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The Common Consolidated Corporate Tax Base: what does the future hold?

The increasing budget requirements of European countries and their implications for taxpayers
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The Common Consolidated Corporate Tax Base: what does the future hold?

Chair

Melchior Wathelet – CMS Bureau Francis Lefebvre (France)

Speakers

Patrick Dewerbe – CMS Rui Pena & Arnaut (Portugal)

Wolf-Georg von Rechenberg – CMS Hasche Sigle (Germany)

Guest speaker

Ioanna Mitroyanni – European Commission - Unit Company Taxation Initiatives

Coordinator

Mathieu Daudé – CMS Bureau Francis Lefebvre (France)

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Programme

— Proposal for a EU Directive on CCCTB

— Case example

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I. Proposal for a EU Directive on CCCTB

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I. Proposal for a EU Directive on CCCTB

1. **General Overview**
2. Content of the Proposal
3. Main Issues
4. Next Steps

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1. General Overview

— Key **Elements**

- Optional aggregation of corporate tax results among EU entities
- Application of a four-steps method
  - — Calculation of the tax results of all the consolidated entities according to a single set of tax rules across the EU
  - — Consolidation of the tax results of the consolidated entities at the level of the group
  - — Apportionment of the consolidated tax profit to each entity of the group according to predetermined legal criteria (sales, labour factor, assets)
  - — Payment by each entity of the group of the corporate income tax due on profits allocated to it by using the corporate income tax rate of its own state of residence

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1. General Overview

— Main **Objectives**

- Allow cross-border tax loss offsets
  — Tax losses incurred in one EU Member State could then be offset against tax profits realized in other EU MS
- Simplify transfer pricing issues within the EU
  — Current high costs of compliance would no longer have to be incurred
  — CCCTB would allow corporations to go beyond the current “transaction by transaction” method
- “One-stop-shop”
  — Consolidated groups would deal with a single tax Administration within the EU, i.e. the tax Administration of the EU member State where the parent company is established.

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I. Proposal for a EU Directive on CCCTB

1. General Overview

2. **Content of the Proposal**

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2. Content of the Proposal

— **Scope** of the consolidation

- Eligible entities
  - — Companies incorporated in the UE subject to corporate income tax in their EU member State of establishment
  - — Companies incorporated in third countries maintaining a permanent establishment in the UE
- Perimeter of the consolidated group
  - — Parent company must hold directly or indirectly in the subsidiaries:
    - more than **50% of the voting rights**; and
    - more than **75% of the economic ownership**.
  - — Calculation rules
    - When the threshold of 50% is reached, the parent company is deemed to hold 100% of such rights
    - Financial rights: multiplication of the interest held in intermediate subsidiaries at each tier

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2. Content of the Proposal

— Main **Rules** of the common tax base

- Taxable Revenues
  - — As a general rule: all profits are included
  - — Exempt revenues: received profit distributions, proceeds from a disposal of shares, income from a permanent establishment in a third country
- Deductible Expenses
  - — As a general rule: all costs incurred with a view to obtaining or securing income, including costs of research and development and costs incurred in raising equity or debt for the purposes of the business (including provisions and depreciation of fixed assets)
  - — Main non-deductible expenses:
    - Profit distributions
    - Costs incurred by a company for the purpose of deriving income which is tax exempt

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2. Content of the Proposal

— **Apportionment** of the taxable profit

- Criteria of apportionment
  - — Any resulting CCCTB group taxable **profit** would be reallocated to the Member State companies using a formulary apportionment with reference to:
    - number of employees (1/6);
    - payroll (1/6);
    - tangible assets(1/3); and
    - sales by destination (1/3).
  - — No apportionment is made if the consolidated result is a consolidated **loss**
    - Consolidated tax losses remain at the level of the parent company during the consolidation period
    - After the termination of the group: unrelieved losses of the group shall be allocated to each group member on the basis of apportionment factors applicable to the tax year of termination

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2. Content of the Proposal

— **Anti-avoidance** measures

- General anti-abuse rule
  - — Artificial transactions carried out for the sole purpose of avoiding taxation are ignored for the purposes of calculating the tax base
  - — Safe harbor provisions would exist for genuine commercial activities
- Thin-capitalization rule
  - — Interest paid to an associated enterprise resident in a third country could not deductible if:
    - no exchange of information agreement has been concluded with this territory; and
    - profits are subject in this territory to a statutory corporate income tax rate which is lower than 40% of the average statutory corporate tax rate of the UE MS
- CFC rule
  - — Direct/Indirect participation > 50% + local statutory CIT < 40% of the average EU CIT + passive income accruing to the entity > 30% of its total income

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3. Main Issues

— **Timing** for implementation / **Participating EU MS**

- Proposal for a EU Council Directive published in March 2011
- French-German agreement of 18th August 2011: a move towards convergence
- Adoption expected for 2013 or 2014
- Political constraints and uncertainties of the process
  - — Length of the procedure depends on the existence of other EU priorities
  - — Unanimity of the MS required (or at least sufficient MS, i.e. 9, to launch an enhanced co-operation)

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3. Main Issues

— Using CCCTB for efficient **structuring**

- Arbitrage possibilities between CCCTB and more favorable domestic corporate tax bases regarding:
  - — Taxable / non taxable profits
  - — Deductible / non deductible expenses
  - — CFC rules
  - — Scope of consolidation ("all in - all out rule" under the CCCTB)
- Other topics to address
  - — Management of tax losses during the group (no carry-back in the CCCTB) and upon termination
  - — Optimization of cross-border payments with third parties since withholding taxes would be due by applying the rate of the EU MS of the entity making the payment and would be subject to the provisions of the bilateral treaties concluded by this same MS

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4. Next Steps

— Process of adoption of an EU Directive in the field of direct taxation

- Treaty provisions: **Article 115 TFEU** → special legislative procedure applicable to directives issued for the approximation of laws, regulations or administrative provisions of the Member States which directly affect the establishment or functioning of the internal market.
- Steps to be implemented:
  - — Proposal for a EU Council Directive by the EU Commission (as long as the Council has not voted, the EU Commission may modify its Proposal)
  - — Mandatory consultation of the European Parliament
  - — Mandatory consultation of the Economic and Social Committee
  - — Unanimous consent of the Council
  - — If unanimous consent of the Council is impossible → next step: 9 MS may then decide to launch an enhanced co-operation:
    - A request made to the EU Commission
    - The EU Commission may the propose a Directive, or explain the reason why a Directive is not necessary
    - The authorization of the launching of the enhanced co-operation is proposed by the Commission and granted by the Council after approval of the Parliament.

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II. Case example

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II. Case example

1. **Description of the case**
2. Opportunity to elect for the CCCTB
3. Structuring an Acquisition of the FGIP group with CCCTB

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1. Description of the Case

— Facts

- The FGIP group carries out business in 4 EU member States:
  - France
  - Germany
  - Italy
  - Portugal
- The group incurs tax losses in France, at the level of the FGIP Holding Company (F1). All the other companies of the group generate tax profits.
- Assuming that the current version of the CCCTB enters into force tomorrow, should the group elect to the regime?
- Assuming that the current version of the CCCTB enters into force tomorrow, would a possible non–EU acquirer of the group have any incentive in electing for this regime to structure the acquisition of the group’s HoldCo?

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1. Description of the Case

— France

- In France, FGIP maintains a presence through the following structure:

	F1 (SAS)	F2 (SA)	F3 (SA)
Activity	Holding Company	R&D	Marketing & Sales
Shareholders	-	Held at 80% by F1	Held at 100% by F1
Tax result	-10.000.000 € (case assumption)		
Turnover	2.000.000 €	50.000.000	25.000.000
Employees	5	400	15
Total Salaries	500.000 €	35.000.000 €	5.000.000 €
Fixes tangible assets	100.000 €	15.000.000 €	2.000.000 €

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1. Description of the Case

— Germany

- In Germany, FGIP maintains a presence through the following structure:

	G1 (AG)	G2 (AG)	G3 (AG)	G4 (GmbH)
Activity	Local Holding Company	Production	Distribution	IT/IP
Shareholders	-	Held at 100% by AG 1	Held at 100% by AG 1	Held at 100% by AG 1
Tax result	+ 10.000.000 € (case assumption)			
Turnover	0 €	250.000.000 €	300.000.000 €	15.000.000 €
Employees	0	1.000	60	8
Total Salaries	0 €	120.000.000 €	6.000.000 €	1.000.000 €
Fixes tangible assets	0 €	50.000.000 €	3.000.000 €	0 €

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1. Description of the Case

— Italy

- In Italy, FGIP maintains a presence through the following structure:

	It 1 (Sp.A)	It 2 (Sp.A)	It 3 (Sp.A)	It 4 (Sp.A)	It 5 (Sp.A)	It 6 (Sp.A)
Activity	Local Holding Company	Production				
Shareholders	-	All Held at 100% by It 1				
Tax result	+ 10.000.000 € (case assumption)					
Turnover	55.000.000 € (consolidated)					
Employees	150 (consolidated)					
Total Salaries	10.000.000 € (consolidated)					
Fixes tangible assets	20.000.000 € (consolidated)					

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1. Description of the Case

— Portugal

- In Portugal, FGIP maintains a presence through the following structure:

	Po 1 (LDA)	Po 2 (LDA)	Po 3 (LDA)	Po 4 (LDA)
Activity	Local Holding Company	Production		
Shareholders	-	Held at 100% by Po 1		
Tax result	+10.000.000 € (case assumption)			
Turnover	40.000.000 € (consolidated)			
Employees	100 (consolidated)			
Total Salaries	5.000.000 € (consolidated)			
Fixes tangible assets	10.000.000 € (consolidated)			

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II. Case example

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2. Opportunity to elect for the CCCTB

Germany

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2. Should FGIP elect for the CCCTB: **Germany**

— Scope of Consolidation

- Question
  - — Assuming that the parent company of the FGIP group is not F1 but G1 and that G1 holds 100% of F1, It1, and Po1, would an election for the CCCTB be an interesting opportunity? If so, which company would you make elect for the system?
- Answer
  - — An election would be beneficial insofar as losses from subsidiaries in other (low tax) countries would be included. According to Art. 43 of the Proposal, profits and losses from all group members will be offset against another, leaving only the net profit to be allocated to the group companies based on their turnover, the number of employees and the tangible assets.
  - — The taxable base in Germany – where the overall tax rate is high – could be reduced by setting off losses resulting from other countries. However, it should be observed that the apportionment scheme privileges countries like Germany, where labor intensive material goods are being produced as opposed to countries where mainly services are provided. This should not have a material impact in this case, as production plants are located in all countries.
  - — The election for CCCTB is supposed to simplifying reporting liabilities, because the CCCTB rules would be applicable for all group members. Since the CCCTB rules will apply only for Corporate Income tax, the German companies of FGIP will nonetheless have to file additional annual accounts base on German accounting standards for trade tax purposes (and reporting issues would actually be worsened)

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2. Should FGIP elect for the CCCTB: **Germany**

— Tax losses

- Question
  - — Assuming that the parent company of the FGIP group is not F1 but G1 and that G1 incurs tax losses, compare the rules applicable according to your domestic tax rules and the rules provided for by CCCTB.
- Answer
  - — In the year where losses occur, the CCCTB rules are more restrictive than the German rules because losses may not be carried back to the previous year. In Germany, such carry-back is possible for one previous year and up to the amount of 511.500 €.
  - — In the following years however, the CCCTB rules are favorable. In Germany, losses may be carried forward for an unlimited period of time. However, the set-off of losses is restricted to 1M€ and 60% of the then remaining profits. 40% of the profits exceeding 1M€ will therefore always be subject to tax (“minimum taxation rule”).
  - — Overall, it seems that the CCCTB rules are favorable for a large group. The carry back option of up to 511.500 € is rather insignificant compared to the possibility to set off losses in the future without limitation.
  - — Furthermore, the losses carry forward in Germany is subject to change-of-control provisions according to which these losses may expire upon transfer of more than 25% of the shares in a company. CCCTB therefore offers an interesting route to fall without the scope of this rule.

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2. Should FGIP elect for the CCCTB: **Germany**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding depreciation?
- Answer
  - — German rules
    - Under German accounting rules, assets are depreciated over their useful life on a straight-line basis. Only assets with a value of 1.000 € and less may be depreciated together in an asset pool over a time period of 5 years. Assets with a value of 410 € or less may be deducted as expenses. Non residential buildings are depreciated on a straight line basis over 33 years (a shorter depreciation term may be applied if a shorter useful life is demonstrated).
  - — CCCTB rules
    - CCCTB: only assets with a useful life of more than 15 years or more shall be depreciated individually on a straight-line basis. Buildings should be depreciated over a period of 40 years. Assets, costs, construction or improvement expenses of less than 1.000 € do not qualify as assets and are deductible expense.
    - The fact that the CCCTB proposal does not include the possibility for a declining depreciation is not disadvantageous at the moment, because there are no such provisions in German tax law, either. However, Germany has in the past introduced special depreciation methods for assets purchased in a certain period of time when the German government meant to stimulate the economy (e.g. until 2007 and 2009-2010). It may therefore be disadvantageous in the future to be bound to the straight-line depreciation when opting for the CCCTB.

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2. Should FGIP elect for the CCCTB: **Germany**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding write-offs?
- Answer
  - — Fixed assets
    - In case of a permanent decrease in value, fixed assets may be written down to the going concern value of that asset. If the value increases in the following years, the book value must be written up again (max to the historic cost less any regular depreciation).
    - This is preferable to the CCCCTB as the provisions in Article 41 are limited to fixed assets that are not subject to depreciation. Even assets that are depreciated individually may not be written down. There is no definition of the decreased value (market value) in the CCCTB proposal.
  - — Current assets
    - According to German rules, write downs on current assets are limited to a permanent decrease in value. However, in such case, the average profit may be deducted from the net realizable value. This is not the case in art. 29 par. 4 of the CCCTB proposal.

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2. Should FGIP elect for the CCCTB: **Germany**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding waiver of debts?
- Answer
  - — Under the German tax regime, waivers of debts are treated as hidden capital contributions. Waivers of debts lead to a (retroactive) increase of the acquisition cost regarding the shareholding in the company that is receiving the waiver.
  - — If a “bad debt” is waived, only that part of the debt will lead to hidden contribution. The part of the nominal value that is reduced will lead to expenditures on the level of the creditor and to taxable profit on the level of the debtor – provided that the debt has not been written down accordingly.
  - — Tax groups in Germany do not require waiver of debts or other similar capital measures. As a precondition for a tax group in Germany (foreign companies are not included), profit-and loss transfer agreement must be in place, by which all P&L accounts of the group’s subsidies are settled at zero.

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2. Should FGIP elect for the CCCTB: **Germany**

— Calculation of the tax base

- Question
  — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding other expenses (salaries, interest, royalties…)?
- Answer
  — In Germany, the deduction of interest is limited by the interest-barrier rules. According to these rule, the interest payable exceeding the received interest may only be deducted up to 30 % of the EBITDA (exceptions: net payable interest does not exceed 3 million; company is not part of a group; capital ratio of the group is not higher than the company's). 25 % of paid interest is added to the taxable base for German trade tax.
  — Despite the high de-minimis-threshold of 3 million Euro in the German rules, the rules of the CCCTB proposal are more favorable because they are limited to cases of actual misuse where the interest receiving company is subject to significantly lower taxation

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2. Should FGIP elect for the CCCTB: **Germany**

— Calculation of the tax base

- Question
  - — Transfer Pricing: can you think of a way for FGIP to design its transfer pricing policy so as to benefit most from the rules provided for by the CCCTB?
- Answer
  - — Inside the CCCTB-group, there is no transfer pricing documentation needed because the arm's length principle does not apply (par. 6 of the Preamble). The income is allocated by a global distribution method. As far as associated enterprises within the meaning of article 78 of the proposal that are located in Germany are concerned, regular German TP obligations may apply.

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2. Should FGIP elect for the CCCTB: **Germany**

— Comparison of the tax due by FGIP in Germany

- Election for CCCTB
  - — Considering the situation of the German companies of the group in terms of assets, salaries, employees and turnover, Germany would be apportioned 73% of the consolidated tax result of the FGIP Group.
  - — Consolidated tax return: 20 M€ (i.e. - 10M€ + 10 M€ + 10M€ + 10 M€)
  - — Tax base attributed to Germany: 14,6 M€
  - — Tax rate: 30%
  - — Tax collected by Germany: **4,38 M€**
- Domestic tax rules
  - — Tax base: +10 M€
  - — Tax rate: 30%
  - — Tax collected by Germany: **3 M€**
- Conclusion
  - — The election for the CCCTB **increases** the total amount of tax paid by the group in Germany.

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2. Opportunity to elect for the CCCTB

Portugal

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2. Should FGIP elect for the CCCTB: **Portugal**

— Scope of Consolidation

- Question
  - — Assuming that the parent company of the FGIP group is not F1 but Po1 and that Po1 holds 100% of F1, G1, and It1, would an election for the CCCTB be an interesting opportunity? If so, which company would you make elect for the system?
- Answer
  - — Expected advantages of an election:
    - Losses incurred cross border would be offsetable without a time limit against the group's profit
    - Group entities would all be subject to a common tax base
    - Administrative and compliance costs would presumably be lower (elimination of the group transaction, contacts with a single Tax Authority).
  - — All companies which are deemed to be regarded as part of the group must elect (or alternatively, may not elect) since CCCTB is an all in / all out regime.

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2. Should FGIP elect for the CCCTB: **Portugal**

— Tax losses

- Question
  - — Assuming that the parent company of the FGIP group is not F1 but Po1 and that Po1 incurs tax losses, compare the rules applicable according to your domestic tax rules and the rules provided for by CCCTB.
- Answer
  - — Portuguese Rules:
    - Losses incurred cross-border cannot in principle be taken into consideration in order to ascertain taxable profit.
    - Tax losses may only be carried forward for as long as 5 years and up to 75% of the taxable profit.
    - There is no carry-back in Portugal.
    - The transfer of tax losses within the context of group reorganization is only possible if previously authorized by the Finance Minister and as long as prove is made of the economic substance of the transactions.
  - — Conclusion: the CCCTB rules would be favorable since the setoff of tax losses is done on a consolidated basis, with no time limit and, provided certain conditions are met, does not seem to be affected by a group’s reorganization.

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2. Should FGIP elect for the CCCTB: **Portugal**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding depreciation?
- Answer
  - — Portuguese accounting rules
    - Assets are depreciated over their useful life on a straight-line method basis, establishing the tax law maximum depreciation rates, by category of assets or industry.
    - Assets are usually depreciated on segregated basis by application of specific depreciation rates established by the law.
    - In certain cases, decreasing rates and accelerated depreciation methods may sometimes be allowed instead of the straight-line method.
  - — CCCTB rules
    - The application of CCCTB rules will result in a more simple process (most fixed assets will be depreciated trough a pool system and by a 25% annual rate.

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2. Should FGIP elect for the CCCTB: **Portugal**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding write-offs?
- Answer
  - — Portuguese Law
    - A decrease in value of the assets booked in the respective tax year may be deducted as long as it corresponds to exceptional depreciation of fixed assets, intangible assets and certain inventories and investment properties. Such deduction is only allowed if the tax payer obtains an authorization from the Tax Authorities and is able to sustain evidence of such exceptional depreciation events
  - — CCCTB
    - In terms of eligible assets, the Portuguese domestic regime is preferable to the CCCTB as the provisions of Article 41 are limited to fixed assets that are not subject to depreciation.
    - However, Portuguese regime is subject to authorization from the Tax Authorities, which does not occur in the CCCTB.

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2. Should FGIP elect for the CCCTB: **Portugal**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding waiver of debts?
- Answer
  - — Portuguese tax law distinguishes whether the waiver of debt results from the recognition a bad debt, or just from a waiver corresponding to a voluntary pardon
    - Waiver of debts resulting from the recognition of bad debts may be tax deductible as long as certain requirements are met regarding time, amount and collection procedures procured.
    - On the contrary, waiver of debts resulting just from voluntary pardons with no collection procedures being executed will not be considered tax deductible.
  - — CCCTB rules for the deduction of non performing receivables seem to be more favorable than those established by Portuguese law (notably by referring to past experience as a valid justification). Nevertheless said rules´ terms are quite generic and remained subject to the interpretation of the expression "*the taxpayer has taken all reasonable steps to pursue payment*"; therefore, it will all depend on further guidance to be issued by the Commission.

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2. Should FGIP elect for the CCCTB: **Portugal**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding other expenses (salaries, interest, royalties…)?
- Answer
  - — Salaries
    - In Portugal, salaries are generally tax deductible, as long as duly supported and in connection with companies taxable activity. CCCTB offer no particular advantage or disadvantage.
  - — Interest
    - Interest expenses are also generally tax deductible. However, interest paid to related parties and to entities domiciled in listed offshore jurisdictions are only tax deductible if complying with transfer pricing rules/arms length conditions. Interest paid to shareholders can only be deductible up to an interest expense remunerated at interest rate of Euribor/12 months
  - — Royalties
    - In Portugal, royalties are generally tax deductible as long as duly supported and documented. Royalties paid to related parties need to comply with transfer pricing regulations.
  - — Conclusion: CCCTB would be in general more favorable and les complex than the domestic rules.

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2. Should FGIP elect for the CCCTB: **Portugal**

— Calculation of the tax base

- Question
  - — Transfer Pricing: can you think of a way for FGIP to design its transfer pricing policy so as to benefit most from the rules provided for by the CCCTB?
- Answer
  - — Transfer pricing rules do not apply in the event a group elects for CCCTB for intra-groups transactions are not taken into account
  - — Intra-group transactions should nevertheless be registered in accordance with article 59-3 of the Commission´s Proposal (application of a consistent and adequately documented method).
  - — These rules does not affect the Group´s possibility to restructure its productive factors in order to achieve tax optimization when applying the CCCTB´s apportionment formula (subject to the limitations provided for artificial arrangements).

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2. Should FGIP elect for the CCCTB: **Portugal**

— Comparison of the tax due by FGIP in Portugal

- Election for CCCTB
  - — Considering the situation of the Portuguese companies of the group in terms of assets, salaries, employees and turnover, Portugal would be apportioned 4,75% of the consolidated tax result of the FGIP Group.
  - — Consolidated tax return: 20 M€ (i.e. - 10M€ + 10 M€ + 10M€ + 10 M€)
  - — Tax base attributed to Portugal: 0,95 M€
  - — Tax rate: 25 %
  - — Tax collected by Portugal: **0,24 M€**
- Domestic tax rules
  - — Tax base: +10 M€
  - — Tax rate: 25 %
  - — Tax collected by Portugal: **2,50 M€**
- Conclusion
  - — The election for the CCCTB **decreases** the total amount of tax paid by the group in Portugal.

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II. Case example

1. Description of the case

2. Opportunity to elect for the CCCTB

3. **Structuring an Acquisition of the FGIP group with CCCTB**

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3. Structuring An Acquisition: Presentation of the Case

— Case situation

- ABC is a US group intending to acquire 100% of FGIP by acquiring 100% of the shares of the holding of the Group (F1, G1, It1 or Po1 according to the different scenario).
- The acquisition price would be paid half in cash and half by a bank loan.
- The target is valued 250.000.000 €.
- ABC expects to receive yearly a distribution in cash of at least 20.000.000 €.
- The acquisition loan would be contracted for 5 years and reimbursable in fine. Agreed annual interest rate: 5,00%.

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3. Structuring An Acquisition: **Germany**

— ABC forms a NewCo in Germany and acquires 100% of the group

- The income of FGIP AG (NewCo) consists of dividends from AG1 and from the foreign holdings F1, It1, and Po1.
  - — Tax treatment: these dividends are exempt from taxation, except for 5% of their amount, which is added back to the tax base.
- Conclusions

	No tax group	German tax group	CCCTB
Germany	4.161.750 €	4.030.500 €	4.096.248 €
France	0 €	0 €	866.380 €
Italy	3.925.000 €	3.925.000 €	530.563 €
Portugal	3.125.000 €	3.125.000 €	222.450 €
Total Tax Due	**11.211.750 €**	**11.080.500 €**	**5.715.641 €**

— Tax burden with CCCTB is significantly lower because the French tax losses and the financing expenses are fully deducible from the tax base. Since the CCCTB does not extend to the tax base of the German Trade tax ,1/4 of the paid interest will be added to the taxable base for trade tax of NewCo.

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Appendix I

CCCTB Case: France

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Opportunity to elect for the CCCTB

France

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Should FGIP elect for the CCCTB: **France**

— Scope of Consolidation

- Question
  - — Assuming that the parent company of the FGIP group is F1 and that F1 holds 100% of Po1, G1, and It1, would an election for the CCCTB be an interesting opportunity? If so, which company would you make elect for the system?
- Answer
  - — Expected advantages of an election:
    - Allow foreign losses to be offset against domestic profits and, conversely, allow domestic tax losses to be immediately offset against foreign tax profits.
    - More generally: take advantage of the favorable divergences which exist between the common tax base and the French corporate income tax base.
  - — Scope of the consolidation:
    - Under present assumptions, with the application of the all in / all out rule, every company of the group described above should be part of the CCCTB if the group elects for the regime.

C/M/S/ Law.Tax

Should FGIP elect for the CCCTB: **France**

— Tax losses

- Question
  - — Assuming that the parent company of the FGIP group is F1, compare the rules applicable according to your domestic tax rules and the rules provided for by CCCTB.
- Answer
  - — French Rules:
    - Foreign tax losses incurred by EU permanent establishments of a French company may not be offset against French tax profits. Similarly, foreign losses incurred by foreign subsidiaries of French companies may, in principle, not be offset against French tax profits. The French domestic tax consolidation regime does not extend to foreign subsidiaries.
    - Tax losses may be carried forward indefinitely; however, the set of losses is restricted to 1 M€ and 60% of the then remaining profits (news rules adopted in September 2011).
    - Losses may be carried-back for one previous year, up to the limit of 1M€.
  - — Whereas the French domestic rules were always more favorable than the CCCTB's when the Council Directive was made public, the situation is now different after the enactment of the second rectifying Finance Act for 2011. The CCCTB's rules now are more favorable regarding loss carry forward; French domestic rules remain however ore favorable regarding carry-backing (but this advantage is capped and therefore offers no incentive to rule out an option for the CCCTB).

C/M/S/ Law.Tax

Should FGIP elect for the CCCTB: **France**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding depreciation?
- Answer
  - — French rules
    - Assets are in principle depreciated over their useful life on a straight-line method basis. Elements forming part of a complex asset should be depreciated separately according to their own useful life when it differs substantially from that of the structure. Companies may rely on usage to appreciate the annual rate of depreciation admitted.
    - Pooling depreciation does not exist under French law.
    - In certain cases, decreasing rates and accelerated depreciation methods may sometimes be allowed instead of the straight-line method.
  - — CCCTB rules
    - The application of CCCTB rules could be advantageous for certain assets (certain intangibles assets, goodwill, etc.), but not for others (buildings may be depreciated over 30 years and not over 40 years, assets eligible for accelerated depreciation rules would no longer benefit from this regime, etc.)

C/M/S/ Law.Tax

Should FGIP elect for the CCCTB: **France**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding write-offs?
- Answer
  - — French Law
    - A decrease in value of the assets booked in the respective tax year may be deducted as long as it corresponds to exceptional depreciation of fixed assets, intangible assets and certain inventories and investment properties.
  - — CCCTB
    - In terms of eligible assets, the French domestic regime is preferable to the CCCTB as the provisions of Article 41 are limited to fixed assets that are not subject to depreciation.
    - However, Portuguese regime is subject to authorization from the Tax Authorities, which does not occur in the CCCTB.

C/M/S/ Law . Tax

Should FGIP elect for the CCCTB: **France**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding waiver of debts?
- Answer
  - — French tax law distinguishes commercial waiver of debts from financial waivers of debts.
    - Commercial waivers of debts result from the existence of commercial trade between the creditor and the debtor. Such waiver of debt may be tax deductible provided that the creditor demonstrate its interest in the operation.
    - Financial "waivers of debts" or financial aids result from the mere existence of financial relations (i.e. shareholding links) between the debtor and the creditor. These aids may be deductible up to the amount of the negative situation of the debtor's net equity and, for the complement, in proportion of the capital of the debtor which is not hold by the creditor.
    - Il is generally admitted that French rules governing waivers of debts are rather liberal in comparison with that of other jurisdictions.
  - — CCCTB rules for the deduction of waivers of debts could be less favorable than French domestic rules. It is however difficult to conclude definitively on this issue at this stage.

C/M/S/ Law . Tax

Should FGIP elect for the CCCTB: **France**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding other expenses (salaries, interest, royalties…)?
- Answer
  - — Salaries
    - Under French rules, salaries and social contributions are in principle fully deductible for income tax purposes. CCCTB therefore offer no particular advantage or disadvantage in this respect.
  - — Interest
    - As a general rule, interest are fully deductible in France, even if the interest are incurred for the acquisition of a n asset which does not generate taxable revenues. This capitalization rules and other anti-avoidance rules may however apply.
    - Since CCCTB does not contain any thin capitalization limitation, the election for the regime may sometimes be more favorable than domestic tax law. However, since French taxation does not exclude the deduction of interest incurred to finance an asset which does not generate any taxable profits in France, domestic rules could often remain advantageous, despite the recent introduction of a new anti-avoidance rule targeting certain acquisition of participations.
  - — Royalties
    - In France, royalties are generally deductible. The regime applicable to royalties should not affect much the choice for the CCCTB regime.

C/M/S/ Law.Tax

Should FGIP elect for the CCCTB: **France**

— Calculation of the tax base

- Question
  - — Transfer Pricing: can you think of a way for FGIP to design its transfer pricing policy so as to benefit most from the rules provided for by the CCCTB?
- Answer
  - — Transfer pricing rules do not apply in the event a group elects for CCCTB for intra-groups transactions are not taken into account
  - — With regard to the relation of the group with third countries, opportunities of optimization may exist since the amount of turnover is one of the apportionment key of the consolidated tax result. European Corporate groups could adapt their structures to this new situation.

C/M/S/ Law.Tax

Should FGIP elect for the CCCTB: **France**

— Comparison of the tax due by FGIP in France

- Election for CCCTB
  - — Considering the situation of the French companies of the group in terms of assets, salaries, employees and turnover, France would be apportioned 13,5% of the consolidated tax result of the FGIP Group.
  - — Consolidated tax return: 20 M€ (i.e. - 10M€ + 10 M€ + 10M€ + 10 M€)
  - — Tax base attributed to France: 2,7 M€
  - — Tax rate: 34,43%
  - — Tax collected by France: **0,93 M€**
- Domestic tax rules
  - — Tax base: -10 M€
  - — Tax rate: 31,4%
  - — Tax collected by France: **0 €**
- Conclusion
  - — The election for the CCCTB **increases** the total amount of tax paid by the group in France.

C/M/S/ Law . Tax

Structuring an Acquisition of FGIP using CCCTB

France

C/M/S/ Law.Tax

Structuring An Acquisition: **France**

— ABC forms a NewCo in France and acquires 100% of the group

- The income of FGIP Fr (NewCo) consists of dividends from F1 and from the foreign holdings AG1, It1 and Po1.
  - — Tax treatment: these dividends are exempt from taxation, except for 5% of their amount, which is added back to the tax base.
- Conclusions

	No tax group	French tax group	CCCTB
Germany	3.750.000 €	3.750.000 €	4.096.248 €
France	0 €	0 €	866.380 €
Italy	3.925.000 €	3.925.000 €	244.694 €
Portugal	3.125.000 €	3.125.000 €	422.423 €
Total Tax Due	**10.800.000 €**	**10.800.000 €**	**5.629.745 €**

— Tax burden with CCCTB is significantly lower because the CCCTB extends the benefits of the tax consolidated group outside of Portugal and eliminates the restriction to the deduction of interest expense incurred in the acquisition of shareholdings imposed to Portuguese holding companies.

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Appendix II

CCCTB Case: Italy

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Opportunity to elect for the CCCTB

Italy

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Should FGIP elect for the CCCTB: **Italy**

— Scope of Consolidation

- Question
  - — Assuming that the parent company of the FGIP group is not F1 but It1 and that It1 holds 100% of F1, G1, and Po1, would an election for the CCCTB be an interesting opportunity? If so, which company would you make elect for the system?
- Answer
  - — Assuming a high tax loss position in France and a tax profit position in the other countries, the option for CCCTB is an opportunity since it permits to off-set profits and losses at a consolidated level.
  - — From a strictly Italian point of view, in case of a tax profit as a result of the CCCTB and based on the apportionment data, only 9% of the consolidated tax base would be subject to tax in Italy.
  - — Obviously, at a global level, the actual interest to opt for CCCTB can be evaluated only by knowing the results of the different domestic taxations compared to the possible result of CCCTB. The CCCTB case examined below under Scenario 3 gives an indication that the CCCTB regime would give rise to a significant reduction of the tax burden of the group.

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Should FGIP elect for the CCCTB: **Italy**

— Tax losses

- Question
  - — Assuming that the parent company of the FGIP group is not F1 but It1 and that It1 incurs tax losses, compare the rules applicable according to your domestic tax rules and the rules provided for by CCCTB.
- Answer
  - — Italian Rules:
    - The Italian tax law, further to the new rules approved in 2011, permits to carry forward the losses for an unlimited period of time.
    - In each tax period, previous tax losses can be off-set only up to the 80% of the taxable income of the period (i.e. a minimum tax is required).
    - Start-up losses (i.e. losses incurred in the first three years) can be off-set without limits of time and up to the 100% of the taxable income.
    - The carry-back is not possible in Italy.
  - — Conclusion: the CCCTB rules are equally favorable or more favorable since the regime does not provide limits in terms of time or off-settable amounts.

C/M/S/ Law.Tax

Should FGIP elect for the CCCTB: **Italy**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding depreciation?
- Answer
  - — Tangible Assets
    - Under Italian rules, assets are depreciated individually on a straight-line basis. For each industry sector, specific tax depreciation rates (reduced at 50% in the year of acquisition of the asset) are provided for the various categories of assets normally used in the sector. Pooled assets depreciation is not possible. Assets with a unit cost of 516 € or less, the full deduction is permitted in the year during which the cost is incurred.
    - CCCTB regime may be more or less favorable than the domestic rules depending on the industry sector and type of assets. For buildings, the Italian domestic rules (yearly depreciation generally not lower than 3%) are more favorable than the CCCTB regime (2,5%).
  - — Intangible Assets
    - Costs incurred for intellectual property rights are deductible in 2 years (against 15 years in the CCCTB regime) with the exceptions of trademarks which are deductible in 18 years. The CCCTB is therefore not always advantageous.
  - — Note
    - A reform of the depreciation tax methods / rates is however expected in Italy; the new depreciation rules should be similar to those of the CCCTB depreciation methods.

C/M/S/ Law . Tax

Should FGIP elect for the CCCTB: **Italy**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding write-offs?
- Answer
  - — Italian Law
    - As a general rule, write-offs of the assets for a permanent decrease of value are not deductible.
    - Bad debts trade-receivables can be wrote down (see below).
    - There are no rules similar to Article 41 of the CCCTB Proposal.
  - — CCCTB
    - CCCTB appears more favorable than domestic rules.

C/M/S/ Law.Tax

Should FGIP elect for the CCCTB: **Italy**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding waiver of debts?
- Answer
  - — Italian tax law
    - A waiver of debts – in terms of a waiver of credits of a shareholder towards a participated company – is not deductible for the shareholder and increases the tax cost of its shareholding. It is not taxable for the participated company either.
    - The loss of a bad debt receivable is deductible if (i) the debtor goes bankrupt or (ii) if the loss is proven by "certain and definite elements". A case by case analysis is always required.
    - A write down of bad debts trade-receivables is deductible in a given tax period within the limit of 0,5% of the trade receivables face value and up to 5% of such value.
  - — Regarding "bad debts", the CCCTB seems to be clearer since it lists the elements/conditions to be satisfied for the deduction.

C/M/S/ Law . Tax

Should FGIP elect for the CCCTB: **Italy**

— Calculation of the tax base

- Question
  - — Is CCCTB more favorable, equally favorable or less favorable than your domestic tax rules regarding other expenses (salaries, interest, royalties…)?
- Answer
  - — Salaries
    - In Italy, as a general rule and with small exceptions for certain items, salaries are fully deductible for income tax purposes. CCCTB offer no particular advantage or disadvantage.
  - — Interest
    - Under Italian lax aw, interest payable exceeding interest receivable may be deducted up to 30% of the EBITDA. The EBITDA 30% portion not utilized for deduction in a given tax year can be carried forward in the subsequent years. Furthermore, interest exceeding the 30% EBITDA can be deducted in a subsequent tax year if the 30% EBITDA of that year is higher than the interest to be deducted for the same year.
    - Since CCCTB does not contain any thin capitalization rules, the election for the regime is in principle more favorable than domestic tax law.
  - — Royalties
    - In Italy, royalties are deductible based on the accrual principle. Upfront payments are deductible in 2 years (as intangible assets) or 18 years in case of trademarks.

C/M/S/ Law.Tax

Should FGIP elect for the CCCTB: **Italy**

— Calculation of the tax base

- Question
  - — Transfer Pricing: can you think of a way for FGIP to design its transfer pricing policy so as to benefit most from the rules provided for by the CCCTB?
- Answer
  - — In calculating the consolidated tax base, profits and losses arising from transactions directly carried out between members of a group shall be ignored.
  - — Since all companies in the case are controlled by the same EU entity (and therefore included within the CCCTB group), the transfer pricing policy is no more an issue, since adjustments are required only between “associated enterprises” where not consolidated in the same group.

C/M/S/ Law.Tax

Should FGIP elect for the CCCTB: **Italy**

— Comparison of the tax due by FGIP in Italy

- Election for CCCTB
  - — Considering the situation of the Italian companies of the group in terms of assets, salaries, employees and turnover, Italy would be apportioned 9% of the consolidated tax result of the FGIP Group.
  - — Consolidated tax return: 20 M€ (i.e. - 10M€ + 10 M€ + 10M€ + 10 M€)
  - — Tax base attributed to Italy: 1,80 M€
  - — Tax rate: 31,4%
  - — Tax collected by Italy: **0,57 M€**
- Domestic tax rules
  - — Tax base: +10 M€
  - — Tax rate: 31,4%
  - — Tax collected by Italy: **3,14 M€**
- Conclusion
  - — The election for the CCCTB **decreases** the total amount of tax paid by the group in Italy.

C/M/S/
Law . Tax

Structuring an Acquisition of FGIP using CCCTB

Italy

C/M/S/ Law.Tax

Structuring An Acquisition: **Italy**

— ABC forms a NewCo in Italy and acquires 100% of the group

- The income of FGIP It (NewCo) consists of dividends from It1 and from the foreign holdings F1, AG1, and Po1.
  - — Tax treatment: these dividends are exempt from taxation, except for 5% of their amount, which is added back to the tax base.
- Conclusions

	No tax group	Italian tax group	CCCTB
Germany	3.795.000 €	3.750.000 €	4.096.248 €
France	0 €	0 €	866.380 €
Italy	4.343.631 €	3.416.702 €	244.694 €
Portugal	3.162.500 €	3.125.000 €	422.423 €
Total Tax Due	**11.301.131 €**	**10.291.702 €**	**5.629.745 €**

— Tax burden with CCCTB is significantly lower because the French tax losses and the financing expenses are fully deducible from the tax base. Dividends are also treated as exempt revenues. Since IRAP is not integrated, an additional tax burden of 3,9% will be borne in Italy.