

Position

POSITION OF FEDIL – DIRECTIVE ON CCTB/CCCTB

FEDIL position paper on the European Commission's proposals for a directive on a common corporate tax base (COM (2016) 685 final), hereafter CCTB, and on a common consolidated corporate tax base (COM (2016) 683 final), hereafter CCCTB, of 25 October 2016

On 25 October 2016, the European Commission presented a new proposal for a common consolidated corporate tax base (CCCTB) within the EU as part of its package of corporate tax reforms. Unlike the 2011 project, the 2016 proposal was divided into two separate frameworks, one with full consolidation (CCCTB) and the other without (CCTB). Discussions on the consolidated proposal (CCCTB) should only begin after the adoption of the CCTB.

General comments

FEDIL supports the Commission's intention to improve the functioning of the single market by proposing a harmonized tax regime for companies. In order to stimulate investment, growth and job creation in the EU, it is important to remove tax obstacles to cross-border investment in the single market, as well as with third countries. A common consolidated corporate tax base has the potential to reduce administrative burden for businesses and facilitate cross-border activities within the EU.

Nevertheless, FEDIL has identified a number of elements that could negatively impact businesses and the economy in general, as well as a number of questions regarding the proposal's potential to reduce administrative burden. At this stage, these elements prevail over the potential benefits to companies. In particular, we would like to emphasize that the proposal for a CCTB, i.e. without the consolidation element, would certainly not satisfy companies, including in terms of administrative simplification. Moreover, in the absence of harmonized accounting rules within the EU, the framework proposed by the Commission may increase the complexity for companies that will have to set up a specific tax accounting system.

Finally, the timing of the CCCTB and CCTB proposals is unfortunate as many changes need to be implemented in the near future by EU member states: the BEPS project at OECD level or the ATAD (Anti-Tax Avoidance Directive) 1 and ATAD 2 directives at European level. These changes are already requiring major adaptations by multinational companies.

Specific comments



As for the objective of harmonizing tax bases in the EU

- Rules in the existing CCTB proposal are too general and there is a significant **risk of divergent interpretations** within different EU Member States. The experience with VAT shows that, after the introduction of a single harmonized tax regime, all questions of interpretation have not been resolved and differences of interpretation persist between Member States, affecting a harmonized application. Moreover, the problem of fraud remains.
- The EU has already taken a number of steps towards increased harmonization and even goes beyond what the States participating in the BEPS project had committed to: ATAD1, ATAD2, CRS, etc.
- The accounting result generally represents the starting point in determining the taxable income of companies: unless the CCTB project intends to detach itself completely from the accounting result in the determination of the tax base, failing **harmonization of the accounting rules** within the different Member States will make it difficult to harmonize taxable bases within the EU.

Regarding the objective of simplifying the tax rules applicable to companies

- **Increased complexity** for businesses due to the coexistence of different tax systems depending on a company's turnover (plus or less than 750 million € in turnover): legal uncertainty for companies (due to a potential change to a different tax system from one year to another) and increased complexity for tax administrations to manage simultaneously two tax systems in parallel.
- **Impact on mergers and acquisitions:** What would be the impact in case a company under the CCCTB regime wants to acquire a business that is not? The coexistence of several tax systems make mergers and acquisitions more complex, for example in regards to the integration of a different tax system. How will the past be managed? What about the losses carried forward? What about the stock of tax credits? Financial information may become illegible.
- Risk that the obligation for large groups (i.e. turnover of more than 750 million €) to submit to the CCCTB regime results in **disproportionate negative impacts** between sectors of activity or between countries.
- **Increased complexity** due to the application of potentially different rules between EU Member States and third countries.
- **Increased complexity** due the fact that the ATAD 1 and ATAD 2 directives have already set up part of the CCTB system within the EU. Indeed, the ATAD 1 & 2 directives and the draft CCTB framework introduce measures which have the same objectives but some of the operating rules diverge.
- **Technical complexity:** the distribution of taxable profits on the basis of a formulary apportionment system taking into account certain criteria (according to the consolidation project) is inconsistent with the transfer pricing principles of the OECD which are recognized by all EU Member States and that the OECD is adapting according to global tax practices with the support of the EU. This is even in contradiction with the BEPS project and recent investigations into State aid tax which consider transfer prices a central element.
- **Technical complexity** as some Member states subject their companies not only to "federal" or "state" taxes but also to local taxes (ICC in Luxembourg).
- **Lack of visibility** on the impact of the changes brought by ATAD and ATAD 2 which have not yet been transposed by the Member States and will only have to be implemented by 2019/2020. Hence, how can we measure now whether additional measures are really necessary? Should we not first assess the impact of ATAD before moving on to the next



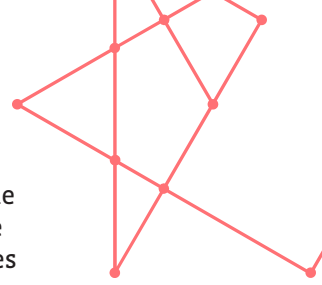
stage?

As for the potential implications for the EU and its Member States

- **Loss of EU competitiveness in relation to third countries:** The CCCTB, and even the CCTB, will not only affect relations between EU Member States, but will also affect competitiveness compared to other countries. As such, tax competition does not stop at EU borders and the competitive position of Europe in the world (i.e. with regard to the United States of America, Asia ...) is at stake. The EU has already gone beyond the requirements of BEPS with ATAD 1 & 2, which is already problematic in terms of EU competitiveness. The introduction of additional measures, which would create further complexity, could constitute a burden for foreign investment in the EU and could even lead to disinvestment from companies already established in the EU.
- **A static European tax system:** Unanimity among Member states is required for any change in the EU corporate tax framework. This means that the system risks to be static and could not evolve as needed. In contrast, third countries could react much more quickly and would have much more flexibility and room for maneuver to meet their needs as well as those of companies, compromising the EU's competitiveness for tax purposes.
- **Lack of analysis of the impact** of CCTB/CCCTB in relations with third countries. The interaction of the CCCTB with international tax treaties is totally ignored, in particular in regards to access to tax concessions for companies that would be part of fiscal consolidation within the CCCTB. Would a taxation determined by the distribution formula change the way we consider the "liable to tax" or how to apply, for example, the 'Controlled Foreign Companies' rules?

As for the Research & Development regime provided in the proposal:

- **Two different approaches:** the proposed CCTB directive tends to favor investment in R&D by granting tax deductions in favor of R&D expenditure. It differs from the alternative approach, namely, a partial exemption from the positive net income generated by certain intellectual property rights. Which approach is the most effective for companies (tax advantages, administrative, easily accessible system ...)? Which regime seems most attractive compared to other existing regimes (EU and non-EU)? Both approaches are in line with the conclusions of the BEPS Final – Action 5 on Harmful Tax Practices. Nonetheless, the BEPS Final Report focuses on an income exemption method, provided there is a direct link between the benefit income and the expenditures contributing to the income.
- **Lack of precision** in the chosen definition of R&D activities eligible under the incentive scheme provided by the proposal: The definition of R&D activities in Article 4 (11) remains too generic, making it difficult to identify eligible expenditure. It would be useful to list precisely the expenditures that would never be eligible and to give examples of eligible expenses (contracts, salaries, supplies, etc.). While the BEPS Final – Action 5 leaves room for adopting incentive tax regimes, it seems that too broad a definition of eligible expenditure could lead to a regime that would fall under the category of "harmful tax practices" in the sense of this report.
- **Optional incentive scheme:** the Proposal inserts the R&D tax regime within the Common Base, although the latter could exist independently. Access to the R&D tax system is possible for companies subject to the rules of the common corporate tax base (large multinational groups), whereas companies for which the CCTB regime is only optional must opt



in. The link between the common corporate tax base and the R&D regime is not obvious. It seems that small and medium-sized companies may be interested in this R&D scheme, without considering using the other rules of the CCTB.

- **Articulation between the scheme proposed by the EU and the various national schemes:** some countries already have R&D schemes. Will these plans continue after the CCCTB has been adopted? Will companies be able to choose between the national scheme and the scheme proposed by the EU? Would it not raise issues of equality before the law and taxation (e.g. a large company that could not opt for the more favorable national regime)?
- In terms of competitiveness, taking advantage of the CCTB system while improving it would be advised. As the new intellectual property tax regime is only announced in Luxembourg by 2018, the acceleration of the adoption of these measures and/or their combination with the CCTB system could be potential tracks to explore. Finally, one should also take into consideration the existence of more attractive regimes than that proposed by the CCTB, as it is the case in the United Kingdom.