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"The new CCCTB proposed scheme: an opportunity for cross-border business, a challenge for the national Judge"

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<u>SUMMARY</u>

I. <u>Preliminary remarks</u>

1. The reasons for the Proposal
2. The CCCTB as a bridge between the freedom of establishment and the tax harmonization
3. Legal aspects

II. <u>The CCCTB scheme at a glance</u>

III. <u>The application of the CCCTB scheme: Key aspects</u>

1 The consolidation.
1.1 <u>Subjective scope of application - the concept of eligible companies</u> (art. 2 of the Proposal)
1.2 <u>The concept of qualifying subsidiary</u> (art. 54 of the Proposal)
1.3 <u>The consolidation of the tax base</u>
1.4 <u>Intra-group transactions</u>

2 The apportionment

3 Operational profiles

IV. <u>The CCCTB scheme: potential scope for litigation and possible interpretative issues for the national Judge</u>

a) *Litigations between tax authorities*
b) *Litigations* between taxpayers and tax authorities

I. Preliminary remarks

The new Common Consolidated Corporate Tax Base (hereinafter also "the CCCTB") is the object of a Proposal from the European Commission dated March 16th 2011 for a Council Directive which basically aims to tackle some major fiscal impediments to growth in the Single Market ([1]).

It consists of an optional scheme to be made available to EU cross-border corporate groups for the determination of the tax base according to new common rules so as to allow the consolidation and set-off of profits and losses respectively earned and incurred in different member states.

Consolidation is at the heart of the project and represents the principal benefit of the CCCTB scheme and the main reason why industry supports it. As it has been clearly observed, "By freeing companies from compliance with intra-group transfer-pricing rules and allowing an immediate profit and loss consolidation, a consolidated base should help to make Europe a highly attractive area in which to do business as well as helping to establish a stable tax base in a competitive global environment" ([2]).

The knowledge and the scientific analysis of such a scheme becomes relevant also for the National Judge who may find himself confronted with a new set of common rules to be applied in litigations between taxpayers and tax authorities following the adoption of this new paradigm, in replacement of the 27 national tax systems that currently exist.

The aim of the present study is to give a general idea of the new proposed scheme without going into technical details, so as to focus on the main interpretative issues that could possibly be brought to the attention of a national court called upon by a tax authority or by a taxpayer under the Directive in comment.

1. The reasons for the Proposal

The Globalisation has widened the scope of economic relations while the internal organisation of firms operating in international markets has changed as well.

[1] In these terms, the Explanatory memorandum to the Proposal , p. 4.

[2] In this sense, M. AUJEAN – M.P. HOO/TAJ, An outline of the CCCTB (Common Consolidated Corporate Tax Base) and some focal points", 2011.

However, tax systems in the EU have not kept up with these developments, and remain highly fragmented with 27 regimes that often collide ([3]).

In spite of the establishment of the internal market and of the economic and monetary union, the allocation of resources and the distribution of economic activities as well as investment choices are still affected by the enduring tax barriers, which have become increasingly significant whereas other obstacles of different nature to the operation of the internal market have been removed.

Nowadays companies cannot generally consolidate profits earned in some member states with losses incurred in others.

This often results in: - over-taxation, when cross-border activities create liabilities that would not have occurred in a purely domestic context; - double taxation, when the same income is taxed in more than one jurisdiction; - and transfer pricing disputes within the EU, also connected with the high cost of complying with transfer pricing formalities.

This situation creates disincentives for investment in the EU and, as a result, runs counter to the priorities set in Europe 2020 – A strategy for smart, sustainable and inclusive growth ([4]).

The priority objective is therefore the elimination of tax obstacles to corporate cross-border activity in a single market with a view to enhancing the effectiveness of the internal market.

To this end, in 2001 a study was conducted by the European Commission in order to find out the measures deemed necessary and realistic in the field of corporate taxation in the EU.

The study presented an exhaustive list of the tax obstacles ([5]) and an analysis of the proposed remedies.

As a general solution, the Commission concluded that, in the long run, the Member States should reach an agreement to authorise EU businesses to adopt a single common consolidated tax base in order to calculate the tax payable on their profits on an EU-wide basis instead of the 27 national tax systems that currently exist ([6]).

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3 Consult P.DE BUCK, *How the CCCTB can attract the interest and the support of the business community*, in World Commerce Review, June 2011, p. 16.

4 Communication from the Commission, 'EUROPE 2020 - A strategy for smart, sustainable and inclusive growth' - COM(2010) 2020, 3.3.2010.

5 The following are the main obstacles relating to corporate taxation, which were listed with the aid of a panel representing employers' and employees'organisations and other economic stakeholders: - the coexistence of 27 different systems; - transfer-pricing issues (documentation and double taxation / arbitration); - the general lack of cross-border loss-offset; - the fact that existing directives do not do enough to eliminate tax obstacles; - double-taxation problems and the inadequacies of bilateral agreements; - the obstacles to reorganisation and restructuring. See the study **Company Taxation in the Internal Market, SEC(2001)1681, 23 October 2001**.

6 This was followed by a discussion paper for Member State governments in 2004 and the establishment of a Council 'working group' made up of member state representatives and charged with the study of the technical requirements of a set of common criteria for calculating EU-wide taxable profits.

2. The CCCTB as a bridge between the freedom of establishment and the tax harmonization

Meanwhile some decisions of the European Court of Justice ([7]), dealing with a growing number of corporate taxation cases in situations involving the exercise of fundamental freedoms granted by the TFEU (Treaty on the Functioning of the European Union, former EC Treaty), came to safeguard the freedom of establishment and capital movement over the attempts of national Tax Authorities to protect their corporate tax bases; these rulings increased pressures for tax harmonisation at the EU level and strengthened the determination of certain EU member states to go ahead with proposals for a Common Consolidated Corporate Tax Base.

- In April 2004 ([8]) the *Cadbury Schweppes* case (Case C-196/04) regarded the compatibility of the UK CFC (Controlled Foreign Companies) legislation with the freedom of establishment and the free movement of services and capital.

The issue concerned two Irish subsidiaries of **a British company** - Cadbury Schweppes PLC - which were located in the International Financial Services Centre; under its CFC rules the UK Inland Revenue had taxed the UK parent on the undistributed profits of the Irish subsidiaries. The decision of the ECJ in September 2006 stated that the mere fact of availing of a lower tax jurisdiction could not *of itself* be grounds for CFC treatment entailing an extraterritorial charge through the resident parent.

The Court considered that the attractiveness of the tax regime is as legitimate a factor as any other in a company's choice of location of its subsidiaries, provided that the subsidiary carries out a genuine economic activity in the host Member State; on this ground, it found that the application of CFC legislation must be based on the "lack of substance" in the foreign operation as in the case of subsidiaries set up by UK companies in foreign jurisdictions for the purpose of escaping the normally applicable UK taxation (the ECJ defined these situations in terms of "wholly artificial arrangements").

- German tax measures on thin capitalisation, designed to counteract the ability to shift between lending and equity to exploit tax-rate differences, have also been overturned by the ECJ.

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[7] For more details, see F. BARRY, *The Common Consolidated Corporate Tax Base Debate*, Trinity College Dublin, October 2008, p. 7-8.

[8] The material used in this paragraph is based on Barry, F, and R. HEALY-RAE (2007) *Implications of the European Court of Justice Decisions on Ireland's Corporation Tax Regime,* in Donal de Buitléir (ed.) *Who's Afraid of the ECJ*, Dublin: Institute of European Affairs and Irish Taxation Institute, 2007, as recalled in F. BARRY, quot.

In the case *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* (Case C-324/00), the German measure was deemed to "make it less attractive for companies established in other Member States to exercise freedom of establishment and they may, in consequence, have refrained from acquiring, creating or maintaining a subsidiary in the State which adopted that measure".

- In December 2005 the Marks & Spencer case (C-446/03)concerned the treatment of cross border losses/group relief.

M&S had established retail operations in other EU member states, including France and Belgium, which were carried on through locally-established subsidiaries: the company wished to off-set losses arising from these subsidiaries against their UK taxable group profits; this was refused by the UK tax authorities on the basis that the subsidiaries were operating outside the UK, and the case went to the ECJ.

The UK tax legislation was doubly called into question; firstly, because it did not recognize the same advantages to parent companies with foreign subsidiaries and parent companies with foreign branches, and secondly, because it placed groups of companies wishing to establish themselves abroad at a disadvantage in comparison to groups resident in the UK. The ECJ decision was that the member state of the resident company should allow relief for the losses when the non-resident subsidiary had exhausted all the possibilities available for having the losses taken into account in its state of residence.

This case gave rise to huge concerns amongst Finance Ministries and Tax Authorities across Europe for two reasons. The first was the enormous potential impact on tax revenues for investing countries, and the second concerned the amounts of money that might be at stake if claims dating back over many years were to be submitted.

These concerns gave a renewed impulse to the CCCTB proposals.

On March 16, 2011, the European Commission presented its proposal **(COM(2001)121/4)** for a directive on a Common Consolidated Corporate Tax Base (CCCTB).

3. Legal aspects

As pointed out in the Explanatory memorandum to the Proposal, the Proposal itself falls within the ambit of Art. 115 of the Treaty on the Functioning of the EU (TFEU) which stipulates that legal measures of approximation of Direct tax legislation shall be vested the legal form of a Directive.

The Proposal complies with the principles of Subsidiarity and Proportionality as well.

This Proposal is justified by reference to the principle of Subsidiarity because individual action by the Member States would fail to achieve the intended results.

On the first issue, we observe that the system of the CCCTB aims to tackle fiscal impediments, mainly resulting from the fragmentation of the Union into 27 disparate tax systems; to this end, non-coordinated action, planned and implemented by each Member State individually, would be ineffective and replicate the current situation.

The nature of the subject requires a common approach by laying down legislation at the level of the Union, since these matters are of a primarily cross-border nature.

The Proposal, being shaped as an optional system, represents also the most proportionate answer to the identified problems. It does not force companies which do not share the intention of moving abroad to bear the unnecessary administrative cost of implementing the common rules in the absence of any real benefits.

The measures laid down in this Proposal are both suitable and necessary for achieving the desired end (i.e. proportionate). They namely deal with harmonising the corporate tax base, which is a prerequisite for curbing the identified tax obstacles and rectifying the elements that distort the single market. In this regard, it should also be clarified that this Proposal does not involve any harmonisation of tax rates (or setting of a minimum tax rate). Indeed, the determination of rates is treated as a matter inherent in Member States' tax sovereignty and is therefore left to be dealt with through national legislation.

II. The CCCTB scheme at a glance

The proposed Directive on a Common Consolidated Corporate Tax Base is intended to provide a lasting solution to the above mentioned problems.

The CCCTB is a system of common rules for computing the tax base of **group companies** which are tax resident **in different EU Member States** and of EU-located branches of third-country companies.

Specifically, the common fiscal framework provides for **uniform rules for the determination of each** company’s (or branch's) individual tax results, the **consolidation** of those results, when there are other group members, and the **apportionment** of the consolidated tax base to each eligible Member State.

The CCCTB system will be optional and available for **companies of all sizes**.

The common approach proposed will ensure consistency in the national tax systems but shall not harmonise **tax rates**: each Member State will apply its own rate to its share of the tax base of taxpayers.

Fair competition on tax rates is to be encouraged in the internal market since it offers more transparency and allows Member States to consider both their market competitiveness and budgetary needs in fixing their tax rates.

On the other hand, harmonisation will only involve the computation of the tax base without interfering with **financial accounts**.

In fact, Member States will maintain their national rules on financial accounting and the CCCTB system will introduce autonomous rules for computing the tax base of companies. So it is not useless to notice that the provision of such a “double track” will make it necessary for EU businesses **to use accounting operations** so as to reconcile the domestic annual or consolidated accounts of national origin with the new common tax scheme of European derivation. To this end, a relevant regulatory role could be played by the national laws, regulations and administrative provisions deemed necessary (under art. 114 of the Proposal) to comply with the Directive.

Under the CCCTB, groups of companies would have to apply a single set of tax rules across the Union and deal with only one tax administration (**one-stop shop).** A company that opts for the CCCTB ceases to be subject to the national corporate tax arrangements in respect of all matters regulated by the common rules. A company which does not qualify or does not opt for the system provided for by the CCCTB Directive remains subject to the national corporate tax rules which may include specific tax incentive schemes in favour of Research & Development.

Business operating across national borders will benefit both from the introduction of cross-border loss compensation and from the reduction of company tax related compliance costs.

Allowing the immediate consolidation of profits and losses for computing the EU-wide taxable bases is a step towards reducing over-taxation in cross-border situations and thereby towards improving the tax neutrality conditions between domestic and cross-border activities to better exploit the potential of the Internal Market; and this is consistent with the above mentioned rulings of the European Court of Justice concerning freedom of establishment and free movement of capitals.

The Proposal is not intended to influence the tax revenues and the impact on the distribution of the tax bases between the EU Member States has been analysed.

For Member States, the introduction of an optional system will of course mean that tax administrations will have to manage two distinct tax schemes (CCCTB and their national corporate income tax). But it is compensated by the fact that the CCCTB will mean fewer opportunities for tax planning by companies using transfer pricing or mismatches in Member State tax systems. There will be **fewer disputes** involving the ECJ or the mutual agreement procedure in double tax conventions.

The proposal includes a complete set of rules for company taxation. It indicates who can opt, how to calculate the taxable base and what is the perimeter and functioning of the consolidation. It also provides for anti-abuse rules, defines how the consolidated base is shared and how the CCCTB should be administered by Member States under a 'one-stop shop' approach.

III. The application of the CCCTB scheme: Key aspects

The basic principles for the determination of the tax base in accordance with the new rules set out in the proposal of Directive and independent from the national rules are**:** on one hand, the set-off – by means of consolidation - among profits and losses of corporations belonging to the same group and residing in different EU Member States (consolidation of the outcome of the single corporations and branches of the cross-border group); on the other hand**,** the apportionment of the common consolidated tax base**,** according to a formula based on three factors (employees, sales and assets), among all the EU Member States interested, which apply their own tax rates.

1 *The consolidation*.

1.1 Subjective scope of application - the concept of eligible companies (Art. 2)

The Directive shall apply to companies established under the laws of a Member State where the company takes one of the forms listed in Annex I and is subject to one of the corporate taxes listed in Annex II of the Directive.

Permanent establishments, located in any EU Member State, may be subject to the rules of the CCCTB.

The Directive shall also apply to companies established under the laws of a third country where the company takes a similar form to one of the forms listed in Annex I and is subject to one of the corporate taxes listed in Annex II of the Directive (Art. **3**). These companies could opt for the CCCTB in respects of their permanent establishments located in the EU.

1.2 The concept of qualifying subsidiary (art. 54)

For the purpose of the CCCTB scheme, in a cross-border corporate group the following companies can be considered as qualifying subsidiaries: all immediate and lower-tier subsidiaries in which the parent company holds the following rights (a) a right to exercise more than 50% of the voting rights; and (b) an ownership right amounting to more than 75% of the company’s capital or more than 75% of the rights giving entitlement to profit.

The common consolidated base is applicable only on an optional basis for a starting period of five years, to be automatically renewed for periods of three years.

Only companies having a UE parent company which controls, also indirectly, more than 75% of the capital or more than 50% of the voting rights in the ordinary assembly can opt for the consolidation of their profits and the profits of the parent company and the other consolidating companies within the group.
The requirements of the qualifying subsidiary must be met for at least nine consecutive months (art. 58 of the Proposal).

1.3 The consolidation of the tax base

Basically the consolidation would be compulsory for all the companies which opt for the CCCTB regulation and hold a subsidiary or a permanent establishment in another member state, that meet the conditions required for the European consolidation (“all in, all out” principle) (Art. 55).
The consolidation concerns the whole tax base of each consolidating company, without regard to the participation share held by the parent company.
To this end, the group is comprehensive of the EU parent company, of its subsidiaries and the permanent establishments having their seat in another member state, without concern for the fact that the parent company having a seat in the EU may in its turn be controlled by a third country company.
The group may also be made of EU companies which are under the common control of a third country parent company.
Moreover, the possible existence of a third country company in intermediate position in a group of EU companies does not interrupt the ownership chain qualifying for the application of the EU consolidation ([9]).
A group may also be made of a taxpayer which holds a permanent establishment in the EU (Art. 54 and Art. 55).
A company is eligible to consolidation when it is controlled, directly or indirectly, for more than 75%.
Each direct participation higher than 75% is considered as equal to 100%: the objective is to include into the consolidation perimeter all the companies in which the parent company holds, directly or indirectly, a control of more than 75% of the capital.

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[9] As it has been noticed (P. VALENTE, *La proposta di direttiva sulla Common consolidated corporate tax base (Ccctb), Il consolidamento della base imponibile,* Il Fisco, n. 14-2011) the CCCTB working group itself has justified such a provision on the account that “.. otherwise taxpayers could split groups into multiple groups. This also applies to the 50% threshold for opting for the common base as otherwise a group could opt for part of the group and keep part of it out of the base” (CCCTB/WP/057).

The aim of the latter disposition is to avoid that a chain held at 75% by means of a number of tiers would fragment into a series of overlapping groups.

1.4 Intra-group transactions

Consolidation is an essential element of such a system and eliminates transfer pricing formalities and intra-group double taxation (Art. 59).

Sales of goods and provisions of services among consolidating companies are considered neutral form a fiscal point of view and the relative consideration shall not form part of the consolidated tax base.

The consolidated tax base will not include any profits or losses on intra-group transactions between members of the consolidated group. This would relate to any profits or losses on the disposal of stocks, fixed assets, shares in consolidated companies or other tangible or intangible assets. Nor would the tax base include intra-group provisions.

Besides, no withholding taxes or other source taxation shall be charged on transactions between members of a group ([10]).

As a consequence, the national legislations on transfer pricing having regard to the arm's length principle in the determination of the price of intra-group transactions will be disregarded.

Groups shall apply a consistent and adequately documented method for recording intra-group transactions; this method shall enable all intra-group transfers and sales to be identified at the lower of cost and value for tax purposes.

2. **The apportionment**

Once the common consolidated tax base has been determined, it will have to be apportioned among the various entities of the consolidated group in order to apply the national tax rate to the share of the tax base accruing to each member entity of the group and establish the amount of corporate income tax payable by each entity (Art. 86).

In this way, the sharing mechanism will apportion a share of the tax base to each entity, not to each Member State([11]) ([12]).

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10 Under art. 59 (Elimination of intra-group transactions) " In calculating the consolidated tax base, profits and losses arising from transactions directly carried out between members of a group shall be ignored".

11 In this sense, M. AUJEAN – M.P. HOO/TAJ, quot.

12 In the view of the Commission, the planned mechanism must meet the following requirements: simple to apply, difficult for taxpayers to manipulate, fair and equitable in the apportionment, deprived of undesirable effects in terms of tax competition.

The apportionment will apply only to EU-resident entities, subsidiaries and permanent establishments, while relations with non-European entities will continue to be based on the arm's length principle.

As for the apportionment method, the option of the Commission has been for a distribution formula based on the economic factors which have helped to generate the tax base of each individual taxpayer.

They are: on the supply side, (i) labour and (ii) capital; on the demand side, (iii) sales by destination.

The labour factor should be computed on the basis of payroll and the number of employees, each item counting for half (Art. 90 and Art. 91).

The asset factor should consist of all fixed tangible assets; intangibles and financial assets should be excluded from the formula due to their mobile nature and the risks of circumventing the system (Artt. 92-94).

The use of these factors gives appropriate weight to the interests of the Member State of origin.

Finally, sales should be taken into account in order to ensure fair participation of the Member State of destination (Art. 95 and Art. 96). Those factors and weightings should ensure that profits are taxed where they are earned.

As an exception to the general principle, where the outcome of the apportionment does not fairly represent the extent of business activity, a safeguard clause provides for an alternative method (Art. 87).

Lastly, the sharing mechanism would apply to all taxable income – not just income from economic activity but also passive income, such as interest, royalties and dividends.

3. Operational profiles

The administration of the CCCTB system would be based on three key concepts, namely the *one-stop shop,* the *principal taxpayer* and the *principal tax authority*. These three concepts "are the cornerstones of an affordable, competitive and effective CCCTB regime" ([13]).

The taxpayer would be in contact with only one tax administration at all stages of the application if this scheme (*one-stop shop).*

The *principal taxpayer* would normally be the parent company if resident in a Member State; he would be under obligation to ensure compliance with the relevant administrative requirements.

The *principal tax authority,* in turn, would be the tax administration of the Member State where the principal taxpayer is resident for tax purposes. If the principal taxpayer were not resident in the EU,

[13] Again, M. AUJEAN – M.P. HOO/TAJ, quot.

the principal tax authority would be the tax administration for the location of a permanent establishment.

Groups would have to notify the competent tax authority of their intention to opt into the CCCTB regime at least three months before the start of the relevant tax year (Art. 104 (1)). The notice to opt would need to be submitted by the parent company, on behalf of the group, to the tax authority of its Member State of residence (i.e., to the principal tax authority). In case of a single company opting for the CCCTB in respect of its permanent establishments in other Member States, the company should submit the notice to opt to its national tax authority.

On the basis of the 'all-in or all-out' principle, the option would apply to all companies included within the consolidation perimeter (Art. 104 (2)).

In cases involving groups, the principal taxpayer (parent company) would be responsible for submitting a single consolidated tax return on behalf of all group members Art. 109 (1)).

Inspections and investigations in the company's premises would be decided jointly by the principal tax authority and the other competent tax authorities. The findings of these inspections and investigations would be collated by the principal tax authority, which, by agreement with the other authorities, would issue an amended assessment.

IV. The CCCTB scheme: potential scope for litigation and possible interpretative issues for the national Judge

The adoption of the CCCTB proposed Directive could give rise to a number of controversial issues for litigation between taxpayers and tax authorities, as well as between tax authorities of Member States adhering to the CCCTB, and could thus result in a number of issues with which tax judges – or, in some countries, administrative judges working in the tax area – would have to deal on deciding litigation cases brought before them or referring these cases to the European Court of Justice.

The CCCTB Proposal, under Arts. 123 to 126, contains provisions regulating disagreements between Member States as well as administrative and judicial appeals lodged by taxpayers ([14]).

Two situations are therefore contemplated, i.e. the case of litigation between tax authorities and the one concerning disputes between taxpayers and tax authorities.

[14] For an acute and thorough analysis of controversial issues in the application of the CCCTB scheme we willingly remand to L.CERIONI, *The Commission's Proposal for a CCCTB Directive: Analysis and Comment,* in Bulletin for International Taxation, September 2011, IBFD, p. 527 ff.

a) *Litigations between tax authorities*. With regard to possible litigations between tax authorities, Art. 123 apparently sets out only two grounds for litigation and accordingly for proceedings brought by a tax authority against another.

The ***first ground** is the disagreement* over the control of the notice to opt for the CCCTB scheme, to be submitted by the parent-company on behalf of the group to the tax authority of its residence Member State (i.e. to the "principal tax authority").

Under Art. 107 (1), this tax authority, on receiving the notice to opt, must examine whether, on the basis of information given in the notice itself, the group fulfils the requirements for eligibility for the CCCTB scheme and must thus either accept or reject the notice to opt within three months of its receipt. Moreover, Art. 107 (2) contemplates the particular case where there has not been full disclosure of the relevant information in the original notice to opt and provides that the "principal tax authority, in agreement with the other competent tax authorities concerned, may invalidate the original notice to opt".

There are therefore two possible decisions to be taken by the "principal tax authority" in relation to the notice to opt – the acceptance or the rejection of the notice (Art. 107 (1)) and the invalidation of the original notice to opt (Art. 107 (2)) - and so, a first ground for litigation, as set out by Art. 123, is the disagreement of another tax authority with any of these decisions taken by the principal tax authority. This other tax authority (i.e. the "complaining tax authority") will be the tax authority of the residence Member State of a CCCTB group member.

Judges hearing proceedings brought by the complaining tax authority in respect of the acceptance or the rejection of the notice to opt under Art. 107 (1) would thus have to decide whether the principal tax authority has made the proper decision regarding the notice to opt. In so doing, they would need to rely on Art. 106 which indicates all the information to be included in the notice to opt, amongst which proofs of the group fulfilling the criteria for eligibility to the CCCTB scheme.

As Art. 106 prescribes the contents of the notice to opt in a clear and precise form, so that no discretionary power seems to be left to the principal tax authority on controlling the notice itself, it would appear that – whenever the notice to opt complies with Art. 106 – the judge should restrict himself to ascertain the recurrence of all the information required and, as a consequence, reject the complain and confirm any decision to accept the notice to opt taken by the principal tax authority.

Issues. Admittedly, an interpretative issue could arise if Art. 106 ([15]) is taken together with Art. 104 (3), because, under Art. 104 (3), after the principal tax authority has transmitted the notice to

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15 **Article 106** (*Information in the notice to opt*)
The following information shall be included in the notice to opt:
(a) the identification of the taxpayer or of the members of the group;
(b) in respect of a group, proof of fulfilment of the criteria laid down in Articles 54 and 55;

opt to the competent tax authorities of the residence States of group members, these tax authorities may transmit to the principal tax authority "their views and other relevant information on the validity and scope of the notice to opt".

Therefore, the following questions arise: should a competent tax authority indicate to a principal tax authority, still in the course of the administrative procedure, that in its view the notice to opt was to be rejected and, in this case, could the principal tax authority freely ignore that view and decide to accept the notice to opt? If so, could the competent tax authority successfully challenge this decision rendered by the principal tax authority?

In the light of the wording of Art. 107 (1) and (2) ([16]), the response would seem to depend on the reason why the competent tax authority gave the view that the notice to opt ought to be rejected.

If the reason was that the list of group members had been incomplete (the list of group members being required by Art. 106, lett. a), the response would appear to be in the negative and the judge could dismiss the appeal by the complaining tax authority. This may be inferred from the content of Art. 107 (2), which provides for a subsequent correction of the notice to opt in the event of a subsequent determination that the originally disclosed list of group members were incomplete and allows the principal tax authority, in agreement with the other competent tax authority, to invalidate the original notice to opt.

Art. 107 (2), however, only deals with the case of incomplete disclosure of group members, providing for the correction of the notice only in this case.

Therefore, if the complaining tax authority (in the situation here exemplified) expressed a negative view due to the fact that it believed any of the other element listed in Art. 106 (b) to (e) had not been sufficiently indicated, whereas the principal tax authority accepted the notice to opt, neither Art. 107 nor Art. 123 would give the judges hearing the appeal any indication about the criteria to be followed to confirm or to invalidate the decisions of the principal tax authority.

(c) identification of any associated enterprises as referred to in Articles 78;

(d) the legal form, statutory seat and place of effective management of the taxpayers;

(e) the tax year to be applied.

The Commission may adopt an act establishing a standard form of the notice to opt. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 131(2).

16 **Article 107** *(Control of the notice to opt)*

1. The competent authority to which the notice to opt is validly submitted shall examine whether, on the basis of the information contained in the notice, the group fulfils the requirements of this Directive. Unless the notice is rejected within three months of its receipt, it shall be deemed to have been accepted.

2. Provided that the taxpayer has fully disclosed all relevant information in accordance with Article 106, any subsequent determination that the disclosed list of group members is incorrect shall not invalidate the notice to opt. The notice shall be corrected, and all other necessary measures shall be taken, from the beginning of the tax year when the discovery is made. Where there has not been full disclosure, the principal tax authority, in agreement with the other competent authorities concerned, may invalidate the original notice to opt.

Arguably, the provisions of Art. 107 and Art. 123 keeping silent in this respect, the judges appear to have complete discretion in carrying out their own assessment as to whether the notice to opt complies with the requirements of Art. 106; it may be submitted that, in so doing, they should follow a "teleological approach" – approach that can, ultimately, be inferred from the European Court of Justice case-law ([17]) - and keep in mind the purpose itself of the CCCTB scheme as defined in the Memorandum and in the Preamble of the Directive.

The *second ground for litigation* set out by Art. 123 lies in the situation where one of the tax authorities involved disagrees with a decision of the "principal tax authority" concerning the issue of amended assessments in three specific situations, as indicated in Art. 114 (3), (5) or (6) second paragraph ([18]):

- issue by the principal tax authority of an amended assessment within three years after the final date for filing the consolidated tax returns or, in case of failure to file the consolidated tax return, issue of an amendment assessment within 3 years of the assessment issued under Art. 112 (Art. 114(3));

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[17] The principle of interpreting Community rules in the light of their purpose has been stated by the ECJ in several cases concerning the freedom of establishment, i.d. "Centros" (Case C-212/97, 9 March 1999), "Uberseering" (Case C-208/00, 5 November 2002), "Cartesio" (Case C-210/06, 16 December 2008), "National Grid" (Case C-371/10, 14 September 2011).

[18] **Article 114 (**Amended assessments)

1. In relation to a single taxpayer, audits and assessments shall be governed by the law of the Member State in which it is resident or in which it has a permanent establishment.

2. The principal tax authority shall verify that the consolidated tax return complies with Article 110(2).

3. The principal tax authority may issue an amended assessment not later than three years after the final date for filing the consolidated tax return or, where no return was filed before that date, not later than three years following issuance of an assessment pursuant to Article 112.

An amended assessment may not be issued more than once in any period of 12 months.

4. Paragraph 3 shall not apply where an amended assessment is issued in compliance with a decision of the courts of the Member State of the principal tax authority according to Article 123 or with the result of a mutual agreement or arbitration procedure with a third country. Such amended assessments shall be issued within 12 months of the decision of the courts of the principal tax authority or the completion of the procedure.

5. Notwithstanding paragraph 3, an amended assessment may be issued within six years of the final date for filing the consolidated tax return where it is justified by a deliberate or grossly negligent misstatement on the part of a taxpayer, or within 12 years of that date where the misstatement is the subject of criminal proceedings.

Such an amended assessment shall be issued within 12 months of the discovery of the misstatement, unless a longer period is objectively justified by the need for further inquiries or investigations. Any such amended assessment shall relate solely to the subject-matter of the misstatement.

6. Prior to issuing an amended assessment, the principal tax authority shall consult the competent authorities of the Member States in which a group member is resident or established. Those authorities may express their views within one month of consultation.

The competent authority of a Member State in which a group member is resident or established may call on the principal tax authority to issue an amended assessment.

Failure to issue such an assessment within three months shall be deemed to be a refusal to do so.

7. No amended assessment shall be issued in order to adjust the consolidated tax base where the difference between the declared base and the corrected base does not exceed the lower of EUR 5,000 or 1% of the consolidated tax base.

No amended assessment shall be issued in order to adjust the calculation of the apportioned shares where the total of the apportioned shares of the group members resident or established in a Member State would be adjusted by less than 0.5%.

- issue by the principal tax authority of an amended assessment, within the extended term of 6 years, in case of a deliberate or grossly negligent misstatement of a taxpayer or within 12 years of that date where the misstatement is subject to criminal proceedings (Art. 114(5));
- refusal or failure, by the principal tax authority, to issue an amended assessment when called upon to do so by the tax authority of the residence State of a group member (Art. 114(6)).

From the viewpoint of the judge of the Member State of the principal tax authority, the provisions of Art. 114 could well give rise to important interpretative issues, with particular regard to situations envisaged in Art. 114 (5) and (6).

Issues. Assuming that the principal tax authority issues an amended assessment on the grounds of a deliberate or grossly negligent misstatement or of a misstatement - made by a taxpayer/group member - subject to criminal proceedings (Art. 114(5)) and the competent tax authority applies against the amended assessment, on the ground that in its view the misstatement is not deliberate or grossly negligent or that it is not such as to be subject to criminal proceedings according to its national law, on which grounds should the judge hearing the appeal assess whether the misstatement is to be regarded as deliberate or grossly negligent or subject to criminal proceedings? Should he assess the misstatement on the basis of the national law of his own State (the State of the principal tax authority) in case this national law or case-law provides criteria for this assessment, *or* should he assess the misstatement under the national law of the taxpayer residing in the State of the complaining tax authority?

Unfortunately, Art. 114(5) is silent in this respect, but the assessment of the misstatement as deliberate or grossly negligent or as subject to criminal proceedings is of utmost important for the judges on deciding whether the claim of the complaining tax authority should be accepted or dismissed.

- Again, in making the assessment of the misstatement, should judges accept any proofs of deliberate or gross negligence misstatement admitted by their national law or by the national law of the residence State of the complaining tax authority? It could be submitted that, in dealing with this gap left by Art. 114 (5), judges should always take into account the ultimate purpose of the CCCTB scheme, and thus seek to draw indications from the Directive Preamble and the Memorandum. In fact, it must be considered that, first of all, the national judge has the straightforward task to apply EU regulations and, generally speaking, national laws implementing EU directives; and in the course of this exercise, when issues arise that are not "acte clair" or have not been answered yet by the European Court of Justice, he has to put questions to the European Court of Justice ([19]) in the

[19] H.P. LEHOFER, *National Judges and EU Institutions,* in the Seminar "Implementing the revised regulatory framework in electronic communications. The role of national judiciary", European Commission, Brussels, 28 November 2011.

preliminary ruling procedure, under article 267 of the Treaty on the Functioning of the European Union.

And so, also in the matter of proofs of misstatement – were the respective national laws (and/or case-law) to diverge in this respect, the national judge should ask for a preliminary interpretation of Art. 114 (5) to the European Court of Justice ([20]).

- Another interpretative issue – that judges could face - appears to arise from Art. 114(6) if taken **in** connection with Art. 114 (7).

Art. 114 (7) ([21]) indicates the cases where no amended assessment should be issued: therefore, *a contraris*, it seems to imply that, outside these cases, an amended assessment could always be issued by the principal tax authority even on request of another tax authority under Art. 114(6). Consequently, if the tax authority of a residence State of a group member requires the principal tax authority to issue an amended assessment because under the law of that residence State there would be a case for issuing such an amended assessment, and the principal tax authority refuses to do so under Art. 114(3) or according to the law of its residence State, the judges of the residence State of the principal tax authority could face again the issue as to whether or not the law of the residence State of the group member should apply.

Art. 114(6) is silent, once again, thus leaving the judges hearing the case with the choice of seeking a literal interpretation of the CCCTB Directive or a teleological interpretation with the help of the Directive Preamble and the Memorandum, or referring the case for a preliminary interpretation to the ECJ.

b) *Litigations* between taxpayers and tax authorities. As regards litigations between taxpayers and tax authorities, Art. 124 indicates a specific number of acts against which the principal taxpayer may appeal, and, in so doing, it does not raise interpretative issues: a judge, on the basis of the clear and precise wording of the provision, should dismiss any appeal brought on any other acts.

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20 On this topic, let us remand to R. PERNA, *The role of courts in reconciling competition, non-competition and constitutional imperatives: the Italian experience*, in Workshop on "Public policies, regulation and economic distress", European University Institute, Florence, 13-14 July 2012.

21 **Article 114 (**Amended assessments)

7. No amended assessment shall be issued in order to adjust the consolidated tax base where the difference between the declared base and the corrected base does not exceed the lower of EUR 5,000 or 1% of the consolidated tax base.

No amended assessment shall be issued in order to adjust the calculation of the apportioned shares where the total of the apportioned shares of the group members resident or established in a Member State would be adjusted by less than 0.5%.

The procedural rules laid down by Art. 125 about administrative appeals appear to be self-sufficient even in second instance.

Issues. The provision of Art. 126 ([22]) on judicial appeals, instead, while stating "A national court may, where appropriate, order evidence to be provided by the principal taxpayer and the principal tax authority on the fiscal affairs of the group members and other associated enterprises and on the law and practices of the other Member States concerned" (Art. 126 (3)), omits to indicate in respect of which acts, and on initiative of whom, proceedings should be brought before the national courts of a Member State most likely different from the State of the principal tax authority.

The wording of Art. 126 (1) – in specifying that "A judicial appeal against a decision of the principal tax authority shall be governed by the law of the Member State of that principal tax authority, subject to paragraph 3" - seems to suggest that a group member could still bring proceedings against acts different from those indicated in Art. 124 (and from decisions of the principal tax authority) before courts of its own residence State, and that, on such occasions, even such courts may order, when they consider it appropriate, evidence to be provided by the principal taxpayer, under Art. 126 (3).

Lastly, let us add that, from the perspective of an Italian judge, the existence of national rules on a possible worldwide consolidated tax base ([23]) does not appear to be helpful in the interpretation and application of the proposed CCCTB scheme.

In fact, unlike the proposed CCCTB Directive which would contain a self-sufficient set of rules on the determination of the taxable income, on consolidation and on apportionment, the Italian worldwide consolidated taxation scheme essentially extends to profits of foreign subsidiaries - to be attributed to the Italian parent company as a result of her option for this scheme - the application of the Italian rules on the determination of the taxable income, and obviously does not contemplate a profit apportionment formula that suspends the application of the double tax conventions between Italy and the foreign countries concerned.

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[22] **Article 126** (Judicial appeals)

1. A judicial appeal against a decision of the principal tax authority shall be governed by the law of the Member State of that principal tax authority, subject to paragraph 3.

2. In making submissions to the courts, the principal tax authority shall act in close consultation with the other competent authorities.

3. A national court may, where appropriate, order evidence to be provided by the principal taxpayer and the principal tax authority on the fiscal affairs of the group members and other associated enterprises and on the law and practices of the other Member States concerned. The competent authorities of the other Member States concerned shall provide all necessary assistance to the principal tax authority.

[23] See F. CARRIROLO, *Il consolidato fiscale mondiale: adempimenti ed effetti dell'opzione*, Fisconelmondo.it.

For these reasons and because of the described set of rules on the determination of the taxable base in the CCCTB scheme, we can ultimately conclude that, should the CCCTB be introduced, it would be likely to be far more attractive, for Italian companies having subsidiaries and branches in other EU countries, than the available national worldwide consolidation tax scheme, and this would hold even truer once the interpretative doubts above indicated were definitively resolved.

Conversely, if the proposed CCCTB Directive were to be introduced without any amendments to the provisions giving rise to the interpretative issues previously highlighted, the application of the new scheme and the first litigation cases could arguably give rise to a (stimulating) challenge for the national judges from any Member State.

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