

# Editorial

## *CCCTB: Enhanced Speed Ahead for Improvement*

**Prof. Dr Eric C.C.M. Kemmeren**, Professor of International Tax Law and International Taxation at the Fiscal Institute Tilburg of Tilburg University, The Netherlands\*

### ENTHUSIASTIC EUROPEAN COMMISSION

After intensive and extensive preparations, the European Commission presented enthusiastically and proudly the youngest scion of the direct tax directives family: Proposal for a Council Directive on a Common Consolidated Corporate Tax Directive (CCCTB).<sup>1</sup> The baby was born on 16 March 2011, or should we say that a proposal to the conception of a baby was born. In any case, the new kid (in a seminal stage) is said to be 'making business easier and cheaper'.<sup>2</sup>

The aim of proposed CCCTB is to significantly reduce the administrative burden, compliance costs, and legal uncertainties that businesses in the EU currently face in having to comply with up to twenty-seven different national systems for determining their taxable profits. Corporate taxation still creates serious obstacles to the establishment of the single market. Transnational companies have to deal with up to twenty-seven different tax laws for calculating their tax base and have to work with up to twenty-seven different tax administrations. Furthermore, they face extremely complex transfer pricing issue, can often not offset their losses in one Member State against profits in another, and face often taxation in case of transnational intra-group reorganizations. The Commission sees as a result that larger businesses are faced with huge costs and complexities, while smaller businesses are often completely deterred from expanding within the EU. Therefore, action at a European level is required.<sup>3</sup>

The proposed CCCTB means that companies will benefit from a 'one-stop-shop' system for filing their tax returns and will be able to consolidate all the profits and

losses they incur across the EU. It will be an optional system. This implies that companies that believe that they will benefit from it can opt in, while other companies can continue to work within their national systems. The CCCTB will offer companies one single set of corporate tax base rules to calculate their profits and the possibility of filing a single, consolidated tax return for their entire activity within the EU. On the basis of this tax return, the company's tax base will then be shared out among the Member States in which it is active, based on a specific formula taking into account three factors: assets, labour, and sales. Member States will tax their share at their own corporate tax rate. Under the CCCTB, Member States will continue to set their corporate tax rate at the level they see fit.

The Commission estimates that, every year, the CCCTB will save businesses across the EU EUR 700 million in reduced compliance costs and EUR 1.3 billion through consolidation. In addition, businesses looking to expand cross-border will benefit from up to EUR 1 billion in savings. The CCCTB will also make the EU a much more attractive market for foreign investors. The proud father, Commissioner Algirdas Šemeta, argued that the CCCTB 'will also open doors for SMEs looking to grow beyond their domestic market. Today's proposal is good for business and good for the EU's global competitiveness'.<sup>4</sup>

The CCCTB is an important initiative of the Commission in the context of the Europe 2020 Strategy.<sup>5</sup> It is also a part of a series of major policy documents that aim to remove obstacles to the establishment of the single market and stimulate growth and job creation within the EU.<sup>6</sup>

\* He is also a member of the board of the European Tax College, deputy justice of the Arnhem Court of Appeals (Tax Division), and of counsel to Ernst & Young, Tax Advisers in Rotterdam, the Netherlands.

<sup>1</sup> See Proposal for a Council Directive on a Common Consolidated Corporate Tax Directive (CCCTB), Brussels (COM)2011 121/4, 2011/0058 (CNS) (hereinafter 'Draft CCCTB Directive').

<sup>2</sup> See European Commission's press release of 16 Mar. 2011, Brussels, IP/11/319.

<sup>3</sup> See, Draft CCCTB Directive, 9-10.

<sup>4</sup> See European Commission's press release of 16 Mar. 2011, Brussels, IP/11/319.

<sup>5</sup> See Communication from the Commission, Europe 2020, 'A European Strategy for Smart, Sustainable and Inclusive Growth', Brussels, 3 Mar. 2010 COM(2010) 2020, 19.

<sup>6</sup> See, e.g., Communication from the Commission, 'Towards a Single Market Act for a Highly Competitive Social Market Economy, 50 Proposals for Improving Our Work, Business and Exchanges with One Another', Brussels, 27 Oct. 2010 COM(2010) 608 final, 16.

## 2 CONDITIONAL SUPPORT FROM THE EUROPEAN BUSINESS COMMUNITY

The CCCTB is supported by the European business community. BusinessEurope emphasizes that the CCCTB must be a competitive option for companies and enhance the attractiveness of the single market as a location for global investments. The support is also subject to the condition that the CCCTB excludes any form of tax rate harmonization.<sup>7</sup> However, not all business representatives in Europe are supporters.<sup>8</sup>

## 3 CRITICAL NATIONAL PARLIAMENTS

The enthusiasm of the Commission for the CCCTB and the support from the European business community are not shared by a number of national parliaments.<sup>9</sup> Draft legislative acts, such as the Draft CCCTB Directive, must also be sent to the national parliaments. They may send to the Commission a reasoned opinion stating that the draft legislative act does not comply with the principles of subsidiarity or proportionality.<sup>10</sup> Each national parliament has two votes, shared out on the basis of the national parliamentary system. In the case of a bicameral parliamentary system, each of the two chambers has one vote. This means that there are  $27 \times 2 = 54$  votes. If at least one-third of all the votes, that is, eighteen votes, represent non-compliance with the principles of subsidiarity or proportionality, the draft must be reviewed. After such review, the Commission may decide based on reasons to maintain, amend, or withdraw the draft. This procedure has received the name 'yellow card'.<sup>11</sup> The deadline for submitting reasoned opinions was 18 May 2011.

<sup>7</sup> See BusinessEurope, 'Common Consolidated Corporate Tax Base to Aim at Global Competitiveness for Cross-Border Business', Press release of 16 Mar. 2011.

<sup>8</sup> See, e.g., the Irish Business and Employers Confederation that holds that the CCCTB proposal is unlikely to make the EU more attractive as an investment location. See Press release of 16 Mar. 2011. It bases its position on a report prepared by Ernst & Young commissioned by a number of Irish business representative groups: 'Common Consolidated Corporate Tax Base: A Study on the Impact of the Common Consolidated Corporate Tax Base Proposals on European Business Taxpayers', January 2011. The impact study prepared by CPB Netherlands for Economic Policy Analysis and Oxford University Centre for Business Taxation commissioned by the European Commission: 'The Economic Effects of EU-Reforms in Corporate Income Tax Systems', October 2009, tends to different conclusions.

<sup>9</sup> See <[www.ipex.eu/ipex/cms/home/Documents/dossier\\_CNS20110058](http://www.ipex.eu/ipex/cms/home/Documents/dossier_CNS20110058)>, 9 Jul. 2011.

<sup>10</sup> See Arts 5 and 12 Treaty on European Union (TEU) in conjunction with of Art. 3 of Protocol 1 and the procedure laid down in Protocol 2 to the TEU.

<sup>11</sup> See, e.g., Koen Lenaerts & Piet van Nuffel, *European Union Law* (London: Sweet & Maxwell, 2011), 136–138. If it concerns a matter falling under the ordinary legislative procedure and the threshold of half of the votes, that is, twenty-seven votes, is met and the Council and the European Parliament share the view of this group of national parliaments, the legislative proposal shall not be given further consideration. This is called the 'orange card' procedure.

According to the information available on the website mentioned, reasoned opinions were sent in by the national parliaments of Bulgaria, Ireland, Malta, The Netherlands (*Tweede Kamer*), Poland (*Sejm*), Romania (*Camera Deputatilor*), Slovakia, and Sweden. It is amazing that the UK is not mentioned, since it was reported in the media that the UK House of Commons passed a motion to send a reasoned opinion as well.<sup>12</sup> In any case, the threshold of eighteen was not met. The information was taken from the website, and the result was thirteen votes.

From this perspective, this means that the European Commission can enthusiastically go forward with the CCCTB Directive as proposed. However, the concerns expressed by the national parliaments are also a political reality. Among other things, concerns have been expressed, such as the following: that the introduction of the CCCTB may lead to a decrease of the EU's gross domestic product with 0.2% and, in a number of Member States, to a negative impact on welfare, a negative impact on investments, and revenue loss; that the Commission is interfering with the tax sovereignty belonging to the Member States when it argues that the impact on the revenues of Member States will ultimately depend on national policy choices with regard to possible adaptations of the mix of different tax instruments or applied tax rates; that the introduction of the CCCTB triggers additional enforcement expenses because a Member State must administer two systems, which do not outweigh the benefits; that the current double tax conventions are not tailored to the CCCTB; and that the suggested formula to share the tax base is disadvantageous to Member States with a substantial service sector because intangible and financial assets are not included.<sup>13</sup>

## 4 CRITICAL NATIONAL GOVERNMENTS

Not only national parliaments are critical, but also, the same is true for a number of governments. Not only the usual suspects such as the Irish and the British but also the German<sup>14</sup> and the Netherlands<sup>15</sup> governments oppose the Draft CCCTB Directive. Similar arguments as expressed by national parliaments have been used by governments. It seems that Member States such as Belgium, the Czech Republic, France, Italy, Luxembourg, and Spain support or lean in favour of the

<sup>12</sup> See, e.g., Kristen A. Parillo, '9 EU Countries Express Subsidiarity Concerns over CCCTB Proposal', *World Tax Daily (WTD)* (26 May 2011): 102-1.

<sup>13</sup> See, e.g., the reasoned opinion of the Netherlands *Tweede Kamer* included in letter of 29 Apr. 2011 to the European Commission. See *Kamerstukken II*, 2010/11, 32 728, No. 4.

<sup>14</sup> See, e.g., Norbert Herzig, *Berlin bremst CCCTB-Projekt – von der GKKB zur GKB* (Handelsblatt, 13 May 2011).

<sup>15</sup> See answers of the Netherlands State Secretary of Finance to Members of Parliament of the *Tweede Kamer* of 4 Jul. 2011, No. AFP/2011/300U.

proposal.<sup>16</sup> In any case, the Commission cannot neglect the criticism of the opposing governments, because it needs them in the Council to get the CCCTB flying. Based on Article 115 TFEU, the adoption of the Draft CCCTB Directive requires that the Council acts unanimously.

## 5 CRITICAL ACADEMIA

Already in the process of preparing the Draft CCCTB Directive, academics have been critical as well.<sup>17</sup> However, a large group of academics is supporting the underlying idea but sees room for improvement. I am one of them.<sup>18</sup> Now that the concrete text of the Draft CCCTB Directive is there, much more ideas for improvement will be developed and published, also in this journal.

What is striking is that most of the arguments produced by national parliaments and governments that are opposing the CCCTB concept focus on their internal positions or on their positions compared to other Member States. They seem to neglect almost completely the original idea of the EU that aims at a regionally highly integrated economy in order to compete with third countries and other trade blocks to improve welfare within the EU as a means of establishing a sustainable peaceful Europe. The idea is that, together as the EU, the Member States can better strengthen their global competitiveness than when they are on their own. Establishing a single market is essential to reach this aim. An improved CCCTB Directive can contribute to this aim and should therefore be supported. I call upon the critical national parliaments and government to focus more on the relationship of the EU with third countries and other trade blocks when discussing improvements of the Draft CCCTB Directive and less on their domestic issues or on intra-EU relationships. What is good for the EU is, in the end, also good for the individual Member States and their people.

<sup>16</sup> See, e.g., <[www.iiea.com/blogsphere/ccctb--dead-on-arrival](http://www.iiea.com/blogsphere/ccctb--dead-on-arrival)> 9 Jul. 2011.

<sup>17</sup> See, e.g., the voluminous and comprehensive book edited by Michael Lang et al., 'Common Consolidated Corporate Tax Base', *Schriftenreihe zum Internationalen Steuerrecht* (Wien, Österreich: Linde Verlag, 2008), 53, in which a large number of academics presented their ideas.

<sup>18</sup> See, e.g., Eric C.C.M. Kemmeren, 'CCCTB and Exemption Method for PEs and Major Shareholdings', in *Common Consolidated Corporate Tax Base*, ed. Michael Lang (Linde Verlag, 2008), 653–704.

## 6 ENHANCED COOPERATION FOR IMPROVEMENT

Considering the current developments, it is rather unrealistic to assume that all twenty-seven Member States will accept an improved version of the Draft CCCTB Directive as from the start. As mentioned, the adoption of a directive requires unanimity within the Council and that is very unlikely to happen. Germany, although opposing the draft directive, has already suggested ideas that it considers to constitute improvements, for example, it does favour standardization of all rules on what is taxable or not across Europe. Therefore, in the end, Germany may be on board for an improved CCCTB Directive.<sup>19</sup> Other critical Member States may follow the German example. Furthermore, six other Member States already support the Commission's proposal or are leaning in favour of it. As a consequence, there may hopefully be a sufficient number of Member States that will support and implement an improved CCCTB Directive. In order to avoid the unanimity blockade, the track of enhanced cooperation based on the Articles 326–334 TFEU can be followed. Then we need only nine Member States to get the CCCTB started.<sup>20</sup> I call upon the Member States and the Commission to move as quickly as possible to the track of enhanced cooperation, so that we do not lose valuable time on Member States that are not supportive (yet). This is in the benefit of Europe. Later on, other Member States can join this group of forerunners when they come to the understanding that an improved CCCTB is also for their benefit. We have seen a similar development with regard to the EURO, which is overall still a big success despite the financial problems that some individual Member States face at this moment. So, enhanced speed ahead for an improved CCCTB Directive, so that it can become a full member of the direct tax directives family!

<sup>19</sup> Although at this moment, it seems to prefer no consolidation, thus a CCTB.

<sup>20</sup> See also, e.g., Eric C.C.M. Kemmeren, 'Traditional and Alternative Routes to European Tax Integration, Primary Law, Secondary Law, Soft Law, Coordination, Comitology and their Relationship', in *Sources of EU Law for European Tax Integration: Well-Known and Alternative Legal Instruments*, ed. Dennis Weber (IBDF, Amsterdam 2010), 29–49.