (CCCTB/WP/066)

Tax principles

51. In general, experts welcomed the approach of using tax principles (instead of national legislation) as a last resort.

52. However, according to one expert, those principles should be used as points to bear in mind when drafting the legislation rather than as a fallback. Other remarks concerned the lack of detail and whether the accounting profession had been

consulted. On the latter question, the CS answered that accountants within the CS had been consulted.

53. The CS also pointed out that, as explained in the presentation, the tax base should be computed in accordance with general tax principles unless otherwise stated in the directive. This is to say that the directive would also contain very specific and detailed rules on timing. At the same time, tax principles would be included, in order to assist in the interpretation of the legislation.

54. Other principles were suggested: - the imparity principle which requires that unrealized losses be recognized, whereas unrealized gains (profits) may not be recognized; - the inclusion of a general definition of assets, liabilities, income and expenses in the general tax principles. On the former proposal, the CS answered that no consensus was found among experts when discussed in sub-group meetings.

Joiners and leavers

Companies entering the CCCTB

55. Several questions were included in the working document WP/066. However, the discussion did not get into detail and several experts stated that they preferred to send written comments.

56. The CS noted, answering a preliminary request for clarification on entering companies, that the presentation did not cover any transfer of assets to third-countries. Instead, only the entry of EU-resident companies into the CCCTB was dealt with.

57. As regards the category of assets for which the underlying capital gains/ losses should be monitored, another expert stressed that all assets should be covered, including the depreciable ones. This is because buildings, for example, do not decrease but rather increase in value over time.

58. One expert expressed concern about the disparity in tax treatment, depending on whether a company is subject to the CCCTB (deferral of capital gains) or to national legislations (exit taxation in most cases). He thus thought this might be discriminatory, which would cause constitutional problems in his country.

59. For the sake of simplicity, another expert suggested that no specific treatment of the underlying capital gain should be applied when a company joins the CCCTB. This is because, at the end of the day, the base will be shared. In other words, the whole gain should be shared upon realisation without allocating part of it to the original MS. However, the expert was rather concerned about what would happen when a company leaves the CCCTB.

Companies leaving the CCCTB

60. A few questions included in the WP/066 were put for discussion: Do Member States agree with the proposed treatment of companies leaving the CCCTB group? This is notably in connection with the taxation of their underlying capital

gains/losses? Do Member States agree with the proposed treatment of reorganisations in the case that no PE remains in the MS ?

61. Some experts agreed that, from a theoretical point of view, the CS were correct. However, some other experts were of the opinion that, from a practical standpoint, the proposal (i.e. deferral of capital gains until actual realisation or until assets leave the EU) would put the taxation of underlying capital gains (i.e. pre-CCCTB and CCCTB) at risk. This is because one could not easily monitor underlying capital gains outside the CCCTB group. If a company were no longer in the CCCTB group, the MS would lose control of its hidden reserves.

62. Another expert raised concern about the practical aspects of the proposal if, for example, a company is successively joining and leaving the CCCTB several times. A system accommodating multiple combinations of pre-CCCTB, CCCTB (joining), national (leaving), CCCTB again (joining), etc would be overly complex. One expert concluded that rules should be aimed at preserving MS' right to tax hidden reserves and ensure that they do not escape taxation completely.

63. Another expert did not agree with the Commission Services' proposal (i.e. deferral of capital gains), since a CCCTB group should always be treated as a single entity (and not only for consolidation purposes). Therefore, when a CCCTB group company is sold, the CCCTB group is actually selling part of its business, which should not be treated as a sale of shares but, instead, as a sale of assets and be taxed as such.

Local taxes

64. The CS introduced a new suggestion for dealing with local taxes, according to which all taxes, other than CIT (company income tax), would be deductible against the CCCTB, unless the amount raised is significant (in terms of percentage of CIT raised in the same country). Thus, taxes which might cause distortion would not be deductible against the consolidated base but would instead be deducted in the MS where they arose. This principle would also be applied to any similar taxes introduced after the implementation of the CCCTB. For example, if a "business tax" in a given MS accounted for more than 25 % of CIT in that MS, it would not be deductible against the CCCTB. Instead, it would be for the MS to decide on the deductibility of those amounts against their own share of the base. The Directive could provide for the preparation of a list of taxes which meet certain criteria. This could be prepared under the Comitology procedure.

65. All experts who took the floor agreed that it should be sought to prevent any form of distortion, resulting from cross-financing between the various ways of collecting tax.

66. A few remarks were made on the CS suggestion: one expert recalled that macro-economic systems were dismissed when the apportionment formula was discussed. Another feared that a threshold problem may arise, in the sense that MS could be prompted to strike a balance between local taxes, in order to ensure that they fall just

under the threshold. Finally, one expert pointed out that the Commission's proposal would remove the need to draw up a list of local taxes.

67. Several experts were of the opinion that no local tax should be deductible from the CCCTB, unless they represent charges in return for specific services. To avoid distortions between MS, other taxes (non-income tax based) could be left to the MS and possibly be allowed a deduction after apportionment. However, it was not explained how this could be achieved without introducing extensive new compliance requirements, although this point has been raised by the CS when this approach has been suggested in the past. Some other experts suggested that taxes, other than charges in return for specific services, should be made non-deductible, with the view of combating tax competition.

Gifts

68. The CS presented a possible definition of charitable bodies. Reference would be made to: - their statute (i.e. foundation, corporate foundation, organisation, museum); - their official existence as a registered entity under the law of a Member State or of an EEA State, provided that an effective exchange of information applies; - their public benefit purpose: non-profit bodies with educational, social, cultural, philanthropic, religious purpose; - a general interest character; - transparency rules and documentation requirements for the charitable body. The CS also suggested that political parties should be excluded but the question was left open.

69. One expert agreed that the definition of a charitable body should be fixed on general criteria. However, in his view, a list would also be needed to achieve absolute certainty and indicate which bodies have proven to meet the criteria.

70. One expert stressed that the tax base could be eroded if no limitation were to be imposed on the deductibility of charitable expenses. It was thus proposed that a ceiling is fixed consisting of a percentage of the tax base.

71. In response to CS questions as regards the treatment of gifts in the form of assets, many experts were of the opinion that, contrary to the treatment provided for in the technical outline (WP/057), the recipient should be allowed to depreciate gift assets, which have already been taxed in the hands of both the donor and of the recipient.

VI. REPORT BY THE COMMISSION SERVICES ON THE WRITTEN COMMENTS RECEIVED FROM MEMBER STATES ON THE WORKING DOCUMENT "POSSIBLE ELEMENTS OF THE ADMINISTRATIVE FRAMEWORK" (CCCTB/WP/061)

72. The Commission Services briefly introduced the topic by saying that the comments sent by some MS had been summarized in a table. It was mentioned that the Draft Directive in this area would build on the outline set out in WP/061 and the various comments received. The CS shed light on the comment made by one MS.

According to this, the administrative framework should be built in such a way that it would grant the taxpayer with the highest level of protection available in the EU (or, at least, a very standard of protection). In that way, no taxpayer would suffer from a move to the CCCTB system.

73. Two experts expressed their concern about the idea of always adopting the most favourable measures and deadlines for the taxpayer. According to one expert, the current national measures depend on how a MS is structured as well as on its size (for example, the size of public administrations may impact on the time required for reaction).What is possible in one MS may not be in another.

VI. REPORT BY THE COMMISSION SERVICES ON DATA TO BE REQUESTED FROM NATIONAL TAX ADMINISTRATIONS FOR THE IMPACT ASSESSMENT (See 'Input from national tax administrations for the Impact Assessment of the reforms at the EU level of corporate tax systems' CCCTB/WP/058 and Annex as presented at 27/28 September 2007 Meeting)

74. Two experts confirmed that they would provide the CS with information on historical data. However, one pointed out that some statistics will need to be adapted before being sent. Another expert stressed that the MS are not in a position to make a simulation of the tax base at this stage because new solutions have been proposed, some of which even during the meeting, and others are still to emerge.

75. The Chair invited the MS to provide the CS with any information (even partial data) by 20th May.

VI. ANY OTHER BUSINESS

76. The Chair informed the meeting that the CS do not envisage organising another meeting of the CCCTB Working Group.

77. Some experts requested further meetings before any proposal is presented. Others agreed with the CS that no more meetings were needed. The CS observed that those who requested further meetings seemed to be those who had contributed the least to previous meetings. The Chair confirmed that no further meeting of the technical WG will be organised. The Chair also reminded experts that the purpose of the WG is to provide the CS with technical assistance and not to negotiate an agreement as representatives of the MS. The Chair recalled that, in the ECOFIN Meeting of 5th June 2007, several Finance Ministers had stated that they would not be able to form an opinion until a proposal were drafted. In the light of this, the CS are currently working towards this.

78. The chair concluded the meeting by thanking MS experts for their oral and written input and also thanked the MS that hosted sub-group meetings. Finally, he

invited experts to submit written comments on the working documents tabled for this WG meeting by mid-May.