



CONFEDERATION
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Opinion Statement FC 3/2017

**on the proposed Directives for the introduction of a
Common Corporate Tax Base & Common Consolidated
Corporate Tax Base**

Prepared by the CFE Fiscal Committee

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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).

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1. Introduction

This is an Opinion Statement of the CFE Fiscal Committee, on the proposals published by the EU Commission in October 2016 re-launching the Common Consolidated Corporate Tax Base (the "Proposals"). The Proposals envisage the implementation of two Council Directives, the first introducing a common corporate tax base ("2CTB") and the subsequent directive implementing the consolidation element ("3CTB").

2. CFE Position

Increasing transparency, clarity and simplification of corporate tax laws in the internal market is essential to ensuring the E.U. is in a position to attract foreign direct investment ("FDI") and encourage indigenous business to grow. This is more pertinent than ever before in the context of the prevailing political climate and the risks of increased tax competition from the U.S. and potentially the U.K. in the coming years.

SMEs, in particular, play a vital role in developing the economy of the internal market and their success is pivotal to the success of the economy of the internal market. CFE therefore welcomes any proposal that aids and facilitates SMEs to develop and expand their business in a cost effective manner.

However, there is no unanimous position within the CFE on the common consolidated tax base as proposed by the Commission. Some members are opposed to both a 2CTB and a 3CTB. 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).

3. Comments on the Proposals generally

Following consultation with the Member Organisations of CFE the following are the primary general concerns raised regarding the Proposals:

3.1 BEPS

The tax landscape in the Member States is subject to much change as a result of the implementation of the BEPS project at EU and national level. Therefore, some CFE members believe that the timing of the Proposals is not ideal; it would be preferable to give time to the BEPS related changes, to take effect, allowing Member States an opportunity to assess the situation prevailing after these provisions are cemented into national tax regimes. In addition, whilst we appreciate that the Proposals are intended to balance and supplement the anti-avoidance measures contained in the Anti-Tax Avoidance Directive (ATAD) 1 and 2, the same concern can be voiced in relation to the need for tax certainty.

Allowing time for the implementation of BEPS related measures and the ATAD would have the added advantage that any proposal in the nature of a 3CTB would be focused on issues and needs arising in a post-BEPS tax environment.

3.2 Erosion of national tax sovereignty

A key concern of CFE members is the erosion of national tax sovereignty and the effect this will have on the flexibility of Member States to react to fiscal and economic issues as they arise in the future.

It is vital for Member States that they have the ability to introduce fiscal measures to react to economic issues and stimulate economic growth generally or a particular sector of the economy as the necessity arises. This can also negatively affect the competitiveness of the Member States and consequently the competitiveness of the internal market as a whole.

Flexibility is also required for Member States to respond to any new abusive practices that might arise over time. Given the different tax environments which exist across the Member States a specific anti-abuse measure required in one Member State may not be required in another. Therefore, Member States need the flexibility to tackle abusive tax practices arising on a country specific basis.

In addition, the 2CTB and 3CTB only provide for a single tax rate. Countries which currently apply higher corporate tax rates to certain classes of income or capital gains would lose that ability under a 3CTB.

One must also consider the impact of the 3CTB on the national budgets of Member States. One member organisation has even suggested that an impact assessment should be carried out for each individual country. In addition, the proportion of a multinational's profits allocated to Member States will fluctuate year-on-year due to changes in staff and asset levels in the country and in other Member States. This will make it very difficult for countries to accurately forecast corporate tax receipts.

3.3 Tax competitiveness & knowledge-based economies

One of the five key objectives of the "Europe 2020" agenda is to increase investment in R&D in EU Member States.¹ CFE welcomes any measure that makes Europe more attractive as a location for R&D investment and as such welcomes the addition of the "super deduction" for R&D expenditure and the accelerated deduction for start-ups. A concern exists that knowledge and service based economies, will be adversely affected if the 3CTB results in a lack of flexibility to develop and implement tax policy for R&D as they see fit within the BEPs framework. Therefore, we believe that countries should remain free to allow additional R&D relief.

3.4 Transition Period & Tax certainty

Concern exists about the management of the transitional system; the implementation of the 2CTB and subsequent 3CTB will have huge practical implications and challenges for both tax authorities and taxpayers alike.

Some tax authorities may require additional time and financial resources to implement an additional supranational system and will have to oversee two concurrent systems of tax administration, a national system for those companies not within the ambit of 2 or 3CTB and a supranational system to manage those companies falling within the 2 and 3CTB.

The situation will be compounded if no sufficient guidance is provided on new measures; the legislation in its proposed form will not be sufficient to provide clarity, particularly in light of the lacuna that will

¹ 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> .

inevitably develop in the interim period between the loss of domestic tax jurisprudence to the development of new European jurisprudence. Member States' corporate tax regimes are based on detailed legislation, guidance, precedents and case law – this would become redundant under a 2 CTB regime for the MNE's falling within the ambit of the legislation. They would become subject to new rules and new definitions, which would create huge uncertainty for such businesses and tax authorities.

One should also look at the experience in the field of indirect tax, where despite the VAT directives there are still issues of uncertainty and considerable divergences of national practices between Member States.

Tax certainty is of paramount concern to business, and is the present focus of OECD, and more recently EU attention². Any proposed changes to the tax system on a European wide level, no matter how laudable the ultimate aim, will not be successful if it leads to tax uncertainty, increased compliance burden and increased disputes.

Whilst the proposals may increase tax certainty in the longer term³, it is vital that the uncertainty in the shorter term is mitigated as much as is possible. In this regard, careful implementation is required. Measures to mitigate uncertainty could include the publication of a detailed commentary to supplement any new legislation and a legal mechanism to create more certainty at the initial stages of the compliance process, so that taxpayers do not have to wait many years for clarification to be provided by the courts. The importance of such a mechanism for tax certainty is highlighted in the EU Commission Taxation Paper 67, *"Dispute prevention and early issue resolution programs, as well as effective dispute resolution procedures are considered of particular relevance to enhance tax certainty in the international context."*⁴

4. Comments on specific provisions within the Proposed Directive for a 2CTB

4.1 Cross – border loss relief (Article 42 Proposed Directive)

Our members have differing views on the introduction of an interim mechanism for cross-border loss relief. Those members in favour of a 3CTB strongly support a temporary mechanism for cross-border loss relief as part of the first 2CTB step.

The following concerns have been voiced by some members:

- The legislation lacks critical details such as whether recapture must take place according to country or entity basis, additional clarity on areas such as this would avoid legal uncertainty and inconsistent implementation by Member States.
- It is not compatible with the basic principle of tax law, as affirmed by the BEPs project, that tax should be paid where the value is created.

² See the IMF/OECD Report on Tax Certainty presented to the G20 in March 2017 and the European Commission Taxation Paper 67 entitled *'Tax Uncertainty: Economic Evidence & Policy Responses'*

³ The Commission Taxation Paper 67 identifies the proposals as a source of increasing tax certainty. It states the following at page 6: *"In perspective, the new common consolidated corporate tax base, proposed in October 2016, promises to simplify the corporate tax system for companies which are or plan to be active in more than one Member State, to reduce the compliance costs and ultimately promote tax certainty"*

⁴ European Taxation Paper 67 at page 29.

- The approach taken in Article 42 differs from the position adopted by the ECJ Case, which has held that a parent company can only use the losses of a foreign branch or subsidiary in circumstances whereby the losses are “trapped” i.e. if it is not possible for the subsidiary to utilise the losses in its Member State of residence. This will lead to a divergence in treatment for companies which will fall within the CCCTB regime and those that will remain subject to domestic tax regimes. Such divergences of treatment should be avoided if possible.

4.2 Exit Tax (Article 29 of the proposed Directive.)

There is a concern that the exit tax provisions contained in Article 29 of the proposed Directive are not compatible with principles enshrined in ECJ case law⁵. The ECJ enunciated the principle that an upfront imposition of an exit tax is not compatible with the EU treaty freedoms unless it contains the option for a deferral of the payment in situations involving a relocation to within the EU or EEA.

The provisions of Article 29 differ from those contained in the Article 5 (2) of the Anti-Tax Avoidance Directive that allows for a deferral of payment over 5 years upon relocation within the EU/EEA.

4.3 Super Deduction for Research & Development

The CFE welcomes all initiatives taken to encourage the growth of research and development activities being carried out in the EU. However, our members believe that Member States should be allowed to implement additional R&D incentive measures within the BEPS framework at a national level, particularly those members’ whereby the current domestic regime is more favourable than that proposed under the super deduction.

As previously referred to, a risk exists that the super deduction for R&D will narrow the tax base in some countries and consequently lead to a rise in tax rates in later years; this would negatively affect tax competitiveness of Member States.

4.4 Allowance for growth & development (AGI)

Our Member Organisations do not take a unanimous position on this. Some of our members welcome the proposal and believe it will redress the imbalance that currently exists between debt and equity financing as a result of the interest deduction relief available to companies. Other Member Organisations wish to highlight that it is currently more difficult to obtain equity finance in the EU than in competitors such as the U.S., the effective penalty in the AGI does not reflect the reality that companies may have no alternative but to finance through debt.

There is a risk that the imposition of the effective penalty will punish companies in times of austerity or economic slowdown, and consequently impede any possible economic recovery. CFE suggests that a provision should be included whereby the penalty would be payable over time and that no effective payment would arise immediately.

5. Comments on specific provisions within the Proposed Directive for a 3CTB

⁵ As first espoused by the ECJ in *National Grid Indus BV v Inspecteur Van de Belastingdienst Rijnmond* (Case C-371/10)

5.1 Dispute Resolution

Many of our members have expressed sincere concerns about the future of dispute resolution mechanisms under the 3CTB system.

The primary concern is that the jurisprudence of domestic courts, developed over many years will become void and leave a vacuum in relation to legal certainty of key taxation concepts.

The CJEU will become the legal forum for the resolution of disputes, with the ECJ as the ultimate arbitrator. In order to avoid legal uncertainty tax disputes would need to be resolved within a short timeframe. As the work at the EU on proposed Directive for Dispute Resolution and at OECD level under the MLI currently demonstrates, it is vital that taxpayers have access to time effective and efficient recourse to dispute resolution, the ECJ would not be a time efficient or effective forum for dispute resolution under the CCCTB.

Some of our members also opine that the 3CTB will lead to an increase in dispute resolution relating to the application of formulary apportionment and profit calculation; this would lead to further delays in the system.

Given that, what is proposed is a complete overhaul of the tax system in the EU and the inherent uncertainty which results from this it is essential that disputes can be resolved to restore tax certainty.

5.2 Formulary Apportionment

We understand that the Commission is amenable to suggestions regarding improvements to the system for profit calculation.

Many of our members have expressed serious doubts about the appropriateness of the allocation keys chosen as part of the proposed formulary apportionment method. The nature of the allocation keys is such that it favours “old-fashioned” traditional economies and biased against service-orientated industries and the digital economy, which the EU is trying to promote.

The following issues have been raised by some of our members:

- The proposed allocation keys would result in outcomes that contravene the principle that profit should be taxed where value is created.
- Sales from trade outside the EU would also be reallocated to other member States based on an EU wide assets and labour formula.
- A two-tier system will develop within member states; one for companies within the CCCTB system and another for the other companies. This will lead to inevitable compliance burdens and complexities for tax authorities, as is the case with a 2CTB discussed previously at 3.4.
- It will not eliminate transfer pricing; only within the EU for the companies coming within the ambit of the legislation. MNEs will still be subject to traditional transfer pricing rules when dealing outside the EU. As above, this leads to a two-tier system, which will lead to increased complexity and compliance costs for MNEs and tax authorities.

- There is a risk that the anti-avoidance provisions contained in the Proposals are insufficient to deter MNEs from engaging in formula factor manipulation.
- It has been noted that the inclusion of sales introduces an element of destination-based tax; this will be more advantageous to the larger Member States. A mechanism should be included which would seek to redress this imbalance against smaller Member States.
- Many of our members take issue with the exclusion of intangibles from the formula. Given the importance of intangible assets in the modern business environment, ignoring the value that they generate is simply not a realistic way of allocating profits.