FACULTY OF LAW
Lund University

Oskar Cimmerholm

The re-launched CCCTB proposal

- an analysis of its compliance with Protocol (No 2) on the application of the principles of subsidiarity and proportionality

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Peter Nilsson

Semester of graduation: Period 1 autumn semester 2016

Contents

Summary

This thesis analyses the compliance of the CCCTB directive proposals with certain aspects of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality. The thesis presents the various CCCTB proposals issued by the European Commission in 2011 and 2016. The analysis focuses on the CCCTB proposals' compliance with the principles of subsidiarity and proportionality and has its starting point in the argumentation in the various reasoned opinions issued by some national parliaments of certain Member States regarding the incompliance with the said principles.

Due to an arguably weak judicial review of the principles of subsidiarity and proportionality by the CJEU, the thesis points out the importance of the reasoned opinions from the national parliaments of the Member States in the political review regarding legislative proposal's compliance with the principles. The thesis highlights the issue that only the principle of subsidiarity should be considered in the reasoned opinions and discusses the possibility of also allowing aspects regarding the compliance with the principle of proportionality to be allowed to be included in the reasoned opinions.

It is argued that the actual content of the CCCTB proposals does comply with the principles of subsidiarity and proportionality. However, another issue regarding the compliance with other aspects of Protocol No 2 is raised and discussed. In light of the analysis made, it could be argued that the CCTB proposal does not comply with the requirement to justify the proposal with regard to the principles of subsidiarity and proportionality, found in Protocol No 2.

Sammanfattning

Denna uppsats analyserar de olika CCCTB-förslagens efterlevnad av vissa aspekter i Protokoll (nr 2) om tillämpning av subsidiaritets- och proportionalitetsprinciperna. Uppsatsen redogör för innehållet i de olika CCCTB-förslagen utfärdade av Europeiska Kommissionen 2011 och 2016. Analysen fokuserar på CCCTB-förslagens efterlevnad av subsidiaritets- och proportionalitetsprinciperna och har sin utgångspunkt i argumentationen i de olika motiverade yttrandena från vissa medlemsstaters parlament beträffande vissa problem med efterlevnaden av nämnda principer.

På grund av en diskutabelt svag juridisk översyn av subsidiaritets- och proportionalitetsprinciperna av EU-domstolen poängterar uppsatsen betydelsen av de motiverade yttrandena från medlemsstaternas parlament i den politiska översynen beträffande lagstiftningsförslags efterlevnad av principerna. Uppsatsen belyser problemet att endast subsidiaritetsprincipen ska beaktas i de motiverade yttrandena och diskuterar möjligheten att också tillåta att aspekter beträffande efterlevnaden av proportionalitetsprincipen ska få lov att inkluderas i de motiverade yttrandena.

Det hävdas i uppsatsen att det faktiska innehållet i CCCTB-förslagen efterlever subsidiaritets- och proportionalitetsprinciperna. Däremot tas andra problem med efterlevnaden av andra aspekter i Protokoll nr 2 upp och diskuteras. I ljuset av den genomförda analysen kan det argumenteras för att CCTB-förslaget inte efterlever kravet i Protokoll 2 att lagstiftningsförslaget ska motiveras med avseende på subsidiaritets- och proportionalitetsprinciperna.

Abbreviations

AIG	Allowance for Growth and Investment
CCTB	Common Corporate Tax Base
CCCTB	Common Consolidated Corporate Tax Base
CFC	Controlled Foreign Corporation
CJEU	Court of Justice of the European Union
EU	European Union
GDP	Gross Domestic Product
SME	Small and Medium-sized Enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

Direct company taxation has since the founding of the European Union received attention as an important element for the establishment and completion of the internal market.[1] Historically it has however been hard for the EU to persuade the Member States to hand over a part of their sovereignty in the tax field. The Member States has so far only been able to agree on a few EU legislative acts concerning direct company taxation, e.g. the Parent-Subsidiary Directive[2] and the Merger Directive[3].

The different tax systems of the Member States on the internal market are considered to cause a number of obstacles to cross-border trade within the Union, affecting the economic efficiency negatively. The European Commission has concluded that it is necessary to tackle the internal market obstacles ultimately with a unionwide comprehensive solution.[4]

The Commission proposed such a comprehensive solution in 2011 with the directive proposal on a Common Consolidated Corporate Tax Base (CCCTB)[5]. However, due to political resistance, that proposal does not seem to be adopted even though it is still pending at the Council and has not yet been withdrawn by the Commission.

[1] Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, COM(2001) 582 final, p. 4.
[2] Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.
[3] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.
[4] Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, COM(2001) 582 final, p. 10f.
[5] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final.

The political resistance of some national parliaments with the 2011 proposal consisted of issues with the Union's competence regarding direct taxation, the compliance with the principle of subsidiarity, but mostly of issues concerning the compliance with the principle of proportionality.

The presented issues made the Commission revise its CCCTB proposal from 2011, resulting in a re-launch of the CCCTB split up in two directive proposals in 2016. A first step aims to make the Member States agree on a directive concerning a Common Corporate Tax Base (CCTB) before trying to implement a Common Consolidated Corporate Tax Base directive in a later stage, since the consolidation part of the 2011 proposal was probably the most disputed part of the proposal.

1.1 Statement of purpose, Question and Demarcation

The overall purpose of this thesis is to analyse the compliance of the 2016 CCCTB package with the requirements found in Protocol (No 2) on the application of the principles of subsidiarity and proportionality. Thus, the question to be answered in this thesis is 'Does the 2016 CCCTB package comply with the requirements in Protocol (No 2) on the application of the principles of subsidiarity and proportionality?'

The purpose and the question have a general appearance and would be hard to answer completely considering the size of this thesis. Consequently, the purpose and question must be further demarcated. The main focus of the analysis will lie with the compliance of the CCCTB package with the principles of subsidiarity and proportionality, since these are the aspects that the 2011 CCCTB proposal received most criticism about in the reasoned opinions from some national parliaments of the Member States. The arguments in the reasoned opinions regarding the proposal's compliance with the principles will be used as a starting point when analysing the

compliance of the proposal with the principles. Regarding the various aspects found in the Protocol, the analysis will further focus on the so-called 'yellow card procedure' and the requirement of a detailed statement that should make it possible to appraise the compliance of the CCCTB proposal with the said principles. To be able to analyse the CCCTB proposals, the actual content of the proposals must be presented. However, the proposals will not be fully explained in detail. The presentation will instead focus on the most important features that arguably have an impact on the proposals' compliance with the principles of subsidiarity and proportionality.

1.2 Methodology

Throughout this thesis, an analytical methodology will be used in order to fulfil the thesis' purpose and answer its question. The analytical methodology perceives the argumentation in the jurisprudence as free and open and does not search for the "correct" or "best" answer to a problem, but rather analyses different arguments and proposed solutions to the problem. The methodology aims to analyse the law and does so by criticising it.[6] The analytical methodology is used because the purpose of the thesis is to analyse the compliance of the 2016 CCCTB package with the requirements found in Protocol (No 2) on the application of the principles of subsidiarity and proportionality, and this will be done, amongst other things, by critically analysing and questioning the outcome the European Commission states the proposals will result in as well as by critically analysing and questioning the argumentation in the reasoned opinions of some national parliaments. The thesis will also present and analyse the actual content of the proposals.

[6] Sandgren, p. 45ff.

One important step in the analytical methodology is to determine the law in force.[7] Therefore, when presenting basic EU tax law and the content of the CCCTB proposals, a legal dogmatic methodology will be used. The legal dogmatic methodology aims to determine the applicable law in force. This task is divided in two – the descriptive phase and the systematising phase. The descriptive phase aims to describe the law, whilst the systematising phase, which is based on the previous phase, aims to identify relationships and similarities so that the law and different sources creates a coherent system.[8] The CCCTB proposals are not law in force, but the legal dogmatic methodology will be used anyway, since the presentation aims to determine how the rules of the proposals would affect the tax field if the proposals were the law in force.

1.3 Research and Material

Research on fundamental EU law is vast, making finding material considering it easy. Research on direct taxation in the European Union is also easily available and the material and issue is quite straightforward.

Since the CCCTB proposal from 2011 has not been adopted as a directive due to political resistance, the subsequent research of the proposal is scarce. Various European Union sources and the reasoned opinions from some national parliaments of the Member States concerning the 2011 CCCTB proposal are thus a big part of the research that this thesis relies on when the compliance of the CCCTB system with the principles of subsidiarity and proportionality is analysed. The reasoned opinions from national parliaments of some Member States serves as the starting point of what issues the 2011 proposal might have with the principles of subsidiarity and proportionality.

[7] Sandgren, p. 46.
[8] Sandgren, p. 43.

The CCTB and CCCTB proposals from 2016 was released in November, just a few weeks before this thesis was concluded, making the research available on these proposal very limited as well. Regarding these proposals, the thesis also relied on various European Union sources when the proposals were presented and analysed. One summary of the proposals from Loyens & Loeff was also used.

1.4 Disposition

This thesis has the following structure. The first chapter contains the introduction chapter, providing the background, the statement of purpose, the question, demarcation, the methodology and the material of the thesis.

The second chapter consists of a presentation of fundamental EU law, written in the light of EU tax law. The chapter includes a presentation of the principles of subsidiarity and proportionality and the Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

In the third chapter, a background of the CCCTB proposal from 2011 is presented as well as a presentation of the most important parts of the proposal itself.

The reception of the CCCTB proposal from those national parliaments of certain Member States who issued reasoned opinions is presented in chapter four.

In chapter five, the re-launch of the proposal is accounted for, with focus on the content of the 2016 proposals.

The last chapter contains the analysis of the thesis. The arguments concerning the compliance with the principles of subsidiarity and proportionality given by some parliaments of the Member States will be

analysed in the light of the changes and similarities between the 2011 CCCTB proposal and the 2016 CCCTB package. The compliance of the 2016 CCCTB package with the principles will also be analysed. Furthermore, the 'yellow card procedure' will be commented on and the overall compliance of the 2016 CCCTB package with Protocol No 2 will be analysed. Lastly, a few concluding remarks of the thesis will be presented.

2 EU tax law

Since the establishment of the European Union, the most important objectives have probably been the creation of the internal market[9] and the economic integration of the Member States by establishing an economic and monetary union[10]. One important aspect in achieving these objectives is to abolish obstacles, including tax obstacles, to the free movement of goods, persons, services and capital.[11]

Direct taxation is not expressly mentioned in the TFEU, in contrast to indirect taxation[12]. This is considered to have two explanations. Firstly, when the Rome Treaty was signed in 1957, direct taxation was not considered as an important or necessary feature for the establishment of the internal market. Secondly, the issue of taxation, and especially direct taxation, has historically been considered, and is still considered, as an important competence for the Member States to keep in order to achieve and realise national politics.[13] However, as explained in this thesis, the European Commission now thinks that it is necessary to harmonise rules regarding direct taxation in order to fulfil the internal market further.

2.1 Principle of conferral

One fundamental principle in the European Union, important when discussing direct taxation, is the principle of conferral. According to this principle, the European Unions shall only act within the limits of the competences conferred upon it by the Member States in the Treaties.

[9] TEU, Article 3(3).
[10] TEU, Article 3(4).
[11] Helminen, p. 10.
[12] TFEU, Article 113.
[13] Adamzyk & Majdańska in Lang et. al. (ed.). p. 14.

Competences not conferred upon the Union in the Treaties remain with the Member States.[14]

The competences within the European Union are divided up in exclusive and non-exclusive competences. The exclusive competences are listed in Article 3 TFEU. In these areas, the European Union has exclusive regulation rights. The non-exclusive competences are divided in two; the shared competences listed in Article 4 and the supporting competences listed in Article 6 TFEU. Regarding the shared competences, the Member States may only exercise their competence to the extent that the Union has not regulated and used its competence in that area. In the areas where the Union has supporting competence, the Union may only intervene to support, coordinate or complement the action of the Member States.[15] When taking the principle of conferral into account, the issue of harmonising in the area of direct taxation falls under the scope of shared competence.[16]

2.2 Approximation of laws

In the European Union, the approximation of laws includes both negative and positive integration measures. The negative integration measures are judicial and are primarily a result of the judgements of the CJEU. When talking about negative integration, the Court abolishes national laws or practices that conflict with EU law.[17] The most relevant EU law provisions concerning negative integration in the direct tax area has been the four fundamental freedoms, which set boundaries for how the national parliaments can legislate in the tax field.[18] Positive integration instead means that the Union regulates certain aspects of the tax field by issuing

[14] TEU, Articles 4 & 5.
[15] Barnard & Peers, p. 107ff; European Union, 'Division of competences within the European Union', <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:ai0020>, visited 2017-01-04.
[16] Helminen, p. 13; TFEU, Articles 4(2)(a) & 115.
[17] Helminen, p. 10.
[18] Adamzyk & Majdańska in Lang et. al. (ed.). p. 15.

directives (or other legislative measures) with the purpose of the approximation of national tax law of the Member States.[19] Both the positive and negative integration relies on the primacy of EU law, stating that EU law norms override national law that are in conflict with EU law, regardless of the status or age of the relevant national law.[20]

2.2.1 Harmonisation

Article 113 of the TFEU covers the legislation process regarding value added tax, excise duties and other indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition. Evidently, this article does not cover the harmonisation of direct taxation. As earlier mentioned, direct taxation is in fact not directly mentioned in the TFEU. Harmonising in the area of direct taxation instead falls under the scope of the approximation of laws with the aim of fulfilling the establishment or functioning of the internal market. However, article 114 TFEU, under which an ordinary legislative procedure shall occur, cannot be used when harmonising in the area of direct taxation since article 114(2) TFEU states that the article shall not apply to fiscal provisions.[21]

Instead, the legal basis for harmonisation in the field of direct taxes is article 115 TFEU. The article authorises the Council to issue directives to approximate laws, regulations or administrative provisions directly affecting the establishment or functioning of the internal market. These directives shall be adopted by a special legislative procedure and by unanimity in the Council (see section 2.3). Due to the requirement that the laws regulations and administrative provisions must be such that they directly affect the establishment or functioning of the internal market, a complete

[19] Helminen, p. 10f.
[20] Helminen, p. 6.
[21] Weber in Weber (ed.) *Traditional and alternative routes to European tax integration,* p. 2.

harmonisation of the Member States' tax laws cannot be based on article 115 TFEU.[22]

2.3 Legislative procedures

In the European Union there are two kinds of legislative procedures – the ordinary and the special legislative procedure. The ordinary legislative procedure is defined in Article 289(1) of the TFEU and consists 'in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission'. Within the ordinary legislative procedure the European Parliament and the Council thus act as co-legislators with symmetric procedural rights. The specific procedure is further defined in Article 294 of the TFEU.[23]

Article 289(2) of the TFEU recognises two special legislative procedures. The wording of the article is:

> 'In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure'.

In the first version of the special legislative procedure the European Parliament acts as the dominant institution with the Council as a mere participant by consenting to the proposed act. In the second variant the Council acts as the dominant institution with the Parliament participating through its consent or by consultation. There are, however, some legal bases that require consultation of an advisory board, of which there are two: the Economic and Social Committee and the Committee of the Regions.[24]

[22] Helminen, p. 21; Weber in Weber (ed.) *Traditional and alternative routes to European tax integration,* p. 2.
[23] Schütze, p. 243f.
[24] Schütze, p. 244.

To find out which legislative procedure that applies in a certain policy area, one must look into its legal basis. For example, Article 115 of the TFEU, wherein one finds the legal basis for harmonisation in the field of direct taxes, states that a special legislative procedure shall apply. Within this special legislative procedure the Council shall act unanimously and, '*after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market*'. Evidently, the Parliament (and the Economic and Social Committee) only has consultation rights when it comes to adopting directives in the direct taxation area. This consultation procedure could be argued to be a mere formality, since it doesn't give the Parliament any veto power as it would have been given if the Parliament instead participated in the special legislative procedure by consent.[25]

2.4 Enhanced cooperation

The requirement of a unanimous Council when issuing a directive under article 115 TFEU makes it difficult to adopt new directives on that legal basis. As an alternative to article 115 TFEU, some Member States can decide to enter into enhanced cooperation and implement a proposal on their own, making it binding only between those Member States. At least nine Member States shall in that case address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission then refers the request to the Council together with its opinion. In the Council, the Member States that has decided to enter into the enhanced cooperation must then approve the proposal unanimously. The

[25] Schütze, p. 251.

European Parliament must also give its consent to the enhanced cooperation.[26]

2.5 The principle of subsidiarity

One important principle the European Union has to obey regarding the exercise of competence conferred upon the Union is the principle of subsidiarity. The principle can be found in Article 5(3) of the TEU and states as follows:

> 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

The principle of subsidiarity aims for the public power to be attributed to the level of governance where it can be most efficiently exercised. For the European Union that means that a decision should be taken as close to the citizens as possible.[27]

2.5.1 The subsidiarity test

From the wording of Article 5(3) TEU, one can understand that the Union must pass a two-step subsidiarity test when it wants to act in a certain area, except in areas where it enjoys exclusive competence.

The first condition is the 'necessity test' and can be read from *'the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level'*. The

[26] TEU, Article 20; TFEU, Articles 326-334; Helminen p. 22.
[27] Barnard & Peers, p. 110f.

first step shall, accordingly to the Impact Assessment Guidelines published by the European Commission, answer the question *'why can the objectives of the proposed action not be achieved sufficiently by Member States?'*. By posing this question one can understand that this part of the subsidiarity test tries to push the decision-making to the level of the Member States rather than at Union level and that it is up to the Union to argue why it shall exercise its competence in that specific case. The Union can justify taking action in a specific case by arguing, for instance, that the issue has transnational aspects that cannot be satisfactorily dealt with by the Member States alone.[28]

The second condition is the 'test of EU Value Added' and can be read from *'by reason of the scale or effects of the proposed action, [the Union objectives can] be better achieved at Union level'*. This second step of the subsidiarity test shall answer the question *'as a result of this [the answer of the first question], can objectives be better achieved by action by the Community?'*. This step of the subsidiarity test derives from the logic of comparative efficiency. The Union can argue that the 'test of EU Value Added' is met by examine if the hypothetical results of action taken by the Union produces clear benefits by reason of its scale and effectiveness compared to the hypothetical results of action taken only by the Member States. The Union can also argue that action taken by the Member States alone, or the lack of Union action, conflict with the requirements of the Treaty or might significantly damage the interests of Member States. Even though the first part of the subsidiarity test tries to push the decision-making to the level of the Member States, this second part is centralising to its nature, since it is almost always considered more efficient to have one uniform system than 28 different ones.[29]

[28] Impact Assessment Guidelines SEC (2009) 92, p. 22f; Barnard & Peers, p. 111; Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 96.
[29] Impact Assessment Guidelines SEC (2009) 92, p. 22f; Barnard & Peers, p. 111f; Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 96.

It is argued in EU law literature that the wording of Article 5(3) has created internal tension within the principle of subsidiarity in EU law due to the fact of the two-step test. Schütze poses a rhetorical question that points out the issue: '*will the combination of these two tests mean that the Union would not be entitled to act where it is – in relative terms – better able to tackle a social problem, but where the Member States could – in absolute terms – still achieve the desired result?'*.[30]

This is not the only problem with Article 5(3) TEU. The wording *'if and in so far'* offers two versions of the subsidiarity principle. The *'if'*-part focuses whether the Union should act and has been defined as the principle of subsidiarity in a strict sense. The *'in so far'*-part focuses how the Union should act and has been defined as the principle of subsidiarity in a wide sense.[31] These two versions of the subsidiarity principle have created some confusion within the Union when the principles of subsidiarity and proportionality are reviewed. As will be presented later, the Court sometimes discusses the intensity of Union intervention under the principle of subsidiarity, and sometimes under the principle of proportionality.[32]

One explanation to this issue is that the principal of subsidiarity in the European Union has over the years developed into having both judicial and political aspects. Schütze points out that the principle of subsidiarity can be used both as a political safeguard of federalism and as a judicial safeguard of federalism. The political safeguard of federalism can be found in Protocol no. 2 'On the Application of the Principles of Subsidiarity and Proportionality'. This protocol, adopted with the Lisbon Treaty, applies only to draft legislative acts. The judicial safeguard of federalism focuses on how the CJEU has interpreted the principle of subsidiarity.[33]

[30] Schütze, p. 253.
[31] Schütze, p. 253.
[32] Schütze, p. 258.
[33] Schütze, p. 253f.

2.6 Protocal No 2 and the 'yellow card procedure'

With the Lisbon treaty, the European Union adopted a protocol on how the principles of subsidiarity and proportionality should be applied and monitored when drafting legislative acts. Specifically, this means that the institution must forward its draft legislative acts to the national parliaments of the Member States.[34] The draft legislative acts must also be justified with regards to the principle of subsidiarity and proportionality. This justification *'should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation'*. The draft legislative act shall also include qualitative and, if possible, quantitative indicators explaining why the objectives can be better achieved at Union level. Finally, the draft legislative shall take into account the possible financial and administrative burdens it puts on the Union, national governments, regional or local authorities, economic operators and citizens.[35]

The monitoring process is, via Article 12(b) of the TEU, found in Articles 6 and 7 of the Protocol and has become known as the 'yellow card procedure'. This procedure means that national parliaments have the right to object to a draft legislative act. The national parliaments have eight weeks from the date of transmission to issue a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. Regardless how many national parliaments issuing reasoned opinions the institution, from where the draft legislative act originates, shall take account of the reasoned opinions. The national parliaments each have two votes in the 'yellow card procedure'. If the national parliament has a

[34] Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, Article 4.
[35] Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, Article 5.

bicameral parliamentary system, each chamber shall have one vote each. If at least one third of the total votes from the national parliaments represents the standpoint that the draft legislative act does not comply with the subsidiarity principle the draft must be reviewed, hence the 'yellow card procedure'. The monitoring process does not give the national parliaments the opportunity to give the draft legislative act a 'red card' and completely put the draft aside. Under the ordinary legislative procedure there is, however, a monitoring process that has become known as the 'orange card procedure'. If a simple majority of the total votes from the national parliaments represents the standpoint that a proposal for a legislative act does not comply with the principle of subsidiarity the Commission must in that case review it and later decide to maintain, amend or withdraw the proposal. If the Commission chooses to maintain the proposal it will have to issue a reasoned opinion wherein it justifies why it considers that the proposal complies with the principle of subsidiarity. Regarding proposals for harmonisation in the tax area this 'orange card procedure' can, however, not be used since Article 113 TFEU (indirect taxation) and Article 115 (direct taxation) stipulates that a special legislative procedure shall be implemented in those cases. To sum up, the introduction of the monitoring process aims to give the national parliaments a bigger part in the Union legislative process and thereby partly restore some of the democratic deficit the Union has been accused of. This relatively new monitoring system is, however, rather complicated and time-consuming, making it maybe even harder to harmonise within the tax area under the Lisbon regime than before.[36]

[36] Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, Articles 6 & 7; Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 105f; Kemmeren, in Weber (ed.) *Traditional and alternative routes to European tax integration,* p. 35.

2.7 The principle of proportionality

Another important principle the European Union must respect when legislating in a certain field is the principle of proportionality. The principle is one of the oldest principles of the Union and is codified in Article 5(4) of the TEU:

> 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'

In European law doctrine the principle of proportionality has developed into a three-step test. When analysing the proportionality of a Union legislative act one should asses the suitability, necessity and proportionality in a strict sense. The suitability question asks whether the measure is suitable to achieve its purported objectives. The necessity question asks whether the measure does not go beyond what is necessary in order to achieve its objectives and whether it is the least restrictive means amongst the various equally effective alternatives. When assessing the last step, the proportionality in a strict sense, one should ask whether the realisation of the goals of the measure entails disproportionate disadvantages compared to its benefits. This last step weighs Member States' interests against Union interests. The three-step test is, however, not universally used or accepted in EU law. The definition in Article 5(4) of the TEU only focuses on the necessity step and the Court has been ambivalent when applying the test. In some cases one can follow all three steps in the Court's logic, while in other cases the Court examines the principle of proportionality by only discussing the suitability and necessity steps.[37]

As presented above, with the Lisbon treaty the European Union adopted a protocol on how the principles of subsidiarity and proportionality should be applied and monitored when drafting legislative acts. The obligations in Article 5 of the protocol, presented in section 2.6, also apply to the principle

[37] Shütze, p. 353; Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 102f.

of proportionality. When assessing the principle of proportionality the Commission, whom is the institution that mostly proposes Union legislation, asks themselves a few questions that can be found in their Impact Assessment Guidelines. When evaluating the scope of the proposed instrument the Commission uses the necessity test by asking whether the measure goes beyond what is necessary in order to achieve its objectives. It also uses a boundary test by asking if the scope of the action is limited to those aspects that Member States cannot achieve satisfactorily on their own. The Commission should also examine if the proposed act creates financial or administrative costs for any part in the Union, and if those costs are minimised. The Union action should also respect national arrangements of the Member States and leave as much scope for national decision as possible. When assessing the nature of the proposed instrument the Commission wants the choice of instrument to be as simple as possible, while still being able to achieve the objectives set out in the act. Finally, the Commission should also properly justify its choice of instrument of the proposed act.[38] The principle of proportionality is not, however, included in the early warning mechanism (the 'yellow card procedure') as the principle of subsidiarity is under Article 6 of the No. 2 Protocol, making the political review of the principle of proportionality, in theory, weaker.

2.8 The intepretation of the principles by the CJEU

2.8.1 The intepretation of the principle of subsidiarity

As earlier stated, the use of the subsidiarity principle as a judicial safeguard of federalism focuses on how the CJEU has interpreted the principle in its

[38] Impact Assessment Guidelines SEC (2009) 92, p. 29f.

case law. A basic problem with the interpretation by the CJEU of a Union legislation that might be in breach of the subsidiarity principle is that it might not be the best place to do so. If the Court were to conclude that the piece of legislation indeed breaches the principle of subsidiarity, it would do so in opposition of the political Union institutions that has agreed to the act in the legislative process. However, the CJEU is the sole institution that has the power to interpret Union law and must therefore evidently do so, even though subsidiarity can be argued to be more of a political issue than a legal one.[39]

The CJEU has never annulled or declared a legislative act as invalid on the ground that it violates the principle of subsidiarity. The issue has, however, been discussed in a few cases.[40] One case in which the CJEU discussed the alleged violation of the principle of subsidiarity is United Kingdom v Council[41] wherein the United Kingdom had applied for the annulment of the Working Time Directive[42]. The United Kingdom argued that the Union legislator didn't fully considered, nor adequately demonstrated that the issue couldn't be satisfactorily regulated by the Member States alone, that such measures would significantly damage the interests of the Member States or whether action taken on Union level would provide clear benefits compared with action on Member State level.[43] The Court's response has structured the judicial vision of the subsidiarity principle ever since.[44] The Court held:

> 'Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action, which otherwise, as in this case, leaves the enactment of the detailed implementing provisions required largely to

[39] Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 99f.
[40] Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 100.
[41] C-84/94 United Kingdom v Council, EU:C:1996:431
[42] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time.
[43] C-84/94 United Kingdom v Council, EU:C:1996:431, paragraph 46.
[44] Schütze, p. 256.

> the Member States. The argument that the Council could not properly adopt measures as general and mandatory as those forming the subject-matter of the directive will be examined below in the context of the plea alleging infringement of the principle of proportionality.'[45]

From this paragraph one can identify two fundamental choices that the CJEU made regarding the interpretation of the principle of subsidiarity. The first choice was that the Court presupposed Union legislation where the Union has decided to harmonise laws. That is indeed conspicuous that the Court answers the 'necessity test' with such simple logics; only the Union can harmonise laws, therefore the Member States has already failed the first test. The second choice the Court made was considering the 'in so far'-part, how the Union should act. Here, the Court decided against the principle of subsidiarity in a wider sense since it does not analyse the intensity of Union intervention under the principle of subsidiarity but rather under the principle of proportionality. By doing so, the Court made a third important choice when interpreting the level of Union intervention of a legislative act. The Court argued that *'the Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments'*[46]. Judicial review should therefore be limited to examining *'whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion'*[47] (the manifest error test). This could be said to constitute a low degree of judicial scrutiny.[48]

A fourth, procedural, conclusion was drawn by the court in subsequent case law from the first and third choices explained above. In Germany v Parliament and Council[49] the German government claimed that the Union legislator in Directive 94/19/EC on deposit-guarantee schemes[50] had not

[45] C-84/94 United Kingdom v Council, EU:C:1996:431, paragraph 47.
[46] C-84/94 United Kingdom v Council, EU:C:1996:431, paragraph 58.
[47] C-84/94 United Kingdom v Council, EU:C:1996:431, paragraph 58.
[48] Schütze, p. 257.
[49] C-233/94 Germany v Parliament and Council, EU:C:1997:231.
[50] Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes.

sufficiently explained how the directive was compatible with the principle of subsidiarity. The German government, however, did not argue that the directive was in breach of the principle itself. Germany argued that the Union must give detailed reasons explaining why the Union, and not the Member States alone, are empowered to act in the specific area and that the Union legislator did not properly explained why the objectives of the directive could not sufficiently be accomplished by action on the level of the Member States. The Court concluded, by analysing the recitals of the directive, that the Union legislator had indeed given consideration to the principle of subsidiarity, even though the principle was not even mentioned in the recitals. The Union legislator considered previous actions by the Member States as insufficient and the legislator therefore found that the legislator itself was indispensable in order to ensure harmonisation in the area. The Court found that this was enough to satisfy the procedural obligations regarding the principle of subsidiarity. Consequently, the Union was not obliged to expressly justify the directive in the light of the principle of subsidiarity.[51]

The first, third and fourth choices has been upheld in subsequent case law by the Court. The Court principally focuses on the 'necessity test' when reviewing the subsidiarity aspect of a Union legislative act. Regarding the 'test of EU Value Added' the Court has in its case law not searched for qualitative or quantitative indicators that an issue can be better solved at the Union level. The manifest error test[52] (explained above) has been upheld by the Court, limiting the judicial review of the subsidiarity principle, and thus leaving the protection of the principle to the political safeguards of federalism.[53]

Regarding the second choice, however, one can argue that the Court is ambivalent. In some cases, the Court has incorporated the question of the

[51] Schütze, p. 257f.
[52] C-84/94 United Kingdom v Council, EU:C:1996:431, paragraph 58.
[53] Schütze, p. 258.

intensity of Union intervention in its subsidiarity analysis while in other cases it has continued to review that intensity when discussing the principle of proportionality.[54] The issue with this ambivalence is that when the Court discusses the intensity of Union intervention under the principle of proportionality, the Court chooses to apply the principle of subsidiarity in a strict sense, making that principle only answer the 'if" question of whether the Union should act and not the 'in so far' question of how the Union should act. In EU law doctrine one can however find arguments that by applying the principle of subsidiarity only in a strict sense, the principle has become only empty formalism. The 'whether' and 'how' questions could be argued to be inherently tied together and cannot be separated when discussing the principle of subsidiarity. Schütze therefore argues that the subsidiarity principle shall answer the question whether the European legislator has unnecessarily restricted national autonomy. This means that the principle of subsidiarity should be understood as 'federal proportionality'.[55] However, as earlier stated, the Court is still ambivalent to whether subsidiarity should be interpreted strictly or in a wide sense.

To sum up, the case law shows that when the Court review Union legislation in the light of the principle of subsidiarity the Union's interests are favoured over the interest of the Member States, resulting in the fact that Union legislation has so far always been upheld by the Court when facing subsidiarity challenges.[56]

[54] Schütze, p. 258.
[55] Schütze, p. 259.
[56] Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 102.

2.8.2 The intepretation of the principle of proportionality

As stated above in section 2.7, the Court has sometimes[57] used the three-step test (suitability, necessity and proportionality in a strict sense) when reasoning regarding the principle of proportionality. However, in most cases, the Court does not make a distinction between the second and third step, thus only reviewing the suitability and necessity of a Union act when analysing the principle of proportionality. When reviewing the suitability, the Court will check whether the Union measure is suitable to achieve the given objectives. This step is considered quite straightforward and is rarely not satisfied by the Court's review. The necessity test is considered to be more demanding however. The Court shall analyse whether the Union has shown that the adopted measure represents the least restrictive means to achieve the given objectives. However, even though that step is satisfied, the measure can still be disproportionate in a strict sense, when the Court examines if the burdens imposed by the act are excessive or not.[58]

The three-step proportionality test could be considered hard to satisfy theoretically. However, the Court has granted the Union legislator a wide margin of appreciation regarding the principle of proportionality. In fact, as shown by case law, the Court will only intervene regarding the principle of proportionality of a legislative act if the action taken is manifestly inappropriate to the objective sought by the measure.[59] As a result of this, when trying to show that a Union measure does not respect the principle of proportionality, a party would have to show to the Court that the objective of the measure was not one that the Union could pursue under the Treaty, or that the objective could be achieved by less intrusive means. This would

[57] See for example: C-331/88 The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others, EU:C:1990:391, paragraph 13.
[58] Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 103; Schütze, p. 353.
[59] C-331/88 The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others, EU:C:1990:391, paragraph 14; C-122/95 Germany v Council, EU:C:1998:94, paragraph 79.

lead the Court to examine other possible policy solutions, and evaluate whether the solution chosen is appropriate to achieve the objectives and do not go beyond what is required to achieve those objectives.[60] This relaxed standard of judicial review means that the Court rarely finds a Union measure that does not respect the principle of proportionality.[61]

[60] Barnard & Peers, p. 116.
[61] Schütze, p. 353.

3 The 2011 CCCTB proposal

3.1 Background

Although corporate taxation has been considered an important element for the completion of the internal market since the early years of the European Union, direct taxation is still a much debated and controversial topic in the European Union. A number of reports and initiatives have been presented during the years aiming to partly harmonize the corporate tax systems in the European Union. Due to reluctance from most of the Member States to give up their sovereignty on the tax area, all the initiatives presented before 1990 were unsuccessful. Since that year the Commission started, in light of the principle of subsidiarity, to develop initiatives in close cooperation with the Member States that have since led to the adaptation of a few legislative acts regarding direct taxation in the corporate tax field.[62]

In the beginning of the new millennia the Commission identified some important challenges in order to further develop the internal market. The Commission concluded that corporation cross-border activities within the European Union sometimes led to discrimination, double taxation, excessive administration costs and delays in tax refunds. These issues combined with the growing globalisation made the Commission focus on tax policymaking that would enhance the global competitiveness of the European Union. That focus fit well with the strategic goal that the European Council recently had set that the European Union should '…*become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion*'.[63]

[62] Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, COM(2001) 582 final, p. 4.
[63] Tax policy in the European Union priorities for the years ahead, COM(2001) 260 final, p. 6, 7 & 14.

The Commission responded to the strategic goal with a communication based on the study "Company Taxation in the Internal Market"[64]. In the communication, the Commission laid down the requirements future corporate taxation policies within the European Union should meet in order to reach a higher level of economic efficiency within the internal market. The corporate taxation policies should:

- 'contribute to the international competitiveness of EU businesses in line with the strategic goal established by the Lisbon European Council;
- ensure that tax considerations distort as little as possible economic decisions by operators;
- avoid unnecessary or unduly high compliance costs and tax obstacles to cross-border economic activity;
- not hinder the possibility of general tax competition while tackling all harmful or economically undesirable forms of tax competition.'[65]

The Commission was careful to explain that a future harmonised tax rate was not what the Commission aimed at since that is a matter for the Member States to decide, in the light of the principle of subsidiarity. The focus should rather lie on developing a common corporate tax base.[66]

The study concluded that different national tax systems on the internal market leads to certain business obstacles that undermines the international competiveness of European companies and wastes resources. Certain key issues were identified:

- The problem with intra-group transfer pricing potentially leads to high compliance costs and there is a risk for double taxation.

[64] Company Taxation in the Internal Market, SEC(2001) 1681.
[65] Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, COM(2001) 582 final, p. 5.
[66] Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, COM(2001) 582 final, p. 8f.

- The rules regarding cross-border flows of income as well as cross-border loss relief between associated companies also contain a risk of double taxation.
- The Member States' conflicting taxation rights also contains a high risk for double taxation.
- Some Member States' tax systems contained a bias towards domestic investments, which is negative for the economic efficiency.

Most of the problems are a result of the need for the companies to comply with different tax systems on the internal market. The multiplicity of tax laws leads to high compliance costs for the companies and is in itself a barrier to cross-border economic activity.[67]

The long term solution to these issues is, according to the Commission, a comprehensive solution wherein companies only have one set of tax rules to comply with; a consolidated corporate tax base. The consolidated corporate tax base would allow corporations with cross-border activities on the internal market to '*compute the income of the entire group according to one set of rules and establish consolidated accounts for tax purposes (thus eliminating the potential tax effects of purely internal transactions within the group)*'.[68]

According to the Commission, a consolidated corporate tax base would for example:

- reduce the compliance costs corporation suffer from the need to deal with multiple tax systems on the internal market.
- eliminate transfer pricing issues on the internal market,

[67] Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, COM(2001) 582 final, p. 10f.
[68] Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, COM(2001) 582 final, p. 11, 15.

- allow intra-group offsetting and consolidation of profits and losses,
- avoid many double taxation situations, and
- remove many discriminatory national rules.

The result would be greater efficiency, simplicity and transparency in company tax systems, which would allow the European Union to enhance the benefits of the internal market.[69]

The Commission put together a group consisting of experts from national tax administrations who met multiple times between the years 2004 and 2008 in order to discuss and develop a proposal for a common corporate tax base. The group also invited key experts from businesses, professions and academia to express their views on the matter. The Commission ordered several studies in order to prepare a detailed Impact Assessment. Four different options were discussed: one compulsory and one optional CCTB (common corporate tax base without consolidation) and one compulsory and one optional CCCTB (common consolidated corporate tax base). The results from the Impact Assessment showed a slightly higher welfare result for the CCCTB options. The Commission thought the optional CCCTB was preferable, for example, because the results showed that the estimated impact on employment is more favourable and every single company in the European Union does not have to comply with the new method of calculating its tax base, saving the compliance costs for those companies.[70]

When evaluating the effects on tax revenue the Commission pointed out that it is also dependent on the Member States' own policymaking. However, the

[69] Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, COM(2001) 582 final, p. 16.
[70] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p.7f.

Commission claimed that a common corporate tax base, overall, would lead to a broader average tax base than the current one in the European Union.[71]

3.2 The 2011 CCCTB proposal

In 2011 the Commission launched a proposal for a Council directive on a Common Consolidated Corporate Tax Base[72]. In the explanatory memorandum of the proposal, the Commission followed up on the matters debated and explained in the earlier presented Communications from the Commission. The proposal aimed to tackle those business obstacles on the internal market earlier presented in this chapter.[73]

Since the proposal concerns direct tax legislation the legal basis of the proposal falls within the ambit of Article 115 of the TFEU. The article stipulates that the Council shall act unanimously in accordance with a special legislative procedure and issue a directive regarding this question since direct taxation directly affects the establishment or functioning of the internal market.[74]

3.2.1 Elegible companies and optionality

The proposal is a system of rules for computing the tax base of intra-group companies resident in the European Union and of third-country companies' branches located in the European Union.[75] The proposal should apply to companies established under the laws of a Member State and take one of the

[71] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p. 8f.
[72] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final.
[73] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p. 4.
[74] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p. 9.
[75] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p. 5.

company forms listed in Annex I and are subject to one of the corporate taxes listed in Annex II. For a company established under the laws of a third country, has a similar company form to one of the forms listed in Annex I and is subject to one of the corporate taxes listed in Annex II the proposal would also apply.[76] Generally, the proposal would apply to most company forms and corporate taxes existing on the internal market.

However, as stated earlier in this chapter, the Commission chose an optional version of the CCCTB. This means that eligible companies operating on the internal market would decide whether they want to be subject to the new tax system in the proposal or continue to be subject to the national tax systems.[77] If a company or a group of companies would choose the CCCTB system that company or group of companies would cease to be subject to the national corporate tax arrangements in respect of all matters regulated by the proposal for a minimum of five years. A company or a group of companies that would not be eligible or would not opt for the CCCTB system would still be subject to national corporate tax rules.[78]

3.2.2 Tax base rules

The tax base shall be calculated as revenues less exempt revenues, deductible expenses and other deductible items.[79] Such exempt revenues would be, for example, received profit distributions and income of a permanent establishment in a third country.[80] Income consisting in interest and royalty payments should be taxable, with credit for withholding tax paid

[76] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Articles 2(1) & 2(2).
[77] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Article 6.
[78] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p. 5, Articles 7 & 105.
[79] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Article 10.
[80] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Article 11.

on such payments.[81] Deductible expenses shall include all costs of sales and expenses incurred by the taxpayer with a view to obtaining or securing income, which would include costs of research and development.[82] A loss from one fiscal year may be carried forward without time limit and be deducted in subsequent tax years.[83]

3.2.3 Consolidation

Perhaps the most important feature of the CCCTB proposal would be the opportunity of tax base consolidation of groups of companies. That possibility would tackle major tax obstacles for groups of companies such as eliminating transfer pricing formalities and intra-group double taxation. Furthermore, the tax consolidation would mean that losses from one group member are automatically offset against profits from other group members, which would greatly improve the desired tax neutrality conditions on cross-border activities and would therefore better exploit the benefits of the internal market.[84] In order to eliminate transfer-pricing formalities, the transactions between group members should be ignored when calculating the consolidated tax base.[85]

When the consolidated tax base would be negative, the loss should be carried forward indefinitely. When the consolidated tax base is positive it should be shared between the concerned Member States in accordance with the sharing formula, which will be explained later in this chapter.[86]

---

[81] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Preamble 12.
[82] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Article 12.
[83] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Article 43.
[84] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p. 5 & Preamble 12.
[85] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Article 59(1).
[86] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Article 57(2).

In order for a subsidiary to qualify to the consolidation there would be a two-step test that would have to be met based on control and ownership or rights to profit. The parent company must hold more than 50% of the voting rights and have an ownership right amounting to more than 75% of the company's capital or more than 75% of the rights giving entitlement to profit. Such a test would ensure a high level of economic integration between the companies in the group. The two-step test should be met throughout the tax year; otherwise the subsidiary is no longer qualified for consolidation and should leave the group.[87]

3.2.4 Tax administration

Under the rules of the proposal a group of companies would, when settling its tax affairs, only have to deal with one principal tax authority[88] in one Member State instead of all tax authorities in all of the Member States where the group operates.[89] This is a so-called 'one-stop-shop' approach and is aiming to greatly reduce the compliance costs for groups of companies on the internal market and increasing economic efficiency as a result.[90] The principal tax authority may initiate and coordinate audits of group members but may also be initiated on the request of a tax authority of another Member State. When a tax authority of one Member State would disagree with the principal tax authority the decision could, in certain cases, be challenged before the courts of the Member State of the principal tax authority within a period of three months.[91]

[87] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Preamble 16 & Article 54(1); Helminen 2015, p. 262.
[88] For definition, see: Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Article 4(22).
[89] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Article 109.
[90] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p. 5.
[91] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Articles 122 & 123.

3.2.5 Apportionment of the tax base

In order to divide the consolidated tax base between the appropriate Member States, the Commission came up with the following formula[92] for calculating the tax share for Member State A:

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

The formula consists of three equally weighted factors (sales, labour and assets). The asset factor should only consist of all fixed tangible assets within the group and not intangibles nor financial assets due to their mobile nature and the risk of circumventing the system. The labour factor consists of two different factors, namely the payroll and the number of employees. The asset and labour factors would give appropriate weight to the interests of the Member States of origin, whereas the sales factor ensures the interest of the Member State of destination.[93]

If the outcome of the formula would not fairly represent the extent of the business activity of a group member within a Member States, the Commission included a safeguard clause in the proposal as an exception to the formula. The group or the principal tax authority could in that case request the use of an alternative method to calculate the share of the tax base. All of the affected tax authorities must agree to the use of such an alternative method.[94]

[92] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Article 86(1).
[93] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Preamble 21.
[94] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, Article 87.

3.2.6 Compliance with the principle of subsidiarity

The Commission argues that the proposal complies with the principle of subsidiarity since the CCCTB system aims to tackle fiscal obstacles that would not be as effective and likely to create distortion on the internal market if each Member States applied its own system. If the Member States individually would implement non-coordinated action to tackle the discussed obstacles on the internal market it would just replicate the current situation since groups of companies would still need to, for example, deal with a number of different tax authorities and it would also create more distortion on the internal market such as double taxation or non-taxation. Thus, the nature of the subject requires a common approach best solved at the European Union level, since the obstacles are primarily of a cross-border nature and individual actions by the Member States would fail to achieve the intended results.[95]

3.2.7 Compliance with the principle of proportionality

The Commission also thinks that the proposal is both suitable and necessary for achieving the desired outcome and that it represents the most proportionate measure to the discussed distortions on the internal market. The argument is that it is an optional system that does not force all companies on the internal market to adopt the CCCTB system and consequently does not put unnecessary compliance costs on those companies. As discussed earlier in this chapter, the proposal is also expected to create more favourable conditions for investments on the internal market, as tax compliance costs is expected to decrease, transfer pricing formalities

[95] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p. 9f.

would be eliminated and it would open up an opportunity to transfer losses across national borders. The Commission further argues that the positive economic impacts would outweigh the financial and administrative costs the national tax authorities initially would bear in order to adapt to the CCCTB system.[96]

[96] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p. 10.

4 Reasoned opinions following the 2011 CCCTB proposal

During the eight week long period following the launch of the proposal in 2011 the following national parliaments or chambers of national parliaments submitted reasoned opinions in accordance with Article 6 of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality: National Assembly of Bulgaria (2 votes); Dáil Éireann (Lower House) of the Irish Parliament (1 vote); Parliament of Malta (2 votes); House of Representatives of the Netherlands (1 vote); Sejm of Poland (1 vote); Chamber of Deputies of Romania (1 vote); National Council of Slovakia (2 votes); Riksdag of Sweden (2 votes); House of Commons of the UK (1 vote). The total votes from the national parliaments or chambers of national parliaments summed up to 13. The total votes needed to trigger a 'yellow card procedure' under Article 7 (2) of the Protocol were 18 (one third of the total 54 votes). The Commission must therefore only have to take account of the reasoned opinions submitted in accordance with Article 7 (1) of the Protocol and does not have to review the draft under the 'yellow card procedure' under Article 7 (2).[97]

In this chapter, the arguments in the reasoned opinions submitted by the national parliaments or the chambers of the national parliaments will be presented. As earlier stated, the national parliaments or the chambers of the national parliaments should state in the reasoned opinions why it considers that the draft in question does not comply with the principle of subsidiarity. However the submitted reasoned opinions contains not very many arguments regarding the principle of subsidiarity but rather arguments regarding the principle of proportionality and the union competence and legal basis of the proposal.

[97] Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 110f.

4.1 Union competence and legal basis

The Sejm, the lower house of the Polish Parliament, argued in its reasoned opinion that the European Union lacks competence altogether to adopt legal acts regarding direct taxation and that the only competence the Union has regarding taxation is to adopt legal acts regarding indirect taxes in accordance with Article 113 of the TFEU. Direct taxation instead falls within the exclusive competence of the individual Member State and by proposing the CCCTB the Commission therefore exceeds the competences conferred upon the Union.[98]

Should the Sejm's argument have any merit the Proposal would not be legitimate, and would it ever be adopted as a directive the CJEU would then probably judge it null and void. Indeed, direct taxation is not directly listed as a Union competence in the TFEU. However, the shared competence between the Member States and the Union regarding the internal market listed in Article 4(2) (a) of the TFEU has, together with Article 115 of the TFEU, earlier acted as legal basis for legal acts regarding direct taxation, e.g. the Parent-Subsidiary Directive. Since neither that directive, nor any other directive adopted on the same legal basis concerning direct taxation has been challenged on the ground of lack of Union competence it seems not very farfetched to argue that the Sejm's argument is without merit. Article 115 of the TFEU states that the Union has competence to adopt legal actions that 'directly affect the establishment or functioning of the internal market', giving the Union a very broad competence and under which legal acts concerning direct taxation must be considered to belong.[99]

[98] Reasoned opinion of the Sejm of the Republic of Poland; Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 111.
[99] Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 112.

The Maltese Parliament also had some issues concerning the legal basis of the proposal. In its reasoned opinion, the Maltese Parliament points to the wording of the Article 115 of the TFEU referring to the 'approximation of laws'. The Parliament argues that approximation means that 'a common result is achieved through the convergence of national laws to achieve that end' and that it does not mean a creation of a law or a unique European system.[100] However, under EU law there does not seem to be a distinction between 'approximation of laws', 'harmonisation' or 'introduction of a common system', meaning that the common system that would be introduced under the proposal would definitely fall within the scope of article 115 of the TFEU.[101]

Furthermore, the Maltese Parliament also argues that Article 115 of the TFEU does not have a broader scope than Article 114 of the TFEU and therefore does not grant the Union a wider scope of action. The argument is that Article 114 cannot be applied in this matter due to the wording in Article 114 (2), stating that paragraph 1 shall not apply to fiscal matters, and since Article 115 states that 'without prejudice to article 114' that exclusion of harmonisation of fiscal provisions should also apply under article 115.[102] Szudoczky argues that it would not make sense if Articles 114 and 115 TFEU, with different legal bases and different legislative procedures, would have the same sphere of application. Instead, the wording in article 115 'without prejudice to article 114' refers to the fact that Article 115 does not deteriorate the effectiveness of Article 114. It means that harmonisation should be based on Article 114 in all fields that is not excluded from its scope. The ordinary legislative procedure should therefore be used as a main rule for harmonisation of national laws. Paragraph 2 of Article 114 points out the fields where harmonisation should be carried out by special legislative procedure under Article 115 and therefore broadens the scope of

[100] Reasoned opinion by the House of Representatives, Maltese Parliament, p. 2.
[101] Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 114.
[102] Reasoned opinion by the House of Representatives, Maltese Parliament, p. 2; Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 114.

action of the Union. Consequently, Article 115 can therefore serve as a legal basis for the proposal.[103]

4.2 Compliance with the principle of proportionality

The Maltese Parliament argued further against the proposal in the light of the principle of proportionality. The concerns raised points out that the proposal does not comply with the principle of proportionality since the benefits with the proposal does not outweigh the burdens on national autonomy and sovereignty. The Parliament argues that the rules in the proposal would hinder the Member States to take decisions regarding national tax policy and that it negatively affects the autonomy of the Member States and their ability to structure their tax systems according to their own socio-economic circumstances. Amongst the different policy options discussed the proposed optional CCCTB is considered the option that is the most intrusive and causes the greatest changes in the national fiscal systems. In addition, even though these burdens would be imposed on the Member States the Maltese Parliament argues that the Commission has not properly shown that the promised results would occur. The Parliament instead argues that a less intrusive policy option, such as a common corporate tax base (CCTB without consolidation) could achieve the desired objectives without as much intrusion on the sovereignty of the Member States. Furthermore, the proposal would be especially burdensome for those Member States with an economy that depends on services. To sum up, the Maltese Parliament thinks that the burdens the proposal inflicts are greater than the benefits and that the benefits presented are merely speculative.[104]

[103] Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 114f.
[104] Reasoned opinion by the House of Representatives, Maltese Parliament, p. 2f; Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 115.

Most of the other parliaments or chamber of parliaments that sent a reasoned opinion presented arguments against the proposal for not complying with the principle of proportionality. The Irish lower house, Dáil Éireann, is doubtful whether adding another tax system would lead to those benefits the Commission hopes. Instead, Dáil Éireann argues that the proposal would not result in a simple or efficient corporate tax system. The benefits proposed by the Commission would only help the large companies and not the SME's and the objectives with the proposal would therefore not be met. Furthermore, Dáil Éireann argues that the proposal would only benefit the larger Member States, whilst Ireland would be amongst a group of six smaller Member States whose businesses would be hardest hit by the proposal. The Irish lower house also sees a risk with the proposal that it would lead to decreasing budget revenues from corporate taxes and a reduction in GDP, employment and foreign investments for certain Member States.[105]

The Romanian Chamber of Deputies argues in its reasoned opinion that the apportionment formula in the proposal could be considered unbalanced, non-equivalent or unfair and would have adverse effects on the tax revenues of some Member States, including Romania, which would lead to uncertainty and unpredictability for the Member States and thus negatively affect foreign investments. Adding the CCCTB system alongside with the national tax systems would also lead to increased administrative costs for the national tax administrations. The Chamber of Deputies also points out that the Commission has not presented any proof of the argued long-term benefits with the proposal. Finally, a risk is pointed out that the expected shrinking tax base would lead to higher tax rates since the Member States would have to compensate for the loss in tax revenues.[106]

[105] Reasoned opinion by Dáil Éireann, p. 2f; Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 120.
[106] Reasoned opinion by the Chamber of Deputies of Romania, p. 3f; Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 120.

The National Assembly of Bulgaria argues that the apportionment formula would cause tax base reductions in some Member States and agrees with the Romanian Chamber of Deputies that it would cause the Member States to increase their tax rates to compensate for the loss in tax revenues. Furthermore, it is also argued that two tax systems would lead to an additional administrative and financial burden for the Member States and that the proposal in whole would have a negative impact on investments.[107]

Both the House of Representatives of the Netherlands and the National Council of Slovakia has similar arguments as presented above from other parliaments or chambers of parliament. It is pointed out that the proposal would have a negative impact on GDP, that the reduced tax base would cause reduced tax revenues and that it would increase administration costs for the Member States. The National Council of Slovakia further points out that the proposal would have a negative effect on employment whilst the House of Representatives of the Netherlands also argues that the proposal would have a negative effect on the level of investment and that the apportionment formula is unfavourable towards Member States with a large service sector due to the fact that factors like intangible and financial assets are not included in the apportionment formula.[108]

Regarding the compliance with the principle of proportionality the Swedish Riksdag argues in its reasoned opinion that the proposal goes one step further than necessary because the Member States are better suited than the EU to design tax systems since corporate taxation are closely linked to other parts of the national tax system and with the Member State's policymaking. In addition, national tax corporate systems are designed in a way that suits the structure of the economy in each Member State and that the introduction

[107] Reasoned opinion by the National Assembly of Bulgaria; Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 119.
[108] Reasoned opinion by the House of Representatives of the Netherlands, p. 2f; Reasoned opinion by the National Council of Slovakia; Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 118f.

of the CCCTB would therefore affect competition negatively on the internal market and consequently also the productivity.[109]

4.3 Compliance with the principle of subsidiarity

The House of Commons of the UK discusses in its reasoned opinion the proposal in the light of the principle of subsidiarity. It argues that the Commission does not clearly show the evidence and only assumes that the issue has transnational aspects that cannot be satisfactorily regulated by action by Member States, for example through informal coordination (necessity test). Nor does the House of Commons accept the lack of evidence that action at EU level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States, since the impact assessment shows a negative impact on investment, employment and GDP at the Union level, with only a marginal gain in welfare (test of EU value added).[110]

The lower house of the Irish Parliament also argues that the Commission does not clearly demonstrates that actions by the Member States, such as informal cooperation or bilateral solutions, may not be equally effective in achieving the objectives discussed in the Proposal (necessity test).[111]

The Maltese Parliament also had some arguments in its reasoned opinion relating to the principle of subsidiarity. It argues that the Member States on their own could sufficiently achieve specific objectives in the proposal (necessity test). Regarding the desired reduce of compliance costs for businesses the Parliament argues that that objective could be achieved through the introduction of electronic means at the Member State level.

[109] Reasoned opinion by the Riksdag of the Kingdom of Sweden.
[110] Reasoned opinion of the House of Commons, paragraphs 22 & 24.
[111] Reasoned opinion by Dáil Éireann, p. 2.

When discussing transfer pricing issues the Parliament argues that these issues would still exist for companies that have not opted for the CCCTB and between companies in different CCCTB groups (EU-value added). Furthermore, the Parliament points out that mechanisms already exists that deal with issues regarding transfer pricing (necessity test).[112]

4.4 Summary of arguments

The arguments stated by the different parliaments and chambers of parliaments of the Member States in their reasoned opinions could be summed up in the following manner.

Regarding the principle of proportionality the overall argument is that the burdens put on the Member States and businesses in the European Union by the CCCTB proposal from 2011 is greater than the benefits it would result in. Specifically, the parliaments and chambers of parliaments argues that:

- the Member States' autonomy and sovereignty regarding decision-making over their own tax systems would become too restricted;
- the European Commission has not properly proved that the implied results with the proposal would occur;
- certain objectives could be accomplished less intrusively for the Member States and businesses with the CCTB option;
- adding an extra tax system wouldn't simplify for the Member States and businesses, but rather complicate the situation further;
- the proposal would lead to increased administrative costs for the Member States;

[112] Szudoczky in Weber (ed). *CCCTB: selected issues*, p. 115ff; Reasoned opinion by the House of Representatives, Maltese Parliament, p. 3ff.

- the apportionment formula is unbalanced, unfair and is unfavourable towards some Member States, especially those with a big service sector;
- the proposal would lead to a tax base reduction for certain Member States that could force the Member States to increase their tax rates, and
- the proposal would negatively affect foreign investments, employment and GDP in certain Member States.

Regarding the issues with the principle of subsidiarity the arguments can be divided into arguments regarding that the proposal does not live up to the necessity test and arguments that it does not live up to the EU value added test. Regarding the necessity test, the arguments are that:

- it isn't proved that the Member States together couldn't achieve the desired objectives without the help of the EU;
- the desired reduce of compliance costs for businesses could be achieved through the introduction of electronic means at the Member State level, and that
- there are already international mechanisms dealing with the issue of transfer pricing.

Regarding the test of EU value added the arguments are that it isn't proved that the proposed CCCTB initiative on EU-level would create better benefits than an initiative would have on a Member State level and that the issues with transfer pricing would still exist for groups of companies not opting for the CCCTB-system and for related companies in different CCCTB-groups.

5 The 2016 CCCTB package

In June of 2015, the Commission issued a press release, stating that the CCCTB proposal would be revised and re-launched. The Commission argued that despite the failure to adopt the CCCTB proposal from 2011, there was a political consensus that the proposal should be reviewed and revived, since it would offer major benefits. At this point, the Commission intended to make the CCCTB mandatory, at least for multinational companies, since the political focus of the CCCTB had shifted from first, primarily, focusing on simplifying the tax environment for businesses to now focusing more and more of the anti-avoidance aspects of the proposal. The press release also stated that the new proposal would have a step-by-step approach where the consolidation step would be postponed, since this part had been the most difficult part to agree on with the 2011 proposal. This aimed at making it easier for the Member States to agree on the common corporate tax base and the international elements of the proposal to prevent base erosion and profit shifting. The consolidation step would be implemented as a second step, once the Member States have agreed on the common tax base.[113]

Consequently, the Commission proposed a comprehensive corporate tax reform for the European Union in October of 2016, with a re-launched CCCTB package as the key element. The Commission made good on its intentions from 2015 to take a step-by-step approach. This time the CCCTB package is divided into two directive proposals – one CCTB proposal and one CCCTB proposal. Simplified, the CCTB proposal aims to provide one single set of rules to decide how a company's profit will be taxed, while the CCCTB proposal aims to introduce the consolidation step, which would

[113] Questions and Answers on the CCCTB re-launch, MEMO/15/5174; Questions and Answers on the Action Plan for Fair and Efficient Corporate Taxation in the EU, MEMO/15/5175; Commission presents Action Plan for Fair and Efficient Corporate Taxation in the EU, IP/15/5188.

allow a group of companies to add up all of its profits and losses to reach a net profit or loss for the entire group of companies. The Commission hopes that the decision to split the CCCTB in two would make the negotiation process more manageable and lead to a quicker decision. However, since the aim is to implement the two proposals separately, there is a risk that the CCTB proposal will be agreed upon and implemented, while the CCCTB proposal will not. The Commission admits that this is a risk, but still argues that an implemented CCTB proposal would still bring some important improvements to the corporate tax environment in the EU.[114]

The CCTB proposal and the CCCTB proposal from 2016 will be briefly presented in the following subchapters. The presentation will focus on the proposals' key changes compared to the CCCTB proposal from 2011.

5.1 The 2016 CCTB proposal

5.1.1 Mandatory for large groups of companies

Different from the 2011 proposal with its optional system, the 2016 CCTB proposal is mandatory for groups of companies above a certain size. The qualification rules are, however, quite similar to the rules for eligible companies and subsidiaries qualifying for consolidation in the 2011 CCCTB proposal. The rules in the CCTB proposal will apply to companies established under the laws of a Member State and take one of the company forms listed in Annex I and are subject to one of the corporate taxes listed in Annex II. The parent company must hold more than 50% of the voting rights and have an ownership right amounting to more than 75% of the company's capital or more than 75% of the rights giving entitlement to profit. However, the requirement of a certain size of the group of companies would also have to be met. For the rules to apply to a company, the

[114] Commission proposes major corporate tax reform for the EU, IP/16/3471; Questions and Answers on the package of corporate tax reforms, MEMO/16/3488.

company must also belong to a consolidated group with a total consolidated group revenue that exceeds EUR 750 000 000 during the previous financial year.[115] This size requirement will exempt micro-enterprises and SME's from the mandatory application of the CCCTB package. However, there is still a possibility for those groups of companies to opt in to the CCCTB system, allowing those groups to benefit from the advantages of the CCCTB package.[116]

5.1.2 Tax base rules

The tax base rules of the CCTB proposal have a broad design; all revenues will be taxable unless expressly exempted. In order for expenses to be deductible, the expenses must be incurred in the direct business interest of the taxpayer[117]. Such expenses shall specifically include all costs of sales and all expenses, net of deductible value added tax, that the taxpayer incurred with a view to obtaining or securing income, including costs for research and development and costs incurred in raising equity or debt for the purposes of the business.[118]

With the proposal, the Commission introduces a super-deduction for research and development costs in order to support innovation on the internal market. The actual R&D costs will be fully deducted in the year they arise. In addition to this, an extra 50% deduction is allowed for R&D costs up to EUR 20 000 000. Above that sum, taxpayers may deduct 25% of the exceeding amount. In order to even further stimulate small and innovative entrepreneurship, the proposal contains an enhanced super-deduction for small starting companies, depending if they meet some given

[115] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, Articles 2 & 3.
[116] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 8.
[117] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, Article 9(1).
[118] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, Article 9(2).

conditions. For example, the company shall not have any associated enterprises and it shall not have been registered for longer than five years. If the company qualifies as such a small starting company, it may instead deduct an extra 100% of its R&D costs up to EUR 20 000 000.[119]

Since the CCTB proposal does not include consolidation, the arm's length principle must be taken into account when calculating the tax base. The proposal contains an arm's length rule stating that where conditions are made or imposed in relations between associated enterprises that differ from those that would have been made between independent enterprises, any income that would have accrued to the taxpayer, but because of those conditions has not so accrued, shall be seen as taxable income.[120]

5.1.3 Loss compensation

Even though the CCTB proposal does not contain rules regarding consolidation, it still introduces some special rules regarding cross-border losses. The general rule is that the proposal allows indefinite loss carry forward for a company, without restrictions on the deductible amount per year. In addition, as a small introduction to the consolidation step in the CCCTB proposal, the CCTB proposal introduces a possibility, under some strict conditions, for companies to consider losses incurred by an immediate subsidiary or permanent establishment situated in other Member States. This cross-border loss relief will, however, only be temporary since the parent company will add back to its tax base the deducted amounts when the subsidiary or permanent establishment situated in the other Member State

[119] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 9f & Article 9(3).
[120] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, Article 57(1).

becomes profitable. If this does not occur within five years, the deducted losses will be added back automatically.[121]

5.1.4 Allowance for Growth and Investment

The Commission aims to change the current situation in some Member States, where there is a definitive advantage in favour of financing investments through debt as opposed to equity due to an asymmetry whereby interest paid out on loans is deductible whereas profit distributions are not. This situation discourages equity financing of investments and can lead the companies on the internal market to become heavily indebted when financing investments through debt instead. The CCTB proposal includes rules to neutralise this situation. The taxpayers will be given an allowance for growth and investment (AGI) according to which increases in their equity will be deductible from their taxable base subject to certain conditions.[122]

5.1.5 Anti-BEPS rules

The Commission has strengthened the anti-BEPS rules in the new CCTB proposal compared to the CCCTB proposal from 2011. It has introduced an interest limitation rule that aims to limit the deductibility of interest and other financial costs, in order to obstruct practices of profit shifting towards low-tax countries. The rule allows full deductibility of interest and other financial costs to the extent that they can be offset against taxable interest and other financial revenues. The surplus of interest costs is subject to deductibility restrictions.[123] The proposal also contains more far-reaching CFC rules and introduces special rules in order to close the loophole created

[121] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 10f & Articles 41 & 42
[122] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 10.
[123] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 10.

by mismatches in different national tax law some groups of companies exploits in order to get double deduction or a deduction in one state without inclusion of the corresponding income item in the other state. Finally, the CCTB proposal, similarly to the 2011 CCCTB proposal, contains a general anti-abuse rule aiming to prevent non-genuine arrangements, which have been set up with the essential purpose of obtaining a tax advantage that defeats the object or purpose of the CCTB directive.[124]

5.1.6 Legal basis, subsidiarity and proportionality

The legal basis of the CCCTB package is Article 115 of the TFEU. As earlier stated, the measures of approximation under this article shall directly affect the establishment or functioning of the internal market. The interesting thing here is that the Commission bases its standpoint on arguments regarding the re-launch of the complete CCCTB package (i.e. including the CCCTB proposal). The Commission argues that the re-launch of the CCCTB aims to facilitate business within the EU by introducing a common system for corporate tax legislation and to make the tax system more robust and resilient to aggressive tax planning. Both objectives are considered to have heavy impact on the internal market as they aim to avoid distortions in its functioning.[125]

When explaining how the CCTB proposal complies with the principle of subsidiarity the Commission also decides to base its standpoint on arguments regarding the complete CCCTB package. The Commission argues that even though the issues the CCCTB package aims to tackle have

[124] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 11 & Article 58; Loyens & Loff, 'The CCTB and CCCTB Proposals: Huge Impact Expected for Company Taxation', <http://cdn.loyensloeff.com/media/7264/genoteerd-english-quoted_109.pdf>, p. 11ff, visited 2017-01-04.
[125] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 4.

distinct origins, these issues can only be tackled effectively through a common solution on the Union level. The alternative, to make the Member States to take actions separately would maintain, or even worsen, the current situation, as the businesses would still have to deal with 28 different tax systems. The CCCTB package aims to increase job growth throughout the internal market and prohibit aggressive tax planning and since these objectives are of a multinational nature, the most efficient measure to implement would be that of a common one. Otherwise, the field of corporate taxation would still remain fragmented, allowing present fiscal obstacles and unfair tax competition practices to continue to exist. In fact, the Commission argues that most key features of the CCCTB package could only be achieved through collective action on Union level, such as the issues with double-taxation, double non-taxation, cross-border loss relief and intra-group transfer pricing.[126]

Regarding the compliance with the principle of proportionality, the Commission states that the proposed measures are both suitable and necessary for achieving the objectives. Here, the Commission first focuses on the CCTB proposal when arguing that it does not go further than harmonising the corporate tax base, which would be necessary to prevent the identified business obstacles on the internal market. Then the Commission continues to argue about the complete CCCTB package when stating that it does not restrict the Member States' sovereignty to determine their desired amount of tax revenues in order to meet their budgetary policy targets, since the CCCTB package does not affect the Member State's right to set their own tax rates. Furthermore, the Commission argues that mere coordination between the Member States would not suffice since tax coordination measures mostly targets specific issues and cannot solve the identified issues on the internal market, which instead requires a holistic solution. Another argument regarding the compliance with the principle of proportionality is that the CCCTB package would only be mandatory for a

[126] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 4f.

certain category of taxpayers, namely groups of companies above a certain size. The Commission argues that it is mainly these large groups of companies that suffers the identified issues and have the possibility to participate in aggressive tax planning.[127]

5.2 The 2016 CCCTB proposal

As explained earlier, the second step of the CCCTB package is the consolidation step, introduced in the CCCTB directive proposal COM(2016) 683 final. The rules laid down in the proposal are very similar to those in the 2011 CCCTB proposal. The 2016 proposal will therefore only be explained briefly.

5.2.1 Consolidation

One key change is that the CCCTB will be mandatory for those groups of companies who also qualify for the mandatory CCTB proposal.[128] The rules that define a consolidated tax group are the same as the 2011 CCCTB proposal; the two-part test based on control (more than 50 percent of voting rights) and ownership (more than 75 percent of equity) or rights to profits (more than 75 percent of rights giving entitlement to profit).[129] Those SME's that have opted for the CCTB are not obliged to also adopt the CCCTB.

The basics regarding the calculation of the common consolidated tax base for the group of companies are similar to the rules in the 2011 CCCTB proposal. The common tax base is calculated by adding together the tax

[127] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 5.
[128] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2016) 683 final, Article 2.
[129] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2016) 683 final, p. 9.

bases of each company in the group, which allows for cross-border set off of profits and losses. When calculating the tax bases together the intragroup transactions are ignored. If the consolidated tax base is positive it will be allocated to the Member States according to the apportionment formula. If the consolidated tax base is negative, the loss will be carried forward.[130]

5.2.2 Apportionment of the tax base

The apportionment formula that allocates the positive consolidated tax base for a group of companies is unchanged compared to the 2011 CCCTB proposal. It still comprises three equally weighted factors: labour, assets and sales by destination. The labour factor is divided into one payroll part and one number of employees part. The Commission argues that this makes for a fairer distribution since it takes into account differences in the levels of wages in the EU. The asset factor consists of all fixed assets. Intangibles and financial assets are still excluded from the formula due to its mobile nature and the risk of circumventing the system. The Commission argues that this formula with its specific factors and weighting will ensure profits are taxed where they are actually earned.[131] Consequently, the apportionment formula still has this composition[132]:

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

[130] Loyens & Loff, 'The CCTB and CCCTB Proposals: Huge Impact Expected for Company Taxation', <http://cdn.loyensloeff.com/media/7264/genoteerd-english-quoted_109.pdf>, p. 16f, visited 2017-01-04.
[131] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2016) 683 final, p. 10.
[132] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2016) 683 final, Article 28(1).

5.2.3 Tax administration

The tax administration rules of the 2016 CCCTB proposal are similar to the rules in the 2011 CCCTB proposal. The consolidated group will deal with one principal tax authority in the Member State where the group's principal taxpayer (the parent company of the group) is resident for tax purposes. This is commonly referred to as the 'one-stop-shop', since a group would only have to deal with one tax administration. The principal tax authority will initiate and coordinate tax audits of the group. However, tax authorities in other Member States, to which the profits of the group are allocated, also have the right to request the initiation of an audit.[133]

[133] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2016) 683 final, p. 10.

6 Analysis

When summing up the changes between the 2011 CCCTB proposal and the 2016 CCCTB package one finds that the most conspicuous change is that the latter is divided into two proposals. Another big change is that the 2016 CCCTB package is mandatory for big groups of companies. Regarding the tax base rules the 2016 CCCTB package introduces a favourable research and development deduction and an even more favourable deduction for start-up companies. The 2016 CCCTB package also introduces an arm's length principle, temporary loss compensation and stricter anti-BEPS rules. The rules regarding consolidation, the second step of the 2016 CCCTB package, is basically unchanged compared to the 2011 CCCTB proposal. The only change is that the consolidation is mandatory for the same big group of companies for which the CCTB proposal is mandatory. The apportionment formula is unchanged, as well as the rules regarding the tax administration.

In the following two subsections, the arguments concerning the compliance with the principles of subsidiarity and proportionality given by some parliaments of the Member States will be analysed in the light of the changes and similarities between the 2011 CCCTB proposal and the 2016 CCCTB package. Following the two initial sections, the compliance of the 2016 CCCTB package with the principles will be analysed. In the next sections the 'yellow card procedure will be commented on and the overall compliance of the 2016 CCCTB package with Protocol No 2 will be analysed. In the last section, some concluding remarks of this thesis will be presented.

6.1 Proportionality arguments

6.1.1 Less autonomy and sovereignty regarding decision-making

The argument presented by some Member States' parliaments regarding that the Member States' autonomy and sovereignty regarding decision-making of their own tax systems would become too restricted if the CCCTB system would be introduced could be argued to still have some merit to it. It could be argued that the Commission, with the 2016 CCCTB package, still has a very high level of ambition to harmonise the corporate tax system on the internal market. It could actually be argued that the new CCCTB package has an even higher level of ambition due to fact that it is mandatory for big groups of companies, more far-reaching tax base rules and the introduction of stricter anti-BEPS rules. However, since the 2016 CCCTB package is divided into two proposals, there is a chance that only the CCTB proposal will be implemented (or none of course). If that would be the case the rules regarding the calculation of the tax base would be harmonised, but not the rules regarding consolidation, restricting the Member States' autonomy and sovereignty in the tax field a little less. Of course, the rules regarding the calculation of the tax base, together with the level of tax rates, are perhaps the most important tool for Member States in its decision-making in the tax area when trying to create a business friendly environment to attract businesses and investments. Thus, even though only the CCTB proposal would be implemented, it still heavily restricts the Member States' autonomy and sovereignty regarding decision-making over their own tax systems. The Commission responds that the 2016 CCCTB package does not restrict Member States' sovereignty to determine their desired amount of tax revenues since the Member States still have the right to decide its own corporate tax rates[134] - an argument the Commission also presented in the

[134] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 5.

2011 CCCTB proposal[135] when arguing its compliance with the principle of proportionality.

To some extent the argument that the Member States' autonomy and sovereignty regarding decision-making over their own tax systems would become too restricted with the CCCTB package still has some merit. The actual level of restriction is however dependent on the actual outcome of the two proposals. Should only the CCTB proposal be implemented, one could argue that the Member States' autonomy and sovereignty is less restricted than if both proposals were to be implemented.

6.1.2 The implied results has not been proven properly

Another argument some Member States' parliaments presented in 2011 was that the Commission had not properly proved that the implied results with the 2011 CCCTB proposal would occur. Before proposing the 2011 CCCTB proposal the Commission prepared a very detailed impact assessment containing five studies, which each provided a far-reaching economic analysis of the different options. The macroeconomic evidence pointed out the optional CCCTB as the preferred policy option, which the Commission also later proposed in the 2011 CCCTB proposal.[136] Three similar economic studies were included in the impact assessment for the 2016 CCCTB package. The outcome of these studies resulted in a preferred policy option that showed clear advantages over the alternative of taking no action at all – the later proposed mandatory CCCTB for large groups of companies.[137] The

[135] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p. 10.
[136] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p. 7f; Summary of the Impact Assessment, Accompanying document to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), SEC(2011) 316 final, p. 7.
[137] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 6f.

mandatory aspect for large groups of companies was chosen because of the will to capture tax avoiders. The threshold of a total consolidated turnover of EUR 750 000 000 was chosen in the light of the principle of proportionality when trying to include multinational groups of companies and trying to exclude purely domestic ones.[138]

When evaluating the argument that the Commission has not properly proved that the implied results would occur, the question one must pose is what level of evidentiary requirements one could impose on the Commission in these cases. One must accept that trying to completely prove the exact outcome of a policy option is very hard and since the CCCTB proposals are extensive proposals with a lot of different economical aspects one could say that it is near to impossible to prove the outcome. The Commission has evidently completed comprehensive impact assessments when trying to show how the proposed policy options would affect the internal market. It is hard to see what else could be demanded of the Commission. One could of course argue that three economic studies for the 2016 CCCTB package is worse than five studies for the 2011 CCCTB and consequently one could still argue that the argument has merit. However, to do so, one must first examine the quality of the studies and how the different studies were conducted, something that would require a higher level of economical knowledge and cannot be done in this thesis.

It is hard to evaluate the level of evidentiary requirements the parliaments of the Member States would like to impose on the Commission in these cases. However, the institution with the task to interpret EU law is the CJEU. As earlier presented in this thesis, the Court has granted the Union legislator a wide margin of appreciation regarding the compliance with the principle of proportionality and the Court will only intervene regarding the principle of proportionality of a legislative act if the action taken is manifestly

[138] Impact Assessment accompanying the document Proposals for a Council Directive on a Common Corporate Tax Base and a Common Consolidated Corporate Tax Base (CCCTB), SWD(2016) 341 final, p. 41 & 67.

inappropriate to the objective sought by the measure. In the light of these facts, one could argue that the Court would not disapprove of the extent of the impact assessments compiled by the Commission and therefore not agree with the argumentation of some parliaments of the Member States that the Commission has not properly proved that the implied results of the CCCTB package would occur. However, as earlier presented, the Commission has only presented the implied results of the complete 2016 CCCTB package and not the implied results of each separate proposal. Here one could argue that the discussed argument would have merit. The CCTB proposal is planned to be implemented as a first stage of the 2016 CCCTB package and must therefore be treated as a directive proposal of its own since the situation could occur that this will be the only proposal of the 2016 CCCTB package that will be implemented. One could strongly argue that the lack of an individual impact assessment for the CCTB proposal certainly gives merit to the argument that the Commission has not properly proved that the implied results would occur. In fact, here one could develop the argumentation to also argue that the Commission has failed to even present the correct implied results of the CCTB proposal since the impact assessment focuses on the results of the complete CCCTB package.

6.1.3 The CCTB option would be enough to reach certain objectives

Some parliaments of the Member States argued that certain objectives of the 2011 CCCTB proposal could be accomplished less intrusively for the Member States and businesses by only implementing the CCTB option. It could be argued that that argument to some extent no longer has merit. The 2016 CCCTB package is divided in one CCTB proposal and one CCCTB proposal. From the legal basis of the proposals (Article 115 of the TFEU), one can understand that each Member State has veto rights in the Council regarding the implementation of the two proposals. Those Member States who thinks that implementing only the CCTB proposal will suffice by being

the most proportionate option to the discussed tax issues on the internal market could decide to agree to the implementation of the CCTB proposal while vetoing the implementation of the CCCTB proposal. By doing so only some objectives of the complete CCCTB package will be solved, but through less intrusive measures for the Member States than if the CCCTB proposal also would be implemented. One can say that by dividing the 2016 CCCTB package into two proposals the Commission has involuntarily opened up a possibility for the discussed proportionality issue some parliaments had with the 2011 CCCTB proposal to be solved.

However, there is a possibility that those parliaments of the Member States who argued that certain objectives of the 2011 CCCTB proposal could be accomplished less intrusively by only implementing the CCTB option would not even argue that regarding the 2016 CCCTB package. The tax base rules of the 2011 proposal has somewhat changed compared to those rules found in the CCTB proposal. The rules found in the CCTB proposal could be argued to be more far-reaching and thus the parliaments perhaps no longer thinks that the CCTB option is as proportionate as before and would now not even consent to adopt the CCTB proposal.

6.1.4 An additional tax system complicates and leads to higher costs

Adding an extra tax system wouldn't simplify for the Member States and businesses, but rather complicate the situation further is an argument presented by some national parliaments. Related to that is the argument that adding an extra tax system would lead to increased administrative costs for the Member States. The 2016 CCCTB package indeed introduces an additional tax system. The question is how complicated it will be for businesses and national tax administrations. Concerning businesses, the CCCTB package is optional for small and medium sized groups of companies. None of these groups would have to opt in to the new tax system

if the group finds the rules of the system too complicated compared to the relevant national tax systems. Regarding those groups of companies the discussed arguments have little merit since the implied complications with the CCCTB package could be avoided if the group does not think the benefits outweighs them. Large group of companies (above the EUR 750 000 000 threshold) would no longer have the benefit of optionality since the CCCTB package would be mandatory for those groups. For these groups the arguments could be considered to have some merit. They would be forced to adapt to the new tax system that could complicate the tax situation of the group. However, since the new tax system would be the only tax system the large groups of companies would be subject to the complications would arguably only be a problem initially when the group transfer from the national tax systems to the new tax system. This point has the Commission also made in the impact assessment of the 2016 CCCTB package. The estimation is that businesses would decrease its time spent on compliance activities by 8% after implementation of the CCCTB, saving the businesses considerable amounts of money.[139] To sum up, the argumentation that the CCCTB would complicate the tax situation further for the businesses on the internal market could be argued to have little merit. The Commission has developed the CCCTB package to simplify the tax situation for businesses, something one must agree would be the case should the CCCTB package be implemented. One tax system for all the companies in a group must be considered easier to deal with for the group than numerous different national tax systems.

Regarding the argument that adding an extra system would complicate the situation and increase administrative costs for national tax administrations could be argued to have merit at a first glance. The tax administrations would have to deal with the CCCTB system alongside with its national tax system. Since the CCCTB system is a completely new system the initial implementation would take a lot of time and consequently lead to higher

[139] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 8.

costs. When the CCCTB system is implemented it would, arguably, still lead to higher costs since maintaining two parallel tax systems would demand more administration than only maintaining one. However, this argument does not take into consideration the simplifying effects of the proposals. When implementing the CCTB the group of companies appoints one company to be its principal taxpayer. The tax affairs of the group are then mainly dealt with by the administration of the Member State where the principal taxpayer resides. This fact would considerably reduce the amount of administration demanded by the national tax administrations. And when implementing the CCCTB, the consolidation aspect would lead to less administrative costs from reduced dealings with complicated transfer pricing issues.[140] However, the administration of a whole group of companies could arguably be more difficult than the administration of one single company, consequently demanding more administrative work from the national tax administration leading to higher costs.

To sum up, there are a lot of aspects of the CCCTB package that is hard to foresee how they precisely would affect the tax compliance costs for the groups of companies and the administrative costs for the national tax administrations. The discussed arguments could therefore still be considered to have some merit.

6.1.5 Unbalanced apportionment formula and national tax base reductions

The Commission chose to reuse the apportionment formula from the 2011 CCCTB proposal in the new 2016 CCCTB proposal since it was still considered the best approach to ensure that profits are taxed where the

[140] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 8.

relevant economic activity takes place.[141] Since the apportionment formula is the same one could definitely argue that the argument from some national parliaments in 2011 that the apportionment formula is unbalanced, unfair and is unfavourable towards some Member States, especially those with a relatively big service sector, still has merit. The main fact to support this argument is that the apportionment formula does not take intangible and financial assets into consideration. This still has to do with the fact that these assets are easy to relocate and therefore it was expected that businesses would have been trying to manipulate the apportionment by exploiting tax rate differences between Member States.[142]

It was argued that this unbalanced apportionment formula would result in tax base reductions for certain Member States, forcing them to increase their tax rates to ensure the same level of tax revenues. From the economic studies, the Commission conducted for the impact assessment to the 2016 CCCTB package one can note that Luxembourg, the UK, Malta and Spain are expected to lose the most tax revenues.[143] This fact could be used to support the previously discussed argument that the apportionment formula is unbalanced, unfair and is unfavourable towards some Member States, especially those with a relatively big service sector, since at least Luxembourg, the UK and Malta are known for its relatively big service sectors. However, the Commission points out the uncertainty of the results of the studies since the studies only in a limited manner capture the positive impact on tax revenues due to the expected reduction in corporate tax avoidance that the CCCTB package is expected lead to.[144] The uncertainty

[141] Impact Assessment accompanying the document Proposals for a Council Directive on a Common Corporate Tax Base and a Common Consolidated Corporate Tax Base (CCCTB), SWD(2016) 341 final, p. 126.
[142] Impact Assessment accompanying the document Proposals for a Council Directive on a Common Corporate Tax Base and a Common Consolidated Corporate Tax Base (CCCTB), SWD(2016) 341 final, p. 121.
[143] Impact Assessment accompanying the document Proposals for a Council Directive on a Common Corporate Tax Base and a Common Consolidated Corporate Tax Base (CCCTB), SWD(2016) 341 final, p. 150.
[144] Impact Assessment accompanying the document Proposals for a Council Directive on a Common Corporate Tax Base and a Common Consolidated Corporate Tax Base (CCCTB), SWD(2016) 341 final, p. 149.

of how the different aspects of the CCCTB would affect the tax revenues of the Member States makes it hard to draw any conclusion whether the discussed argument has merit or not. However, these uncertainties with the economic studies could be argued to support the earlier discussed argument that the Commission has failed to properly prove that the implied results with the proposal would occur.

6.1.6 Negatively affecting foreign investments, employment and GDP in certain Member States

A few national parliaments argued that there was a risk that the 2011 CCCTB proposal would negatively affect foreign investments, employment and GDP in certain Member States. The argumentation is, however, not very well substantiated in the reasoned opinions. The argumentation seems to originate from the general argumentation that the economic effects with the proposal are hard to foresee and that due to the consolidation some Member States would probably see its tax revenues decline and would therefore have to implement a higher tax rate to compensate and thus would cause foreign investments decline. The Commission argued in the 2011 proposal that the CCCTB system would lead to increased cross-border investment within the Union in the long run due to the fact that the system would create more favourable conditions for investment as tax compliance costs should be expected to decrease.[145] In the 2016 proposals, the Commission still argued that the CCCTB system would create more favourable conditions for cross-border investment. In fact, due to some changed tax base rules in the 2016 proposals compared to the 2011 proposal (e.g. the start-up and R&D super-deductions and the allowance for growth and investment), one could argue that the new CCCTB system would create

[145] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p. 8 & 11.

an even more business-friendly environment regarding foreign investments that would have a positive effect on employment and GDP as well. The Commission argues that under the CCCTB regime, the cost of setting up a subsidiary abroad would decrease by up to 67%, making it a great deal easier for businesses to go abroad. The Commission also presents numbers of how it expects the CCCTB package would affect investments, employment and GDP. The investments are expected to increase up to 3.4% while employment is expected to increase up to 0.6%. The overall economic growth is expected to increase with up to 1.2%. However, the numbers presented are regarding the EU as a whole. Numbers regarding how the individual Member States are affected regarding investments, employment and GDP are not presented. Thus, it is still possible that under the 2016 CCCTB regime certain Member States would see a decrease in investments, employment and GDP. The discussed argument could therefore still be considered to have merit.

6.2 Subsidiarity arguments

The national parliaments that submitted reasoned opinions in 2011 argued that the CCCTB proposal did not comply with the principle of subsidiarity. Unfortunately, not all parliaments presented arguments supporting the incompliance with the principle of subsidiarity even though that is the sole principle that should be discussed in the reasoned opinions. Most national parliaments instead presented arguments primarily claiming the proposal's incompliance with the principle of proportionality. Some national parliaments did however present arguments concerning the principle of subsidiarity. Regarding the necessity test of the principle of subsidiarity the national parliaments argued that: it isn't proved that the Member States together couldn't achieve the desired objectives without the help of the EU; the desired reduce of compliance costs for businesses could be achieved through the introduction of electronic means at the Member State level; and that there are already international mechanisms dealing with the issue of

transfer pricing. Regarding the test of EU value added the arguments were that it isn't proved that the proposed CCCTB initiative on EU-level would create better benefits than an initiative would have on a Member State level and that the issues with transfer pricing would still exist for groups of companies not opting for the CCCTB-system and for related companies in different CCCTB-groups.

The Commission's argumentation regarding the compliance with the principle of subsidiarity in the 2016 CCCTB package was similar to the argumentation in the 2011 CCCTB proposal. The Commission argues that even though the discussed issues have distinct origins, only a common approach would tackle the issues effectively. If the Member States would try to tackle the issues individually, that would only perpetuate, or even worsen, the current situation. The 2016 CCCTB package aims to create jobs and growth on the internal market as well as prevent aggressive tax planning, issues that are common on the internal market and therefore requires a common approach to tackle. Tax avoidance practices in particular are a cross-border issue, since they exploit mismatches in different national tax system to circumvent taxation. Should the Member States take individual action, the Commission argues that it would only solve the discussed issues bilaterally in the best-case scenario.[146]

It is hard to argue that any changes in the 2016 CCCTB package compared with the 2011 CCCTB proposal would heavily affect the level of compliance with the principle of subsidiarity. The proposed action is still on the EU-level, the tax rules are as far-reaching and the Commission's argumentation regarding the principle is similar to the argumentation in 2011. It could therefore be argued that the arguments from the national parliaments that it isn't proved that the Member States together couldn't achieve the desired objectives without the help of the EU and that it isn't proved that the proposed CCCTB initiative on EU-level would create

[146] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, p. 4.

greater benefits than an initiative would have on a Member State level still are relevant. However, since this would be a matter of what standard of evidentiary requirements one could ask from the Commission, one could discuss if those arguments have any merit at all. The Commission has presented logical arguments of why it would be better to take action on the EU-level compared to take action on the level of the Member States, but any hard evidence has not been presented. This would of course have to do with the fact that it would be very hard for the Commission to make impact assessments on every possible action that the Member States could take to tackle the issues discussed. To ask for such a level of evidentiary requirements would be a bit too much. It could therefore be argued that it would be enough for the Commission to show what effect its own proposed action would have compared to the current situation and to argue according to those results.

The argument that the desired reduce of compliance costs for businesses could be achieved through the introduction of electronic means at the Member State level could still be put forward by the national parliaments. The issue is how relevant such an argument actually is. Tax administration would of course do well to become more efficient by introducing more electronic means, but that does not mean that the EU should not strive to reduce the compliance costs further by harmonising tax rules on the internal market. Nor is it certain that the compliance costs for businesses would decline as much by introducing more electronic means in the tax administration as it would by offering a harmonised tax system on the internal market. The same point could be made regarding the argument that international mechanisms already exist that deals with the issue of transfer pricing. The argument could still be put forward regarding the 2016 CCCTB package, but to argue that harmonising the tax system on the internal market would solve the issue more efficiently and thoroughly would not be very farfetched.

Another argument concerning transfer-pricing put forward by a national parliament in 2011 was that these issues would still exist for companies that have not opted for the CCCTB and between companies in different CCCTB groups. This argument could also be put forward regarding the 2016 CCCTB package. However, one could discuss how relevant this argument is. Neither the 2011 CCCTB proposal nor the 2016 CCCTB has as its objective to solve these issues. To argue that some transfer pricing issues still would exist even after the proposals would be implemented even though the proposals are not designed to solve those issues is a quite weak and irrelevant argument.

6.3 Compliance with the principles regarding the 2016 CCCTB package

When summing up sections 6.1 and 6.2 and comparing the rules in the 2011 CCCTB proposal and the 2016 CCCTB package one could argue that more has changed concerning the arguments regarding the compliance with the principle of proportionality than the compliance with the principle of subsidiarity. Some aspects of the proposals concerning the compliance with the principle of proportionality has changed according to what some national parliaments argued in their reasoned opinions. For example, the 2016 CCCTB package is divided into two separate proposals. This could mean that just the CCTB proposal would be implemented while the CCCTB would not, arguably manifesting a less intrusive option that the full CCCTB option. However, some changes could be argued to go in the opposite direction. For example, the two proposals are mandatory for bigger groups of companies, making the 2016 CCCTB package somewhat more intrusive. The stricter anti-BEPS rules and the more far-reaching tax base rules are of course also more intrusive for the Member States, but has its origin in stricter and more far-reaching objectives and could therefore be argued to still be proportionate. It would probably not be too far-fetched to argue that the CJEU would not nullify the 2016 CCCTB package based on the

argument of incompliance with the principle of proportionality. As shown in section 2.8.2, the CJEU has given the Union legislators a wide margin of appreciation regarding the principle of proportionality and the Court will only intervene regarding the principle of proportionality of a legislative act if the action taken is manifestly inappropriate to the objective sought by the measure. This implies a high threshold for the national parliaments to overcome in its argumentation against the proposal's compliance with the principle, something that could be argued the parliaments has not succeeded to do. The arguments could be argued to have merit to some extent, but they do not show that the action taken is manifestly inappropriate to the objective sought by the measure. Consequently, the CJEU would probably not find that the 2016 CCCTB package does not respect the principle of proportionality.

Concerning the compliance with the principle of subsidiarity, one could see that the 2016 CCCTB package is still introduced at Union level and the argumentation from the Commission is still the same: the objectives of the proposals cannot be achieved sufficiently by the Member States alone but can rather be better solved at Union level. Thus, it could be tempting to argue that the arguments from the national parliaments regarding the incompliance with the principle of subsidiarity would still have merit. However, as stated in section 6.2, those arguments could be argued to have little relevance. The objectives with the proposals are mostly cross-border issues that logically require cross-border solutions. The Member States could of course intensify its bilateral commitment by also trying to solve the objectives of the proposals. However, such a solution would be more ineffective and would not lead to such a holistic solution as the proposals would introduce. The arguably weak arguments regarding the incompliance with the principle of subsidiarity from the national parliaments would probably neither persuade the CJEU to nullify the 2016 CCCTB package. Due to the 'manifest error test' developed in case law the Union legislators, also regarding the principle of subsidiarity, benefit from a wide margin of appreciation. This has resulted in that union legislations never have been

overturned by the CJEU when facing subsidiarity challenges and it could be argued that nothing regarding the argumentation concerning the incompliance with the principle of subsidiarity given by the national parliaments about the CCCTB proposals would change that fact. In fact, when analysing the arguably weak arguments from the national parliaments, it could be argued that the main issue that the national parliaments has with the CCCTB proposals is not an issue with the incompliance with the principle of subsidiarity but rather a pure unwillingness to confer such a big piece of tax politics to the European Union. The issue could therefore be argued to be more of a political issue, than a judicial one. However, in the reasoned opinions under the 'yellow card procedure', the national parliament should only state why it considers that the draft in question does not comply with the principle of subsidiarity and nothing else. This could somewhat explain the weak arguments from the national parliaments regarding the incompliance with the principle of subsidiarity since they were forced, if they wanted to express their dissatisfaction with the proposal, to transform a seemingly political issue with the 2011 CCCTB proposal into judicial terms, and more specifically, into arguments only concerning the principle of subsidiarity. This leads the discussion into issues with the 'yellow card procedure', as will be discussed in the next section.

6.4 Yellow card procedure

As earlier explained, the 'yellow card procedure' means that the national parliaments of the Member States can, within eight weeks since a draft legislative act has been proposed, issue a reasoned opinion stating why the said draft does not comply with the principle of subsidiarity. However, as seen in the reasoned opinions issued in the 'yellow card procedure' following the 2011 CCCTB proposal, the national parliaments presented more arguments focusing on the proposal's incompliance with the principle of proportionality. This could possibly be explained by the fact, as explained earlier in this thesis, that it can be difficult to distinguish between the

precise scope of the two principles. Both EU law doctrine and the Court, to some extent, intertwine the principles when discussing its meanings, making it an understandable fault that also the national parliaments mix the two principles together when issuing a reasoned opinion. Another aspect of this is of course that it can be an indication that the national parliaments have more issues with the compliance with the principle of proportionality than with the principle of subsidiarity of the said proposal, and perhaps of draft legislative acts in general.

One important aspect of this discussion is whether the Commission takes arguments regarding the principle of proportionality into account when reviewing the reasoned opinions from the national parliaments. When analysing the changes in the different CCCTB proposals, one could argue that the changes are more related to the principle of proportionality than to the principle of subsidiarity. This could mean that the Commission actually has taken into account the arguments from the reasoned opinions regarding the compliance with the principle of proportionality when developing the new 2016 CCCTB package. However, it is hard to examine exactly what made the Commission to make those changes. Other explanations could of course include political pressure from elsewhere, such as from the Council, or that the Commission also has trouble separating the two principles discussed. However, if the Commission in fact has made the changes because they took the proportionality arguments into account, that is perhaps yet another argument in favour of officially including aspects regarding the principle of proportionality in the reasoned opinions in the 'yellow card procedure'. As presented earlier, the wide margin of appreciation the Court grants to the Union legislators regarding the principles of subsidiarity and proportionality constitutes a weak judicial review of the principles. A strengthened political review, by introducing the principle of proportionality in the reasoned opinions in the 'yellow card procedure', could help to ensure a higher level of compliance of the principle of proportionality. Another argument in favour of introducing aspects regarding the principle of proportionality in the reasoned opinions in

the ‘yellow card procedure’ is that the principle of proportionality is a better tool to use when discussing and balancing the interests of the Member States against the interests of the Union. This is something that the discussed reasoned opinions are perhaps an example of. By officially accepting aspects of the principle of proportionality in the reasoned opinions in the ‘yellow card procedure’, the Union could therefore further restore the democratic deficit the Union has been accused of.

6.5 Compliance with Protocol No 2 regarding the 2016 CCCTB package

In the light of previous sections in this chapter, it would probably not be too farfetched to argue that the 2016 CCCTB package does comply with the principle of subsidiarity and the principle of proportionality, especially since the Court would probably not find any reason to nullify the proposals on those grounds. However, the Court could still find some issues based on the Protocol No 2 with the CCCTB package. As earlier presented, Article 5 of the Protocol requires that the draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. The draft should contain a detailed statement making it possible to appraise compliance with the principles. The detailed statements concerning the compliance with the principles of the two proposals of the 2016 CCCTB package are, as presented earlier, identical. The statements focuses on the compliance with the principles of the complete CCCTB package, and not on the compliance of each separate proposal, something that could be argued to go against the abovementioned requirement in Article 5 of the Protocol. The proposals are separate proposals and must be treated as such, since there is a chance that only the CCTB proposal of the 2016 CCCTB package will be agreed upon and implemented. Should the CCTB proposal be implemented it would thus be done without its own specific detailed statement justifying the proposal with regard to the principles of subsidiarity and proportionality. The question is if the Court would think that this complies with the requirements

in the Protocol no. 2 or not. A relevant case to discuss here is Germany v Parliament and Council[147] explained in section 2.8.1, when the German government claimed that the Union legislator had not sufficiently explained how a directive was compatible with the principle of subsidiarity. The Court concluded that the Union legislator had given sufficient consideration to the principle of subsidiarity, since the legislator considered previous actions by the Member States as insufficient and the legislator therefore found that the legislator itself was indispensable in order to ensure harmonisation in the area. The Union was not obliged to expressly justify the directive in the light of the principle of subsidiarity. Taking this case into consideration when evaluating the CCTB compliance with the requirements in the Protocol no. 2, one could argue that the Commission has justified the CCTB proposal sufficiently, at least when it comes to the compliance with the principle of subsidiarity. However, at the time of the presented case, a requirement to expressly justify the compliance with the principles, as that in the present Protocol no. 2, did not exist. This of course imposes a greater burden at present day on the Union legislator compared to the situation in the discussed case. This fact indeed points towards the conclusion that the Commission has not sufficiently justified the proposal with regard to the principles of subsidiarity and proportionality, since the proposal should contain a detailed statement making it possible to appraise compliance with the principles. To be able to appraise the proposal's compliance with the principles, the required detailed statement must be meant to cover the implications the rules in the proposal are expected to cause. In the CCTB proposal, the detailed statement covers the implications the complete CCCTB package is expected to cause. Thus, it could strongly be argued that the CCTB proposal does not comply with all the requirements in Protocol no. 2.

[147] C-233/94 Germany v Parliament and Council, EU:C:1997:231.

6.6 Concluding remarks

This thesis has analysed the compliance of the 2016 CCCTB package with the requirements found in Protocol (No 2) on the application of the principles of subsidiarity and proportionality. The general question the thesis has answered is 'Does the 2016 CCCTB package comply with the requirements in Protocol (No 2) on the application of the principles of subsidiarity and proportionality?' The focus in the analysis has lied with the proposal's compliance with the principles of subsidiarity and proportionality.

Certain cautious conclusions could be drawn from the analysis. Regarding the general CCCTB issue, one could argue that the national parliaments have a more political problem by handing over such a big area of its tax politics to the EU than they have with the principle of subsidiarity in the proposals. This unwillingness from the national parliaments to hand over such a big area of its tax politics to the EU could also reflect the views of the national governments that are represented in the Council, whom would decide on the agreement of the 2016 CCCTB package. This could lead to yet another failure to reach unanimity in the Council and leave the proposals unimplemented. Should, however, only a few Member States vote against the implementation, the enhanced cooperation could be a viable solution for the other Member States in favour of the proposals in order to further develop the tax harmonisation in the EU. Should the CCCTB be implemented through enhanced cooperation by some Member States and show to be successful it could lead to more Member States wanting to opt in to the system, furthering tax harmonisation gradually instead of trying to force all the Member States into the system at once. Another aspect of this could be that a CCCTB system implemented through enhanced cooperation could distort the internal market further, creating internal tensions and set up more tax barriers between those Member States inside the CCCTB system and those outside the system. This could perhaps be argued to be a trade barrier and go against the whole idea with the internal market of the EU.

This is however a question for another thesis and will not be discussed further here.

Concerning the ‘yellow card procedure’ the analysis has shown that when legislative acts has been challenged with incompliance with the principles of subsidiarity and proportionality one can conclude that the principles suffers from an arguably weak judicial review in the CJEU. This is an argument to also include arguments regarding the principle of proportionality in the ‘yellow card procedure’ in order to instead strengthen the political review of the principles. However, due to the national and Union institutions’ difficulty to separate the scope of the principles, one could argue that this unofficially somewhat already is the case.

When discussing the compliance of the 2016 CCCTB package with the requirements found in Protocol (No 2) on the application of the principles of subsidiarity and proportionality, one could argue that the actual content of the proposal indeed complies with the principles. However, since the detailed statements of the two proposals in the 2016 CCCTB package, that should make it possible to appraise compliance with the principles of a single proposal, are identical, one could argue that at least the CCTB proposal does not fully comply with requirements of the Protocol.

Bibliography

Literature

Barnard, Catherine & Peers, Steve (ed.), *European Union law*, 2014

Helminen, Marjaana, *EU tax law: direct taxation*, 4. ed., IBFD, Amsterdam, 2015

Lang, Michael, Pistone, Pasquale, Schuch, Josef & Staringer, Claus (ed.), *Introduction to European tax law on direct taxation*, 4. ed., Linde, Wien, 2016

Sandgren, Claes, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation*, 3., [extended and revised], Norstedts juridik, Stockholm, 2015

Schütze, Robert, *European Union Law*, Cambridge University Press, Cambridge, 2015

Weber, Dennis Manolito (ed.), *Traditional and alternative routes to European tax integration: primary law, secondary law, soft law, coordination, comitolgoy and their relationship*, IBFD, Amsterdam, 2010

Weber, Dennis Manolito (ed.), *CCCTB: selected issues*, Kluwer Law International, Alphen aan den Rijn, 2012

European Union sources

Treaties

The Treaty on the European Union

The Treaty on the Functioning of the European Union

Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality

Directives

Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time.

Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes.

Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.

Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

Commission communications

Tax policy in the European Union priorities for the years ahead, COM(2001) 260 final.

Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, COM(2001) 582 final.

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

Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2016) 683 final.

Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final.

Commission Staff Working Documents

Company Taxation in the Internal Market, SEC(2001) 1681.

Impact Assessment Guidelines SEC (2009) 92.

Summary of the Impact Assessment, Accompanying document to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), SEC(2011) 316 final.

Impact Assessment accompanying the document Proposals for a Council Directive on a Common Corporate Tax Base and a Common Consolidated Corporate Tax Base (CCCTB), SWD(2016) 341 final.

Press releases

Commission presents Action Plan for Fair and Efficient Corporate Taxation in the EU, IP/15/5188.

Questions and Answers on the CCCTB re-launch, MEMO/15/5174.

Questions and Answers on the Action Plan for Fair and Efficient Corporate Taxation in the EU, MEMO/15/5175.

Commission proposes major corporate tax reform for the EU, IP/16/3471.

Questions and Answers on the package of corporate tax reforms, MEMO/16/3488.

Notice to Members

Notice to Members (35/2011), Reasoned opinion by the House of Representatives of the Kingdom of the Netherlands on the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB).

Notice to Members (37/2011), Reasoned opinion by the Riksdag of the Kingdom of Sweden on the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB).

Notice to Members (38/2011), Reasoned opinion by the National Assembly of the Republic of Bulgaria on the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB).

Notice to Members (39/2011), Reasoned opinion by the House of Commons of the United Kingdom of Great Britain and Northern Ireland on the proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB).

Notice to Members (40/2011), Reasoned opinion by the Sejm of the Republic of Poland on the proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB).

Notice to Members (41/2011), Reasoned opinion by the House of Representatives of the Republic of Malta on the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB).

Notice to Members (42/2011), Reasoned opinion by the National Council of the Slovak Republic on the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB).

Notice to Members (43/2011), Reasoned opinion by Dáil Éireann of the Republic of Ireland on the proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB).

Notice to Members (45/2011), Reasoned opinion by the Chamber of Deputies of Romania on the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB).

Electronic sources

European Union, 'Division of competences within the European Union', <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:ai0020>, visited 2017-01-04.

Loyens & Loff, 'The CCTB and CCCTB Proposals: Huge Impact Expected for Company Taxation', <http://cdn.loyensloeff.com/media/7264/genoteerd-english-quoted_109.pdf>, visited 2017-01-04.

Table of cases

Court of Justice of the European Union

Case C-331/88.
Judgment of the Court (Fifth Chamber) of 13 November 1990.
The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others.
Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United Kingdom.
Substances having a hormonal action - Validity of Directive 88/146/EEC.
EU:C:1990:391

Case C-84/94.
Judgment of the Court of 12 November 1996.
United Kingdom of Great Britain and Northern Ireland v Council of the European Union.
Council Directive 93/104/EC concerning certain aspects of the organization of working time - Action for annulment.
EU:C:1996:431

Case C-233/94.
Judgment of the Court of 13 May 1997.
Federal Republic of Germany v European Parliament and Council of the European Union.
Directive on deposit-guarantee schemes - Legal basis - Obligation to state reasons - Principle of subsidiarity - Proportionality - Consumer protection - Supervision by the home Member State.
EU:C:1997:231

Case C-122/95.
Judgment of the Court of 10 March 1998.
Federal Republic of Germany v Council of the European Union.
Framework Agreement on Bananas - GATT 1994 - Final Act.
EU:C:1998:94