Would a CCTB be more suitable to overcome the tax obstacles to the Common Market than the CCCTB?

By

Jan Grabowski

U1261884

ANR: 816702

Exam Committee:

Drs. E.D.M. Gerrits RA

Prof. dr. P.H.J. Essers

Tilburg University

Faculty of Law

Content:

Scope and Methodology……………………………………………………………... p. 1

1. History of Direct Tax Harmonization in the European Union…………………… p. 3

2. The Common Consolidated Corporate Tax Base Draft Directive………………. p. 6

2.1. Optionality of the CCCTB………………………………………………… p. 7

2.2. The Corporate Tax Base as defined by the CCCTB……………………….. p. 8

2.3. Consolidation…………………………………………………………........ p. 9

2.4. Apportionment of tax base………………………………………………… p. 10

3. Criticism of the CCCTB……………………………………………………….. p. 12

3.1. EU Member State responses to the CCCTB……………………………. p. 12

3.2. Findings on the CCCTB's Tax Base definition…………………………… p. 15

3.3. Findings on the Consolidation under the CCCTB……………………….... p. 17

3.4. Findings on the Apportionment Formula under the CCCTB……………... p. 21

3.5. Short assessment of the CCCTB's goals and its impact………………….. p. 24

4. A Common Corporate Tax Base under enhanced cooperation………………… p. 26

4.1. Enhanced Cooperation…………………………………………………… p. 26

4.2 An enhanced Common Corporate Tax Base……………………………… p. 27

4.3. Summary of CCTB compared to CCCTB……………………………….... p. 31

5. Conclusion………………………………………………………………………. p. 32

6. Bibliography…………………………………………………………………… p. 35

Scope and Methodology:

The Master Thesis at hand deals with the Common Consolidated Corporate Tax Base (CCCTB) draft proposal for a Common Consolidated Corporate Tax Base Directive. The essence of this essay is to analyse the proposed Directive as to its means to tackle the tax obstacles for the completion of the internal market, identified by the European Commission, based on its 2001 agenda to harmonize the corporate tax base.

In order to understand the necessity of such a harmonization, and how the European Union has come to the CCCTB Directive proposal, I will provide a short outline of the historical developments of harmonization efforts in the field of corporate taxation in the European Union, in chapter 1. Subsequently, in chapter 2, the solutions provided for in the CCCTB draft directive will be presented. The core focus of this presentation will lay on the so-called "three – steps", namely the definition of the corporate tax base, the consolidation of accounts and the apportionment formula. In the following the proposed solutions will be analysed and critically assessed. This assessment will be based on the objective criteria of subsidiarity and proportionality, fairness and costs. In substance, for the principle of subsidiarity and proportionality, I will take the set out criteria by the EU for legislative acts with regard to these principles and apply them to the draft CCCTB. Additionally, the criticism of the objecting states will serve as a further criterion. As regards the criterion of fairness, the rules of the CCCTB will be checked on the basis of their conceptual background, and their capability of creating fair and sound interpretations. The critical aspect behind this analysis is the fact that the CCCTB appears to be mainly rule based, and intends neither to fall back on international accounting standards, nor on national laws of the Member States. The cost criterion is heavily linked to the consolidation and apportionment formula. The benefits of the latter must be weighed against the potential costs of such a mechanism and the solutions presented by the CCCTB. Not only the additional administrative costs for Member States and companies must be considered, but also the lacking inclusion of intangible assets in the calculation of the tax base.

Having analysed the CCCTB, the essay will turn in its fourth chapter to a potential alternative to the CCCTB. For the purpose of this paper, the alternative under investigation will be a Common Corporate Tax Base (CCTB) under enhanced cooperation. The CCTB differs from the CCCTB proposal as it does not consolidate the group – companies' accounts, but merely defines the tax base as such. This solution will be taken into consideration and analysed. In analysing both solutions it is important to state which obstacles exist for the

internal market. The consecutive step is to analyse the solutions put forward as to whether they tackle the tax obstacles addressed. If the tax obstacle is effectively addressed, the question that needs to be answered next is at what cost. The cost factor of both the CCTB and the CCCTB will be compared to each other. The CCTB would also need to pass the other two criteria, which it will be checked against. The comparison of these two solutions will eventually lead to the answering of the main research question, whether a CCTB would be more feasible to overcome the hurdles to harmonization of corporate taxation.

The research question focuses on the future of corporate taxation in the EU. The consequences of an overhasty harmonization come what may, might be beyond words. The question tries to assess the pace at which we should move towards harmonization, of one of the most important fields in the area of European Law.

1. History of Direct Tax Harmonization in the European Union

The European Union is a tool to maintain peace and security throughout the countries of the European Union. Having witnessed numerous wars culminating in the cruelties of World War I and World War II, the calls for permanent peace, via a cooperation of European States, for example through a "*United States of Europe*"[1] emerged from different parties. Robert Schuman, the former minister of foreign affairs of France, realized that via economic and political cooperation a war would not only become "unthinkable" but also "materially impossible".[2] Prior to those deliberations European Countries have proven that only political ties were insufficient to maintain peace, as for example prior to World War I. In these days the monarchies of the United Kingdom, Germany and Russia had strong family ties with each other, but no economic cooperation. [3]

Emerging from the European Coal and Steel Community which was founded in 1952 in order to tie the coal and steel industries of Belgium, Luxembourg, the Netherlands and especially of Germany and France, the further developments of the predecessors of what is nowadays known as European Union lead to the enhancement of economic cooperation. The idea was to guarantee economic growth and to deepen economic and political integration throughout the EU Member States by diminishing the barriers to trade.[4] Soon it was realized that a common market was the key to the fulfilment of these goals. The single market's realization depended on the so called four freedoms: the free movement of goods, the freedom of establishment for EU citizens, and the free movement of capital and of services. The single market intends to promote fair competition amongst the EU Member States, improving the efficient allocation of goods, services and resources. By these measures, cooperation and prosperity among the EU Member States should be enhanced and guaranteed, leaving no space for further aggression between them.[5]

---

[1] Winston Churchill, The tragedy of Europe (Speech at the University of Zürich 19 September 1946) <http://www.europa.clio-online.de/site/lang__de/ItemID__297/mid__11373/40208215/default.aspx> accessed 22 June 2014.

[2] R. Schuman, The Schuman Declaration, 9th of May 1950, <http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm> accessed 23 June 2014.

[3] World Trade Report 2007, Six decades of Multinational Trade Cooperation: What have we learnt? The Economics and Political Economy of International Trade Cooperation, (ii) European free trade in decline, 1879 – 1914, <http://www.wto.org/english/res_e/booksp_e/anrep_e/wtr07-2b_e.pdf > accessed 23 June 2014

[4] Konrad Adenauer Stiftung, Europe's Single Market – Expoliting untapped Potentials, p. 6, <http://www.kas.de/wf/doc/kas_35341-1522-24-30.pdf?130909102632> accessed 22 June 2014.

[5] Official Website of the Noble prize, Nobel Prizes and Laureates, European Union, Prize motivation: "for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe" <http://www.nobelprize.org/nobel_prizes/peace/laureates/2012/eu-facts.html > accessed 22 June 2014.

For each economy, the corporate tax laws play a crucial role. However, regardless of all the successful cooperation in several fields of the common market, the harmonization of tax laws, especially in the field of corporate taxation has not yet been achieved. Nevertheless, ever since the idea of a common market emerged, there has been a latent movement towards political action for harmonization of corporate tax laws. In the light of the young EU Communities of 1958, two studies were published with regard to corporate taxation in the Member States. The *Neumark* report of 1962 and the *Temple* report of 1970 were followed by legislative initiatives.[6] In 1970, a proposal has been made that the corporate income tax in the Member States must decrease to a level in between 45% - 55%, which was, however, withdrawn in 1990.[7] The next important attempt was the 1988's proposal for a harmonized tax base for enterprises, as it was regarded a necessary tool to realize the common market's goal to perfectly reallocate resources within the single market. However, the draft was never presented completely due to the reluctance of Member States before such a big step.[8]

Even though these proposals failed, because of the member states' unwillingness to create harmonized tax laws, awareness of the problems caused by different tax systems among the Member States, was always present. With the signing of the Maastricht Treaty, 1992, and the abolition of fiscal frontiers, the situation for tax harmonization started to change. The Maastricht Treaty did not *per se* give a legal basis for the harmonization of tax laws, but for the harmonization of laws necessary for the completion of the Common Market. Hence, indirectly this legal basis enabled the European Commission to harmonize tax laws, linked to other areas of law.[9] Amongst others, Directive 77/799/EEC was presented with the primary aim to secure mutual assistance between national tax authorities.[10] Additionally, the EU has adopted the Merger Directive[11], aiming at the elimination of tax obstacles for cross – border reorganizations in the EU, and the Parents – Subsidiary directive[12], removing tax obstacles for intra group company transactions. Furthermore, Convention 90/436/EEC on the

[6] Official website of the European Commission, "General Overview of the Company Tax in the European Union", Background <http://ec.europa.eu/taxation_customs/taxation/company_tax/gen_overview/index_en.htm> accessed 21.06.2014.
[7] Commission staff working paper, "Company Taxation in the Internal Market", COM(2001)582 final, Earlier Commission initiatives in the area of company taxation 16, 16.
[8] *Ibid.*
[9] Treaty establishing the European Community Treaty (Maastricht Treaty) art 94.; Treaty on the European Union (Maastricht Treaty) art 115.
[10] Official website of the European Commission, General Overview of the Company Tax in the European Union Background <http://ec.europa.eu/taxation_customs/taxation/company_tax/gen_overview/index_en.htm> accessed 14.05.2014.
[11] Council Directive (EEC) 90/434 of 23 July 1990 on the common system of taxation applicable to mergers, division, transfer of assets and exchange of shares concerning companies of different Member States [1990] OJ L225/ 1-5.
[12] Council Directive (EEC) 90/435 of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [1990] OJ L225/ 6-9.

elimination of double taxation in connection with the adjustment of profits of associated enterprises was adopted, which is commonly referred to as the "arbitration convention." Last but not least, in 2003 the Commission adopted Directive 2003/49/EC. The so – called 'Interest and Royalties Directive' intended to abolish withholding taxes on cross border interests and royalty payments.[13]

Even though the above-mentioned legal instruments were adopted under the umbrella of completing the internal market, and created some common taxation rules, the Commission regarded the scope and pace of harmonization as insufficient. In its Communication No. 495 the Commission stated that there was "clearly a pressing need to make progress in the field of taxation and to ensure a more effective co-ordination of taxation policies."[14] Key to the proposed tax package is the Code of Conduct for business taxation aiming to prevent any economic distortion and the erosion of the taxable base in the EU.[15]

The pace of tax harmonization until the current century was rather slow based on the reluctance of member states to co-ordinate their national tax laws. However, with the beginning of the current century, it has been pointed out clearly that there is a need for the harmonization of company tax in the European Member States. The 28 Member States of the European Union, hereinafter referred to as EU, were facing difficulties with high complying costs for multinational companies because of the different national legal systems. Furthermore, the issue of double taxation, as well as transfer pricing complications, limits on cross – border loss relief and tax charges on cross – border business restructurings, were identified as the core impediments to the internal market.[16]

According to *Benedetto Della Vedova*[17] and the majority of the EU Parliament, the best strategy to tackle these obstacles is the provision of a "consolidated corporate tax base for their (the companies) EU – wide activities."[18] Furthermore, it was also believed by the

---

[13] Official website of the European Commission, "Taxation of cross-border interest and royalty payments in the European Union" <http://ec.europa.eu/taxation_customs/taxation/company_tax/interests_royalties/index_en.htm> accessed 23.06.2014.

[14] Communication from the Commission to the Council COM(97)495 final, "Towards tax co-ordination in the European Union", Way Forward and Conclusion 9, 9.

[15] Ibid., A package to tackle harmful tax competition 5, 5.

[16] E. Röder, *Proposal for an Enhanced CCTB as Alternative to a CCCTB with Formulary Appointment*, Max Planck Institute for Tax Law and Public Finance, Working Paper 2012 – 01, February 2012, p. 128.

[17] Rapporteur of the Economic and Monetary Affairs Committee for the Commission Communication on Company Taxation of the European Parliament.

[18] B. Della Vedova, "*Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU – wide activities*", European Company Tax Conference Brussels, April 2002, p.2.

Commission that "the only systematic way to address the tax obstacles for companies is the consolidated corporate tax base."[19]

The following part, will introduce the Common Consolidated Corporate Tax Base, and point out its main tools to complete the goals of the EU Commission.

2. The Common Consolidated Corporate Tax Base Draft Directive

The CCCTB is the draft proposal for a EU Directive for a common system for calculating the tax base of businesses operating in the EU.[20] It has been proposed on the 16th of March 2011 and is still pending outcome of further discussion among the heads of states in the Council of the European Union. The EU defines it as a single set of rules that make it possible for companies operating in the EU to compute their taxable profits.[21]

The CCCTB is a concept that has been presented for the first time in the Commission's Communication of 2001[22] and has been reaffirmed in 2003.[23] Its core ambition is to address the underlying tax obstacles, which exist for companies operating throughout the EU. These obstacles, which are the high complying costs for companies operating in more than one Member State, the issue of double taxation, as well as transfer pricing complications, limits on cross – border loss relief and tax charges on cross – border business restructurings, should all be tackled in one stroke by the current draft proposal, as the Commission believes that this is the only systematic way to do so.[24]

The perspective for qualifying companies or group companies, to only have to comply with one EU system for computing its taxable income is very promising, and sounds for now very admirable. The CCCTB is, however, still pending, and needs the unanimous approval of all Member States.[25] Before turning to the reasons why it is still pending, we will first have a look on how the CCCTB functions. The CCCTB tries to tackle the remaining tax obstacles by a three-step approach. These three steps include a determination of the tax base by a single set

---

[19] Official Website of the European Commission, Common Tax Base, <http://ec.europa.eu/taxation_customs/taxation/company_tax/common_tax_base/index_en.htm#practical> accessed 23.06.2014.
[20] *Ibid*.
[21] *Ibid*.
[22] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee COM (2001) 582, Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU – wide activities, October 23 2001
[23] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee COM (2003) 726, An internal Market without company tax obstacles achievements, ongoing inititatives and remaining challenges, November 24 2003.
[24] Official Website of the European Commission, Common Tax Base.
[25] TFEU art 115.

of rules, a consolidation of taxable profits, and last but not least an allocation of the overall profits of the corporate group to the Member States where the group is active. The following chapter will introduce these three factors of the CCCTB, starting with the optional application of the Directive.

2.1. Optionality of the CCCTB

Prior to the presentation of the CCCTB draft, the two options were discussed, of whether the application of the Directive should be mandatory or optional. According to the Commission's findings, in its impact assessment, both systems would benefit the EU Member States in terms of economic efficiency. Nevertheless, the lawmaker did chose for an optional system as it would better cope with the estimated impact on employment and the avoidance of costs caused by enforcing overall new tax rules across the EU.[26] These findings were supported by the Tax Executive Institute, which commented on the preparatory works to the CCCTB that optionality is the key to the fulfilment of the CCCTB's purposes.[27] Additionally the European Business Initiative on Tax agreed in its reports, on the CCCTB, to the optional clause.[28]

Therefore, the CCCTB, if accepted unanimously by the EU Member States, will be an optional tool. Companies will have to opt in for the system provided for in the CCCTB.[29] By opting into the CCCTB system, the company will cease to be subject to national tax provisions regarding the matters covered by the Directive.[30] However, once the CCCTB is chosen, it becomes binding for five years, and extends its binding effect for another three years if not clearly terminated.[31].

Having the basic application criteria set, the following three subchapters will describe the "three – steps" which the lawmaker provides in order to tackle the present tax obstacles in the EU.

---

[26] Commission Proposal COM(2011) Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)121, 8

[27] See the Tax Executives Institute is a international association for in-house tax professionals <http://www.tei.org/organization/Pages/about_tei.aspx> accessed 22.06.2014.

[28] European Business Initiative on Tax, 'Comments on CCCTB WP 57, 59, 60, 61 and 62', 1,<http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/ebit_contrib_dec2007.pdf>

[29] CCCTB art 6.

[30] CCCTB art 7.

[31] CCCTB art 105 (1).

2.2. The Corporate Tax Base as defined by the CCCTB

The CCCTB provides in its fourth chapter the Articles that are important in defining the factors of the tax base. It is an extensive set of rules and does provide for a detailed description of what constitutes a tax base. To start with the most important, the tax base is defined as: *"tax base shall be calculated as revenues less exempt revenues, deductible expenses and other deductible items."*[32] The building blocks of what should be contained in the corporate tax base are clearly pointed out in this article. Concerning the deductible expenses and other deductible items, no such concepts as an Allowance for Corporate Equity or a Comprehensive Business Income tax are granted.[33] Interest is deductible according to Article 12 CCCTB, whereas return on equity is treated as a non – deductible expense, as stated in article 14(1) a) and c) CCCTB. Profit and losses are recognized as soon as they are realized,[34] and the accounting for revenues and expenses must occur in the year they accrue.[35] However, if at the end of a tax year an obligation or possible future obligation, arising from activities of the current or previous year, on behalf of the taxpayer, can be reliably estimated a deduction is possible when the settled amount is expected to result in a deductible expense.[36] The term "reliably estimated" is further defined in Article 25(2). Concerning losses, they can be carried forward for an indefinite time, as pointed out in Article 43 of the CCCTB. However, a carry back of losses is not possible. Trying to address the problem of double taxation, it is possible under the CCCTB, to have profit distributions and capital gains on the disposal of shares tax exempt.[37] Otherwise, the profits of a company would be taxed twice, namely at the moment when the former accrue and additionally at the moment the capital gain is realized.[38] Also regarding the elimination of double taxation of income from third country permanent establishments, the exemption method is used.[39] Whereas the exemption method seems to be the predominant tool to avoid double taxation, the credit method is still used for passive income.[40]

Based on Articles 10 and 17 of the CCCTB, one can say that there is a clear commitment to the accrual approach and the deliberate decision to follow the profit and loss

---

[32] CCCTB art 10.
[33] Cf. R.A. De Mooij and M.P. Devereux, *Alternative Systems of Business Tax in Europe – An applied analysis of ACE and CBIT Reforms*, Taxud Taxation Papers, Working paper No 17, 2009, p. 12 et seq.
[34] CCCTB art 9(1).
[35] CCCTB art 18.
[36] CCCTB art 25 (1).
[37] CCCTB art. 11 (c) & (d).
[38] U. Schreiber, *International Company Taxation – An introduction to Legal and Economic Principles,* Springer Heidelberg New York Dordrecht London 2013, p. 129.
[39] CCCTB art11(e)
[40] CCCTB art. 76.

approach over the balance sheet approach.[41] Even though these findings will be addressed more detailed at a later stage, they appear to be noteworthy at this stage. Furthermore, the definitions provided for the tax base under the CCCTB are wide. Notably, there is no big reference to the IAS/IFRS tax base definition, or to national law. Refraining from the IAS/IFRS definitions clearly indicates, that for the EU lawmaker, the concept of tax and financial accounting shall be treated under different rules, as the goals of both financial and tax accounts differ. By defining the subject matter for a corporate tax base as detailed as possible, it is desired that no drawbacks to national GAAP rules occur.[42] The undesirable outcome of such drawbacks would lead to different interpretations of the tax base under the 28 EU tax law regimes, as other than in a Regulation, the laws enacted by a Directive have to be implemented in the national legal framework.

2.3. Consolidation

The CCCTB provides for a system of consolidation. It is titled as the "elimination of intra – group transactions" and to be found under Article 59 of the CCCTB. The "elimination" occurs via ignoring the profits and losses arising from transactions directly carried out between members of a group, while calculating the consolidated tax base.[43] The answer to the question of who can become part of a group taxation scheme is to be found in Article 54. According to the first paragraph, Subsidiaries in which the parent company exercises more than 50% of the voting rights are qualifying subsidiaries. Furthermore, when the parent companies hold *ownership rights amounting to more than 75% of the company's capital or more than 75% of the rights giving entitlement to profit.* In Article 55 it is also pointed out, that permanent establishments may also form part in a tax group.[44] For non-resident taxpayers the same rules count for their permanent establishments, located in one of the Member States.

The decision of opting into the CCCTB system lies with the parent company, or if the parent company is a non-EU tax resident, with the relevant eligible subsidiary or permanent establishment within the territory of the EU. Once opted for the CCCTB, the accounts of all subsidiaries and permanent establishments are consolidated for tax purposes, no matter of any opposing minority shareholdings. This reflects the either "all in" or "all out" principle. The

---

[41] N. Herzig and J. Kuhr, *Direct Taxation in the EU: The Common Corporate Tax Base as the next sub – step towards Harmonization*, Wroclaw Review of Law. Administration & Economics 2013/24, p.8, < http://wrlae.prawo.uni.wroc.pl/index.php/wrlae/article/view/13/26> accessed 24.06.2014.

[42] C. Spengel & C. Malke, *Comprehensive Tax Base or Residual Reference to GAAP or Domestic Tax Law?* Series on International Tax Law Vol. 53, Linde Verlag Wien, p.87.

[43] CCCTB art 59 (1).

[44] CCCTB art. 55.

result of the consolidation would be, that the whole group would only have to deal with one tax administration, namely the one provided for under the CCCTB. This one – stop shop regime would eliminate the other national legislations as regards the issues covered by the CCCTB.[45] This should reduce the compliance and administrative costs for companies. Concerning Business Reorganisations, the CCCTB provides in its 70th article that the reorganisation of a tax group member shall not give rise to "profits or losses" and shall be treated as a transaction dealt with under Article 59 CCCTB.[46]

The question remains, however, how the tax base will be calculated, and the taxing rights will be distributed among the Member States. For that respect, the CCCTB provides for a formula, which is to be found under Article 86(1), the apportionment of the consolidated tax base.

2.4. Apportionment of tax base

The CCCTB attempts to consolidate the accounts of multinational operating companies, by applying an apportionment formula, giving the respective Member State in which a group member operates a fair share regarding the tax base. The adoption of such a formula would change the complete scheme of accounting throughout the European Union, as no Member State uses such a method, but rather separate accounting with an arm's length approach in order to determine the taxable income of companies' trading with affiliated companies. However, the CCCTB system as well as the arm's length theory fulfil the same task, namely allocating the fair share of profit to each group entity and allocate the rights of taxation to the involved Member States. Nevertheless, there are countries in which a formula apportionment is used. Serving as a role model for the formula used in the CCCTB one has to name the Massachusetts – Formula, applied in some US federal states, and the Canadian – Formula. Whereas the Canadian – Formula uses only two factors in its calculation, namely Sales and Payroll, the CCCTB – Formula and the Massachusetts – formula apply three factors, namely assets, labour and sale.[47]

Once assessed which share a Member State is entitled to tax, the national tax rate is applicable to that share of taxable income. As Member States differ in their economic activities, the CCCTB provides for more detailed rules regarding the scope, valuation and allocation of the factors in the formula.[48] According to this 'safeguard clause' either the

---

[45] CCCTB art.109.
[46] CCCTB art. 70(1).
[47] M. Petutschnig, *Common Consolidated Corporate Tax Base: Effects of Formulary Apportionment on Corporate Group Entities,* WU International Taxation Research Paper Series, 2012 – 04, p.9.
[48] CCCTB art 87.

taxpayer or the tax authority can request an alternative calculation method, if one or both sense that the outcome of apportionment does not "fairly represent the extend of the business activity" of that group member. Additionally, as regards the apportionment factors, more detailed rules are available in the CCCTB for their correct calculation. E.g. the labour factor is sub – divided and therefore flexible as to the payroll and the number of employees in order to ensure equality in calculation between Member States with low and high salary levels.[49] Concerning the asset factor, all fixed tangible assets are calculated for their average tax value at the end and beginning of a year. By year the tax year is meant.[50] Even though this is a normal approach to include assets in the valuation of the tax base, there is no explicit reference to intangible assets.[51] The Commission regards the indirect inclusion of intangible assets via researchers' salaries and research assets as sufficient.[52] The calculation of the sales factor is made dependent on the destination of sold goods[53], or the place where the service is physically carried out.[54] Because of the fact, that intra – group sales are frail to manipulation, via tax planning and/or profit shifting, as they are measured at arm's length, they are excluded from the sales factor under the CCCTB.[55] Based on the same assumptions of manipulation, sales are measured at the place of destination and not origin.[56] This does not count for so called "nowhere sales", to Member States that do not host a subsidiary or permanent establishment of a group.[57] Last but not least, as regards specific sectors, such as financial institutions, insurance, oil and gas, shipping, both air transport and waterway transport, dedicated formulas are applicable.[58]

In order to avoid tax planning by taxpayers, the proposal contains provisions, which are designed to avoid this. The avoiding strategy is based on setting time frames before the benefits of tax-free intra – group transactions can be benefited from. So if a group member sells an asset within the first five years of its company group membership, the profit from this disposal is allocated to the company.[59] Another situation that is covered, is the partial prohibition on exemption of capital gains on a disposal of shares, when resulting from this

[49] CCCTB art. 86(1).
[50] CCCTB art 92 – 94.
[51] European Commission Working Paper (CCCTB/WP/060) 13 November 2007 Common Consolidated Corporate Tax Base, CCCTB: possible elements of the sharing mechanism, Annex to CCCTB/WP/060: Synthesis of possible apportionment rules, Para. 16
[52] CCCTB/WP/060 para 34.
[53] CCCTB art 95.
[54] CCCTB art96.
[55] CCCTB/WP/060 para. 48.
[56] *Ibid*., para. 44.
[57] CCCTB, art 96(4).
[58] CCCTB art 98.
[59] CCCTB art 61.

disposal the company ceases to be a member of the CCCTB group. In case that the ceasing group company has acquired assets via an intra – group transfer, in the current or previous year, those will be taxed ordinarily.[60] Article 67 CCCTB further expands article 75.

Having enlisted the core provisions of the CCCTB, the following part will analyse these, and the perception of the CCCTB among the Member States.

3. Criticism of the CCCTB

The CCCTB has been subject to a lot of criticism and debate. Its feasibility in technical as well as political terms has caused an uproar amongst governments of the EU and legal scholars, experts and commentators. Before turning to the technical concerns as regards applicability and theoretical problems, we will first turn to the political concerns raised by some EU member states upon perception of the CCCTB draft proposal.

3.1. EU Member State responses to the CCCTB

As the area of corporate income taxation is mainly governed at the level of the Member States, one of the main issues regarding the proposal is the competence of the EU to regulate this area of law. Whereas the field of indirect taxation does fall under the competencies of the EU, to the extend that harmonisation is needed for the establishment and functioning of the internal market[61], there is no direct mandate for the EU in the field of corporate taxation. Nevertheless, under Article 115 TFEU, the EU is competent to enact laws for the approximation of laws, which directly affect the completion of the internal market. Since the establishment of this competence, the EU has used this legal basis for the removal of tax obstacles on several occasions, as mentioned in chapter one. As pointed out above, the EU intends to remove the current tax obstacles to the functioning of the internal market via the CCCTB proposal, and especially regarded from a an economic point of view, it is clear that corporate taxation does affect cross – border movement of economic activities. As the tax systems of Member States differ, and partly clash, the EU legislator attempts to reduce those obstacles/complications to trade. Hence, Article 115 TFEU is a solid basis for the harmonization of corporate tax laws.

Nevertheless, according to Article 4(2) TFEU, the internal market is a shared competence of the EU and the Member States. Therefore, whilst enacting laws in a field of

[60] CCCTB art 75.
[61] TFEU Art. 113

shared competences, the EU legislator is bound by certain limits in its actions. The most important limit is enshrined in the principle of subsidiarity and proportionality. In Article 5 TEU it is set out that *"the limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality*."[62] The principle of subsidiarity means in detail, that the EU lawmaker may "*act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States (...) and be better achieved at Union Level*."[63] This principle is accompanied by further rules of Protocol 2 to the TEU and TFEU. Amongst others, a legislative proposal is required to provide for a detail statement of the financial impact of that proposed legal act. It needs to explain the reasons why national government fall short in providing for a better solution and that the proposal is justified regarding the principles of subsidiarity and proportionality.[64] Member States do have the right to send reasoned opinions regarding the proposal on its non – compliance with the principles of subsidiarity and proportionality, within eight weeks.[65]

Such reasoned opinions were issued, of which nine expressed negative opinions regarding the compliance with the principles of subsidiarity and proportionality. The "yellow card"[66] was communicated to the Commission by the governments of Bulgaria, Ireland, Malta, The Netherlands, Poland, Romania, Slovakia, Sweden and the United Kingdom. Subject to the critical opinions was the view, that the draft infringes the principle of subsidiarity.[67]

The Swedish government was of the opinion, that the individual Member State is in a better position than the EU to define the core needs of a corporate tax system, and therefore should be eligible to overcome the obstacles for the achievement of national and European goals.[68] According to the government of the United Kingdom, the CCCTB is not necessary to achieve the set out goals of the proposal, because there is no proof that the different national tax solutions for corporate tax "inherently impede the proper functioning of the internal market." Rather should the tax issues be subject to measures on a lower governmental level.[69] The Irish government accorded to these findings by concluding that with insufficient evidence

[62] TEU art 5(1).
[63] *Ibid*., Article 5(4).
[64] TFEU, Annex Protocol (No 2) on the application of the principles of subsidiarity and proportionality, art 5.
[65] Ibid., Article 6.
[66] Ibid.
[67] Lower house of the Czech Parliament reported the same concerns belatedly
[68] European Parliament Committee on Legal Affairs, Notice to Members, Reasoned opinion by the Riksdag of the Kingdom of Sweden on the proposal for a Council Directive on a CCCTB (COM(2011)0121 – C7-0092/2011 – 2011/0058(CNS)) 16 May 2011, p. 2.
[69] UK Parliament, Reasoned Opinion of the House of Commons on a CCCTB, p. 5.

"it is hard to conclude that EU legislative action is both necessary and of greater benefit than individual action."[70] The EU defines the obstacles in its working document to the CCCTB proposal. It enlists the additional compliance costs at the current stage as one obstacle, it describes the scenario of double taxation as well as the over taxation of cross border activities. All of these obstacles are presented relying on independent reports, which are presented in the working document, and compare the costs and savings of companies under three regimes; namely under a CCCTB a CCTB and the current state of art. The figures appear to show evidence that a EU initiative would decrease obstacles, especially costs, compared to the current state of art.[71] It furthermore touches upon the potentially increasing administrative costs for companies as well as Member States' under a new regime. This evidence is to be found in the impact assessment of the commission on a CCCTB proposal and will be addressed in the following chapters more detailed.[72] It is furthermore noteworthy that the objections raised by the Member States do not only concern a potential CCCTB but might also affect the alternate solution of a Common Corporate Tax Base.

As regards the principle of proportionality, Member States refer to existing EU laws, decisions and initiatives, such as the Arbitration Convention, the Joint Transfer Pricing Forum and the Code of Conduct on Business Taxation, as evidence, that the issues concerning cross border taxation can be addressed by informal coordination and/ or multi - / bilateral measures.[73] According to the Commission, the optional nature of the CCCTB underlines the intention of the EU to respect the principle of proportionality, as no one is forced to apply the CCCTB rules.[74] Furthermore, according to the Commission, "non- coordinated action planned and implemented by each Member State individually, would replicate the current situation, as taxpayers would still need to deal with as many tax administrations as the number of jurisdictions in which they are liable to tax. Community action is necessary in view of establishing a juridical framework with common rules."[75] The arguments regarding proportionality claim the opposite of each other. There seems to be no right or wrong answer to theses arguments. This is rather a question of pace, and intention to harmonize as quick as, or as slow as, possible. The argument of the objecting Member States is not wrong, but

[70] Irish Parliament, 'Report under Standing Order 105 on the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (COM(2011)121)', p. 2.
[71] Commission Staff Working Document (SEC2011), Impact Assessment, CCCTB Accompanying document to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, 16 March 2011, p. 34.
[72] *Ibid*., p.32
[73] The KPMG Guide to CCCTB, Part 1, p.16 <
http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/ccctb-part1.pdf> accessed 10 August 2014
[74] CCCTB, Explanatory Memorandum, 3 (c) Proportionality.
[75] Commission Staff Working Document (SEC2011), Impact Assessment, CCCTB Accompanying document to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, 16 March 2011, p. 15/16.

perhaps against the important background of the substance matter not strong enough to establish an infringement of the principle of proportionality.

Further objection has been raised as regards the CCCTB proposal on behalf of, e.g. Germany.[76]The general concerns on the principle of subsidiarity and proportionality are paired with technical concerns. In order to understand the problems that can be seen with the CCCTB as it stands right now, a critical analysis of the CCCTB three – steps will be provided. The following part will analyse the tax base under the CCCTB, followed by an assessment of the consolidation and apportionment formula.

3.2. Findings on the CCCTB's Tax Base definition

As already mentioned above, the CCCTB's definition of a corporate tax base provides for a certain breadth. Apparently, does it neither rely on a formal linkage to the IAS/IFRS definitions nor on the general applicable accounting practices of EU Member States' national legislation.[77] Regarding the harmonization efforts behind the CCCTB, the initial thought behind this approach is sound and recommendable. Even though reference and fall back clauses to national legal systems could fill loopholes, the CCCTB choses to refrain from such steps as in the light of this simplification via harmonization, the possible interpretation of the CCCTB in light of national law would fragment the substance of the tax base definition into 28 different understandings. Such a development would render the CCCTB useless, as we would not manifestly change the actual state of art. This is also enshrined in the work of the working group on the CCCTB. In Working Paper 057[78], the working group admits that a link between IAS/IFRS would provide a common starting point, but many Member States do not allow the application of IAS/IFRS for individual company accounts. Additionally, some IAS/IFRS standards are not suitable for tax purposes. The ultimate result of such a system would therefore be a reliance on national GAAP and would consequently lead to different results, as the CCCTB would define the tax base, but methodology for adjusting the accounts would be left to the Member States' legislation. Last but not least, IAS/IFRS are not popular amongst the most important group of companies, namely the small and medium – sized

[76] Brocke von/Rottenmoser, Harmonisierung direkter Steuern? Die GKKB im Lichte der Rechtsetzungskompetenzen der EU, IWB 2011, p.620ff.
[77] C. Spengel & C. Malke, *Comprehensive Tax Base or Residual Reference to GAAP or Domestic Tax Law?*, p. 87.
[78] European Commission Working Paper (CCCTB/WP/057) 26 July 2007 Common Consolidated Corporate Tax Base, CCCTB: possible elements of a technical outline.

enterprises. Leaving them out would create a legislative tool for the big players, but ignoring the vast majority.

The approach chosen by the EU legislator might appear sound, but nevertheless does not seem to comply with the issue of fairness and legal certainty in each case. Even though the list of rules is wide, it does seem to lack a sophisticated conceptual framework behind it. In chapter II of the CCCTB, fundamental concepts are enlisted and explained. In Article 9 of the CCCTB, general principles are added to the directive. Profits and losses are defined in chapter II and further elaborated on under Article 9, namely that they should be recognised when they are realized. The problem is, however, that Member States vary on those terms, "realization" and "profit & losses", and base their definitions and applications on the IAS/IFRS, such as the UK. This approach appears to be natural to national systems, but was withdrawn by the EU legislator. Hence, there needs to be a specifically defined tax base in the CCCTB's framework.[79] Therefore, such an independent framework will increase the administrative burden. The EU Commission also came to this conclusion as it is stated, "in case of optional policy alternatives, the costs associated with maintaining two different systems simultaneously should be estimated."[80] However, it appears, that this EU framework is not sophisticated enough. Therefore, national courts in interpreting vague formulations in the draft directive in the light of its national law might result in different interpretations in the Member States. This might lead to legal uncertainty. Even if the case will be referred to the ECJ, the interpretation of the questionable rule might end up in a non – satisfactory result, as the EU Commission denies the interpretation of the rules in the light of the IAS, and so no common tax principles are available on which the rules could be interpreted. The following paragraph will address the question whether the CCCTB does provide for consistent rules that might be relied upon in the interpretation of it.

It appears from Article 9, that transaction should be measured individually, supporting the legal form over substance principle as the transaction is being measured independently from related transactions.[81] Depreciation, however, is granted to the economic owner, instead of the legal owner, as set out in Article 34 CCCTB, which supports the substance over form principle.[82] Regarding revenues, "equity raised by the tax payer or debt repaid to it", shall not be included.[83] Furthermore, equity and debt repayment are excluded from deductible

[79] The KPMG Guide to CCCTB, Part 1, p. 20.
[80] Commission Staff Working Document (SEC2011), Impact Assessment, CCCTB Accompanying document to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, 16 March 2011, p. 32.
[81] The KPMG Guide to CCCTB, Part 1, p. 21.
[82] *Ibid.*
[83] CCCTB, Article 4(8).

expenses, whereas money loans do fall under the category of deductible expenses.[84] Therefore, loans appear to be deductible, but their repayment does not appear to be included in revenue. The same time, loans received are not excluded from revenues, but their repayment is excluded from deductible expenses.[85] This solution appears to be inconsistent. Another inconsistent interpretation is the realisation principle. According to Article 9(1) CCCTB losses and profits shall be realised when they occur. Article 18 and 19, however, appear to define that "profit should only be taxed when the measurement of it can be made with sufficient certainty."[86] Article 23 deals with the change of taxable amount based on fair value of financial assets and liabilities held for trading. This is a different path than chosen for in Articles 18 & 19. The question remains whether the realization principle is based on liquidity or certainty. This question is not answered by the CCCTB and thus creates another example for potential legal uncertainty.[87]

Based on these examples, it becomes clear, that even though the CCCTB provides for a variety of rules, they do not seem to be consistent and sophisticated enough in itself to provide for sufficient grounds of unanimous interpretation by the courts, and so reference would be made to national interpretations, creating legal uncertainty.

Furthermore, according to the Italian government, the optional application of the corporate tax base definition, as well as the scope of the tax base are insufficient to tackle the proper functioning of the internal market.[88] It is stated in the document, that the rules governing the tax base should be mandatory, ensuring the sound fiscal competition in the internal market. In order to achieve this goal, a minimum tax rate should be established.[89] Even though the Italian criticism, the majority of criticism by legal experts and Member States does not address the tax base definition, but the consolidation and the apportionment formula. The following part will address these issues.

3.3. Findings on the Consolidation under the CCCTB

The consolidation of group accounts across borders is potentially the highest admirable change the CCCTB would bring about. As accounts of group companies would be consolidated, even and especially across borders, losses incurred by a consolidated group

[84] CCCTB Article 14 (1(a)).
[85] The KPMG Guide to CCCTB, Part 1, p. 21.
[86] *Ibid.*
[87] *Ibid.*
[88] Final Document Approved by the Finance Committee of Italy's Chamber of Deputies, Attachement 7, Re: Proposal for a Council Directive on a Common Consolidated Corporate Tax Bae (COM (2011)121 final), p.4.
[89] *Ibid.*

member could be offset against profits of consolidated corporations not only in the same Member State but also across borders. By this instrument, the quasi-non – availability of cross – border relief would be circumvented, for both the same company as well as within a group of companies. The issue of cross – border relief has been one of the identified tax obstacles to trade, as pointed out at earlier stage, and so far has been left with unsatisfactory solutions.

The European Court of Justice in several instances has addressed the issue of cross border relief. In the first case, which addressed this matter, *Marks & Spencer,*[90] the conditions under UK law for group relief of losses have been challenged. It was required by UK law, that for group company relief of losses, all involved parties needed to carry on an economic activity in the UK. Hence, a group company having no branch in the UK and no residency could not offset its losses to a UK group company. According to the ECJ, these conditions were an infringement against the freedom of establishment, guaranteed by the Treaty of the European Union. The court, however, also held, that this restriction to the freedom could be justified on three cumulative grounds.[91] The first fact that must be established is whether the restriction is needed "to preserve the allocation of taxing rights between Member States."[92] Secondly, the restriction is intended to preserve a double relief of losses.[93] Last but not least, the former state of art used to prevent the risk of tax avoidance.[94] All of these justifications must however be proportional. Proportionality must be tested against the criterion whether the non – resident subsidiary exhausted all possible relief mechanisms available in it Member State.[95] This decision leads however to unsatisfactory result, and with the proposed act things would change to the benefit of cross border relief.

Additionally to the possibility of cross – border relief, the consolidation of accounts would eliminate the intra – group transactions for corporations, transfer pricing. The current solution for calculating intra group transactions is a complex list of guidelines set out by the OECD.[96] The core of these guidelines is to proof that a transfer of assets is done at arm's length. The arm's length principle requires for an intra – group transaction to simulate a situation where buyer and seller act independently, and the asset is sold at a fair market value, at the best interest of the parties involved.[97] The documentation and the comparability

[90] Case C-446/03 Marks & Spencer [2005] ECR I-10837
[91] *Ibid*., Para. 69-70.
[92] *Ibid*., Para 43-46.
[93] *Ibid*., Para. 47-48
[94] *Ibid*. Para. 49-50.
[95] *Ibid*., Para 55.
[96] OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrators, OECD Publishing, 2010.
[97] Glossary of Statistical Terms, Arm's Length Principle, Definition, <http://stats.oecd.org/glossary/detail.asp?ID=7245> accessed 23.06.2014.

research of proving arm's length would become dispensable, and so compliance cost would decrease.[98] These costs contain the documentation of transfer pricing transfers, the reporting to the Member States and the consultation with Member States regarding the correctness of the transfer pricing volume. Additionally, in 1999 business have reported that 42% of cases of adjustment gave rise to double taxation.[99] "Double taxation in transfer pricing occurs when the tax administration of one Member State unilaterally adjusts the price set by a company on a cross-border intra-group transaction, without this adjustment being offset by a corresponding adjustment in the other Member State/s concerned."[100] The proposed solution for consolidation allows for group companies to identify intra group transfers at lower cost for tax purposes,[101] provided that the documentation of these transfers is consistent and adequate.[102] Additionally, no withholding tax will be levied on intra – group transactions.[103]

An example provided by the Commission in its working document on the CCCTB provides for a good illustration of the cost benefits of the consolidation. According to this table, time savings in compliance would decrease under the CCCTB up to 8% compared to the current state of art.[104] In setting up a new subsidiary compared to the current state of art, time effort in compliance with the CCCTB would decrease by 69,50% and cost savings would amount to 62,35% for large parent companies. For medium sized companies time effort compared to nowadays solutions would make only 28,88% and costs would decrease by 66,96 % in keeping consolidated tax accounts. In monetary figures this would mean a decrease to 53.000 € and 42.000€ in compliance costs, over 136.890,52 € and 125.837,45 € under the current state of art.[105] These numbers speak for themselves and appear to be very desirable. Nevertheless, the consolidation of accounts will only be possible for CCCTB applying companies, and therefore the arm's length principle would not become obsolete, within the EU and outside the EU. The threshold for qualifying group companies to consolidate their accounts, does probably not meet all affiliated groupings. There might be strong cooperation below the set threshold and so, still the arm's length principle applicable. Therefore, there is

[98] Commission Staff Working Document (SEC2011), Impact Assessment, CCCTB Accompanying document to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, 16 March 2011, p.33.
[99] Commission Staff Working Document (SEC2011), Impact Assessment, CCCTB Accompanying document to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, 16 March 2011, p. 12.
[100] *Ibid.*
[101] CCCTB art 59(4).
[102] CCCTB art 59(3).
[103] CCCTB art. 60.
[104] Commission Staff Working Document (SEC2011), Impact Assessment, CCCTB Accompanying document to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, 16 March 2011, p. 33.
[105] Ibid.

also a provision on the adjustment of transfer prices, based on the arm's length principle in the CCCTB.[106]

With all the benefits that a consolidation might bring, there is also concern raised by some Member States as regards the consolidation. According to the Dutch government, one possible drawback could be the incapability of the country in which the central account is held, where the top of the holding sits, to perform in – depth tax audits.[107] Such a shortcoming would have effect "on the entire European taxable income."[108] Additionally, but this is also linked to the optionality of the CCCTB, the proposed act could lead to an increase of compliance costs for Member States. Even though the consolidation should facilitate accounting being placed under one system, Member States would be obliged to run next to the CCCTB system, still the national tax system.[109] The German government, having been one of the supporters of the CCCTB, declared in response to a parliamentary question, that the consolidation might cause a deficit in the budget of the state. The commission's impact assessment found that the national governments would not suffer any deficiencies, but based on former calculations, the new system would be introduced at the cost of the Member States' budgets.[110] Additionally, based on the tax exempt transfer of assets within a CCCTB group, without the realisation of hidden reserves and the tax exempt disposal of shares, Member States could lose their taxing rights, as via this method hidden reserves could be shifted from high tax countries to lower tax countries.[111]

Despite the critical voices, one must state that the potential decrease of complying costs with all the criteria attached to the arm's length principle seem promising for qualifying group companies, but at the end of the day, Member States fear to be disadvantaged by the new system. The consolidation does however depend on the mechanisms supporting its realization. For the CCCTB consolidation this supporting mechanism is the apportionment formula. This will be analysed in the following chapter, potentially relativizing the promising figures presented by the EU Commission.

---

[106] CCCTB art. 79.
[107] Official Website of PriceWaterhouseCoopers, A Transfer Pricing Publication, *Pricing Knowledge Network – Focusing on the impact of major intercompany pricing issues,* 4th of May 2011, <http://www.publications.pwc.com/DisplayFile.aspx?Attachmentid=4537&Mailinstanceid=20671> accessed 21.06.2014.
[108] *Ibid.*
[109] *Ibid.*
[110] German Bundestag, Drucksache 17/5748, Answer of the German First Chamber to a parliamentary question on the CCCTB proposal by members of the opposition Party Bündnis 90 die Grünen, p.2, <http://dipbt.bundestag.de/dip21/btd/17/057/1705748.pdf> accessed 23.06.2014.
[111] *Ibid.*

3.4. Findings on the Apportionment Formula under the CCCTB

As already mentioned in chapter two, the apportionment formula would bring about the most radical change to the calculation of the corporate tax. As the consolidation of accounts would, once applied, create one account for the group of companies, the share of the tax base should be distributed equally and proportional amongst the Member States where the group's operations take place. Formulary apportionment is new to the European Union, but an accepted technique applied in some regions of the world. The OECD guiding principles have been subject to the same discussion as we are facing currently in the EU. Even though the territorial scope of the discussion goes beyond the borders of the EU, it summarises very well the arguments of the two opposing parties. The apportionment formula is a counter doctrine to the applicable doctrine of separate accounts for each company of a corporate group, in which the group – transactions are accounted for at the arm's length principle. The arm's length principle has been identified as being incapable of accounting for the synergy rents earned by multinational enterprises[112]. The same critics hail the formulary appointment method for providing more administrative convenience and certainty for taxpayers.[113] It is argued, that the apportionment method fits the economic reality, as it considers the group the same way the group sees itself, operating on close relationship to each other. The close operation of those highly integrated companies makes it for the separate accounting method impossible to determine what contribution the associated enterprises make to the overall profit of the group.[114] It is further argued, that the fact that the taxpayer only keeps one account, instead of several separate accounts for the States it operates in, lowers the compliance costs for the former.[115] The opposition to the apportionment formula raises significant concern as to several weaknesses of the formula, but especially to the difficulty of choosing the right factors for calculation and the measurement of the latter.[116] The different economic activities in Countries make it hard to agree on common terms as to which factors should form part of the formula.

The factors chosen by the CCCTB are labour, sales and assets. They should "take account of both the supply and the demand side on the generation of companies' income."[117] The first notable aspect of the formula is, that it transforms the "corporate income tax into an

[112] E. Röder, *Proposal for an Enhanced CCTB as Alternative to a CCCTB with Formulary Appointment,* p.131.
[113] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrators, C.2, para 1.19.
[114] *Ibid.*
[115] *Ibid.,* para. 1.20.
[116] *Ibid.,* para. 1.22.
[117] see footnote 47, para. 11.

implicit tax on the factors used in the formula."[118] Economically speaking this means that the tax burden is levied on labour, sales and assets. This fact might shift the tax burden to workers and consumers, labour and sales factor. Whether this is desirable or not depends on the point of view, however, sales and labour are already taxed at other stages, such as the VAT for goods, and the income taxation of employees. Nevertheless, even though this issue has been addressed at an early stage of the assessment of the Working group, it has not been clearly pointed out so far. [119]

Concerning the asset factor most concern has been raised so far. According to the working group the factors should represent the relevant factors, which contribute to the generation of companies' taxable income. If this ideal is matched, the apportionment formula is supposed to be difficult to manipulate. Nevertheless, the asset factor bears some frictions with this ideal concept. First of all, fixed tangible assets are included in the tax base formula at tax written down value.[120] Intangible assets do not form part of the asset factor, because of their "mobile nature and the risk of circumventing the system."[121] Before turning to the issue of intangible assets, the first question that needs to be answered is, whether the valuation of fixed tangible assets on its tax value is appropriate. Compared to the market value, the tax value does not give reliable figures in the long run. The assessment of value based on its current market value requires annual evaluation of the asset. This would turn, however, to be very costly.[122] Additionally, the issue of excluding intangible assets is very controversial. Even though, the costs for researchers, labour, and for research assets, fixed asset, are included in the formula, the exclusion of intangible assets is hardly excusable.[123] Intangible assets are in nowadays economy important profit drivers.[124] The mere inclusion of costs for research staff and assets for the creation of intangible assets cannot be equalled the value of the intangible asset as such. Probably, the inclusion of intangible assets, and its valuation at market value would have caused to high costs for the companies and has been therefore left out. Furthermore, in a scenario where an intangible asset is acquired, one could actually include the assets value based on the price the acquirer paid. Even though this valuation would be less costly, the use of intangible assets acquired by third parties and the ignoring of

[118] E. Röder, *Proposal for an Enhanced CCTB as Alternative to a CCCTB with Formulary Appointment*, p. 132.
[119] *Ibid.*
[120] *Ibid.*
[121] CCCTB Preamble Recital 21.
[122] *Ibid.*
[123] E. Röder, *Proposal for an Enhanced CCTB as Alternative to a CCCTB with Formulary Appointment* p.133.
[124] D. Volkov T. Garanina, *Intangible Assets: Importance in the Knowledge – Based Economy and the Role in Value Creation of a Company*, < file:///Users/jangrabowski/Downloads/ejkm-volume5-issue4-article137%20(1).pdf> accessed 24.06.2014.

in-house created intangible assets would seem rather arbitrary.[125] The exclusion of intangible assets does cause certain uproar on behalf of some Member States. Germany and the Netherlands, to name two, approach this solution with much scepticism, and amongst others deny their support to the current CCCTB proposal, based on this scepticism. According to the Dutch government, intangible assets are “key value drivers” and must form part of the asset factor in the apportionment formula.[126] The German government fears of above-mentioned short comings in the state budget, because of consolidation, and on the lack of intangible assets in the apportionment formula, as thereby insufficient results will probably occur in calculating the tax base.[127] The indirect inclusion of intangible assets, via research assets and research staff salary, does not represent the importance of this factor.[128] This can be illustrated by the example provided by Leonard Nakamura, that the capitalized value of intangible assets is six times as high as the research and development costs.[129] Assuming that the book value of R&D costs lies in a medium sized company around 10.000€, the value of the intangible assets would be around 60.000 €. This ignorance of intangible assets in calculating the corporate tax base would be significant and misrepresenting the actual value of the assets. Furthermore, the OECD found that the unmeasured intangible capital has been calculated to account for 18% of growth in multi factor productivity, between 1990 and 2000.[130] These numbers will probably have increased in the last decade, as the modernization and the development of innovation go hand in hand.

Next to the shortcomings as regards the asset factor, the next potential threat is the possibility of new tax planning approaches. Even though the CCCTB to a certain extend limits tax planning via the arm’s length principle, it gives new potentials. The tax allocation is based on the formula and these three factors provide for solution but also for the new problems. One problem could be the outsourcing of activities to purely low tax countries, thereby eliminating the asset and labour factor in that Member State. Physical presence in high tax countries could also be deliberately abandoned for sales, as there needs to be a permanent establishment or subsidiary, in that high tax country for the CCCTB group to be taxed in that Member State. Instead, third party contractors could deliver and distribute the goods. Those new planning opportunities, as well as the rational between R&D costs create

---

[125] E. Röder, *Proposal for an Enhanced CCTB as Alternative to a CCCTB with Formulary Appointment* p.133.
[126] See Footnote 90.
[127] See Footnote 93.
[128] *Ibid*.
[129] A. Damodaran, The Value of Intangibles, Slide No. 2, <
http://people.stern.nyu.edu/adamodar/pdfiles/ovhds/dam2ed/intangibles.pdf> accessed 10 August 2014.
[130] OECD, New Sources of growth: intangible assets, 2006, <http://www.oecd.org/sti/inno/46349020.pdf> accessed 10 August 2014.

immeasurable costs at the current stage, but might easily neutralize the cost savings pointed out in the previous sub – chapter.

Given the above-mentioned weaknesses of the CCCTB, the next sub – chapter will summarize the findings and shortly assess them on the basis of the goals of the CCCTB.

3.5. Short assessment of the CCCTB's goals and its impact

The CCCTB's goals are manifold. Mainly it is meant to simplify taxation in the EU for corporations and to remove transfer-pricing problems.[131] The common tax base is intended to be defined by the CCCTB in a very clear and complete manner. It is kept as independent as possible from existing mechanisms and does not refer to national legal systems. For the purpose of creating a new body of corporate taxation, which is equal for all eligible companies, and Member States, this decision is sound, but unsophisticated as it stands right now. The inconsistent application of terms and mechanisms does not provide for legal certainty, and might cause unfair circumstances for companies. Additionally, the optionality of the CCCTB, and thus the optionality of the definition of a corporate tax base is for the fulfilment of the harmonization maybe a necessary, political decision, but not convincing. A mandatory application of the tax base definition would provide for less complication. The application of two tax systems creates more complication and higher costs for the tax authorities. For the eligible companies, that might form a CCCTB group, the application of the CCCTB mechanism might create lower compliance costs as regards the scope of the CCCTB. Nevertheless, the CCCTB does only apply generally. For transactions that are not covered by the CCCTB draft, the national tax system would still apply. Applying two separate tax systems creates definitely more costs than only one system, for both, the corporations and the Member States. The question is, however, whether the hybrid system of CCCTB and national tax laws outweighs the current cost factor.

The attempt of tackling double taxation is to be found in Articles 11 and 59 of the CCCTB. Even though it is very beneficial for the applying companies, the potential loopholes as regards the transfer of hidden reserves create manifold problems for Member States. The simplification for the CCCTB group accounts might occur at the expense of Member States, by losing taxing rights on crucial assets, as the tax exempt disposal of shares might be abused by a company to transfer important assets and hidden reserves, completely legal with no tax burden on them. Even though transfer pricing would be abandoned to a certain extend, the

[131] CCCTB\WP\060, Comments, p.1.

costs created via the exclusion of intangible assets as well as the new tax planning mechanism for companies would create, next to administrative costs, potentially high losses in the fiscal revenue of the Member States. Therefore, it is politically not supported by strong economic countries of the EU, as the consolidation would create costs that might outweigh the abolishment of the current obstacles under the arm's length principle, for companies.

The consolidation of accounts and the apportionment formula, attempt to tackle the transfer – pricing issues under the current system. As for the corporate groups that fall under the CCCTB, this might be the case, but only for the actions and operations within the threshold of qualifying group members. However, there will be sufficient affiliated companies that fall outside the scope of the CCCTB, and hence the arm's length principle will still be necessary to maintain. Especially the given example of the importance of intangible assets appears to make the CCCTB proposal ignorant as regards the importance of these for profit generators of companies. The inclusion of those via research costs, for researchers, and the value of research assets, does not sufficiently represent the value of a potential innovation. The explanation by the commission for refraining from the inclusion of intangible assets is the difficulty of measuring those assets, and the apportionment of these to a certain Member State because of their mobility. Even though it simplifies the creation of a CCCTB, it is questioned by Member States whether this attempt reflects economic reality.

The above – mentioned examples are only are glimpse of what potentially can be caused via the apportionment. The anti-abuse clauses provided in the CCCTB appear not to be sufficient as their main tool to prevent tax planning is the setting of time limits. The success of these clauses depends mainly on the patience of the companies involved. Most probably, if the CCCTB would be adopted, the safety measures would need an improvement in the course of time. Furthermore, the exclusion of intangible assets from the apportionment formula

The limits on cross – border loss relief and cross – border business restructurings are addressed by the CCCTB, and solutions have been proposed. Nevertheless, even though both matters are enabled and simplified, they come at the above-mentioned cost, the consolidation and apportionment formula bring about. The impact of the apportionment formula is negative on the fiscal revenue of the Member States.

Regarding the principle of subsidiarity the Commission has delicately provided indicators that prove the need for EU legislation. Nevertheless, proportionality is debatable. Especially in the light of the potential costs that might outweigh the benefits, a simpler solution might be preferable, excluding the consolidation of accounts.

Having assessed the strengths and weaknesses of the CCCTB, the following chapter will consider an alternative solution for the harmonization of the Corporate Taxation in the EU.

4. A Common Corporate Tax Base under enhanced cooperation

As the criticism of the CCCTB proposal is manifold and well funded, alternative solutions for the harmonization of the corporate tax base must be considered. Purely because the CCCTB does not seem fit at current stage to tackle the tax obstacles, does not mean that the identified obstacles are obsolete. One alternative that will be discussed in this chapter would be the model of enhanced cooperation among Member States. Via this method several Member States could begin to harmonize their tax bases, and begin the tackling of tax obstacles on a smaller territorial extend. Before turning to a potential common corporate tax base framework, a short introduction will be given to the method of enhanced cooperation.

4.1. Enhanced Cooperation

The Treaty on the European Union provides under its fourth title for general rules for enhanced cooperation. The method of enhanced cooperation has been established in the Lisbon treaty, and provides for an alternative to fulfil EU policies, "when it has been established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole."[132] Nevertheless, this is only possible "within the framework of the Union's non – exclusive competences.[133] Enhanced cooperation hints at realizing the objectives of the European Union, by enabling Member States to create a pool of greater cooperation, than provided for by existing laws. Nevertheless, the EU, via its institutions and procedures, shall hold the patronage over the enhanced cooperation.[134] Even though it is primarily intended to accelerate EU integration and harmonization "for the most ambitious Member States", other Member States may at any point join the agreement.[135] However, Member States that want to participate must comply with the decisions taken in the

[132] TEU art 20(2).
[133] *Ibid.*, art 20(1).
[134] Official Website of the European Union, The Lisbon Treaty: a comprhensive guide, Enhanced Cooperation, <http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0018_en.htm> accessed 23.06.2014.
[135] *Ibid.*

framework of enhanced cooperation.[136] One of the general principles of the model of enhanced cooperation is that it does not undermine the objectives of the single market and that the minimum threshold of establishing enhanced cooperation in a certain field is the participation of at least nine Member States. Furthermore, the participating Member States and the Commission must ensure, that enough encouragement is given for non – participating Member States to become part of the framework. The decisions and agreed terms of the enhanced cooperation framework are binding only among the participating Member States. Supervision of the activities of the framework lies with the EU Commission and Council.[137]

As the CCCTB draft proposal has received a "yellow card" by nine of the Member States and five other Member States raised deliberate concern, the probability of the CCCTB to be rejected, not voted in favour for unanimously, is relatively high. Even though this might only be a policy decision by the Member States concerned, the CCCTB directive as planned does run high probability to fail. Under these circumstances, the tool of enhanced cooperation might bring relief to harmonization efforts in the field of corporate tax harmonization, instead of a standstill in these matters. There is the option that the Member States that have not raised objections against the proposal will adopt the CCCTB via this way, or Member States agree on a Common Corporate Tax Base without Consolidation. Based on the raised concerns, the governments of France and Germany have announced in 2011,that both states plan to work on a green paper for a common set of rules determining the tax base for corporations by 2013. Even though this green paper is limited to German and French corporate tax laws, the core idea behind it is the convergence via cooperation to common solutions.

4.2 An enhanced Common Corporate Tax Base

The German and French green paper is an attempt by Germany and France to overcome the current struggle the EU has with harmonizing the corporate tax base through the proposed CCCTB directive. Via systematically studying their tax systems both countries try to converge specific aspects of their corporate tax systems. Their attempt might give impetus to other Member States to join such a strategy. The message this cooperation sends is distinct, as two of the strongest EU economies try "to sort out the mess". By convergence, transparency is increased and so compliance costs are lowered. The attempt to converge the systems, even as to the tax rates applicable, counters negative tax competition. The main criteria for such a CCTB should be the one, that have been set out by the EU at an earlier

[136] *Ibid.*
[137] *Ibid.*

stage, by enlisting the core tax obstacles to the internal market, namely: high complying costs for multinational companies, the issue of double taxation, as well as transfer pricing complications, limits on cross – border loss relief and tax charges on cross – border business restructurings. Compared to those achievable goals, appear the core topics of this green paper, the taxation of corporate groups, the taxation of dividends, the offsetting of losses, the taxation of partnerships, thin capitalization and the corporate income tax rates[138] as rather pragmatic.[139] It resembles politic reality, but misses a common definition of a corporate tax base. It discusses, however, certain aspects of a corporate tax base, which on the long run could be subject to further harmonization. The incentives that this cooperation might give, heavily depend on the ambitions by the Member States to converge their systems. Nevertheless, for the time being, for a CCTB, a generally accepted definition is of crucial importance.

Even though the consolidation of accounts and the corresponding apportionment formula would play no role under a CCTB, the CCCTB's definition of a corporate tax base could be used as a basis for the development of a CCTB. The legislator would need to overcome the shortcomings in the conceptual framework, that the interpretation of the tax base would be as unanimous as possible. Furthermore, in order to fulfil the goal of simplification and harmonization, the tax base's mandatory application should at least be considered. It would simplify the state of art, as only one definition would be applicable, unlike under the CCCTB 28 national definitions of a corporate tax base alongside the common definition. Not only would the single definition create fewer complications but also lower complying costs. The lower complying cost can be substantiated by the fact, that tax advisors, lawyer, experts of companies, even though acting cross – borders, would still speak the same language, tax – wisely. The findings of the German and UK government, that the CCTB would decrease their fiscal revenues can be left aside, as the result of quantitative analysis show that on an EU 27 average, the tax burden would decrease by around 0.06%.[140] Even though the current tax Systems of the Member States deviate from the CCCTB definition, the transition to the common system should not create big difficulties as the

---

[138] Deloitte Tax – News, Green Book on tax convergence published, <http://www.deloitte-tax-news.de/german-tax-legal-news/green-book-on-tax-convergence-published-german-coalition-parties-plan-for-further-business-tax-reform.html> accessed 22.06.2014.

[139] Loyens & Loeff, Green Paper German – French harmonization corporation tax; a further step to a common tax base within the European Union, 21 February 2012, 9 Preliminary Conclusions, <http://www.loyensloeff.com/nl-NL/Practice/Documents/Green%20Paper%2021%20February%202012.pdf> accessed 23.06.2014.

[140] C. Spengel M. Ortmann – Babel & others, *A Common Corporate Tax Base for Europe: An Impact Assessment of the Draft Council Directive on a CC(C)TB*, Discussion Paper No. 12-39, Centre for European Economic Research, p.1.

deviations are of formal and technical nature and should not have a significant impact on the tax burden.[141] Hence, the common corporate tax base would tackle the obstacle of high complying costs of corporations. The costs of such a harmonization would probably be imposed on the Member States, as regards the transition to the common system and the decrease of the tax burden on companies at the expense of the fiscal revenue of the Member State. Nevertheless, the decrease of the tax burden can be described as marginal. Additionally, a CCTB without consolidation would be less complicated in its application, as no sharing mechanism would be required.[142] This would also reduce administrative costs, as the communication between tax authorities would become obsolete. This argument would also count for businesses, as the costs for consolidation would also not be incumbent on them.

The second impediment to the internal market, identified by the EU Commission, is double taxation.[143] The potential areas in which double taxation might occur are manifold, in corporate tax. There is the double taxation of dividends and capital gains, the double taxation via withholding taxes, and double taxation via transfer pricing adjustments.[144] Solely a common corporate tax base would tackle neither of the double taxation issues. An adjustment of existing laws would be needed. For example, regarding the issue of double taxation of dividends, an adjustment of the parent subsidiary directive would be needed, by e.g. exempting profit distributions and capital gains irrespective of the shares held by the parent company, contrary to the current state of art.[145] The reluctance to harmonize tax laws larger than to a minimal extend can be seen in the green paper of Germany and France on a common corporate tax base, and so, potential adjustments of existing legal instruments would hardly be achieved. Hence, the CCTB does not address the issue of double taxation. The present system would probably be kept in place. The disadvantage of bearing the costs of this situation would be the corporations, as they would still be exposed to double taxation.

As regards the problem of cross border loss compensation, the CCTB does not explicitly cope with the problem and mechanisms behind the current solutions. Nevertheless, a common corporate tax base would address the first problem of cross border loss compensation. One of the problems regarding the issue at hand is the different definition of factors that constitute the corporate tax base. Losses in one Member State might be regarded as profit in another Member State. The common definition of these factors would create a

---

[141] *Ibid*.
[142] The KPMG Guide to CCCTB, Part 1, p. 11.
[143] Communication from the Commission Com(2011) 712 final, 11 November 2011, Double taxation in the Single Market.
[144] E. Röder, *Proposal for an Enhanced CCTB as Alternative to a CCCTB with Formulary Appointment* p. 138.
[145] Council Directive (2011/96/EU) of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ 2011 L 345/8, Article 4(1).

common starting point for this problem, as the required recalculation would vanish.[146] However, at the end of the day, the obstacles to cross border loss compensation only start with the definition of the constituent parts of a tax base. Therefore, the CCTB would not significantly change the state of art, and would therefore not contribute to the abandonment of this tax obstacle. The price to be paid by this lack of harmonization would to be braced by corporations operating across the EU, as they would be put at the disadvantage of not being able to offset their losses made in one Member State against the profits achieved in another.[147] The CCTB could overcome this obstacle, by including detailed rules governing cross – border relief between all EU companies belonging to a group.[148]

The final identified tax obstacle to the internal market is the issue of cross – border restructurings and the underlying tax issues to it. The Merger Directive deals with cross – border reorganizations at the EU level. The central tax problem of reorganizations of companies across borders is caused by hidden reserves, especially the levying of exit taxes on hidden reserves that a Member State levies on companies that are reorganizing in another Member State. The ECJ has held that the Member State is entitled to tax unrealized capital gains as long as they can be reliably determined. The leaving company may, however, decide for taxation once the asset is disposed of. The final option is the payment of deferred taxes, linked to a requirement of annual return, proving the on-going possession of the hidden asset to the abandoned Member State. This requirement includes interest payments on the deferred tax amount. These options were elaborated by the ECJ in the *National Grid* Case,[149] answering the question, whether exit taxes are an infringement of the freedom of establishment. A common corporate tax base definition would not suffice to tackle the tax issues related to cross – border reorganizations. Further harmonization would be needed as regards the three solutions set out in the *National Grid* case. Nevertheless, in solving the issue, the important aspect to be respected is the allocation of taxing rights to Member States. As at least two Member States share the apparent difficulties in a cross – border reorganization, the taxation of hidden reserves must be allocated according to the hidden reserves that have accrued on that respective territory. For example, the payment of tax on hidden reserves once they are disposed of would need further deliberation. After the hidden

[146] E. Röder, *Proposal for an Enhanced CCTB as Alternative to a CCCTB with Formulary Appointment* p. 144.
[147] M. Schulman, *Treatment of Cross Border Losses in the European Union*, July 2010 Aarhus School of Business <http://pure.au.dk/portal/files/12866/Treatment_of_Cross_Border_Losses_in_the_European_Union.pdf> accessed 23 July 2014.
[148] The KPMG Guide to CCCTB, Part 1, p. 11.
[149] ECJ, 11 March 2004, Case C-9/02, Hughes de Lasteyrie du Saillant; ECJ, 7 September 2006, Case C-470/04, N.

reserve has left a Member State, it might still have gained in value before being sold. This increase in value, should as it occurred on another Member State's territory, be subject to tax in that Member State, instead of the former. The problem with further harmonization is the same as stated for double taxation, the reluctance of Member States to harmonize more than necessary. The fact that the CCTB would not sufficiently tackle the issue at stake, would burden the companies seeking for reorganisation with administrative costs.

With the CCCTB proposal a number of Member States have raised concern as to the infringement of the principle of subsidiarity and proportionality. The main reasons were the lack of proof that the CCCTB was necessary to address the tax obstacles to the internal market compared to potential national regulations.[150] The CCTB could face similar difficulties, as the sovereignty of Member States is restricted as to the definition of the corporate tax base. As pointed out in the previous section, the decrease in tax burden would amount to a EU – 27 average of 0.06%, which appears to be a marginal number. Nevertheless, countries where the tax burden could be considerably reduced could oppose a CCTB, and decide not to participate in such a framework of enhanced cooperation. Those countries would probably be Cyprus, with a reduction of tax burden of 4.04%, Ireland, -2.39% and Italy, -2.43%.[151] However, the break into the national sovereignty in designing the tax laws would rather be small, as except for the tax base definition, nothing would change. Concerning further harmonization, the pace at which Member States would continue their cooperation would depend on them.

4.3. Summary of CCTB compared to CCCTB

A harmonized CCTB and CCCTB are two distinct approaches regarding the harmonization of corporate tax. Nevertheless, if the tax base definition of the CCCTB would be applied, the starting point would be the same. For the above-mentioned reasons the mandatory application of the CCTB would decrease compliance costs for corporations, as the rules would be the same throughout the cooperating countries. Compared to the CCCTB's optional application of the corporate tax base definition, the mandatory application of a CCTB would decrease the compliance costs for multinational companies significantly, as well as for the Member States, after transition to the new system. The issue of proportionality would be

---

[150] See Chapter 3.1.

[151] C. Spengel M. Ortmann – Babel & others, *A Common Corporate Tax Base for Europe: An Impact Assessment of the Draft Council Directive on a CC(C)TB,* p.2.

less striking, as the legislator would not reach far into the national sovereignty of the Member States, because except for the tax base definition, the competences would remain with the Member States. Regarding the principle of subsidiarity, the same concerns would remain, but as discussed above, they seem not to be as well founded as the criticised elaboration by the EU.

The issue of fairness, which is not covered well by the CCCTB proposal, would only become less of a problem under the CCTB, if the conceptual shortcomings would be addressed. The interpretations in questionable situations would still rely on national interpretations, if no sophisticated framework of principles and definitions would be provided by a CCTB. Hence, legal certainty in cross border transactions could not be guaranteed.

The cost savings factor of a CCTB has also been addressed in the Commission's Working Document on the CCCTB. Whereas the compliance time under a CCCTB decreased by 69,50%, the CCTB would provide for a decrease of 9,84 %, for medium sized parent companies, compared to the current system. Compliance costs would decrease by 2,25 % under a CCTB, compared to 66,96% under the proposed regime. For large companies the difference in time savings between CCCTB and CCTB would be approximately 59% and in costs as well, in favour of the CCCTB.[152] The numbers definitely speak for the CCCTB, but do not take into account the above-established loss in fiscal revenues by exclusion of intangible assets. Unfortunately these figures cannot be concretized at the current stage, but the accounting for 1/6th of the actual value of intangible assets appears to be a striking difference. Depending on the nature of activities of a company, the differences in compliance time and costs can be vanished by the potential shortcomings in taxable amount for the Member State.

5. Conclusion

We have seen that harmonization efforts of the taxation of corporations date back to the early days of the EU. Ever since, Member States have been reluctant to harmonize this area of law, and thereby causing complications in the fulfilment of the internal market. Harmonization of trade laws and corporate laws have come a long way in order to achieve economic cooperation, but the tax laws for corporations have not, even though forming a crucial aspect of economic activity. Therefore, up until today only few tax issues have been addressed by EU legislation. The proposal for a CCCTB Directive was brought forward in

[152] Commission Staff Working Document (SEC2011), Impact Assessment, CCCTB Accompanying document to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, 16 March 2011, p. 34.

order to intervene with this slow pace of harmonization. The EU Commission has in its action plan of 2001 identified the core obstacles to the common market, namely the difficulties of high complying costs for multinational companies, because of the different national legal systems, the issue of double taxation, as well as transfer pricing complications, limits on cross – border loss relief and tax charges on cross – border business restructurings. The Draft of the CCCTB addresses all of these obstacles, via its "three steps". Those "three steps" constitute the harmonization of the corporate tax base, the consolidation of accounts of group companies and the apportionment formula, in order to allocate the taxable share of profit to Member States. The proposal has been subject to much criticism. It was doubted that the CCCTB proposal was in light with the primary EU principle of subsidiarity and proportionality. Furthermore, the consolidation of accounts and the accompanying apportionment formula were criticised. The disputed aspects of these two steps were the weak constitution of the apportionment formula factors. The exclusion of intangible assets is regarded as necessary by the EU Commission, as the valuation is deemed to be complicated and the mobility of these assets make it rather difficult to allocate them to a certain Member State. Even though these findings might be correct for the purpose of adopting the CCCTB, they do not reflect economic reality. Additionally, the potential abuse regarding hidden reserves and further planning mechanisms, lead Member States to reject the proposal. Consequently France and Germany launched a cooperative study of their national tax systems with the intention to converge their system gradually. Even though this green paper proved to be pragmatic, the idea behind the concept, namely the harmonization of the tax base only, is accepted as an alternative to the CCCTB. The CCTB would tackle, however, not all the tax obstacles identified. A mandatory application of a CCTB would solely tackle the obstacle of high complying costs that go hand in hand with the application of 28 different national tax systems. For the rest of the obstacles further effort on behalf of the Member States would be needed, or an inclusion of solutions linked to the CCTB.

Based on these findings it remains to answer the question of whether a CCTB would be better for EU corporate tax harmonization than a CCCTB. On the long run, the answer to this question must be no. The obstacles would not be tackled in their entirety, and the state of art would probably remain almost unchanged. However, the CCCTB is also not suitable as it stands right now for harmonization. Even though it provides for manifold solutions to the tax obstacles, it has too many shortcomings. The degree of those shortcomings, resulting in new tax planning mechanisms, and elusive costs is capricious. The apportionment formula is deficient, and so there is no proof that it is superior the arm's length principle. The current

state of art is nowhere close to be a final solution, but it is billable. For the time being, from my point of view, the CCTB should be taken as a starting point, and its application should be mandatory. The consolidation of accounts and the apportionment formula should be improved and added to the CCTB as soon as its shortcomings are overcome. Hence, the approach should be “step by step” instead of “three steps” at a time.

Bibliography

European Law Primary Sources

Treaty establishing the European Community (Maastricht Treaty)

Treaty on the European Union (Maastricht Treaty)

Case Law of the European Court of Justice

Case C-446/03 Marks & Spencer [2005] ECR I-10837

Case C- 371/10 National Grid Indus [2011]

European Law Secondary Sources

Council Directive (EEC) 90/434 of 23 July 1990 on the common system of taxation applicable to mergers, division, transfer of assets and exchange of shares concerning companies of different Member States [1990] OJ L225

Council Directive (EEC) 90/435 of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [1990] OJ L225

Council Directive (2011/96/EU) of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ 2011 L 345/8

European Law Draft Directives

Commission Proposal COM(2011) Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)121

Preparatory Work by the European Union

Commission staff working paper, "Company Taxation in the Internal Market", COM(2001)582 final, Earlier Commission initiatives in the area of company taxation 16

Communication from the Commission to the Council COM(97)495 final, "Towards tax co-ordination in the European Union",

Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee COM (2001) 582, Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU – wide activities, October 23 2001

Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee COM (2003) 726, An internal Market without company tax obstacles achievements, ongoing inititatives and remaining challenges, November 24 2003.

European Commission Working Paper (CCCTB/WP/060) 13 November 2007 Common Consolidated Corporate Tax Base, CCCTB: possible elements of the sharing mechanism, Annex to CCCTB/WP/060: Synthesis of possible apportionment rules

European Commission Working Paper (CCCTB/WP/057) 26 July 2007 Common Consolidated Corporate Tax Base, CCCTB: possible elements of a technical outline

Commission Staff Working Document (SEC2011), Impact Assessment, CCCTB Accompanying document ot the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, 16 March 2011

Communication from the Commission Com(2011) 712 final, 11 November 2011, Double taxation in the Single Market

EU Internet Sources

Official website of the European Commission

Official website of the European Commission

International Sources of Law

OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrators 2010

National Reports

UK Parliament, Reasoned Opinion of the House of Commons on a CCCTB

Reasoned opinion by the Riksdag of the Kingdom of Sweden on the proposal for a Council Directive on a CCCTB

Irish Parliament, 'Report under Standing Order 105 on the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base

German Bundestag, Drucksache 17/5748, Answer of the German First Chamber to a parliamentary question on the CCCTB proposal by members of the opposition Party Bündnis 90 die Grünen

Final Document Approved by the Finance Committee of Italy's Chamber of Deputies, Attachement 7, Re: Proposal for a Council Directive on a Common Consolidated Corporate Tax Bae

Literature

World Trade Report 2007, Six decades of Multinational Trade Cooperation: What have we learnt? The Economics and Political Economy of International Trade Cooperation

Konrad Adenauer Stiftung, Europe's Single Market – Expoliting untapped Potentials

E. Röder, *Proposal for an Enhanced CCTB as Alternative to a CCCTB with Formulary Appointment*, Max Planck Institute for Tax Law and Public Finance, Working Paper 2012 – 01, February 2012

B. Della Vedova, "*Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU – wide activities"*

Cf. R.A. De Mooij and M.P. Devereux, *Alternative Systems of Business Tax in Europe – An applied analysis of ACE and CBIT Reforms*, Taxud Taxation Papers, Working paper No 17, 2009

N. Herzig and J. Kuhr, *Direct Taxation in the EU: The Common Corporate Tax Base as the next sub – step towards Harmonization*, Wroclaw Review of Law. Administration & Economics 2013/24

C. Spengel & C. Malke, *Comprehensive Tax Base or Residual Reference to GAAP or Domestic Tax Law?* Series on International Tax Law Vol. 53, Linde Verlag Wien

M. Petutschnig, *Common Consolidated Corporate Tax Base: Effects of Formulary Apportionment on Corporate Group Entities,* WU International Taxation Research Paper Series

Brocke von/Rottenmoser, Harmonisierung direkter Steuern? Die GKKB im Lichte der Rechtsetzungskompetenzen der EU, IWB 2011

D. Volkov T. Garanina, *Intangible Assets: Importance in the Knowledge – Based Economy and the Role in Value Creation of a Company*

C. Spengel M. Ortmann – Babel & others, *A Common Corporate Tax Base for Europe: An Impact Assessment of the Draft Council Directive on a CC(C)TB*, Discussion Paper No. 12-39, Centre for European Economic Research

M. Schulman, *Treatment of Cross Border Losses in the European Union*, July 2010 Aarhus School of Business

Other

Official Website of the International Tax Law review, Eight Member States Show CCCTB Yellow Card <http://www.internationaltaxreview.com/Article/2835775/Eight-member-states-show-CCCTB-yellow-card.html>

Official Website Deloitte Belgium, CCCTB – essentials and the path ahead, Issue 44, June 2011 <http://www.deloitte.com/view/en_id/id/64eb16a6167b0310VgnVCM3000001c56f00aRCRD.htm>

Winston Churchill, The tragedy of Europe (Speech at the University of Zürich 19 September 1946) <http://www.europa.clio-online.de/site/lang__de/ItemID__297/mid__11373/40208215/default.aspx>

R. Schuman, The Schuman Declaration, 9th of May 1950, <http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm>

Official Website of the Noble prize, Nobel Prizes and Laureates, <http://www.nobelprize.org/nobel_prizes/peace/laureates/2012/eu-facts.html >

Glossary of Statistical Terms, Arm's Length Principle, Definition, <http://stats.oecd.org/glossary/detail.asp?ID=7245>

Official Website of PriceWaterhouseCoopers, A Transfer Pricing Publication, *Pricing Knowledge Network – Focusing on the impact of major intercompany pricing issues,* 4th of May 2011

The KPMG Guide to CCCTB, Part 1, p.16 < http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/ccctb-part1.pdf>

Deloitte Tax – News, Green Book on tax convergence published, <http://www.deloitte-tax-news.de/german-tax-legal-news/green-book-on-tax-convergence-published-german-coalition-parties-plan-for-further-business-tax-reform.html>

Loyens & Loeff, Green Paper German – French harmonization corporation tax; a further step to a common tax base within the European Union, 21 February 2012, 9 Preliminary Conclusions, <http://www.loyensloeff.com/nl-NL/Practice/Documents/Green%20Paper%2021%20February%202012.pdf>

A. Damodaran, The Value of Intangibles, Slide No. 2, < http://people.stern.nyu.edu/adamodar/pdfiles/ovhds/dam2ed/intangibles.pdf>

OECD, New Sources of growth: intangible assets, 2006, <http://www.oecd.org/sti/inno/46349020.pdf>