

Comments on document CCCTB\WP\035

Common Consolidated Corporate Tax Base Working Group

– Issues related to Group Taxation –

Introduction

The UNICE Task Force on CCCTB is pleased to have the opportunity to comment on yet another important topic dealt with by the Commission and the Member States. The issue of Group Taxation has been briefly touched upon in our previous paper on “Territorial Scope”. Considering its importance, further comments are necessary.

In line with the Commission document, the paper is based on the assumption that all 25 Member States will participate in the CCCTB. As in previous comments, the positions taken may be subject to revision as other areas of the CCCTB are explored. This applies in particular to the administrative aspects and the successful removal of double taxation.

General remarks

An optional and competitive **CCCTB** would have many advantages and, **correctly designed**, would contribute considerably to the fulfilment of the Lisbon objectives. As we can see it, there are three core benefits with a CCCTB:

1. removal of *double taxation* due to conflicting tax claims,
2. reduction of compliance costs by allowing for a *single compliance* of a single set of rules in a single location, and
3. assurance of net taxation through *consolidation*.

Without consolidation, two of these fundamental advantages would fail, essentially depriving the project from its chances to contribute to the much needed growth in the EU economy. The Task Force therefore supports the Commission in that the CCCTB should be consolidated from the beginning.

In line with the Commission, we are against a two-step process. Such an approach would be detrimental to the process and face the risk of creating a system which is not removing tax obstacles or designed to operate efficiently in a consolidated tax environment. It would also remove much of the incentive to create a truly competitive system which will cope with international competition. As pointed out by the Commission, consolidation cannot be sidelined for later consideration as it is crucial to the discussions of other structural elements, especially the work on international aspects. It is therefore important that the work focuses on creating a comprehensive CCCTB which is consolidated from the start.

Indeed, an optional and competitive CCCTB is the most appropriate long term solution towards less tax obstacles. This process should, however, not interfere with the important objective of short term targeted measures. Until a competitive CCCTB is successfully introduced, it is crucial that some intermediate solutions are adopted. This

especially regards the introduction of a regime for cross-border loss relief and the creation of simpler and more transparent transfer pricing rules, including better arbitration mechanisms. The Task Force therefore supports the Commission in making rapid progress in these important areas.

Definition of a group

The group definition is essential for the application of the CCCTB as it will determine which companies will be covered by the CCCTB rules and thus enjoy the benefits of the scheme. It is therefore crucial that the CCCTB provides for a simple and straightforward group concept which contributes to a competitive regime. A number of issues need to be considered.

Legal v. economic relationship etc.

The Task Force endorses a definition which is based on the legal relationship between two companies rather than economic criteria such as economic or managerial control. More specifically it prefers a definition based on the legal relationship above an approach that would contain a mixed requirement of both legal and economic criteria.

However, the CCCTB nevertheless need to recognize that there are a number of significant dual structures operating in the EU. To ensure that such structures can facilitate the CCCTB-regime, the Task Force takes the view that groups that show a significant and sufficient economic link and which are operating under common management, should be allowed to opt in as one group.

Whether or not there should be a threshold setting legal ownership requirements very much depends on how the consolidation is to be calculated. For reasons of simplicity, we believe that the consolidation should be based on the companies' entire profits or losses. A proportional scheme where the consolidation is based on the level of legal ownership would be overly complex.

As a consequence, the group concept will most likely require a minimum level of ownership. For reasons of competitiveness and to ensure the widest possible applicability of the CCCTB, any such threshold should be kept as low as possible.

Group structures are often complex and designed to optimize economic and legal efficiency. To reflect the true ownership level and ensure neutrality in how groups are structured, it is important that the group definition also accounts for indirect holdings.

Type of legal ownership

A consequential question is what type of legal ownership should qualify for CCCTB treatment (e.g. voting and/or non-voting shares). In this respect it is crucial that the CCCTB regime recognizes that Member States under general law adopt a large range of differentiated regimes, enabling different voting rights, 'golden shares' etc. For this reason, we believe that the group definition should be based on the holding in shares/capital rather than the voting rights. A core purpose of the CCCTB is to provide for a net taxation of profits coming from the capital invested in the business. Consequently, the group definition should ensure that the tax outcome reflects the invested capital.

However, recognizing the holding of the voting rights as a key factor for company control and decision making, a dual requirement between shares/capital and voting rights could also be considered. Any such approach should, for the reasons mentioned above, attribute primary importance to holdings in shares/capital.

In this respect it should be clarified that we do not favour a system of having a certain level of *either* voting rights *or* capital/shares. Such a kind of a dual approach would give rise to conflicting CCCTB structures including the same entities.

Eligible entities

To maximise the benefits of the CCCTB it should cover as many entity types as possible. It should also, to the extent possible, respect the principle of neutrality and not interfere with the most efficient way of structuring business activities by using appropriate entity forms. Neither should it require current groups to restructure in order to benefit from the regime.

With this in mind, it is not appropriate to limit the CCCTB to entity forms which are subject to corporate income tax. Tax transparent entities, such as partnerships, are frequently used in group structures, something which obviously should be possible also in the future without disqualifying part of the group from CCCTB-treatment. This is particularly important from the perspective of SMEs, as they often operate through transparent partnerships.

A distinction of eligible entities based on legal capacity could be considered. It is, however, important to note that the concept of legal capacity is a very ambiguous concept having different meaning in different jurisdictions. Recognizing this fact, the group concept should include entities featuring general law capacity, whether tax transparent or subject to corporate tax. It must, however, also be recognised that there are entities which have tax law capacity (i.e. subject to corporate income tax as such) without having legal personality under general law. Such business forms should be covered.

In its working paper, the Commission indicates that it should be discussed whether all entities in the same group should be included in the CCCTB regardless of the activity perused - or expressed differently, whether eligible entities conducting certain (e.g. financial or insurance) activities could be excluded. On this we would like to repeat that the CCCTB must be a comprehensive system which is “exclusive” and not “supplementary” to the domestic tax regimes.¹ The aim of the CCCTB is to replace 25 parallel tax systems with one common scheme, which should be the only one business has to comply with. Therefore, eligible entities should be included in the CCCTB, regardless of the type of activity carried out. In rare cases, where a differentiated treatment might be justified for a certain sector, this should be provided for within the CCCTB regime itself.

To optimize neutrality and facilitate the benefits of the CCCTB to the widest extent possible, the inclusion of a non-eligible entity in a group should not disqualify the rest of the group members from opting for CCCTB treatment. Also, to avoid uncertainty all eligible entity forms should be listed in the CCCTB regulation.

¹ Comments on document CCCTB\WP\026, The territorial scope of the CCCTB, p. 2.

“All or none” principle v. elective approach

An important issue is finally whether eligible entities should be included automatically in the CCCTB or not. Indeed, from a theoretical perspective, an “all or none” principle might appear logical at first sight. In practice, however, such an approach would, especially for large groups, in many cases mean that the administrative burden offsets the benefits with a CCCTB. This has proven to be the case in countries (such as Denmark) currently allowing for cross-border consolidation. A similar scenario would obviously be of detriment to the CCCTB regime. We therefore advocate an optional approach where the group is entitled to opt in or out with respect to the individual entities of the group.

With respect to the concern of so-called “cherry picking” it should be recognized that an option to go in or out of the CCCTB regime in practice is combined with very large administrative and economic costs as well as practical difficulties. In particular, it should be noted that an opt-out of the system by one or several of the group members would require the reintroduction of separate tax accounts. It also means that these group companies have to reintroduce the compliance with transfer pricing rules and documentation requirements. Furthermore, the group will lose the benefits of consolidation and single compliance with a single tax base. Thus, if the CCCTB is designed to provide for a competitive tax based featuring intra-group consolidation, the incentive for tax planning through cherry picking appears very limited.

Methods for consolidation

The design of the consolidation method is indeed a very difficult issue. The Task Force on CCCTB is currently working on exploring the topic in further detail and expects to come back on it in more detail at a later stage. As general remark, however, it is of primary importance that the consolidation regime adopted for the CCCTB is designed to reduce compliance costs and prevent double taxation arising from transfer pricing. As argued above, one of the core benefits of a CCCTB is to reduce compliance costs by allowing for a single compliance in a single location. The consolidation method would need to be designed to comply with this objective.

On behalf of the UNICE Task Force on CCCTB

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June 28, 2006