

AmCham EU's response to the public consultation on the Re-launch of the Common Consolidated Corporate Tax Base (CCCTB)

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €2 trillion in 2014 and directly supports more than 4.3 million jobs in Europe.

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6 January 2016

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*** Name of your organisation**

American Chamber of Commerce to the European Union (AmCham EU)

*** Contact email address**

eje@amchameu.eu

*** Is your organisation or your enterprise included in the Transparency Register?**

- Yes
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CONSULTATION RESPONSE

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* If other, please specify:

100 character(s) maximum

AmCham EU speaks for over 160 American companies from a broad range of sectors committed to Europe.

3. Important notice on the publication of responses

* Please note: In order to ensure a fair and transparent consultation process only responses received through our online questionnaire will be taken into account. Furthermore, the European Commission will prepare a report summarising the responses. Contributions received are thus intended for publication on the Commission's website.

Do you agree to your contribution being published?

- Yes**, I consent to all of my answers being published **under my name**.
- Yes**, I consent to all of my answers/personal data being published **anonymously**.
- No**, I do not want my response to be published.

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- Yes
- No

4. Policy directions

* The Commission believes that the CCCTB system can be an effective tool against aggressive tax planning and at the same time retain its attractiveness to the business.

What are your views?

- I agree
 Neutral
 I don't agree
 Other

Comments (optional):

2000 character(s) maximum

The 2011 Impact Assessment highlights increasing problems as barriers to the single market: (1) tax administration costs for taxpayers & authorities, (2) double tax and (3) over taxation. Mismatches in tax law/interpretation cause issues for taxpayers and authorities, presenting risks to taxpayers of double tax. We support efforts to remove barriers to international trade, investment, and fair competition to strengthen the single market.

Whilst CCCTB could advance certain EU policy objectives, this would be at the cost of departing from the Arm's Length Principle. The ALP is the international standard; any departure increases the likelihood of mismatches between EU and non-EU countries, particularly if the tax base is not calculated with reference to the ALP. The EU, OECD, G20 and beyond have spent considerable effort strengthening the ALP as part of the BEPS project. We question the value in seeking to discard it before the project is complete.

We believe that a mandatory CCCTB will result in disagreements over the formulary concept with countries outside the EU, leading inevitably to mismatches and double tax in third-country situations, including with the USA. As treaty relief is granted on ALP it is hard to see how CCCTB would not lead to double tax for investors in or out of the EU unless it is optional.

Within the EU, CCCTB could help reduce mismatches if consolidation was a feature; if included, a CCCTB could meet the objective of reducing intra-EU tax planning whilst providing businesses with greater certainty over intra-EU risks. For intra-EU transactions, the CCCTB may also reduce EU compliance burdens and disputes. These secondary objectives would be attractive if they could be achieved without incurring the cost of increased mismatches when dealing with non-EU parties, although it is difficult to see how this could be achieved. CCCTB must also avoid adding a further layer of reporting that is not in line with existing reporting requirements (e.g. CBCR).

* The Commission envisages re-launching the CCCTB in a staged approach which will consist of 2 steps: Firstly, agreement on the tax base, secondly, moving on to consolidation.

What are your views on the staged approach?

- I'm **in favour** of the staged approach
 Neutral
 I'm **against** the staged approach
 Other

Comments (optional):

2000 character(s) maximum

We reiterate the concerns expressed above about almost certain double tax, and we further believe that introducing the CCCTB without consolidation would be a fundamental mistake. If, nevertheless, it is decided to move forward on a phased basis, then we urge the Commission to seek a binding commitment from Member States that a second phase of consolidation will follow automatically. This should be done in advance in order to minimise the risks of the project 'stalling' after the first phase, and avoid the uncertainty and disadvantages that this would bring for all business in the EU.

Tax bases calculated with a different methodology to the rest of the world (with all the difficulties this will bring) without the comfort of at least intra-EU administrative benefits and elimination of intra-EU mismatches will increase the cost and uncertainty of doing business in the EU.

We consider that the method of calculating the tax base (e.g. allocation keys) should be carefully considered; we note in particular that intangible assets are increasingly value drivers in global businesses and these do not appear to be taken into account at all. If the CCCTB is to be successful and encourage investment (particularly in innovative activities) all parties must have confidence that the allocation keys appropriately take all assets into account.

In such a scenario, effective cross border loss relief would be critical during the first stage (see Q7). Implementation of the project has been resisted by some for a many years; it would be an opportunity missed to enhance the single market if only implemented in a way that retains many of the difficulties and mismatches of the existing regime.

The 2011 Impact Assessment noted that from an overall welfare perspective, the benefits of an appropriately structured CCCTB are greater than a CCTB without consolidation. It is reassuring that business' preferences in this regard are aligned with those of the wider community.

* It is a priority of the Commission to promote discussion in Council of certain BEPS-related international aspects of the common base before the re-launched CCCTB is proposed. The aim will be to arrive at consensus on how to implement certain OECD anti-BEPS best practice recommendations in a uniform fashion across the EU. The intention would be to create a common playing field in defending the Single Market against base erosion and profit shifting.

What are your views on agreeing on such a common approach?

CONSULTATION RESPONSE

- I'm **in favour** of such a common approach
 Neutral
 I'm **against** such a common approach
 Don't know

Comments (optional):

2000 character(s) maximum

The OECD has (at the behest of the G20, of which the EU and four of its Member States are members) undertaken significant work on the BEPS project to address tax planning perceived as aggressive. The participating countries recognised that there was no 'one size fits all' solution and made a series of recommendations, best practices and minimum standards which are in the process of being implemented at a national level.

Aligning anti-BEPS measures across Member States may help to limit the risk of inconsistent adoption. However, it remains unclear why a CCCTB proposal would be a suitable vehicle for such measures.

In any case, it is not possible to provide meaningful comments on the alignment of common anti-BEPS tax base rules in a CCCTB context before the common tax base rules have been agreed. Many of the OECD recommendations are inter-related and national law needs to be reviewed carefully to ensure that the implementation of anti-BEPS rules has no undesirable consequences (such as addressing the same issue twice or multiple times, discriminating against certain businesses/sectors, creating unintended consequences, losing the ability to ensure equal application of tax rules to tax payers etc).

We urge the Commission to seek a high level consensus on the objectives and scope of the CCCTB and the impact of other pan-European proposals seeking to implement BEPS measures uniformly before embarking on detailed implementation issues such as the precise anti-avoidance measures to be included within CCCTB; it should be kept in mind that Member States start from very different places in relation to the anti-BEPS measures they have already implemented, and may be implementing in the coming years. Moreover, absent some fundamental agreement on standards amongst Member States (for example in relation to tax residence and the taxation of royalties), it is not clear how common anti- abuse rules could adequately address certain issues.

5. Scope, Anti-avoidance

5.1 Scope of the CCTB/CCCTB Proposal

* The Commission considers making the new proposal for a CCCTB obligatory for all EU companies which are part of a group. A group can be formed:

- Between parent and subsidiary companies where there is a holding of more than 50% of the voting rights; and direct or indirect holding amounting to more than 75% of capital or more than 75% of the profit rights); or

- Between a Head Office and its permanent establishment where a company has one or more permanent establishment in other Member States.

What are your views on making the proposal for a CCCTB obligatory for all EU companies which are part of a group?

- I'm **in favour** of this obligation
 Neutral
 I'm **against** this obligation
 Don't know
 Other

Would you suggest a different approach to defining who should be required to use the CCCTB? If yes, please explain your suggestion briefly.

2000 character(s) maximum

If CCCTB were implemented, international businesses would still be required to conform to the ALP with regard to intra-group transactions in order to ensure compliance with third country tax rules, as well a variety of non-income tax reasons (regulatory requirements, corporate law, customs law and VAT). The transition to a parallel, completely new regime would be a significant challenge that would require significant resources. We have concerns about the practical administrative implications of all group companies being required to move into the regime concurrently and highlight again the importance of optionality to limit this burden.

At group level, international (non-EU) trade across a number of third territories is often significant. The operation of a parallel CCCTB system, in addition to the ALP, and the resulting engagement with tax authorities in EU and non-EU countries would create a significant burden. Only groups operating solely within the EU would avoid this burden, thus it would create a barrier to investment into and out of the EU.

At entity level it would be inequitable for a company that has generated tax losses under an existing regime (based upon a tax base calculated under the ALP) to be forced to enter into a regime that restricts the use of those losses based upon different criteria. Businesses would be more likely to support a regime offering groups cross border loss relief flexibility, ideally through full consolidation.

We therefore consider that the CCCTB should be optional, at least initially, and, depending on the detail of the proposals, we may also consider that there should be optionality on an entity by entity basis.

We note that without careful consideration of the interaction of Member States' legal frameworks, arbitrary limits regarding the companies in scope may invite abuse. A definitive clearance mechanism would be welcomed.

* The Commission envisages providing the following option:

Companies which would not be subject to the mandatory CCCTB - because they do not fulfil the requirements of being part of a group - could still have the possibility to apply the rules of the system.

What are your views on offering non-qualifying companies the option to apply the rules?

- I'm **in favour** of this option
 Neutral
 I'm **against** this option
 Don't know
 Other

Comments (optional):

2000 character(s) maximum

We consider that if adopted, CCCTB should be optional for all groups.

It would be equitable to offer companies that do not fall within a group as defined under CCCTB rules the option to apply CCCTB rules.

5.2 Anti-avoidance elements

* In view of recent developments, the CCCTB system should include more robust rules to defend itself against aggressive tax planning.

Which of the elements of the CCCTB system would you reinforce so that the system can better respond to tax avoidance? *(Multiple answers possible)*

- Rules for limiting interest deductibility
 Disallowance of tax exemption for portfolio participations
 Exit taxation rules
 More robust rules on controlled foreign companies regimes (CFC)
 Anti-abuse rules based on effective rather than statutory rates
 Addressing distortions caused by debt/equity bias
 Other suggestion
 None of the above

* Please specify your other suggestions

2000 character(s) maximum

As noted above, we consider that it is difficult to address these elements outside of or prior to a more general development of what the CCCTB rules may include. Alignment of tax base rules before the common tax base rules have been agreed more broadly would at the very least require revisiting to ensure that they are fit for purpose after the implementation of CCCTB in Member States.

Again it should be kept in mind that Member States start from very different places in relation to the anti-BEPS measures they have already implemented, as well as any future measures.

In any case, it will be critical that the EU follows the BEPS policy recommendations, focusing on standard application across the EU to ensure consistency and reduce unnecessary complexity and administrative burden.

6. Hybrid Mismatches, Research and Development

* Hybrid mismatches are the result of disparities in the tax treatment of an entity or financial instrument under the laws of two or more States. Currently, arrangements can be set up to exploit such mismatches for the purpose of lowering their overall tax burden. The risk of such arrangements would be removed in transactions between enterprises applying the common tax base rules within a consolidated group. It would however persist in relations with enterprises outside the common rules as well as during step 1 of the staged approach to a CCCTB, in the absence of tax consolidation amongst the companies applying the common rules.

One option to address hybrid mismatches would be to require enterprises to follow in a Member State the classification of entities and/or of financial instruments adopted in the other Member State or the third country which is party to the transaction.

In your view, can hybrid mismatches be effectively addressed through any other measures than the one suggested above?

- Yes
 No
 Don't know
 Other

Please explain your response and/or provide further comments:

We consider that identifying and copying the classification of an instrument in a second country (which is potentially outside the EU) seems an unnecessary and inequitable dilution of EU sovereignty that would be difficult to administer.

The OECD's proposed rules in its final Report on Neutralising the Effect of Hybrid Mismatches (October 2015) should eliminate hybrid mismatches (or at least give participating countries the option to eliminate those mismatches impacting their tax base). Whilst AmCham EU does not consider that enough consideration has been given by the OECD to the compliance burden of such rules, it is expected that these rules will become an international standard. The best way to achieve this objective is through consistent international rules, rather than regional cooperation or standalone domestic rules. Accordingly, AmCham EU recommends that the EU follows the OECD's recommended approach in the CCCTB and any implementation action should be informed by extensive consultation

to identify and exclude damaging unintended consequences, for instance in the case of 'hybrid' regulatory capital and repo/stock lending transactions.

6.2 Treatment of costs for Research and Development

* In the currently pending CCCTB proposal, the Commission has proposed a favourable treatment of costs for Research and Development (R&D) by making these costs fully deductible in the tax year they are incurred, with the exception of costs relating to immovable property.

What are your views on the existing framework for R&D?

- I **support** the existing framework for R&D
 Neutral
 I **don't support** the existing framework for R&D
 Don't know
 Other

Comments (optional):

2000 character(s) maximum

As mentioned above, a high level consensus on the objectives and scope of the CCCTB should be obtained before discussing detailed implementation issues such as deduction of R&D costs.

* One option for rendering the CCCTB more favourable to promoting R&D could be to introduce more generous provisions for deducting R&D costs, such as super deductions which are currently applied by a number of Member States (e.g. Croatia, the Netherlands and the UK)?

What are your views on making the existing framework for R&D more favourable?

- I'm **in favour** of making the existing framework more favourable for R&D
 Neutral
 I'm **against** making the existing framework more favourable for R&D
 Don't know
 Other

Would you suggest an alternative scheme? If so, please explain in your response and/or provide further comments

2000 character(s) maximum

All tax-related incentives create additional complexity in relation to the administration of taxes. However, to the extent that incentives can boost innovation and support the EU growth agenda, we consider that they should be encouraged.

In addition to direct R&D incentives, patent boxes, super deductions and/or R&D-related tax credits have been used by Member States domestically to generate more innovation in the EU. As per the

OECD BEPS Action 5 Report, we believe it should remain a sovereign decision whether such incentives are offered.

We also note that one factor of the CCCTB that could actively discourage investment in R&D and innovative activities within the EU is that under the proposals released to date, intangible assets would not be taken into account when calculating each Member State's tax base. Whilst the value of intangible assets are often debated, most tax regimes recognise that there is value attributable to intangible property, and that in many cases this value can be significant. A failure to recognise this value as part of the CCCTB tax base apportionment could discourage investing in R&D (or other innovative activities) that are expected to create or develop such intangible assets within the EU.

Any framework that is adopted should include (unlimited) carry forward incentives to reflect the value created by investments in R&D on which it may take time to realise returns.

7. Debt-Equity Tax Bias, Cross-Border Loss Relief

7.1 Debt-Equity Tax Bias

* Corporate tax systems usually favour debt-financing over equity-financing by treating interest payments as a tax deductible expense with no equivalent deduction for the return paid to equity.

Should the aspect of debt-equity tax bias be addressed in the proposal?

- Yes
- Neutral
- No
- Don't know
- Other

Comments (optional):

2000 character(s) maximum

As mentioned above, a high level consensus on the objectives and scope of the CCCTB should be obtained before discussing detailed implementation issues such as tax deductible financing expenses.

The CCCTB project is primarily focused on the taxation of corporate groups. In this context, it seems misleading to assume that there is a general debt-equity tax bias given that (i) corporate recipients of interest payments are typically taxed at normal corporate tax rates whereas (ii) the existence of a variety of rules (thin cap rules, EBITDA tests, misuse rules, subject-to-tax rules etc) may deny interest deductions at the level of the payer of the interest thus effectively creating double taxation while dividend payments of equity are typically (largely) exempted if paid to a corporation. Where interest payments are being made to individuals, a debt-equity tax bias may or may not exist depending on the way interest and dividend income of individuals is taxed, what marginal rates apply etc.

Thus, given the very existence – far less the extent – of the debt equity bias in a cross border context is extremely unclear, we do not believe that the question of how to deal with it is appropriate.

The corporate tax debt-equity bias could be addressed via three possible policy options.

- Option 1 is the Comprehensive Business Income Tax (CBIT) that disallows any financing costs as deductible expense.
- Option 2 is the Allowance for Corporate Equity (ACE) that allows the deductibility of actual interest payments and of a notional interest on equity.
- Option 3 is the Cost of Capital Allowance (COCA) that allows the deductibility of a notional interest on capital (equity and debt).

In your view, which option would be best suited to address the debt-equity tax bias?

- Comprehensive Business Income Tax (CBIT)
- Allowance for Corporate Equity (ACE)
- Cost of Capital Allowance (COCA)
- None of the above
- Don't know
- Other

If you suggested that another option would be better to address the debt-equity tax bias, what design would you suggest? Please explain your response and/or provide further comments:

Comments (optional):

2000 character(s) maximum

An ACE could help to attract more equity investments thereby opening new (and clearly needed) funding opportunities for EU businesses to reduce the EU businesses' reliance on the bank/ debt funding sector. Any COCA should ensure that notional deductions are not below actual debt expenditure.

7.2 Temporary mechanism for cross-border loss relief

* The Commission envisages proposing a temporary mechanism for cross-border loss relief with recapture until the consolidation step (CCCTB) is agreed. The aim will be to balance out the absence of the benefits of consolidation during the first step (CCTB) of the proposal.

What are your views on such a temporary mechanism for cross-border loss relief?

- I'm **in favour** of such a temporary mechanism
- Neutral

- I'm **against** such a temporary mechanism
 Don't know
 Other

Which other measures could temporarily substitute the absence of consolidation? Please explain your response and/or provide further comments.

Comments (optional):

2000 character(s) maximum

As mentioned above, consolidation is an essential component of any CCCTB regime. A CCCTB that does not eliminate much of the tax risk and documentation burden related to intra-EU transfer pricing for income tax purposes would be a concern for business, even with cross border loss offset. Furthermore, such loss relief and 'clawbacks' will likely introduce further complexity and so, to reiterate, consolidation is therefore the preferred option in order not to damage the single market.

8. Final remarks, additional information

Is there anything else you would like to bring to the attention of the Commission?

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) here.

If implemented, CCCTB should be introduced in a manner that can reduce the compliance burden and risks of double taxation in order to strengthen rather than weaken the single market.

As a summary, in order to meet these objectives we consider that CCCTB must have the following general features:

- Consolidation
- Coordination with trading partners' existing rules (e.g. treaty relief)
- Administrative simplification (incl. one stop shop)
- Optionality, including various opt-in provisions

In addition, careful consideration would be required of many policy or implementation issues that cannot be addressed before these fundamental features have been agreed and more substantive proposals made. For example:

- If CCCTB were to be made compulsory for groups, flexibility around timing would be needed to address an otherwise challenging compliance timescale.

- The (average) tax base should remain consistent.

- Phase 1 (CCTB) should not proceed without at the very least interim cross-border tax relief, and provision for automatic consolidation.

- CCCTB should not add additional layers of complexity and reporting beyond the OECD BEPS recommendations, which seek to address aggressive tax planning.

More detailed comments will be required if and when this process moves forward and we look forward to contributing at that time.

We would finally like to raise again that we do not consider that CCCTB should be used as a vehicle for addressing anti-BEPS issues. Indeed, seeking to agree the specific details of what should or should not be included in the tax base before consensus is reached on fundamental principles is likely to make reaching agreement on these fundamentals more difficult and risk the success of the project. The main target must be removal of the increasing disincentives to growth and investment in the EU by the risk of double taxation and the ever-growing compliance burden relating to transfer pricing and other tax measures.