The CCTB and CCCTB Proposals: Huge Impact Expected for Company Taxation
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1 Introduction

On 25 October 2016 the European Commission relaunched the project to harmonize corporate income tax systems in the EU to a very large extent. This project is without doubt the most ambitious corporate tax reform ever proposed in the EU and is referred to as the Common Corporate Consolidated Tax Base (CCCTB). The proposal published on 25 October 2016 is the second try. Already in 2011 the European Commission made a design for an EU-wide corporate income tax system. For various reasons, this proposal could not count on a warm interest of the Member States. One of the most controversial issues was the cross border consolidation and the apportionment of the consolidated profit by using a formula based on assets, workforce and sales instead of a more sophisticated transfer pricing approach. The budgetary implications for Member States and concerns of losing their corporate taxation system as a policy tool were the main drivers for the lack of political consensus.

With the aim of rebooting the CCCTB-project and to facilitate this political process, the European Commission is now promoting a two-step approach. The European Commission suggests that Member States agree on the common tax base first, with consolidation and formulary apportionment as a second step. Therefore, the 2011 proposal has been split up into the following proposals:

- a proposal for a common corporate tax base (CCTB); and
- a proposal for a common corporate consolidated tax base (CCCTB).

The first proposal provides a single set of detailed rules to calculate the taxable income of a company. Next to the rules addressing traditional profit calculation issues, for example rules on the depreciation of assets, the proposal contains provisions against base erosion and profit shifting (BEPS) in addition to the EU Anti-Tax Avoidance Directive1 (ATAD). The latter rules have been inspired by the recommendations of the BEPS project of the OECD. The proposal comes with two specific features to boost the European economy as a whole, namely an allowance for growth and investment (AGI) and a super deduction of R&D expenses. The European Commission advocates an ambitious timetable. The CCTB should in its view already become applicable as from 1 January 2019.

The ultimate goal of the European Commission, however, stays a full-fledged CCCTB, including consolidation and formulary apportionment. The European Commission urges the Member States to take up the CCCTB proposal “after the elements of the common base have politically been agreed”. The aim of the European Commission is that CCCTB should be applicable as from 1 January 2021. In the European Commission’s view the CCTB can be applied on a stand-alone basis, that is without a CCCTB. Keeping in mind the troublesome history of the CCCTB since 2011, the two-step approach bears the risk of ending up with a CCTB only, i.e. without the benefit of cross border consolidation.

For the CCTB and/or CCCTB to become a reality, unanimous consent of all EU Member States is required. To gain support for the proposals, the European Commission points at several major developments since 2011, especially the increase of aggressive tax planning strategies by multinational companies, the financial crisis and the relative low growth and investment in the EU. According to the European Commission these developments reinforce the need for a common approach to corporate taxation in the EU.

In this special edition of Quoted we focus on the proposal for a CCTB (paragraphs 2-5) and the consolidation and formulary apportionment (paragraph 6). Paragraph 7 takes a look into the future and elaborates on the next steps.

1 Council Directive EU 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.
2 Personal and Material Scope of the CCTB

2.1 Mandatory for the Larger Groups of Companies

The CCTB system distinguishes between companies that have to apply the system mandatorily and companies that have the right to apply the system on a voluntary basis. A company should apply the rules of the CCTB if all of the following conditions are met:

- a) the company takes one of the company forms listed in an annex to the CCTB Directive. This list is very broad and includes the most frequent used company forms such as public companies and private companies with limited liability. If the company is established under the laws of a third state, it is sufficient that it has a similar form to the companies listed in the annex;²
- b) the company is subject to one of the corporate taxes listed in the annex to the CCTB Directive or to a similar tax subsequently introduced;
- c) the company belongs to a consolidated group for financial accounting purposes with a total consolidated group revenue that exceeded EUR 750 million during the financial year preceding the relevant financial year; and
- d) the company qualifies as parent company or a subsidiary and/or has one or more permanent establishments in other Member States.

In our view the proposal does in principle not aim at making a difference between companies established under the laws of a Member State and companies established under the laws of a third country.³ Both types of companies seem to fall under the mandatory scope of the CCTB when the conditions (a), (b), (c), and (d) are met. The application of the CCTB to a company automatically includes its permanent establishments in (other) Member States. A company resident for tax purposes in a third country, can on the basis of the aforementioned conditions be confronted with the mandatory application of the CCTB rules with respect to its permanent establishment(s) in the EU. Companies established under the laws of third state that do not have a similar form to companies listed in the annex have to apply the rules on a mandatory basis with respect to their permanent establishments in the EU when (solely) conditions (b) and (c) are met.⁴

The condition mentioned under (c) boils down to a size threshold and tries to make sure that only the larger internationally active companies in the world are obliged to calculate their European profits on the basis of the CCTB rules. This even applies if only a small part of the turnover is generated in the EU. The full turnover of all entities that are included in the consolidated financial statements is decisive.⁵

The condition mentioned under (d) requires the company to be either a parent company or a subsidiary.⁶ The condition does not seem totally logical in the context of the CCTB. The best explanation is that already in the CCTB the European Commission wants to anticipate on the ultimately desired CCCTB.⁷ A parent-subsidiary

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² The European Commission will annually publish a non-exhaustive list of third country company forms that fulfil this similarity requirement.
³ The wording of the first sentence of art. 2(1) CCTB perhaps suggests otherwise. We think, however, that it can be derived from art. 2(2) second paragraph CCTB that third country companies and EU companies are treated equally.
⁴ We assume that art. 2(2) CCTB accidentally refers to conditions (b) and (d) instead of (b) and (c). In our view art. 2(2) CCTB is a safety net provision.
⁵ See art. 4(10) CCTB. The size criterion corresponds with the threshold for mandatory country-by-country reporting for groups. Approximately 80% of the companies under the mandatory scope of the CCTB are internationally active; see Impact Assessment SWD(2016) 134 final, p. 107.
⁶ Or a head office of a permanent establishment situated in a Member State.
⁷ According to par. 10 of the pre-amble of the CCTB Directive, this condition must ensure “coherence” between the two steps of the CCCTB-project. Under the CCCTB a parent company must under certain additional conditions form a consolidated group with its subsidiaries. See art. 6 CCCTB.
relationship is defined by a two-part cumulative test based on (i) control (more than 50% of the voting rights) and (ii) ownership (more than 75% of the capital) or rights to profits (more than 75% of the rights giving entitlement to profits).

The mandatory scope of the CCTB can be illustrated by the following two examples:

**Example 1**

```
<table>
<thead>
<tr>
<th>Company</th>
<th>Owner</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>EU</td>
<td>100%</td>
</tr>
</tbody>
</table>
```

**Example 2**

```
<table>
<thead>
<tr>
<th>Company</th>
<th>Owner</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>EU</td>
<td>60%</td>
</tr>
</tbody>
</table>
```

In both examples the EU company forms a consolidated group for financial accounting purposes with its US corporate shareholder and the total consolidated group turnover exceeds EUR 750 million. The EU company in example 1 is captured by the mandatory scope of the CCTB. This is not the case in example 2 because the EU company lacks the status of subsidiary in terms of the CCTB; the ownership test of more than 75% of the capital or profit rights is not met.

### 2.2 Optional for Small and Medium Sized Enterprises (SME’s)

SME’s are excluded from the mandatory application of the CCTB through the EUR 750 million-turnover threshold. They are free to apply their national corporate income tax systems. However, any company that meets the conditions mentioned under (a) and (b) has the right to opt-in and apply the rules of the CCTB Directive for a period of 5 years. This period can subsequently be extended by consecutive periods of another 5 years. Such a choice should obviously be subject to a cost-benefit analysis. Due to some specific features of the CCTB it might be attractive for SME’s to apply the rules voluntarily (see paragraphs 3 and 5). In this respect it is important to note that any company belonging to a SME group can opt for the CCTB on an individual basis. Unlike the CCCTB, the CCTB does not contain an “all in or all out approach”. However, the option for the CCTB system by a company always includes its permanent establishments situated in other Member States. Hence, it is not possible for a head office to apply the rules of the CCTB while its permanent establishment in another Member State applies local national corporate income tax rules (and vice versa).

The possibilities for SME group to opt for the CCTB can be illustrated by an example:

```
<table>
<thead>
<tr>
<th>Company</th>
<th>Owner</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>US 1</td>
<td>EU</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>NL 2</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>NL 3</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>BE 4</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>FR 5</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>IT</td>
<td></td>
</tr>
<tr>
<td></td>
<td>DE</td>
<td></td>
</tr>
</tbody>
</table>
```

Each of the companies belonging to this SME group – US 1 (with respect to its permanent establishment in Germany), NL 2, NL 3, BE 4 and FR 5 - can individually opt for the CCTB. If the French subsidiary FR 5 opts to apply the rules of the CCTB, its Italian permanent establishment is automatically subject to the CCTB and no longer subject to the Italian corporate income tax rules. The tax authorities of the relevant Member States need to be notified by the taxpayer. We already point out here that NL 3 will under the CCTB be able to deduct any losses of BE 4, even if BE 4 does not opt to apply the CCTB (see paragraph 5). For cross border loss relief it is sufficient that NL 3 applies the CCTB.

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8 See art. 64 CCTB.
2.3 Interaction with National Corporate Income Tax Systems

The proposal explicitly mentions that a company that applies - mandatorily or voluntarily - the rules of the CCTB shall cease to be subject to national corporate tax law in respect of all matters regulated by the CCTB, unless otherwise stated. The matters that the CCTB leaves open to national corporate income systems are very limited. An example is the possibility of a Member State to provide for the deduction of gifts and donations to charitable bodies. Another example is the possibility to provide for a deduction of pension provisions.

The expressions made by the European Commission indicate that under the CCTB there is no additional room for any rule of national corporate income tax law. The European Commission emphasizes that under a CCTB companies will only have to refer to one set of rules when calculating taxable profits and that this calculation will be uniform throughout the EU. However, we think it is too easy to say that national corporate income tax systems would by definition be superfluous under the CCTB. It seems that national corporate income tax rules can come into play when the CCTB does not regulate a matter. One important example is a national group taxation system, like the fiscal unity regime in the Netherlands. Such a system has not been regulated in the CCTB. In practical terms this means that a parent company resident in the Netherlands should be able to form a fiscal unity with its Dutch subsidiary, even if both of them apply the rules of the CCTB. If our analysis were incorrect, the strange effect would occur that only relief for cross-border losses seems possible under the CCTB system (see paragraph 5).

Moreover, the question arises how the CCTB relates to other directives in the field of direct tax law, for example the Merger Directive. As the CCTB Directive does not regulate the tax treatment of mergers, (partial) divisions and transfers of assets, it seems plausible that the rules of the Merger Directive remain applicable to CCTB-companies.

Based on the text of the provisions it seems possible for a Member State to apply different tax rates for companies falling under the national corporate income tax rules and companies falling under the CCTB in order to more or less compensate for the difference in tax base.

3 Main Elements of the Tax Base

3.1 Profit Calculation Basics

The CCTB does not make reference to (international) accounting standards – like IAS/IFRS - to calculate the tax base. Instead, the CCTB provides an independent set of rules to calculate the tax base. Under the CCTB system a company is not required to draw up a tax balance sheet as the profit calculation rules are solely based on a profit/loss account. The tax base is conceptually calculated as follows:

<table>
<thead>
<tr>
<th>Revenues</th>
</tr>
</thead>
<tbody>
<tr>
<td>+/- Exempt revenues</td>
</tr>
<tr>
<td>+/- Deductible expenses</td>
</tr>
<tr>
<td>+/- Depreciation of fixed assets</td>
</tr>
<tr>
<td>+/- Allowance for growth and investment (AGI)</td>
</tr>
<tr>
<td>+/- Super deduction R&amp;D expenses</td>
</tr>
</tbody>
</table>

The tax base is structured around a broad definition of revenues. In the preamble it has been assumed that all revenues should be taxable, unless expressly exempted.

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9 See art. 1(1) CCTB.
10 See art. 9(4) CCTB.
11 See art. 24 CCTB.
12 The Q&A states that the CCTB provides the single set of rules to decide how a company’s profit will be taxed.
13 An indication for this is art. 13(2) CCTB, which refers to the rules of a national group taxation system.
14 Directive No 2006/133/EC.
15 The reason is the view of the European Commission that a tax balance sheet is only an unnecessary administrative burden.
16 See par. 7 of the preamble.
The participation exemption for major shareholdings is an exempt income item. A major shareholding requires a minimum holding of 10% in the capital or 10% or the voting rights of a company for an uninterrupted period of at least 12 months. Both proceeds from a share disposal and profit distributions are exempt. The participation exemption is applied on a net basis because expenses incurred by the parent company "for the purpose of deriving income that is exempt" are labelled non-deductible. We assume, although this is not crystal clear, that also the interest incurred on a loan to finance a major shareholding is captured by this deduction limitation. The participation exemption can however be overruled by the switchover clause, which is further addressed in paragraph 4.

The main rule for the deductibility of expenses entails a business purpose test. Expenses are only deductible to the extent they are in the direct business interest of the taxpayer. It is specified that deductible costs include all costs of sales and all expenses that the taxpayer incurs with a view of obtaining or securing income. Two specific categories of expenses are explicitly declared to be deductible, namely costs for raising equity or debt and R&D expenses (see paragraph 3.5 for the super deduction of R&D expenses). The CCTB furthermore provides a list of non-deductible items, including corporate taxes, fines and penalties. Although interest expenses are in principle deductible, the CCTB contains a general interest deduction limitation rule that is discussed in paragraph 5.1.

3.2 Arm's Length Principle

When calculating the tax base the arm's length principle has to be taken into account. The CCTB includes an arm's length standard in similar terms as the OECD Model Tax Convention. According to this standard any income that did not accrue to the taxpayer because of conditions made or imposed in relations between associated enterprises that differ from those that would have been made between independent enterprises, have to be recorded as taxable income. Moreover, benefits granted to associated enterprises shall not be treated as deductible expense where such benefits would not be granted to an independent third party. Enterprises are, amongst others, understood as associated enterprises in case of a direct or indirect > 20% participation in terms of voting rights or capital ownership. Remarkably, downward adjustments of the tax base do not seem to be provided for, at least not explicitly.

3.3 Timing and Valuation

For timing and valuation issues the CCTB system provides for a CCTB framework and for rules concerning specific "balance sheet" items. They are of a rule-based nature instead of a principal based one. The very heart of the general framework is that revenues shall in principle be recognized in the year in which they accrue and expenses shall be recognized in the year in which they are incurred. The principle of accrual of revenues is clarified in much detail. The same is true for the incurrence of deductible expenses. However, a detailed discussion of the general framework goes beyond the scope of this newsletter.

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17 This minimum holding period of 12-months must for the purposes of exempting the proceeds of a disposal be completed before the disposal. The participation exemption does not apply in any event if the shareholding is held for trading. The latter is the case if it is acquired principally for the purpose of selling it in the "short term" (see art. 21 CCTB). Unfortunately short term is not defined.
18 See art. 12(g) CCTB. This article differs from art. 14(g) 2011 proposal which stipulated that the costs in connection with exempt capital gains and profit distributions "shall be fixed at a flat rate of 5% of that income unless the taxpayer is able to demonstrate that it has issued a lower cost".
19 See art. 9(1) CCTB.
20 See art. 56 CCTB.
21 See art. 14 CCTB.
22 See art. 15 CCTB.
23 See art. 16 CCTB.
24 See art. 17 CCTB.
The rules concerning specific "balance sheet" items cover, amongst others, the following issues:

- fixed assets (tangibles, intangibles and financial assets, see paragraph 3.4 below);
- stock and work in progress;
- financial assets and liabilities held for trading;
- long-term contracts;
- provisions;
- bad debt deductions
- hedging; and
- asset transfers without a change of ownership (exit tax).

Our impression is that many of these rules are in fact inspired by the international accounting standards, although – as expressed in paragraph 3.1 – no formal link between the CCTB and IAS/IFRS is established.

### 3.4 Fixed Depreciation Percentages

Under the CCTB system fixed tangible and fixed intangible assets are in principal depreciated on a straight-line basis. An exception applies to fixed tangible assets that are not subject to wear and tear such as land, fine art or antiques. These assets are not subject to depreciation, however a deduction can be claimed in case of an exceptional decrease in value. Because of the absence of a tax balance sheet, the depreciation bases and other relevant data for calculating the tax base, should be recorded in a so-called “fixed asset-register”. The CCTB distinguishes for depreciation purposes between five categories of fixed assets mainly depending on their expected useful lives. Each category has its own fixed depreciation percentage by virtue of an assumed depreciation period. For example, buildings should always be depreciated over 40 years resulting in a fixed depreciation percentage of 2.5% per year.

We included the five categories of fixed assets in the table below.

<table>
<thead>
<tr>
<th>Type of asset</th>
<th>Fixed depreciation period</th>
<th>Fixed depreciation percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial, office and other buildings</td>
<td>40 years</td>
<td>2.5%</td>
</tr>
<tr>
<td>Industrial buildings and structures</td>
<td>25 years</td>
<td>4%</td>
</tr>
<tr>
<td>Long-life tangible assets (useful life ≥ 15 years)</td>
<td>15 years</td>
<td>6.66%</td>
</tr>
<tr>
<td>Medium-life fixed tangible assets (8 ≤ useful life &lt; 15 years)</td>
<td>8 years</td>
<td>12.5%</td>
</tr>
<tr>
<td>Fixed intangible assets</td>
<td>15 years</td>
<td>6.66%</td>
</tr>
</tbody>
</table>

The depreciation base comprises the full acquisition and/or construction costs, including the cost directly connected with the acquisition or construction. No residual value has to be taken into account, which means that fixed assets for tax purposes can be written off completely. The fixed depreciation period of 15 years for fixed intangible assets should be replaced by the period for which the asset enjoys legal protection or for which the right, for example a license, has been granted (if any). For second-hand tangible fixed assets the taxpayer has the right to demonstrate that the estimated remaining useful life is shorter than the fixed depreciation period.

In addition, under the CCTB system fixed tangible assets with a useful life of less than 8 years are considered to be “short life tangible assets” which are depreciated together under a pooling system at an annual rate of 25% of the pooled depreciation base.
3.5 Allowance for Growth and Investment (art. 11)

The CCTB system does not allow profit distributions to be deducted from the tax base.\(^{31}\) To reduce the different tax treatment of equity and debt, the CCTB includes a so-called allowance for growth and investment (AGI).\(^{32}\) The AGI is a specific version of an allowance for corporate equity (ACE) granting a defined return for equity which return is deductible from the tax base. Instead of a regular ACE, the proposed AGI is not applied to the total equity (stock-based approach) but to the increase of equity measured over a rolling 10 years period (incremental-based approach).

The deduction is calculated by multiplying the increase of the equity base by a fixed rate which equals the yield of a 10 years government benchmark bond. Under current market conditions the rate would be 2.7%.\(^{33}\) The equity base in principle equals capital and reserves derived from the financial accounts. To make sure that a group of companies receives the AGI only once for the same euro of capital invested, the value of shareholding participations need to be deducted. The equity base of an individual company can be calculated as follows:

<table>
<thead>
<tr>
<th>Capital and reserves</th>
<th>Equity base</th>
</tr>
</thead>
<tbody>
<tr>
<td>-/- Tax value participation in the capital of associated enterprises</td>
<td></td>
</tr>
<tr>
<td>Equity base</td>
<td></td>
</tr>
</tbody>
</table>

For the first 10 years that a taxpayer is subject to the CCTB, the increase of the equity base shall be measured by reference to the equity base at the start of the CCTB. This can be illustrated by an example where company becomes subject to the CCTB in 2019 while its equity base end of 2018 equals 100. We assume an AGI rate of 3%.

<table>
<thead>
<tr>
<th>Year</th>
<th>Equity base</th>
</tr>
</thead>
<tbody>
<tr>
<td>2019</td>
<td>200</td>
</tr>
<tr>
<td>2020</td>
<td>300</td>
</tr>
<tr>
<td>2021</td>
<td>100</td>
</tr>
<tr>
<td>2022-2028</td>
<td>300</td>
</tr>
<tr>
<td>2029</td>
<td>300</td>
</tr>
</tbody>
</table>

In 2019 and 2021 the AGI deduction amounts to 3 because of an equity base increase of 100 relative to 2018 (200 -/- 100). In 2020 and in 2021-2028 the AGI deduction is 6 because the equity base has increased 200 compared to 2018 (300 -/- 100). In year eleven (2029) the 10 years period is moved one year. The increase of the equity base has to be calculated as the difference between the equity base in in 2029 (300) and the equity base in 2019 (200). This means the AGI deduction in 2029 is 3 (3% x 100).

If there is an equity base decrease measured over a rolling 10 years period, the AGI turns into a penalty. An amount equal to the AGI-rate multiplied by the equity decrease becomes taxable. It goes without saying that this effect of the AGI is detrimental for business. Decisions to pay dividend to shareholders could be seriously affected by this penalty element. Another effect to take into account is that AGI deductions are considered as borrowing costs and therefore are subject to the interest deduction limitation on the basis of EBITDA (see paragraph 4.1).

3.6 Super Deduction for R&D Expenses (art. 9)

To support innovation in the EU, the CCTB includes a super deduction for R&D expenses.\(^{34}\) The full cost of R&D will be 100% deductible, while an additional 50% deduction is allowed for R&D expenses up to EUR 20 million. An additional 25% deduction is allowed for R&D expenses over EUR 20 million. These super deductions are available for all companies that fall under the CCTB system.

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\(^{31}\) See art. 12(a) CCTB.

\(^{32}\) See art. 11 CCTB.

\(^{33}\) We derived this percentage from the Q&A on the package of corporate tax reforms, 25 October 2016.

\(^{34}\) See art. 9(3) CCTB.
Start-up companies are allowed to deduct their R&D costs twice. In addition to the full (100%) R&D costs deduction, start-up companies are allowed to deduct an additional 100% for R&D expenses up to EUR 20 million. A start-up company is defined as a company which meets, amongst others, the following conditions:

- the company is not listed and has fewer than 50 employees and has an annual turnover and/or annual balance sheet total that does not exceed EUR 10 million;
- the company has not been registered for more than 5 years; and
- the company does not have any associated enterprises.

The CCTB system does not provide for in an output-related incentive for R&D, such as an IP regime. In the view of the European Commission Member States are not allowed to apply these kind of regimes, which result in a lower (effective) tax rate compared to companies falling under the CCTB system (see paragraph 2.3).

4 Anti-BEPS Elements of the Tax Base

4.1 Interest Limitation Rule Based on EBITDA (art. 13)

The proposal includes an interest limitation rule. The annual deduction of net borrowing costs is limited to the higher of (i) 30% of the earnings before interest, taxes, depreciation and amortization (EBITDA) and (ii) an amount of EUR 3 million. Under the CCCTB the threshold is increased to EUR 5 million for the group. The disallowed interest in a particular tax year can be carried forward indefinitely.

For tax groups – to be defined in accordance with the national tax systems - the net borrowing costs, the EBITDA and the EUR 3 million threshold are calculated based on the overall position of all entities belonging to the tax group.

Exceptions are provided for the following situations:

- Standalone entities are entitled to fully deduct their net borrowing costs. This exception is justified by the limited risk of base erosion and profit shifting in those cases. A standalone entity is a company which is not part of a consolidated group for financial accounting purposes and has no associated enterprises or permanent establishments;

- Grandfathering rule for existing loans: net borrowing costs on loans concluded before the date of the political agreement on the CCTB proposal are excluded from the fixed ratio rule. However, this exception does not apply to loans that have been subsequently modified;

- Loans relating to long-term public infrastructure projects are also excluded from the fixed ratio rule, provided that the project operator, borrowing costs, assets and income are all in the EU.

Due to their particular features the interest limitation rules are not applicable to financial undertakings.

The CCTB interest limitation rule does not provide for a “group carve out”. Therefore, the CCTB proposal is stricter than art. 4(2) ATAD based on which the taxpayer could be given the right to fully deduct exceeding borrowing costs for example if the taxpayer can demonstrate that the ratio of its equity over its total assets is equal to or higher than the equivalent ratio of the group.

4.2 Switch-Over Clause (art. 53)

Despite the debate that resulted in deleting the switch-over clause from the ATAD the European Commission re introduces a switch over clause. This provision requires Member States to deny an exemption from corporate tax with respect to distributions of profits and proceeds from the sale of shares in entities that are resident in, and permanent establishments that are situated in, third countries and that have been taxed below a certain level.35

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35 The provision will not apply in case there is a tax treaty in force between the Member State of residence of the taxpayer and the third country providing for the exemption method for these types of income.
The low taxation threshold applies to situations where the entity or permanent establishment is subject, in the country of residence or the country where the permanent establishment is located, to a tax on profits at a statutory corporate tax rate lower than 50% of the statutory tax rate that would have been charged under the applicable corporate tax system of the Member State of the taxpayer receiving the income. Under the CCCTB this threshold will be defined by reference to the average statutory corporate tax rate of all Member States.

For the purposes of calculating the permanent establishment tax base in the context of the low taxation test, the proposal determines that the CCTB rules are applicable.

The switch-over clause will not apply to losses arising from the disposal of shares in an entity that is tax resident in a third country. This aims at avoiding the use of the switch-over clause as a mechanism to import foreign ('low-taxed') losses.

In order to avoid (juridical) double taxation a credit shall be available for tax paid abroad. The wording of the provision suggests that the credit relief refers to any tax already paid by the taxpayer in the country of source but it does not include a credit for the underlying tax at the first-tier or lower-tier level.

Since the switch-over clause covers a similar area as the CFC rules questions arise as to how to coordinate their application. The proposal does not contain any information in this respect. The position seems to be that:

- the switch-over clause aims to address situations not covered by the CFC rules (notably with respect to the 50% control requirement);
- the switch-over clause application is limited to third country situations;
- the CFC rule covers situations of undistributed income of the subsidiary;
- the CFC rule also applies to indirect shareholdings and indirect permanent establishments.

### 4.3 Controlled Foreign Companies (CFC, art. 59-60)

The CCTB also includes far reaching CFC rules. The effect of this provision is to re-attribute the income of a low-taxed CFC to its parent company, which is subject to tax on such attributed, undistributed, income in the State where it is resident for tax purposes.

The CFC legislation must be applied by a Member State to an entity or permanent establishment of which profits are not subject to tax or are exempt in the Member State where the entity is resident or the permanent establishment is situated, when the following conditions are met:

- in case of an entity, the taxpayer by itself or together with associated enterprises\(^ {36} \), holds directly or indirectly more than 50% of the capital or the voting rights or is entitled to receive more than 50% of the profits of an entity.
- the actual corporate tax paid by the entity or permanent establishment is lower than the difference between the corporate tax that would have been charged on the entity or permanent establishment under the CCTB rules and the actual corporate tax paid on those profits. Therefore, the CFC rules apply if the actual CIT paid by the CFC is less than half of the CIT that would have been paid in the Member State of the taxpayer.

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\(^{36}\) An associated enterprise is determined on the basis of a direct or indirect participation in terms of voting rights or capital ownership exceeding 20% or the possibility to exercise significant influence on the management.
The following examples illustrate the application of this condition:

Example 1: the parent company in Member State A is taxed at a rate of 40% whilst the CFC is taxed at a rate of 25%. The profits of the CFC are 1,000. The actual tax paid in the CFC jurisdiction is 250 (25% * 1,000). The corporate tax that would have been charged in Member State A is 400 (40% * 1,000). The difference is therefore 150 (400-250). The actual tax paid in the CFC jurisdiction (250) is higher than the difference (150), so the CFC rules do not apply.

Example 2: the parent company in Member State A is taxed at a rate of 40% whilst the CFC is taxed at a rate of 10%. The profits of the CFC are 1,000. The actual tax paid in the CFC jurisdiction is 100 (10% * 1,000). The corporate tax that would have been charged in Member State A is 400 (40% * 1,000). The difference therefore is 300 (400-100). The actual tax paid in the CFC jurisdiction (100) is lower than the difference (300), so the CFC rules apply.

Under the CCCTB the scope of the CFC rules is limited to the entities and permanent establishments located in third countries.

For the purposes of calculating the actual tax paid by the CFC, permanent establishments of a CFC that are not subject to tax or are exempt from tax in the CFC jurisdiction should not be taken into account. This is an “anti-mixing rule” that aims to avoid loopholes when the CFC jurisdiction exempts high-taxed permanent establishment income from taxation and the CFC creates a permanent establishment in another country in order to escape the actual tax paid threshold.

The CFC rules apply to the following specified categories of income:

- interest or any other income generated by financial assets;
- royalties or any other income generated from intellectual property;
- dividends and income from the disposal of shares;
- income from financial leasing;
- income from insurance banking and other financial activities;
- income from invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises and add no or little economic value.

A carve-out is provided for situations where the CFC is located in a EU/EEA State and has been set up for valid commercial reasons that reflect economic reality. The assessment of “economic reality” constitutes an all or nothing approach based on four substance factors: commensurate staff, equipment, assets and premises.

Exceptions are also applicable if the income of the CFC consists for one third or less of the specific types of listed income and, for financial undertakings, if one third or less of the entity’s specific types of listed income arises from transactions with the taxpayer or its associated enterprises.

The foreign income to be included in the tax base must be calculated in accordance with the CCTB rules. Losses of the CFC entity or permanent establishment are not included in the tax base but may be carried forward to reduce CFC income in future tax years.

The CCTB provides for a mechanism to prevent double taxation as a consequence of the switch-over clause and the CFC rules. If a CFC distributes profits which have already been included in the taxpayer’s tax base pursuant to the CFC-rule, and the taxpayer is liable to tax on such profits, the CFC income previously included in the tax base shall be deducted from the tax base when

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37 This approach corresponds in essence to the first option contained in the ATAD.
calculating the taxpayer’s tax liability on the distributed profits. This way it is prevented that CFC income is effectively taxed twice in the hands of the taxpayer.

4.4 Mismatches (art. 61)
The European Commission proposed various provisions to neutralize tax effects of hybrid mismatches. These mismatches usually result in a double deduction (in both states) by using hybrid entities or in a deduction in one state without inclusion of the corresponding income item in the other state (for instance by using hybrid funding instruments). Many of the solutions to neutralize these mismatches boil down to a denial of the deduction of a payment, for example a royalty payment or an interest payment. The provision, which is in line with the ATAD proposal, covers the following mismatches.

**Hybrid mismatch structures (entities and financial instruments):** this concerns structures in which an entity or a financial instrument is qualified differently for tax purposes in two jurisdictions. According to the proposal, in intra-EU scenarios, double deduction situations should be solved by limiting the deduction in the Member State of the source. For deduction/non-inclusion situations the Member State of the payer should deny the deduction.

In cases involving third countries Member States are required (depending on the state of the payer), to deny of deduction of payments or to include the income that otherwise would not be taxed.

**Hybrid mismatch permanent establishments:** this addresses situations in which a EU taxpayer has a permanent establishment in another Member State or in a third country and the two jurisdictions treat the permanent establishment differently. In case such difference in treatment leads to non-taxation in one jurisdiction without inclusion in the other jurisdiction, the Member State in which the taxpayer is a resident is required to tax the income which is attributed to the hybrid permanent establishment. In case of a double deduction or deduction without inclusion, the same rules should apply as the ones described above for neutralizing hybrid mismatch structures.

**Imported mismatches:** this refers to situations that shift the effect of a hybrid mismatch between parties in third countries into the jurisdiction of a Member State through the use of a non-hybrid instrument. This is a remarkable step as the European Commission tries to come up with solutions within the EU for mismatches that are generated outside the EU territory. The priority rule is that third states should address these types of situations. Otherwise, the Member State of the taxpayer is required to deny a deduction which would otherwise be deductible in the two jurisdictions.

**Dual resident mismatches:** this addresses situations of double deduction if a payment made by a dual resident (both in a Member State and a third state) is deducted in the two jurisdictions where the taxpayer is considered as resident. In these cases, the Member State should deny the deduction of the payment to the extent that such payment is set-off against income in that Member State but is not treated as income under the laws of the third country.

4.5 General Anti-Abuse Clause (GAAR, art. 58)
The proposal includes a general anti-abuse rule which is more or less in line with the ATAD proposal. The preamble makes clear that the function of the GAAR is “to fill in gaps, which should not affect the applicability of specific anti-abuse rules”. The idea is that the GAAR is applied in a uniform manner to domestic situations and cross-border situations involving companies established in third countries.

The GAAR is applicable when there are:
(i) non-genuine arrangements (or a series thereof);
(ii) which have been put in place for the essential purpose of obtaining a tax advantage, and
(iii) which defeat the object or purpose of the CCTB Directive.

Non-genuine arrangements refer to arrangements that are not put in place for valid commercial reasons reflecting economic reality. This appears to be in line with the abuse case law of the European Court of Justice.
in direct tax cases\(^{38}\) which states that making use of a tax advantage as such cannot be not labelled as non-genuine. A taxpayer has the right to choose the most tax efficient structure for its commercial affairs\(^{39}\). Therefore, the GAAR should not apply in case of arrangements entered into for valid commercial reasons which reflect economic reality. However, the reference to “essential purpose” of obtaining of a tax advantage seems more generous for taxpayers than the “main purpose or one of the main purposes-test” adopted in the ATAD\(^{40}\).

The application of the GAAR leads to a substance over form approach: legal arrangements may be (partially) disregarded in specific situations and a calculation of the tax base based on the economic substance of the case at hand may lead to a different outcome.

5 Loss Compensation

5.1 National Losses (art. 41)

The CCTB allows for an indefinite loss carry forward without restrictions on annually tax-deductible amounts.\(^{41}\) No loss-carry back is allowed. Pre-entry losses are imported to the CCTB system but carried forward based on the (old) carry forward rules of the national legislation of the state in which those losses were incurred.

Loss carry forward is not available in cases of share transfers whereby the acquiring entity obtains a shareholding that meets the control/ownership test under the above group definition (control and ownership test) in combination with a major change of activity of the acquired taxpayer. The background is clear: trading in loss companies should be discouraged. The proposal does not contain a “motive test”. If both conditions (becoming a group entity and change of activity) are met, no carry forward is allowed.

5.2 Cross Border Losses and Recapture (art. 42)

The CCTB-proposal includes an intra-EU cross-border loss offset provision. The loss-import/recapture system only applies in the transitory period in which the CCTB Directive is applicable. This mechanism has been developed to make up for the fact that as long the CCCTB Directive has not been implemented, taxpayers are deprived from the benefits of the tax consolidation under the CCCTB.

The difference between the cross-border loss offset and the consolidation is that the latter allows to fully offset profits and losses within a CCCTB group and to eliminate intra-group transactions whereas cross-border loss offset only allows an upstream offset between parents and subsidiaries. In addition, the loss offset is temporary because it is accompanied by a recapture mechanism as explained below.

Under the proposed CCTB rules losses incurred by a qualifying subsidiary or a permanent establishment in another Member State may be offset against the taxpayer’s taxable profits. To qualify as a subsidiary the parent should meet the ownership and control test of article 3(1) of the CCTB Directive (see paragraph 2.1). Loss-import for direct subsidiaries is available in proportion to the taxpayer’s shareholding. For indirect subsidiaries different rules apply.

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\(^{38}\) CJ 12 September, case C-196/04, Cadbury Schweppes.

\(^{39}\) See preamble 10 of the ATAD.

\(^{40}\) See: - 4th Presidency compromise, Room document #1, Working party on Tax Question, ATAD, 15 April 2016, p. 20 where it is implied that “main or one of the main purposes” comprises a broader approach to address tax avoidance when compared to “essential purpose”.

\(^{41}\) This is different from the German regime where the first amount of EUR 1 million can be fully off-set and amounts in excess of EUR 1 million only for 40%. Similar principles apply e.g. in Italy and France.
The scope of the cross-border loss relief is illustrated with the following picture:

DE 1 may deduct the losses incurred by its IT 4 permanent establishment and from its subsidiary NL 2 while such possibility is not available as regards losses incurred by SP 3 since SP 3 does not qualify as an immediate subsidiary. However the losses incurred by SP 3 may be offset at the level of NL 2. The proposal is such that first NL 2 should carry forward its own losses (if any) and that up to the remaining profit SP 3 losses can be deducted from NL 2 profits. This prevents a cascade effect at the level of DE 1. If NL 2 incurs losses, no losses from SP 3 can be taken into account, neither at the level of NL 2 nor at the level of DE 1. If NL 2 generates profits (also after carry forward of its prior year losses) SP 3 losses can be taken into account but up to the profit of NL 2, so that no cross-border losses incurred by NL 2/SP 3 are deducted at the level of DE 1.

The deducted amounts are added back to the taxpayer’s taxable base if and to the extent that the subsidiary or permanent establishment subsequently becomes profitable. In order to safeguard national tax revenues, an automatic add-back applies after 5 years, to the extent recapture has not yet been made. The cross-border loss relief is there for only a temporary deduction (timing difference).

An automatic add-back will also apply whenever the subsidiary or permanent establishment is sold, wound up or transformed into a permanent establishment or subsidiary respectively (irrespective of the fair market value of the subsidiary or permanent establishment at that time) or in case the parent company no longer meets ownership test for its immediate subsidiaries.

6 CCCTB

6.1 Introduction

As explained before, “consolidation”42 is the second step in the 2 stages approach proposed by the European Commission. The CCCTB proposal establishes a system for the consolidation of the (common) tax bases of members of a group, lays down rules on the allocation to Member States through ‘formula-apportionment’ and provides for common procedural rules for the administration of the system through a ‘one-stop-shop’ approach.

The explanatory memorandum to the CCCTB-Directive sets out that since the publication of the 2011 proposal ‘various elements (especially, tax consolidation) have given rise to a difficult debate’ and that ‘it is fundamental that tax consolidation remains an essential element of the CCCTB initiative, since the major tax obstacles faced by companies in the EU can most effectively be tackled within a consolidated group’.43 Consolidation should provide for automatic cross border loss relief and the elimination of transfer pricing rules between group members. Consolidation, including formula apportionment, however also is the most far-reaching component and will have major budgetary and administrative consequences for both taxpayers and tax authorities. This chapter addresses some key features of the CCCTB.

42 Recital (4) of the Pre-amble to the CCCTB-Directive.
43 Explanatory memorandum to the CCCTB-Directive, p.3.
6.2 Consolidation (art. 5-6)

Taxpayers that mandatorily apply the CCTB will also mandatorily fall under the scope of the CCCTB, which immediately appears to be the most important difference in relation to consolidation when comparing the 2011 and 2016 CCCTB proposals.\(^{44}\) As mentioned in paragraph 2, SME’s that opt to apply the CCTB can choose not to apply the CCCTB. The rules for determining the parent company and qualifying subsidiaries, are identical under the CCTB and the CCCTB.\(^{45}\) Reference is made to paragraph 2.1.

For a CCCTB group, an “all in or all out approach” applies. A resident taxpayer forms a group with:

(a) all its permanent establishments that are situated in a Member State;
(b) all permanent establishments that are situated in a Member State and belong to its qualifying subsidiaries that are resident in a third country for tax purposes;
(c) all its qualifying subsidiaries that are resident in a Member State for tax purposes, including the permanent establishments of those subsidiaries where such permanent establishments are situated in a Member State;
(d) other resident taxpayers, including their permanent establishments that are situated in a Member State, where all those resident taxpayers are qualifying subsidiaries of a non-taxpayer who is resident in a third country for tax purposes, has a similar legal form to one of the company forms listed in an annex to the CCCTB proposal and meets the size threshold.

A non-resident taxpayer shall form a group in respect of all its permanent establishments that are situated in one or more Member States and with all its qualifying subsidiaries that are resident in a Member State for tax purposes, including the permanent establishments of those subsidiaries where such permanent establishments are also situated in one or more Member States.

The example below illustrates which immediate and indirect subsidiaries and permanent establishments will form part of the group (assuming 100% voting and ownership at all levels).\(^{46}\)

As a non-resident taxpayer, US 1 shall form a CCCTB-group with all subsidiaries and permanent establishments, except for SP 10. From the perspective of US 1, SP 10 does not fall under the grouping requirements for non-resident taxpayers and the requirements for resident taxpayers do not apply to US 1. If FR 3 would be considered the taxpayer, all subsidiaries and permanent establishments of US 1, except for DE 4 and IT 5 shall be included in a group. In this scenario, SP 10 shall be included since US 2 is a qualifying subsidiary resident in a third country within the meaning of item (b) above. DE 4 would not fall under the scope of item (d) above, since

\(^{44}\) Article 2 CCCTB and article 2 CCTB.
\(^{45}\) Article 3 CCCTB and article 5 CCTB.
\(^{46}\) Derived from Vakstudie Highlights & Insights on European taxation, Special edition: Proposal for a Common Consolidated Corporate Tax Base (CCCTB), nr. 6, 2011.
US 1 is not a non-taxpayer in view of its IT 5 permanent establishment. Under the 2011 proposal, DE 4 would need to be included in the group, whereas IT 5 would not.

Under the 2011 proposal, the CCCTB was optional, which may explain the above ambiguity in relation to IT 5. Based on the mandatory character of the new CCCTB proposal, the purpose would in our view be that all of the subsidiaries and permanent establishments in the example form, including DE 4 and IT 5, part of a single group, also to avoid that taxpayers could use the ambiguity to play with the composition of the CCCTB group. We expect that the European Commission intends to cover such situations in subsequent drafts of the CCCTB proposal.

If US 1 would not meet the control and ownership test with respect to FR 3 and FR 3 meets the test with respect to its direct and indirect subsidiaries and permanent establishments, there will be two separate groups. A first group, with US 1 as non-resident taxpayer, would consist of DE 4 and IT 5 and a second group, with FR 3 as resident taxpayer, would consist of the remaining subsidiaries and permanent establishments. This in our view is in line with the rationale of the grouping concept based on the two-part test of control and ownership.

**Consolidated tax base**

The consolidated tax base for the group is calculated by adding together the (common) tax bases of the group members, which thus allows for cross border set off of profits and losses within the group. Intragroup transactions\(^47\) are ignored for the calculation of the consolidated tax base; however, groups are required to apply a consisted and adequately documented method for recording intragroup transactions. If the consolidated tax base is positive, it will be allocated to the Member States based on formulary apportionment (see 6.3).\(^48\) If the consolidated tax base is negative, the loss shall be carried forward and set off against the next positive consolidated tax base. The CCCTB does not allow for the carry back of losses.

The CCCTB-proposal furthermore includes detailed rules to address the taxation of losses and unrealized capital gains (e.g., specific rules on entering/leaving the group), and some specific provisions to address misuse of exemption eligibility. It goes beyond the scope of this contribution to address these rules and provisions in detail, but we address some key elements below.

Pre-CCCTB losses (either domestic or CCTB losses) of a group member may be offset against its apportioned share. No group losses are attributed to a group member leaving the group.\(^49\) However, upon termination of a group, unrelieved losses of the group are apportioned to the group members according to a formula. A member can offset these losses against future profits calculated based on the CCTB rules or based on the domestic tax regime.

With respect to unrealized capital gains, the apportioned share of a group member will be adjusted if a taxpayer economically owned certain fixed assets when joining a group followed by a disposal of such assets within five years. Comparable rules apply if certain fixed assets are disposed of within three years after the departure from a group by a taxpayer. For intangible property different rules have been proposed.

The rules for business reorganizations and entering/leaving the group are rather complex to avoid that the consolidated profit is affected by transitory items and pre consolidation aspects. One may question whether such detailed rules fit with the concept of a very simple formula for the apportionment of the consolidated tax base as has been proposed by the European Commission.

\(^47\) Exceptions apply to the oil and gas sector and the shipping, inland waterways transport and air transport industry (art. 42 and 43 CCCTB).

\(^48\) Withholding tax on interest and royalties paid by a group member to a recipient outside the group and tax credits based on art. 55(1) CCTB will also be allocated to the Member States based on formula apportionment.

\(^49\) Art 21 CCCTB, no attribution.
The CCCTB proposal provides for various rules with respect to the interaction between the CCTB and the CCCTB. One of these rules establishes that the principal taxpayer shall determine which currency applies if all group members are located in Member States that have not adopted the Euro. In that case, the main rule of article 20(2) CCTB that Euro shall be the functional currency does not apply. A single group member in a Euro state would mean that the whole group would be required to apply the Euro as functional currencies. It would be welcome if the CCCTB (and the CCTB) would allow for the use of other, also non-EU, currencies as functional currencies, since this can be considered positive for non-EU investors and certain industries typically apply specific currencies (e.g. USD in the oil & gas industry).

6.3 Formula for Apportionment (art. 28-45)

According to the proposal of the European Commission, the consolidated tax base will be shared between group members (and thus between Member States), based on a fixed formula. The apportioned share shall be taxed against the national tax rate applicable to the group member concerned.

Formula apportionment takes place based on the factors labor, assets and sales, whereby equal weight is given to each of these factors. Alternative formulae will apply to certain sectors, such as financial services and insurance, oil and gas as well as shipping and air transport, to better address the specifics of such sectors.

The labor factor has been divided into a payroll and employee headcount component, to account for differences in the level of wages. Employees will in principle be included in the labor factor of the group member from which they receive their remuneration, whereby derogation may occur if employees physically exercise their employment under the control and responsibility of another group member. If an employee is included in the headcount component of a group member, his remuneration will be included in the payroll component of the same group member.

The asset factor consists of fixed tangible assets only, whereby fixed assets are in principle allocated to the economic owner based on the average value for tax purposes. Land and other non-depreciable assets are valued at original cost. Intangibles and financial assets have been excluded from the asset factor in view of their mobile nature and the risk of abuse. Furthermore, intangibles may be difficult to value. In particular, the exclusion of intangibles may become a subject of debate since these can be considered key value drivers for many groups. To a certain extent, this point has been addressed: the total costs for R&D, development, marketing and advertising of a taxpayer over the 6 years before joining the group shall be included in the asset factor in the five years that follow joining of the group. One may question whether this is sufficient if intangibles are key value drivers, but it fits with the concept of a formula that is simple and difficult to manipulate.

The abovementioned labor and assets factors seek to apportion at origin. The sales factor seeks to apportion sales at destination, by in principle including them based on the location where the dispatch or transport of goods to the person acquiring them ends or based on the location where services are physically carried out or supplied.

*Formula for Apportionment*

\[
\text{Share A} = \left( \frac{1}{3} \frac{\text{Sales}^A}{\text{Sales}^{\text{Group}}} + \frac{1}{3} \frac{\text{Payroll}^A}{\text{Payroll}^{\text{Group}}} + \frac{1}{3} \frac{\text{No of employees}^A}{\text{No of employees}^{\text{Group}}} \right) \times \text{Cons Tax Base}
\]
Specific provisions apply for companies entering and leaving the group, for apportionment in case of transparent entities and for items that shall be deducted from the apportioned share (for example, pre-entry losses). Furthermore, the European Commission may adopt acts laying down detailed rules in relation to the different elements of the formula.

The formula in the new CCCTB proposal is the same as in the 2011 proposal. CCCTB is also seen as a means to establish a system of corporate taxation in the EU whereby business profits are taxed in the jurisdiction where value is actually created. In his speech in relation to the new CCTB and CCCTB proposals, Commissioner Moscovici stressed that multinationals should pay their taxes where profits are generated and the CCCTB should lead to fair sharing of profits between Member States. The formula is designed in such a way that manipulation is difficult, and that may certainly prevent certain forms of aggressive tax planning. However, whether items as “sales” and “headcount”, while leaving out intangibles, result in an allocation to jurisdictions where value is actually created remains to be seen.

The formula proposed by the European Commission will lead to attribution of profits that will materially differ from the arm’s length principle, which has been and still is applied throughout the world. This will certainly lead to heated discussions between Member States, as this will impact their corporate tax revenues. The choice for a certain formula may be driven not only by technical but also by political considerations. This element is also reflected by the safeguard clause. If the outcome of the formula does not fairly represent where profits are generated, the principal taxpayer or a competent authority may request the use of an alternative method. The safeguard clause can however only be applied if all Member States involved agree and it is therefore unlikely that this will be used frequently in practice.

6.4 One-Stop-Shop

The CCCTB proposal provides for a ‘one-stop-shop’ system, whereby a special administrative framework applies. Groups in principle only deal with the tax administration (i.e., the ‘principal tax authority’ or PTA) of the Member State in which the so-called principal taxpayer (PTP) is resident. A taxpayer may by way of derogation hereof request an opinion on a specific transaction or series of transactions from the competent authority of the Member State in which it is resident.

In most cases, the group’s parent company, or ‘parent company within the EU’, will be the PTP, but there also are cases where the PTP can be designated by the group (in case of sister companies of non-EU parent) or by a non-resident taxpayer (in case of permanent establishments of a non-EU parent). The one-stop-shop system not only implies a heavy administrative burden on the PTP, but also on the PTA. One could think that a ‘try-out’ period for a limited number of taxpayers to assess the impact of the CCCTB and to determine whether also tax administrations in the Member States are up to speed to apply this system on a larger scale. However, the ambitious timing as proposed by the European Commission and the mandatory character do not seem to allow for such try-out period.

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50 Although some forms of tax planning are prevented it is also clear that the formula may provide new incentives for multinational enterprises to pursue artificial tax base shifting within the EU. Reference is made to M. de Wilde, Tax Competition within the European Union. Is the CCCTB Directive a Solution? ELR May 2014, No. 1.

51 Art. 29 CCCTB.

52 Based on art. 61 CCCTB, the competent authority must take all steps to respond within a reasonable time and the opinion issued shall be binding on it. In our view it is not clear whether such opinion will also be binding on the PTA. It seems that the PTA will be allowed to challenge, or ignore, such opinions by issuing amended assessments.

53 In paragraph 6.2 we have addressed situations where companies and/or permanent establishments shall not be included in a CCCTB group, whereas the purpose of the CCCTB proposal would appear to be that they should be included in a group. Amendment of the group criteria in art. 6 CCCTB would likely also require amendments to the ‘principal taxpayer’ definition in art. 4(11) CCCTB.
Since the approach of tax administrations towards taxpayer’s is far from harmonized within the EU, taxpayers may consider to amend their (corporate) structure in a manner that leads to a ‘preferred’ tax administration as PTA, for example a tax administration endorsing the enhanced compliance concept. However, in exceptional circumstances, the Member States concerned may determine that another taxpayer than the one designated by the group will be the PTP. This would also affect the choice for the PTA.

The administrative framework establishes that the PTP shall give notice to the PTP of the creation of a group at least three months before the beginning of the tax year and describes which information shall be included in such notice. The CCCTB further provides for detailed procedures with respect to the examination of a notice to create a group and the termination of a group, both for groups applying the CCCTB voluntarily and mandatorily.

The PTP will be required to file the consolidated tax return with the PTA within the 9 months following the end of the tax year. Also this timing seems ambitious, especially considering that there are Member States that have extension regimes of more than 12 months for domestic tax returns. The consolidated tax return and supporting documents shall be stored in a central database to which all competent authorities shall have access. The administrative framework furthermore establishes the manner of communication (through the CCN/CSI) and contains a secrecy clause. Secrecy and data protection in our view may become a topic of discussion in the process towards approval of the CCCTB proposal.

We expect that not all Member States consider the levels of data protection and confidentiality identical throughout the EU.

The consolidated tax return shall be treated as an assessment of the tax liability of each group member, whereby a specific instrument of national law of a Member State will need to be issued if the consolidated return does not allow for enforcement of a tax liability of a group member. The PTP shall verify whether the consolidated tax returns meets the relevant requirements and is allowed to issue amended assessments where appropriate. A competent authority concerned may also ask for the issuance of an amended assessment by the PTP.

The CCCTB sets forth that the PTP may initiate and coordinate audits. Furthermore, competent authorities may also request for the initiation of an audit. Audits shall be conducted in accordance with the national legislation of the Member State in which the audit is carried out. This also forms an exception to the one-stop-shop rule. Currently, there are clear differences in the audit approach followed in the various Member States. Also here time will tell whether a fully harmonized approach can be adopted in the near future.

The administrative framework provides for detailed rules and procedures for administrative appeals, with a body independent from the tax authorities in the PTA Member State, and judicial appeals against PTA decisions, governed by the laws of the PTA Member State. More importantly, the CCCTB provides for rules and procedures for disputes between competent tax authorities. In our view, the fact that detailed provisions for disputes between Member States are needed in an approach towards harmonization shows that there is a long way to go for the CCCTB.

54 The rules addressing timing do not seem to match. The notice must be sent to the PTP at least three months before the beginning of the tax year concerned (art. 46(1) CCCTB), the PTA shall transmit the notice immediately to the competent authorities while they must submit their views within one month (art. 46(3)), but art. 47(1) CCCTB mentions that the Directive shall start applying to the group one month after the notice to create a group was received by the aforementioned competent authorities, i.e. likely before the beginning of the tax year concerned.

55 Reference is made to the common communication network / common system interface.
7 Next Steps

Now that the European Commission has re-launched the CCCTB-project by putting forward 2 Directive proposals, the question arises as to what the chances are that the CCTB and the CCCTB become a reality. Based on the experiences with the recently adopted Anti-Tax Avoidance Directive, we expect Member States to be reluctant to give up their tax sovereignty. The first serious hurdle to be taken is the European yellow card procedure under which the national parliaments of the Member States can force the European Commission to reconsider its proposals. At least one third of the votes allocated to those parliaments is needed to force a re-examination. The deadline to issue a yellow card by national parliaments ends 20 December 2016.

It is expected that before this date the proposals will be put on the agenda for a debate between the Ministers of Finance of the Member States within the Ecofin Council. The outcome of this debate seems crucial for the political future of the proposals in the short run. If under the current Slovak Presidency of the EU or the presidencies in the near future concrete and ambitious goals are set, the negotiations could make a quick start in the Ecofin Council bodies at a technical level. However, if the proposals do not receive a warm welcome at the level of the Ecofin Council, the same could happen as with the original CCCTB proposal of 2011. The absence of willingness to compromise could result in a deadlock.

Companies are recommended to follow these developments closely. Continuous pressure by politicians, the media and NGO’s and initiatives by the OECD, the G-20 and the EU have led to a new corporate tax climate. There is political momentum for far reaching proposals such as the CCTB and the CCCTB. If adopted, those proposals will dramatically change corporate taxation within the EU. If in the next months it would become clear that sufficient political support exists, that would also be an appropriate time for companies to consider to what extent such new corporate tax system affects their position.

In the first quarter of 2017 Loyens & Loeff will organise a CCTB/CCCTB client seminar.
Quoted
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Loyens & Loeff N.V. is an independent full service firm of civil lawyers, tax advisors and notaries, where civil law and tax services are provided on an integrated basis. The civil lawyers and notaries on the one hand and the tax advisors on the other hand have an equal position within the firm. This size and purpose make Loyens & Loeff N.V. unique in the Benelux countries and Switzerland.

The practice is primarily focused on the business sector (national and international) and the public sector. Loyens & Loeff N.V. is seen as a firm with extensive knowledge and experience in the area of, inter alia, tax law, corporate law, mergers and acquisitions, stock exchange listings, privatisations, banking and securities law, commercial real estate, employment law, administrative law, technology, media and procedural law, EU and competition, construction law, energy law, insolvency, environmental law, pensions law and spatial planning.

1430 people work at Loyens & Loeff N.V., including 840 civil lawyers, tax advisors and notaries. The firm has six offices in the Benelux countries and Switzerland, and seven in important financial centres of the world.

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