THE COMMON CONSOLIDATED CORPORATE TAX BASE (CCCTB) – ISSUES FOR MEMBER STATES OPTING OUT AND THIRD COUNTRIES: A CRITIQUE AND SOME IN DEPTH ANALYSIS

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A recent article in European Taxation, entitled "*The Common Consolidated Corporate Tax Base – Issues for Member States Opting Out and Third Countries"* ("March 2008 article") raised a number of issues concerning the EU Common Consolidated Corporate Tax Base (CCCTB) project which are worthy of further analysis given the importance of the topic at the moment. Two conclusions of that article, that "[m]any areas in the design of the CCCTB have not been thought through" and that "it is imperative for any non-CCCTB jurisdictions to be actively involved in the CCCTB project so as to ensure that their interests are sufficiently safeguarded", triggered this re-examination of the work carried out to date by the Commission Services and the Working Groups on the CCCTB project.

This article challenges a number of points made in that article and attempts to re-examine the current state of play of the CCCTB without repeating the contents of the Commission documents. Instead, focus is placed on some of the contentious issues arising from that article with particular emphasis on the interpretation of the Court's case law in this area. These issues are highlighted at the start of each section.

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Section A: *AMID* and *Futura Participations:* cross-border losses and the CCCTB

> "The European Court of Justice (ECJ) has dealt with this issue, but not very satisfactorily. For example, ECJ case law is not clear insofar as relief for cross-border losses of the same company is concerned. In some cases, the cross-border offsetting of losses between the head office and the branch was permitted, whilst in other cases it was not."

> "In *AMID*, a loss-making Belgian company was allowed to offset its losses against a profit-making foreign branch (ECJ, 14 December 2000, Case C-141/99, *Algemene Maatschappij voor Investering en Dienstverlening NV(AMID) v. Belgian State*)." (Footnote 11)
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> "In *Futura*, a French company was not permitted to carry forward losses against the profits of its Luxembourg branch (ECJ, 15 May 1997, Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions*)." (Footnote 12)

This criticism of the European Court in the area of cross-border losses in relation to a single company appears to be unfounded. The Court's case law concerning branches and their losses, and cross-border loss relief when the loss is at the head office level is consistent and in line with its other jurisprudence in the direct tax area.

The *AMID* and *Futura Participation*s decisions are clearly distinguishable: in *AMID*, the Court was dealing with an "origin" State tax rule and losses at the head office level, in the "origin" Member State; in *Futura Participations*, the Court was examining a "host" State tax rule and losses at the branch level, in that "host" Member State.

There was never any question in *AMID* of the losses having to be relieved cross-border in Luxembourg. This is a misinterpretation of the Court's judgment because it is clearly specified in *AMID* that "in its Belgian Corporation Tax return in respect of the 1982 accounting year, [AMID] deducted its Belgian loss of 1981 from its Belgian profits of 1982".[2] It was this deduction that was denied by the Belgian tax

2 *AMID* paragraph 11.

rules. Similarly, in *Futura Participations*, [3] there was never an issue of cross-border loss relief, as such: the losses at issue related to the Luxembourg branch and were not at the head office level in France.

***AMID*[4]**

In *AMID*, Belgian loss relief rules impacted on a Belgian resident company with a Luxembourg branch; the Luxembourg branch made profits and the Belgian head office made losses. Under the Belgian-Luxembourg Double Tax Convention (DTC), the income of Luxembourg branches of Belgian companies was exempt in Belgium. Since, under the Luxembourg tax system it was not possible to obtain loss relief for the Belgian losses in Luxembourg, AMID sought to carry forward its losses against its profits in Belgium the following year. This was refused by the tax authorities because AMID had made profits in Luxembourg the previous year through its Luxembourg branch. AMID argued that the Belgian loss relief rules were in breach of the freedom of establishment.

The ECJ agreed, noting that the legislation "establishes a differentiated tax treatment as between companies incorporated under national law having establishments only on national territory and those having establishments in another Member State…those companies are likely to suffer a tax disadvantage which they would not have to suffer if all their establishments were situated in the Member State of origin".[5] Belgium was unable to demonstrate any objective difference between a Belgian company which, having no establishments outside Belgium (the "Non-migrant") incurred a loss, and a Belgian company which, having an establishment in Luxembourg, incurred a loss in Belgium and made a profit in Luxembourg in the same tax year (the "Migrant"). Moreover, Belgium offered no justification for this different tax treatment of comparable situations.

Consequently, the Court found that the Belgian tax rules were precluded by Article 43 EC (Article 52 of the Treaty at the time of the case). The Court's emphasis was on the "stranded" losses which otherwise might remain unrelieved in either the

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3 See Katri Aarnio, "*Treatment of permanent establishments and subsidiaries under EC law: towards a uniform concept of secondary establishment in European tax law?"* EC T.R. 2006, 15(1), 18-26; Jose M. Calderon Carrero and another, "*Accounting, the permanent establishment and EC law: the Futura Participations case"*, EC T.R. 1999, 8(1), 24-38; Timothy J. Lyons, "*Futura Participations: discriminatory accounting"*, B.T.R. 1998, 1, 61-64; Eric G. Tomsett, "*Recent developments in EC tax law: recent cases: discrimination under European law: accounting requirements*", C.T.R. 1998, 1(3), 279-280.

4 See Fabrizio Amatucci, "*Limited tax liability of non-resident companies and freedom of establishment"*, EC T.R. 2003, 12(4), 202-207; Frank Carr, "*Cross border loss relief"*, Ir. T.R. 2003, 16(3), 235; and Peter Cussons, "*Fog in the Channel - Continent isolated*", Tax J. 2003, 677, 9-11.

5 *AMID* paragraph 23.

"origin" or "host" Member States in a situation where they would be relieved if the establishment was situated in the "origin" Member State.

In coming to its solution, the Court applied the "Migrant/Non-migrant Test" from the perspective of an "origin" Member State's tax rules. More importantly, and contrary to the statement made in the March 2008 article that in "*AMID*, a loss-making Belgian company was allowed to offset its losses against a profit-making foreign branch"; it was a loss-making Belgian company that was prevented from carrying forward its losses from income it earned at the head office level in Belgium.

Futura Participations

In *Futura Participations*, the Court applied the same "Migrant/Non-migrant Test" but this time from the perspective of a "host" Member State.

Futura Participations was a French company with a branch in Luxembourg.
In this instance, the losses to be carried forward related to the Luxembourg branch, not the French head office; in other words, in order for the losses to be relieved in Luxembourg, they had to be "economically linked to the income earned" in Luxembourg, the "host" Member State. The basis of assessment for resident and non-resident taxpayers in calculating the tax payable in Luxembourg was the profits and losses arising from their Luxembourg activities. The income of residents and non-residents earned outside Luxembourg was not taken into account. Accordingly, the Luxembourg rules were not discriminatory because they treated a non-resident company with a branch in Luxembourg (the "Migrant") in a similar way to a company resident in Luxembourg (the "Non-migrant").

The problem with the Luxembourg loss relief rules, however, rested on a second condition – a requirement that a set of Luxembourg accounts had to be maintained at the Luxembourg branch in order for losses relating to the branch to be carried forward. Obviously, such a requirement also applied to companies resident in Luxembourg. However, from the perspective of the European Internal Market, this imposed an additional obstacle on the freedom of establishment of a French company with a branch in Luxembourg because such a company also had the expense and administrative burden of maintaining a set of accounts in France.

Luxembourg argued that its rules were justified by the need to ensure that "the losses which the taxpayer wishes to carry forward did in fact arise from its Luxembourg activities and that the amount of losses corresponds, under Luxembourg rules (…) to the amount of losses actually incurred by the taxpayer".[6]
The Court rejected this argument on proportionality grounds, stating that the sole concern of the Luxembourg tax authorities was "to ascertain clearly and precisely that the amount of the losses to be carried forward corresponds, under the

6 *Futura Participations* paragraph 28.

Luxembourg rules (…) to the amount of losses actually incurred in Luxembourg by the taxpayer".[7] It was therefore not essential for the Luxembourg accounts to be maintained in order to carry forward the losses of the branch.

More recently, in *Deutsche Shell*,[8] the Court confirmed its earlier case law concerning branches when dealing with exchange rate losses incurred by a German head office when it repatriated start-up capital from its Italian subsidiary. Once again the Court applied the "Migrant/Non-migrant Test" from an "origin" Member State perspective in coming to the conclusion that the German tax rules, which denied the deduction of the currency losses, constituted an obstacle to the freedom of establishment.

Section B: *Marks and Spencer*[9]

> "*Marks & Spencer* tried to address the question of cross-border loss relief between group companies. The ECJ's solution is far from ideal and appears to be beleaguered by interpretative difficulties. Following *Marks & Spencer*, it would appear that cross-border loss relief is generally still unavailable, unless the surrendering company has exhausted all possibilities for relief available in its Member State of residence, including carry-back, current-year relief against other local profits, or carry-forward either by the surrendering company or a third party to which those losses were transferred and/or sold."

Once again, this criticism of the Court's *Marks and Spencer* decision appears unfounded. How is the "ECJ's solution far from ideal"? What is "ideal"? How is it "beleaguered by interpretative difficulties"?

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7 *Futura Participations* paragraph 39.

8 See Tom O'Shea, "*German Currency Loss Rules Incompatible With EU Law, ECJ Says*", 2008 WTD 44-2.

9 See Tom O'Shea, *"Marks and Spencer v Halsey (HM Inspector of Taxes): Restriction, Justification and Proportionality"*, [2006] 15(2) EC Tax Review 66-82; Simon Whitehead, *"Cross border group relief post Marks and Spencer"*, Euro. T.S. 2008, Jun, 4-7; CFE, *"Opinion statement of the CFE Task Force on ECJ cases on the judgment in the case of Marks and Spencer Plc v Halsey (Case C-446/03) - judgment delivered 13 December 2005"*, Euro. Tax. 2007, 47(1), 51-54; Melchior Wathelet, *"Marks and Spencers Plc v Halsey: lessons to be drawn"*, B.T.R. 2006, 2, 128-134; and Timothy Lyons, "*Marks and Spencer: something for everyone?"*, B.T.R. 2006, 1, 9-14.

A detailed analysis of the *Marks and Spencer* decision goes beyond the scope of this article,[10] but it should be noted that it was a judgment of the Grand Chamber and that the solution adopted by the Court was in keeping with its earlier jurisprudence, in particular, with its case law in the health services area where it had to deal with "budgeting" and "planning" issues put forward by the Member States in order to justify their domestic rules in the area of health service provision. These same budgetary and planning problems existed in the direct tax arena. Moreover, since *Marks and Spencer*, the Court has delivered a number of judgments explaining much of its reasoning and it appears that the judgment is solid.[11]

The criticism of the Court's judgment in *Marks and Spencer* appears to be linked to the understanding of the actual judgment itself, and in particular, the understanding of the role played by the Court in the area of cross-border loss relief. It is therefore insufficient to state that cross-border loss relief is "generally still unavailable, unless the surrendering company has exhausted all possibilities for relief available in its Member State of residence…" This misses the whole point of the *Marks and Spencer* judgment which was an application of the "Migrant/Non-migrant Test" from the perspective of an "origin" Member State. Cross-border loss relief is generally unavailable. Member States retain direct taxing competence. Therefore, it is up to individual Member States to decide whether or not to extend loss relief cross-border.

The real significance of the *Marks and Spencer* decision lies in the fact that cross-border loss relief may have to be granted in intra-Community situations where it is granted domestically. Thus, the *Marks and Spencer* decision extended loss relief cross-border to "final" or "terminal" or "stranded" losses, in situations where loss relief was granted domestically. Putting it another way, in *Marks and Spencer*, if the United Kingdom did not provide group relief tax advantages for domestic situations involving United Kingdom companies, then the United Kingdom did not have to grant loss relief cross-border. This point appears to have been missed in the March 2008 article. It is important to understand that cross-border loss relief does not have to be granted in situations where relief is not available in the establishment Member State.

Applying the "Migrant/Non-migrant Test", it is clear that if the United Kingdom did not provide group relief generally, it would be under no Community law obligation to provide such relief cross-border because the "Migrant" and the "Non-migrant"

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10 For a detailed analysis of *Marks and Spencer*, see Tom O'Shea, *"Marks and Spencer v Halsey (HM Inspector of Taxes): Restriction, Justification and Proportionality"*, [2006] 15(2) EC Tax Review 66-82,

11 It should be noted that the *Marks and Spencer* decision was challenged by Advocate General Sharpston in *Lidl Belgium*. See the contra arguments put forward in support of the *Marks and Spencer* judgment in Tom O'Shea, "*EU Cross-border Loss Relief: Which View Will Prevail"*, 2008 WTD 66-3 and, subsequent to the *Lidl Belgium* judgment, see Tom O'Shea, *"ECJ Rejects Advocate General's Advice in Case on German Loss Relief"*, 2008 WTD 123-2.

would be treated in a similar way: neither would benefit from cross-border loss relief.

In *Marks and Spencer*, the fact that the United Kingdom chose to provide group relief domestically, triggered a problem in a European Internal Market situation because freedom of establishment from an "origin" Member State perspective came into play. This required the "Migrant" and the "Non-migrant" to be treated in a similar way when they were in a comparable situation.

In the situation at stake in *Marks and Spencer*, two United Kingdom parent companies had to be compared: one with a subsidiary in the United Kingdom, the other with a subsidiary in another Member State. Normally, the subsidiary situated in the "host" State is taxed by that Member State on its profits and losses. Therefore, providing loss relief cross-border is not the norm because usually the profits of the subsidiary are taxed by the establishment Member State. Consequently, it is that Member State that gives relief for the losses. However, in a "terminal" or "final" loss situation there may be no possibility for the losses of the subsidiary to be relieved or off-set in the establishment Member State. In such limited circumstances, the ECJ was satisfied that the "origin" Member State had to grant loss relief in situations where that loss relief was granted to United Kingdom parent companies with subsidiaries in the United Kingdom which had incurred losses. Otherwise, two United Kingdom parent companies would be treated differently and the parent company that had exercised freedom of establishment would be disadvantaged by such rules which failed to extend loss relief cross-border in "terminal" or "final" loss situations.

The CCCTB is designed to prevent such losses from being "stranded" in the establishment Member State. This is examined in more detail in the next section.

Section C: Non-CCCTB Member States and CCCTB losses

> "Unless the CCCTB regime includes loss relief rules vis-à-vis consolidated and non-consolidated group members, the *Marks & Spencer* principle would appear to be the default point. This could mean that the non-CCCTB Member State may be forced to allow the offsetting of the CCCTB's losses against the profits of the non- CCCTB affiliate… The treatment of cross-border losses might also not be consistent. For example, a non-CCCTB parent and/or affiliate could be forced to *give* relief for CCCTB group losses, but might not be able to *get* relief from the CCCTB group, due to its non-consolidated status."

There are a number of issues jumbled-up in these statements and any analysis requires a deeper understanding of what the proposals are for the treatment of losses within the CCCTB group because, if the *Marks and Spencer* "formula" is applied, no cross-border loss relief needs to be granted in situations (a) where the losses in the establishment Member State are not "final" or "terminal" in nature and (b) where no loss relief is granted for groups resident in the "origin" Member State of the parent company. If the losses within the CCCTB group can be carried forward against future profits, then many of the problems perceived in the relationship between CCCTB and non-CCCTB companies do not exist. This view is somewhat contrary to the stance taken in the March 2008 article.

CCCTB and losses

The Commission's Working Document – *CCCTB Possible Elements of a Technical Outline,*[12] proposed that losses in relation to single companies "should be eligible for carry forward indefinitely".[13] Furthermore, consolidation will be mandatory for all companies opting for CCCTB which have a qualifying subsidiary or a permanent establishment in another EU Member State under a proposed "all-in" or "all-out" proviso.[14] Losses incurred before entering a CCCTB group would not be taken into account in the consolidation. Significantly, under the proposed CCCTB rules when consolidation results in an overall loss for the group, "this loss would be carried forward at group level and set off against future consolidated profits, before the net profits are shared out".[15] The aim is to ensure that there are no "stranded" losses.

Under these proposals, the losses incurred in relation to the CCCTB would all have the opportunity of being carried forward. This would rule out application of cross-border loss relief under the *Marks and Spencer* formula" because, clearly, losses of a CCCTB group will not be "final" in nature, generally speaking. There will be exceptions, such as when a CCCTB group terminates; in such a situation, under the current proposals, group losses will be attributed to the taxpayers belonging to the consolidated group at the moment of termination.[16]

For the purposes of the *Marks and Spencer* "formula", therefore, it seems more appropriate to divide the analysis into the following constituents: (a) situations

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12 See "*CCCTB: possible elements of a technical outline*", available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/CCCTBWP057_en.pdf (last visited 12 August 2008)

13 See paragraph 84 of the Technical Outline.

14 Ibid paragraph 85.

15 Ibid paragraph 101.

16 Ibid paragraph 104.

involving two non-CCCTB Member States; (b) situations involving parent companies located in a CCCTB Member State and subsidiaries with losses located in a non-CCCTB Member State; and (c) situations where the parent companies are located in a non-CCCTB Member State with subsidiaries with losses located in a CCCTB Member State.

(a) Non-CCCTB Member States

If the losses are in a non-CCCTB company and that company is a subsidiary of a company resident in another non-CCCTB Member State, the *Marks and Spencer* "formula" applies to this loss situation: if the losses are "terminal" or "final" and no relief can be obtained in the establishment Member State, then loss relief may have to be granted in the parent company's Member State of residence in situations where loss relief is granted under domestic rules to that Member State's resident companies.

(b) CCCTB Member State (Parent company) and a non-CCCTB (subsidiary company, with "final" losses)

If the parent company is located in a CCCTB Member State and it has a subsidiary resident in a non-CCCTB Member State, there will be no consolidation under the CCCTB regime. However, the *Marks and Spencer* "formula" will apply to the "final" losses of the non-CCCTB subsidiary; loss relief will have to be granted cross-border by the parent company's Member State in those situations where loss relief is granted by that Member State to domestic groups.

(c) Non-CCCTB Member State (Parent company) and a CCCTB (subsidiary company, with "final" losses)

It is apparent from the Commission's proposals that a CCCTB subsidiary can have "final" losses only after a CCCTB group has been terminated, because it is at this stage that the losses are attributed to the members of the consolidated group. Therefore, the *Marks and Spencer* "formula" applies to these "final" losses of the CCCTB subsidiary and the Member State of the parent company would be obliged to grant not less favourable treatment in terms of loss relief than it grants to its domestic groups.

The tax treatment of losses in the CCCTB era appears to be equally consistent in relation to "final" losses of subsidiaries whether such losses are in a CCCTB Member State or in a non-CCCTB Member State. The issue appears to be when the losses are "final", in keeping with the *Marks and Spencer* formula for cross-border loss relief. Clearly, if losses can be carried forward within a CCCTB group they are not "stranded" or "final" in nature and therefore, cross-border loss relief under the *Marks and Spencer* formula will not be applicable.

Section D: *Thin Cap GLO*[17]

> "The same cannot, however, be said for third country companies lending to their CCCTB subsidiaries, as such lenders would have less protection following
> *Thin Cap GLO…*
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> In *Thin Cap GLO*, the ECJ found that the freedom of establishment applied, which meant that third-country companies were not protected." (Footnote 46)

The *Thin Cap GLO* judgment did not take away any third country rights granted under the EC Treaty and, contrary to the view expressed in the March 2008 article, did not mean that third country companies were "not protected" nor had "less protection". This is a misunderstanding of the relationship between free movement of capital and freedom of establishment and a misinterpretation of the Court's jurisprudence.

Free movement of capital rights have been granted under Article 56 EC and extend to third country companies. The rights that have been granted under Article 56 EC are defined in more detail, but not exhaustively, in Annex I of Directive 88/361. These rights are fully protected under the EC Treaty.

What the March 2008 article fails to make clear is that these rights, which are granted under the EC Treaty, are the only rights extended to such third country companies by Article 56 EC. Article 43 EC (Freedom of establishment) has not been extended to third countries.[18] Hence, it is not a question of the EC Treaty granting such third country companies "less protection" or the ECJ finding that "third country companies were not protected" because freedom of establishment was applicable.

17 See Karen Banks, "*The application of the fundamental freedoms to Member State tax measures: guarding against protectionism or second-guessing national policy choices?*" E.L. Rev. 2008, 33(4), 482-506; Suzanne Kingston, "*A light in the darkness: recent developments in the ECJ's direct tax jurisprudence*", C.M.L. Rev. 2007, 44(5), 1321-1359; and Caroline Docclo and another, "*Interest paid* to a related company resident in another Member State or in a non-member country - interest treated as dividend – thin capitalization", EC T.R. 2007, 16(4), 192-194.

18 See Tom O'Shea, "*Thin Cap GLO and Third-Country Rights: Which Freedom Applies*", Tax Notes International, Apr 23, 2007, 371-375.

Clearly, third country companies receive the rights they are granted under Article 56 EC and these rights are protected by the ECJ.

In relation to the thin capitalisation rules at issue in *Thin Cap GLO*, it was apparent that such rules applied only to groups of companies where the a U.K. resident company that was at least 75 percent owned, directly or indirectly, by a non-U.K. resident parent company and the U.K. resident company had been granted a loan either by that parent company or by another non-U.K. resident company that was at least 75 percent owned, directly or indirectly, by that parent company.

The Court noted from its earlier *Baars* decision that rules that apply to holdings of capital by nationals of a member state in a company established in another Member State, ''giving them a definite influence on the company's decisions and allowing them to determine its activities,'' come within freedom of establishment. Also, the Court noted that the U.K.'s thin cap rules applied only to situations when the ''lending company has a definite influence on the borrowing company'' or when the lending company is controlled by a company that has such an influence. In other words, the level of control involved had to allow the non-U.K. resident company to influence the financing decisions by loans or equity. Consequently, the Court held that the U.K.'s thin cap rules were targeted ''only at relations within a group of companies" and that this primarily affected freedom of establishment and that any restrictions on the freedom to provide services and financing decisions of other group companies, to determine whether those companies should be financed, the free movement of capital ''must be seen as an unavoidable consequence of any restriction on the freedom of establishment.''

Therefore, contrary to the view expressed in the March 2008 article, in *Thin Cap GLO*, the Court was not restricting third country company rights; rather it was pointing out that no such rights existed under Article 43 EC. Third country companies did not receive "less protection" following *Thin Cap GLO*, rather they received the protections they had been granted under the EC Treaty and EC secondary legislation,[19] and no more.

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19 For instance, maritime services have been extended to third country situations under Council Regulation (EEC) N° 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries.

Section E: *Cadbury Schweppes*[20]

> "Accordingly, any uniform CFC rules under the CCCTB regime would have to comply with these requirements. A decision would also have to be made as to whether or not the CFC rules would apply in the same way vis-à-vis all non-CCCTB jurisdictions (Member States and third countries)."

Once again the above statement bundles a number of significant issues together which require untangling. First, the proposed CCCTB rules will be "common rules" put in place under Article 94 EC by a minimum harmonisation directive. Consequently, Community secondary legislation will be at stake, not a Member State's tax rules as seen in *Cadbury Schweppes* which concerned the United Kingdom's Controlled Foreign Companies (CFC) legislation. Whilst such rules must respect primary Community rules contained in the EC Treaty, they fulfil a different purpose to that of CFC rules and accordingly must be considered in a different context.

Secondly, it is clear from the *A* case,[21] that third country situations must be examined separately from internal market situations. In the *A* case, the Court noted that "relations between the Member States take place against a common legal background, characterised by the existence of Community legislation, such as Directive 77/799, which laid down reciprocal obligations of mutual assistance. Even if, in the fields governed by that directive, the obligation to provide assistance is not unlimited, the fact remains that that directive established a framework for cooperation between the competent authorities of the Member States which does not exist between those authorities and the competent authorities of a third country where the latter has given no undertaking of mutual assistance".[22]

The CCCTB rules (including any common CFC rules) will be applicable to certain third country companies with subsidiaries and permanent establishments in EU

20 See Tom O'Shea, *"The UK's CFC rules and the freedom of establishment: Cadbury Schweppes plc and its IFSC subsidiaries – tax avoidance or tax mitigation?" EC Tax Review*, 2007, 1, 13-33; Rita de la Feira, *"Prohibition of abuse of (Community) law: the creation of a new general principle of EC law through tax"*, C.M.L. Rev. 2008, 45(2), 395-441; and Grahame Turner, *"The legitimacy of CFC legislation within the Community"*, EC T.J. 2007, 9(1), 23-47.

21 Philippe-Emmanuel Partsch and another, *"The Court of Justice clarifies the application of the principle of free movement of capital in relations between Member States and third countries"*, B.J.I.B. & F.L. 2008, 23(3), 158; Pasquale Pistone, *"Ups and downs in the case law of the European Court of Justice and the swinging pendulum of direct taxation*", Intertax 2008, 36(4), 146-153; and Renata Fontana, *"Direct investments and third countries: things are finally moving ... in the wrong direction"*, Euro. Tax. 2007, 47(10), 431-436.

22 *A* case paragraph 61.

Member States. Consequently, Member States where the CCCTB regime is in operation may treat third country "establishments" differently from non-CCCTB Member States where the CCCTB regime will not be in use. This different treatment is not discriminatory in itself. Similarly, CFC rules contained in the CCCTB regime will not be automatically discriminatory if they treat companies resident in third countries differently from companies resident within the EU, and more specifically, from companies falling within the CCCTB regime. Clearly, there may be justifications for such different treatment which go beyond the Court's *Cadbury Schweppes* requirements. For example, the Court pointed out in the *A* case that there may be situations where the framework put in place by the common rules allows this different treatment to take place without breaching the EC Treaty. Thus, in the *A* case, the Court found that "with regard to the documentary evidence which the taxpayer may provide to enable the tax authorities to ascertain whether the requirements under national legislation are satisfied, the Community harmonisation measures on company accounts which apply in the Member States allow the taxpayer to produce reliable and verifiable evidence on the structure or activities of a company established in another Member State, whereas the taxpayer is not ensured of such an opportunity in the case of a company established in a third country which is not required to apply those Community measures".[23]

Thus, it is argued that the proposed CCCTB "CFC" rules do not have to be identical to the formula used by the Court in *Cadbury Schweppes* because third country situations may require different treatment. Furthermore, it does not appear that the proposed CCCTB "CFC" rules will have to treat all non-CCCTB situations in the same way. Clearly, the third country situations may differ from those involving non-CCCTB EU Member States.

Conclusions

Much of the criticism of the Court's jurisprudence in the March 2008 article rests on the interpretation of the ECJ's case law. This is clearly demonstrated by the suggestion that third country lenders are in some way receiving "less protection following *Thin Cap GLO*". It has been shown above that this is clearly not the case. Moreover, suggestions that the ECJ has dealt with the issue of cross-border loss relief "not very satisfactorily" and that its case law is "not clear" are subjective in nature and depend on the author's understanding of the Court's jurisprudence. The reference to the ECJ's solution in *Marks and Spencer* as being "far from ideal" makes one ask the question: what is "ideal"?

Accordingly, it is argued that the relationship between CCCTB and the Court's jurisprudence to date needs further analysis. This article attempted to analyse the some of the Court's jurisprudence and to provide a different view to that expressed

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23 A case paragraph 62.

in the March 2008 article. When faced with CCCTB issues, it seems clear that the Court will assess such issues in a way which is similar to its approach with other tax directives, such as the Parent and Subsidiary Directive, the Mergers Directive and the Mutual Assistance Directive.

In the *A* case, the ECJ dealt with third country situations in the context of an EC directive. It is likely that the Court will react in a similar fashion to third country situations when it encounters the CCCTB Directive (should it ever get implemented). It is also apparent from the above analysis how the Court will apply its *Marks and Spencer* decision in a CCCTB context.[24] The Court is reasonably coherent in its approach and provides solutions based on solid jurisprudence which fit with its other decisions in the direct tax area. Much of the criticism of the Court's direct tax jurisprudence is therefore ill deserved.

24 Indeed, the above analysis was supported by the Court's recent *Lidl Belgium* and *Deutsche Shell* decisions, discussed above.