



EUROPEAN COMMISSION
DIRECTORATE-GENERAL TAXATION AND CUSTOMS UNION
Analyses and tax policies
Analysis and Coordination of tax policies

Brussels, 26 July 2006
Taxud E1, OP

CCCTB\WP\040\doc\en
Orig. EN

COMMON CONSOLIDATED CORPORATE TAX BASE WORKING GROUP (CCCTB WG)

Personal scope of the CCCTB

Meeting to be held on 12 September 2006

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WORKING DOCUMENT

I Introduction and purpose of the paper

1. Any corporate tax legislation has to identify which entities and income are subject to tax. While the income covered by the common consolidated corporate tax base (CCCTB) is being examined by Subgroup 3 and the territorial aspect by Subgroup 4, some more considerations will be necessary as regards to which entities the CCCTB will be applicable. The purpose of this working document is not to duplicate ongoing discussions on the territorial scope of the CCCTB and the definition of the taxable income. It focuses on taxable persons to be included in the scope of the CCCTB.
2. As it is currently the view of the Commission that CCCTB should be optional, the implications of this will have to be taken into account. In the Commission Services' view, it should not be necessary for the CCCTB to determine the entities subject to tax (establishing the liability to tax should continue to rely on national tax law), but it will have to determine which entities should be eligible to opt for it. This working document aims to highlight the main issues at stake in relation to this question and to identify the main areas where a choice will have to be made at the final stage.
3. On several occasions, the CCCTB WG (together with the High level group at the Council) have touched upon the question of which businesses should be covered by CCCTB. This question was raised for example at the last CCCTB WG Plenary dealing with financial institutions and group taxation¹. The Commission Services suggest that the CCCTB should be as wide as possible as it aims to remove as wide range of tax obstacles to cross border activities in the internal market as possible. Therefore it has to be closely analysed whether there are any areas of business activity represented by incorporated business that should be a priori excluded from the scope of the CCCTB. At the same time, the CCCTB should interfere as little as possible with the taxation of individuals.

II Approach for definition of personal scope

4. As mentioned above it seems difficult to envisage that liability to company tax should derive from community law. Under a more realistic approach, the CCCTB legislation would detail which companies/entities which are subject to national

¹ For the reference to previous work the Commission services' working document on financial institutions (CCCTBWP/027) highlighted that some entities (collective investment vehicles / pension funds / Venture capital institutions) may not be able to consolidate but could be covered by CCCTB rules. At the ad hoc meeting on 2 June 2006 some representatives of business and MS expressed the clear view that collective investment vehicles should not be covered by CCCTB and stressed that they should not be even if they are incorporated. Moreover, the working document on group taxation (CCCTBWP/035/ paragraphs 17 & 18) raised the issue of the entities eligible to be part of a consolidated group (legal entities effectively subject to corporate income tax / entities without legal personality but liable to corporate tax).

corporate tax can opt for the CCCTB. As a first step the national law would apply and it would remain fully in MS competence to decide which businesses are or are not in the scope of company taxation (in other words liability to tax would continue to derive from national tax law).

5. As the main goal of the CCCTB is to remove obstacles created by existence of 25 different corporate tax systems, it would probably make sense to cover in CCCTB only entities doing business, whereas some corporate tax systems cover a wider group of entities (e.g. if the national legislation uses the 'residual' type of definition: "any person not liable to individual income tax").
6. However, MS may wish to include also some entities not currently covered by corporate income tax. Similar entities might be either subject to corporate income tax in a MS and exempted or subject to some other tax in another MS, and a common base should imply as far as possible the common treatment of similar entities carrying on similar businesses. For example a central bank could be incorporated and subject to company tax in one MS but a central bank in another MS may not be subject to company tax.
7. In a similar way some MS may wish to exclude some entities which are subject to company taxation in their legislation but which should not be covered by CCCTB. This could be either because they are not carrying on business activities and are thus exempted in practice or because they are subject to special provisions in connection to specific activities or requirements. For example shipping companies falling under a special 'tonnage tax' regime. Similarly, some special rules could be created as regards some sectors, for example certain financial institutions might be covered by CCCTB but be only able to consolidate with other similar entities.
8. As for actual determination of the scope in the CCCTB legislation (assuming the 'realistic' approach mentioned in paragraph 4 is adopted) several techniques can be envisaged :
 - (i) a general definition based on common criteria
 - (ii) an explicit list of taxes and/or company forms in participating MS
9. In (ii) the fact that the company/ entity is subject to corporate income taxes existing in participating MS as listed in the CCCTB legislation would be the basic criterion.
10. Creating a list of the legal forms to be covered by the CCCTB legislation allows the exclusion of some entities subject to corporate tax, but not for example doing business such as some non profit organisations. This type of approach is applied in existing EC company tax directives, the entity must be subject to tax, but it must also be listed as an eligible entity.
11. Unlike existing company tax directives (which build up on existing national legislation and provide for some specific benefits) the CCCTB is being designed as a comprehensive measure and it will not be complementary to existing tax rules. For companies opting for the CCCTB the CCCTB rules will replace the existing tax

base rules. In addition to that the CCCTB aims to consolidate profit and losses of entities belonging to the same group. If the scope of the CCCTB did not cover all or most of existing incorporated businesses, groups of companies might be able to use it as a tool in order to avoid the consolidation of some entities (and thus escape from any all in /all out rule).

III Main types of structures to be examined

12. Currently in most MS business activities are carried on through:

- Incorporated entities / companies taxed at the level of company
- Un-incorporated or incorporated entities taxed transparently (i.e. the participants/shareholders are subject to tax rather than the transparent entities themselves)

Incorporated entities

13. Incorporated entities carrying out business activities in the CCCTB jurisdictions should be eligible to be covered by CCCTB rules. However, whether the CCCTB should be restricted to those who operate in more than one MS is an open question (ie should the CCCTB be open to entities with activities in only one MS). In practice it is likely that only entities operating in more than one MS would consider opting for CCCTB. Making cross border activities a formal requirement might complicate the system unnecessarily as it would be necessary to define (and examine in practice) what is considered to be a cross border activity.
14. In this respect it should also be kept in mind that restricting the scope of CCCTB to entities operating cross border might raise a difficulty as regards state aid, particularly if the CCCTB were also to be determined (under the state aid criteria) to be a measure granting an advantage.
15. If the CCCTB is restricted to listed legal forms (as mentioned in Para 10) some differences between MS may exist in the range of legal forms listed (in some cases, new legal forms may fall in or out of the scope depending on the respective drafting of each MS's respective part of the list). Amending the list would in theory require the change of EC legislation with all the necessary procedures, although it might be possible to include a 'and similar new or replacement legal forms' clause along the lines of the OECD Model clause on what taxes are covered by a Double Tax Treaty. A 'list approach' could be open to being used as a tool by companies to keep part of their business outside the consolidation (if an 'all in/all out approach is taken).
16. As an alternative, the personal scope of CCCTB could be outlined in the form of a general definition with common criteria referring to business or profit making activities. This would stipulate that any entity with or without legal personality or any comparable entity incorporated or registered abroad but operating in the EU and subject to corporate income tax would be covered by CCCTB. However, this

could be problematic as it would appear to cover individuals whose business activities in some MS are subject not to company tax but to personal tax.

Un-incorporated entities and incorporated entities taxed transparently

17. The possible inclusion of partnerships/transparent entities requires careful analysis as these entities may host large businesses which might be operating cross border. At the same time, the tax treatment of these entities raises difficult questions and some of them remain unsolved (interpretation of transparency itself / tax residence / and inconsistencies between MS over whether certain entities are transparent or 'opaque').
18. In the case of consolidation of several entities in a group including transparent entities and non-transparent or 'opaque' entities, the consolidated tax base would have to be allocated to each entity in order to allow the transparent entity to allocate it to its participants/'shareholders'. The base would then be taxed at the level of the participant/shareholder. The allocation of the consolidated tax base to each MS would not be sufficient and separate allocation to each entity located in a MS would be necessary. This allocation process could raise some administrative difficulties. Where some participants/shareholders were located in third states this would add additional complexity.
19. For the sake of completeness it should be mentioned that although self-employed individuals are in principle not usually subject to corporate income tax they may run similar types of business as companies in some cases. Self employed individuals are generally subject to personal income tax on the profit arising from their business. There seems to be little benefit to include such businesses in the scope of CCCTB as the aim of this scheme is to remove tax obstacles to cross border activities in the EU. There is no intention for the CCCTB legislation to extend into the taxation of individuals. As such entities are not likely to be internationally active and should be in practice small if not very small businesses, there seems to be no need to include them in the CCCTB scope.

Questions to experts of the working group

(i) Do experts consider that the definition of scope should rely on liability to tax as defined by national tax law (as for the existing directives) or do they favour another approach and if so, which one?

(ii) If the definition of the personal scope of CCCTB were to rely on existing liability to tax deriving from national tax law, do experts prefer

- a general definition with common criteria,

- or an approach by lists as in the directives

(iii) Do experts consider that some entities not currently in the scope of company tax should be in the scope of CCCTB? If so, which ones and why?

(iv) Do experts consider that some entities should be excluded from the scope of CCCTB even though they are currently in the scope of company taxation at national level?

(v) Which entities should be in any case excluded from the scope of CCCTB and why?