BUSINESSEUROPE

Position

October 20, 2010

Workshop on the Common Consolidated Corporate Tax Base (CCCTB)
Comments on document CCCTB/RD/004
Anti-Abuse rules in the CCCTB

Introduction

The BUSINESSEUROPE Task Force on CCCTB is pleased to have been given the opportunity to provide some preliminary remarks in relation to the questions posed by the Commission on Anti-Abuse rules in the CCCTB. The positions taken by the Task Force may be subject to revision as other areas of the CCCTB are explored and discussed.

General remarks

Once again the Task Force would like to underline that the development of anti-abuse measures, whether aimed at intra-CCCTB transactions or transactions *vis a vis* third countries, must strictly adhere to the concept of wholly artificial arrangements and in no way conflict with *bona fide* business activities. This will be crucial for businesses' interest in opting for the CCCTB. It is also crucial that the CCCTB is not hampered by a web of complicated anti-abuse rules resulting in interpretation difficulties and increased compliance costs.

Furthermore, some of the rules refer to exchange of information on request in relation third countries. In principle, such a requirement is reasonable. However, it should be targeted only in relation to non-cooperative tax havens. As it stands, there may be a potential problem in relation to e.g. the U.S. Analyzing Article 26 of the U.S. Model Tax Treaty, it is not clear that the U.S. fully meets the standard of the Mutual Assistance Directive.

Responses to the questions posed by the Commission

What are your views of the GAAR?

Para. 6-8 – As we have stated previously in our comments, from a principal point of view we are against introducing a general anti-abuse rule (GAAR) into the CCCTB. There are several reasons for this. The Task Force would rather like to see the CCCTB built on the basis of legal certainty and with a possibility of achieving an enhanced relationship between business and the principal tax authority. To meet this objective, it

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will be necessary for tax authorities to work together as well as invest in a closer cooperation with business in order to understand present business models used.

Our view is that the CCCTB must be based on solid and sound tax principles, which are comprehensive and exclusive thereby giving investors' confidence in their investment decision as far as taxation goes.

If it is not possible to avoid having a GAAR in the CCCTB system, we believe it is crucial that some form of advanced ruling also is introduced. Such a ruling system should include

- clear rules on whom the ruling should be obtained from and the timescale for providing the ruling
- the mechanism for providing consistency in rulings and
- the process for seeking judicial review of any refused rulings specifying the court(s) by which the appeal should be heard.

What are your views of the suggested rule on the *limitation to interest deduction? Is it a sufficient replacement of Thin Capitalisation?*

Para. 10-14 – We acknowledge the Commissions efforts to produce a balanced alternative to thin capitalisation rules in order to limit the deductibility of interest in abusive cases. In particular, we appreciate that the proposed thin capitalization rule does not affect interest payments on third party loans. Other than a shareholder loan, such third party debt is already in principle incapable of conveying abusive transactions (due to the fact that the respective parties are not related to each other). However, even though the proposed rule does have some merits we believe that a switch-over mechanism should be considered also with respect to interest.

So far, the switch-over has only been discussed with respect to exempt income. If there are to be any limitations in the deductibility of related-party **interest expenses** we believe that this method could be applied also in this respect (subject to some modifications). For such expenses, the switch-over mechanism would essentially allow for full deductions in all cases where the statutory tax rate on interest in the state of the recipient exceeds 40 % of the average statutory tax rate applicable in the EU Member States. Where the tax falls below this safe haven level, the interest should still be deductible provided that the transaction does not constitutes a *wholly artificial arrangement*. Where this is the case, the interest expense will not be deductible under CCCTB as such.

Regarding the specific provision in paragraph 11, we feel that it is not reasonable to deny deductibility of interest in relation to payments to a special regime in a third country, whereas a similar regime is acceptable within the EU. Consequently, if a special regime is in place in the EU then a similar one should also be acceptable for interest deduction payments when located outside the EU.

Do you have any comments on a possible switch-over clause?

Para. 15-16 – A properly designed switch-over rule could be a good way to address the prevailing different levels of taxation in the world without interfering too much with *bona fide* business activities. As a matter of fact, it is our opinion that such a mechanism could be designed as a sufficient regime with respect to all kinds of transactions, as opposed to having various additional complicated anti-abuse measures in the CCCTB, e.g. CFC legislation.

Consequently, we agree with the Commission's approach with a threshold of 40 % of the average statutory tax rate applicable in the EU Member States.

However, the switch over clause should be combined with an escape clause giving the taxpayer the opportunity to provide evidence of any commercial justification also with respect to transactions falling outside of the threshold. This would give a reasonable level of predictability and contribute to a CCCTB that is both attractive and competitive.

Furthermore, the Commission also suggests that an exception from exemption should be made with respect to special regimes resulting in substantially lower levels of taxation. To ensure simplicity and predictability, any such regime must apply in exceptional cases only and should be defined using some sort of a "black list".

Consideration should also be given to regimes adopted in developing countries aiming at attracting foreign investment.

What are your views of the suggested CFC rules?

As a general remark and as stated above, we do not find it necessary to also introduce CFC rules in the CCCTB. Such rules tend to go beyond wholly artificial arrangements and they thereby infringe on the principle of net taxation, making European businesses less competitive in the global arena.

Although the rule proposed by the Commission is more reasonable than many of the CFC regimes seen in the Member States, CFC rules are by nature very complex and create a high degree of uncertainty for businesses, to the detriment of investment and job opportunities.

However, if MS insist on having CFC rules in the CCCTB, any such regime should follow the principles of the switch-over clause. Even if the tax level of the other state drops below the 40 % threshold, no CFC-taxation should be levied where there is a valid commercial justification for the establishment. In addition, not to interfere with *bona* fide business activities, the rule is to be limited to passive income only and provide for a white list to ensure sufficient predictability. Also, under no circumstances should profits that have been subject to CFC-treatment be subject to additional taxation upon distribution as this would result in an undue double taxation. Any rule that does

not comply with these principles is unacceptable as it would clearly go beyond the objective of preventing abusive behaviours.

Para. 19 – Sub-paragraph **(c)** entails the need to define and update recognised stock exchanges. This would constitute an administrative burden calling for a regular update of a list of acceptable stock exchanges. This is an unfortunate feature of the suggested system which should be reconsidered.

Furthermore, we find it difficult to reconcile with the proposed concept of *tainted* income under **(d)** since it is likely to exclude central treasury functions within a group (cash pooling and alike).

What are your views of the rules on disallowance of the participation exemption in share disposals?

Para. 22-24 – From a general standpoint, we refer to our comments in relation to paragraphs 15-16 on using a switch over mechanism to all kinds of transactions.

On the specific provision in paragraph 24 we think that taxpayers also should be given the opportunity to retain participation exemption if they demonstrate that the assets were moved to the leaving taxpayer before the decision to dispose the shares was made.

What are your views of the rules to tackle double deductions in the so-called 'sandwich cases'?

Para. 25-26 – We find the condition requiring the third company being located in a jurisdiction which exchanges information on request to be reasonable.

What are your views of the rules to avoid a manipulation of the asset factor?

Para. 27-29 – We find the statement in paragraph 29 ambiguous. According to paragraph 9 in the paper, the GAAR should only be considered if a potentially abusive practice does not fall within the scope of any of the specific rules. If there is a specific provision targeting manipulation of the asset factor through intra-group transfers, then why should the GAAR be applicable? Regarding our principal view on GAAR, see our comments on paragraphs 6-8.

On behalf of The BUSINESSEUROPE Task force on CCCTB

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