Some Introductory Remarks on the Relaunched CCTB/CCCTB Proposals from a Policy Perspective

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1. Introduction

On 25 October 2016 the European Commission has submitted two far-reaching proposals to harmonize corporate income tax systems across the European Union. These proposals put forward by the Commission are in essence a rebirth of its original CCCTB proposal dating back from 2011. The precursor of the current proposals has been highly controversial from the start and – to be honest - has never been taken seriously. Mainly because of the commitment of many Member States to keep their corporate income tax system competitive on a stand-alone basis, it was no surprise that the Member States over the past five years were unable to find unanimity. The negotiations were hopelessly deadlocked. In the spring of 2013 the president of the EU at that time, Mr. Van Rompuy, made an appeal to Member States for more ‘flexibility in the national positions’ and ‘more willingness to compromise’ in the context of the CCCTB negotiations. This call was clearly without success.

Now, the European Commission makes another attempt and has split the original proposal up into two separate proposals. The first proposal, which should enter into force 1 January 2019, aims to harmonize the corporate tax bases of the Member States (CCTB) in a comprehensive way. The politically most controversial elements are part of the second proposal (CCCTB). This second proposal foresees that the European profit of a group of companies is calculated on a consolidated basis and is subsequently allocated by a formula to the individual group companies and permanent establishments. Subsequently, each Member State can tax resident companies and permanent establishments against its own tax rate. So the proposals do not do affect the competence of Member States to set their own tax rates. In

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4 In 2011 there was a lot of skepticism about the chances of success of the CCCTB proposal. I refer, for example, to the comment made by Bellingwout that “one needs to drink a lot of glasses of ouzo to believe this proposal is ready to be implemented”. See J.W. Bellingwout, “3CTB – Enige internationale aspecten” (“3CTB – Some International Aspects”), Weekblad 2011/6927, p. 1425.

5 Since publication the proposal is under the auspices of the European Council (both the ‘Working Party on Tax Questions’ and ‘High Level Working Party’). First-mentioned working party focuses on the technical aspects of the proposal. Several technical discussions took place over the last years.


the view of the Commission, the second proposal should become reality no later than two years following the implementation of the CCTB. For the sake of clarity, I mention that the

The two-step approach shows that the European Commission has gained experience from the fiasco with the 2011 proposal. Only the early stages of the negotiations on the 2011 proposal showed some progress. Under the Danish Presidency of the EU during the first half year of 2012 a compromise proposal was produced.\(^8\) This first compromise showed important modifications to several provisions of the common tax base.\(^9\) The first clear sign of an inevitable lack of political commitment became clear in 2013. The Irish Presidency during the first half year of 2013 prepared a report that basically concluded that there was no political support for further negotiations.\(^10\) The only way forward that could count on support “an overwhelming majority of” Member States was in any case to limit the technical discussions to the common tax base, without touching upon the consolidation and formula. The Member States agreed that the consolidation mechanism and the formula would go back to the table until sufficient progress would be made on the common tax base.\(^11\) The climax of this approach taken by the Member States was the compromise proposal which was made public by the Italian Presidency during the second half year of 2014.\(^12\) In 2015 and 2016 the work on the common tax base basically stopped because the implementation of the recommendations of the OECD/BEPS project took full attention of the Member States.\(^13\)

It is a major insight in my view that the recent relaunch of the CCCTB project by the European Commission essentially revitalize the practical agreement made in 2013 between the Member States to focus first on the common tax base before going into discussions on the consolidation mechanism and the formula apportionment system. Moreover, the new CCTB/CCCTB proposals transform this practical agreement into a formal European legislative process.\(^14\) At the Ecofin Council meeting of 6 February 2017 is was agreed that all (technical) efforts should be concentrated on the rules for calculating the tax base.\(^15\)

2. **Stimulating growth and investment within the EU**

The new CCTB/CCCTB proposals are accompanied by an 157-page impact assessment setting out the policy objectives.\(^16\) The two main objectives of the proposals are:

- Stimulating growth and investment within the EU; and
- Enhancing the fairness of corporate income tax within the EU.

I recall that the 2011-proposal solely was motivated by the need to remove the cross border tax obstacles in the internal market. This goal, which is in favor of international business, still remains and is evolved to stimulating growth and investment within the EU. How do the

\(^8\) Compromise Proposal CCCTB 16 April 2012, doc.nr. 8790/12.

\(^9\) For example, modifications to the participation exemption, the deductibility of expenses, the conditions for provisions, and more detailed rules for the depreciation of assets.

\(^10\) See the so-called Synthesis Report of 27 March 2013, doc.nr. 7830/13. This report was made up after consultation all Member States by the Irish Presidency.


\(^12\) Compromise Proposal CCCTB van 19 November 2014, doc.nr. 15756/14. The explanatory memorandum is included in a separate document (doc nr. 15756/14).

\(^13\) The result is the adoption of the Anti Tax Avoidance Directive.


\(^15\) See Conclusions Ecofin Council 6 February 2017, doc.nr. 5988/17, par. 18-20.

proposals contribute to this goal? First, harmonizing the tax bases reduces the administrative burden for multinational companies active in several Member States dramatically. Second, the CCTB proposal includes a super deduction of costs incurred for research and development.\footnote{See Article 9(3) CCTB.} However, this incentive seems primarily of a defensive nature. The European Commission fears that without such an incentive multinational companies will choose to (re)locate research and development activities outside the EU.\footnote{For example the United States of America, Japan of South Korea. See Impact Assessment CCTB/CCCTB Proposals 25 October 2016, SWD(2016) 341 final, p. 60.} Only for start-up companies the European Commission is expecting a real incentive effect form the super deduction.\footnote{Because of this reason start-up companies are granted a double super deduction ("super-super" deduction; See Article. 9(3), second sentence, CCTB.}

Third, the CCTB proposal contains an allowance for corporate equity which aims to contribute to growth and investments in the EU.\footnote{See Article 11 CCTB.} Fourth, it is obvious that the consolidation mechanism and the formula apportionment in the CCCTB have many benefits for business. Transfer pricing – which puts an high administrative burden on companies and gives rise to double taxation – will be no longer an issue to be dealt with respect to intra-group transactions in the EU.\footnote{With respect to group companies located in third countries, transfer pricing logically stays relevant.} Similarly, the designation of one competent tax authority to determine the consolidated profit and how it is distributed, would clearly reduce the administrative burden on multinational companies. This feature of the CCCTB is known as the one-stop-shop. Another important consequence of consolidation would entail automatic cross border relief within the EU. It seems to me that international business is in even greater need of cross border relief in the future. The OECD/BEPS project and the Anti-Tax Avoidance Directives limit the possibilities to shift profits cross border. In anticipation of the establishment of a CCCTB, the CCTB proposal already provides for the possibility of upstream cross border loss relief.\footnote{See Article 42 CCTB.}

The European Commission acknowledges that there is a trade-off between the two general objectives.\footnote{Impact Assessment CCTB/CCCTB Proposals 25 October 2016, SWD(2016) 341 final, p. 24.} It is a question of finding the right balance. For example, the European Commission mentions that stimulating growth and investment by more attractive tax allowances could run into conflict with a desired level of fairness of corporate income tax within the EU. It strikes me that in this discussion the European Commission does not pay attention to a trade-off in reverse order. A frequently expressed and wide-spread concern is that growth and investment in the EU could be seriously undermined by a too rigorous European approach to tackle profit shifting and base erosion. From a global perspective the EU could put itself at a competitive disadvantage by introducing measures that go beyond the recommendations made in the context of the OECD. The Commission’s – many times - repeated argument that a good functioning of the internal market needs a comprehensive solution that goes further than the OECD/BEPS project, does not consider this vital concern. Moreover, this concern is fueled by the position taken by the European Commission that de EU should serve as a leading example for the rest of the world with regard to tackling tax avoidance. Perhaps could this trade-off issue be solved by making the right and balanced choices about the OECD recommendations to be implemented in the common tax base.
3. Enhancing the fairness of corporate income tax within the EU

The second main objective, namely improving the fairness of corporate income tax within the EU, is new compared to the 2011-proposal. This is not surprising because the 2011 proposal comes from an era in which combatting base erosion and profit shifting was simply part of the international political agenda. Symptomatic of the absence of this important agenda item is the Commission’s attitude towards transfer pricing. The focus of the European Commission in 2011 laid exclusively with the administrative burden and potentially double taxation as consequences of transfer pricing. The fact that transfer pricing also gives rise to opportunities for base erosion and profit shifting, was not on the European Commission’s radar screen. Currently, the European Commission promotes the consolidation mechanism and formula apportionment as a fair and efficient answer to profit shifting and base erosion. According to the European Commission this formula apportionment more resilient to aggressive tax is planning practices than the widespread transfer pricing methods for allocating profit. And as icing on the cake, the European Commission claims that the proposed formula apportionment is an effective tool for attributing income where value is created. This claim refers to the overall objective of the OECD/BEPS project and is within the context of the proposed sharing formula highly controversial. I cannot see this as anything other than a complete new justification for the formula apportionment system. Back in 2011, the formula apportionment system was purely labeled as “necessary evil” by the European Commission. In the European Commission’s view at that time, a formula apportionment system had to be accepted in order to make cross border consolidation possible. The new justification for using a formula, quite bluntly shows us the tide is turning.

The CCTB proposal – so, without the consolidation element – obviously aims to enhance the fairness of corporate income taxation by introducing provisions that limit base erosion and profit shifting possibilities, for example as a general interest deduction limitation rule, CFC rules and hybrid mismatch rules. Although such rules are already included in the Anti-Tax Avoidance Directive, the European Commission holds the view that the this recently adopted directive does not go far enough. It is true that the Anti-Tax Avoidance Directive lays down only minimum standards and includes several options for Member States. In the view of the European Commission it would be appropriate to harmonize corporate income tax bases by absolute rules, rather than minimum standards. Generally speaking, the absolute rules of the CCTB proposal are turning the thumbscrews on taxpayers. The leading example of this are the proposed CFC rules. The options in the Anti-Tax Avoidance Directive for calculating CFC income (namely Model A and Model B) show that the views of the Member States on CFC rules remained divided. Nonetheless, the CCTB proposal includes CFC rules that qualify as one of the strictest regimes in the world. It goes without saying that the CCTB/CCCTB proposals will, in fact, re-open the negotiations between the Member States on the implementation of the OECD/BEPS recommendations.

To support the goal of fairness enhancement, the European Commission proposes to apply the CCTB/CCTB system on a mandatory basis for groups of companies with a consolidated

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24 Since the start of the OECD/BEPS project in the summer of 2013 this is fundamentally changed.
25 See paragraph 1 of the explanatory memorandum accompanying the CCTB/CCCTB proposals.
26 See paragraph 1 of the explanatory memorandum accompanying the CCTB/CCCTB proposals.
27 See Article 7 and 8 of the Anti-Tax Avoidance Directive.
28 See Article 59 and 60 CCTB and Article 73 CCCTB.
turnover above € 750 million world-wide. This is a whole different ball game compared to the 2011 proposal. Under the 2011 proposal it was - in any case - left up to business itself to apply the CCCTB system. Such a choice is under the current proposals only available for small and medium sized business. As I understand it, the European Commission prefers a size-related threshold because aggressive tax planning structures require a minimum of resources of the group involved.\(^3^0\) Basically, it is assumed by the European Commission that only companies of a certain size can afford aggressive tax planning structures. The question arises why the European Commission does not propose to apply the CCTB/CCCTB system on a mandatory basis to any company belonging to a multinational group (irrespective of its size). After all, the aggressive tax planning structures which the European Commission intends to tackle are of a cross border nature. From the impact assessment accompanying the new CCTB/CCCTB proposals, it can be drawn up that the European Commission believes that such a (more logical) definition of the mandatory scope would potentially run onto conflict with the fundamental freedoms.\(^3^1\) However, the image arises that the European Commission tries as much as possible to limit the mandatory scope of the CCTB/CCCTB proposals to cross border groups of companies. According to an estimation, 81% of the corporate groups with consolidated turnover of more than € 750 million is active internationally.\(^3^2\) The other 19% of these corporate groups is solely domestically active. The fact that this residual category of 19% falls under the mandatory scope of the CCTB/CCCTB proposals, might be considered as an accepted overkill effect of the € 750 million threshold.

4. **Yellow card procedure**

According to the European Commission, the CCTB/CCCTB proposals have a direct impact on the good functioning of the internal market.\(^3^3\) To be adopted these proposals must (also) be in accordance with the principles of subsidiarity and proportionality.\(^3^4\) The European Commission believes that this is the case because the objectives of the CCTB/CCTB proposals (as discussed in paragraph 2 and 3) cannot be (fully) achieved by the EU Member States separately.\(^3^5\) The nature of the objectives would require a common approach. In the Commission’s view the CCTB/CCCTB proposals do not exceed what is necessary to achieve the objectives.\(^3^6\) Because of this proportionality principle, it seems that the European Commission has resisted the temptation to include in the proposals a harmonization of tax rates, for example a minimum tax rate. So the CCTB/CCCTB proposals are not without a (legal) reason restricted to the calculation and apportionment of the tax base. The mandatory application of the CCTB/CCCTB framework to companies which belong to groups of a certain size, can also be traced back to the proportionality principle.

It is standard case law of the ECJ that EU Member States may easy consider themselves competent to act as (tax) legislator. The ECJ allows EU Member States a broad range of

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\(^3^0\) See paragraph 5 of the pre-ambule CCTB/CCCTB proposals.
\(^3^1\) Impact Assessment CCTB/CCCTB Proposals 25 October 2016, SWD(2016) 341 final, p. 42. The European Commission notices that mandating firms with cross-border operations into to the CCCTB while domestic firms (even of a comparable size) are given the possibility to opt in, could be challenged on discrimination grounds.
\(^3^3\) De CCTB/CCCTB proposals are based on Article 115 TFEU.
\(^3^4\) See Article 5, paragraph 3, TFEU.
\(^3^5\) See paragraph 2 of the explanatory memorandum accompanying the CCTB/CCCTB proposals.
\(^3^6\) See the proportionally principle laid down in Article 5, paragraph 4, TFEU.
discretion, which entails political, economic and social choices.\textsuperscript{37} In essence, the yellow card procedure is the only possibility for the subsidiarity principle and proportionally principle to show its teeth.\textsuperscript{38} Through the yellow card procedure the national parliaments can enforce a review of a proposal. The European Commission is obliged to review its proposal when at least 19 yellow cards (votes) are issued. This threshold equals 1/3 of all available votes. Each of the 28 national parliaments holds two votes. If there are two chambers in a Member State, each is chamber allocated one vote.\textsuperscript{39} Although the amount of yellow cards issued is stuck at twelve so that a review is formally not required, the conclusion must be that the proposals did not receive a very warm welcome. The same thing happened with the 2011 proposal. The yellow card procedure seems to functioning like an outlet for all kinds of concerns of the national parliaments. A frequently raised concern is the increase of the administrative burden the tax authorities of the Member States will face by maintaining multiple tax systems (namely the local corporate income tax system, the CCTB system and the CCCTB system).

In the table below, the issued yellow cards are shown with respect to both the 2011 proposal as the recent proposals.\textsuperscript{40}

\textit{Table: Issued yellow cards in 2011 and 2016}

<table>
<thead>
<tr>
<th>Member State</th>
<th>2011</th>
<th>2016</th>
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<tbody>
<tr>
<td>Bulgaria</td>
<td>2</td>
<td>-</td>
</tr>
<tr>
<td>Denmark</td>
<td>-</td>
<td>2</td>
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<tr>
<td>Ireland</td>
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<tr>
<td>Luxembourg</td>
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<td>2</td>
</tr>
<tr>
<td>Malta</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Poland</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Romania</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Slovakia</td>
<td>2</td>
<td>-</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Sweden</td>
<td>2</td>
<td>2</td>
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<tr>
<td>\textit{Total}</td>
<td>14</td>
<td>12</td>
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The outcome provides a rather flattering picture of the skepticism. For example, the yellow card of \textit{UK House of Commons} does not count because it was issued too late.\textsuperscript{41} Furthermore, the national parliaments of \textit{Germany}, \textit{Finland}, \textit{Portugal} and \textit{Slovakia} primarily sent out critical messages, however without issuing a yellow card. The \textit{German Bundesrat} indicated to be skeptical towards the Commission’s initiative as a whole because of its lack of tax rate harmonization and its - as unfair perceived - sharing formula. According to the Bundesrat, \textit{Hochtechnologietaaten} placed are at a disadvantage since intangible assets are not taken into account in the formula.\textsuperscript{42} In my view, it is remarkable that even \textit{Germany} as one of the of the big Member States with, moreover, a solid industrial economy (i.e. a lot of fixed assets) calls into question the fairness of the sharing mechanism. Such critics used to come mainly from

\textsuperscript{37} According to the ECJ the legality of a measure can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. See for a recent example ECJ 8 June 2015, C-508/13 (Republic of Estonia vs European Parliament and Council of the European Union).

\textsuperscript{38} See Article 5, paragraph 3, TFEU in combination with Protocol nr. 2.

\textsuperscript{39} At least 1/3 of 65 votes (2 x 28 Member States).

\textsuperscript{40} The reasoned opinions of the national parliaments can be found on this website: www.ipix.eu.

\textsuperscript{41} \textit{The House of Commons} blames the holiday period for this in December.

\textsuperscript{42} Beschluss des Bundesrates, nr. 640/16, 16 december 2016, par. 6.
the smaller Member States with a smart economy, for example The Netherlands. However, the CCTB/CCCTB proposals did not receive just negative feedback. Supportive feedback was provided by the national parliaments of France, Austria and the Czech Republic.

5. Closing observations

What are the chances of success of the CCTB/CCCTB proposals? On the one hand it seems a smart move of the European Commission to relaunch its 2011 CCCTB project within the new international momentum to combat base erosion and profit shifting. The negotiations on the 2011 proposal between the Member States were hopelessly deadlocked and there seemed, even in the long run, no chance to reach a compromise. The OECD/BEPS project has paved to way to international tax coordination including – at European level – legally binding directives in the area of corporate income taxes. It is no surprise the European Commission tries to benefit from these developments and has put its most far-reaching and controversial proposal in direct taxation in history back on the agenda. The technical features of the proposal have been changed slightly. The most fundamental change is, however, the way the CCTB/CCCTB proposals is presented. The relaunched proposals are presented as the best medicine against erosion and profit shifting. The political effects of this new approach should in my view not be underestimated.

On the other side, it are difficult times for Europe. So difficult, in fact, that the European Commission felt compelled to present five scenarios for the future of Europe in a white paper. These five scenarios are not blue prints cast in stone, but of an illustrative nature to stimulate the debate. In two of the five scenarios the Member States will cooperate more intensively in the field of direct taxation. These scenarios include the scenario where certain Member States that want to do more deepen their cooperation (“Those who want more do more”) and the scenario where the EU comes close to a federal state (“Doing much more together”). In two other scenarios the cooperation in the field of taxation is limited. In the most realistic scenario, which is labeled in the white paper as “Carrying on” any guidance on the cooperation in the field of taxation is missing. In my view, this cannot be a coincidence as the future of the CCTB/CCCTB proposals is, in fact, unpredictable.

The meeting of the Ecofin Council on 23 May 2017 shows that it will be a major challenge for Member States to choose for a CCTB/CCCTB instead of tax competition. Although a public debate was held at the Ecofin meeting, the positions of many Member States remain mostly unclear. At first sight, almost all Member States seemed to support the proposals. However, German Finance Minister Schäuble observed the policy dilemma Member States face as follows:

“I have tried to listen as carefully as possible. And my conviction is that the problems will be very diffuse and very high and are increased by this discussion. Everybody has agreed we support this initiative, we need further political discussions, and technical work and so, but if we listen carefully we see it is a lot of problems. I would give the advice, once again what is really needed to make prioritization, to enhance competitiveness for the European Union and the Member States and the cohesion of the common market. I would give the advice that we

44 These scenarios are labeled as “Nothing but the single market” and “Doping less more efficiently”.
45 Only The Netherlands showed to be absolutely opposed.
46 See for a video of the debate: https://video.consilium.europa.eu/en/webcast/044d6f5d-a5ee-49e3-9d07-e7890b4103bb. Wolfgang Schäuble is speaking at 1.24h.
should rely on these two issues. Because if we want to get a Common Corporate even Consolidated Tax Base, I think we will discuss it again and again and again (...). Maybe we can draw some conclusions from this discussion in getting clearer views that we need to prioritize or not, on what is really needed. And otherwise we should be careful not to raise to high expectations (...)”

From the debate it can be further derived that some Member States are only willing to compromise on a CCTB if there is enough room for national policy choices. It goes without saying that this kind of flexibility would, in fact, make (harmful) tax competition still possible through the back door. Moreover, a CCTB which leaves all kind of policy choices to the individual Member States obviously makes it more difficult to agree on consolidation and apportionment as a second step (CCCTB).