CONFEDERATION FISCALE EUROPEENNE

Opinion Statement FC 1/2016

on the public consultation

Re-launch of the Common Consolidated Corporate Tax Base

Prepared by the CFE Fiscal Committee

Submitted to the European Commission in January 2016

The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 27 professional organisations from 21 European countries with more than 200,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.
The CFE is registered in the EU Transparency Register (no. 3543183647-05).

Introduction

This is an Opinion Statement of the CFE Fiscal Committee, responding to the European Commission´s public e-consultation on a re-launch of the Common Consolidated Corporate Tax Base (CCCTB, in the following: 3CTB), conducted between October 2015 and January 2016[1]. In the following, "2CTB" is used for a common corporate tax base lacking the element of consolidation. "Common tax base" is used in comments not specifically related to the consolidation element, thus including 2CTB and 3CTB. The original Opinion Statement has been submitted electronically. Chapters 1-3 contain statistical questions and questions specifically directed to enterprises; they are not included in this version. CFE answers are in blue text.

We will be pleased to answer any questions you may have concerning CFE comments. For further information, please contact Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

4. Policy directions

a) The Commission believes that the C CCTB system can be an effective tool against aggressive tax planning and at the same time retain its attractiveness to the business.
What are your views?

[x] Other.

A common tax base should be distinguished from anti-BEPS measures, which may be adopted instead or in addition.

There is no unanimous position within the CFE on a common tax base. Several members are opposed to both a 2CTB and a 3CTB[2]. None of our members support a 2CTB as a permanent solution.

Those members who are supportive of a common tax base believe that this should focus on its original purpose: finding effective solutions to cross-border issues by reducing compliance burdens and legal uncertainty (e.g. transfer pricing, offset of losses incurred in other member states). This would bring simplification and transparency and reduce opportunities for tax avoidance. The decision to take effective action against tax avoidance would ultimately rest with the member states.

Those members opposed to a common tax base have expressed the following main reservations:

- *Criteria used in formula apportionment may be too imprecise and may not appropriately attribute value to all factors that determine the profitability of an enterprise;*
- *The formula apportionment criteria proposed in 2011 discriminate small countries, particularly those leveraged towards the service industry;*

[1] http://ec.europa.eu/taxation_customs/common/consultations/tax/relaunch_ccctb_en.htm

[2] *Our Committee members opposed to a common tax base include Latvia, Malta, the Netherlands and the UK, i.a..*

- *A common tax base means a loss of national tax sovereignty and flexibility to use taxation as an instrument to stimulate or dampen the economy; the possibility to change tax rates will often not be sufficient.*
- *A 3CTB will only eliminate transfer pricing for those entities that solely do business within the 3CTB area; the vast majority of multinationals will do business outside that limited area and would find the adoption of a 3CTB even more complex than the current position. In addition, arm's length transfer pricing will still be required for accounting or commercial purposes.*
- *Time should be allowed for the BEPS outcomes to be implemented before considering whether a common tax base is desirable.*
- *A 2CTB appears to be targeted at those countries which choose different measures from others appropriate to business in that country; safeguard in those circumstances should remain the OECD Global Forum and the EU Code of Conduct Group.*
- *Recourse to the CJEU is often not a satisfactory way of resolving tax disputes, as proceedings are time-consuming and CJEU decisions are often open to multiple interpretations.*
- *Agreement on the 2011 3CTB proposal could not be reached in almost five years and a common tax base and apportionment has not been considered as part of the BEPS debate.*

b) The Commission envisages re-launching the CCCTB in a staged approach which will consist of 2 steps: Firstly, agreement on the tax base, secondly, moving on to consolidation.
What are your views on the staged approach?

[x] Agree.

Those members who are in favour of a common tax base are in favour of a 3CTB. They consider a 2CTB to be incomplete, as it does not solve important issues, e.g., related to transfer pricing, and ask the Commission to come up with a clear political commitment on the introduction and the timing of a 3CTB.

c) It is a priority of the Commission to promote discussion in Council of certain BEPS-related international aspects of the common base before the re-launched CCCTB is proposed. The aim will be to arrive at consensus on how to implement certain OECD anti-BEPS best practice recommendations in a uniform fashion across the EU. The intention would be to create a common playing field in defending the Single Market against base erosion and profit shifting.
What are your views on agreeing on such a common approach?

[x] Agree.

We would favour a common EU approach to anti-BEPS measures versus third countries rather than unilateral measures by member states. Such measure should make sure not to place EU companies at a disadvantage towards competitors from other major economies.

We understand that, given the political difficulty to achieve agreement on a common tax base that would also include anti-BEPS measures, the Commission intends to propose anti-BEPS measures in early 2016 and then a 2CTB and/or 3CTB Directive in summer 2016. We support the approach to treat these two matters separately, for political reasons. The common approach to BEPS should be legally binding, i.e. a Directive.

If no anti-BEPS Directive can be agreed at short notice, the Commission should work towards an anti-BEPS Recommendation (preferably a Council Recommendation). Such Recommendation should include a monitoring mechanism to identify countries that deviate from the recommended approach.
Any EU anti-BEPS measure should be supplemented by a strong dispute resolution mechanism which is able to reach binding solutions. A minimum solution as referred to in the final Recommendations on BEPS Action 14 would not be sufficient, as we do not expect that the agreed minimum standard will significantly improve the functioning of the OECD MAP process which has proven too time-consuming, with an average resolution time of two years.
One possibility could be to widen the scope of the EU Arbitration Convention to matters beyond transfer pricing and make this an EU law instrument. We would also appreciate more transparency of this process, paying due regard to confidentiality of taxpayer information, with the aim of establishing a case law.
If there will be a common tax base through an EU Directive, the dispute resolution mechanism would become obsolete for matters covered by the common tax base, as matters could then be referred to the ECJ.

5. Scope, anti-avoidance

5.1 Scope of the CCTB/CCCTB proposal

a) The Commission considers making the new proposal for a CCCTB obligatory for all EU companies which are part of a group. A group can be formed:
  - Between parent and subsidiary companies where there is a holding of more than 50% of the voting rights; and direct or indirect holding amounting to more than 75% of capital or more than 75% of the profit rights; or
  - Between a Head Office and its permanent establishment where a company has one or more permanent establishment in other Member States.

What are your views on making the proposal for a CCCTB obligatory for all EU companies which are part of a group?

[x] Other.

Our answer depends on whether a common tax base will contain a consolidation element. Those members that are supportive of a common tax base assume that a 2CTB, if adopted, would be mandatory, while a 3CTB should be voluntary (while it is clear that in a voluntary 3CTB, all qualifying entities have to be included). We expect that a mandatory 3CTB will hardly be accepted.

Those members not in favour of a common base believe that a common tax base should be optional if introduced.

As no practical experience has been gathered on a common tax base, a 2CTB should remain optional for a transitional period, to enable businesses to adapt and to allow the development of a case law and established practices, which will result in greater certainty.
It is important that companies are not forced to adopt a common tax base at a time when they face increased costs and uncertainty as a result of the BEPS Recommendations.

Would you suggest a different approach to defining who should be required to use the CCCTB? If yes, please explain your suggestion briefly.

If a common tax base is made mandatory, it should only be mandatory for companies that meet a certain size threshold. There should be a two-fold test:

1) *The size of the group within the EU exceeds the definitions for micro, small and medium-sized entities, according to the relevant definitions in the EU Accounting Directive; and*
2) *The size exceeds a certain threshold in more than one member state, to be agreed upon.*

The latter is to exclude companies that only have marginal income or activities in other member states. Businesses that operate (almost) entirely in one member state should not be forced to apply a common tax base which would be a strong disincentive to engaging in cross-border business. The size threshold in 2) should be easy to apply. While it has been remarked that income as the sole criterion could be prone to manipulation, a threshold in 2) containing several elements would probably be too complicated to apply for smaller businesses.

b) The Commission envisages providing the following option: Companies which would not be subject to the mandatory CCCTB - because they do not fulfil the requirements of being part of a group - could still have the possibility to apply the rules of the system.
What are your views on offering non-qualifying companies the option to apply the rules?

[Agree]

Our members who support a 3CTB consider that there should be a possibility to grant joint ventures the possibility to form a 3CTB group with all companies that are partner to the joint venture.

5.2 Anti-avoidance elements

In view of recent developments, the CCCTB system should include more robust rules to defend itself against aggressive tax planning. Which of the elements of the CCCTB system would you reinforce so that the system can better respond to tax avoidance?

- ☐ Rules for limiting interest deductibility
- ☐ Disallowance of tax exemption for portfolio participations
- ☐ Exit taxation rules

- ☐ More robust rules on controlled foreign companies regimes (CFC)
- ☐ Anti-abuse rules based on effective rather than statutory rates
- ☐ Addressing distortions caused by debt/equity bias

Other suggestion (please specify):

We understand that the above-mentioned measures relate to third countries, in a 3CTB regime.

CFC rules should follow the OECD Recommendation on BEPS Action 3[3] *and the "Italian" CCCTB compromise proposal of November 2014.*

To avoid double taxation, there should be a rule obliging Member States to allow a credit for foreign taxes actually paid or to exempt dividends and gains on disposition of CFC shares from taxation if the income of the CFC has previously been subject to CFC taxation.

6. Hybrid Mismatches, Research and Development

6.1 Hybrid mismatches

Hybrid mismatches are the result of disparities in the tax treatment of an entity or financial instrument under the laws of two or more States. Currently, arrangements can be set up to exploit such mismatches for the purpose of lowering their overall tax burden. The risk of such arrangements would be removed in transactions between enterprises applying the common tax base rules within a consolidated group. It would however persist in relations with enterprises outside the common rules as well as during step 1 of the staged approach to a CCCTB, in the absence of tax consolidation amongst the companies applying the common rules.

One option to address hybrid mismatches would be to require enterprises to follow in a Member State the classification of entities and/or of financial instruments adopted in the other Member State or the third country which is party to the transaction.

We believe that an anti-BEPS Directive should already contain common definitions that eliminate hybrid mismatches. If not, those members supportive of a 3CTB suggest that it should contain such definitions.

Any rule according to which the tax treatment in one country will depend on the tax treatment in another country is difficult to apply, as up-to-date information on the tax treatment in the other country will often not be readily available, especially if both countries speak different languages.

In your view, can hybrid mismatches be effectively addressed through any other measures than the one suggested above?

6.2 Treatment of costs for Research and Development

[3] http://dx.doi.org/10.1787/9789264241152-en

In the currently pending CCCTB proposal, the Commission has proposed a favourable treatment of costs for Research and Development (R&D) by making these costs fully deductible in the tax year they are incurred, with the exception of costs relating to immovable property.

What are your views on the existing framework for R&D?

[x] Supportive.

Actual R&D expenses should remain deductible. There should be a nexus requirement to ensure that only expenses for R&D actually carried out in the country should be deductible.

Countries should remain free to allow additional R&D relief like R&D tax credits or super-deductions. As set out in the "Europe 2020" agenda, one of the 5 key objectives is to increase investment in R&D in EU member states[4].

It is important that the EU remains an attractive location for R&D in comparison to competitor territories, e.g. U.S. or Singapore. In order to achieve this, we believe that member states should have flexibility to design tax policy for R&D as they see fit within a BEPS framework.

Would you suggest an alternative scheme? If so, please explain in your response and/or provide further comments.

7 Debt Equity Bias, Cross-Border Loss Relief

7.1 Debt Equity Bias

Corporate tax systems usually favour debt-financing over equity-financing by treating interest payments as a tax deductible expense with no equivalent deduction for the return paid to equity.

a) Should debt bias be addressed in the proposal?

   There is no unanimous position within our members.
   It has been remarked that equity financing is not readily available in the EU and the EU is behind the U.S. in terms of alternatives to bank financing. It is imperative that any changes do not further impact the financing options available for businesses in the EU.

   Some members do not support any of the Commission's proposals in this area and instead support the BEPS Action 4 outcome. The following remarks have been made:

   - *The fact that debt and equity are differently treated for financial reporting purposes (and therefore, often, also management incentive purposes) casts significant doubt on the impact of the so-called tax bias in isolation. In any event, to introduce a new and very significant difference between the CCCTB tax result on the one hand, and both the financial reporting result and the result for the purposes of almost any third country tax regime threatens*

[4] *While the target is that by 2020, 3% of the EU's GDP should be invested in R&D, in 2013, the average of the EU countries was only 2.02%: http://ec.europa.eu/eurostat/web/europe-2020-indicators .*

increased compliance costs and new opportunities for tax arbitrage at the expense of national exchequers.

- *These proposals take no account of the differing tax treatment at the level of the recipient (who will often be a related group company or an individual shareholder) - who in some jurisdictions such as the UK is able to deduct the cost of financing his/her investment in a closely held company. It is impossible either to analyse the true impact of the existing tax regimes on the real gearing of business activity or to design a coherent alternative proposition without taking these issues into account.*
- *The supposedly distorting effect of marginal debt vs equity financing decisions is in any event severely reduced by national and other rules which disallow costs of debt finance in excess of certain levels - such rules of course include any introduced pursuant to the BEPS proposals.*
- *Adopting ACE in particular would oblige national governments in a time of austerity to either accept a lower tax take or increase their headline rate of tax, with a likely loss of competitiveness. By contrast, the reduction in tax liabilities as a result of ACE might be expected to be discounted by genuine global investors, as such experiments in departure from the normal patterns of corporate tax regimes have generally been short-lived when, rarely, they have been introduced.*
- *Thus some of our members are strongly opposed to addressing so-called debt equity bias on the basis of any theoretical or artificial proposal. Alignment with the accounts where practicable and acceptable in broader policy terms is preferred.*

b) The corporate tax debt equity bias could be addressed via three possible policy options.

- ☐ Option 1 is the Comprehensive Business Income Tax (CBIT) that disallows any financing costs as deductible expense.
- ☐ Option 2 is the Allowance for Corporate Equity (ACE) that allows the deductibility of actual interest payments and of a notional interest on equity.
- ☐ Option 3 is the Cost of Capital Allowance (COCA) that allows the deductibility of a notional interest on capital (equity and debt).

In your view, which option would be best suited to address the corporate debt bias?

All of our members believe that financing costs should remain deductible and therefore disagree with Option 1.
Those of our members who support addressing corporate debt bias would favour Option 2, as set out in the EU Taxation Paper 44/2014: "Addressing the Debt Bias: A Comparison between the Belgian and the Italian ACE Systems"[5].

If you suggest that another option would be better suited to address the corporate debt equity bias, what design would you suggest? Please explain your response and/or provide further comments:

7.2 Temporary mechanism for cross-border loss relief

[5]http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_papers/taxation_paper_44.pdf

The Commission envisages proposing a temporary mechanism for cross-border loss relief with recapture until the consolidation step (CCCTB) is agreed. The aim will be to balance out the absence of the benefits of consolidation during the first step (CCTB) of the proposal.

What are your views on such a temporary mechanism for cross-border loss relief?

Those members supportive of a 3CTB strongly support a temporary mechanism for cross-border loss relief as part of a 2CTB, as a first step towards a 3CTB. This is all the more relevant as we observe that the EU Court of Justice´s case law is attaching more and more conditions to the "finalisation" and offset of losses incurred by a subsidiary resident in another member state[6]:

Such mechanism should contain a rule on where losses should be transferred if a business makes profit in several countries. We would suggest that losses will have to be transferred to the ultimate parent company. It would also be desirable to have a facility for loss carry back.

Which other measures could temporarily substitute the absence of consolidation?

8 Final remarks, additional information

Is there anything else you would like to bring to the attention of the Commission?

Enhanced co-operation:

Those members that support a 3CTB suggest that the Commission should consider the possibility of pursuing a common corporate tax base by way of enhanced co-operation, if unanimity on a proposal cannot be achieved.

Those members not supportive of a common tax base believe that this would still impact the competiveness of companies operating in the Single Market in terms of higher effective tax rates, increased compliance costs and more information disclosure.

Apportionment:

Those members supportive of a 3CTB believe that if a 3CTB is introduced, countries should not be allowed to apply different apportionment formulas. Experience from the US where States apply different apportionment formulas shows that such system creates great complexity in practice.

Suggested areas of focus for the Commission

In addition to the above-mentioned, and in order to avoid any uncertainty in the State Aid area that impacts EU Companies, we ask the Commission to provide further clarity and support in this field.

[6] *Judgment of 3 February 2015 in case C-172/13, European Commission v. UK ("final losses", or "Marks & Spencer II"); see also CFE Opinion Statement ECJ-TF 2/2015, containing further references:* http://www.cfe-eutax.org/node/5055