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EU Perspective Note – Tax Consolidation: Status and Prospects

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A significant body of case law has been developed by the Court of Justice of the European Union (CJEU) addressing the tax consolidation or fiscal unity regimes of various EU Member States, particularly under the freedom of establishment enshrined in the Treaty on the Functioning of the European Union (TFEU) (see I., below). Confronted with the diversity of those regimes, and *inter alia* with a view to reducing the case load of the CJEU in this area, the Commission, in 2011 and again in 2016, presented its own tax consolidation concept in the (wider) context of the Common (Consolidated) Corporate Tax Base (C(C)CTB) proposals (see II., below).

I. The CJEU and tax consolidation

The case law developed by the CJEU on various EU Member States' tax consolidation or fiscal unity regimes principally[1] emerged in the context of the freedom of establishment rather than the free movement of capital. This is logical since, according to the CJEU, the free movement of capital applies only in situations where a person neither pursues an economic activity nor has a permanent presence in the State in which the (tax) measure under challenge was enacted, or – more relevantly for the subject at hand – where a shareholder has an insufficient level of participation in a company to benefit from the freedom of establishment rules.[2]

The seminal case was *Papillon*,[3] which concerned the (then applicable) French tax group rules giving a French group of companies the right to make an election allowing the ultimate parent of the group to take into account all of the profits and losses of the group companies and thus become the only corporation taxpaying entity in the group. The claimant, Société Papillon, made such an election, but the election was rejected because the group structure included some French sub-subsidiaries that were held through a Dutch subsidiary and the French rules required all companies in the chain to be French taxpayers. The CJEU pointed out that the French rules at issue were aimed at treating, to the extent possible, a group constituted by a parent company and its subsidiaries and sub-subsidiaries in the same way as an undertaking with a number of permanent establishments (PEs), by allowing the results of each company to be consolidated. Because that objective can be attained both in the situation in which a parent company resident in a Member State holds sub-subsidiaries also resident in that State through a subsidiary that is itself resident, and in the situation in which a parent company resident in the same Member State holds sub-subsidiaries that are also resident in that State, but through a subsidiary established in another Member State, those situations must be considered to be objectively comparable. Consequently, the tax regime at issue amounts to a restriction on the freedom of establishment, inasmuch as, from a tax perspective, it gives rise to unequal treatment based on the place of the registered office of the subsidiary through which the resident parent company holds its resident sub-subsidiaries and thus puts structures involving EU subsidiaries in a disadvantageous position compared to structures involving purely domestic subsidiaries. The CJEU rejected the need to prevent losses being used twice and the risk of tax avoidance as grounds of justification for this treatment because, in the case at hand, the question of whether the profits and losses of companies belonging to the group should be taken into account arose only in relation to companies that were resident in a single Member State (i.e., the question did not concern whether a nonresident subsidiary should be capable of falling within the group taxation regime). For the same reason, the restriction could, in the Court's view, not be justified by the allocation of the power to impose taxes between Member States. On the other hand, the CJEU considered that the restriction was justifiable based on the need to ensure the coherence of the tax system. The reasoning of the Court was that the French tax integration regime at issue provided for the tax consolidation of companies and, to offset this, for the neutralization of certain transactions between the group companies to prevent, *inter alia*, the use of losses twice at the level of resident companies falling within the tax integration regime.

In the case of losses recorded by a sub-subsidiary, the subsidiary will generally provide for the depreciation of its holding in that sub-subsidiary and the parent company will, as a result, provide for the depreciation of its holding in the subsidiary. Since those circumstances involve one and the same loss, originating at the level of the sub-subsidiary, where each of those companies is subject to the tax integration regime, the neutralization mechanism results in the provision for depreciation made by the parent company and the subsidiary being disregarded. However, should the subsidiary be a nonresident company, the losses recorded by the sub-subsidiary would be taken into account twice, first, in the form of the direct losses of that sub-subsidiary and, secondly, in the form of a provision made by the parent company for the depreciation of its holding in that subsidiary. The internal transactions would not be neutralized because a nonresident subsidiary is not subject to the tax integration regime. As a result, the direct link that exists under the tax integration regime between the tax advantages and the neutralization of intra-group transactions would be eliminated, thereby affecting the coherence of the regime. Eventually, however, the Court rejected the fiscal coherence defense for proportionality reasons, as the French legislation at issue prevented resident companies holding resident sub-subsidiaries through subsidiaries that are resident in another Member State from proving that there was no risk of losses being used twice under the tax integration regime.

In *X Holding*,[4] a Dutch resident parent company sought to form a fiscal unity with its loss-making Belgian resident subsidiary. Under the Dutch fiscal unity regime, however, only Dutch resident companies and nonresident taxpayers having PEs in the Netherlands are eligible to enter into a tax consolidation. The CJEU found the regime to be *prima facie* incompatible with the freedom of establishment. The Court reasoned that the situation of a resident parent company wishing to form a single tax entity with a resident subsidiary and the situation of a resident parent company wishing to form a single tax entity with a nonresident subsidiary are objectively comparable with regard to the objective of a tax scheme such as that at issue in the main proceedings, insofar as, in each case, the parent seeks to benefit from the advantages of the scheme (in particular, from the fact that the scheme allows the profits and losses of the companies constituting the single tax entity to be consolidated at the level of the parent company and the transactions carried out within the group to remain neutral for tax purposes). However, in the CJEU's view, the regime is justified (and proportionate) in view of the need to safeguard the allocation of the power to impose taxes between the Member States. This is because, since the parent company is at liberty to decide to form a single tax entity with its subsidiary and at equal liberty to dissolve such an entity from one year to the next, allowing a nonresident subsidiary to be included in the single tax entity would be tantamount to granting the parent company the freedom to choose the tax scheme applicable to the losses of that subsidiary and the place where those losses are taken into account, thus allowing the parent company to choose freely the Member State in which the losses of the subsidiary are to be taken into account.

In *SCA Group Holding and Others*,[5] however, the CJEU held the Dutch fiscal unity rules to be in breach of the freedom of establishment because they did not allow the formation of: (1) a fiscal unity between a Dutch parent company and a Dutch sub-subsidiary held through an EU/European Economic Area (EEA) intermediate subsidiary; or (2) a fiscal unity between two Dutch "sister" companies held through a joint EU/EEA parent company. According to the Court, the rules create a difference in treatment since the ability to elect for the tax entity regime is dependent on whether the parent company holds its indirect stakes through a subsidiary established in the Netherlands or in another Member State (which is in line with the decision in *Papillon*, Case C-41/13, referred to above). An analogous difference of treatment exists where resident sub-sub-subsidiaries cannot be integrated into a tax entity with the resident parent company because both the intermediate subsidiary and the intermediate sub-subsidiary are established in another Member State (Case C-39/13). Finally, the legislation at issue also creates a difference in treatment between: (1) a parent company whose seat is in the Netherlands, which, thanks to the single tax entity regime may, *inter alia*, in determining its taxable profit, immediately set off the losses of its loss-making subsidiaries against the profits of its profit-making subsidiaries; and (2) a parent company that also owns subsidiaries in the Netherlands but has its seat in another Member State and does not have a PE in the Netherlands, which is excluded from benefitting from the single tax entity regime and, therefore, from the cash-flow advantage that that regime bestows (Case C-40/13).

In Case C-39/13 and Case C-41/13, the CJEU referred to the Dutch participation exemption, under which profits or losses resulting from the possession, acquisition or disposal of a holding are not taken into account in determining the taxable profit of a tax entity. It is, therefore, through this general exemption, and not through specific provisions for the neutralization of certain transactions (as was the case in *Papillon*), that the Dutch tax system seeks to prevent the double use of losses within a tax entity. Accordingly, no direct link can be established between the granting of the tax advantage linked to the formation of a tax entity and the offsetting of that advantage by a particular tax. Consequently, the restriction on the freedom of establishment resulting from the national legislation cannot be regarded as justified by an overriding reason in the public interest based on preserving the coherence of the tax system. The CJEU also rejected the argument that the rules were justified on the grounds of the risk of tax avoidance, reiterating its settled case law that those grounds do not, by themselves, constitute an autonomous justification for a tax restriction on the freedom of establishment if they are not relied on in conjunction with a specific objective of combatting wholly artificial arrangements that do not reflect economic reality and whose purpose is to escape the tax normally due.

In Case C-40/13, which related to a fiscal unity between Dutch "sister" companies, the CJEU concluded that the objective of the tax entity regime at issue, which is to allow companies in the same group to be regarded for tax purposes as if they constituted one and the same taxpayer, can be achieved both by groups whose parent company is Dutch-resident and by groups whose parent company is not Dutch-resident, at least insofar as this concerns solely the taxation of the sister companies that are taxable in the Netherlands. The difference in treatment, as regards the possibility of integrating sister companies for tax purposes, is therefore justified neither by an objective difference in situations (i.e., between the situation in which the parent is Dutch-resident and that in which it is non-Dutch resident) nor by an overriding reason in the public interest based on the coherence of the tax system, related to the prevention of the double use of losses.

Building on its decision in *X Holding* (see above),[6] in *Groupe Steria*,[7] the CJEU found the French consolidation rules providing for a full exemption of dividends paid between members of a "tax-integrated group" (i.e., a fiscal unity), while (as French law does not allow the formation of a fiscal unity in cross-border situations) dividends received from companies outside a tax group (such as EU subsidiaries) were only 95% exempt, to be non-compliant with the freedom of establishment (and the free movement of capital). This is commonly referred to as the "per element" approach, i.e., taxpayers that are unable to enter into a fiscal unity with subsidiaries established elsewhere in the European Union are nevertheless eligible for benefits from separate elements of the fiscal unity regime as if a fiscal unity with foreign subsidiaries could be entered into. In *X*,[8] the CJEU confirmed that the "per element" approach is also applicable to the Dutch fiscal unity regime. At issue was a provision of the Dutch Corporate Income Tax Act disallowing the deduction of interest paid on a debt to an affiliated party where the debt is used to fund a capital contribution, a dividend distribution or an acquisition of a participation ("tainted transactions"), depending on the business motives for the transaction and the way in which the loan is structured. However, since such tainted transactions are usually invisible if they occur within a Dutch fiscal unity, the application of the provision at issue could generally be avoided in domestic situations. Since the benefits of the Dutch fiscal unity regime are limited to Dutch tax-resident entities, such benefits cannot be obtained in cross-border situations, which the CJEU considered to amount to a (non-justifiable) restriction to the freedom of establishment.

In sum, under the *Groupe Steria* doctrine and the "per element" approach adopted in that case, as further clarified by the CJEU in subsequent cases, cross-border company structures may not automatically be excluded from all the benefits of group taxation regimes. Instead, generally, a case-by-case assessment has to be made.

II. The common consolidated corporate tax base

A. General

On March 16, 2011, the European Commission issued a Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (the "2011 CCCTB Proposal"),[9] which it eloquently described as a holistic solution to profit shifting. The general objective of this proposal was to improve the simplicity and efficiency of the corporate income tax systems in the European Union, thus contributing to the better functioning of its internal market. In summary, the proposal's specific objectives were to: reduce tax-related compliance costs for companies; eliminate double taxation; and eliminate the over-taxation of cross-border economic activity, among other things, by enabling cross-border loss relief. Under the 2011 CCCTB Proposal, the CCCTB is a proposed system of standardized rules for computing the tax base of a (qualifying) corporate group with subsidiaries and/or PEs in EU Member States, allowing it to consolidate its profits and losses. The consolidated result is subsequently allocated by means of an apportionment formula to the group members in the Member States in which the group has a taxable presence. Member States then apply their own national tax rates to the amounts so allocated to calculate the tax due in each Member State. The building blocks of the CCCTB are: (1) depreciation and assets; (2) provisions and reserves; (3) taxable income; (4) foreign income and relations outside the European Union; (5) consolidation; and (6) formulary apportionment. In essence, the system was intended to ensure that a group of companies would only have to comply with one EU system for computing its taxable profits and would only be required to file a single tax return with a single tax authority.

Since its publication, the 2011 CCCTB Proposal has been met with opposition from a number of Member States, either by way of the formal objection procedure, popularly known as the "yellow card" procedure, or informally, for example, via government statements. Given the attitude of some Member States, it became increasingly doubtful whether the unanimity required for the Directive's adoption could be achieved and the suggestion was made that the procedure of enhanced cooperation[10] might well be the only way for the CCCTB ever to come into existence.

Against this backdrop, on June 17, 2015, the Commission announced, as part of its Action Plan for Fair and Efficient Corporate Taxation in the European Union,[11] that it would come forward with a new proposal to revive the CCCTB within 18 months. The proposal would be for a mandatory CCCTB, at least for qualifying multinational companies, that would be introduced via a step-by-step approach, i.e., the first step would be for consolidation to be postponed so as to allow Member States to progress more quickly on other aspects of the CCCTB, particularly the common base and international elements to prevent base erosion and profit shifting (an element of cross-border loss relief would also be included); once the common base was secured, consolidation would then be introduced as the second step. Thus, on October 25, 2016, the Commission relaunched the CCCTB-project by submitting, simultaneously and as part of a single initiative, two proposals: one for a common corporate tax base (the "2016 CCTB Proposal"); and another for the CCCTB (with a simultaneous repeal of the 2011 CCCTB Proposal) (the "2016 CCCTB Proposal").

B. The common corporate tax base

The 2016 CCTB Proposal defines the elements of the common base and lays down the rules for calculating the corporate tax base, including certain provisions against tax avoidance and on the international dimension of the proposed tax system. Two additional topics are covered, as compared to the 2011 CCCTB Proposal, namely rules against debt bias and a super-deduction for R&D. A company that applies these rules would cease to be subject to the national corporate tax law with respect to all matters regulated by the CCTB Directive (once adopted), unless otherwise stated.[12]

An in-depth analysis of the 2016 CCTB Proposal is beyond the scope of this note.[13] Rather, in what follows the focus is on the consolidation aspect that is at the core of the 2016 CCCTB Proposal.

C. Consolidation

Under the 2016 CCCTB Proposal, the CCCTB is a proposed system of standardized rules for computing (based on the CCTB rules) the tax base of a (qualifying) corporate group with subsidiaries and/or PEs in EU Member States, allowing it to consolidate its profits and losses. The consolidated result is subsequently allocated by means of an apportionment formula to the group members in the Member States in which the group has a taxable presence. The Member States then apply their own national tax rates to the allocated amounts to calculate the tax due in each Member State. In essence, the system means that a group of companies will only have to comply with one EU system for purposes of computing its taxable profits and will only be required to file a single tax return with a single tax authority.

Eligibility for a consolidated tax group is determined using a two-part test based on: (1) control (more than 50% of voting rights); and (2) ownership (more than 75% of equity) or rights to profits (more than 75% of rights carrying entitlement to profits). To guarantee the integrity of the system, the two thresholds for control and ownership or profit rights must be met through-out the tax year;[14] when a company fails to pass the test, it must leave the group immediately. To prevent manipulation of the tax results by having companies join and leave a group on a short-term basis, there is a minimum requirement of nine consecutive months for establishing group membership.[15] A company that applies the CCCTB rules ceases to be subject to its national corporate tax law with respect to all matters governed by the rules.[16]

Specifically, the CCCTB rules are to have mandatory application to a company that is established under the laws of a Member State, including its PEs in other Member States, where the company fulfills all of the following conditions: (1) it takes one of the company forms listed in Annex I; (2) it is subject to one of the corporate taxes listed in Annex II or to a similar tax introduced subsequently; (3) it belongs to a consolidated group for financial accounting purposes with a total consolidated group revenue that exceeded 750 million euros in the financial year preceding the relevant financial year; and (4) it qualifies as a parent company or a qualifying subsidiary and/or has one or more PEs in other Member States.[17] For this purpose, a "qualifying subsidiary" means any immediate or lower-tier subsidiary in which the parent company: (1) has a right to exercise more than 50% of the voting rights; and (2) has an ownership right amounting to more than 75% of the subsidiary's capital or owns more than 75% of the rights carrying entitlement to profits. In relation to lower-tier subsidiaries, once the voting-right threshold is reached with respect to a subsidiary, the parent company will be considered to hold 100% of the rights concerned. While entitlement to profits and ownership of capital are to be calculated by multiplying the interests held, directly and indirectly, in subsidiaries at each tier, ownership rights amounting to 75% or less held directly or indirectly by the parent company, including rights in companies resident in a third country, must also be taken into account in the calculation.[18] On the other hand, the concept of a PE is closely tied to the post-BEPS recommended definition of a PE in the OECD Model Tax Convention. Unlike that in the 2011 CCTB Proposal, the revised definition covers only PEs situated within the European Union and belonging to a taxpayer that is resident for tax purposes within the European Union, thus leaving the third-country dimension to be dealt with in bilateral tax treaties and national law.

The CCCTB also applies to a company that is established under the laws of a third country with respect to its PEs situated in one or more Member States where the company fulfills the conditions set out above in (1) to (4). As regards whether a company fulfills condition (1) (i.e., "corporate form"), it is sufficient that a company in a third country has a similar form to one of the company forms in Annex I and, for this purpose, the Commission will annually adopt a list of third country company forms that are similar to the company forms listed in Annex I. However, the fact that a third country company form is not included in that list will not preclude the application of the CCCTB rules to that form.[19]

A company that fulfills conditions (1), (2) and (4), but does not fulfill condition (3) may opt (including for its PEs situated in other Member States) to apply the CCCTB rules for a period of five tax years. That period is automatically extended for successive terms of five tax years (provided conditions (1), (2) and (4) continue to be fulfilled), unless there is a notice of termination.[20] The CCCTB rules do not apply to shipping companies operating under a special tax regime.[21]

The CCCTB is centered around the concept of a "principal taxpayer." A "principal taxpayer" means one of the following: (1) a resident taxpayer that forms a group with its qualifying subsidiaries, with one or more of its PEs located in another Member State or Member States or with one or more PEs of a qualifying subsidiary that is resident in a third country; (2) a resident taxpayer designated by a group that is composed of only two or more resident taxpayers that are immediate qualifying subsidiaries of the same parent company resident in a third country; (3) a resident taxpayer that is the qualifying subsidiary of a parent company resident in a third country, where that resident taxpayer forms a group with only one or more PEs of its parent; or (4) a PE designated by a nonresident taxpayer that forms a group with only its PEs located in two or more Member States.[22] A "principal tax authority" is the competent authority of the Member State in which the principal taxpayer is resident for tax purposes or, in the case of a PE of a nonresident taxpayer, the Member State in which that PE is situated.[23]

For purposes of the CCCTB rules, a resident taxpayer[24] forms a group with: (1) all its PEs that are situated in a Member State; (2) all PEs that are situated in a Member State and belong to its qualifying subsidiaries that are resident in a third country for tax purposes; (3) all its qualifying subsidiaries that are resident in a Member State for tax purposes, including the PEs of those subsidiaries where such PEs are situated in a Member State; and (4) other resident taxpayers, including their PEs that are situated in a Member State, where all those resident taxpayers are qualifying subsidiaries of a nonresident taxpayer that is resident in a third country for tax purposes, has a similar form to one of the company forms in Annex I and meets the total consolidated group revenue threshold.[25]

A nonresident taxpayer forms a group with respect to all of its PEs that are situated in one or more Member States and with all of its qualifying subsidiaries that are resident in a Member State for tax purposes, including the PEs of those subsidiaries where such PEs are also situated in one or more Member States.

A company in insolvency or liquidation may not become a group member. A taxpayer with respect to which a declaration of insolvency is made or that is liquidated must leave the group immediately.

Once the "tax base" (i.e., the individual tax results) of each group member has been determined (based on the CCTB rules), all the tax bases of the group members are aggregated. The CCCTB Proposal does not provide detailed guidance as to how the consolidation is to be made. As a result of this pooling of tax bases, losses incurred by one consolidated group member company will be set off against profits of another consolidated group company, regardless of the companies' Member State of residence or establishment. Thus, the CCCTB arguably offers a solution to the general unavailability of (EU) cross-border relief, an issue repeatedly on the agenda of the CJEU.[26]

Another deemed benefit arising from cross-border consolidation is the elimination of (the tax impact of) intra-group transactions for companies participating in the CCCTB group, i.e., profits and losses arising from transactions carried out directly between members of a group are to be ignored.[27] In the Commission's view, this should help eliminate transfer pricing issues and related compliance costs within such groups.

D. Apportionment

Where the consolidated tax base is negative, the loss may be carried forward and set off against the next positive consolidated tax base. Where the consolidated tax base is positive, it is apportioned between the members of the group (and thus indirectly between the respective Member States) in accordance with the formulary apportionment mechanism set out in Chapter VIII of the 2016 CCCTB Proposal.[28]

The idea behind this "sharing" mechanism is that companies should pay taxes in proportion to their economic presence in a country. According to the Commission, the objectives of the sharing mechanism are: (1) to be as simple as possible to apply for taxpayers and tax administrations; (2) to be easy for tax administrations to audit; (3) to be difficult for taxpayers to manipulate; (4) to distribute the tax base among the various entities concerned in a way that can be considered fair and equitable; and (5) not to lead to undesirable effects in terms of tax competition. The 2016 CCCTB Proposal achieves this "sharing" or apportionment based on a formulary apportionment mechanism that comprises three equally-weighted factors, i.e., labor, assets and sales: (1) labor being computed based on both payroll and number of employees (each item counts for half); (2) assets consisting of all fixed tangible assets, meaning that intangibles and financial assets are excluded from the formulary apportionment; and (3) sales being taken into account to increase the taxing entitlement of the Member State of destination.[29]

As indicated, the consolidated tax base is only shared when it is positive.[30] The calculations for sharing the consolidated tax base are made at the end of the group's tax year.[31] A negative consolidated tax base is carried forward at the group level and may be set off against future consolidated profits (without time limit).

There are sector-specific formulae for financial institutions, insurance undertakings, and oil and gas, shipping, inland waterways transport and air transport businesses.[32]

Article 44 of the 2016 CCCTB Proposal provides an overview of items that may be deducted against an entity's apportioned share. In most cases, these items have already been specifically dealt with elsewhere in the C(C)CTB Proposal(s). The items include: (1) unrelieved losses incurred by a taxpayer before it becomes subject to the CCCTB rules; (2) unrelieved losses incurred at the level of the group; (3) amounts related to the disposal of fixed assets, revenues and expenses related to long-term contracts and future expenses; (4) in the case of insurance undertakings, optional technical provisions (as referred to in the CCTB rules); (5) gifts and donations to charitable bodies that are deductible under national law (as referred to in the CCTB rules); and (6) pension provisions that are deductible under national law (as referred to in the CCTB rules).

The tax liability of each group member is the outcome of the application of the national tax rate to the apportioned share, adjusted for amounts required to be set off against the apportioned share and further reduced by deductions for double tax relief.[33]

E. Administration, procedures and appeals

Chapter IX (Articles 46 through 68) of the 2016 CCCTB Proposal sets out detailed rules on the administration and procedures with respect to the CCCTB.

The principal taxpayer is required to file the consolidated tax return of the group with the principal tax authority. The return is treated as an assessment of the tax liability of each group member. The principal taxpayer is also responsible for all procedural obligations relating to the taxation of PEs. The consolidated tax return must be submitted to the principal tax authority within the nine months following the end of the tax year.[34]

The consolidated tax return must show: (1) the identity of the principal taxpayer; (2) the identities of all the group members; (3) the identities of any associated enterprises; (4) the tax year to which the tax return relates; (5) how the tax base of each group member was calculated; (6) how the consolidated tax base was calculated; (7) how the apportioned share of each group member was calculated; and (8) how the tax liability of each group member was calculated.[35]

Where the principal taxpayer fails to file a consolidated tax return, the principal tax authority will issue a tax assessment based on an estimate, taking into account the available information. The principal taxpayer may appeal that assessment.[36]

When required, the principal tax authority (after consultation with the competent authorities of the Member States in which a group member is resident for tax purposes or situated in the form of a PE) will issue an amended tax assessment no later than three years after the final date for submission of the consolidated tax return or, where no return was submitted before that date, no later than three years following the date on which a tax assessment was issued by the principal tax authority. An amended tax assessment may not be issued for the same group more than once in any period of 12 months. By way of derogation, an amended tax assessment may be issued within six years of the final date for filing the consolidated tax return where that is justified by a deliberate or grossly negligent misstatement on the part of the taxpayer, or within 12 years of that date where the misstatement is the subject of criminal proceedings. That amended tax assessment must be issued within 12 months of the discovery of the misstatement, unless a longer period is objectively justified by the need for further inquiries or investigations. Any such amended tax assessment must relate solely to the subject matter of the misstatement. No amended tax assessment may be issued to adjust the consolidated tax base where the difference between the declared consolidated tax base and the corrected consolidated tax base does not exceed the lower of 5,000 euros or 1% of the consolidated tax base; nor may an amended tax assessment be issued to adjust the calculation of the apportioned shares where the total of the apportioned shares of the group members resident or established in a Member State would be adjusted by less than 0.5%.[37]

The principal tax authority may initiate and coordinate audits of group members. An audit may also be initiated at the request of a competent authority. An audit is to be conducted in accordance with the national legislation of the Member State in which it is carried out, subject to such adjustments as are necessary to ensure a proper implementation of the CCCTB rules. An audit may include inquiries, inspections or examinations of any kind for purposes of verifying the compliance of a taxpayer with the CCCTB rules.[38]

A principal taxpayer may appeal the following acts among others: (1) a decision rejecting a notice of intention to create a group; (2) a notice requesting the disclosure of documents or information; (3) an amended tax assessment; (4) an assessment of failure to file a consolidated tax return; and (5) an invalidation of the original notice of intention to create a group by the principal tax authority. The appeal must be lodged within 60 days of the receipt of the act that is the subject of the appeal. An appeal does not have any suspensory effect on the tax liability of a taxpayer.[39]

Detailed rules on administrative appeals are set out in Article 67 of the 2016 CCCTB Proposal.

Judicial appeals against a decision of the principal tax authority are governed by the law of the Member State of that principal tax authority, it being understood that a national court may order evidence to be provided by the principal taxpayer and the principal tax authority on the fiscal affairs of the group members and other associated enterprises and on the law and practices of the other Member States concerned. The competent authorities of the other Member States concerned must provide all necessary assistance to the principal tax authority.[40]

F. The (uncertain) future

Since the launching of the 2016 C(C)CTB Proposals, a number of follow-up events have taken place.

In the European Parliament, the 2016 C(C)CTB Proposals were assigned to the Economic and Monetary Affairs Committee (ECON). The ECON adopted (separate) reports on February 21, 2018. The European Parliament adopted its opinion in plenary session on March 15, 2018, suggesting amendments to both the CCTB and the CCCTB.[41] As regards the CCCTB, the European Parliament proposes to: (1) modify the apportionment formula by inserting a fourth "data factor," i.e., the collection and use of personal data of online platforms and services users should be added to the labor, assets and sales factors of the formula; (2) insert the concept of a digital PE (DPE) (i.e., a significant digital presence of a taxpayer that provides services in a jurisdiction directed towards consumers or businesses in that jurisdiction) into the articles relating to scope and tax residence, among others; (3) delete provisions relating to specific sectors, notably shipping companies; (4) clarify and streamline a number of provisions (namely provisions on the effect of consolidation, and the definitions of "consolidated tax base"); (5) insert a provision that establishes an obligation for the Commission to analyze ways to improve the effectiveness and efficiency of the settlement of disagreements between Member States (for example, via a dispute settlement mechanism), and set up a transitional compensation mechanism for Member States that may lose tax revenue with the introduction of the CCCTB; (6) ensure a smooth transition to the CCCTB for Member States; (7) task the Commission with proposing to allocate a part of the fiscal revenues generated from the CCCTB to the budget of the EU and proportionally reduce Member States' contributions to that same budget; (8) bring forward transposition by one year, with Member States' deadlines for adoption and publication in/by 2019 and application starting by 2020; and (9) if the Council fails to adopt a unanimous decision on the CCCTB, request that the Commission issue a new proposal based on Article 116 of the TFEU, under which the European Parliament and the Council act in accordance with the ordinary legislative procedure, the last resort being the initiation of enhanced cooperation (see above) by Member States, which should remain open at all times to non-participating Member States joining.

On June 19, 2018, the German Finance Minister, Olaf Scholz, and his French counterpart, Bruno Le Maire, issued a common position paper on the 2016 CCTB Proposal.[42] The common position focuses on modifications aimed at completing or amending the 2016 CCTB Proposal with respect to certain specific points. As regards the scope and general principles of the 2016 CCTB Proposal, it is proposed, *inter alia*, to: (1) make the CCTB rules compulsory for all companies that are subject to corporate tax, irrespective of their legal form or their size; (2) provide a general rule to the effect that the tax base is determined based on accounting principles and calculated by applying the business asset comparison method; (3) do away with the CCTB provisions regarding tax incentives for R&D (Article 9 of the 2016 CCTB Proposal) and equity financing (Article 11 of the 2016 CCTB Proposal) and with the provisions on cross-border loss relief (Article 42 of the 2016 CCTB Proposal) — these provisions would be discussed later as part of the negotiations on the 2016 CCCTB Proposal; and (4) provide for a reasonable transition period of at least four years, with transitional rules to be set out in the directive. The common position also notes that further discussions will be necessary regarding the approximation of the Member States' corporate income tax rates to ensure the effective tax harmonization of the corporate tax base. The common position also suggests that: a number of technical amendments be made to the proposed definition of the tax base, including with respect to the deductibility of certain expenses (for example, taxes and duties other than profit taxes, gifts and donations, entertainment costs, or a 5% add-back to be included in the participation exemption regime); certain clauses be clarified, such as those on hidden profit distributions, asset depreciation, hedging instruments and insurance undertakings; and there be a minimum taxation of profits (i.e., by limiting loss carryforwards to 50-60% of the taxable profit after the deduction of 1 million euros) and a one-year loss carryback in an amount of up to 1 million euros.

While the objective of the France-German common position was undoubtedly to give a new dynamic to the discussions between Member States on the adoption of the CCTB and, by implication, the CCCTB, the amendments proposed therein appear to be quite substantive, which may well lead to the opposite result.

In addition, key concerns have been and continue to be raised with respect to the CCTB and CCCTB Proposals. These concerns relate not only to the erosion of national tax sovereignty that the Proposals imply and the effect this might have on the ability of Member States to react flexibly to fiscal and economic issues as they arise in the future, but also to the potential impact of the Proposals on Member States' national budgets. A further concern is the perhaps unfortunate timing of the Proposals as Member States' national tax regimes find themselves already under pressure from the many OECD BEPS-related changes. Also, the nature of the elements of the allocation key/apportionment mechanism might well lead to more tax revenue flowing to the larger Member States, to the detriment of the smaller Member States. Yet another concern is the impact that the Proposals may have on the Member States' bilateral tax treaties (the Proposals implying in essence a departure from the arm's-length principle while that principle would continue to play a key role in tax treaties).

Against this backdrop, the 2016 CCTB and CCCTB Proposals are now in the hands of the Council, where work is reportedly ongoing at working party level. The author is not aware of any recent developments that would be indicative of an adoption of the Proposals in the short term.

NOTES

[1] See, however, the *GroupeSteria* case discussed below.

[2] See, Case C-436/00, *X and Y*; Case C-251/98, *Baars*. It is also settled case law of the CJEU that third-country nationals cannot indirectly benefit from the freedom of establishment (which is not open to them) through their rights under the free movement of capital principle. According to the Court, in cases where the national rules involved fall within the material scope of the freedom of establishment rather than the free movement of capital, any restrictive effects on the latter freedom are merely an "unavoidable consequence" of the restriction on the former freedom. *See* Case C-342/00, *Lankhorst-Hohorst*; Case C-196/04, *Cadbury Schweppes*; Joined Cases C-282/04 and C-283/04, *Commission v. Netherlands* (Golden Share); Case C-294/04, *Lasertec*; C-452/04, *Fidium Finanz*; Case C-524/04, *Thin Cap GLO*. *Adde*, Case C-47/12, *Kronos International*; Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company*; and Case C-464/15, SECIL: "(. . .) since the [TFEU] does not extend freedom of establishment to non-member States, it is important to ensure that the interpretation of Article 63(1) TFEU as regards relations with those states does not enable economic opera-

tors who do not fall within the territorial scope of freedom of establishment to profit from that freedom." Not unsurprisingly, it has been suggested that, in holding that the freedom of establishment prevails over the free movement of capital, the CJEU is intentionally attempting to curb nonmember countries' rights under the free movement of capital.

[3] Case C-419/07, *Papillon*.

[4] Case C-337/08, *X Holding*.

[5] Joined Cases C-39/13, C-40/13 and C-41/13, *SCA Holding Group and Others*.

[6] Case C-337/08, *X Holding*.

[7] Case C-386/14, *Groupe Steria*.

[8] Case C-398/16, *X*.

[9] COM (2011) 121 final.

[10] Under the EU law, enhanced cooperation may only be adopted as a last resort when the Council has established that the objectives of the cooperation cannot be achieved by the European Union as a whole within a reasonable time. Enhanced cooperation must be intended to further the objectives of the Union, protect its interests and reinforce its integration process. At least nine Member States must participate. Others may join at a later stage. Enhanced cooperation must not undermine the internal market or the economic, social and territorial cohesion of the European Union. It must not constitute a barrier to, or discrimination in, trade between Member States, nor may it distort competition between them. It must respect the competencies, rights and obligations of non-participating Member States. Although legislation adopted by enhanced cooperation only binds participating Member States, it does form part of the EU *acquis* and can have a knock-on effect on non-participating Member States. Enhanced cooperation is based on Treaty on European Union (TEU), Art. 20, and the detailed rules set out in TFEU, Part VI, Title III (Arts. 326 *et seq*.). An example of the enhanced cooperation procedure being followed is the proposed Financial Transaction Tax.

[11] Communication from the Commission to the European Parliament and the Council, A Fair and Efficient Corporate Tax System in the European Union, SWD (2015) 121 final.

[12] 2016 CCTB Proposal, Art. 1.1 and 1.2.

[13] For a detailed discussion, see Faes, 7450-2nd T.M., Business Operations in the European Union – Taxation, at VIII.H.2.b.

[14] 2016 CCCTB Proposal, Art. 8.1.

[15] 2016 CCCTB Proposal, Art. 8.2.

[16] 2016 CCCTB Proposal, Art. 1.2.

[17] 2016 CCCTB Proposal, Art. 2.1.

[18] 2016 CCCTB Proposal, Art. 5.

[19] 2016 CCCTB Proposal, Art. 2.2.

[20] 2016 CCCTB Proposal, Art. 2.3.

[21] 2016 CCCTB Proposal, Art. 2.4.

[22] 2016 CCCTB Proposal, Art. 3(11).

[23] 2016 CCCTB Proposal, Art. 3(27).

[24] 2016 CCCTB Proposal, Art. 4 provides its own definition of residence, i.e., independent of any national law definition in a particular EU Member State. To be resident in a Member State, a company must: (1) have its registered office, place of incorporation, or place of effective management in that Member State; and (2) not be tax resident in a third country under a tax treaty between that Member State and that third country. A tie-breaker provision resolves cases of double taxation between Member States in favor of the country in which the place of effective management is located.

[25] 2016 CCCTB Proposal, Art. 6.

[26] *See, e.g.*, Case C-446/03, *Marks & Spencer*; Case C-231/05, Oy AA; Case C-337/08, *X Holding*; Case C-414/06, *Lidl*; Case C-157/07, *Krankenheim*).

[27] 2016 CCCTB Proposal, Art. 9.1. In addition, no withholding taxes or other source taxation may be imposed on intra-group transactions (2016 CCCTB Proposal, Art. 10).

[28] 2016 CCCTB Proposal, Art. 7.

[29] Specifically, the consolidated tax base is shared between the group members in each tax year based on the following apportionment formula (A being group member A):

$$\text{Share A} = \left(\frac{1}{3}\frac{\text{Sales}^{A}}{\text{Sales}^{Group}} + \frac{1}{3}\left(\frac{1}{2}\frac{\text{Payroll}^{A}}{\text{Payroll}^{Group}} + \frac{1}{2}\frac{\text{No of employees}^{A}}{\text{No of employees}^{Group}} \right) + \frac{1}{3}\frac{\text{Assets}^{A}}{\text{Assets}^{Group}} \right) * \text{Con'd Tax Base}$$

The 2016 CCCTB Proposal formula echoes the traditional equally weighted three-factor "Massachusetts formula" developed in the United States under Massachusetts state income tax law in the 1950s. See, however, the safeguard clause in 2016 CCCTB Proposal, Art. 29 if the principal taxpayer or a competent authority considers that the outcome of the apportionment of the consolidated tax base to a group member according to the formula does not fairly represent the extent of the business activity of that group member.

[30] 2016 CCCTB Proposal, Art. 28.1.

[31] 2016 CCCTB Proposal, Art. 28.2.

[32] 2016 CCCTB Proposal, Arts. 40–43.

[33] 2016 CCCTB Proposal, Art. 45.

[34] 2016 CCCTB Proposal, Art. 51.

[35] 2016 CCCTB Proposal, Art. 52.

[36] 2016 CCCTB Proposal, Art. 54.

[37] 2016 CCCTB Proposal, Art. 56.

[38] 2016 CCCTB Proposal, Art. 64.

[39] 2016 CCCTB Proposal, Art. 66.

[40] 2016 CCCTB Proposal, Art. 68.

[41] See *http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)*595907 (CCTB) and *http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)*599395 (CCCTB).

[42] See, *https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Europe/Articles/2018-06-20-Meseberg-att2.pdf?__blob=publicationFile&v=3* and *https://www.economie.gouv.fr/files/files/PDF/2018/Tax_FR-DE-agreed-EN.pdf*.