

THE INFLUENCE OF BREXIT ON CCTB/CCCTB AND BRITISH COMPANIES

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## **Preface**

This thesis is the culmination of my time in the International Business Taxation program at Tilburg University. During my time as a student here, I had the honor to learn international business tax law from some of the greatest minds of our time. I had the pleasure of many enlightening discussions. I was able to complement my knowledge of European law with a deep insight into the principles and functioning of International and European Business Taxation. The challenging and intellectually stimulation classes at Tilburg Law School enabled me to conduct research on this field. This thesis combines the knowledge I gained through my master candidacy in Tilburg with countless hours of research. It is my first attempt at a contribution to the most interesting field of international business taxation.

I would like to thank my supervisor, Dr. Cihat Öner, for his invaluable support throughout the thesis process. His eruditeness combined with his unmatched approachability made working with him a pleasure. His support went far above and beyond what was necessary and what I expected.

I would also like to thank Prof. dr. Eric CCM Kemmeren for his support in defining the topic of my thesis, his patience during the long process of doing the groundwork for the research to come, and many fascinating, informative, and challenging, yet also highly enjoyable discussions.

Finally, I would like to thank my parents for their support of my education to Tilburg, in Tilburg, and beyond Tilburg, and of course especially during the time I wrote this thesis.

Christian L. Neufeldt,

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## **Abstract**

The United Kingdom (UK) is leaving the European Union (EU). Independently, the EU engages with a Commission proposal to establish a Common Corporate Tax Base (CCTB) and subsequently intends to consolidate it throughout the Union to a Common Consolidated Corporate Tax Base (CCCTB). This thesis aims to display that British companies would profit from being part of a CCTB and that CCTB and CCCTB will lead to new obstacles for British companies with permanent establishments in EU Member States (MSs).

CCTB will remove obstacles from the Common Market. Therefore, it would also promote the trade between the UK as an EU MS and the other MSs. British multi-national enterprises would be among the companies profiting most from the CCTB rules. Yet, the political circumstances surrounding Brexit make a CCTB Directive nigh-impossible and even an enhanced cooperation on this field with the UK unlikely.

After Brexit, UK companies could still rely on CCTB rules regarding the time before. For the time after that, they would face the same obstacles any other non-EU company would face when keeping a permanent establishment in an EU MS.

While a CCTB, seems unlikely even as an enhanced cooperation, a CCCTB will not be adopted before Brexit. Consequently, from the time a CCCTB is adopted, British companies would not be different from companies from third states. Intra-EU, their tax bases would be consolidated according to CCCTB, while the tax relationships between the UK and the different MSs would be ruled by the respective tax conventions.

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## 1. Introduction

In 2011, the European Commission proposed a council directive on a Common Consolidated Corporate Tax Base.<sup>1/2</sup> The goal of this proposal was to remove tax obstacles from the European market, encourage growth and investment in the European Union<sup>3</sup>, eliminate transfer pricing formalities, and inter-group double taxation, and allow multi-national groups to deal with a single tax authority in the EU.<sup>4</sup> In short, its aim was “to significantly reduce the administrative burden, compliance costs, and legal uncertainties”<sup>5</sup> of companies doing business in different EU Member States.<sup>6</sup> The parliaments and governments of the MSs objected heavily.<sup>7</sup> This made the adoption of the CCCTB2011 proposal unlikely to come into force.<sup>8</sup> Thus, in 2016, the Commission relaunched the CCCTB as a two-step process. Firstly, a Common Corporate Tax Base<sup>9</sup> should be established.<sup>10</sup> This faces less opposition than a CCCTB.<sup>11</sup> The consolidation will be the second step per the CCCTB2016 proposal.<sup>12</sup>

Among the sternest critics of a CCCTB is the United Kingdom.<sup>13/14</sup> The UK House of Commons even strongly disagrees on the CCTB proposal.<sup>15</sup> Yet, on June 23, 2016 the people of the UK voted to secede from the EU. Subsequently, the British parliament enacted the European Union (Notification of Withdrawal) Act 2017. On March 29, 2017, Prime Minister May formally notified the EU of the British intention to leave the Union.<sup>16</sup>

CCTB is the next step of European taxation<sup>17</sup> and will have a paramount influence on it. Moreover, if CCCTB2016 will be adopted, its impact on European taxation will be even bigger. Brexit will have a great influence on the trade between the UK and the remaining MSs.<sup>18</sup> Therefore, companies

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<sup>1</sup> Hereinafter “CCCTB”.

<sup>2</sup> Commission, ‘Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)’ COM (2011) 121 final/2 (CCCTB2011).

<sup>3</sup> Hereinafter “EU”.

<sup>4</sup> *ibid* 4-6, 12 Consideration 6, 14 Consideration 23.

<sup>5</sup> Eric CCM Kemmeren, ‘CCCTB: Enhanced Speed Ahead for Improvement’ [2011] EC Tax Review 207.

<sup>6</sup> Hereinafter “MSs”.

<sup>7</sup> *ibid* 209-210.

<sup>8</sup> Norbert Herzig and Johannes Kuhr, ‘Direct Taxation in the EU: The Common Corporate Tax Base as the Next Sub-Step Towards Harmonization’ [2011] Wroclaw Review of Law, Administration & Economics 1, 2-3.

<sup>9</sup> Hereinafter “CCTB”.

<sup>10</sup> Commission, ‘Proposal for a Council Directive on a Common Corporate Tax Base’ COM (2016) 685 final (CCTB).

<sup>11</sup> Sebastian Schulz, *Harmonisierung der steuerlichen Gewinnermittlung in der Europäischen Union* (Eul Verlag 2016), 91.

<sup>12</sup> Commission, ‘Proposal for a Council Directive on a Common Consolidated Corporate Tax Base’ COM (2016) 683 final (CCCTB2016).

<sup>13</sup> Hereinafter “UK”.

<sup>14</sup> Jamie Morgan, ‘Corporation Tax as a Problem of MNC Organisational Circuits: The Case for Unitary Taxation’ [2016] *The British Journal of Politics and International Relations* 463, 476.

<sup>15</sup> UK House of Commons, ‘Resolution. Taxation: a Common Consolidated Corporate Tax Base’ <<http://data.consilium.europa.eu/doc/document/ST-5220-2017-INIT/en/pdf>> accessed 13 April 2017.

<sup>16</sup> UK Prime Minister, ‘Art 50 Notification Letter’ <[http://www.consilium.europa.eu/en/press/press-releases/2017/03/pdf/070329\\_UK\\_letter\\_Tusk\\_Art50\\_pdf](http://www.consilium.europa.eu/en/press/press-releases/2017/03/pdf/070329_UK_letter_Tusk_Art50_pdf)> accessed 14 April 2017.

<sup>17</sup> Sebastian Schulz (n 11) 91.

<sup>18</sup> John Springford and others, ‘The Economic Consequences of Leaving the EU. The Final Report of the CER Commission on Brexit 2016’ <[https://www.cer.org.uk/sites/default/files/smc2016\\_26april2016.pdf](https://www.cer.org.uk/sites/default/files/smc2016_26april2016.pdf)> 38-39 accessed 19 February 2017.

should keep Brexit in mind when making long-term decisions.<sup>19</sup> Yet, because of the Brexit-related uncertainties, practitioners cannot give well-thought advice.<sup>20</sup> Analyzing the effects of CCTB and CCCTB2016<sup>21</sup> will help building the academic foundation legal and tax advisors need when helping their clients navigate through the challenges of Brexit.

Having said that, the CCTB proposal only deals with companies opting out of its rules. It does not state what happens in case a country leaves the EU and thus the CCTB framework. While the UK is the first MS which is going to leave the EU, it is of interest for academia how CCTB would deal with possible later exits.

## 1.1 Motivation

While engaging with legal theories is a rewarding undertaking, it is the application of the law that shapes the world. Tax law is a most interesting field, but any analysis there remains moot if it does not take the economic consequences into account. Predictions disregarding the political circumstances are at best of purely theoretic nature and at worst wrong in their entirety. Brexit will be the peaceful secession in the Western World. Independently of the way the UK will take out of the EU, Brexit will shape the world.

CCTB/CCCTB2016 define a common tax base across the EU's MSs and eventually consolidate the groups within. It might well take time to adopt a CCCTB directive, but it would indeed shape the world of European taxation. The motivation for this study is the conflict between CCTB/CCCTB2016 and Brexit. Both will affect British companies. The citizen of the UK voted to leave the Union and an analysis of the effects of the Directives might provide one answer on the question if this decision was economically sound. Even after Brexit, British companies will be subject to EU laws when investing in EU MSs. Thus, they will have to adjust to a CCTB and later CCCTB. Also, without thorough analysis, the effects of Brexit might dilute the Directives influence on British companies until they can no longer be realized. The motivation behind this thesis is to provide an analysis of the interplay between the effects Brexit and CCTB/CCCTB2016 have on British companies.

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<sup>19</sup> Amelia Schwanke, 'UK Expedites EU Corporate Tax Race to the Bottom' [August 2016] *International Tax Law Review* 23 <<http://www.internationaltaxreview.com/Article/3574269/UK-expedites-EU-corporate-tax-race-to-the-bottom.html>> accessed 19 February 2017.

<sup>20</sup> Allen & Overy (ed), 'Brexit – Legal Consequences for Commercial Parties. Tax and the Implications of Brexit' <[http://www.allenoverly.com/SiteCollectionDocuments/AO\\_05\\_Brexit\\_Specialist\\_paper\\_Tax.pdf](http://www.allenoverly.com/SiteCollectionDocuments/AO_05_Brexit_Specialist_paper_Tax.pdf)> accessed 19 February 2017; Deloitte (ed), 'UK leaving the EU: Briefing Paper on Direct and Indirect Tax Implications' <<https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/tax/deloitte-uk-eu-tax-briefing.pdf>> accessed 19 February 2017; KPMG (ed), 'Impact of Brexit on Tax' <<https://home.kpmg.com/uk/en/home/insights/2016/09/impact-of-brexit-on-tax.html>> accessed 19 February 2017; Anjana Haines, 'Brexit: Navigating the Tax Minefield' [July 2016] *International Tax Law Review* 12 <<http://www.internationaltaxreview.com/Article/3569712/Brexit-Navigating-the-tax-minefield.html>> accessed 19 February 2017.

<sup>21</sup> Hereinafter jointly referred to as "the Directives".



## 1.2 Research Question

On this background, the research question is: What will be the influence of Brexit on the effects of CCTB/CCCTB on British companies? To answer this, one first needs to lay out the economic influence of CCTB on British multi-national companies pre-Brexit and if a CCTB is possible at that time. Then, the thesis will focus on the results of Brexit for UK multi-national companies that apply CCTB rules after their implementation but before Brexit. Finally, the thesis will show the effect of CCCTB2016 on companies with headquarters in the UK and subsidiaries in EU MSs.

## 1.3 Delimitation

There are many uncertainties surrounding Brexit. Art 50 TEU<sup>22</sup> generally gives the UK and the EU two years from the date of the notification of the British intention to leave to negotiate the exit from the Union. These negotiations may be concluded earlier or the parties may agree on an extension of time.<sup>23</sup> This thesis only engages with the political question of the timeline of Brexit regarding its consequences for CCTB/CCCTB2016. The negotiating parties might choose a “clean cut”, dissolving any ties between the EU and the UK. In this case, they could come to a conclusion before the two-year period of Art 50 runs out, making even an enhanced cooperation on a CCTB improbable before Brexit. Conversely, they might agree to extend the negotiation period, making a pre-Brexit CCTB more probable and even a pre-Brexit CCCTB possible. If the negotiations are concluded within a few months after this thesis is finished, even an enhanced cooperation on a CCTB becomes improbable before Brexit. If the negotiation period is extended for several years, even a CCCTB might be possible before Brexit is finalized. This thesis will presume that the EU and the UK will need the two-year period for their negotiations, but will not agree on any extension. While it can be argued that these negotiations will have the strongest impact on *indirect* taxes,<sup>24</sup> this thesis will analyze only Brexit’s influence on CCTB and CCCTB2016 and therefore will be limited to *direct* taxes.

At the time this thesis is being finalized, the 2017 General Elections have just been held. As a consequence, the Conservative and Unionist Party lost its majority in the House of Commons.<sup>25</sup> If Mrs. May remains Prime Minister and what results a possible change would have on Brexit cannot reasonably be predicted at this time. The statements of her and other prominent members of the British government,<sup>26</sup> including Secretary of State for Foreign and Commonwealth Affairs Boris Johnson<sup>27</sup> and

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<sup>22</sup> Consolidated Version of the Treaty on European Union [2016] OJ C202/13 (TEU).

<sup>23</sup> Art 50 para 3 TEU.

<sup>24</sup> Laura Ambagtsheer-Pakarinen and others, “‘God Save the Brexit’: Tax Implications of Leave Vote”[2016] European Taxation 474.

<sup>25</sup> BBC, ‘Results’ <<http://www.bbc.com/news/election/2017/results>> accessed 13 June 2017.

<sup>26</sup> BBC, ‘General Election 2017: Theresa May is “Best Placed Person” for Brexit’ <<http://www.bbc.com/news/election-2017-40237819>> accessed 13 June 2017.

<sup>27</sup> *ibid.*

Secretary of State for Exiting the European Union David Davis<sup>28</sup> suggest she may proceed as intended. This thesis will therefore not expect the General Elections to make substantive changes to the results laid out under the *status quo ante*.

Moreover, CCTB and CCCTB2016 are still at the proposal stage. In case of the CCTB proposal, it is uncertain when the Council will adopt it and if this will happen before or after Brexit. The Council will not adopt the CCCTB2016 proposal before Brexit, it is uncertain if it will be adopted at all. The fact that the Directives are still at the proposal stage, means they are work in progress and the different EU institutions may change some details. This thesis will engage with the impact the Directives would have in their current form, not with the question if and when their adoption would be probable and what changes might be required for that.

This thesis focuses on the interplay between CCTB/CCCTB2016 and Brexit. Consequently, it will not analyze CCCTB2011 and the differences between CCCTB2011 in depth. Also, it will not engage with the entire proposals but only those parts necessary to answer the research question.

Furthermore, CCCTB2011 and subsequently CCTB/CCCTB2016 have their origin in the International Accounting Standards/International Financial Reporting Standards.<sup>29/30</sup> Arguing the reason behind international standards and the details of IAS/IFRS compared to CCTB/CCCTB2016 rules would go far beyond the scope of this thesis. IAS/IFRS was a starting point for the CCCTB, but CCCTB2011 did already not use it as a reference.<sup>31</sup> Also, compared to CCCTB2011, the Directives moved further away from IAS/IFRS.<sup>32</sup> The relationship between CCCTB2011 and the Directives and IAS/IFRS has been subject to academic research, on which this thesis will rely. The UK, as well as many EU MSs are part of the Organisation for Economic Co-Operation and Development.<sup>33</sup> This thesis will focus on subsidiaries in OECD MSs. Even if some EU MSs are not in the OECD, this thesis will only engage with subsidiaries in states that are in the EU and the OECD and will presume that the respective tax conventions with the UK are in accordance with the OECD Model Convention.<sup>34</sup> Additionally, this thesis will rely on the state of the art of scholarly opinion on applied inter- and multinational concepts of law and accounting. It will not provide an in-depth discussion of the OECD Model Convention, and not provide a new approach toward this Convention, but rely on the state of discussion among legal and economic scholars. Finally, the thesis will focus on British companies with EU subsidiaries. Since the UK will most likely leave the EU before CCCTB2016 will be adopted, the

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<sup>28</sup> BBC, 'General Election: David Davis Backs Theresa May' <<http://www.bbc.com/news/av/election-2017-40245531/general-election-david-davis-backs-theresa-may>> accessed 13 June 2017.

<sup>29</sup> Hereinafter "IAS/IFRS".

<sup>30</sup> Peter Essers and Ronald Russo, 'The Precious Relationship between IAS/IFRS, National Tax Accounting Systems and the CCCTB' in Peter Essers and others (eds), *The Influence of IAS/IFRS on the CCCTB, Tax Accounting, Disclosure, and Corporate Law Accounting Concepts* (Kluwer Law International 2009); Rob van Lent, 'The Influence of IFRS on CCCTB' (MSc thesis, Tilburg University 2014).

<sup>31</sup> Ronald Russo, 'CCCTB' in Denis M Weber *CCCTB* (Kluwer Law International 2012) 69-70.

<sup>32</sup> Norbert Herzig and Johannes Kuhr (n 8) 5-6.

<sup>33</sup> Hereinafter "OECD".

<sup>34</sup> OECD, 'Model Tax Convention on Income and on Capital 2014 (Full Version)' (OECD Publishing 2015) (MTC).

effects of this directive on intra-Union companies will not be part of this thesis. CCTB/CCCTB rules regarding British PEs of EU companies, for example the Controlled Foreign Company rules of Art 59-60 CCTB do not fall under the scope of this thesis.

#### 1.4 Methodology

To answer the research questions laid out above in section 1.2, this thesis will look at the effects of CCTB before and after Brexit and at CCCTB2016. The answers will be based on statutory EU law, primarily TEU and TFEU<sup>35</sup>, on European case law, and on the CCCTB2011 and CCTB/CCTB2016 proposals, the objections of national parliaments and governments, and the opinions of scholars and practitioners. The literature review will not be limited to writings of the legal scientists but also include those of scholars working on the fields of economics and social sciences.

In order to develop a general understanding of the CCCTB phenomena and the legal concepts behind the new two-step process, it is necessary to review the key academic literature first. Since the relaunch happened only in October 2016, as of the time of the writing of this thesis only few articles have been published on the new proposals. It is therefore necessary to engage with the literature published on CCCTB2011 in conjunction with that proposal, as well as CCTB and CCCTB2016. This should enable the author to develop an understanding of the CCTB/CCCTB2016 proposals as they currently stand. In addition to the consultation of printed scholarly opinions and international treaties, online research will be conducted by accessing EU law data and unpublished theses.

Building upon this, the author will review the regulations and key concepts laid out in the CCTB/CCCTB2016 proposals, their basic definitions and general scope. Different language versions of CCTB/CCCTB2016 will be consulted to analyze legal concepts which the Directives do not define. This will be supported by a review of the evaluations of the corresponding parts of the CCCTB2011 proposal to demonstrate the stance of the Commission regarding further clarification and changes to the proposals' text. The interpretation of the Directives' key concepts will be subject to the European Treaties and will be supported by a comparative view on the laws of the MSs.

To ensure a comprehensive discussion of the relevant material and opinions and the inclusion of the most recent research, the author will also engage with unpublished materials from the Social Science Research Network, such as Gribnau's paper on the interplay between legal certainty and (other) legal principles<sup>36</sup>.

This thesis will evaluate relevant judgements of the European Court of Justice, such as the ruling on the *Marks & Spencer* case<sup>37</sup> and their impact on the research question.

The thesis will review rules and regulations similar to CCTB/CCCTB2016 by other supranational institutions regarding international tax harmonization to allow for an adequate assessment

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<sup>35</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU).

<sup>36</sup> Hans Gribnau, 'Legal Certainty: A Matter of Principle' (2010) Tilburg Law School Legal Studies Research Paper Series 12/2014, 69 <<https://ssrn.com/abstract=2447386>> accessed 07 June 2017.

<sup>37</sup> Case C-62/00 *Marks & Spencer* [2002] ECR I-6348.

of the Directives' provisions. Hereby, the emphasize will be on the OECD's Model Convention and Base Erosion and Profit Shifting Actions Plans to demonstrate the difference between the EU as an economic union that promotes its MSs' economies and the OECD as a supranational organization with similar MSs that promotes trade and counteracts tax evasion *per se*. This difference will be used to highlight the advantages the UK will no longer be subject to when, post-Brexit, it remains ties to individual EU MSs but is no longer part of the Union.

This thesis will discuss the evolution of the Directives from proposals over a possible enhanced cooperation on a CCTB and a CCTB directive to the consolidation of the tax base by a CCCTB directive. According to the title of the thesis, it will not discuss this process on itself, but how it might develop in front of the Brexit process. This thesis will provide an analysis of the legal, economic and political aspects of CCTB and Brexit to show if and how British companies might become subject to CCTB. It will engage with the text of the CCTB proposal to highlight the legal effects the directive would have on British companies within the EU. It will evaluate economic studies on the effects of CCTB on companies resident in a UK that is part of the EU. The thesis will analyze the political feasibility of a CCTB pre-Brexit by engaging with the different powers involved.

Moreover, this thesis will discuss the effects of CCTB and CCCTB2016 on British companies post-Brexit. It will not engage with a hypothetical CCCTB pre-Brexit. It will not analyze the interplay between Brexit and other directives regarding British companies. Finally, the author will consolidate the findings made throughout the research process of which this thesis gives an account to highlight how Brexit influences the effects of CCTB/CCCTB2016 on British companies.

## 2. Benchmark

### 2.1 Introduction

CCTB<sup>38</sup> and CCCTB2016<sup>39</sup> intend to decrease the legal uncertainties and compliance costs in the European market. Therefore, they should lead to a legal de-regulation. From the legal point of view, this would ease the administrative burden for companies in the MSs. Moreover, the intention of both proposals is to reduce the administrative burden. From the economic point of view, this is only true, if they have an impact on the difficulty to deal with this burden, as well as on the related costs. Furthermore, CCCTB2016 seeks to prevent hybrid mismatches not only between EU MSs, but also between MSs and third countries.<sup>40</sup> Thus, the introduction of CCCTB2016 should prevent hybrid mismatches between the UK and other EU MSs even if the UK left the Union before this proposal is adopted.

### 2.2 Influence of CCTB/CCCTB2016

The intention of the Commission for proposing CCTB and CCCTB2016 is to remove obstacles and reduce market distortions for multi-national companies doing business within the EU.<sup>41</sup> As put by Brauner, “[t]he general goal of CCCTB is to ameliorate, if not eliminate, undesirable tax competition and waste that are based on differences in tax rules rather than directly in tax rates.”<sup>42</sup> Third country companies will not be able to benefit directly from the Directives. Yet, the EU benefits highly from inbound investments and consequently values the principle of “economic openness”.<sup>43</sup> Consequently, CCTB/CCCTB2016 should have no negative influence on UK companies.

### 2.3 Conclusion and Outline

Having said that, under the influence of Brexit, the advantages of CCTB and CCCTB2016 for British companies should be reduced. The direct result and reason for Brexit is that the UK will no longer be part of the EU. Hence, its companies will no longer be able to benefit from CCTB/CCCTB2016 provisions. Because only their branches and subsidiaries within the EU would be subject to the Directives, the whole company could not benefit from CCTB/CCCTB2016. Moreover, the Directives would put the burden on UK companies of having to comply with CCTB/CCCTB2016 in addition to the different national tax systems, intertwined with the respective tax treaties with the UK.

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<sup>38</sup> Commission, ‘Proposal for a Council Directive on a Common Corporate Tax Base’ COM (2016) 685 final (CCTB).

<sup>39</sup> Commission, ‘Proposal for a Council Directive on a Common Consolidated Corporate Tax Base’ COM (2016) 683 final (CCCTB2016).

<sup>40</sup> CCCTB2016, Consideration 17.

<sup>41</sup> CCTB, Consideration 1 = CCCTB2016, Consideration 1.

<sup>42</sup> Yariv Brauner, ‘CCCTB and Fiscally Transparent Entities: A Third Countries’ Perspective’ in Michael Lang and others (eds), *Corporate Income Taxation in Europe* (Edward Elgar Publishing 2013) 200.

<sup>43</sup> Eric CCM Kemmeren and Daniël S Smit, ‘Taxation of EU-Non-Resident Companies under the CCCTB System’ in Michael Lang and others (eds), *Corporate Income Taxation in Europe* (Edward Elgar Publishing 2013) 52-53.

### 3. Legislative Framework and Definitions

#### 3.1 Introduction

Legal research requires an attention to detail and a thorough understanding of technical terms. The analysis of the consequences of CCTB<sup>44</sup>/CCCTB2016<sup>45</sup> that is the subject of this thesis requires an overview of the Directives' general terms. How these terms are consistent with similar terms laid out by other supranational bodies of which the UK is a member and how they contradict each other influences the British interpretation of them inside and outside of the EU. Therefore, as a basis for discussing the effects of CCTB and CCCTB2016, the scope and the definitions the proposals give will be laid out first. Hereby, the focus will not be on the entire proposals, but on those terms and definitions relevant to the research question. A special focus will be put on the prerequisites of permanent establishments<sup>46</sup>. As will be shown, what defines a PE is not only crucial for the mandatory applicability of the Directives to intra-EU companies, but also to PEs of companies with headquarters outside of the Union.

The CCTB and the CCCTB2016 proposals are part of the same two-step process. Thus, they use the same general definitions. Accordingly, Art 1' CCCTB2016 refers to the tax base established by CCTB, and Art 3 CCCTB2016, which gives the definitions for CCCTB2016, refers for most definitions to those CCTB gives in Art 4 or is a verbatim copy of CCTB. Moreover, CCCTB2016 will base on CCTB. Thus, while CCCTB2016 deals with the consolidation exclusively, regarding the other rules set both proposals have the same general scope. The Directives lay out their scope and definitions in their respective first chapter.

#### 3.2 Scope

##### 3.2.1 Introduction

The Commission lays out that scope in the Directives' respective Art 2. Some changes regarding the references notwithstanding, Art 2 CCCTB2016 is a verbatim copy of Art 2 CCTB. Per Art 2 para 1, both directives will apply to any company established under the laws of a MS and its permanent establishments in other MSs, if it

- a) takes the form of one of the companies listed in Annex I to CCTB/CCCTB2016
- b) is subject to a corporate tax listed in Annex II to CCTB/CCCTB2016 or a similar tax subsequently introduced
- c) is part of a consolidated group for accounting purposed with a consolidated group revenue exceeding 750,000,000. - € in the last financial year

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<sup>44</sup> Commission, 'Proposal for a Council Directive on a Common Corporate Tax Base' COM (2016) 685 final (CCTB).

<sup>45</sup> Commission, 'Proposal for a Council Directive on a Common Consolidated Corporate Tax Base' COM (2016) 683 final (CCCTB2016); hereinafter jointly with CCTB referred to as "the Directives".

<sup>46</sup> Hereinafter "PEs".

- d) is a parent company or a qualifying subsidiary as defined in Art 3 CCTB, 5 CCCTB2016 or has one or more PEs in other MSs as defined in Art 5 CCTB.<sup>47</sup>

### 3.2.2 EU Companies

If a company meets points (a) and (b), but not (c) and (d), ie if it meet the company form requirement and is subject to a tax listed in Annex II but does not have a high enough revenue and/or is not a parent company, qualifying subsidiary or has PEs in other MSs, it may opt to have the Directives applied to itself and all its PEs in other MSs for a period of five years.<sup>48</sup> At the end of these five years, the Directives will be applied to the company for another five years unless it gives notice to opt out. The company has to meet the conditions of points (a) and (b) at the beginning of every five-year period.

### 3.2.3 Non-EU Companies

If a company that is established in a third country meets the conditions laid out in sub-paras (b) to (d), its PEs in EU MSs are in general subject to the Directives, as well, as stated in both Directives' Art 2 para 2. Regarding points (a) and (b), the company form and tax has to be similar to the listed ones. The Commission will keep a non-exclusive list of foreign company forms meeting this condition.

## 3.3 Definitions

### 3.3.1 Introduction

After their respective introductions and laying out their scopes, the Directives give some general and some specific definitions. Among these definitions, the Directives' definition of PEs is of special importance. The definition of PEs plays a major role in inter- and transnational discussions on the future of international taxation.<sup>49</sup> Scholars argue for over twenty years about how to adapt the concept to modern technologies, e-commerce and tax structures in the modern world.<sup>50</sup> Thus, the way CCTB/CCCTB2016 define them, also highlights the EU's connection with other supranational bodies and Europe's place in the international community. 22 of the 28 MSs of the EU are also part of the OECD,<sup>51</sup> whose definition of PEs will be compared to the Directives' in sec 3.2.2. Moreover, the European Community as a predecessor of the EU takes part in the OECD's work.<sup>52</sup> While the Directives

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<sup>47</sup> Hereinafter "larger enterprises".

<sup>48</sup> Hereinafter "small and medium enterprises"/"SMEs".

<sup>49</sup> Monica Gianni, 'The OECD's Flawed and Dated Approach to Computer Servers Creating Permanent Establishments' (2014) 17 *Vanderbilt Journal of Entertainment and Technology Law* 1; Manoj K Singh, 'Taxing E-Commerce on the Basis of Permanent Establishment: Critical Evaluation' (2014) 42 *Intertax* 325.

<sup>50</sup> Arvid A Skaar, *Permanent Establishment: Erosion of a Tax Treaty Principle* (Kluwer Law and Taxation Publishers 1991); Jinyan Li, 'Permanent Establishment: An Evolving Concept Under China's Tax Treaties (1983-2013)' (2015) 63 *Canadian Tax Journal* 350.

<sup>51</sup> MSs of the EU but not the OECD are Bulgaria, Croatia, Cyprus, Lithuania, Malta, and Romania. For the lists of members see OECD, 'Members and Partner' <<http://www.oecd.org/about/membersandpartners>> accessed 03 June 2017 and EU, 'EU Member Countries in Brief' <[https://europa.eu/european-union/about-eu/countries/member-countries\\_en](https://europa.eu/european-union/about-eu/countries/member-countries_en)> accessed 03 June 2017, respectively.

<sup>52</sup> Supplementary Protocol No. 1 to the Convention on the OECD.

will only be applicable within the EU, they are important for companies headquartered all over the world if they have PEs in the EU.

CCTB defines general terms in Art 4, which is appropriately named “Definitions”, while at CCCTB2016 Art 3 is named “Definitions”, and links its definitions in Art 3 points 1 – 10 and 12 – 21 to the respective paragraphs of Art 4 CCTB. The Directives define every company that falls under the mandatory scope of CCTB or has opted for applying it as a “taxpayer” and every company that does not as a “non-taxpayer”. A company that opts in to CCTB but is not subject to CCCTB2016 is known as a “single taxpayer”.<sup>53</sup>

“Revenues” are all proceeds from sales, not including equity raised and debt repaid.<sup>54</sup> “Expenses” are all decreases in a taxpayer’s net equity different from distributions to its shareholders or equity owners in their respective capacity.<sup>55</sup> A “tax year” is a “calendar year or any other appropriate period for tax purposes”.<sup>56</sup>

Moreover, the Directives give further, more specific definitions in the other articles of their first chapters. A subsidiary is “qualified” in the sense of the Directives, if the parent company has a right to exercise more than 50 % of its voting rights and owns more than 75 % of the subsidiary’s capital or is entitled to more than 75 % of its profits.<sup>57</sup> Art 3 para 2 CCTB, 5 para 2 CCCTB2016 define how to calculate these quotas.

### 3.3.2 Residency

Whether a taxpayer is a “resident taxpayer” or “non-resident taxpayer” depends on whether he is, for tax purposes, resident in a MS or not.<sup>58</sup> As straightforward (and tautological) as this definitions sounds in theory, its simplicity raises practical concerns. Because this definition also is the basis for the personal scope of the Directives, it shows the different requirements for companies in the European pre-Brexit UK and the non-European post-Brexit UK. In accordance not only with the structure of the Directives, but also with the timeline underlying this thesis, the focus will be first on “resident” and then on “non-resident taxpayers”.

A “resident taxpayer” is a taxpayer that is resident for tax purposes in a MS.<sup>59</sup> CCTB does not define when a taxpayer is resident for tax purposes, but leaves the decision of the state of residence to the respective tax treaty. CCCTB2016 defines the state of residence as the MS, where the company has its “registered office, place of business or place of effective management”<sup>60</sup>. A tax treaty supersedes this

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<sup>53</sup> Art 4 paras 1, 2 CCTB, 3 points 1-3 CCCTB2016.

<sup>54</sup> Art 4 para 5 CCTB, 3 point 6 CCCTB2016.

<sup>55</sup> Art 4 para 6 CCTB, 3 point 7 CCCTB2016.

<sup>56</sup> Art 4 para 7 CCTB, 3 point 8 CCCTB.

<sup>57</sup> Art 3 para 1 CCTB, 5 para 1 CCCTB2016.

<sup>58</sup> Art 4 paras 3, 4 CCTB, 3 paras 4, 5 CCCTB2016; the terms “taxpayer”, “non-taxpayer”, “single taxpayer”, “resident taxpayer”, and “non-resident taxpayer” will hereinafter be used as defined by the Directives.

<sup>59</sup> Art 4 para 3 CCTB.

<sup>60</sup> Art 4 para 1 CCCTB2016.



rule, if it is concluded between the concerning MS and a third country.<sup>61</sup> If the criteria for tax residence apply to different MSs, the place of effective management is the decisive criterion.<sup>62</sup> This is in accordance with the MTC, which applies similar criteria and uses the place of effective management a tie breaker.<sup>63</sup>

### 3.3.3 Permanent Establishment

A key factor regarding the scope of the Directives is their definition of PEs. As shown above, the Directives will apply to any economic nexus that qualifies as a PE and when determining whether a company is subject to the Directives an important point is if it has a PE in another MS. The term “permanent establishment” is not exclusive to the Directives. On a supranational level, it is also defined by Art 5 of the OECD Model Convention,<sup>64</sup> and Art 5 of the United Nations’<sup>65</sup> Model Convention<sup>66</sup>. The definition given by the OECD Model Convention is considered to be prone to abuse, though.<sup>67</sup> Therefore, the OECD prepared in cooperation with the G20 the Base Erosion and Profit Shifting Action 7<sup>68</sup> to prevent the artificial avoidance of PE status. All these sets of rules first lay out what constitutes a PE in general, and then state different exceptions.

In general, a company establishes a PE by having a fixed place of business in state other than where it is located or by employing a dependent agent there. While the different definitions for PEs have the same subject, they vary in detail. Unique to the UN Model Convention is that a company has a PE in another state, if it offers insurance services there.<sup>69</sup> Per the Directives, a taxpayer has a “permanent establishment” according to Art 5 para 1 CCTB, if he carries on his business at least partially through a fixed place in a MS different from that taxpayer’s state of residence. In most parts, the Directives, the OECD Model Convention, and the UN Model Convention agree on the general requirements for PEs by place of business. BEPS7 is meant to combat modern tax avoidance schemes by improving the OECD rules on PEs while retaining its general concept.

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<sup>61</sup> *ibid.*

<sup>62</sup> Art 4 para 2 CCCTB2016.

<sup>63</sup> Art 4 para 1, 3 MTC.

<sup>64</sup> OECD, ‘Model Tax Convention on Income and on Capital 2014 (Full Version)’ (OECD Publishing 2015) (MTC).

<sup>65</sup> Hereinafter “UN”.

<sup>66</sup> UN, ‘Model Double Taxation Convention between Developed and Developing Countries’ (United Nations 2011).

<sup>67</sup> OECD, ‘Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 – 2015 Final Report’ (OECD Publishing 2015) (BEPS7) 13-14.

<sup>68</sup> OECD, BEPS7, hereinafter “BEPS7”.

<sup>69</sup> UN, Art. 5 para 6.

	<b>CCTB/CCCTB 2016</b>	<b>OECD</b>	<b>BEPS7</b>	<b>UN</b>
Place of management	+	+	+	+
Branch	+	+	+	+
Office	+	+	+	+
Factory	+	+	+	+
Workshop	+	+	+	+
Place of extraction of natural resources	+	+	+	+
Building site, construction, installation	> 12 months	> 12 months	> 12 months	> 6 months
Furnishing of services	-	-	-	> 183 d / 12 months
Insurance	-	-	-	+
Preparatory or auxiliary character	+	+	+	+
Other places of business	-	-	+	-

*Table 3.1: Criteria for PE by place of business*

Even if a taxpayer carries out certain activities or establishes a fixed point of business in another MS/Contracting State, he generally does not establish a PE, if the activity or point of business has an auxiliary or preparatory character.<sup>70</sup> BEPS7 applies this condition to all exceptions of Art 4 OECD MTC.<sup>71</sup> BEPS7 also introduces a new “anti-fragmentation rule”.<sup>72</sup> This rule states that even points of business with an auxiliary or preparatory character constitute PEs, if the company to which the point of business belongs or a closely related company has a PE in the MS of that point of business or another point of business and those points of business would establish a PE combined. Contrariwise, all sets of rules include clauses by which a company can have a PE in another state without holding any property rights or carrying out any business there itself if it has an agent in that state insofar as the agent’s activity is not auxiliary or preparatory.<sup>73</sup>

	<b>CCTB/CCCTB2016</b>	<b>OECD</b>	<b>BEPS7</b>	<b>UN</b>
Preparatory or auxiliary work	+	+	+	+
Acting in the ordinary course of business	+	+	+	+
Impartial conditions	-	-	-	+
(Almost) exclusive relationship	+	-	+	+
"Closely related"	+	-	+	-

*Table 3.2: Criteria for PE by agent*

According to the Directives, an agent is someone who acts in a MS on behalf of a taxpayer and “habitually concludes contracts [...] or plays the principal role leading to the conclusion of contracts

<sup>70</sup> Art 5 para 3 CCTB; OECD, MTC Art 5 para 4; UN, Art 5 para 4.

<sup>71</sup> OECD, BEPS7 28-29.

<sup>72</sup> OECD, BEPS7, 39.

<sup>73</sup> Art 5 para 4 CCTB; OECD, MTC Art 5 para 5; UN, Art 5 para 7.

that are routinely concluded without material modification by the taxpayer”<sup>74</sup>. According to the OECD Model Convention, the agent has to conclude the contract himself.<sup>75</sup> An independent agent does not establish a PE, though.<sup>76</sup> The OECD Model Convention does not define when an agent is independent, but states that such an agent has to “act in the ordinary course of [his] business”<sup>77</sup> to avoid establishing a PE. Under CCTB/CCCTB2016 and UN Model Convention rules, an agent remains independent, unless he acts exclusively or almost exclusively on behalf of one company.<sup>78</sup> Under the Directives and BEPS7, this is not limited to one company. Instead, the agent has to be “closely related” to the taxpayer or taxpayers he is acting for to lose his independent status.<sup>79</sup> A person is closely related to a taxpayer, if that person holds directly or indirectly more than 50 % of its voting rights or of the rights to the taxpayer’s profits or more than 50 % of its ownership rights or vice versa.<sup>80</sup>

### 3.4 Analysis

The Directives clearly define their scope and lay out a comprehensive set of definitions. Among the definitions laid out by the Directives, the definition of PEs plays an important part. While this definition follows the general definition of PEs as laid out by other international bodies such as the OECD and the UN, the Directives use the new criterion of ownership and profit rights regarding the dependency of agents.

There are two points of disagreement between CCTB/CCCTB2016 and the OECD Model Convention on the one hand and the UN Model Convention on the other hand regarding the general requirements for PEs. Unlike the Directives and the OECD Model Convention, the UN Model Convention acknowledges the furnishing of services for more than 183 days in a given fiscal year and only requires a construction site to last for six months. The UN Model Convention goes beyond the other sets of rules by making “[t]he furnishing of services through personnel engaged by the enterprise for such purposes” a PE, if it is conducted for an aggregated period of at least 183 days in a twelve months period.<sup>81</sup> This is intended to protect underdeveloped countries.<sup>82</sup> The OECD Model Convention treats services the same way it treats goods.<sup>83</sup> Since the EU has no underdeveloped countries among its MSs, the Directives follow the OECD Model Convention in this regard. Having said that, the OECD Committee acknowledges that in most Contracting States generally only a period of six months is required until an establishment becomes permanent.<sup>84</sup> The reason the period of establishment has so far

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<sup>74</sup> Art 5 para 4 CCTB.

<sup>75</sup> OECD, MTC Art 5 para 5.

<sup>76</sup> Art 5 para 5 CCTB; OECD, MTC Art 5 para 6; UN, Art 5 para 6-7.

<sup>77</sup> OECD, MTC Art 5 para 6.

<sup>78</sup> Art 5 para 5 lit a CCTB; UN, Art 5 para 7.

<sup>79</sup> Art 5 para 5 lit a CCTB; OECD, BEPS7, 16.

<sup>80</sup> Art 5 para 5 lit b CCTB; OECD, BEPS7, 16-17.

<sup>81</sup> UN, Art 5 para 3 lit b.

<sup>82</sup> Michael Lennard, ‘The UN Model Tax Convention as Compared with the OECD Model Tax Convention’ [January/February 2009] Asia-Pacific Tax Bulletin 4, 5-7.

<sup>83</sup> *ibid.* 5.

<sup>84</sup> OECD, MTC R(19)-9, para 24.

not been adjusted in the OECD Model Convention but in its Commentaries, is the latter's easier mode of adjustment.<sup>85</sup> Because of modern construction techniques, buildings are created faster than in the past.<sup>86</sup> Therefore, construction companies can also create value at the construction site faster. Following the lead of the UN Model Convention and applying the same period to construction works as to goods and services therefore seems not unreasonable. Nonetheless, the Directives follow the OECD Model Convention. Since the UK is among the OECD's Contracting States, this increases the convergence points between existing British tax treaties and CCTB/CCCTB2016 rules, thus decreasing the compliance costs for multi-national enterprises headquartered in the UK.

### 3.5 Conclusion

The scope and definitions laid out by the Directives clearly show that CCTB and CCCTB2016 are intended to remove obstacles inside the European market. In the form proposed by the Commission, the Directives would be capable of supporting this goal. The definition of PEs is unique to the Directives and thereby best fitted to serve the common market. A free European market cannot exist if the EU seals itself off from the international community. Consequently, the definition of PEs builds upon the examples given by other supranational bodies, namely and mainly the OECD. Yet, the Directives' objective is to further the Union's goals, support the trade between its MSs and further their prosperity. Therefore, its scope is limited to the MSs. Third countries cannot join, countries exiting the EU cannot remain inside the CCTB/CCCTB2016 regime. Companies headquartered in third countries are not barred from having the Directives applied to them altogether, but they can only enjoy them insofar as they are established in the EU. They will be subject to the Directives the same way European companies will be, while not receiving the benefit of a common tax base throughout the company and eventual consolidation. The scope and definitions of the Directive already highlight that the Directives might have a positive impact on the companies within the Union, while putting a higher burden on companies from third countries. Under the influence of Brexit, British companies will lose the advantage linked to the status of a European company while acquiring the disadvantages connected with EU-non-member companies. Considering just scope and definitions as the core and starting point of the Directives, Brexit will have a negative influence on CCTB/CCCTB2016 and British companies.

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<sup>85</sup> Michael Lennard (n 92) 4-5.

<sup>86</sup> *ibid.* 5.

## 4. Common Corporate Tax Base Pre-Brexit

### 4.1 Introduction

This chapter will highlight the influence a Common Corporate Tax Base would have on a UK that remains in the EU and analyze the probability of British companies becoming subject to CCTB pre-Brexit. It will show that the exact circumstances regarding the adoption of the CCTB proposal<sup>87</sup> remain uncertain. The legal requirement of unanimity in the Council vote puts a heavy burden on the proposal and reduces the likelihood of its adoption. Even if the Council adopts the proposal, it does not necessarily have to do that before Brexit. It is most likely that at least some MSs, including France and Germany, will apply CCTB rules. These two MSs do already cooperate on the field of direct taxation. Since they are among the economically strongest MSs, it would not be impossible for them to gather the seven other MSs required for an enhanced cooperation. While this would not lead to a tax base common to the entire EU, it would establish a CCTB within key-members of the Union. The CCTB proposal originates in EU deliberation. Therefore, those MSs might apply them as proposed by the Commission. The rules as proposed by the Commission have already been discussed among the MSs and are a reaction to some of the critique on CCCTB2011<sup>88</sup>. Additionally, since they are proposed by the Commission, they offer a neutral standpoint. They neither invoke the image of two strong MSs strong-arming other into compliance with rules favorable to them, nor that of two wealthy countries buying the allegiance of less affluent ones. Hence, the application of CCTB rules in the EU remains possible and probable regardless of the proposal's adoption by the Council. After this application proved to be favorable to the cooperating MSs' economies, the MSs not cooperating might join the example, eventually adopting the proposal in the Council. Even if the UK will not apply CCTB rules, they will be of paramount importance for EU companies and British companies with branches or subsidiaries in the EU.

### 4.2 Legal Background

The EU rule-making process is one of the main reasons it remains uncertain when and even if CCTB will be adopted. Rule-making on the field of direct taxes in the EU is governed by Art 115 TEU<sup>89</sup> and thus requires the unanimous vote per its para 3.<sup>90</sup> Therefore, every MS has the power to veto CCTB.<sup>91</sup> If the MSs do not agree on a directive, Title III TEU<sup>92</sup> allows for an enhanced cooperation between at least nine MSs. In the past, there has been much debate, whether the mechanism was limited to areas on which only a relative majority is required or if the MSs could use it on areas that require an absolute

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<sup>87</sup> Commission, 'Proposal for a Council Directive on a Common Corporate Tax Base' COM (2016) 685 final (CCTB).

<sup>88</sup> Commission, 'Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)' COM (2011) 121 final/2 (CCCTB2011).

<sup>89</sup> Consolidated Version of the Treaty on European Union [2016] OJ C202/13 (TEU).

<sup>90</sup> Art 5 para 1 Consolidated Version of the Treaty on European Union [2016] OJ C202/13 (TEU); Art 115 Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU).

<sup>91</sup> Norbert Herzig and Johannes Kuhr, 'Direct Taxation in the EU: The Common Corporate Tax Base as the Next Sub-Step Towards Harmonization' [2011] Wroclaw Review of Law, Administration & Economics 2.

<sup>92</sup> Consolidated Version of the Treaty on European Union [2016] OJ C202/13 (TEU).

majority, as well.<sup>93</sup> CCTB would base on Art 115 TFEU<sup>94</sup> and therefore require a unanimous vote. If an enhanced cooperation was only possible on areas on which a relative majority is required, the MSs could not engage in an enhanced cooperation on CCTB. The debate has been settled by a ruling of the Court of Justice of the EU<sup>95</sup>. CJEU ruled that the concept of enhanced cooperation is applicable to all areas of EU legislation.<sup>96</sup> Thus, interested MSs could enact an enhanced cooperation on a CCTB, if the Council does not adopt the CCTB proposal pre-Brexit. Since TEU continues to apply to the UK until Brexit is finalized,<sup>97</sup> the UK could be among the cooperating MSs.

## 4.3 Consequences

### 4.3.1 Introduction

A British participation on a CCTB would influence the UK's tax system from the legal, as well as from the economic point of view. Because a CCTB directive would have a wider scope than an enhanced cooperation, the influence of the former could reasonably be expected to be stronger. Yet, this would only be a difference in quantity, not in quality. Since the British corporate tax base is already similar to the proposed CCTB, legally it would not lead to many changes, thereby not putting a high legal burden of adjustment on UK companies. Nevertheless, British companies and subsequently the British economy would profit from CCTB.

### 4.3.2 Legal

Legally, CCTB would only make a small difference for UK companies compared to UK tax laws. The difference between an EU-wide CCTB and an enhanced cooperation would only be that the latter would not apply in the entire EU, but only in the cooperating MSs. CCTB rules will be mandatory for any large enterprises according to the principles laid out above in section 3.1. SMEs will be able to opt-in according to the rules laid out above. From the legal point of view, the difference between UK tax laws and CCTB tax rules would be the same for large enterprises and SMEs. The rules regarding depreciation<sup>98</sup>, stocks and works-in-progress<sup>99</sup>, the deductibility of probable future legal obligations<sup>100</sup>, and the exemption of certain profit distributions<sup>101</sup> will have the biggest impact on EU companies.<sup>102</sup>

There are less differences between CCTB rules and UK tax laws than between these rules and the tax laws of most other MSs, though. The different national depreciation rules in the EU vary in

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<sup>93</sup> Theodore Konstantinides, *Division of Power in European Union Law* (Kluwer Law International 2009) 250-255.

<sup>94</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU).

<sup>95</sup> Hereinafter "CJEU".

<sup>96</sup> Joined Cases C-274/11 and C-295/11 *Spain and Italy v Council* (Grand Chamber 16 April 2013).

<sup>97</sup> Norbert Herzog and Johannes Kuhr (n 105) 2-3.

<sup>98</sup> Chapter IV CCTB.

<sup>99</sup> Art 19 CCTB.

<sup>100</sup> Art 23 CCTB.

<sup>101</sup> Art 8 lit d CCTB.

<sup>102</sup> Marcus Ager, *Verlustausgleich in der Common Consolidated Corporate Tax Base* (Springer Gabler 2017) 47.

detail. This puts a high administrative burden on taxpayers<sup>103</sup>, as well as on the various tax authorities in the EU. CCTB depreciation rules are meant to simplify depreciation for both sides.<sup>104</sup> CCTB depreciation uses a two-tier system. Longer lived assets are depreciated on an individual base,<sup>105</sup> while other assets are depreciated together in an asset pool<sup>106</sup>. Compared to the rules of most MSs, this does ease the regulatory burden.<sup>107</sup> So far, the UK is among the four EU MSs which do allow an asset pool.<sup>108</sup> Thus, UK companies would not profit from the CCTB asset pool depreciation. Having said that, CCTB rules allow the individual depreciation of commercial, office and other buildings<sup>109</sup> and industrial buildings<sup>110</sup>.

Since 2011, UK tax laws do not acknowledge these assets.<sup>111</sup> CCTB allows the taxpayer to make a consistent choice between the first-in first-out<sup>112</sup>, last-in first-out<sup>113</sup>, and weighted cost methods.<sup>114</sup> The UK allows such a choice as well, with FiFo and the weighted cost method being used most frequently.<sup>115</sup> Profit distributions are fully deductible in the UK as well as under CCTB rules.<sup>116</sup> Under the latter, these deductions are condition to a holding of at least 10 % in the capital or holding rights in the distributing company.<sup>117</sup> CCTB rules allow deducting any amount arising from probable future legal obligations.<sup>118</sup> While only about half of the MSs allow this deduction,<sup>119</sup> i.e. the UK does<sup>120</sup>. Conversely to the current British tax laws, CCTB does not allow a loss-carryback.<sup>121</sup> In conclusion, albeit CCTB rules allow depreciating office and industrial buildings and UK tax laws allow a loss-carryback, CCTB would lead to far less differences in the UK than in other MSs.

#### 4.3.3 Economic

The Commission expects that the CCTB will have a positive impact on all MSs' economies.<sup>122</sup> It bases this opinion first and foremost on the CORETAX study<sup>123</sup> conducted by the Joint Research

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<sup>103</sup> For the definition of "taxpayers" see s 3.2.

<sup>104</sup> CCTB 14, Consideration 11.

<sup>105</sup> Art 33 CCTB.

<sup>106</sup> Art 37 CCTB.

<sup>107</sup> Marcus Ager (n 117) 25.

<sup>108</sup> Ibid.

<sup>109</sup> Art 33 no 1 lit a CCTB.

<sup>110</sup> ibid lit c.

<sup>111</sup> Christoph Spengel and others 'Gemeinsame Konsolidierte KSt-Bemessungsgrundlage (GK(K)B) und steuerliche Gewinnermittlung in den EU-Mitgliedsstaaten, der Schweiz und den USA' (2013) 08 Der Betrieb (Supplement No 2) 1, 13.

<sup>112</sup> Hereinafter "FiFo".

<sup>113</sup> Hereinafter "LiFo".

<sup>114</sup> Art 19 para 2 CCTB.

<sup>115</sup> Steven Collings, *UK GAAP Financial Statement Disclosures Manual* (John Wiley & Sons 2016) 307-308.

<sup>116</sup> Christoph Spengel and others (n 126) 13.

<sup>117</sup> Art 8 lit d CCTB:

<sup>118</sup> Art 23 no 1 para 1 CCTB.

<sup>119</sup> Christoph Spengel and others (n 126) 13.

<sup>120</sup> Steven Collings (n 130) 330-331.

<sup>121</sup> Marcus Ager (n 117) 26.

<sup>122</sup> CCTB 7-8.

<sup>123</sup> María T Álvarez-Martinez and others 'Modelling Corporate Tax Reforms in the EU: New Calibrations and Simulations with the CORTAX Model' (2016) JRC Working Paper on Taxation and Structural Reforms No 08/2016.

Centre<sup>124</sup> of the European Commission.<sup>125</sup> This study predicts a decreases in taxes collected from MNEs by the UK of -0.63 % of its GDP, and a decreases in corporate income tax collected of -1.47 %.<sup>126</sup> At the first sight this creates the impression that CCTB would have a positive impact on MNEs headquartered in the UK. The study expects CCTB to increase their corporate income tax rate 10.923 percentage points, though.<sup>127</sup> Thus, the decrease in taxes collected by the UK would not originate in a more efficient tax structure. Rather, it would be the result of these companies' reaction to a higher effective corporate income tax rate. Having said that, the JRC study expects a change in capital costs of -0.043 percentage points for MNEs.<sup>128</sup> It prognoses an increase in investments in MNEs of 1.364 % and 0.73 % in all companies.<sup>129</sup> This will increase the capital stock of MNEs headquartered in the UK by 8.154 %. According to the data provided by the JRC study, CCTB would have a positive impact on companies headquartered in the UK with subsidiaries in other MSs.

In 2009, Oestreicher et. al. used the European Tax Analyzer to calculate the impact of a CCTB on the effective tax burden for large enterprises and SMEs.<sup>130</sup> Based on the data for 2006, they stated a comparatively high tax burden of 31.92 Mio. Euros for an average large enterprise (16.4 % above the EU average) and a low tax burden of 0.78 Mio. Euros for the average SME (19.1 % below the EU average).<sup>131</sup> By applying all CCTB options of CCCTB2011<sup>132</sup>, the tax burden increased by 2.5 % for larger enterprises and 1.9 % of SMEs. Contrarily, the effective corporate tax rate for MNEs headquartered in the UK will be reduced by 0.59 – 4.82 %. While they come to different results in some details, Oestreicher et. al. agree with the JRC study that CCTB will have a positive impact for UK headquartered MNEs.<sup>133</sup>

In 2011 Spengel and Oestreicher published a study conducted for the Taxation and Customs Union Directorate General of the European Commission, which uses the European Tax Analyzer, as well.<sup>134</sup> This study predicts that applying all CCTB options will increase the tax base value of large enterprises by 0.24 %, and the effective tax burden by 2.51 %.<sup>135</sup> Similarly, the effective tax burden for British SMEs will increase by an average of 1.93 %.<sup>136</sup> Regarding the British tax system, this study uses tax laws as of 2006, though.<sup>137</sup> The changes made to the UK tax code since 2006 suggest that the

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<sup>124</sup> Hereinafter "JRC".

<sup>125</sup> CCTB 6.

<sup>126</sup> María T. Álvarez-Martinez and others (n 138) 14-15.

<sup>127</sup> *ibid* 67.

<sup>128</sup> *ibid* 58, 67.

<sup>129</sup> *ibid* 67.

<sup>130</sup> Andreas Oestreicher and others 'Common Corporate Tax Base (CCTB) and Effective Tax Burdens in the EU Member States' [2009] ZEW Discussion Papers, No. 09-026.

<sup>131</sup> *ibid* 7.

<sup>132</sup> Commission, 'Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)' COM (2011) 121 final/2 (CCCTB2011).

<sup>133</sup> *ibid* 15-16.

<sup>134</sup> Christoph Spengel and Andreas Oestreicher, *Common Corporate Tax Base in the EU* (Springer 2012).

<sup>135</sup> *ibid* 48-49

<sup>136</sup> *ibid* 163.

<sup>137</sup> *ibid* IX-X, 1-2.



CORETAX study predicts the impact of CCTB more accurately. As shown above, this study expects CCTB to have a positive impact on UK based companies.

#### 4.4 Political Feasibility

##### 4.4.1 Introduction

For British companies, these considerations remain theoretic, if CCTB will not be adopted by the Council or enacted by an enhanced cooperation before Brexit. Even if CCTB will be enacted by an enhanced cooperation pre-Brexit, British companies would only be subject to it at *en large*, if the UK would be among the cooperating MSs. Ten MSs already sent reasoned opinions questioning the CCTB proposal's compliance with the principles of subsidiarity<sup>138</sup> and proportionality<sup>139, 140</sup>. Therefore, the feasibility of the CCTB proposal seems doubtful regardless of Brexit. While some MSs might enact its rules by an enhanced cooperation according to Title III TEU, a British participation remains improbable.

##### 4.4.2 Directive

As shown above in section 4.3.1, the Council can only adopt the CCTB proposal by unanimous vote. Nine MSs clearly oppose CCCTB.<sup>141</sup> The adoption of that Directive pre-Brexit is therefore highly improbable. Ireland<sup>142</sup>, Sweden<sup>143</sup>, the Netherlands<sup>144</sup>, Spain<sup>145</sup>, Austria<sup>146</sup> and Cyprus<sup>147</sup> issued reasoned opinions opposing CCTB, as well. The arguments against CCTB are similar to those against CCCTB. The issuing states' main argument is that CCTB would violate the principles of subsidiarity and proportionality in a similar manner. In addition to this, six MSs oppose CCTB. Among the sternest opponents of CCTB and both CCCTB proposals is the UK. Over time, economic or political pressure from the 21 pro-CCTB MSs might convince other opposing MSs to agree to the adoption of the proposal. Before Brexit, such a change of mind seems nigh-impossible. Hence, Brexit might improve the chances of the adoption of the Directives.<sup>148</sup> This thesis argues that while CCTB will most likely not be adopted before Brexit, Brexit improves its overall chance to be adopted.

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<sup>138</sup> Art 5 para 3 TEU.

<sup>139</sup> Art 5 para 4 TEU.

<sup>140</sup> Norbert Herzig and Johannes Kuhr (n 105) 3-4.

<sup>141</sup> For an analysis of the individual opinions see Klaus von Brocke and Georg Rottenmoser 'Die GKKB im Lichte der Rechtsetzungskompetenzen der EU' [2011] Internationale Wirtschaftsbrieife 620.

<sup>142</sup> Council of the European Union, 'Interinstitutional Files 2016/0336 (CNS) and 2016/0337 (CNS)' 15770/16.

<sup>143</sup> Council of the European Union, 'Interinstitutional Files 2016/0337 (CNS)' 5182/17.

<sup>144</sup> Council of the European Union, 'Interinstitutional Files 2016/0336 (CNS) and 2016/0337 (CNS)' 5215/17, 5216/17, 5217/17 and 5218/17.

<sup>145</sup> Council of the European Union, 'Interinstitutional Files 2016/0336 (CNS), 2016/0337, 2016/0338 and 2016/0339 (CNS)' 5269/17.

<sup>146</sup> Council of the European Union, 'Interinstitutional Files 2016/0336 (CNS) and 2016/0337 (CNS)' 5651/17.

<sup>147</sup> Council of the European Union, 'Interinstitutional Files 2016/0336 (CNS) and 2016/0337 (CNS)' 8176/17.

<sup>148</sup> Laura Ambagtsheer-Pakarinen and others, "'God Save the Brexit": Tax Implications of Leave Vote'[2016] European Taxation 474, 489.

#### 4.4.3 Enhanced Cooperation

Before Brexit, an enhanced cooperation remains the only feasible way to introduce a CCTB. The six MSs that actively oppose CCTB would not have to partake in this cooperation as long as the number of cooperating states totals at least nine.

These nine MSs might use the Green Paper on German-French convergence in business taxation<sup>149</sup> as the starting point for this enhanced cooperation.<sup>150</sup> Compared to its predecessors, the Lisbon Treaty<sup>151</sup> encourages enhanced cooperation.<sup>152</sup> While six MSs directly oppose CCTB, the remaining did not yet issue a reasoned opinion. The German-French Green Paper shows that the MSs do not oppose cooperation in the field of direct taxation in every case. Two of the economically most powerful MSs already do cooperate by the way of the mentioned Green Paper. The possibility of cooperation highlighted by the mere existence of the Green Paper might convince other MSs to join.

Moreover, the reasons brought forth by the Commission regarding CCTB remain valid and apply to an enhanced cooperation, as well. While the scope would be limited to the cooperating MSs, the results would apply to them in the same way as a CCTB directive would, leading to a change in quantity, not in quality compared to the adoption of a CCTB directive.

The interdependency between the cooperating MSs in the light of a French participation might be another argument for third MSs to join. Eberhartinger and Petutschnig showed for a CCCTB that France, as the MS with the highest tax rate, would be most susceptible to a shift of employment to other MSs.<sup>153</sup> While the effects of consolidation would be limited to a CCCTB, the study suggest similar effects for CCTB provisions. Using a CCTB decreases the capital costs for employment in the participating low tax countries. If France, the MS with the highest tax rate, participates in an enhanced cooperation, other MSs might be inclined to do so as well.

The overall impact of such a CCTB would be limited to the cooperating MSs. However, the economic power of the two participants of the Green Paper might lead to another argument for further MSs to join France and Germany on an enhanced cooperation. The main reason many MSs prefer a CCTB over a CCCTB is the respective impact on tax revenue.<sup>154</sup> As shown above in section 4.3.2 for the UK, such a loss in revenue originates primarily in capital shifting because of high national tax rates. The German and French participation could therefore encourage low tax MSs to join CCTB to attract companies as taxpayers. An enhanced cooperation on a CCTB might also be capable of diverting tax

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<sup>149</sup> Bundesministerium der Finanzen, *Grünbuch der Deutsch-Französischen Zusammenarbeit. Konvergenzpunkte bei der Unternehmensbesteuerung* (Green Paper, 2012).

<sup>150</sup> Jan Grabowski, 'Would a CCTB Be More Suitable to Overcome the Tax Obstacles to the Common Market Than the CCCTB?' (LLM thesis, Tilburg University 2014).

<sup>151</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/01.

<sup>152</sup> Ester Herlin-Karnell and Theodore Konstadinides 'The Rise and Expression of Consistency in EU Law' in Catherine Barnard and others *Cambridge Yearbook of European Legal Studies*, vol 15 (Bloomsbury 2013) 158.

<sup>153</sup> Eva Eberhartinger and Matthias Petutschnig, 'CCCTB: the Employment Factor Game' (2017) 43 *European Journal of Law and Economics* 333.

<sup>154</sup> Norbert Herzig and Johannes Kuhr (n 105) 3.

bases towards the cooperating MSs.<sup>155</sup> This may persuade undecided MSs to rather join the enhanced cooperation early than remaining outside and suffering losses that cannot be recuperated when they eventually do join.

The French and the German ministers of foreign affairs highlighted both countries' interest in a strong Europe.<sup>156</sup> Hereby they put an emphasis on the importance of “[f]ostering growth and completing the Economic and Monetary Union”<sup>157</sup>. They stress that France and Germany intend to continue furthering the European integration and leading by example. Since they gave the example of a working cooperation on direct taxes, they can be expected to agree to an enhanced cooperation between all interested MSs.

Furthermore, a fierce tax competition between the EU and the UK post-Brexit remains possible. The other MSs might want to use a CCTB in preparation for this. If the UK would be part of a CCTB, the UK and the participating MSs that remain in the EU would have a level playing field for such a competition. Even if the UK would not be part of the CCTB, the MSs would gain an advantage from participating, though. New import burdens post-Brexit might lead to corporate restructuring in favor of MSs. If multi-national companies would be subject to a German-French tax base, anyway, they might be inclined to choose a state with the same tax base as the destination of their shifting operations. This might also encourage other MSs to opt for an enhanced cooperation which gives them influence over the details of the tax base over adjusting to the German-French system or competing with it.

An enhanced cooperation on a CCTB is therefore more probable than a CCTB Directive. France and Germany do already cooperate on direct taxation. Building on this fundament, an enhanced cooperation would be possible before Brexit.

#### 4.4.4 British Participation

Even if a sufficient number of MSs would decide to enact such an enhanced cooperation, the UK would not have to participate. While there are good arguments why the UK might cooperate on CCTB, the British intention to leave the EU makes it unlikely that the UK would agree to cooperate in even more fields inside the EU framework. The UK intends to do business with EU MSs even post-Brexit. Partaking in the enhanced cooperation would ease the transition period for larger enterprises. The CCTB would be optional for SMEs as they could choose to tie themselves closer to the EU or to apply the UK rules. Applying CCTB would lead to a higher tax burden for these companies. Thus, giving this option to SMEs might be politically sound for the British government. If only a small percentage of UK SMEs choose to apply CCTB, the government might argue a strong support of Brexit among British companies. Additionally, the UK intends to use some tax measures to attract foreign

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<sup>155</sup> Veronika Solilová and Danuše Nerudová, ‘Implementation of Common Consolidated Corporate Tax Base and Its Implications for Non-Participating Country’ (2016) 64 *Ekonomický časopis* 282.

<sup>156</sup> Jean-Marc Ayrault and Frank-Walter Steinmeier, ‘A Strong Europe in a World of Uncertainties’ <<https://www.auswaertiges-amt.de/cae/servlet/contentblob/736268/publicationFile/217575/160624-BM-AM-FRA-DL.pdf>> accessed 06 June 2017.

<sup>157</sup> *ibid* 7.

investments.<sup>158</sup> If British SMEs could choose between (EU) CCTB and British tax laws and only a fraction would opt for CCTB, the UK might show that their tax system is already favorable. Furthermore, British politicians recently made several public statements which put a strain on peaceful negotiations.<sup>159</sup> Conversely, Prime Minister May pointed out that the UK sought peaceful, cooperative negotiations with the EU.<sup>160</sup> Cooperating with the other MSs on a measure which will shape EU taxation for the time after Brexit might prove this intention.

Additionally, cooperating on CCTB would not have to prolong the general Brexit negotiations. Rather, the enhanced cooperation could include rules for the exit of a cooperating MS. Thus, it might not only be sound politically for the UK to opt for more EU rules than most other MSs while leaving the Union because of too many EU rules. Albeit the UK might benefit economically, as well as politically from participating in an enhanced cooperation on CCTB, *in praxi* this might be impossible.

The British decision to leave the Union originates in a wish for independence, disregarding economic consequences. Even if the UK would voluntarily join an enhanced cooperation, it would submit in this regard to EU supervision. Thence, a British participation might be nearly impossible to justify internally. Furthermore, intertwining its tax system with a CCTB, even one not applied in all MSs, might contradict the British goal of a “clean cut”. Such a clean cut would have negative consequences on the UK’s economy. The British government might seek to avoid a temporary economic high induced by EU regulations before the inevitable Brexit-induced downfall. It also might want to prevent tying the Scots closer to the EU by establishing a common tax base the Scotland and part of the MSs. Finally, the remaining MSs intend to negotiate Brexit united. Therefore, they might want to abstain from connecting themselves to the UK more closely. Even if there are sound arguments for a British participation, it remains highly unlikely that the UK would join an enhanced cooperation on a CCTB.

#### 4.5 Conclusion

UK based MNEs would benefit from CCTB. Therefore, one can expect CCTB to have a positive impact on UK MNEs pre-Brexit. Legally, the transition from national tax laws to CCTB would be easier for them than for MNEs headquartered in most other MSs. While loss-carryback would no longer be permitted, they could plan their taxes accordingly. Additionally, CCTB would enable them to depreciate office and industrial buildings. One can reasonably expect CCTB to have a positive economic impact on UK based MNEs under the *status quo*, as well. Overall, CCTB would have a positive impact on MNEs headquartered in the pre-Brexit UK.

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<sup>158</sup> Adam Bienkov, ‘Theresa May ‘Stands Ready’ to Turn Britain into Tax Haven After Brexit’ *Business Insider* (London, 16 January 2017) <<http://uk.businessinsider.com/theresa-may-stands-ready-to-turn-britain-into-a-tax-haven-after-brexit-2017-1?r=UK&IR=T>> accessed 13 April 2017.

<sup>159</sup> Gordon Rayner, ‘Gibraltar Row: Theresa May urges ‘jaw-jaw, not war-war’ with Spain’ *The Telegraph* (London, 3 April 3, 2017) <<http://www.telegraph.co.uk/news/2017/04/03/gibraltar-row-theresa-may-urges-jaw-jaw-not-war-war-spain>> accessed 13 April 2017.

<sup>160</sup> *ibid.*

Participating in an enhanced cooperation would also lead to political benefits for the UK. Having said that, the adoption of the CCTB proposal in the two-year period before the finalization of Brexit remains doubtful regardless of the British vote. Yet, one might reasonably expect France and Germany to gather the required nine MSs to enact the CCTB rules by the way of enhanced cooperation eventually. Nevertheless, the implications of a British involvement in this cooperation, while the UK is seceding from the Union, might make it impossible for the UK to be part of such an enhanced cooperation, even if it would be enacted pre-Brexit.

In conclusion, Brexit would have a negative influence on CCTB and British companies. The economic consequences of CCTB would be favorably to British companies and enhance their opportunities on the Common Market. Yet, the political realities of Brexit make a CCTB directive with British participation unlikely. At this time, a CCTB directive before Brexit even seems impossible. Hence, Brexit reduces the chances of British companies to profit from the chances CCTB would give them.

## 5. Common Corporate Tax Base Post-Brexit

### 5.1 Introduction

The effect Brexit will have on the economic world will be paramount.<sup>161</sup> As shown above, a Common Corporate Tax Base<sup>162</sup> would certainly have an impact on companies based in the UK. This chapter will engage with influence of Brexit on British companies under a CCTB according to the Commission's CCTB proposal<sup>163</sup>. After the introduction, the focus will shift to the legal background for companies not headquartered in the EU keeping permanent establishments<sup>164</sup> therein. Section 5.3 will focus on the transition from CCTB (either as a directive or regarding the states participating in an enhanced cooperation) to UK tax laws after Brexit, while section 5.4 will answer how CCTB will deal with these companies when Brexit and the transition are concluded.

Analyzing the influence of CCTB on British companies post-Brexit requires one to take a step back and look at the big picture. Companies that restrict their economic activity to the UK and other non-EU states will not be subject to an EU directive such as CCTB. This thesis will not engage with the very principles of sovereignty and the reason rules and regulations of supranational bodies have no direct influence on non-members. Rather, it will analyze the interplay between CCTB and the British tax treaties with EU MSs. Hereby, it will presume that these treaties follow the OECD Model Convention<sup>165</sup>.

### 5.2 Legal Background

Post-Brexit, CCTB would still apply to the European PEs of British companies under the conditions laid out above in section 3.2.2. The Freedom of Capital of Art 63 TFEU<sup>166</sup> would continue to apply to UK companies the way it applies to any non-EU company. British companies could no longer invoke the Freedom of Establishment of Art 49 TFEU, though.

### 5.3 From CCTB to UK Tax Laws

#### 5.3.1 Introduction

Throughout this thesis so far it has been shown that Brexit is a process of uncertainties. This section will show that the EU remains reliable nevertheless and that even if the UK leaves the Union, CCTB and the principles the EU is built upon provide some certainty for British companies.

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<sup>161</sup> John Springford and others, 'The Economic Consequences of Leaving the EU. The Final Report of the CER Commission on Brexit 2016' <[https://www.cer.org.uk/sites/default/files/smc2016\\_26april2016.pdf](https://www.cer.org.uk/sites/default/files/smc2016_26april2016.pdf)> 38-39 accessed 19 February 2017.

<sup>162</sup> Hereinafter "CCTB".

<sup>163</sup> Commission, 'Proposal for a Council Directive on a Common Corporate Tax Base' COM (2016) 685 final (CCTB).

<sup>164</sup> Hereinafter "PEs".

<sup>165</sup> OECD, 'Model Tax Convention on Income and on Capital 2014 (Full Version)' (OECD Publishing 2015) (MTC).

<sup>166</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU).

Eventually, the principles laid out in section 5.3 will apply to British companies that existed before Brexit, as well. After Brexit, CCTB will cease to apply in the UK. This section will provide an analysis of the transition of British companies from EU to non-EU companies from the point of view of the CCTB. Chapter VI CCTB contains the “rules on entering and leaving the system of the tax base”. These rules are aimed at taxpayers who become subject to CCTB, either mandatorily or by opting in, and who leave CCTB, or who are no longer subject to CCTB. The proposal does not contain rules regarding the exit of a country from the CCTB framework. Since non-EU states are not eligible to join CCTB and the proposal’s objective is to strengthen the European integration and the internal market, such rules would be inconsistent with its framework. Leaving the transition rules to the Brexit negotiations under Art 50 TEU would create most certainty once the negotiations are concluded. Yet, their results are unpredictable, at least at the time of the writing of this thesis. Moreover, if another MS chose to secede from the Union, the Brexit negotiations might support the new exit, but one would have to account for the individual circumstances surrounding the second exit. The application of the rules of Chapter VI CCTB under the principles of European law might serve as a basis for negotiations on the future of the taxation of the concerned companies during Brexit, as well as the hypothetical second exit. If CCTB is not included in any of these negotiations, they would even have to provide guidelines for this on their own.

### 5.3.2 Chapter VI CCTB

As mentioned in the introduction, Chapter VI does not deal with MSs leaving the CCTB framework, but with taxpayers entering and leaving the CCTB system.<sup>167</sup> When a taxpayer leaves the CCTB system, his assets and liabilities shall be recognized at the value they have according to CCTB rules.<sup>168</sup> This allows a smooth transition from CCTB to the national tax system and discourages switching between the systems for other than commercial reasons. The asset pool shall be recognized as it is with a future depreciation according to the declining balance method at a rate of 25% *per annum*.<sup>169</sup> Revenues and expenses arising from long-term contracts shall be treated according to national rules, with the condition that those already taken into account for tax purposes shall not be taken into account again.<sup>170</sup> Expenses deducted before the taxpayer left the CCTB system shall not be deductible again, while any part unrelieved shall be deductible according to CCTB rules.<sup>171</sup> Revenues a taxpayer has already included in its tax base under the CCTB system shall not be included in the tax base under a national system.<sup>172</sup>

In summary, Chapter VI ensures that a taxpayer can rely on CCTB even if he leaves the system. The rules regarding a leaving taxpayer provide him with certainty regarding any taxes paid before and

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<sup>167</sup> Cf Art 43 CCTB.

<sup>168</sup> Art 48 CCTB.

<sup>169</sup> Art 49 CCTB.

<sup>170</sup> Art 50 CCTB.

<sup>171</sup> Art 51 para 1, 3 CCTB.

<sup>172</sup> Art 51 para 2 CCTB.

the base of taxes to be paid because of events during his time under CCTB. They also make sure that he pays what he is due. Chapter VI CCTB provides the taxpayer, as well as the tax authority with planning dependability.

### 5.3.3 Legal Certainty and Legitimate Expectations

#### 5.3.3.1 Introduction

Although this does not rule how to treat a taxpayer whose state of residence leaves the EU under CCTB, it shows that CCTB in general and the rules regarding exiting taxpayer in special are governed by the principles of legal certainty and legitimate expectations. These principles are not unique to Chapter VI or even CCTB, but are part of the fundament of EU law. They are deeply rooted in the UK law, as well.

#### 5.3.3.2 Background

On the EU level, the principle of legal certainty is a part of the rule of law as guaranteed by Art 2 TEU<sup>173</sup>. It became a cornerstone of the *acquis communautaire* even before the Lisbon Treaty<sup>174</sup> was signed. The CJEU has first acknowledged the principle of legal certainty in its ruling on the *Algera* case<sup>175</sup> and reconfirmed it ever since.<sup>176</sup> The general principle of legal certainty is complemented by the principle of legitimate expectations.<sup>177</sup>

In UK law, legal certainty is a principle that predates even the EU's predecessors by far, yet is still held in highest regard.<sup>178</sup> Based on the fairness principle, the UK acknowledges the principle of legitimate expectations, as well.<sup>179</sup>

From a substantive point of view, these principles protect against retroactive laws and guarantee legitimate expectations.<sup>180</sup> Gribnau showed that these principles also are of high importance in regard to tax law.<sup>181</sup> On this field, the principles discussed here generally prohibit retroactivity.<sup>182</sup>

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<sup>173</sup> Consolidated Version of the Treaty on European Union [2016] OJ C202/13 (TEU).

<sup>174</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/01.

<sup>175</sup> Joined Cases C-7/56 & 3-7/57 *Algera and others v. Common Assembly* [1957] ECR 41, 55.

<sup>176</sup> Eg Case C-23/68 *Klomp v. Inspectie der Belastingen* [1969] ECR 44, para 13; Case C-265/78 *H. Ferwerda v. Produktschap voor Vee en Vlees* [1980] ECR 618 para 17; Case C-110/03 *Belgium v. Commission* [2005] ECR I-2829 para 30; for a more comprehensive list see Thomas von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' (2014) 37 *Fordham International Law Journal* 1311.

<sup>177</sup> For this principle see eg Case C-62/00 *Marks & Spencer* [2002] ECR I-6348; Case C681/11 *Bundeswettbewerbshörde and Bundeskartellanwalt v. Schenker & Co AG and others* [2013] ECR I-0000 para 41.

<sup>178</sup> *Vallejo v. Wheeler* [1774] 1 *Cowp* 143; *Golden Straight Corporation v. Nippon YKK UKHL* 12, [2007] 2 *AC* 353.

<sup>179</sup> *R v. Ministry of Agriculture, Fisheries and Food ex p Hamble (Offshore) Ltd* [1995] *EWHC* 2 All ER 714 (QB).

<sup>180</sup> Paul Craig, *EU Administrative Law* (7<sup>th</sup> edn, Sweet & Maxwell 2012).

<sup>181</sup> Hans Gribnau, 'Legal Certainty: A Matter of Principle' (2010) *Tilburg Law School Legal Studies Research Paper Series* 12/2014, 69, 81-83 <<https://ssrn.com/abstract=2447386>> accessed 07 June 2017.

<sup>182</sup> *ibid* 86-87.



### 5.3.3.3 Retroactivity

This raises the question whether a Brexit tax, resulting in higher taxation for British companies, would be a retroactive tax. The answer to that depends on how “Brexit tax” is defined. If tax rates are increased after Brexit or if a new tax is levied after Brexit on a tax base that covers actions that happen in the future, it is not retroactive. The mere fact that the “reason” for levying that tax lies in the past, does not make it a retroactive tax. The principle of legal certainty does not guarantee the *status quo* in perpetuity.<sup>183</sup> Raising the tax rate on taxable actions conducted during the negotiation years after Brexit is concluded would be a text book example of retroactive taxes and violate not only European, but also British legal principles. This thesis will focus on the middle ground and show that the rules, which will apply to UK companies after Brexit, could not legally differ from those for companies which left the CCTB system voluntarily. If the UK would disregard CCTB rules after Brexit, it would still violate EU law, as well as international and even its own laws. Furthermore, such a decision seem politically and economically unreasonable and therefore unlikely.

First, CCTB ensures that companies leaving its framework may keep any tax credits accumulated. The principles of legal certainty and legitimate expectations prohibit depriving them of these rights. Unless the UK enacts a law, they may legitimately expect that the rights they enjoy under CCTB will be guaranteed post-Brexit, even if they become subject to British tax laws.

Second, according to EU law, the EU treaties continue to apply to the UK until Brexit is finalized, either by a Brexit agreement or by the passing of the two-year period.<sup>184</sup> When the UK leaves the EU, this will relieve it from any obligations regarding its treaties for the future. Brexit will have no retroactive effect *ex tunc*, though. Thus, even if the UK is no longer a MS, it is bound by the EU treaties for the events that happened pre-Brexit.

Third, this is supported by international law. The EU treaties are in force in regard to the UK and therefore binding to the UK, which has to execute them in good faith.<sup>185</sup> It may not invoke its internal laws to abstain from this duty.<sup>186</sup>

Finally, a UK law violating the rights UK companies acquired under CCTB would contradict the UK’s own interests and even violate higher internal principles of law. As shown above, the principles of legal certainty and legitimate expectations are part of UK law. While the main reason, the UK left the EU, was to be free from EU rules, it does not disregard its economy. Even suggesting UK-based companies might be subject to higher and retrospective taxes regarding their time under CCTB merely because of staying in the EU would be capable of starting a movement of assets to the remaining MSs. The resulting loss for the British economy would also contravene the interests of British politicians.

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<sup>183</sup> Hans Gribnau (n 202).

<sup>184</sup> Art 50 para 3 TEU.

<sup>185</sup> Art 26 of the Vienna Convention on the Law of Treaties.

<sup>186</sup> Art 27 of the Vienna Convention on the Law of Treaties.

#### 5.3.3.4 Conclusion

EU and UK laws would prevent the UK from levying retroactive taxes on companies formerly subject to CCTB; the EU could not even accept a Brexit agreement requiring that.

The most imminent sign that the UK could not levy taxes on CCTB companies retroactively are its own principles of legal certainty and legitimate expectations. Moreover, the taxes would be levied for a time at which the UK had been part of the EU. During that time, it was part to European laws. Even if one would not consider UK laws disregarding European principles for the time before Brexit a violation of EU laws if they are enacted after Brexit, British subjects could legitimately expect to enjoy these rights as long as they were EU citizens. Any *ex post facto* violation of European rights, including a retroactive change of the tax base would therefore also violate British law.

The status of Britons as European citizens also has implications for the EU's position on the Brexit negotiations. While the goal of these negotiations is, of course, for the UK to leave the Union, until the negotiations are concluded, the UK is an EU MS and British subjects are EU citizens.<sup>187</sup> The Union is obliged to ensure the equal treatment of all EU citizens.<sup>188</sup> Since TEU and TFEU are primary EU law, the Union would neither be able to legally change, nor to disregard or even violate it. Even if the Council conducts the negotiations for the EU,<sup>189</sup> and even if the Council consists of the heads of state or government of the MSs,<sup>190</sup> it is an EU institution distinct from the MSs and bound by the treaties<sup>191</sup>. Hence, the European treaties forbid the Council, and thereby the EU, to discriminate without a good reason between Britons and other EU citizens. Any agreement regarding their time *post* Brexit might be justified by the mere fact of the British exit. For the time of the negotiations UK citizens are EU citizens, though, entitled to the same European rights and the same protection as any other. As a result, the EU does not have to engage with the taxation of any events that will occur after Brexit. Nevertheless, the Council could not agree to any clause in the Brexit agreement that leads to retroactive taxation and violates the European rights of Britons during their time as EU citizens.

UK based companies could rely upon the CCTB system during the time before Brexit. There is reason to assume that European rights and principles of law will continue to apply to them regarding the time the UK was part of the EU. Even if one disagrees with the spillover effect of the European Treaties, UK laws would ensure legal certainty for British companies.

#### 5.3.4 Exit Taxation

Exit taxation may apply in two situations. First, when a company leaves the CCTB framework. Since this situation is of relevance for any transfer for assets any time after Brexit is concluded, section

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<sup>187</sup> Art 50 para 3 TEU in conjunction with Art 9 TEU and Art 20 TFEU.

<sup>188</sup> Art 9 TEU.

<sup>189</sup> Art 50 para 1 TEU.

<sup>190</sup> Art 15 para 2 TEU.

<sup>191</sup> Art 13 paras 1, 2 TEU.

5.4.2 will deal with this question. The other situation in which CCTB rules might allow levying an exit tax is the moment of Brexit itself. In this case, the same arguments brought forth in section 5.3.3 apply.

## 5.4 CCTB After the Transition

### 5.4.1 Introduction

After the conclusion of Brexit and the transition, any British company will be a foreign company under CCTB, not different from an existing or new Canadian or South African company. As shown above, the permanent establishments of these companies are still subject to CCTB if they are located in CCTB states. As Brexit is concluded, the benefits of CCTB laid out above in section 4.3 do no longer apply to British companies. Having said that, after the transition, the uncertainties laid out in section 5.3 will stop to burden UK companies with PEs in EU MSs.

### 5.4.2 Exit Taxation

The theoretic revenue on which exit taxes may be levied under CCTB is calculated by the formula

$$\text{revenue} = (\text{market value of the assets at the time of the exit}) - (\text{value of the assets for tax purposes})$$

*Formula 5.1: CCTB Exit Tax Base*

Regarding companies with head offices in non-EU states, a MS may levy an exit tax to the extent it loses the right to tax the asset when a taxpayer transfers assets from its PE in a MS to its head office or another PE in an EU or non-EU states,<sup>192</sup> or when the company moves the business carried out by the PE to another EU or non-EU states<sup>193</sup>. Such a tax shall not be levied when the transfer is “related to the transfer of securities, assets posted as collateral or where the asset transfer takes place in order to meet prudential capital requirements or for the purpose of liquidity management where those assets are set to revert to the MS of the transferor within a period of 12 months.”<sup>194</sup> While in general an exit tax maybe levied when intra-EU transfers occur as well, only EU MSs are obliged to accept the value applied for the exit tax base.<sup>195</sup>

### 5.4.3 Hybrid Mismatches

The Commission acknowledges that differences in tax systems might lead to hybrid mismatches.<sup>196</sup> Since these mismatches generally either lead to a double deduction or to a deduction in one country without a corresponding inclusion in another, CCTB seeks to prevent them.<sup>197</sup>

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<sup>192</sup> Art 29 para 1 lit b CCTB.

<sup>193</sup> Art 29 para 1 lit d CCTB:

<sup>194</sup> Art 29 para 3 CCTB.

<sup>195</sup> Art 29 para 2 CCTB.

<sup>196</sup> CCTB 11.

<sup>197</sup> CCTB, Consideration 17.

Art 4 para 31 CCTB defines “hybrid mismatches”. This definition is in accordance with the general definition used by inter- and transnational organizations.<sup>198</sup> The rules MSs have to follow in case a hybrid mismatch occurs ensure the prevention of double deductions of losses and non-inclusion of profits.<sup>199</sup>

The CCTB proposal lays out the rules regarding transparent entities in the two articles of its Chapter X. Art 62 deals with the allocation of the income of transparent entities intra-EU. Art 63 sets the rules for the determination of transparency of third country entities. Whether an entity located in a third country is transparent or not, will be determined by the laws of the MS in which the taxpayer is located. This is in accordance with the international standard, which determines the transparency according to the state in which the taxpayer has its residence<sup>200</sup>.

Because CCTB reduces the chance for a hybrid mismatch to occur within its scope, Brexit will increase it for British companies, thereby also increasing their compliance costs. When an entity is “transparent” is even under CCTB regulated by the laws of the MSs, though. Therefore, no difference would come from Brexit in this regard.

## 5.5 Conclusion

Brexit would influence CCTB and British companies rather once Brexit is concluded. While UK companies could remain under CCTB rule until Brexit is finalized, they would leave the CCTB framework when the UK leaves the EU. British, European and general international laws would provide them with some certainty during the exit process, though. Even after Brexit, British companies will be subject to CCTB if they have PEs in the EU. UK companies would be treated equally to residents of other non-MSs, but lose the benefits CCTB provides to intra-EU companies. As a result of Brexit, UK based companies would have to bear the compliance costs linked to the combat of hybrid mismatches.

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<sup>198</sup> OECD, ‘Hybrid Mismatch Arrangements’ (Tax Policy and Compliance Issues March 2012) <[http://www.oecd.org/ctp/exchange-of-tax-information/HYBRIDS\\_ENG\\_Final\\_October2012.pdf](http://www.oecd.org/ctp/exchange-of-tax-information/HYBRIDS_ENG_Final_October2012.pdf)> accessed 13 June 2017.

<sup>199</sup> Art 61 para 1 sub-para 2, para 2 sub-para 2, para 3 sub-para 2, paras 4, 5 CCTB.

<sup>200</sup> Yariv Brauner, ‘CCCTB and Fiscally Transparent Entities: A Third Countries’ Perspective’ in Michael Lang and others (eds), *Corporate Income Taxation in Europe* (Edward Elgar Publishing 2013) 204.

## 6. Common Consolidated Corporate Tax Base

### 6.1 Introduction

As shown above in section 4.4, a CCTB will most probably not be adopted as a directive before Brexit. Consolidation should be the second step and follow the establishment of a CCTB. Therefore, one cannot reasonably expect a CCCTB to become law before Brexit. Since this thesis presumes that the UK will not be a MS of the EU when CCCTB2016<sup>201</sup> will be adopted, it raises the question to what extent British companies would be subject to that directive. This thesis presumes that a CCTB as laid out in the Commission's CCTB Proposal<sup>202</sup>, which is discussed above in section 4 and 5, will be adopted by the EU before the adoption of the CCCTB2016 proposal. It has been pointed out above in section 5.3, that British companies without permanent establishments in the EU will no longer be subject to CCTB. A company that is not subject to a CCTB is, a fortiori, not subject to its consolidation. UK companies do have PEs in the remaining EU MSs, though. A PE is subject to the laws of the state in that it is established. This includes the tax code, which, in case of EU MS will be in accordance with CCCTB2016. As laid out above in section 3.2, the PEs of companies established in third countries, such as in a post-Brexit UK, are therefore subject to CCCTB2016 under the same conditions as those of European companies. All PEs and subsidiaries of a non-EU company that are located in the EU form a tax group, subject to CCCTB2016.<sup>203</sup>

Accordingly, this chapter will analyze the influence of CCCTB2016 on British companies post-Brexit. It will not consider the purely theoretic effects CCCTB2016 would have on British companies without Brexit or if CCCTB2016 would be adopted pre-Brexit. It will rather focus on the real-life implications CCCTB2016 will have on companies headquartered outside of the EU. While CCCTB2016 will only be applicable inside the Union, and non-Union states are barred from joining the framework, a European CCCTB will still influence non-EU companies<sup>204</sup>. Nevertheless, the effects CCCTB2016 will have on EU-non-resident companies differ from the effect on EU-resident companies. Concerning British companies, this difference constitutes the influence of Brexit.

### 6.2 Applicability of CCCTB2016 to British Companies

If they meet the conditions laid out above in section 3.2.2, CCCTB2016 is applicable to British companies the way it is applicable to any non-EU company. Since British companies do not qualify as resident taxpayers<sup>205</sup>, they would have to invest through a European subsidiary or branch to be eligible for CCCTB2016. The Directives do not lay out specific rules, which investment schemes open

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<sup>201</sup> Commission, 'Proposal for a Council Directive on a Common Consolidated Corporate Tax Base' COM (2016) 683 final (CCCTB2016).

<sup>202</sup> Commission, 'Proposal for a Council Directive on a Common Corporate Tax Base' COM (2016) 685 final (CCTB).

<sup>203</sup> Art 6 para 2 CCCTB2016.

<sup>204</sup> Eric CCM Kemmeren and Daniël S Smit, 'Taxation of EU-Non-Resident Companies under the CCCTB System' in Michael Lang and others (eds), *Corporate Income Taxation in Europe* (Edward Elgar Publishing 2013).

<sup>205</sup> For the distinction between "resident" and "non-resident taxpayer" see above ss 3.2.2, 3.2.3 and 3.3.2.

CCCTB2016 for non-resident taxpayers. The EU’s fundamental freedoms, mainly the Freedom of Establishment, and their interpretation by the CJEU, offer guidelines for an analysis.<sup>206</sup>

### 6.3 Tax Allocation

The main feature added by CCCTB2016 to CCTB is, as their names imply, the consolidation according to Chapter III. The tax bases of all members of a group are added to a consolidated tax base.<sup>207</sup> It is then apportioned to the group members by the rules laid out in Chapter VIII. In general, the apportionment of group member A is per calculated by the formula as reads:

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

*Formula 6.1: General Apportionment Formula<sup>208</sup>*

As the result of the consolidation, intra-group transaction cease to influence a group member’s tax base. Therefore, transfer pricing rules will not make sense anymore and will no longer be applicable in the EU.<sup>209</sup> They are still part of the core of the guidelines, though.<sup>210</sup> Thus, they will continue to guide transactions between group members and their non-EU related persons.<sup>211</sup> Between these entities, the arm’s length principle will still apply. This principle allows for the price a company would have paid or received at arm’s length by three formulas, the “comparable uncontrolled price method”, the “cost-plus method”, and the “resale price method” but if none of these would come to a sufficient result, any other suitable method is permitted.<sup>212</sup> The comparable uncontrolled price method looks at the price of similar transactions to determine if the price paid is in accordance with the arm’s length principle.<sup>213</sup> The cost-plus method looks at the relevant gross margin.<sup>214</sup> The resale price method subtracts a certain gross margin from the price of a theoretical resale to a third party.<sup>215</sup> The tax treaties of OECD MSs generally follow the OECD guidelines. As laid out above, however, not all EU MSs are also part of the OECD.

The high diversity of transfer pricing methods applied by the MSs’ tax treaties makes the establishment of a branch or subsidiary inside the EU from without a complex endeavor.<sup>216</sup> It is even more complicated by the parallel existence of an intra-EU formulary appointment and the inter-EU

<sup>206</sup> Eric CCM Kemmeren and Daniël S Smit (n 229) 56-57.

<sup>207</sup> Art 7 para 1 CCCTB2016.

<sup>208</sup> Art 28 para 1 CCCTB2016.

<sup>209</sup> CCCTB2016, 7; cf Art 9 CCCTB2016.

<sup>210</sup> OECD, ‘Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010’ (OECD Publishing 2010) (TP guidelines).

<sup>211</sup> Eid AG Ali, ‘The International Aspects of the European Common Consolidated Corporate Tax Base (CCCTB) and Their Interaction with Third Countries’ (PhD thesis, Brunel University 2013) 224.

<sup>212</sup> Cihat Öner, ‘Transfer Pricing Rules in the New Turkish Corporate Income Tax Act’ (2007) 65 Intertax 414, 416-17.

<sup>213</sup> *ibid* 416.

<sup>214</sup> *ibid* 417.

<sup>215</sup> *ibid*.

<sup>216</sup> Eid AG Ali (n 237) 226.

application of the arm's length principle, which might lead to inevitable economic double taxation.<sup>217</sup> Even if group members are supposed to deal only with the principal tax authority as a "one-stop-shop,"<sup>218</sup> companies resident in a non-EU MS will still have to deal with the tax laws and respective double taxation conventions between their home state and any MS involved.

#### 6.4 Withholding Tax

Another effect of Brexit on British companies subject to CCCTB2016 would be the possible levying of withholding or other source taxes, but no such taxes shall be imposed inside a tax group.<sup>219</sup> While this wording is very broad, its effect is limited to taxes similar to those named in Annex II CCCTB2016.<sup>220</sup> Payments of a group member to a non-group member, may be subject to withholding taxes imposed by the Member States.<sup>221</sup> While Art 26 CCCTB2016 explicitly only allows this for payments of interests and royalties, the context of the proposal shows that the MSs will not be limited in their power to levy withholding taxes on payments to non-MSs.<sup>222</sup> After Brexit, the UK based headquarter would be such a non-group member. Hence, Brexit would open the possibility of levying withholding taxes on British companies if existing tax treaties between the UK and EU MSs provide for that. Most EU MSs are also MSs of the OECD and they generally follow the OECD Model Convention. Nevertheless, OECD MSs are free to deviate from the Model and some EU MSs never joined the OECD. This lead to what Englisch calls an "obvious lack of harmonization regarding structures and rates of national withholding taxes levied by MSs on [...] outbound payments."<sup>223</sup> Because of Brexit, British companies would have to deal with a multitude of different withholding tax systems when they keep PEs in the EU. If levied, the withholding taxes would be distributed among the MSs according to the formula laid out in Chapter VIII CCCTB2016.<sup>224</sup>

The MSs are encouraged to renegotiate tax treaty provisions in conflict with CCCTB provisions.<sup>225</sup> Intra-EU withholding taxes would in general conflict with CCCTB2016. As shown above, they would still be allowed under certain circumstances. Furthermore, Art 26 CCCTB2016 allows withholding taxes on outbound payments "in accordance with the applicable rules of national law and any applicable double tax convention". MSs are not obliged to make any changes to their national laws in this regard.<sup>226</sup> Preventing them from levying withholding taxes, would unduly infringe upon their

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<sup>217</sup> *ibid* 225-26.

<sup>218</sup> CCCTB2016, 10-11.

<sup>219</sup> Art 10 CCCTB2016.

<sup>220</sup> Joachim Englisch, 'Withholding Taxation' in Michael Lang and others (eds), *Corporate Income Taxation in Europe* (Edward Elgar Publishing 2013) 161-62, showing this for Art 60 CCCTB2011, of which Art 26 CCCTB2016 is a verbatim copy.

<sup>221</sup> Art 26 CCCTB2016.

<sup>222</sup> Cf Joachim Englisch (n 246) 167-168, who showed this for the (unchanged) context of the CCCTB2011 proposal.

<sup>223</sup> Joachim Englisch (n 246) 160.

<sup>224</sup> Art 26 CCCTB2016.

<sup>225</sup> Eid AG Ali (n 237)

<sup>226</sup> Joachim Englisch (n 246) 167.

sovereignty.<sup>227</sup> Weber and van de Streek argue a CCCTB would prevent the MSs from concluding new tax treaties regarding withholding taxes.<sup>228</sup> The wording of Art 26 CCCTB2016 is not limited to existing double tax conventions. Additionally, while the main intention for CCCTB2016 is to remove obstacle from the internal market,<sup>229</sup> the proposal is meant to give the EU a tax base suitable for the modern, digitalized world.

One way to do so might be by levying a withholding tax on high-risk taxpayers.<sup>230</sup> The MSs would not be able to modernize their tax treaties if they could not apply them to new challenges of the digital economy. CCCTB2016 does not intend to establish a European tax code. Rather, the MSs will continue to apply and modify their respective national tax codes under the CCCTB2016 regime. They can only do so regarding withholding taxes on outbound payments, if they are able to adapt their tax treaties appropriately. MSs are still allowed to conclude new double tax conventions which contain withholding tax provisions. Moreover, Consideration 8 to CCCTB2016 differentiates between withholding taxes on interest and royalties, which are shared between MSs and those on dividends, which are not shared, establishing different classes of withholding taxes within the CCCTB2016 framework. Thence, it would be neither in the interest of the MSs, nor of the Union, to eliminate all withholding taxes on outbound payments. As a result of Brexit, British companies can expect to be subject to various withholding taxes when doing business in the EU despite of CCTB/CCCTB2016.

## 6.5 Thin Capitalization Rules

Under current corporate tax systems, a company may deduct interests paid from its tax base, while equity returns are non-deductible.<sup>231</sup> Consequently, companies are encouraged to use debt as the means to acquire investments.<sup>232</sup> Because Multi-national enterprises also use this mechanism for tax shifting, thin capitalization rules were introduced, limiting the amount of deductible interest paid between related entities.<sup>233</sup> Dourado and de la Feria argued for CCCTB2011 that thin capitalization rules should be included into a CCCTB, because “thin capitalization rules are effective [...] and perhaps equally important, failure to include such rules could in itself give rise to much more significant economic distortions.”<sup>234</sup> Contrariwise, a CCCTB is *per se* prone to be used to circumvent thin capitalization rules. A company under this kind of framework could, as put by Spengel and Wendt,

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<sup>227</sup> Dennis Weber and Jan van de Streek, ‘Commentary’, in Michael Lang and others (eds), *Corporate Income Taxation in Europe* (Edward Elgar Publishing 2013) 190.

<sup>228</sup> *ibid.*, 191-92.

<sup>229</sup> CCCTB2016, Consideration 1.

<sup>230</sup> Andres Baez and Yariv Brauner, ‘Withholding Taxes in the Service of BEPS Action 1’ <<https://www.ibfd.org/sites/ibfd.org/files/content/WithholdingTaxesintheServiceofBEPSAction1-whitepaper.pdf>> accessed 05 June 2017.

<sup>231</sup> Andreas Haufler and Marco Runkel, ‘Firms’ Financial Choices and Thin Capitalization Rules Under Corporate Tax Competition’ (2012) 56 *European Economic Review* 1087, 1087.

<sup>232</sup> *ibid.*

<sup>233</sup> *ibid.* 1087-88.

<sup>234</sup> Ana P Dourado and Rita de la Feria, ‘Thin Capitalization Rules in the Context of the CCCTB’ Oxford University Centre for Business Taxation Working Paper 08/04, 21, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2293447](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293447)> accessed 13 June 2017.



evade thin taxation rules by first granting “a loan [to a ] subsidiary resident in a country without thin-capitalization rules, and afterwards this loan is directed to the relevant company via intra-group transactions.”<sup>235</sup> Under the CJEU ruling on the *Lankhorst-Hohorst* case,<sup>236</sup> the freedom of establishment does not allow the MSs to enact thin capitalization rules that apply exclusively to companies resident in other MSs. Since the freedom of establishment is applicable only to EU residents; this judgement does not apply in regard to non-EU-resident companies.<sup>237</sup> Even without a CCCTB provision on thin capitalization rules, the laws of the MSs could effectively combat tax evasion by UK companies through thin capitalization. These rules show a strong variance, especially in regard to foreign companies’ PEs in EU MSs.<sup>238</sup> As a result of Brexit, UK companies would have to take these rules in addition to those of the CCTB/CCCTB2016 framework into consideration when investing in EU MSs.

## 6.6 Conclusion

CCCTB should remove obstacles from the Common Market and increase the openness for third country resident companies. The consolidation will remove obstacles and the “one-stop-shop” will ease the establishment in other MSs for EU resident companies. This effect will not apply to UK residents. In theory, all PEs and subsidiaries of a non-EU resident company build a group the way EU resident companies do. In practice, UK companies would not get the advantage of the “one-stop-shop”. Rather, they would still have to consider the tax laws of all MSs in which they keep a PE or a subsidiary and the tax treaties between the UK and these states. EU companies would be subject to the same tax base, deal with the same tax authority and form a single group for tax purposes throughout the EU. UK companies, will have to consider CCCTB2016 rules additionally to the tax laws and respective tax treaties of each MS they deal with. They might be subject to withholding taxes according to national laws and would have to follow thin capitalization rules.

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<sup>235</sup> Christoph Spengel and Carsten Wendt, ‘A Common Consolidated Corporate Tax Base for Multinational Companies in the European Union: Some Issues and Solutions’ Oxford University Centre for Business Taxation Working Paper 07/17, 42 <<https://ideas.repec.org/p/btx/wpaper/0717.html>> accessed 13 June 2017.

<sup>236</sup> Case C-324/00 *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* [2002] ECR I-11779.

<sup>237</sup> Ana P Dourado and Rite de la Feria (n 261) 8.

<sup>238</sup> Jennifer Blouin and others, *Thin Capitalization Rules and Multi-National Firm Capital Structure* (Office for Official Publications of the European Union 2014).

## **7. Summary and Final Conclusion**

Brexit would certainly have an influence on CCTB/CCCTB2016 and British companies. By influencing structure and composition of the Union and its organs, Brexit would influence if and how the Directives might become adopted, as well. By depriving British companies from their EU membership, Brexit would also partially deprive them of the European freedoms and the benefits of CCTB/CCCTB2016.

The influence of Brexit on the proposals itself might be positive. As long as the UK is part of the EU, the political implications of Brexit reduce the chance of the adoption of a CCTB or CCCTB directive. After Brexit is finalized, one of the main opponents of the proposals left the Union. Consequently, the chances of the adoption of the directives would grow. Not only would a major opponent lose his vote, and effectively the chance to veto the Directives, the UK would also lose its intra-EU influence on the decision-making process. Having said that, the unwillingness of the UK to become part of the CCTB/CCCTB2016 framework will most likely delay its adoption until Brexit is finalized. This leaves an enhanced cooperation as the only suitable way to enact CCTB rules in the EU in the near future. If executed well, other MSs might join the enhanced cooperation and adopt it as a directive eventually.

In theory, British companies would be among the major profiteers of CCTB/CCCTB2016, while having one of the smallest compliance costs for the change from national tax laws to the CCTB/CCCTB2016 framework. Since the British tax code is already similar to CCTB rules, British companies would gain a lot further mobility in the EU. CCCTB2016 would even enable British SMEs to establish PEs in the other MSs with ease. Brexit will deprive British companies of these benefits. Even when they can make use of the “one-stop-shop” mechanism regarding their European PEs, they will have to comply with the national tax laws of each MS involved and comply with the respective double taxation conventions with the UK.

When they are subject to these national laws, British companies after Brexit could no longer invoke the freedom of establishment. The subjects left to the national tax laws of the MSs will influence the results of CCTB/CCCTB2016 for British companies stronger, than the rules itself. The different withholding taxes British companies with PEs in the MS might become subject to, will reduce their mobility in addition to the reduction by the loss of CCTB/CCCTB2016 benefits. The possible application of thin capitalization rules would have a similar effect. Pre-Brexit, the freedom of establishment protects UK companies from these rules.

Even after Brexit, British companies could invoke the freedom of capital, though, still being able to invest in the remaining MSs. Also, for the time the UK is part of the EU, the European Treaties and international law provide UK companies with reliability and the ability to plan at least for that period of time.

In conclusion, Brexit deprives British companies from CCTB/CCCTB2016 benefits. Its biggest impact will not be based on the results of these directives itself, but rather on the ways the MSs may

deviate from CCTB/CCCTB2016 rules. While Brexit leads to many uncertainties and a lack of forecast reliability for British companies, the EU and its rules function as a pillar of certainty and reliability for the time of the Brexit negotiations and prevent and retroactive changes. The influence of Brexit on CCTB/CCCTB2016 and British companies will be that these companies will lose the benefits of the Union membership and the accompanying benefits from the Directives while facing a plethora of national tax laws regarding their economic activity in the remaining EU MSs. Brexit will make it legally more complicated, and subsequently economically more expensive, for British companies to do business in the remaining MSs.

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