cutting through complexity

The KPMG Guide to CCCTB

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Foreword

History shows that harmonising direct taxes within the European Union (EU) is anything but fast and easy. The twenty-plus years it took to get the Merger and Parent Subsidiary Directives approved and the three attempts needed to get the Savings Directive on the EU statute book serve as reminders of a difficult process. In the end, however, such initiatives were passed into law. It is not at all clear that the Proposed Directive on the Common Consolidated Corporate Tax Base (CCCTB), which is significantly more ambitious and far reaching than any previous direct tax proposal, will follow the earlier directives into law.

The origins of the CCCTB can, like the other tax directives, be traced back many years. Cross-border losses, for example, have been on the EU Commission's wish list for a quarter of a century and serious work on technical detail has been going on at the EU level since the Commission launched the idea of the CCCTB in 2003.

Of course, the technical detail cannot be viewed in isolation from the political aspects. For some EU member States, retaining sovereignty over direct taxation is a political imperative. The recent banking crisis has done nothing to soften this view as countries have become even more conscious of the need to safeguard tax revenues. Whilst its advocates are hailing the economic benefits for the EU's internal market, others see CCCTB as an unacceptable threat to their national interest. One school of thought considers that solving the current Eurozone crisis is a more real concern and would banish the CCCTB to the realms of fantasy.

But despite the political and technical obstacles, the EU Commission's CCCTB initiative remains a serious proposal. Businesses throughout the EU will need to monitor the progress of the proposals – which will be driven largely at a political level.

This KPMG guide to CCCTB responds to the need of those who require more understanding of the proposals. It provides clear, practical descriptions of the proposals as well as insights into the detailed technical aspects. We will supplement the guide over time with special features on related topics and update it if the proposals take further shape.

As well as contributions from specialists from KPMG member firms around the world, we are pleased to include contributions from a number of highly respected experts from outside the KPMG sphere, and I would like to take this opportunity to express my thanks for their valued input. The names of our contributors appear in the Introduction and Contents sections of the publication.

For current on-line text and updates to the KPMG guide to CCCTB please visit www.kpmg.com/ccctb

Robert van der Jagt,
Chairman, KPMG's EU Tax Centre

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Introduction

The European Commission issued a Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) on 16 March 2011.[1] The general objectives of this proposal were to improve the simplicity and efficiency of the corporate income tax systems in the EU and thus contribute to the better functioning of its internal market.[2] In summary, the proposal's specific objectives are:

- reducing tax-related compliance costs for companies
- eliminating double taxation
- eliminating over-taxation on cross-border economic activity, including enabling cross-border loss relief.[3]

In tackling the job of developing the technical rules, the Commission identified the following areas as building blocks:

1. depreciation and assets
2. provisions and reserves
3. taxable income
4. foreign income and relations outside the EU
5. consolidation
6. formulary apportionment.

These topics were discussed and ideas developed by sub-groups working under the auspices of the Commission's CCCTB working group (WG). The ideas were further developed through meetings with and written comments from other stakeholders, such as business federations and professional organisations. Numerous working papers were produced as a result, many of which are referenced in this publication and may be accessed online. These are listed in Appendix 4.

This publication aims to provide readers with an easily accessible, clear overview of the main provisions of the Directive, together with more in-depth insights into a number of specific issues.

The publication is divided into three parts. Part 1 puts the Directive into its historical, political and economic context and looks at possible future developments, including the possibility that the Commission could adopt the compromise solution of the Common Corporate Tax Base, i.e. CCCTB without consolidation. We also focus on selected technical legal issues, such as subsidiarity, and the 'enhanced cooperation' process. The Directive itself is relatively short when compared with the corporate income tax legislation of a typical Member State. Whilst the above-mentioned working papers can be helpful in understanding the Directive's provisions, it should not be assumed that they will form part of the ultimate formal legislative framework. The same applies as regards the relevance of international accounting standards, despite their close relationship with certain of the Directive's provisions. In order to

1 COM(2011) 121 final. For simplicity, the proposal is referred to in this publication as "the Directive", but it should be understood that the proposal has not yet been adopted by the European Council and there is no certainty that it will be adopted either in its current or an amended form. References in this publication to "will" and "is" and the like should be read accordingly.

2 Commission Staff Working Document Impact Assessment, SEC(2011) 315/2.

3 Idem.

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fill this legislative gap, the Directive provides for delegated regulations to be issued in certain areas. Part 1 addresses this delegation process – sometimes referred to as 'comitology' – and the extent to which this legislative gap needs to be filled by specific rules, rather than relying on general principles.

Part 2 generally follows the structure of the Directive and takes the reader through its essential details with practical examples and illustrations.

The chapters in Part 3 will be added periodically, where appropriate, to reflect new developments. These chapters are expected to provide greater insight into selected technical and practical issues arising from the Directive, such as the following:

- corporate reorganisations
- interaction with double taxation treaties
- tax implications for US companies
- lessons from the US formula apportionment model
- practical legal issues with CCCTB groups
- accounting implications
- transfer pricing
- transitional issues
- compliance costs.

In addition, KPMG's EU Tax Centre is carrying out a comparative survey of the main rules of the Directive and corresponding rules of the EU Member States. The survey results will also be made available in due course in the same way as the chapters in Part 3.

The text of the Directive may be accessed in Appendix 1, while Appendix 2 contains the European Commission's own description of the basic elements of the CCCTB system. Defined terms are shown in this publication in italic type, and their definitions are set out in Appendix 3.

I would like to extend my special thanks to Andrea Ryan from KPMG in Ireland, for her valuable contribution in producing the initial text for Part 2 of this publication.

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PART 1

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CHAPTER ONE

CCCTB: Past, Present and Future

KPMG's **EU Tax Centre** in the Netherlands and **Gabriele Rautenstrauch,** KPMG in Germany

1. Background

A common market was one of the most important objectives of the original EEC Treaty. Its creation involved the removal of 'obstacles which still stifled the free flow of goods and services',[1] and was epitomised by the four freedoms: goods, workers, capital and services. The harmonisation of indirect taxes formed part of this process, as evidenced, for example, by the harmonisation of the value added tax VAT and the adoption of the sixth VAT Directive in 1977.

The harmonisation of direct taxes, although the subject of much discussion, has had a less successful track record. One of the first initiatives in this area was the 1962 Neumark Report. Among the ideas considered in this report in the context of relieving double taxation was a centralised system for computing total taxable income within a single State followed by 'an allocation of the bases of assessment among the different interested States'. However, it is interesting to note that the idea was rejected on the grounds that it would require a 'very broad alignment of national legislations and a very developed degree of collaboration between the tax authorities of the Member States' and that it would be 'far too different from traditional methods followed in the field of double taxation'.[2]

The new approach was characterised by a combination of positive and negative integration rather than aiming at exhaustive harmonisation.

The Neumark report was followed by the Van den Tempel Report in 1970, which focused on cross-border dividend payments. This was followed in 1975 by a proposal by the European Commission on the harmonisation of corporate tax systems that dealt with double taxation relief and withholding tax for cross-border dividend payments and proposed a single corporate tax rate. This proposal failed to get the necessary support. In 1984 and 1985, the European Commission put forward proposals on loss relief that were subsequently withdrawn. These were followed in 1988 by a draft proposal for the harmonisation of the tax base of enterprises that was never tabled, due to the reluctance of most Member States.[3]

The focus shifted in 1990 with a communication from the European Commission in which it proposed that direct tax measures should be aimed at completing the internal market and should respect the principle of subsidiarity.[4] This communication led to the presentation of the Ruding Report in 1992. Rather than looking to a comprehensive harmonisation of the corporate tax systems, this report made a number of separate recommendations, including minimum standards for the corporate tax base. This reflected the difference in approach between the former common market and the internal or single market that was established in 1993 by the Single European Act. The new approach was characterised by a combination of positive and negative integration rather than aiming at exhaustive harmonisation. Positive integration involved the approximation of laws whereas negative integration meant the prohibition of discriminatory or restrictive practices by Member States. Accordingly, the proposals aimed at setting minimum standards regarding tax rates whilst limiting other aspects such as depreciation rates. Within these boundaries, Member States would be free to choose how to structure their systems. However, despite their more

1 'Better off in Europe', European Commission, 2006.
2 The EEC reports on tax harmonisation, IBFD, 1963, p 142.
3 European Commission website: http://ec.europa.eu/taxation_customs/taxation/company_tax/gen_overview/index_en.htm.
4 Commission communication to Parliament and the Council: Guidelines on company taxation (SEC(90)601).

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modest aims, the Ruding report's recommendations were clearly 'too much, too soon' for Member States, and they were not implemented.

In the meantime, the new approach had already borne fruit in 1990 with the adoption of the Parent Subsidiary Directive,[5] the Merger Directive[6] and the Arbitration Convention.[7] Encouraged by this success, the Commission followed in 1991 with two further proposed directives, one on cross-border interest and royalty payments and another on cross-border losses.[8] However, the latter proposal was withdrawn in 2001 when the Commission proposed the CCCTB,[9] because the discussion about loss compensation and possible group consolidation was intimately linked to the comprehensive solution of CCCTB. Experience also showed that Member States were reluctant to consider the initiative and that the European Council was not willing to adopt it.[10]

Meanwhile, the Council had re-evaluated its approach to direct taxation in the context of completing the single market.[11] In 1997, the Commission presented the 'Monti tax package' consisting of a code of conduct for business taxation, a savings directive, and a directive on intra-group interest and royalties, all of which were subsequently introduced.[12]

This study identified and analysed various perceived obstacles to completing the Internal Market, most of which arose as a result of the co-existence of 15 (now 27) separate national taxing systems.

In 2000, the European Council launched the 'Lisbon Strategy', with the overarching aim of making the EU the world's most competitive and dynamic economy. This was followed in 2001 by an in-depth study carried out by the Commission into corporate taxation within the EU, together with a Communication to the European Council.[13] This study identified and analysed various perceived obstacles to completing the Internal Market, most of which arose as a result of the co-existence of 15 (now 27) separate national taxing systems. Particular problems focused on in the study were the limited application of the direct tax directives, the absence of cross-border loss relief, and the application of 'separate accounting' under the arm's length transfer pricing approach. The latter was considered to be particularly responsible for high compliance costs and double taxation. The Commission put forward a number of targeted solutions to resolve these problems but concluded that these would only comprise a partial solution. They would not address the underlying problem of the separate national tax systems. Accordingly, one of the recommendations put forward by the Commission was that:

> 'Companies with cross-border and international activities within the EU should in future be allowed 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)'.

The Commission added, 'It is important to note that this approach does not infringe Member States, sovereignty to set corporate tax rates. They would apply their national tax rate to their specific share of the overall tax base as computed according to a commonly agreed allocation mechanism'.

Two main contenders emerged from this initiative as a potential comprehensive corporate tax policy solution: the common consolidated corporate tax base and the 'home state taxation' (HST) proposal.

HST was intended to be particularly beneficial for small and medium-sized enterprises (SME). Under HST, SMEs would be allowed to apply the home state company tax rules wherever they were operating in the EU. Subsequently, each participating Member State would then apply its own tax rate to the share of the profit of the business activities that is allocated to that State.[14] This allocation would be done on the basis of a formula based on value added.

A number of public conferences and consultations followed, including a public consultation on the possible use of International Accounting Standards as a starting point for a common EU tax base.[15] The CCCTB emerged as the most promising comprehensive solution. In 2004, a working group was set up, together with six sub-groups, to help the Commission develop the CCCTB idea. These groups generated more than 50 working papers that helped develop policy and design of the new system.[16] This work was supplemented in various other ways, such as meetings, comments and advice from academics and business organisations, as well as a workshop organised by the Commission in October 2010.

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5 Council Directive 90/435/EEC.
6 Council Directive 90/434/EEC.
7 Convention 90/436/EEC.
8 COM (90)571 final (withdrawn 1994); COM(90) 595 final.
9 Commission of the European Communities, Communication, 23 October 2001, COM(2001) 582.
10 Commission of the European Communities, Communication, 24 November 2011, COM(2003) 726.
11 Towards Tax Co-ordination in the European Union: a package to tackle harmful tax competition, COM(97) 495 final.
12 Respectively: Conclusions of the ECOFIN Council, December 1, 1997; 2003/48/EC; 2003/49/EC.
13 Commission communication: 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.
14 Commission of the European Communities, Communication 24 November 2003, COM(2003) 726.
15 The following account is based on the Commission Staff Working Document Impact Assessment, SEC(2011) 315 final.
16 These are listed in Appendix 4.

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The paper outlined five policy choices that had been considered in the design of the CCCTB, ranging from doing nothing to a compulsory common consolidated corporate tax base.

On 15 March 2011, the Commission finally published a draft Directive on CCCTB together with an extensive impact assessment paper.[17] The paper outlined five policy choices that had been considered in the design of the CCCTB, ranging from doing nothing to a compulsory common consolidated corporate tax base. These choices were evaluated against the following objectives, which were seen as the key remaining corporate tax obstacles for companies operating in the Internal Market, taking into account the principles of subsidiarity and proportionality[18] as well as their macro-economic impact:

1) compliance costs

2) double taxation

3) absence of cross-border loss relief.

A directive was chosen as the appropriate legal instrument over 'soft' law alternatives, given the subject matter of the issue, i.e. Member States' corporate tax base and the need to provide uniform rules. A directive was also considered to satisfy the proportionality requirement.

This analysis finally led to an optional CCCTB being the preferred policy option, based in particular on the macroeconomic evidence.

2. Future Outlook

Since its publication, the proposed Directive has met opposition from a number of Member States, either by way of the formal objection procedure, popularly known as the yellow card procedure, or informally such as through government statements. As insufficient votes were raised under the yellow card procedure, the Commission has not had to reconsider the proposal. However, in view of the unanimity required among Member States for the Directive to be adopted, its path clearly will not be easy. In this light, the Commission's hope for its adoption in 2013 is perhaps optimistic.[19] For more detail on the procedural aspects, see Chapter 2.

If and when the Directive is formally adopted by the European Council, it will then have to be implemented into the national tax systems of each Member State. The Commission envisages this process being completed in time for the CCCTB system to come into force as from 2015 or 2016.[20]

How this implementation takes place is, in principle, up to the Member States since they are free to choose the means and form of implementation, provided that the intended aim of the Directive is achieved (Art. 115 Treaty on the Functioning of the European Union (TFEU)). In practice, it is likely that many Member States will simply transpose large parts of the Directive into their national tax legislation, given the prescriptive nature of many of its provisions. This 'rules-based' approach is discussed and contrasted with a 'principles-based' approach in Chapter 3. Member States could still find it necessary to supplement the Directive's provisions with additional provisions, for example, where it is considered that the Directive does not provide sufficient detail. Such an ad hoc approach to implementation would clearly not be desirable, given the objective of a uniform EU-wide set of rules. However, to a large extent, it seems likely that this approach might be avoided due to the various delegation provisions contained in the Directive (see Chapter 2).

In addition to the substantive tax rules, it will also be necessary to implement procedural rules, procedures and systems for applying the new system (see Chapter 13). The practical difficulties – such as setting up a central database accessible to all EU tax authorities – should not be underestimated. Again, it may be questioned whether the Commission's vision of implementation by 2015 or 2016 is not optimistic.

Aside from the question of implementing the Directive into the respective national legislations, the question also arises as to the Directive's potential impact on bilateral treaties between the Member States themselves and between Member States and third countries. Regarding the former, the Directive provides that its provisions apply notwithstanding the provisions of treaties between the Member States. Whether such treaties should be amended is not of practical consequence, assuming both Member States apply the CCCTB system. Practical concerns will arise if the Directive is implemented by a sub-group of Member States under the enhanced cooperation procedure (described in more detail in Chapter 2). Regarding treaties with third countries, although the Directive does not expressly deal with this issue, it seems

17 Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) – COM(2011) 121 final, and Commission Staff Working Document Impact Assessment, SEC(2011) 315 final. For simplicity the proposal will be referred to in this publication as 'the Directive', but it should be understood that the proposal has not yet been adopted by the European Council and there is no certainty that it will be adopted either in its current or an amended form. References in this publication to 'will' and 'is' and similar terms should be read accordingly.

18 For a discussion of these concepts, see Chapter 2.

19 European Commission: Citizen's Summary. A common corporate tax system for the EU.

20 Idem.

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likely that Member States will be obliged (from the point of view of EU law) to renegotiate those treaties that conflict with the Directive. Again, the time needed to complete such processes should not be underestimated.

As mentioned above, the proposal in principle needs the unanimous approval of all 27 Member States in order to be adopted. However, there is a special mechanism, known as the 'enhanced cooperation' procedure, by which a sub-group of Member States may adopt the proposal between themselves. The procedure is subject to strict procedural conditions and can only be followed if there is no other reasonable way to attain the goals that are subject of the enhanced cooperation. For details, see Chapter 2.

Also, these States fear that companies could manipulate the formula in a way that the main part of the tax base would be apportioned to countries with a low corporate tax rate.

Another possible scenario is that the political discussions will result in a compromise solution under which only part of the proposed system is introduced. In most likely scenario for this compromise, only the common tax base would be adopted, i.e. without the consolidation and apportionment parts. This option, generally referred to as the Common Corporate Tax Base (CCTB), would remove many of the most politically sensitive aspects of the proposal, i.e. those aspects that impact the most on the respective national corporate tax revenues. Whether such a compromise solution would be the end or the beginning of further corporate tax harmonisation, only time could tell. The compromise solution could, for example, be followed by specific EU-wide solutions for cross-border loss relief or, more generally, by way of the consolidation approach contained in the current proposals. The CCTB scenario is discussed in more detail below.

3. The Alternative CCTB Scenario

3.1. Possibility that the CCCTB will only be implemented as CCTB

The adoption of the CCCTB Directive would require unanimity in the European Council (Art. 115 TFEU). Currently, such a broad consensus seems far off. The large number of official statements by Member States stating that the CCCTB is contrary to the subsidiarity principle supports this view. Other Member States have, in principle, expressed their support of the CCCTB project. However, it seems likely that even the supportive Member States might limit their support and advocate a 'small' solution: the implementation of a CCTB, i.e. a European tax base that would be calculated according to common rules but would not include the consolidation of the tax bases of the group followed by a sharing mechanism. The Member States supporting this alternative argue that the distribution of the consolidated tax base to EU group companies or EU branches according to a formula would be too complex and the outcome unforeseeable. Also, these States fear that companies could manipulate the formula in a way that the main part of the tax base would be apportioned to countries with a low corporate tax rate. The necessary intensive communication between the European tax authorities seems unlikely to be realised in time. Additionally, some Member States see the loss of sovereignty in the area of corporate tax law as the main obstacle to a CCCTB. Germany, in particular, fears that with the introduction of a cross-border loss transfer, which is inherent to EU-wide consolidation, permanent tax revenue shortfalls will occur. In addition, the 'Europeanisation' of 'hidden' reserves means that they may arise in one Member State but could be shared out according to the formula and taxed by a number of other Member States; this is seen as a major obstacle.

Therefore, it is conceivable that the European Council will be under pressure to accept a 'small' solution. It may well be that the adoption of such a CCTB may have a greater probability of success than the implementation of a CCCTB. This view seems to be confirmed by the Council in connection with the Euro Plus Pact, which concluded that 'developing a common corporate tax base could be a revenue neutral way to ensure consistency among national tax systems whilst respecting national tax strategies, and to contribute to fiscal sustainability and the competitiveness of European businesses.'[21] It should be noted that 'consolidated' has been omitted in this statement. The proposals for a convergence of French and German corporate tax bases are another illustration of the support for such a development.

As mentioned above, the adoption of a CCCTB or CCTB Directive would require unanimity in the Council. Even for the 'small' solution unanimity may not be achievable. This raises the possibility that the Member States will consider applying the enhanced cooperation procedure (Art. 20 TEU, Art. 326 et seq. TFEU), which requires at least nine Member States in order to adopt the Directive. For further details, see Chapter 2.

21 Conclusions of the European Council, 24/25 March 2011.

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3.2. Overview of the advantages and disadvantages of a CCTB

The introduction of a CCTB would have advantages as well as disadvantages compared with the introduction of a CCCTB. Of course, the possibility of calculating the tax bases for all the group companies located in the EU according to one set of rules would be a major simplification, whether this occurs is in the form of a CCCTB or CCTB.

One advantage – from a tax administration's point of view – is that the CCTB would be easier to handle because the sharing mechanism would not need to be applied. This would also reduce the necessities of communication and coordination between the tax authorities of the Member States. Some Member States argue against a CCCTB because they expect a decrease in tax revenues. If a CCTB were to be introduced, changes in tax revenues would mainly be caused by the differences in calculating the tax base for CCTB purposes compared with the tax base calculated according to the respective domestic tax laws. The corporate tax rate could be amended in order to achieve the same amount of tax revenue as before the introduction of the CCTB. A similar approach to this problem might also be taken in the case of CCCTB. A loss of tax revenue due to cross-border loss utilisation or a different attribution of the tax base according to the formula (which could occur when introducing a CCCTB) could be excluded by only implementing a CCTB.

For taxpayers, a major advantage would be the improved transparency of tax computation between Member States. If the corporate tax base has to be calculated according to the same EU-wide rules, every taxpayer could easily define the preferential location for a planned investment by comparing just the nominal corporate tax rates of the respective Member States. Differences in such nominal rates reflect differences in effective tax rates much more closely under a CCTB than under current tax systems. For such a comparison, no consolidation would be needed.

The advantages of tax-neutral cross-border restructurings or fewer double taxation issues in EU cross-border situations could also be realised even if only a CCTB were to be introduced, depending on its structure.

Another advantage of a CCTB would be that the administration costs of a group's tax department may be reduced because of the common framework of tax rules and because no additional costs for the consolidation and sharing would arise. However, according to the impact assessment that accompanied the draft Directive,[22] it appears that the reduction of administration costs is of minor importance for companies. The major disadvantage for taxpayers of implementing a CCTB instead of CCCTB would be the non-application of the automatic cross-border loss compensation. Without consolidation, the positive (profit) and negative (loss) tax bases of group companies could not be aggregated. Hence, the uncertainties of the implementation of a cross-border loss relief resulting from the European Court of Justice (ECJ) decisions (Marks & Spencer, Lidl Belgium) and how the domestic tax authorities will interpret them would still remain. These uncertainties could be removed if a CCTB Directive included explicit rules governing cross-border loss relief between all EU companies that belong to a group. At minimum, a definition of 'final losses' would be necessary.

In addition, a CCTB would not eliminate intra-group transactions as no consolidation would take place.

In addition, a CCTB would not eliminate intra-group transactions as no consolidation would take place. As a result, one of the major advantages of a CCCTB would be lost: the transfer pricing issues (calculation, benchmarking, documentation and, finally, the discussions with tax authorities of the transfer prices) would still remain for tax purposes. From both taxpayers' and tax authorities' perspectives, the elimination of transfer pricing issues would lead to a significant reduction in administration costs.

Without the consolidation and allocation of the consolidated tax base to the Member States, there would be less pressure to enact and maintain common rules in all Member States as there would be no sharing out of the consolidated tax base. Rather, each Member State would calculate the tax base only for its own tax revenue. Without this stronger need for harmonised rules, there is a greater risk that Member States' tax authorities would interpret the common rules in different ways or would even introduce different rules adapting the CCTB Directive (e.g., introduction of incentives such as tax credits). This risk is intensified by the fact that some transactions are not yet governed by the draft Directive and that some rules are subject to interpretation.

22 Commission Staff Working Document Impact Assessment, SEC(2011) 315 final.

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3.3. 'All-in all-out' principle applicable if a CCTB were to be introduced?

If the Council of the European Union decides to opt for the CCTB, the question arises as to whether the 'all-in all-out' principle would also apply to the CCTB. By this principle (Art. 55 of the CCCTB Directive), in a *group* of companies, all EU *group members* must be included in the CCCTB *group* and therefore apply the CCCTB rules. (See Chapter 4 for the definition of a *group*.) If a parent company opts for the CCCTB, then this will apply to all *group members*.

The all-in all-out principle is necessitated by the consolidation and sharing mechanism. According to the European Commission, taxpayers should not be given the possibility of cherry-picking, i.e. by including some *group* companies in the CCCTB *group* and leaving others out.[23] It could therefore be argued that the all-in all-out principle need not necessarily apply to the CCTB. On the other hand, it is likely that the Member States will insist that a *group* may only opt to include all their EU-based subsidiaries in the CCTB (should the CC(C)TB be optional). The reason behind such an approach could be that Member States would prefer the administrative simplicity of a non-optional approach. It may therefore be possible that a Member State would oblige companies either to calculate the tax bases of all their (domestic) *group* companies according to CCTB rules or according to domestic rules. In addition, it seems likely that some Member States would want to introduce the CC(C)TB as an obligatory tax base to avoid having to administer two sets of rules.

3.4. Possible criteria for companies in order to decide whether to opt for a CCTB

In deciding whether to opt for CCTB, companies should first analyse the locations of the group's subsidiaries. A key criterion, of course, is the calculation of the tax base. If the calculation of the *group* companies' tax bases would lead to an increased tax base compared with the tax base calculated in accordance with the respective domestic tax laws, the decision must be against opting for the CCTB (assuming that the corporate tax rates of the Member States are the same for the two calculation methods). For this reason, the rules for the calculation of the CCTB tax base must be analysed in detail.

If cross-border restructurings are planned, it could be preferable to opt for the CCTB, particularly if the domestic transaction tax law does not allow for a tax-neutral restructuring, which would be possible under a CCTB.

Whether opting for the CCTB would lead to significantly reducted compliance costs is questionable. A possible reduction in costs for the subsidiaries' tax departments could be accompanied by an increase in costs for the head office's tax department.

As such, the decision as to whether to opt for the CCTB or continue to apply domestic tax laws must be based on a sound analysis of the facts and circumstances, for which a detailed knowledge of the CCTB computation rules and domestic tax law rules will be necessary.

23 CCCTB\WP\057\doc\en.

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CHAPTER TWO

Selected EU Law and Procedural Issues

Marius Vascega[24] and **Servaas van Thiel**[25]

1. Introduction

Chapter 2 deals with certain legal and procedural aspects of the CCCTB Directive: EU competence in the area of corporate tax harmonisation (Section 2), limits to the exercise of this competence imposed by the subsidiarity and proportionality requirements (Section 3), possible decision-making procedures for the adoption of the CCCTB Directive (Section 4), and post-legislative acts that would need to be enacted after adoption of the Directive (Section 5).

2. Competence

Corporate income taxation is currently almost entirely regulated at the national level by the Member States. Thus, a preliminary question needs to be addressed as to whether the EU has regulatory competence (the right to exercise legislative powers) in the area of corporate income taxation (for the national law context in which the current proposals have been made, see Chapter 1).

To answer that question, the starting point is the European 'constitutional' rule that EU regulatory competences are based on the principle of conferral of competence (Arts. 3(6), 4(1), 5(1) and (2) Treaty on the European Union, TEU). In essence, this means that the EU is competent to act (legislate) in a specific area only when that competence is conferred to it by the Treaties, and that, therefore any EU act must have a proper legal basis in the Treaty, which provides for the competence rationae materiae, also known as the vertical division of competences between the Union and the Member States (and the applicable decision-making procedure known as the horizontal division of powers between the EU institutions). The opposite is also true – if the Treaties do not confer competence on the EU, the power to act (i.e. legislate) stays with the Member States.

According to that case law, EU competences were understood to be explicit or implied, and exclusive or shared with the Member States, and in fact, most EU competences were understood to be explicit and shared.

For a long time, the problem has been that the question of EU competences was not explicitly addressed by the Treaties, so that the discussion on which powers were conferred on the EU and which not, was always guided by the case law of the ECJ, which, since the earliest days of the European integration process, has acted as the Union's 'constitutional' court.[26] According to that case law, EU competences were understood to be explicit or implied, and exclusive or shared with the Member States, and in fact, most EU competences were understood to be explicit and shared.

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26 Under the Treaties, the ECJ has traditionally been given the role to verify the legality of the acts of the European institutions. One of the grounds for annulment of such an act has been 'lack of competence'.

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Interestingly, however, the 2009 Lisbon Treaties do address the question of EU competences explicitly. Articles 4 and 5 TEU and 2 to 6 Treaty of the Functioning of the European Union (TFEU) list the subject areas in which the EU is (exclusively or not) competent to act.[27] In addition, other Articles of the Treaty provide the EU with a specific legal basis to act. In the area of taxation, for instance, Article 113 TFEU confers on the EU the competence to adopt acts to harmonise the indirect tax legislation of the Member States, i.e. national laws concerning turnover taxes, excise duties and other forms of 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.[28]

In the area of direct taxation there is no similar explicit mandate for the EU to harmonise the laws of the Member States. This, however, does not automatically mean that the EU is not competent to exercise its legislative power over direct taxes. Current Article 115 TFEU, which is of a more general nature, provides the EU with the competence to 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. Since the 1990s, this more generic legal basis has been used for EU legislation that seeks to remove direct tax obstacles to the internal market (although the current level of harmonisation of corporate income taxation in the EU is limited[29]).

That same legal basis is now also used for the CCCTB Directive. Seen from the economic angle and considering the close relation between corporate taxation and the cross-border movement of economic activity on the internal market, there is clearly a sufficient basis for the EU to try to harmonise certain aspects of the corporate income tax systems of the Member States. In fact, more and more companies are making use of the internal market and have cross-border activities. In doing so, they have to deal with 27 different corporate tax systems that rarely co-exist peacefully and often clash. The consequences are the significant obstacles to making full use of the internal market, such as additional compliance costs, double taxation and over-taxation, as mentioned in Chapter 1. The Commission estimates that the CCCTB could substantially reduce these obstacles, which would positively influence the ability and willingness of companies to expand abroad, thereby better exploiting the potential of the internal market.[30]

The CCCTB Directive thus aims at harmonisation of the national corporate tax provisions of Member States with a view to removing obstacles to the internal market. As a consequence, the proposal directly affects the functioning of the internal market and consequently falls under the remit of Article 115 TFEU. It can therefore be concluded that Article 115 provides a relevant and sufficient legal basis for the EU to adopt a CCCTB Directive.

Further, it is worthwhile to note that the internal market is a shared competence of the EU and the Member States (Art. 4(2) TFEU). Thus, the EU and the Member States may legislate and adopt legally binding acts in this area. Member States may exercise their competence only to the extent that the EU has not exercised its competence or has decided to cease exercising its competence.[31] In addition, the scope of the exercise of competence by the EU only covers particular elements governed by the act in question and not the whole area.[32]

The EU is therefore competent to legislate on CCCTB together with the Member States (shared competence). The Member States are free to regulate aspects of the corporate tax base (and the corporate tax rate) nationally as long as the EU has not yet legislated. Furthermore, Member States will remain competent to legislate on those elements of corporate taxation not dealt with under the CCCTB Directive.

3. Subsidiarity and Proportionality

Whilst the Treaties confer competence on the EU to legislate on the corporate tax base, they also place certain limitations to this legislative action. Since the 1992 Maastricht Treaty, these limits are reflected in the principles of subsidiarity and proportionality, which are enshrined as general principles. In their present form (Art. 5(3) and (4) TEU), these principles provide essentially that:

- In areas of shared competence, the EU can only act if the objectives sought cannot be sufficiently achieved through the action of the Member States themselves and can be better achieved at the EU level (subsidiarity).

27 The EU has exclusive competence in areas such as the customs union, competition rules, monetary policy, conservation of maritime biological resources, and the common commercial policy (Art. 3 TFEU). In many other areas, the EU shares its legislative competences with the Member States (Art. 4 TFEU), which means that both may exercise their regulatory powers (Art. 4 TFEU). In some areas, such as human health, industry, culture, tourism, education, civil protection and administrative cooperation, the EU has a 'supporting' competence (Art. 6 TFEU). In the areas of R&D, space, development and humanitarian aid, the EU has competence to carry out activities but the exercise of that competence cannot prevent Member States from carrying out their competence (Art. 4 paragraphs 3 and 4).

28 The Treaty lays down certain other provisions on taxation, e.g. Arts. 65 and 110-112 TFEU. These are not related to the harmonisation of tax provisions of the Member States.

29 See also Chapter 1.

30 See Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) – COM(2011) 121 final, Explanatory Memorandum, pp. 5–6.

31 Art. 2(2) TFEU. In contrast, exclusive competence of the EU is characterised by the fact that only the EU is able to legislate and adopt legally binding acts in a given area, such as customs union, competition rules, monetary policy in the countries using the euro, conservation of marine biological resources in the common fisheries policy, and common commercial policy (Art. 3 TFEU). In this case, the Member States can legislate themselves only if so empowered by the EU or for the implementation of EU acts (Art. 2(1) TFEU).

32 Protocol No 25 to the TEU and TFEU on the Exercise of Shared Competence.

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- The content and form of EU action should not exceed what is necessary to achieve the objectives of the Treaties. Therefore, if there is a choice between several appropriate measures, the least onerous should be chosen and the disadvantages caused must not be disproportionate to the aims pursued (proportionality).[33]

Further rules on these principles are to be found in Protocol 2 to the TEU and TFEU on the Application of the Principles of Subsidiarity and Proportionality, which provides that draft legislative acts should be justified with regard to these principles. To that end, any legislative act is required to contain a detailed statement on the expected financial impact and implications of national rules and on the reasons why the EU is best placed to legislate (qualitative and quantitative indicators). Moreover, the draft legislative act must minimise any financial or administrative burden, commensurate with the objective to be achieved.

The Commission must re-examine the proposal and decide whether to maintain, amend or withdraw it ('yellow card' procedure).

The protocol further requires that each EU institution constantly respects these principles. In addition, it provides for control by the national parliaments, which may send their reasoned opinions of non-compliance to the Commission within eight weeks from the date of issuance of the proposal.[34] Where reasoned opinions represent at least one-third of the votes allocated to the national parliaments (currently 18 out of 54 votes),[35] the Commission must re-examine the proposal and decide whether to maintain, amend or withdraw it ('yellow card' procedure).[36]

As required under the Protocol, the Commission did put forward a detailed statement on the compliance of the CCCTB Directive with the principles of subsidiarity and proportionality.[37] Nevertheless, many national parliaments reacted to the CCCTB Directive by sending the following negative subsidiarity opinions within the eight-week period, which ended on 18 May 2011:[38]

Member State[39]	Unicameral/bicameral	Votes
Bulgaria	Unicameral	2
Ireland	Unicameral	2
Malta	Unicameral	2
The Netherlands	One chamber	1
Poland	One chamber	1
Romania	One chamber	1
Slovak Republic	Unicameral	2
Sweden	Unicameral	2
United Kingdom	One chamber	1

Their main subsidiarity claim is that the Commission did not provide enough qualitative and quantitative indicators to prove that fiscal impediments to cross-border activity cannot be sufficiently addressed by the Member States themselves and that action at the EU level would have additional benefits. They further argue that the CCCTB Directive would have little impact on the desired reduction of tax burdens, whilst creating substantial additional compliance costs for businesses and administrative costs for Member States.

33 As a consequence of the comprehensive legislative program initiated by the Commission and adopted by the Council to achieve an internal market without frontiers by 1993, Member States' fears about the loss of their sovereignty increased as did the popularity of the subsidiarity and proportionality concepts, since they were perceived as the gatekeepers against a hyperactive European lawmaker (for further information see S. van Thiel, 'Subsidiariteit en belastingrecht in Europees perspectief', contribution to the ninth Congress of the 'Landelijk Overleg Fiscalisten' on 31 May 1993 in Tilburg, Netherlands. See also S. van Thiel, *Free movement of persons and income tax law: the European Court in search of principles* (Amsterdam: IBFD, 2002), pp. 101–119). In 1990 the Guidelines on company taxation (see Report from the Commission to the Council on the scope for convergence of tax systems in the Community, 26 March 1980, COM(80) 139 final, *Bulletin of the European Communities*, Supplement 1/80; see also Commission communication to Parliament and the Council, Guidelines on company taxation, 20 April 1990, SEC (90) 601 final) stressed that Member States should remain free to determine their tax arrangements, except where these would lead to major distortions. The Council embraced the subsidiarity concept in its November 1992 conclusions on the 1992 Ruding Committee Report (see Conclusions and recommendations of the Committee of Independent Experts on Company Taxation (Luxembourg: Office for Official Publications of the European Communities, 1992) (Ruding Report); see also Press release of the 1621st Council meeting of Economic and Financial Questions of 23 November 1992, Council document 10088/92), in which it emphasised national sovereignty and subsidiarity and clearly expressed its reluctance towards any comprehensive proposals on the corporate tax base or rates and its preference for more modest action to prevent double taxation and combat harmful tax competition.

34 It is interesting that Protocol No 2, even though covering both subsidiarity and proportionality, in the procedure for submitting 'non-compliance' opinions only refers to subsidiarity. Most of the opinions of the national parliaments are, nevertheless, not limited to the subsidiarity arguments, but also cover proportionality and other issues.

35 Each of the 27 Member States has two votes (bringing the total number of possible votes to 54), which are either both allocated to the unicameral national parliament or, in the case of a bicameral parliamentary system, divided between the two chambers, allocating one vote to each chamber.

36 As regards the proposals under the ordinary legislative procedure, the protocol also provides for a stricter 'orange card', which is not applicable to the CCCTB Directive since it is to be adopted under the special legislative procedure (for further information on legislative procedures see footnote 46). The 'orange card' procedure is triggered where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least a simple majority of all the votes allocated to the national parliaments, i.e. currently 28 votes. Under this procedure (as in the 'yellow card' procedure) the Commission must re-examine the proposal. However, if the Commission chooses to maintain the proposal, this can still be overridden by a majority of 55 percent of the Members of the Council or a majority of the votes cast in the European Parliament, in which case the legislative proposal shall not be given further consideration.

37 See Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) – COM(2011) 121 final, Explanatory Memorandum, pp. 9–10; see also Accompanying Commission Staff Working Paper – Impact Assessment (SEC(2011) 315 final), pp. 15–16.

38 The opinions can be found on the inter-parliamentary EU information exchange system at http://www.ipex.eu/IPEXL-WEB/home/home.do.

39 The lower house of the Czech Parliament also delivered a negative opinion but after the deadline of 18 May 2011. The Belgian, Danish, Italian, Lithuanian and Luxembourg Parliaments or their committees adopted opinions (positions) on substantive points without delivering a negative conclusion regarding subsidiarity.

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National parliaments also considered the proposal to be in breach of the proportionality principle. They referred to the Arbitration Convention,[40] the Joint Transfer Pricing Forum,[41] ECJ case law,[42] and the Code of Conduct on Business Taxation[43] to illustrate that cross-border tax problems can be addressed by means of informal coordination and bilateral or unilateral measures.

In spite of this prompt reaction by many national Parliaments, the total number of 'negative votes' fell short of the 18 required for initiating the 'yellow card' procedure. Hence, legislative work can continue without the need for the Commission to formally re-examine its proposal under the 'yellow card' procedure. However, this does not necessarily mean that the subsidiarity and proportionality discussion has come to an end. It may be raised again in further discussions in the Council[44] and even in a procedure before the ECJ.[45]

4. Decision-making Procedure

The EU legislative process normally starts with a proposal by the European Commission because, due to the EU's constitutional framework, this EU institution has been given the right of legislative initiative in order to ensure that any EU legislation (directive or regulation) serves the common EU interest. Once the European Commission adopts the proposal by way of a majority vote in the College of Commissioners (Art. 250 TFEU), the proposal can be put to the Council and the European Parliament for deliberation and adoption in accordance with the applicable legislative procedure.[46]

Article 115 TFEU, on which the CCCTB Directive is based, provides that the legislative act on CCCTB shall be adopted by the Council acting unanimously in accordance with the special legislative procedure and after consulting the European Parliament and the Economic and Social Committee.

In their consultative roles, the European Parliament and the Economic and Social Committee cannot block adoption of the legislative act; they can only provide opinions, which the Council is then free to take into account. The key role in deliberations is given to the Council because, under the unanimity requirement, any member of the Council, i.e. any Member State, is able to veto adoption of the proposal. This normally implies many changes to the text of a proposal in order to satisfy demands of all the Member States before its potential adoption.

In the absence of unanimity, however, there exists a possibility for a smaller group of interested Member States to move forward under the Lisbon Treaty articles on enhanced cooperation. In fact, for the CCCTB Directive, this option has already been suggested in the press in light of the strong positions taken by certain Member States on tax harmonisation.[47]

Enhanced cooperation allows a group of interested Member States to move forward with a higher level of harmonisation of specific legal provisions than would be achievable among all the Member States.[48] The possibility of enhanced cooperation has existed since the 1999 Treaty of Amsterdam, but it has rarely been used[49] since EU integration generally requires a level playing field between all Member States.

40 90/436/EEC of 23 July 1990, Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, OJ L 225, 20 August 1990, p. 10.

41 The EU Joint Transfer Pricing Forum is an expert group that has been functioning since 2002. It has three functions: to provide a platform where business and national tax administration experts can discuss transfer pricing issues that constitute obstacles to cross-border business activities within the European Union; to advise the Commission on transfer pricing tax issues; and to assist the Commission in finding practical solutions, compatible with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, in order to achieve a more uniform application of transfer pricing rules within the European Union.

42 In particular, ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes),* [2005] ECR I-10837.

43 1997 Code of Conduct for Business Taxation (Conclusions of the ECOFIN Council meeting of December 1, 1997, OJ C 2, 6 January 1998, p. 1).

44 An important conclusion inferred from the negative opinions on subsidiarity submitted by the parliaments of the Member States is that the parliaments of at least 10 Member States see substantial problems with the proposal, which implies that the concerns raised by these parliaments may be reflected in the positions adopted by their governments in Council negotiations.

45 Member States may bring an action in the event of infringement of the principle of subsidiarity (Art. 8 of Protocol 2 to the Lisbon Treaty), but the Court has never actually annulled any EU act on that basis and seems very reluctant to do so, thereby leaving Union institutions with considerable discretionary powers and indirectly confirming that subsidiarity is essentially a political, rather than a strictly legal, principle. See ECJ, 8 June 2010, Case C-58/08, *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform*, Paras. 72-79; July 12, 2005, Joined Cases C-154/04 and 155/04, *Alliance for Natural Health and Others v Secretary of State for Health, and The Queen, National Association of Health Stores and Others v Secretary of State for Health, National Assembly for Wales*, Paras. 99-108; and 10 December 2002, Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco*, Paras. 173-183, [2010] ECR not yet published. As regards the principle of proportionality, the Court also recognises the broad discretion of the legislator and does not substitute its own assessment for that of the EU institutions. It is therefore not a question of whether a measure is the only or the best one possible, the legality of the measure can only be affected if it is manifestly inappropriate to the objective that the legislator is attempting to pursue. See ECJ, 7 July 2009, Case C-558/07, *S.P.C.M. SA, C.H. Erbslöh KG, Lake Chemicals and Minerals Ltd, Hercules Inc. v Secretary of State for the Environment, Food and Rural Affairs*, Paras. 41-42; 13 May 1997, [2009] ECR I-05783. Case C-233/94, *Federal Republic of Germany v European Parliament and Council of the European Union*, Paras. 54-57; 12 November 1996, Case C-84-94, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, Paras. 57-58, [1997] ECR I-02405.

46 The ordinary legislative procedure (previously known as the co-decision procedure) provides for the joint adoption of a legislative act by the European Parliament and the Council on a proposal from the Commission (Arts. 289(1) and 294 of the Treaty on the Functioning of the European Union (TFEU)). The special legislative procedure provides for the adoption of a legislative act by the European Parliament with the participation of the Council, or by the Council with the participation of the European Parliament (Art. 289(2) TFEU).

47 See, for example, 'Irish cool to E.U. tax proposal', *International Herald Tribune* (17 March 2011); 'Brussels unveils proposals for corporate tax overhaul', *Financial Times* (17 March 2011); 'Le projet de Bruxelles pour harmoniser l'impot sur les societes', *Le Figaro* (March 16, 2011); 'UK softens hostility to EU company tax plan', *Financial Times* (10 March 2011); and 'EU nearing "competitiveness pact" agreement but divided over tax plans', *Irish Times* (9 March 2011).

48 The other instrument in use is opt-out, which allows Member States to refrain from participation in certain policies (for example, the Schengen Area).

49 The only two examples are enhanced cooperation on divorce law and enhanced cooperation on EU patents. See Council decision 2010/405/EU of 12 July 2010, authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ L 189 of 22 July 2010, p. 12) and Council decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (OJ L 76 of 22 March 2011, p. 53).

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Enhanced cooperation is subject to a range of substantive and procedural conditions that may not always be easy to satisfy. Substantive conditions provide, for example, that enhanced cooperation must aim to further objectives of the European Union, to protect its interests, and to reinforce the integration process (Art. 20(1) TEU). Moreover, it may not undermine the internal market or distort competition between Member States (Art. 326 TFEU). Finally, enhanced cooperation must respect the competences, rights and obligations of non-participating Member States (Art. 327 TFEU).

The main procedural conditions require that enhanced cooperation only be used as a last resort: the Council must establish that the objectives cannot be achieved within a reasonable period by the EU as a whole and at least nine Member States must be willing to participate (Art. 20(2) TEU). In addition, the enhanced cooperation procedure can only commence on the basis of a request by interested Member States to the Commission, specifying the scope and objectives of the proposed enhanced cooperation (Art. 329(1) TFEU). The Commission may, but is not obliged to, make a proposal to that effect to the Council (Art. 329(1) TFEU). Consent of the European Parliament is required (Art. 329(1) TFEU), meaning that the European Parliament does not have a legal power to amend the proposal but can vote either in favour or against it. On the basis of the proposal by the Commission, and after obtaining the consent of the European Parliament, the Council, acting under qualified majority, may grant authorisation to proceed with enhanced cooperation (Art. 329(1) TFEU). Any further decisions within the framework of such authorised enhanced cooperation must be unanimous amongst the participating Member States, but non-voting Member States are allowed to participate in the deliberations (Art. 20(3) TEU and Art. 330 TFEU). Finally, once decided, the enhanced cooperation always remains open to participation by other Member States once they are prepared to fulfil the conditions of participation (Arts. 328 and 331 TFEU).

Deliberations on the CCCTB Directive have already started in the Council.[50] Given the complexity of the proposal, however, the technical discussions in the Council working parties have not yet led to any compromise texts or any decisions at the level of the Committee of Permanent Representatives COREPER or the Council.[51] Thus, the route that the proposal will take remains to be seen.

5. Transposition and Implementation

If and when the CCCTB Directive were to be adopted, it would become an EU directive,[52] which is binding as to the result to be achieved but leaves to the national authorities the choice of form and methods (Art. 288 TFEU).[53] This means that the provisions of the CCCTB Directive would not be directly applicable to the companies of the Member States. Rather, the national authorities of the Member States would have an obligation to transpose its provisions into national legislation within a certain period of time (generally two years) (Art. 134 CCCTB Directive).

Furthermore, before the actual provisions of the Directive can be applied in practice, another layer of discussions is needed about the various post-legislative acts foreseen for the adoption by the Commission with various degrees of participation by the Member States. Here, the following distinction should be made.

- Implementing acts under the comitology procedure (Art. 131 CCCTB Directive) to be used for establishments of eligible third country company forms (Art. 3 CCCTB Directive), rules on calculation of factors in apportionment formula (Art. 97 CCCTB Directive), standard form of the notice to opt (Art. 106 CCCTB Directive), and rules on electronic filing, tax returns and supporting documentation (Art. 113 CCCTB Directive).

  Comitology refers to the EU procedures for delegating implementation/implementing powers to the European Commission with a different degree of involvement by the specially designated committees composed of the representatives of the Member States and chaired by the Commission. It was used in the EU decision-making long before the Lisbon Treaty.[54] Article 131(2) CCCTB Directive makes a reference to Article 5 of the new 'comitology' regulation[55], which provides for an examination procedure. In this procedure, the Commission is supposed to make a proposal of the implementing act, which is then examined by the committee composed of representatives of the Member States. In the area of taxation, the implementing measure can normally be adopted only if the committee supports it by qualified majority (Art. 5(2)-5(4) of the new 'comitology' regulation).

50 After the proposal was submitted to the Council, it was taken up by the Hungarian Presidency for discussions in the Council High Level Working Party for Taxation on 28 April 2011, and, subsequently, by the Council. Working Party on Tax Questions (Direct Taxation) on 5 May, 31 May, and 27 June 2011. The Polish Presidency took up the proposal for discussion in the Working Party on Tax Questions (Direct Taxation) on 19 July, 6 September, 11 October, and 15 November 2011.

51 Generally, the Commission's legislative proposals are first examined by the relevant preparatory bodies (working parties) of the Council, where the Presidency can propose changes to the proposals in order to reach a compromise between the positions adopted by the Member States. Afterwards, the proposals (or, if necessary, compromise texts that include changes) are submitted for discussion on the remaining political issues (or for approval, if the text of the proposal has already been agreed by the working party) to the COREPER. Subsequently, the legislative proposals are submitted to the relevant Council for a formal decision, where the Ministers discuss the remaining political issues (or take a formal decision without a discussion if the text has already been agreed by the working party and/or COREPER).

52 Art. 115 TFEU, on which the CCCTB Directive is based, only provides a legal basis for directives.

53 In contrast, a regulation is binding in its entirety and directly applicable in all Member States.

54 See Council Decision 1999/468/EC of the Council of 28 June 1999, laying down the procedures for the exercise of the implementing powers conferred on the Commission (OJ L 184 of 17 July 1999, p. 23), as amended by Council decision 2006/512/EC of 17 July 2006 (OJ L 200 of 22 July 2006, p. 11).

55 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011, laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of the implementing powers (OJ L 55 of 28 February 2011, p. 13).

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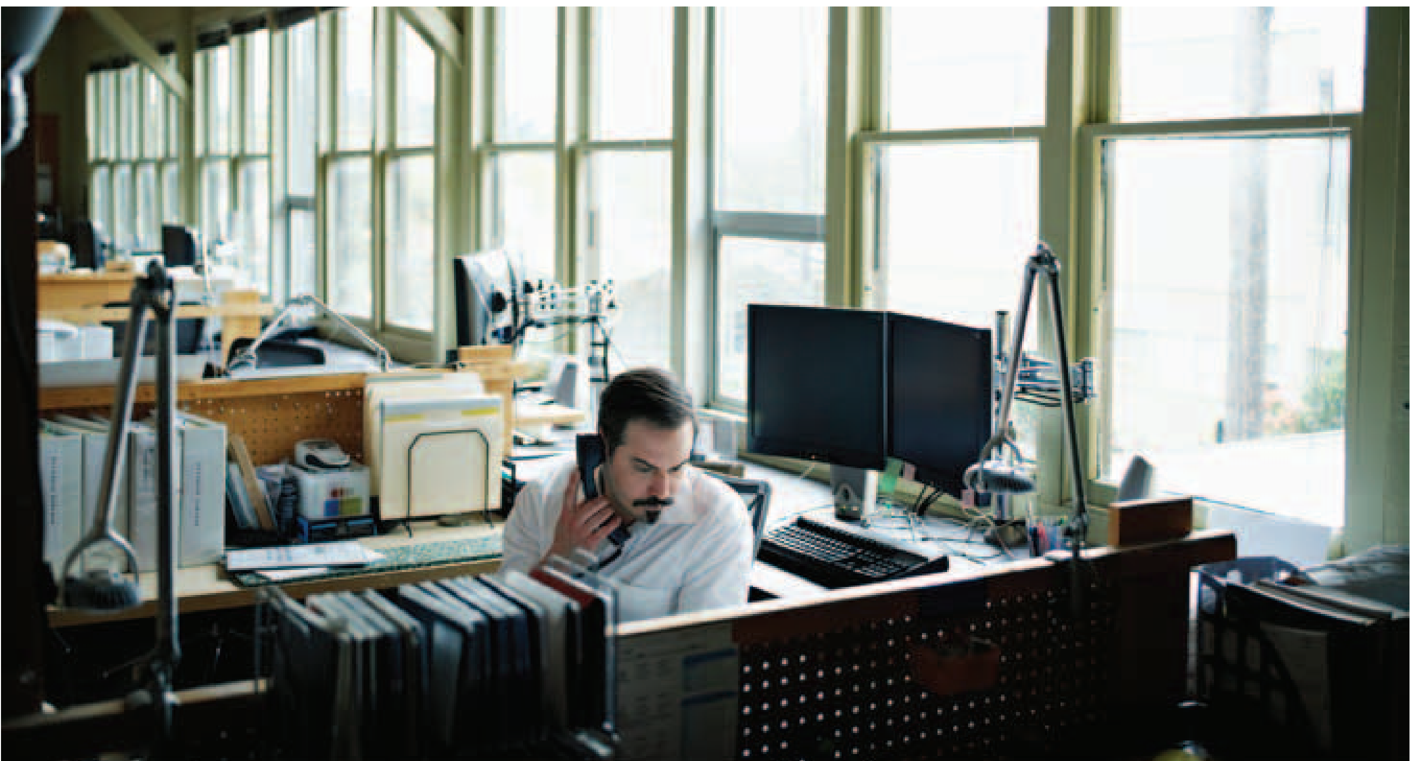
- Delegated acts (Arts. 127-129 CCCTB Directive) to be used for amendment of Annexes I, II and III of the CCCTB Directive (Article 2(3) and 14(3) CCCTB Directive), establishment of more detailed rules on specific aspects related to depreciation (Art. 34(5) CCCTB Directive), and precision of categories of fixed assets (Art. 42 CCCTB Directive).

  The procedure of delegated acts is a new procedure introduced by the Lisbon Treaty to be used to supplement or amend certain non-essential parts of the legislative acts (Art. 290 TFEU). The CCCTB Directive provides that the Commission may adopt the delegated act, unless the Council revokes the delegation or objects to the delegated act by qualified majority (Arts. 128-129 CCCTB Directive, in conjunction with Art. 290(2) TFEU).

Though the comitology and delegated acts procedures differ, both of them provide for decision-making under qualified majority, which removes the veto power of the Member States otherwise exercised under the unanimity voting requirement provided for by the special legislative procedure. In the past, Member States were therefore reluctant to provide for comitology in the area of direct taxation. Though comitology was recently introduced in the legislation related to direct taxation,[56] several Member States have made it clear that their agreement to the limited use of comitology is exceptional and should in no way be seen as setting a precedent for its use in the area of taxation.[57]

Therefore, the provisions of the CCCTB Directive related to these post-legislative acts may be subject to difficult discussions in the Council.



56 See Council directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EC (OJ L 64 of 11 March 2011, p. 1).
57 See Council document 5846/11 + ADD 1 + COR 1, respectively, of 4 and 8 February 2011, available on Council's website at www.consilium.europa.eu.

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CHAPTER THREE

The Nature of the Directive: Rules or Principles?

Judith Freedman[58] and **Graeme Macdonald**[59]

1. Legislative Basis for the CCCTB

EU directives are, by definition, outlines. They are binding, as to the result to be achieved, upon each Member State but leave to the national authorities the choice of form and methods. This contrasts with a regulation, which is binding in its entirety and directly applicable in all Member States (Article 288 Treaty on the Functioning of the European Union, TFEU).

It might have been expected that the CCCTB would be introduced by way of a regulation, (as was the *Societas Europaea*[60]), given that the aim was to provide a complete code for corporation tax at the European level. A directive would not normally provide such a code and would leave the details to be provided by Member States. The Commission concluded, however, that there was no legal basis for a regulation because the provision is based on Article 115 TFEU, which permits only the issue of directives for approximation directly affecting the establishment or functioning of the internal market.[61] The Commission accepts that it will be impossible to lay down every detailed rule in the basic instrument.

The Directive therefore provides for assistance with implementation and variation of detail under two special procedures known as the comitology procedure (Art. 131 of the Directive) and the delegated acts procedure (Arts. 127-129). The scope under both procedures is, however, strictly related to specific, limited provisions, and it does not extend to gaps which might appear in the definition of the tax base in general (see Chapter 2).

2. Principles

2.1. What is a principle?

Despite the fact that the Directive is not a regulation, it does appear to aim to set out the basic structure of a code for corporation tax. In particular, it sets out to lay down a self-contained set of rules for measuring the tax base.

Lack of detail does not, in itself, make the legislation 'principles-based'. Proper principles-based legislation needs a set of guiding primary assumptions or fundamental tenets in operation that can act as a default setting in the event that a question arises on how to proceed in any matter, whether this is to be decided by a committee, the national courts or the ECJ. It is essential that the principles are made explicit so they can act as 'gap-fillers'. The 'coherent principles approach' to drafting requires that these principles and all the charging and scoping measures of the legislation take the form of operative high-level provisions. This is sometimes called the cascade structure, with the principle at the top and the rules providing the exceptions.[62] The advantage of such principles is not that they give administrators and courts discretion; it is that they provide boundaries for the exercise of discretion by those bodies.

58 Professor of Taxation Law, University of Oxford.
59 Formerly University of Kent.
60 Council Regulation on the Statute for a European Company, (EC) No. 2157/2001.
61 CCCTB/WP057\doc\en (2007). It has also been questioned whether Art. 115 is an adequate legal basis for a directive – e.g. UK House of Commons Twenty-seventh Report of Session 2010-12 – European Scrutiny Committee. http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xxv/42804.htm. See also Chapter 2.
62 These ideas were developed by the Australian Tax Office and are discussed further in J. Freedman, 'Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited' [2010] BTR 717.

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2.2. What are the principles behind the CCCTB?

2.2.1. European Union principles

The broad principles behind the CCCTB are those underlying EU Law and derived from the Treaty on European Union and the TFEU, such as the four freedoms, the need for the establishment of an internal market and the balancing principle of subsidiarity. In addition, certain general principles have been evolved by the ECJ since the establishment of the European Community: principles such as legal certainty and proportionality.

This may be considered to be principles-based legislation in the sense that the scope of the provision is wide and then what follows provides carve-outs.

These principles guide the interpretation of all European Union Law, but they are very general in nature, though often relied upon by the ECJ for its creative interpretations. Nevertheless, something more seems to be required to provide the framework for the provision of a complete code for corporation taxation.

2.2.2. The tax base: tax and accounting principles

A third layer of principles can be found in Chapter II of the Directive: Fundamental Concepts. Article 4, the definition provision, provides very broad definitions of such concepts as '*profit*' and '*loss*'. This may be considered to be principles-based legislation in the sense that the scope of the provision is wide and then what follows provides carve-outs. Anything that is not covered by a carve-out is caught by the provision, providing a default principle. These definitions are supplemented by general principles in Article 9: that profits and losses shall be recognised only when realised; that transactions and taxable events shall be measured individually; and that the calculation of the tax base shall be carried out in a consistent manner unless exceptional circumstances justify a change.

In the UK, the legislative requirement to tax profits, without defining that term, led the courts to develop a system which now relies heavenly on accounting standards unless there is a specific statutory provision to the contrary. Other Member States also have a culture of looking to accounting to provide answers about the definition of profit. At the same time, the national courts play slightly varying roles in each Member State when it comes to deciding the meaning of terms like profit and realisation.

From the start of discussions about CCCTB, it was clear that, given the objectives of this system to improve the harmonisation of corporate taxation across the EU, there would have to be a single tax base defined specially for the purpose, rather than relying on individual national tax rules. A default to national law is clearly inconsistent with a common European tax base. The use of International Accounting Standards (IAS/IFRS) as a starting point or default was also rejected for the reasons described in Chapter 5.

It is clear that a primary objective of CCCTB is the minimisation of compliance costs and administrative burdens.[63] A separate tax base, as opposed to an accounting-based set of rules for measuring the tax base, will in itself add to the administrative burden. Although it will be possible as a matter of calculus to start from the accounting measure and adjust to arrive at the tax measure, this is not the form of most countries' tax rules. They start from internal definitions and progress to a resultant measure; there are influences from accounting measures but no systematic association.

2.2.3. Interpreting the tax base provisions in the Directive

So, in the event we have a stand-alone set of rules, which make no cross references but which in some areas clearly borrow from existing published accounting standards,[64] these rules will have to be supplemented over time and inevitably will be put to the test, with the ECJ ultimately being asked to interpret them.

One question will be the extent to which domestic courts in Member States and ultimately the ECJ will take IAS into account when faced with a difficult question relating to the tax base. Through judicial decisions, the IAS and their conceptual framework could become a set of default principles. On the other hand, the ECJ might resist this in the light of the clear rejection of IAS as a starting point following consultation by the Commission. The lack of clarity over this could create considerable uncertainty – not because this is a principles-based piece of legislation but because the principles to be applied are unclear.

Assuming that the ECJ does not look to IAS to provide interpretative material (or does so only partially), the question will be whether the Directive provides any explicit statements of principle to guide this process. Are the rules in the Directive internally consistent enough to suggest implicit principles? Or is what is proposed a set of rules which are no more than generalisations that will in time be found wanting and for which there are no obvious guidelines as to the limits of

63 Explanatory Memorandum to the Directive.
64 For example, Art. 29 and IAS 2, Art. 25 and IAS 37, Art. 23 and IAS 39.

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their application? Are the rules as drafted consistent with the generally accepted principles of tax design?

3. Principles Underlying the Tax Base

3.1. Economic neutrality, horizontal equity, and form and substance

It is difficult to deduce from the preamble to the Directive any principles that may guide interpretation of the tax base rules. It is clear from clause 1 of the preamble that the existence of 27 diverse corporate tax systems is regarded as an obstacle and distortion which impedes the proper functioning of the internal market. In terms of tax principles, the preamble recognises that economic neutrality and horizontal equity, both requiring the same tax treatment of transactions which are in substance identical, are real issues because failure to abide by them has real economic consequences. Does that mean, however, that in applying the rules regard will be had to the substance of transactions, or will the form predominate? Article 9 sets out general principles, the second of which is that 'Transactions and taxable events shall be measured individually'. This certainly suggests that legal form will predominate, with each individual transaction being measured regardless of any related transactions. On the other hand, depreciation is clearly intended to be based to some extent on substance, since it is given to the economic rather than the legal owner by Article 34.

3.2. Lack of conceptual framework

Beyond the principles referred to above, the CCCTB tax base is not conceptually defined, and so there is no reference point by which to judge any particular outcome following application of the rules. Although *profit* is defined widely, as discussed above, so that this could have been the basis for the type of cascade principles-based drafting discussed above, it is not entirely clear that the base is profit. *Profit* is defined as 'an excess of *revenues* over *deductible expenses* and other deductible items in a tax year' (Art. 9), but, apart from one reference (discussed below), it is not otherwise mentioned. Article 10 sets out the elements of the tax base: the tax base is to be calculated as '*revenues* less *exempt revenues*, *deductible expenses* and other deductible items'. These are the building blocks of the calculation.

3.2.1. Revenues

The preamble to the Directive states in clause 10 that 'All *revenues* should be taxable unless expressly exempted'. This could be seen as a principle consistent with the cascade form of drafting referred to above. It is also consistent with economic neutrality, which requires inclusive generality with exemptions being detailed and protected.

Article 4 defines *revenues* as 'proceeds of *sales* and of any other transactions, net of value added tax and other taxes and duties collected on behalf of government agencies, whether of a monetary or non-monetary nature, including proceeds from disposal of assets and rights, interest, dividends and other profits distributions, proceeds of liquidation, royalties, subsidies and grants, gifts received, compensation and ex-gratia payments. *Revenues* shall also include non-monetary gifts made by a *taxpayer*. *Revenues* shall not include equity raised by the *taxpayer* or debt repaid to it' (Art. 4(8)).

This may be considered to be principles-based legislation in the sense that the scope of the provision is wide and then what follows provides carve-outs.

A clear omission here is the exclusion of money raised by borrowing, but by what principle do we deduce this? Non-deductible expenses include repayment of equity and debt but not monies loaned (Art. 14(1)(a)). There is an internal consistency with regard to equity – equity raised is excluded from *revenues* and equity repaid excluded from expenses – but not with regard to loans. Loans made are not excluded from expenses and so they are theoretically deductible; but their repayment is not included in revenue. On the other hand, loans received are not excluded from *revenues* but their repayment is excluded from deductible expense. Will the court simply rely on 'absurdity' to deal with the inconsistency? Reference to almost any concept of income would give a clear answer by reference to the change in assets and liabilities over the period.

This example also makes clear the weakness of an approach that merely reflects a calculus and does not start from a conceptual base. Old accounting standards were very much of this type; they were essentially *ex post* rationalisations of the profit and loss calculus as it was practised. The more modern standards, typified by the International Financial Reporting Standards (IFRS), are more conceptually based, starting with definitions of assets and liabilities and arriving at profit or loss as a residual. There are no such conceptual definitions in the Directive; if there were, the omission noted above would not be problematic.

3.2.2. Realisation

The term *profit* (and *loss*) is used with reference to the realisation principle: 'profits and losses shall be recognised only when realised' (Art. 9(1)). The aim appears to be that

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'Income and expenses would be recognised on an accruals basis in the tax year to which they relate. This reflects general accounting practice and corresponds to the IFRS Framework, under which the effects of transactions and other events are recognised when they occur (and not at the moment when cash or its equivalent is received or paid)'.[65]

Articles 18 and 19 define when *revenues* accrue and when expenses are incurred by reference to legal rights and obligations, subject in both cases to the proviso that the amounts can be measured with reasonable accuracy, (regardless in the case of *revenues* of whether payment is deferred). But what then is meant by the use of the concept of 'realisation' in Article 9 of the Directive and why is it there? Is it a principle based on certainty, i.e. profit should only be taxed when the measure of it can be made with sufficient certainty? Or is it based on liquidity, which would mean that that profits should only be taxed when there has been a cash or near cash transaction to fund it? Articles 18 and 19 suggest the former but seem to require a crystallising transaction or event.

So if realisation is a principle, how is Article 23 justified? This brings into tax the change in fair value (nowhere defined) of *financial assets and liabilities held for trading*. It does so explicitly notwithstanding Articles 18 and 19, which do not refer to the realisation principle directly but appear to relate to it. Does Article 23 ignore articles 18 and 19 because there are no rights and obligations involved in valuing assets and liabilities held and on the assumption that the reasonable accuracy requirement is met? That being so, and with no reference to overriding the realisation principle, can we deduce that the realisation principle is about certainty rather than liquidity, particularly since the liquidity principle is not met? A proper statement of what is meant by the realisation principle would have averted this enquiry. It would also answer the question, which the accrual concept does not, of when the profit element in a deposit is realised and so taxable.

Is the use of the realisation concept here intended to be the same as its use in European company law? The company law concept has itself presented problems. In a general accounting context, the realisation concept is now much less important than it was in the past, both in IFRS and at national level in some jurisdictions, making the realisation concept even more problematic, especially since the Directive does not envisage an on-going and developing link with IFRS and so that the guidance from that source is limited.

3.3. Consistency different from uniformity

Article 9 sets out a principle of consistency, which is defined as a principle requiring consistent treatment over time (Art. 9(3)). However, the Directive at times appears to favour the different principle of uniformity, which applies identical measures to all taxpayers.

So, for example, provision is made for the depreciation of assets. Individually depreciable assets – buildings, long-life tangible assets and intangible assets – are all allocated fixed rates at which they are to be depreciated (Art. 36). Similarly pooled assets are all depreciated at a fixed rate of 25 percent (Art. 39). These rates are regardless of the actual rates of depreciation that might be evidenced by accounting depreciation. Whilst there is provision for exceptional depreciation on non-depreciating assets (Art. 41), there is no equivalent for other assets.

In tax terms, this uniform approach to depreciation is neither neutral nor equitable. The actual economic rate of depreciation on the same type of asset can vary widely depending upon the use to which it is put and the industry in which it is used; different assets might vary in their depreciation to a greater or lesser extent. If economic income is the intended tax base, then uniform rates of depreciation will favour some taxpayers and penalise others.

This may be justified in terms of minimising compliance and administration costs and reducing manipulation for tax purposes. For these reasons, policy makers might well accept a crude approximation, ignoring the particular timing as long as recognition of depreciation is given at some time. However, this approach ignores tax principles in order to achieve practical objectives. Without a clear expression of either the principle or the reasons for doing so, this undermines the principles basis of the Directive.

4. Conclusion

Does the Directive provide a principles-based approach to the calculation of the tax base? Certainly the breadth of the tax base achieved by the generality of the rules is to be welcomed and should prevent the creation of ill-found legal distinctions between, for example, capital and revenue and the creation of 'nothings'. At another level, the Directive simply describes how stock and work-in-progress values are to be used in calculating *profit*. It does not begin to explain or justify the basis of valuation of lower than cost or market value, for example, in terms of the carrying amounts of assets being their recoverable costs (as opposed to the prudent recognition of unrealised losses). There seems to be a clarity here, but is this in fact over-simplification rather than clarity? Will the lack of a conceptual foundation or a principled underpinning come back to bite? Just as early accounting standards, devoid of principle, were found wanting, the rules embodied in the Directive could well be found to be deficient. Would the ultimate decision on the appropriate tax base become a matter for the ECJ and, if so, is that acceptable politically and as a matter of practice?

65 CCCTB/WP057\doc\en.

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APPENDIX 1

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Full text of Proposal for a COUNCIL DIRECTIVE on a Common Consolidated Corporate Tax Base (CCCTB) European Commission COM (2011) 121 Final

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Explanatory Memorandum

1. Context of the Proposal

The Common Consolidated Corporate Tax Base (CCCTB) aims to tackle some major fiscal impediments to growth in the Single Market. In the absence of common corporate tax rules, the interaction of national tax systems often leads to over-taxation and double taxation, businesses are facing heavy administrative burdens and high tax compliance costs. This situation creates disincentives for investment in the EU and, as a result, runs counter to the priorities set in Europe 2020 – A strategy for smart, sustainable and inclusive growth.[1] The CCCTB is an important initiative on the path towards removing obstacles to the completion of the Single Market[2] and was identified in the Annual Growth Survey[3] as a growth-enhancing initiative to be frontloaded to stimulate growth and job creation.

The common approach proposed would ensure consistency in the national tax systems but would not harmonise tax rates. Fair competition on tax rates is to be encouraged. Differences in rates allows a certain degree of tax competition to be maintained in the internal market and fair tax competition based on rates offers more transparency and allows Member States to consider both their market competitiveness and budgetary needs in fixing their tax rates.

The CCCTB is compatible with the rethinking of tax systems and the shift to more growth-friendly and green taxation advocated in the Europe 2020 strategy. In designing the common base supporting research and development has been a key aim of the proposal. Under the CCCTB all costs relating to research and development are deductible. This approach will act as an incentive for companies opting in to the system to continue to invest in research and development. To the extent that there are economic losses to be offset on a cross-border basis, consolidation under the CCCTB tends to shrink the common base. However, in general, the common base would lead to an average EU base that is broader than the current one, mostly due to the option retained for the depreciation of assets.

A key obstacle in the single market today involves the high cost of complying with transfer pricing formalities using the arm's length approach. Further, the way that closely-integrated groups tend to organise themselves strongly indicates that transaction-by-transaction pricing based on the 'arm's length' principle may no longer be the most appropriate method for profit allocation. The possibility of cross-border loss offsets is only made possible in a limited number of circumstances within the EU, which leads to over-taxation for companies engaged in cross-border activities. In addition, the network of Double Tax Conventions (DTCs) does not offer an appropriate solution for the elimination of double taxation in the single market, as it is designed to operate in a bilateral context at the international level, rather than within a closely integrated setting.

1 Communication from the Commission, 'EUROPE 2020 – A strategy for smart, sustainable and inclusive growth' – COM(2010) 2020, 3.3.2010.
2 Communication from the Commission, 'Towards a Single Market Act – For a highly competitive social market economy – 50 proposals for improving our work, business and exchanges with one another' – COM(2010) 608, 27.10.2010.
3 Communication from the Commission, 'Annual Growth Survey: advancing the EU's comprehensive response to the crisis', COM(2011) 11, 12.01.2010.

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The CCCTB is a system of common rules for computing the tax base of companies which are tax resident in the EU and of EU-located branches of third-country companies. Specifically, the common fiscal framework provides for rules to compute each company's (or branch's) individual tax results, the consolidation of those results, when there are other group members, and the apportionment of the consolidated tax base to each eligible Member State.

The CCCTB will be available for all sizes of companies; MNEs would be relieved from the fact of certain tax obstacles in the single market and SMEs would incur less compliance costs when they decided to expand commercially to another Member State. The system is optional. Since not all businesses trade across the border, the CCCTB will not force companies not planning to expand beyond their national territory to bear the cost of shifting to a new tax system.

Harmonisation will only involve the computation of the tax base and will not interfere with financial accounts. Therefore, Member States will maintain their national rules on financial accounting and the CCCTB system will introduce autonomous rules for computing the tax base of companies. These rules shall not affect the preparation of annual or consolidated accounts.

There is no intention to extend harmonisation to the rates. Each Member State will be applying its own rate to its share of the tax base of taxpayers.

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

Business operating across national borders will benefit both from the introduction of cross-border loss compensation and from the reduction of company tax related compliance costs. Allowing the immediate consolidation of profits and losses for computing the EU-wide taxable bases is a step towards reducing over-taxation in cross-border situations and thereby towards improving the tax neutrality conditions between domestic and cross-border activities to better exploit the potential of the Internal Market. Calculations on a sample of EU multinationals shows that, on average approximately 50% of non-financial and 17% of financial multinational groups could benefit from immediate cross-border loss compensation.

A major benefit of the introduction of the CCCTB will be a reduction in compliance costs for companies. Survey evidence points to a reduction in the compliance costs for recurring tax related tasks in the range of 7% under CCCTB. The reduction in actual and perceived compliance costs is expected to exert a substantial influence on firms' ability and willingness to expand abroad in the medium and long term. The CCCTB is expected to translate into substantial savings in compliance time and outlays in the case of a parent company setting up a new subsidiary in a different Member State. On average, the tax experts participating in the study estimated that a large enterprise spends over €140,000 (0.23% of turnover) in tax related expenditure to open a new subsidiary in another Member State. The CCCTB will reduce these costs by €87,000 or 62%. The savings for a medium sized enterprise are even more significant, as costs are expected to drop from €128,000 (0.55% of turnover) to €42,000 or a decrease of 67%.

The proposal will benefit companies of all sizes but it is particularly relevant as part of the effort to support and encourage SMEs to benefit from the Single Market as set out in the review of the Small Business Act (SBA) for Europe[4]. The CCCTB notably contributes to reduced tax obstacles and administrative burdens, making it simpler and cheaper for SMEs to expand their activities across the EU. The CCCTB will mean that SMEs operating across borders and opting into the system will only be required to calculate their corporate tax base according to one set of tax rules. The CCCTB complements the European Private Company (SPE), which is still under discussion in the Council. A common framework for computing the tax base for companies in the EU would be particularly useful for SPEs operating across Member States.

The present proposal is not intended to influence the tax revenues and the impact on the distribution of the tax bases between the EU Member States has been analysed. In fact, the impact on the revenues of Member States will ultimately depend on national policy choices with regard to possible adaptations of the mix of different tax instruments or applied tax rates. In this respect it is difficult to predict the exact impacts on each of the Member States. In this context, as an exception to the general principle, where the outcome of the apportionment of the tax base between Member States does

4 Communication from the Commission, 'Review of the "Small Business Act" for Europe', COM(2011)78 final, 23.2.2011.

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not fairly represent the extent of business activity, a safeguard clause provides for an alternative method. Moreover, the Directive includes a clause to review the impacts after five years following the entry into force of the Directive.

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

To assist Member State tax administrations in the run up to the implementation of the CCCTB it is planned that the FISCALIS EU programme will be mobilised to assist Member States in the CCCTB implementation and administration.

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

2. Results of Consultations with the Interested Parties and Impact Assessments

(a) Consultations

Following publication of the Company Tax Study in 2001, the Commission led a broad public debate and held a series of consultations.

The most important step in that process was the creation of a Working Group (CCCTB WG) consisting of experts from the tax administrations of all Member States. The CCCTB WG was set up in November 2004 and met thirteen times in plenary sessions up until April 2008. In addition, six sub-groups were established to explore specific areas in more depth and reported back to the CCCTB WG. The role of the national experts was limited to providing technical assistance and advice to the Commission services. The CCCTB WG also met in extended format three times (i.e. December 2005, 2006 and 2007) to allow all key experts and stakeholders from the business, professions and academia to express their views.

Further, the Commission consulted informally, on a bilateral basis, several business and professional associations. Some of those interest groups submitted their views officially. The results of academic research were also considered. Thus, leading scholars furnished the Commission with their insights in connection with various features of the system.

The Commission also organised two events in Brussels (April 2002) and Rome (December 2003 with the Italian Presidency). In February 2008, another conference, co-sponsored by the Commission and an academic institution, took place in Vienna and discussed in detail several items relevant to the CCCTB. Finally, on 20 October 2010, the Commission consulted experts from Member States, business, think tanks and academics on certain topics which its services had reconsidered and further developed since the last meeting of the CCCTB WG in April 2008.

(b) Impact Assessment

A very detailed Impact Assessment has been prepared. It includes the results of the following studies: (i) European Tax Analyzer (ETA); (ii) Price Waterhouse Cooper-Study (PWC); (iii) Amadeus and Orbis database; (iv) Deloitte Study and (v) CORTAX study.

The report follows the Guidelines of Secretariat General for Impact Assessments and thereby it provides: (i) a review of the consultation process; (ii) a description of the existing problems; (iii) a statement of the objectives of the policy; and (iv) a comparison of alternative policy options which could attain the stated objectives. In particular, a CCTB (common tax base without consolidation) and a CCCTB (common tax base with consolidation), both compulsory and optional, are subject to analysis and their respective economic, social and environmental impacts are compared.

Comparison of Policy Options

The impact assessment looks at different options with the aim to improve the competitive position of European companies by providing them with the possibility to compute their EU-wide profits according to one set of rules and, hence, choose a legal environment that best suits their business needs, while eliminating tax costs related to the existence of 27 separate national tax systems. The report considers 4 main policy scenarios, which are compared with the 'no action' or 'status-quo' scenario (option 1):

(i) An optional Common Corporate Tax Base (optional CCTB): EU-resident companies (and EU-situated permanent establishments) would have the option to compute their tax base pursuant to a set of common rules across the Union instead of any of the 27 national corporate tax systems. 'Separate accounting' (i.e. transaction-by-transaction pricing according to the 'arm's length' principle) would remain in place for intra-group transactions, as the system would not involve a consolidation of tax results (option 2).

(ii) A compulsory Common Corporate Tax Base (compulsory CCTB): all qualifying EU-resident companies (and EU-situated permanent establishments) would be required to compute their tax base pursuant to a single set of common rules across the Union. The new rules would replace the current 27 national corporate tax systems. In the absence of consolidation, 'separate accounting' would continue to determine the allocation of profit in intra-group transactions (option 3).

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(iii) An optional Common Consolidated Corporate Tax Base (optional CCCTB): a set of common rules establishing an EU-wide consolidated tax base would be an alternative to the current 27 national corporate tax systems and the use of 'separate accounting' in allocating revenues to associated enterprises. Thus, the tax results of each group member (i.e. EU-resident company or EU-situated permanent establishment) would be aggregated to form a consolidated tax base and re-distributed according to a pre-established sharing mechanism based on a formula. Under this scenario, EU-resident companies and/or EU-situated permanent establishments owned by companies resident outside the Union would be entitled to apply the CCCTB, provided that they fulfil the eligibility requirements for forming a group and all eligible members of the same group opt to apply the common rules ('all-in all-out') (option 4).

(iv) A compulsory Common Consolidated Corporate Tax Base (compulsory CCCTB): EU-resident companies and/or EU-situated permanent establishments owned by companies resident outside the Union would be required to apply the CCCTB rules insofar as they fulfilled the eligibility requirements for forming a group.

Impact Analysis

The economic results of the Impact Assessment show that the removal of the identified corporate tax obstacles would allow business to make sounder economic choices and thus improve the overall efficiency of the economy. The options for an optional and compulsory CCCTB will both result in a slightly higher welfare. The optional CCCTB is preferable for a number of reasons. The two main reasons verified in the Impact Assessment are (i) the estimated impact on employment is more favourable and (ii) the enforced change by every single company in the Union to a new method of calculating its tax base (regardless of whether it operates in more that one Member State) is avoided.

The reforms under analysis are potentially associated with important dynamic effects in the long run. The reduction in uncertainty and in the costs (actual and perceived) that companies operating in multiple jurisdictions currently incur is the main channel through which these effects are expected to materialize. Ultimately, this will translate into increased cross-border investment within the Union, stemming both from further expansion of European and foreign multinational enterprises and from de novo investment of purely domestic companies into other Member States. Notably, the elimination of additional compliance costs associated with the obligation to comply with different tax rules across the Union and deal with more than one tax administration ('one-stop-shop' principle) are likely to enhance companies' capacity to expand cross-border. Such a prospect should be particularly beneficial for small and medium enterprises which are mostly affected by the high compliance costs of the current situation.

Although the Impact Assessment points out that the final impact of the introduction of a CCCTB on overall tax revenues depends on the Member States' own policy choices, it is important that Member States pay close attention to the revenue effects, in particular given the very difficult budgetary situation in many Member States.

In general, the new rules for the common base would lead to an average EU base that is broader than the current one. To the extent that there are economic losses to be offset on a cross-border basis, consolidation under CCCTB tends to shrink the common base.

In fact, the impact on the revenues of Member States will ultimately depend on national policy choices with regard to possible adaptations of the mix of different tax instruments or applied tax rates. In this respect, it is difficult to predict the exact impacts on each of the Member States. However, the Directive includes a clause to review the impacts after 5 years.

3. Legal Elements of the Proposal

(a) Legal Basis

Direct tax legislation falls within the ambit of Article 115 of the Treaty on the Functioning of the EU (TFEU). The clause stipulates that legal measures of approximation under that article shall be vested the legal form of a Directive.

(b) Subsidiarity

This proposal complies with the principle of Subsidiarity.

The system of the CCCTB aims to tackle fiscal impediments, mainly resulting from the fragmentation of the Union into 27 disparate tax systems, that businesses are faced with when they operate within the single market. Non-coordinated action, planned and implemented by each Member State individually, would replicate the current situation, as companies would still need to deal with as many tax administrations as the number of Member States in which they are liable to tax.

The rules set out in this proposal, such as the relief for cross-border losses and tax-free group restructurings, would be ineffective and likely to create distortion in the market, notably double taxation or non-taxation, if each Member State applied its own system. Neither would disparate national rules for the division of profits improve the current – already complex – process of allocating business profits amongst associated enterprises.

The nature of the subject requires a common approach.

A single set of rules for computing, consolidating and sharing the tax bases of associated enterprises across the Union is expected to attenuate market distortions caused by the

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current interaction of 27 national tax regimes. Further, the building blocks of the system, especially cross-border loss relief, tax-free intra-group asset transfers and the allocation of the group tax base through a formula, could only be materialised under a common regulatory umbrella. Accordingly, common rules of administrative procedure would have to be devised to allow the principle of a 'one-stop-shop' administration to function.

This proposal is limited to combatting tax obstacles caused by the disparities of national systems in computing the tax base between associated enterprises. The work that followed up to the Company Tax Study identified that the best results in tackling those obstacles would be achieved if a common framework regulated the computation of the corporate tax base and cross-border consolidation. Indeed, these matters may only be dealt with by laying down legislation at the level of the Union, since they are of a primarily cross-border nature. This proposal is therefore justified by reference to the principle of Subsidiarity because individual action by the Member States would fail to achieve the intended results.

(c) Proportionality

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

The present initiative is expected to create more favourable conditions for investment in the single market, as tax compliance costs should be expected to decrease. Further, companies would be likely to derive considerable benefits from the elimination of transfer pricing formalities, the possibility to transfer losses across national borders within the same group as well as from tax-free intra-group reorganisations. The positive impact should outweigh possible additional financial and administrative costs which national tax authorities would have to undergo for the purpose of implementing the system at a first stage.

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

4. Budgetary Implication

This proposal for a Directive does not have any budgetary implications for the European Union.

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Proposal for a
COUNCIL DIRECTIVE
on a Common Consolidated Corporate Tax Base (CCCTB)

The Council of the European Union

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Parliament[5],

Having regard to the opinion of the European Economic and Social Committee[6],

Acting in accordance with a special legislative procedure,

Whereas:

(1) Companies which seek to do business across frontiers within the Union encounter serious obstacles and market distortions owing to the existence of 27 diverse corporate tax systems. These obstacles and distortions impede the proper functioning of the internal market. They create disincentives for investment in the Union and run counter to the priorities set in the Communication adopted by the Commission on 3 March 2010 entitled Europe 2020 – A strategy for smart, sustainable and inclusive growth[7]. They also conflict with the requirements of a highly competitive social market economy.

(2) Tax obstacles to cross-border business are particularly severe for small and medium enterprises, which commonly lack the resources to resolve market inefficiencies.

(3) The network of double taxation conventions between Member States does not offer an appropriate solution. The existing Union legislation on corporate tax issues addresses only a small number of specific problems.

(4) A system allowing companies to treat the Union as a single market for the purpose of corporate tax would facilitate cross-border activity for companies resident in the Union and would promote the objective of making the Union a more competitive location for investment internationally. Such a system would best be achieved by enabling groups of companies with a taxable presence in more than one Member State to settle their tax affairs in the Union according to a single set of rules for calculation of the tax base and to deal with a single tax administration ('one-stop-shop'). These rules should also be made available to entities subject to corporate tax in the Union which do not form part of a group.

(5) Since differences in rates of taxation do not give rise to the same obstacles, the system (the Common Consolidated Corporate Tax Base (CCCTB)) need not affect the discretion of Member States regarding their national rate(s) of company taxation.

(6) Consolidation is an essential element of such a system, since the major tax obstacles faced by companies in the Union can be tackled only in that way. It eliminates transfer pricing formalities and intra-group double taxation. Moreover, losses incurred by taxpayers are automatically offset against profits generated by other members of the same group.

(7) Consolidation necessarily entails rules for apportionment of the result between the Member States in which group members are established.

5 OJ C […], […], p. […].
6 OJ C […], […], p. […].
7 COM(2010) 2020.

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(8) Since such a system is primarily designed to serve the needs of companies that operate across borders, it should be an optional scheme, accompanying the existing national corporate tax systems.

(9) The system (the Common Consolidated Corporate Tax Base (CCCTB)) should consist in a set of common rules for computing the tax base of companies without prejudice to the rules laid down in Council Directives 78/660/EEC[8] and 83/349/EEC[9] and Regulation of the European Parliament and of the Council 1606/2002/EC[10].

(10) All revenues should be taxable unless expressly exempted.

(11) Income consisting in dividends, the proceeds from the disposal of shares held in a company outside the group and the profits of foreign permanent establishments should be exempt. In giving relief for double taxation most Member States exempt dividends and proceeds from the disposals of shares since it avoids the need of computing the taxpayer's entitlement to a credit for the tax paid abroad, in particular where such entitlement must take account of the corporation tax paid by the company distributing dividends. The exemption of income earned abroad meets the same need for simplicity.

(12) Income consisting in interest and royalty payments should be taxable, with credit for withholding tax paid on such payments. Contrary to the case of dividends, there is no difficulty in computing such a credit.

(13) Taxable revenues should be reduced by business expenses and certain other items. Deductible business expenses should normally include all costs relating to sales and expenses linked to the production, maintenance and securing of income. Deductibility should be extended to costs of research and development and costs incurred in raising equity or debt for the purposes of the business. There should also be a list of non-deductible expenses.

(14) Fixed assets should be depreciable for tax purposes, subject to certain exceptions. Long-life tangible and intangible assets should be depreciated individually, while others should be placed in a pool. Depreciation in a pool simplifies matters for both the tax authorities and taxpayers since it avoids the need to establish and maintain a list of every single type of fixed asset and its useful life.

(15) Taxpayers should be allowed to carry losses forward indefinitely, but no loss carry-back should be allowed. Since carry-forward of losses is intended to ensure that a taxpayer pays tax on its real income, there is no reason to place a time limit on carry forward. Loss carry back is relatively rare in the practice of the Member States, and leads to excessive complexity.

(16) Eligibility for consolidation (group membership) should be determined in accordance with a two-part test based on (i) control (more than 50% of voting rights) and (ii) ownership (more than 75% of equity) or rights to profits (more than 75% of rights giving entitlement to profit). Such a test ensures a high level of economic integration between group members, as indicated by a relation of control and a high level of participation. The two thresholds should be met throughout the tax year; otherwise, the company should leave the group immediately. There should also be a nine-month minimum requirement for group membership.

(17) Rules on business reorganisations should be established in order to protect the taxing rights of Member States in an equitable manner. Where a company enters the group, pre-consolidation trading losses should be carried forward to be set off against the taxpayer's apportioned share. When a company leaves the group, no losses incurred during the period of consolidation should be allocated to it. An adjustment may be made in respect of capital gains where certain assets are disposed within a short period after entry to or exit from a group. The value of self-generated intangible assets should be assessed on the basis of a suitable proxy, that is to say research and development, marketing and advertising costs over a specified period.

(18) When withholding taxes are charged on interest and royalty payments made by taxpayers, the proceeds of such taxes should be shared according to the formula of that tax year. When withholding taxes are charged on dividends distributed by taxpayers, the proceeds of such taxes should not be shared since, contrary to interest and royalties, dividends have not led to a previous deduction borne by all group companies.

(19) Transactions between a taxpayer and an associated enterprise which is not a member of the same group should be subject to pricing adjustments in line with the 'arm's length' principle, which is a generally applied criterion.

(20) The system should include a general anti-abuse rule, supplemented by measures designed to curb specific types of abusive practices. These measures should include limitations on the deductibility of interest paid to associated enterprises resident for tax purposes in a low-tax country outside the Union which does not exchange information with the Member State of the payer based

8 OJ L 222, 14.8.1978, p. 11.
9 OJ L 193, 18.7.1983, p. 1.
10 OJ L 243, 11.9.2002, p. 1.

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on an agreement comparable to Council Directive 2011/16/EU[11] concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums[12] and rules on controlled foreign companies.

(21) The formula for apportioning the consolidated tax base should comprise three equally weighted factors (labour, assets and sales). The labour factor should be computed on the basis of payroll and the number of employees (each item counting for half). The asset factor should consist of all fixed tangible assets. Intangibles and financial assets should be excluded from the formula due to their mobile nature and the risks of circumventing the system. The use of these factors gives appropriate weight to the interests of the Member State of origin. Finally, sales should be taken into account in order to ensure fair participation of the Member State of destination. Those factors and weightings should ensure that profits are taxed where they are earned. As an exception to the general principle, where the outcome of the apportionment does not fairly represent the extent of business activity, a safeguard clause provides for an alternative method.

(22) Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[13] applies to the processing of personal data carried out within the framework of this Directive.

(23) Groups of companies should be able to deal with a single tax administration ('principal tax authority'), which should be that of the Member State in which the parent company of the group ('principal taxpayer') is resident for tax purposes. This Directive should also lay down procedural rules for the administration of the system. It should also provide for an advance ruling mechanism. Audits should be initiated and coordinated by the principal tax authority but the authorities of any Member State in which a group member is subject to tax may request the initiation of an audit. The competent authority of the Member State in which a group member is resident or established may challenge a decision of the principal tax authority concerning the notice to opt or an amended assessment before the courts of the Member State of the principal tax authority. Disputes between taxpayers and tax authorities should be dealt with by an administrative body which is competent to hear appeals at first instance according to the law of the Member State of the principal tax authority.

(24) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty on the Functioning of the European Union in order to adapt the Annexes to take into account the changes to the laws of the Member States concerning company forms and corporate taxes and update the list of the non-deductible taxes as well as lay down rules on the definition of legal and economic ownership in relation to leased assets and the calculation of the capital and interest elements of the leasing payments and of the depreciation base of a leased asset. It is necessary that the powers are delegated to the Commission for an indeterminate time, in order to allow the rules to be adjusted, if needed.

(25) In order to ensure uniform conditions for the implementation of this Directive as regards the annual adoption of a list of third country company forms which meet the requirements set out in this Directive, laying down rules on the calculation of the labour, asset and sales factors, the allocation of employees and payroll, assets and sales to the respective factor as well as the valuation of assets for the asset factor and the adoption of a standard form of the notice to opt and of rules on electronic filing, on the form of the tax return, on the form of the consolidated tax return and on the required supporting documentation, powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) 182/2011 of the European Parliament and of the Council of 28 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers[14].

(26) The objective of this Directive cannot be sufficiently achieved through individual action undertaken by the Member States because of the lack of coordination among national tax systems. Considering that the inefficiencies of the internal market primarily give rise to problems of a cross-border nature, remedial measures must be adopted at the level of the Union. Such an approach is in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

(27) The Commission should review the application of the Directive after a period of five years and that Member States should support the Commission by providing appropriate input to this exercise.

Has adopted this Directive:

11 OJ L 64, 11.3.2011, p. 1.
12 OJ L 336 27.12.1977, p.15.
13 OJ L 281, 23.11.1995, p. 31–50.
14 OJ L 55, 28.2.2011, p. 13.

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CHAPTER I
Scope

Article 1
Scope

This Directive establishes a system for a common base for the taxation of certain companies and groups of companies and lays down rules relating to the calculation and use of that base.

Article 2
Eligible companies

1. This Directive shall apply to companies established under the laws of a Member State where both of the following conditions are met:

   (a) the company takes one of the forms listed in Annex I;

   (b) the company is subject to one of the corporate taxes listed in Annex II or to a similar tax subsequently introduced.

2. This Directive shall apply to companies established under the laws of a third country where both of the following conditions are met:

   (a) the company has a similar form to one of the forms listed in Annex I;

   (b) the company is subject to one of the corporate taxes listed in Annex II.

3. The Commission may adopt delegated acts in accordance with Article 127 and subject to the conditions of Articles 128, 129 and 130 in order to amend Annexes I and II to take account of changes to the laws of the Member States concerning company forms and corporate taxes.

Article 3
Eligible third country company forms

1. The Commission shall adopt annually a list of third country company forms which shall be considered to meet the requirements laid down in Article 2(2)(a). That implementing act shall be adopted in accordance with the examination procedure referred to in Article 131(2).

2. The fact that a company form is not included in the list of third country company forms referred to in paragraph 1 shall not preclude the application of this Directive to that form.

CHAPTER II
Fundamental Concepts

Article 4
Definitions

For the purposes of this Directive, the following definitions shall apply:

(1) ‘taxpayer’ means a company which has opted to apply, the system provided for by this Directive;

(2) ‘single taxpayer’ means a taxpayer not fulfilling the requirements for consolidation;

(3) ‘non-taxpayer’ means a company which is ineligible to opt or has not opted to apply the system provided for by this Directive;

(4) ‘resident taxpayer’ means a taxpayer which is resident for tax purposes in a Member State according to Article 6(3) and (4);

(5) ‘non-resident taxpayer’ means a taxpayer which is not resident for tax purposes in a Member State according to Article 6(3) and (4);

(6) ‘principal taxpayer’ means:

   (a) a resident taxpayer, where it forms a group with its qualifying subsidiaries, its permanent establishments located in other Member States or one or more permanent establishments of a qualifying subsidiary resident in a third country; or

   (b) the resident taxpayer designated by the group where it is composed only of two or more resident taxpayers which are immediate qualifying subsidiaries of the same parent company resident in a third country; or

   (c) a resident taxpayer which is the qualifying subsidiary of a parent company resident in a third country, where that resident taxpayer forms a group solely with one or more permanent establishments of its parent; or

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(d) the permanent establishment designated by a non-resident taxpayer which forms a group solely in respect of its permanent establishments located in two or more Member States.

(7) 'group member' means any taxpayer belonging to the same group, as defined in Articles 54 and 55. Where a taxpayer maintains one or more permanent establishments in a Member State other than that in which its central management and control is located, each permanent establishment shall be treated as a group member;

(8) 'revenues' means proceeds of sales and of any other transactions, net of value added tax and other taxes and duties collected on behalf of government agencies, whether of a monetary or non-monetary nature, including proceeds from disposal of assets and rights, interest, dividends and other profits distributions, proceeds of liquidation, royalties, subsidies and grants, gifts received, compensation and ex-gratia payments. Revenues shall also include non-monetary gifts made by a taxpayer. Revenues shall not include equity raised by the taxpayer or debt repaid to it;

(9) 'profit' means an excess of revenues over deductible expenses and other deductible items in a tax year;

(10) 'loss' means an excess of deductible expenses and other deductible items over revenues in a tax year;

(11) 'consolidated tax base' means the result of adding up the tax bases of all group members as calculated in accordance with Article 10;

(12) 'apportioned share' means the portion of the consolidated tax base of a group which is allocated to a group member by application of the formula set out in Articles 86-102;

(13) 'value for tax purposes' of a fixed asset or asset pool means the depreciation base less total depreciation deducted to date;

(14) 'fixed assets' means all tangible assets acquired for value or created by the taxpayer and all intangible assets acquired for value where they are capable of being valued independently and are used in the business in the production, maintenance or securing of income for more than 12 months, except where the cost of their acquisition, construction or improvement are less than EUR 1,000. Fixed assets shall also include financial assets;

(15) 'financial assets' means shares in affiliated undertakings, loans to affiliated undertakings, participating interests, loans to undertakings with which the company is linked by virtue of participating interests, investments held as fixed assets, other loans, and own shares to the extent that national law permits their being shown in the balance sheet;

(16) 'long-life fixed tangible assets' means fixed tangible assets' with a useful life of 15 years or more. Buildings, aircraft and ships shall be deemed to be long-life fixed tangible assets;

(17) 'second-hand assets' means fixed assets with a useful life that had partly been exhausted when acquired and which are suitable for further use in their current state or after repair;

(18) 'improvement costs' means any additional expenditure on a fixed asset that materially increases the capacity of the asset or materially improves its functioning or represents more than 10% of the initial depreciation base of the asset;

(19) 'stocks and work-in-progress' means assets held for sale, in the process of production for sale or in the form of materials or supplies to be consumed in the production process or in the rendering of services;

(20) 'economic owner' means the person who has substantially all the benefits and risks attached to a fixed asset, regardless of whether that person is the legal owner. A taxpayer who has the right to possess, use and dispose of a fixed asset and bears the risk of its loss or destruction shall in any event be considered the economic owner;

(21) 'competent authority' means the authority designated by each Member State to administer all matters related to the implementation of this Directive;

(22) 'principal tax authority' means the competent authority of the Member State in which the principal taxpayer is resident or, if it is a permanent establishment of a non-resident taxpayer, is situated;

(23) 'audit' means inquiries, inspections or examinations of any kind conducted by a competent authority for the purpose of verifying the compliance of a taxpayer with this Directive.

Article 5
Permanent establishment

1. A taxpayer shall be considered to have a 'permanent establishment' in a State other than the State in which its central management and control is located when it has a fixed place in that other State through which the business is wholly or partly carried on, including in particular:
   (a) a place of management;
   (b) a branch;
   (c) an office;
   (d) a factory;
   (e) a workshop;
   (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

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2. A building site or construction or installation project shall constitute a permanent establishment only if it lasts more than twelve months.
3. Notwithstanding paragraphs 1 and 2, the following shall not be deemed to give rise to a permanent establishment:
   (a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the taxpayer;
   (b) the maintenance of a stock of goods or merchandise belonging to the taxpayer solely for the purpose of storage, display or delivery;
   (c) the maintenance of a stock of goods or merchandise belonging to the taxpayer solely for the purpose of processing by another person;
   (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the taxpayer;
   (e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the taxpayer, any other activity of a preparatory or auxiliary character;
   (f) the maintenance of a fixed place of business solely for any combination of activities mentioned in points (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
4. Notwithstanding paragraph 1, where a person – other than an agent of an independent status to whom paragraph 5 applies – is acting on behalf of a taxpayer and has, and habitually exercises, in a State an authority to conclude contracts in the name of the taxpayer, that taxpayer shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the taxpayer, unless the activities of such person are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.
5. A taxpayer shall not be deemed to have a permanent establishment in a State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.
6. The fact that a taxpayer which is a resident of a State controls or is controlled by a taxpayer which is a resident of another State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either taxpayer a permanent establishment of the other.

CHAPTER III
Opting for the System Provided for by this Directive

Article 6
Opting

1. A company to which this Directive applies which is resident for tax purposes in a Member State may opt for the system provided for by this Directive under the conditions provided for therein.
2. A company to which this Directive applies which is not resident for tax purposes in a Member State may opt for the system provided for by this Directive under the conditions laid down therein in respect of a permanent establishment maintained by it in a Member State.
3. For the purposes of paragraphs 1 and 2, a company that has its registered office, place of incorporation or place of effective management in a Member State and is not, under the terms of an agreement concluded by that Member State with a third country, regarded as tax resident in that third country shall be considered resident for tax purposes in that Member State.
4. Where, under paragraph 3, a company is resident in more than one Member State, it shall be considered to be resident in the Member State in which it has its place of effective management.
5. If the place of effective management of a shipping group member or of a group member engaged in inland waterways transport is aboard a ship or boat, it shall be deemed to be situated in the Member State of the home harbour of the ship or boat, or, if there is no such home harbour, in the Member State of residence of the operator of the ship or boat.
6. A company resident in a Member State which opts for the system provided for by this Directive shall be subject to corporate tax under that system on all income derived from any source, whether inside or outside its Member State of residence.
7. A company resident in a third country which opts for the system provided for by this Directive shall be subject to

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corporate tax under that system on all income from an activity carried on through a permanent establishment in a Member State.

Article 7
Applicable law

Where a company qualifies and opts for the system provided for by this Directive it shall cease to be subject to the national corporate tax arrangements in respect of all matters regulated by this Directive unless otherwise stated.

Article 8
Directive overrides agreements between Member States

The provisions of this Directive shall apply notwithstanding any provision to the contrary in any agreement concluded between Member States.

CHAPTER IV
Calculation of the Tax Base

Article 9
General principles

1. In computing the tax base, profits and losses shall be recognised only when realised.
2. Transactions and taxable events shall be measured individually.
3. The calculation of the tax base shall be carried out in a consistent manner unless exceptional circumstances justify a change.
4. The tax base shall be determined for each tax year unless otherwise provided. A tax year shall be any twelve-month period, unless otherwise provided.

Article 10
Elements of the tax base

The tax base shall be calculated as revenues less exempt revenues, deductible expenses and other deductible items.

Article 11
Exempt revenues

The following shall be exempt from corporate tax:

(a) subsidies directly linked to the acquisition, construction or improvement of fixed assets, subject to depreciation in accordance with Articles 32 to 42;

(b) proceeds from the disposal of pooled assets referred to in Article 39(2), including the market value of non-monetary gifts;

(c) received profit distributions;

(d) proceeds from a disposal of shares;

(e) income of a permanent establishment in a third country.

Article 12
Deductible expenses

Deductible expenses shall include all costs of sales and expenses net of deductible value added tax incurred by the taxpayer with a view to obtaining or securing income, including costs of research and development and costs incurred in raising equity or debt for the purposes of the business.

Deductible expenses shall also include gifts to charitable bodies as defined in Article 16 which are established in a Member State or in a third country which applies an agreement on the exchange of information on request comparable to the provisions of Directive 2011/16/EU. The maximum deductible expense for monetary gifts or donations to charitable bodies shall be 0.5% of revenues in the tax year.

Article 13
Other deductible items

A proportional deduction may be made in respect of the depreciation of fixed assets in accordance with Articles 32 to 42.

Article 14
Non-deductible expenses

1. The following expenses shall be treated as non-deductible:

   (a) profit distributions and repayments of equity or debt;

   (b) 50% of entertainment costs;

   (c) the transfer of retained earnings to a reserve which forms part of the equity of the company;

   (d) corporate tax;

   (e) bribes;

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(f) fines and penalties payable to a public authority for breach of any legislation;

(g) costs incurred by a company for the purpose of deriving income which is exempt pursuant to Article 11; such costs shall be fixed at a flat rate of 5% of that income unless the taxpayer is able to demonstrate that it has incurred a lower cost;

(h) monetary gifts and donations other than those made to charitable bodies as defined in Article 16;

(i) save as provided for in Articles 13 and 20, costs relating to the acquisition, construction or improvement of fixed assets except those relating to research and development;

(j) taxes listed in Annex III, with the exception of excise duties imposed on energy products, alcohol and alcoholic beverages, and manufactured tobacco.

2. Notwithstanding point (j) of paragraph 1 a Member State may provide for deduction of one or more of the taxes listed in Annex III. In the case of a group, any such deduction shall be applied to the apportioned share of the group members resident or situated in that Member State.

3. The Commission may adopt delegated acts in accordance with Article 127 and subject to the conditions of Articles 128, 129 and 130 to amend Annex III as is necessary in order to include all similar taxes which raise more than 20 % of the total amount of corporate tax in the Member State in which they are levied.

Amendments to Annex III shall first apply to taxpayers in their tax year starting after the amendment.

Article 15
Expenditure incurred for the benefit of shareholders

Benefits granted to a shareholder who is an individual, his spouse, lineal ascendant or descendant or associated enterprises, holding a direct or indirect participation in the control, capital or management of the taxpayer, as referred to in Article 78, shall not be treated as deductible expenses to the extent that such benefits would not be granted to an independent third party.

Article 16
Charitable bodies

A body shall qualify as charitable where the following conditions are met:

(a) it has legal personality and is a recognised charity under the law of the State in which it is established;

(b) its sole or main purpose and activity is one of public benefit; an educational, social, medical, cultural, scientific, philanthropic, religious, environmental or sportive purpose shall be considered to be of public benefit provided that it is of general interest;

(c) its assets are irrevocably dedicated to the furtherance of its purpose;

(d) it is subject to requirements for the disclosure of information regarding its accounts and its activities;

(e) it is not a political party as defined by the Member State in which it is established.

CHAPTER V
Timing and Quantification

Article 17
General principles

Revenues, expenses and all other deductible items shall be recognised in the tax year in which they accrue or are incurred, unless otherwise provided for in this Directive.

Article 18
Accrual of revenues

Revenues accrue when the right to receive them arises and they can be quantified with reasonable accuracy, regardless of whether the actual payment is deferred.

Article 19
Incurrence of deductible expenses

A deductible expense is incurred at the moment that the following conditions are met:

(a) the obligation to make the payment has arisen;

(b) the amount of the obligation can be quantified with reasonable accuracy;

(c) in the case of trade in goods, the significant risks and rewards of ownership over the goods have been transferred to the taxpayer and, in the case of supplies of services, the latter have been received by the taxpayer.

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Article 20
Costs related to non-depreciable assets

The costs relating to the acquisition, construction or improvement of fixed assets not subject to depreciation according to Article 40 shall be deductible in the tax year in which the fixed assets are disposed of, provided that the disposal proceeds are included in the tax base.

Article 21
Stocks and work-in-progress

The total amount of deductible expenses for a tax year shall be increased by the value of stocks and work-in-progress at the beginning of the tax year and reduced by the value of stocks and work-in-progress at the end of the same tax year. No adjustment shall be made in respect of stocks and work-in-progress relating to long-term contracts.

Article 22
Valuation

1. For the purposes of calculating the tax base, transactions shall be measured at:
   (a) the monetary consideration for the transaction, such as the price of goods or services;
   (b) the market value where the consideration for the transaction is wholly or partly non-monetary;
   (c) the market value in the case of a non-monetary gift received by a taxpayer;
   (d) the market value in the case of non-monetary gifts made by a taxpayer other than gifts to charitable bodies;
   (e) the fair value of financial assets and liabilities held for trading;
   (f) the value for tax purposes in the case of non-monetary gifts to charitable bodies.
2. The tax base, income and expenses shall be measured in EUR during the tax year or translated into EUR on the last day of the tax year at the annual average exchange rate for the calendar year issued by the European Central Bank or, if the tax year does not coincide with the calendar year, at the average of daily observations issued by the European Central Bank through the tax year. This shall not apply to a single taxpayer located in a Member State which has not adopted the EUR. Nor shall it apply to a group if all group members are located in the same Member State and that state has not adopted the EUR.

Article 23
Financial assets and liabilities held for trading (trading book)

1. A financial asset or liability shall be classified as held for trading if it is one of the following:
   (a) acquired or incurred principally for the purpose of selling or repurchasing in the near term;
   (b) part of a portfolio of identified financial instruments, including derivatives, that are managed together and for which there is evidence of a recent actual pattern of short-term profit-taking.
2. Notwithstanding Articles 18 and 19, any differences between the fair value at the end of the tax year and the fair value at the beginning of the same tax year, or at the date of purchase if later, of financial assets or liabilities held for trading shall be included in the tax base.
3. When a financial asset or liability held for trading is disposed of, the proceeds shall be added to the tax base. The fair value at the beginning of the tax year, or the market value at the date of purchase if later, shall be deducted.

Article 24
Long-term contracts

1. A long-term contract is one which complies with the following conditions:
   (a) it is concluded for the purpose of manufacturing, installation or construction or the performance of services;
   (b) its term exceeds, or is expected to exceed, 12 months.
2. Notwithstanding Article 18, revenues relating to a long-term contract shall be recognised, for tax purposes, at the amount corresponding to the part of the contract completed in the respective tax year. The percentage of completion shall be determined either by reference to the ratio of costs of that year to the overall estimated costs or by reference to an expert evaluation of the stage of completion at the end of the tax year.
3. Costs relating to long-term contracts shall be taken account of in the tax year in which they are incurred.

Article 25
Provisions

1. Notwithstanding Article 19, where at the end of a tax year it is established that the taxpayer has a legal obligation, or a probable future legal obligation, arising from activities

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or transactions carried out in that, or previous tax years, any amount arising from that obligation which can be reliably estimated shall be deductible, provided that the eventual settlement of the amount is expected to result in a deductible expense.

Where the obligation relates to an activity or transaction which will continue over future tax years, the deduction shall be spread proportionately over the estimated duration of the activity or transaction, having regard to the revenue derived therefrom.

Amounts deducted under this Article shall be reviewed and adjusted at the end of every tax year. In calculating the tax base in future years account shall be taken of amounts already deducted.

2. A reliable estimate shall be the expected expenditure required to settle the present obligation at the end of the tax year, provided that the estimate is based on all relevant factors, including past experience of the company, group or industry. In measuring a provision the following shall apply:

   (a) account shall be taken of all risks and uncertainties. However, uncertainty shall not justify the creation of excessive provisions;

   (b) if the term of the provision is 12 months or longer and there is no agreed discount rate, the provision shall be discounted at the yearly average of the Euro Interbank Offered Rate (Euribor) for obligations with a maturity of 12 months, as published by the European Central Bank, in the calendar year in the course of which the tax year ends;

   (c) future events shall be taken into account where they can reasonably be expected to occur;

   (d) future benefits directly linked to the event giving rise to the provision shall be taken into account.

Article 26
Pensions

In case of pension provisions actuarial techniques shall be used in order to make a reliable estimate of the amount of benefits that employees have earned in return for their service in the current and prior period.

The pension provision shall be discounted by reference to Euribor for obligations with a maturity of 12 months, as published by the European Central Bank. The calculations shall be based on the yearly average of that rate in the calendar year in the course of which the tax year ends.

Article 27
Bad debt deductions

1. A deduction shall be allowed for a bad debt receivable where the following conditions are met:

   (a) at the end of the tax year, the taxpayer has taken all reasonable steps to pursue payment and reasonably believes that the debt will not be satisfied wholly or partially; or the taxpayer has a large number of homogeneous receivables and is able to reliably estimate the amount of the bad debt receivable on a percentage basis, through making reference to all relevant factors, including past experience where applicable;

   (b) the debtor is not a member of the same group as the taxpayer;

   (c) no deduction has been claimed under Article 41 in relation to the bad debt;

   (d) where the bad debt relates to a trade receivable, an amount corresponding to the debt shall have been included as revenue in the tax base.

2. In determining whether all reasonable steps to pursue payment have been made, the following shall be taken into account:

   (a) whether the costs of collection are disproportionate to the debt;

   (b) whether there is any prospect of successful collection;

   (c) whether it is reasonable, in the circumstances, to expect the company to pursue collection.

3. Where a claim previously deducted as a bad debt is settled, the amount recovered shall be added to the tax base in the year of settlement.

Article 28
Hedging

Gains and losses on a hedging instrument shall be treated in the same manner as the corresponding gains and losses on the hedged item. In the case of taxpayers which are members of a group, the hedging instrument and hedged item may be held by different group members. There is a hedging relationship where both the following conditions are met:

   (a) the hedging relationship is formally designated and documented in advance;

   (b) the hedge is expected to be highly effective and the effectiveness can reliably be measured.

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Article 29
Stocks and work-in-progress

1. The cost of stock items and work-in-progress that are not ordinarily interchangeable and goods or services produced and segregated for specific projects shall be measured individually. The costs of other stock items and work-in-progress shall be measured by using the first-in first-out (FIFO) or weighted-average cost method.
2. A taxpayer shall consistently use the same method for the valuation of all stocks and work-in-progress having a similar nature and use. The cost of stocks and work-in-progress shall comprise all costs of purchase, direct costs of conversion and other direct costs incurred in bringing them to their present location and condition. Costs shall be net of deductible Value Added Tax. A taxpayer who has included indirect costs in valuing stocks and work-in-progress before opting for the system provided for by this Directive may continue to apply the indirect cost approach.
3. The valuation of stocks and work-in-progress shall be done in a consistent way.
4. Stocks and work-in-progress shall be valued on the last day of the tax year at the lower of cost and net realisable value. The net realisable value is the estimated selling price in the ordinary course of business less the estimated costs of completion and the estimated costs necessary to make the sale.

Article 30
Insurance undertakings

Insurance undertakings that have been authorised to operate in the Member States, in accordance with Council Directive 73/239/EEC[15] for non-life insurance, Directive 2002/83/EC of the European Parliament and of the Council[16] for life insurance, and Directive 2005/68/EC of the European Parliament and of the Council[17] for reinsurance, shall be subject to the following additional rules:

(a) the tax base shall include the difference in the market value, as measured at the end and the beginning of the same tax year, or upon completion of the purchase if later, of assets in which investment is made for the benefit of life insurance policyholders bearing the investment risk;

(b) the tax base shall include the difference in the market value, as measured at the time of disposal and the beginning of the tax year, or upon completion of the purchase if later, of assets in which investment is made for the benefit of life insurance policyholders bearing the investment risk;

(c) the technical provisions of insurance undertakings established in compliance with Directive 91/674EEC[18] shall be deductible, with the exception of equalisation provisions. A Member State may provide for the deduction of equalisation provisions. In the case of a group, any such deduction of equalisation provisions shall be applied to the apportioned share of the group members resident or situated in that Member State. Amounts deducted shall be reviewed and adjusted at the end of every tax year. In calculating the tax base in future years account shall be taken of amounts already deducted.

Article 31
Transfers of assets towards a third country

1. The transfer of a fixed asset by a resident taxpayer to its permanent establishment in a third country shall be deemed to be a disposal of the asset for the purpose of calculating the tax base of a resident taxpayer in relation to the tax year of the transfer. The transfer of a fixed asset by a non-resident taxpayer from its permanent establishment in a Member State to a third country shall also be deemed to be a disposal of the asset.
2. Paragraph 1 shall not apply where the third country is party to the European Economic Area Agreement and there is an agreement on the exchange of information between that third country and the Member State of the resident taxpayer or of the permanent establishment, comparable to Directive 2011/16/EU.

CHAPTER VI
Depreciation of Fixed Assets

Article 32
Fixed asset register

Acquisition, construction or improvement costs, together with the relevant date, shall be recorded in a fixed asset register for each fixed asset separately.

Article 33
Depreciation base

1. The depreciation base shall comprise any cost directly connected with the acquisition, construction or improvement of a fixed asset.

15 OJ L 228, 16.8.1973, p. 3.
16 OJ L 345, 19.12.2002, p. 1.
17 OJ L 232.9.12.2005, p. 1.
18 OJ L 374, 19.12.1991, p. 1

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Costs shall not include deductible value added tax.

In the case of fixed assets produced by the taxpayer, the indirect costs incurred in production of the asset shall also be added to the depreciation base in so far as they are not otherwise deductible.

2. The depreciation base of an asset received as a gift shall be its market value as included in revenues.
3. The depreciation base of a fixed asset subject to depreciation shall be reduced by any subsidy directly linked to the acquisition, construction or improvement of the asset as referred to in Article 11(a).

Article 34
Entitlement to depreciate

1. Subject to paragraph 3, depreciation shall be deducted by the economic owner.
2. In the case of leasing contracts in which economic and legal ownership does not coincide, the economic owner shall be entitled to deduct the interest element of the lease payments from its tax base. The interest element of the lease payments shall be included in the tax base of the legal owner.
3. A fixed asset may be depreciated by no more than one taxpayer at the same time. If the economic owner of an asset cannot be identified, the legal owner shall be entitled to deduct depreciation. In that case the interest element of the lease payments shall not be included in the tax base of the legal owner.
4. A taxpayer may not disclaim depreciation.
5. The Commission may adopt delegated acts in accordance with Article 127 and subject to the conditions of Articles 128, 129 and 130 in order to lay down more detailed rules concerning:
   (a) the definition of legal and economic ownership, in relation in particular to leased assets;
   (b) the calculation of the capital and interest elements of the lease payments;
   (c) the calculation of the depreciation base of a leased asset.

Article 35
Depreciation of improvement costs

Improvement costs shall be depreciated in accordance with the rules applicable to the fixed asset which has been improved as if they related to a newly acquired fixed asset.

Article 36
Individually depreciable assets

1. Without prejudice to paragraph 2 and Articles 39 and 40, fixed assets shall be depreciated individually over their useful lives on a straight-line basis. The useful life of a fixed asset shall be determined as follows:
   (a) buildings: 40 years;
   (b) long-life tangible assets other than buildings: 15 years;
   (c) intangible assets: the period for which the asset enjoys legal protection or for which the right is granted or, if that period cannot be determined, 15 years.
2. Second-hand buildings, second-hand long-life tangible assets and second-hand intangible assets shall be depreciated in accordance with the following rules:
   (a) a second-hand building shall be depreciated over 40 years unless the taxpayer demonstrates that the estimated remaining useful life of the building is shorter than 40 years, in which case it shall be depreciated over that shorter period;
   (b) a second-hand long-life tangible asset shall be depreciated over 15 years, unless the taxpayer demonstrates that the estimated remaining useful life of the asset is shorter than 15 years, in which case it shall be depreciated over that shorter period;
   (c) a second-hand intangible asset shall be depreciated over 15 years, unless the remaining period for which the asset enjoys legal protection or for which the right is granted can be determined, in which case it shall be depreciated over that period.

Article 37
Timing

1. A full year's depreciation shall be deducted in the year of acquisition or entry into use, whichever comes later. No depreciation shall be deducted in the year of disposal.
2. Where an asset is disposed of, voluntarily or involuntarily, during a tax year, its value for tax purposes and the value for tax purposes of any improvement costs incurred in relation to the asset shall be deducted from the tax base in that year. Where a fixed asset has given rise to an exceptional deduction under Article 41, the deduction under Article 20 shall be reduced to take into account the exceptional deduction already received.

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Article 38
Rollover relief for replacement assets

1. Where the proceeds from the disposal of an individually depreciable asset are to be re-invested before the end of the second tax year after the tax year in which the disposal took place in an asset used for the same or a similar purpose, the amount by which those proceeds exceed the value for tax purposes of the asset shall be deducted in the year of disposal. The depreciation base of the replacement asset shall be reduced by the same amount.

   An asset which is disposed of voluntarily must have been owned for a minimum period of three years prior to the disposal.

2. The replacement asset may be purchased in the tax year prior to the disposal.

   If a replacement asset is not purchased before the end of the second tax year after the year in which the disposal of the asset took place, the amount deducted in the year of disposal, increased by 10%, shall be added to the tax base in the second tax year after the disposal took place.

3. If the taxpayer leaves the group of which it is a member or ceases to apply the system provided for by this Directive within the first year, without having purchased a replacement asset, the amount deducted in the year of disposal shall be added to the tax base. If the taxpayer leaves the group or ceases to apply the system in the second year, that amount shall be increased by 10%.

Article 39
Asset pool

1. Fixed assets other than those referred to in Articles 36 and 40 shall be depreciated together in one asset pool at an annual rate of 25% of the depreciation base.

2. The depreciation base of the asset pool at the end of the tax year shall be its value for tax purposes at the end of the previous year, adjusted for assets entering and leaving the pool during the current year. Adjustments shall be made in respect of acquisition, construction or improvement costs of assets (which shall be added) and the proceeds of disposal of assets and any compensation received for the loss or destruction of an asset (which shall be deducted).

3. If the depreciation base as calculated in accordance with paragraph 2 is a negative amount, an amount shall be added, so that the depreciation base is zero. The same amount shall be added to the tax base.

Article 40
Assets not subject to depreciation

The following assets shall not be subject to depreciation:

(a) fixed tangible assets not subject to wear and tear and obsolescence such as land, fine art, antiques, or jewellery;

(b) financial assets.

Article 41
Exceptional depreciation

1. If, in exceptional circumstances, a taxpayer demonstrates that the value of a fixed asset not subject to depreciation has permanently decreased at the end of a tax year, it may deduct an amount equal to the decrease in value. However, no such deduction may be made in respect of assets the proceeds from the disposal of which are exempt.

2. If the value of an asset which has been subject to such exceptional depreciation in a previous tax year subsequently increases, an amount equivalent to the increase shall be added to the tax base in the year in which the increase takes place. However, any such addition or additions, taken together, shall not exceed the amount of the deduction originally granted.

Article 42
Precision of categories of fixed assets

The Commission may adopt delegated acts in accordance with Article 127 and subject to the conditions of Articles 128, 129 and 130 in order to define more precisely the categories of fixed assets referred to in this Chapter.

CHAPTER VII
Losses

Article 43
Losses

1. A loss incurred by a taxpayer or a permanent establishment of a non-resident taxpayer in a fiscal year may be deducted in subsequent tax years, unless otherwise provided by this Directive.

2. A reduction of the tax base on account of losses from previous tax years shall not result in a negative amount.

3. The oldest losses shall be used first.

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CHAPTER VIII
Provisions on Entry to and Exit from the System Provided for by this Directive

Article 44
General rule on recognition and valuation of assets and liabilities

When a taxpayer opts to apply the system provided for by this Directive, all assets and liabilities shall be recognised at their value as calculated according to national tax rules immediately prior to the date on which it begins to apply the system, unless otherwise stated in this Directive.

Article 45
Qualification of fixed assets for depreciation purposes

1. Fixed assets entering the system provided for by this Directive shall be depreciated in accordance with Articles 32 to 42.
2. Notwithstanding paragraph 1, the following depreciation rules shall apply:
   (a) fixed assets that are individually depreciable both under the national corporate tax law previously applicable to the taxpayer and under the rules of the system shall be depreciated according to Article 36(2);
   (b) fixed assets that were individually depreciable under the national corporate tax law previously applicable to the taxpayer but not under the rules of the system shall enter the asset pool provided for in Article 39;
   (c) fixed assets that were included in an asset pool for depreciation purposes under the national corporate tax law previously applicable to the taxpayer shall enter the system in the asset pool provided for in Article 39, even if they would be individually depreciable under the rules of the system;
   (d) fixed assets that were not depreciable or were not depreciated under the national corporate tax law previously applicable to the taxpayer but are depreciable under the rules of the system shall be depreciated in accordance with Article 36(1) or Article 39, as the case may be.

Article 46
Long-term contracts on entering the system

Revenues and expenses which pursuant to Article 24(2) and (3) are considered to have accrued or been incurred before the taxpayer opted into the system provided for by this Directive but were not yet included in the tax base under the national corporate tax law previously applicable to the taxpayer shall be added to or deducted from the tax base, as the case may be, in accordance with the timing rules of national law.

Revenues which were taxed under national corporate tax law before the taxpayer opted into the system in an amount higher than that which would have been included in the tax base under Article 24(2) shall be deducted from the tax base.

Article 47
Provisions and deductions on entering the system

1. Provisions, pension provisions and bad-debt deductions provided for in Articles 25, 26 and 27 shall be deductible only to the extent that they arise from activities or transactions carried out after the taxpayer opted into the system provided for by this Directive.
2. Expenses incurred in relation to activities or transactions carried out before the taxpayer opted into the system but for which no deduction had been made shall be deductible.
3. Amounts already deducted prior to opting into the system may not be deducted again.

Article 48
Pre-entry losses

Where a taxpayer incurred losses before opting into the system provided for by this Directive which could be carried forward under the applicable national law but had not yet been set off against taxable profits, those losses may be deducted from the tax base to the extent provided for under that national law.

Article 49
General rule for opting-out of the system

When a taxpayer leaves the system provided for by this Directive, its assets and liabilities shall be recognised at their value as calculated according to the rules of the system, unless otherwise stated in this Directive.

Article 50
Fixed assets depreciated in a pool

When a taxpayer leaves the system provided for by this Directive, its asset pool under the system provided for by this Directive shall be recognised, for the purpose of the national

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tax rules subsequently applicable, as one asset pool which shall be depreciated on the declining balance method at an annual rate of 25%.

Article 51
Long-term contracts on leaving the system

After the taxpayer leaves the system, revenues and expenses arising from long-term contracts shall be treated in accordance with the national corporate tax law subsequently applicable. However, revenues and expenses already taken into account for tax purposes in the system provided for by this Directive shall not be taken into account again.

Article 52
Provisions and deductions on leaving the system

After the taxpayer leaves the system provided for by this Directive, expenses which have already been deducted in accordance with Articles 25 to 27 may not be deducted again.

Article 53
Losses on leaving the system

Losses incurred by the taxpayer which have not yet been set off against taxable profits under the rules of the system provided for by this Directive shall be carried forward in accordance with national corporate tax law.

CHAPTER IX
Consolidation

Article 54
Qualifying subsidiaries

1. Qualifying subsidiaries shall be all immediate and lower-tier subsidiaries in which the parent company holds the following rights:
   (a) a right to exercise more than 50% of the voting rights;
   (b) an ownership right amounting to more than 75% of the company's capital or more than 75% of the rights giving entitlement to profit.
2. For the purpose of calculating the thresholds referred to in paragraph 1 in relation to companies other than immediate subsidiaries, the following rules shall be applied:
   (a) once the voting-right threshold is reached in respect of immediate and lower-tier subsidiaries, the parent company shall be deemed to hold 100% of such rights.
   (b) entitlement to profit and ownership of capital shall be calculated by multiplying the interests held in intermediate subsidiaries at each tier. Ownership rights amounting to 75% or less held directly or indirectly by the parent company, including rights in companies resident in a third country, shall also be taken into account in the calculation.

Article 55
Formation of group

1. A resident taxpayer shall form a group with:
   (a) all its permanent establishments located in other Member States;
   (b) all permanent establishments located in a Member State of its qualifying subsidiaries resident in a third country;
   (c) all its qualifying subsidiaries resident in one or more Member States;
   (d) other resident taxpayers which are qualifying subsidiaries of the same company which is resident in a third country and fulfils the conditions in Article 2(2)(a).
2. A non-resident taxpayer shall form a group in respect of all its permanent establishments located in Member States and all its qualifying subsidiaries resident in one or more Member States, including the permanent establishments of the latter located in Member States.

Article 56
Insolvency

A company in insolvency or liquidation may not become a member of a group. A taxpayer in respect of which a declaration of insolvency is made or which is liquidated shall leave the group immediately.

Article 57
Scope of consolidation

1. The tax bases of the members of a group shall be consolidated.
2. When the consolidated tax base is negative, the loss shall be carried forward and be set off against the next positive consolidated tax base. When the consolidated tax base is positive, it shall be shared in accordance with Articles 86 to 102.

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Article 58
Timing

1. The thresholds of Article 54 must be met throughout the tax year.
2. Notwithstanding paragraph 1, a taxpayer shall become a member of a group on the date when the thresholds of Article 54 are reached. The thresholds must be met for at least nine consecutive months, failing which a taxpayer shall be treated as if it had never having become a member of the group.

Article 59
Elimination of intra-group transactions

1. In calculating the consolidated tax base, profits and losses arising from transactions directly carried out between members of a group shall be ignored.
2. For the purpose of determining whether there is an intra-group transaction, both parties to the transaction must be group members at the time that the transaction is effected and the associated revenues and expenses fall to be recognised.
3. Groups shall apply a consistent and adequately documented method for recording intra-group transactions. Groups may change the method only for valid commercial reasons, at the beginning of a tax year.
4. The method for recording intra-group transactions shall enable all intra-group transfers and sales to be identified at the lower of cost and value for tax purposes.

Article 60
Withholding and source taxation

No withholding taxes or other source taxation shall be charged on transactions between members of a group.

CHAPTER X
Entering and Leaving the Group

Article 61
Fixed assets on entering the group

Where a taxpayer is the economic owner of non-depreciable or individually depreciable fixed assets on the date of its entry into a group and any of these assets are disposed of by a member of a group within five years of that date, an adjustment shall be made in the year of the disposal to the apportioned share of the group member that held the economic ownership over these assets on the date of entry. The proceeds of such disposal shall be added to that share and the costs relating to non-depreciable assets and the value for tax purposes of depreciable assets shall be deducted.

Such an adjustment shall also be made in respect of financial assets with the exception of shares in affiliated undertakings, participating interests and own shares.

If, as a result of a business reorganisation, the taxpayer no longer exists or no longer has a permanent establishment in the Member State in which it was resident on the date of its entry into the group, it shall be deemed to have a permanent establishment there for the purpose of applying the provisions of this Article.

Article 62
Long-term contracts on entering the group

Revenues and expenses which accrued according to Articles 24(2) and (3) before a taxpayer entered the group but had not yet been included in the calculation of tax under the applicable national corporate tax law shall be added to, or deducted from the apportioned share in accordance with the timing rules of national law.

Revenues which were taxed under the applicable national corporate tax law before a taxpayer entered the group in an amount higher than that which would have been charged under Article 24(2) shall be deducted from the apportioned share.

Article 63
Provisions and deductions on entering the group

Expenses covered by Articles 25, 26 and 27, which are incurred in relation to activities or transactions carried out before a taxpayer entered the group but for which no provision or deduction had been made under the applicable national corporate tax law shall be deductible only against the apportioned share of the taxpayer, unless they are incurred more than five years after the taxpayer enters the group.

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Article 64
Losses on entering the group

Unrelieved losses incurred by a taxpayer or a permanent establishment under the rules of this Directive or under national corporate tax law before entering a group may not be set off against the consolidated tax base. Such losses shall be carried forward and may be set off against the apportioned share in accordance respectively with Article 43 or with the national corporate tax law which would be applicable to the taxpayer in the absence of the system provided for by this Directive.

Article 65
Termination of a group

When a group terminates, the tax year shall be deemed to end. The consolidated tax base and any unrelieved losses of the group shall be allocated to each group member in accordance with Articles 86 to 102, on the basis of the apportionment factors applicable to the tax year of termination.

Article 66
Losses after the group terminates

Following termination of the group, losses shall be treated as follows:

(a) if the taxpayer remains in the system provided for by this Directive but outside a group, the losses shall be carried forward and be set off according to Article 43;

(b) if the taxpayer joins another group, the losses shall be carried forward and be set off against its apportioned share;

(c) if the taxpayer leaves the system, the losses shall be carried forward and be set off according to the national corporate tax law which becomes applicable, as if those losses had arisen while the taxpayer was subject to that law.

Article 67
Fixed assets on leaving the group

If non-depreciable or individually depreciable fixed assets, except for those which gave rise to a reduced exemption under Article 75, are disposed of within three years of the departure from the group of the taxpayer holding the economic ownership over these assets, the proceeds shall be added to the consolidated tax base of the group in the year of disposal and the costs relating to non-depreciable assets and the value for tax purposes of depreciable assets shall be deducted.

The same rule shall apply to financial assets, with the exception of shares in affiliated undertakings, participating interests and own shares.

To the extent to which the proceeds of disposal are added to the consolidated tax base of the group, they shall not otherwise be taxable.

Article 68
Self-generated intangible assets

Where a taxpayer which is the economic owner of one or more self-generated intangible assets leaves the group, an amount equal to the costs incurred in respect of those assets for research, development, marketing and advertising in the previous five years shall be added to the consolidated tax base of the remaining group members. The amount added shall not, however, exceed the value of the assets on the departure of the taxpayer from the group. Those costs shall be attributed to the leaving taxpayer and shall be treated in accordance with national corporate tax law which becomes applicable to the taxpayer or, if it remains in the system provided for by this Directive, the rules of this Directive.

Article 69
Losses on leaving the group

No losses shall be attributed to a group member leaving a group.

CHAPTER XI
Business Reorganisations

Article 70
Business reorganisations within a group

1. A business reorganisation within a group or the transfer of the legal seat of a taxpayer which is a member of a group shall not give rise to profits or losses for the purposes of determining the consolidated tax base. Article 59(3) shall apply.

2. Notwithstanding paragraph 1, where, as a result of a business reorganisation or a series of transactions between members of a group within a period of two years, substantially all the assets of a taxpayer are transferred to another Member State and the asset factor is substantially changed, the following rules shall apply.

   In the five years that follow the transfer, the transferred assets shall be attributed to the asset factor of the

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transferring taxpayer as long as a member of the group continues to be the economic owner of the assets. If the taxpayer no longer exists or no longer has a permanent establishment in the Member State from which the assets were transferred it shall be deemed to have a permanent establishment there for the purpose of applying the provisions of this Article.

Article 71
Treatment of losses where a business reorganisation takes place between two or more groups

1. Where, as a result of a business reorganisation, one or more groups, or two or more members of a group, become part of another group, any unrelieved losses of the previously existing group or groups shall be allocated to each of the members of the latter in accordance with Articles 86 to 102, on the basis of the factors applicable to the tax year in which the business reorganisation takes place, and shall be carried forward for future years.
2. Where two or more principal taxpayers merge within the meaning of Article 2(a)(i) and (ii) of Council Directive 2009/133/EC,[19] any unrelieved loss of a group shall be allocated to its members in accordance with Articles 86 to 102, on the basis of the factors applicable to the tax year in which the merger takes place, and shall be carried forward for future years.

CHAPTER XII
Dealings Between the Group and Other Entities

Article 72
Exemption with progression

Without prejudice to Article 75, revenue which is exempt from taxation under Article 11(c), (d) or (e) may be taken into account in determining the tax rate applicable to a taxpayer.

Article 73
Switch-over clause

Article 11(c), (d) or (e) shall not apply where the entity which made the profit distributions, the entity the shares in which are disposed of or the permanent establishment were subject, in the entity's country of residence or the country in which the permanent establishment is situated, to one of the following:

(a) a tax on profits, under the general regime in that third country, at a statutory corporate tax rate lower than 40% of the average statutory corporate tax rate applicable in the Member States;

(b) a special regime in that third country that allows for a substantially lower level of taxation than the general regime.

The average statutory corporate tax rate applicable in the Member States shall be published by the Commission annually. It shall be calculated as an arithmetic average. For the purpose of this Article and Articles 81 and 82, amendments to the rate shall first apply to taxpayers in their tax year starting after the amendment.

Article 74
Computation of income of a foreign permanent establishment

Where Article 73 applies to the income of a permanent establishment in a third country, its revenues, expenses and other deductible items shall be determined according to the rules of the system provided for by this Directive.

Article 75
Disallowance of exempt share disposals

Where, as a result of a disposal of shares, a taxpayer leaves the group and that taxpayer has within the current or previous tax years acquired in an intra-group transaction one or more fixed assets other than assets depreciated in a pool, an amount corresponding to those assets shall be excluded from the exemption unless it is demonstrated that the intra-group transactions were carried out for valid commercial reasons.

The amount excluded from exemption shall be the market value of the asset or assets when transferred less the value for tax purposes of the assets or the costs referred to in Article 20 relating to fixed assets not subject to depreciation.

When the beneficial owner of the shares disposed of is a non-resident taxpayer or a non-taxpayer, the market value of the asset or assets when transferred less the value for tax purposes shall be deemed to have been received by the taxpayer that held the assets prior to the intra-group transaction referred to in the first paragraph.

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19 OJ L 310, 25.11.2009, p. 34.

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Article 76
Interest and royalties and any other income taxed at source

1. Where a taxpayer derives income which has been taxed in another Member State or in a third country, other than income which is exempt under Article 11(c), (d) or (e), a deduction from the tax liability of that taxpayer shall be allowed.
2. The deduction shall be shared among the members of a group according to the formula applicable in that tax year pursuant to Articles 86 to 102.
3. The deduction shall be calculated separately for each Member State or third country as well as for each type of income. It shall not exceed the amount resulting from subjecting the income attributed to a taxpayer or to a permanent establishment to the corporate tax rate of the Member State of the taxpayer's residence or where the permanent establishment is situated.
4. In calculating the deduction, the amount of the income shall be decreased by related deductible expenses, which shall be deemed to be 2% thereof unless the taxpayer proves otherwise.
5. The deduction for the tax liability in a third country may not exceed the final corporate tax liability of a taxpayer, unless an agreement concluded between the Member State of its residence and a third country states otherwise.

Article 77
Withholding tax

Interest and royalties paid by a taxpayer to a recipient outside the group may be subject to a withholding tax in the Member State of the taxpayer according to the applicable rules of national law and any applicable double tax convention. The withholding tax shall be shared among the Member States according to the formula applicable in the tax year in which the tax is charged pursuant to Articles 86 to 102.

CHAPTER XIII
Transactions Between Associated Enterprises

Article 78
Associated enterprises

1. If a taxpayer participates directly or indirectly in the management, control or capital of a non-taxpayer, or a taxpayer which is not in the same group, the two enterprises shall be regarded as associated enterprises.

   If the same persons participate, directly or indirectly, in the management, control or capital of a taxpayer and a non-taxpayer, or of taxpayers not in the same group, all the companies concerned shall be regarded as associated enterprises.

   A taxpayer shall be regarded as an associated enterprise to its permanent establishment in a third country. A non-resident taxpayer shall be regarded as an associated enterprise to its permanent establishment in a Member State.
2. For the purposes of paragraph 1, the following rules shall apply:
   (a) participation in control shall mean a holding exceeding 20% of the voting rights;
   (b) participation in the capital shall mean a right of ownership exceeding 20% of the capital;
   (c) participation in management shall mean being in a position to exercise a significant influence in the management of the associated enterprise.
   (d) an individual, his spouse and his lineal ascendants or descendants shall be treated as a single person.

In indirect participations, the fulfilment of the requirements in points (a) and (b) shall be determined by multiplying the rates of holding through the successive tiers. A taxpayer holding more than 50% of the voting rights shall be deemed to hold 100%.

Article 79
Adjustment of pricing in relations between associated enterprises

Where conditions are made or imposed in relations between associated enterprises which differ from those that would be made between independent enterprises, then any income which would, but for those conditions, have accrued to the taxpayer, but, by reason of those conditions, has not so accrued, shall be included in the income of that taxpayer and taxed accordingly.

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CHAPTER XIV
Anti-abuse Rules

Article 80
General anti-abuse rule

Artificial transactions carried out for the sole purpose of avoiding taxation shall be ignored for the purposes of calculating the tax base.

The first paragraph shall not apply to genuine commercial activities where the taxpayer is able to choose between two or more possible transactions which have the same commercial result but which produce different taxable amounts.

Article 81
Disallowance of interest deductions

1. Interest paid to an associated enterprise resident in a third country shall not be deductible where there is no agreement on the exchange of information comparable to the exchange of information on request provided for in Directive 2011/16/EU and where one of the following conditions is met:

   (a) a tax on profits is provided for, under the general regime in the third country, at a statutory corporate tax rate lower than 40% of the average statutory corporate tax rate applicable in the Member States;

   (b) the associated enterprise is subject to a special regime in that third country which allows for a substantially lower level of taxation than that of the general regime.

2. The term 'interest' means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest.

3. Notwithstanding paragraph 1, interest paid to an entity resident in a third country with which there is no agreement on the exchange of information comparable to the exchange of information on request provided for in Directive 2011/16/EU shall be deductible, in an amount not exceeding that which would be stipulated between independent enterprises, where one of the following conditions is met:

   (a) the amount of that interest is included in the tax base as income of the associated enterprise in accordance with Article 82;

   (b) the interest is paid to a company whose principal class of shares is regularly traded on one or more recognised stock exchanges;

   (c) the interest is paid to an entity engaged, in its country of residence, in the active conduct of a trade or business. This shall be understood as an independent economic enterprise carried on for profit and in the context of which officers and employees carry out substantial managerial and operational activities.

Article 82
Controlled foreign companies

1. The tax base shall include the non-distributed income of an entity resident in a third country where the following conditions are met:

   (a) the taxpayer by itself, or together with its associated enterprises, holds a direct or indirect participation of more than 50% of the voting rights, or owns more than 50% of capital or is entitled to receive more than 50% of the profits of that entity;

   (b) under the general regime in the third country, profits are taxable at a statutory corporate tax rate lower than 40% of the average statutory corporate tax rate applicable in the Member States, or the entity is subject to a special regime that allows for a substantially lower level of taxation than that of the general regime;

   (c) more than 30% of the income accruing to the entity falls within one or more of the categories set out in paragraph 3;

   (d) the company is not a company, whose principal class of shares is regularly traded on one or more recognised stock exchanges.

2. Paragraph 1 shall not apply where the third country is party to the European Economic Area Agreement and there is an agreement on the exchange of information comparable to the exchange of information on request provided for in Directive 2011/16/EU.

3. The following categories of income shall be taken into account for the purposes of point (c) of paragraph 1, in so far as more than 50 % of the category of the entity's income comes from transactions with the taxpayer or its associated enterprises:

   (a) interest or any other income generated by financial assets;

   (b) royalties or any other income generated by intellectual property;

   (c) dividends and income from the disposal of shares;

   (d) income from movable property;

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(e) income from immovable property, unless the Member State of the taxpayer would not have been entitled to tax the income under an agreement concluded with a third country;

(f) income from insurance, banking and other financial activities.

Article 83
Computation

1. The income to be included in the tax base shall be calculated according to the rules of Articles 9 to 15. Losses of the foreign entity shall not be included in the tax base but shall be carried forward and taken into account when applying Article 82 in subsequent years.
2. The income to be included in the tax base shall be calculated in proportion to the entitlement of the taxpayer to share in the profits of the foreign entity.
3. The income shall be included in the tax year in which the tax year of the foreign entity ends.
4. Where the foreign entity subsequently distributes profits to the taxpayer, the amounts of income previously included in the tax base pursuant to Article 82 shall be deducted from the tax base when calculating the taxpayer's liability to tax on the distributed income.
5. If the taxpayer disposes of its participation in the entity, the proceeds shall be reduced, for the purposes of calculating the taxpayer's liability to tax on those proceeds, by any undistributed amounts which have already been included in the tax base.

CHAPTER XV
Transparent Entities

Article 84
Rules for allocating the income of transparent entities to taxpayers holding an interest

1. Where an entity is treated as transparent in the Member State of its location, a taxpayer holding an interest in the entity shall include its share in the income of the entity in its tax base. For the purpose of this calculation, the income shall be computed under the rules of this Directive.
2. Transactions between a taxpayer and the entity shall be disregarded in proportion to the taxpayer's share of the entity. Accordingly, the income of the taxpayer derived from such transactions shall be considered to be a proportion of the amount which would be agreed between independent enterprises calculated on an arm's length basis which corresponds to the third party ownership of the entity.
3. The taxpayer shall be entitled to relief for double taxation in accordance with Article 76(1),(2),(3) and (5).

Article 85
Rules for determining transparency in the case of third country entities

Where an entity is located in a third country, the question whether or not it is transparent shall be determined according to the law of the Member State of the taxpayer. If at least two group members hold an interest in the same entity located in a third country, the treatment of the latter shall be determined by common agreement among the relevant Member States. If there is no agreement, the principal tax authority shall decide.

CHAPTER XVI
Apportionment of the Consolidated Tax Base

Article 86
General principles

1. The consolidated tax base shall be shared between the group members in each tax year on the basis of a formula for apportionment. In determining the apportioned share of a group member A, the formula shall take the following form, giving equal weight to the factors of sales, labour and assets:

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

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2. The consolidated tax base of a group shall be shared only when it is positive.
3. The calculations for sharing the consolidated tax base shall be done at the end of the tax year of the group.
4. A period of 15 days or more in a calendar month shall be considered as a whole month.

Article 87
Safeguard clause

As an exception to the rule set out in Article 86, if the principle taxpayer or a competent authority considers that the outcome of the apportionment to a group member does not fairly represent the extent of the business activity of that group member, the principal taxpayer or the authority concerned may request the use of an alternative method. If, following consultations among the competent authorities and, where applicable, discussions held in accordance with Article 132, all these authorities agree to the alternative method, it shall be used. The Member State of the principal tax authority shall inform the Commission about the alternative method used.

Article 88
Entering and leaving the group

Where a company enters or leaves a group during a tax year, its apportioned share shall be computed proportionately having regard to the number of calendar months during which the company belonged to the group in the tax year.

Article 89
Transparent entities

Where a taxpayer holds an interest in a transparent entity, the factors used in calculating its apportioned share shall include the sales, payroll and assets of the transparent entity, in proportion to the taxpayer's participation in its profits and losses.

Article 90
Composition of the labour factor

1. The labour factor shall consist, as to one half, of the total amount of the payroll of a group member as its numerator and the total amount of the payroll of the group as its denominator, and as to the other half, of the number of employees of a group member as its numerator and the number of employees of the group as its denominator. Where an individual employee is included in the labour factor of a group member, the amount of payroll relating to that employee shall also be allocated to the labour factor of that group member.
2. The number of employees shall be measured at the end of the tax year.
3. The definition of an employee shall be determined by the national law of the Member State where the employment is exercised.

Article 91
Allocation of employees and payroll

1. Employees shall be included in the labour factor of the group member from which they receive remuneration.
2. Notwithstanding paragraph 1, where employees physically exercise their employment under the control and responsibility of a group member other than that from which they receive remuneration, those employees and the amount of payroll relating to them shall be included in the labour factor of the former.

   This rule shall only apply where the following conditions are met:

   (a) this employment lasts for an uninterrupted period of at least three months;

   (b) such employees represent at least 5% of the overall number of employees of the group member from which they receive remuneration.
3. Notwithstanding paragraph 1, employees shall include persons who, though not employed directly by a group member, perform tasks similar to those performed by employees.
4. The term 'payroll' shall include the cost of salaries, wages, bonuses and all other employee compensation, including related pension and social security costs borne by the employer.
5. Payroll costs shall be valued at the amount of such expenses which are treated as deductible by the employer in a tax year.

Article 92
Composition of the asset factor

1. The asset factor shall consist of the average value of all fixed tangible assets owned, rented or leased by a group member as its numerator and the average value of all fixed tangible assets owned, rented or leased by the group as its denominator.
2. In the five years that follow a taxpayer's entry into an existing or new group, its asset factor shall also include the total amount of costs incurred for research, development, marketing and advertising by the taxpayer over the six years that preceded its entry into the group.

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Article 93
Allocation of assets

1. An asset shall be included in the asset factor of its economic owner. If the economic owner cannot be identified, the asset shall be included in the asset factor of the legal owner.
2. Notwithstanding paragraph 1, if an asset is not effectively used by its economic owner, the asset shall be included in the factor of the group member that effectively uses the asset. However, this rule shall only apply to assets that represent more than 5% of the value for tax purposes of all fixed tangible assets of the group member that effectively uses the asset.
3. Except in the case of leases between group members, leased assets shall be included in the asset factor of the group member which is the lessor or the lessee of the asset. The same shall apply to rented assets.

Article 94
Valuation

1. Land and other non-depreciable fixed tangible assets shall be valued at their original cost.
2. An individually depreciable fixed tangible asset shall be valued at the average of its value for tax purposes at the beginning and at the end of a tax year.

   Where, as a result of one or more intra-group transactions, an individually depreciable fixed tangible asset is included in the asset factor of a group member for less than a tax year, the value to be taken into account shall be calculated having regard to the whole number of months.
3. The pool of fixed assets shall be valued at the average of its value for tax purposes at the beginning and at the end of a tax year.
4. Where the renter or lessee of an asset is not its economic owner, it shall value rented or leased assets at eight times the net annual rental or lease payment due, less any amounts receivable from sub-rentals or sub-leases.

   Where a group member rents out or leases an asset but is not its economic owner, it shall value the rented or leased assets at eight times the net annual rental or lease payment due.
5. Where, following an intra-group transfer in the same or the previous tax year, a group member sells an asset outside the group, the asset shall be included in the asset factor of the transferring group member for the period between the intra-group transfer and the sale outside the group. This rule shall not apply where the group members concerned demonstrate that the intra-group transfer was made for genuine commercial reasons.

Article 95
Composition of the sales factor

1. The sales factor shall consist of the total sales of a group member (including a permanent establishment which is deemed to exist by virtue of the second subparagraph of Article 70(2) as its numerator and the total sales of the group as its denominator.
2. Sales shall mean the proceeds of all sales of goods and supplies of services after discounts and returns, excluding value added tax, other taxes and duties. Exempt revenues, interest, dividends, royalties and proceeds from the disposal of fixed assets shall not be included in the sales factor, unless they are revenues earned in the ordinary course of trade or business. Intra-group sales of goods and supplies of services shall not be included.
3. Sales shall be valued according to Article 22.

Article 96
Sales by destination

1. Sales of goods shall be included in the sales factor of the group member located in the Member State where dispatch or transport of the goods to the person acquiring them ends. If this place is not identifiable, the sales of goods shall be attributed to the group member located in the Member State of the last identifiable location of the goods.
2. Supplies of services shall be included in the sales factor of the group member located in the Member State where the services are physically carried out.
3. Where exempt revenues, interest, dividends and royalties and the proceeds from the disposal of assets are included in the sales factor, they shall be attributed to the beneficiary.
4. If there is no group member in the Member State where goods are delivered or services are carried out, or if goods are delivered or services are carried out in a third country, the sales shall be included in the sales factor of all group members in proportion to their labour and asset factors.
5. If there is more than one group member in the Member State where goods are delivered or services are carried out, the sales shall be included in the sales factor of all group members located in that Member State in proportion to their labour and asset factors.

Article 97
Rules on calculation of factors

The Commission may adopt acts laying down detailed rules on the calculation of the labour, asset and sales factors, the allocation of employees and payroll, assets and sales to the respective factor and the valuation of assets. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 131(2).

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Article 98
Financial institutions

1. The following entities shall be regarded as financial institutions:

    (a) credit institutions authorised to operate in the Union in accordance with Directive 2006/48/EC of the European Parliament and of the Council;[20]

    (b) entities, except for insurance undertakings as defined in Article 99, which hold financial assets amounting to 80% or more of all their fixed assets, as valued in accordance with the rules of this Directive.

2. The asset factor of a financial institution shall include 10% of the value of financial assets, except for participating interests and own shares. Financial assets shall be included in the asset factor of the group member in the books of which they were recorded when it became a member of the group.

3. The sales factor of a financial institution shall include 10% of its revenues in the form of interest, fees, commissions and revenues from securities, excluding value added tax, other taxes and duties. For the purposes of Article 96(2), financial services shall be deemed to be carried out, in the case of a secured loan, in the Member State in which the security is situated or, if this Member State cannot be identified, the Member State in which the security is registered. Other financial services shall be deemed to be carried out in the Member State of the borrower or of the person who pays fees, commissions or other revenue. If the borrower or the person who pays fees, commissions or other revenue cannot be identified or if the Member State in which the security is situated or registered cannot be identified, the sales shall be attributed to all group members in proportion to their labour and asset factors.

Article 99
Insurance undertakings

1. The term "insurance undertakings" shall mean those undertakings authorised to operate in the Member States in accordance with Directive 73/239/EEC for non-life insurance, 2002/83/EC for life insurance and Directive 2005/68/EC for reinsurance.

2. The asset factor of insurance undertakings shall include 10% of the value of financial assets as provided for in Article 98(2).

3. The sales factor of insurance undertakings shall include 10% of all earned premiums, net of reinsurance, allocated investment returns transferred from the non-technical account, other technical revenues, net of reinsurance, and investment revenues, fees and commissions, excluding value added tax, other taxes and duties. For the purposes of Article 96(2), insurance services shall be deemed to be carried out in the Member State of the policy holder. Other sales shall be attributed to all group members in proportion to their labour and asset factors.

Article 100
Oil and gas

Notwithstanding Article 96(1), (2) and (3), sales of a group member conducting its principal business in the field of the exploration or production of oil or gas shall be attributed to the group member in the Member State where the oil or gas is to be extracted or produced.

Notwithstanding Article 96(4) and (5), if there is no group member in the Member State of exploration or production of oil and gas or the exploration or production takes place in a third country where the group member which carries on the exploration or production of oil and gas does not maintain a permanent establishment, the sales shall be attributed to that group member.

Article 101
Shipping, inland waterways transport and air transport

The revenues, expenses and other deductible items of a group member whose principal business is the operation of ships or aircraft in international traffic or the operation of boats engaged in inland waterways transport shall not be apportioned according to the formula referred to in Article 86 but shall be attributed to that group member. Such a group member shall be excluded from the calculation of the apportionment formula.

Article 102
Items deductible against the apportioned share

The apportioned share shall be adjusted by the following items:

(a) unrelieved losses incurred by a taxpayer before entering the system provided for by this Directive, as provided for in Article 64;

(b) unrelieved losses incurred at the level of the group, as provided for in Article 64 in conjunction with Article 66(b) and in Article 71;

(c) the amounts relating to the disposal of fixed assets as provided for in Article 61, revenues and expenses related to long-term contracts as provided for in Article 62 and future expenses as provided for in Article 63;

20 OJ L 177, 30.06.2006, p. 1.

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(d) In the case of insurance undertakings, optional technical provisions as provided for in Article 30(c);

(e) the taxes listed in Annex III where a deduction is provided for under national rules.

Article 103
Tax liability

The tax liability of each group member shall be the outcome of the application of the national tax rate to the apportioned share, adjusted according to Article 102, and further reduced by the deductions provided for in Articles 76.

CHAPTER XVII
Administration and Procedures

Article 104
Notice to opt

1. A single taxpayer shall opt for the system provided for by this Directive by giving notice to the competent authority of the Member State in which it is resident or, in respect of a permanent establishment of a non-resident taxpayer, that establishment is situated. In the case of a group, the principal taxpayer shall give notice, on behalf of the group, to the principal tax authority.

   Such notice shall be given at least three months before the beginning of the tax year in which the taxpayer or the group wishes to begin applying the system.

2. The notice to opt shall cover all group members. However, shipping companies subject to a special taxation regime may be excluded from the group.

3. The principal tax authority shall transmit the notice to opt immediately to the competent authorities of all Member States in which group members are resident or established. Those authorities may submit to the principal tax authority, within one month of the transmission, their views and any relevant information on the validity and scope of the notice to opt.

Article 105
Term of a group

1. When the notice to opt has been accepted, a single taxpayer or a group, as the case may be, shall apply the system provided for by this Directive for five tax years. Following the expiry of that initial term, the single taxpayer or the group shall continue to apply the system for successive terms of three tax years unless it gives notice of termination. A notice of termination may be given by a taxpayer to its competent authority or, in the case of a group, by the principal taxpayer to the principal tax authority in the three months preceding the end of the initial term or of a subsequent term.

2. Where a taxpayer or a non-taxpayer joins a group, the term of the group shall not be affected. Where a group joins another group or two or more groups merge, the enlarged group shall continue to apply the system until the later of the expiry dates of the terms of the groups, unless exceptional circumstances make it more appropriate to apply a shorter period.

3. Where a taxpayer leaves a group or a group terminates, the taxpayer or taxpayers shall continue to apply the system for the remainder of the current term of the group.

Article 106
Information in the notice to opt

The following information shall be included in the notice to opt:

(a) the identification of the taxpayer or of the members of the group;

(b) in respect of a group, proof of fulfilment of the criteria laid down in Articles 54 and 55;

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

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

(e) the tax year to be applied.

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

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Article 107
Control of the notice to opt

1. The competent authority to which the notice to opt is validly submitted shall examine whether, on the basis of the information contained in the notice, the group fulfils the requirements of this Directive. Unless the notice is rejected within three months of its receipt, it shall be deemed to have been accepted.
2. Provided that the taxpayer has fully disclosed all relevant information in accordance with Article 106, any subsequent determination that the disclosed list of group members is incorrect shall not invalidate the notice to opt. The notice shall be corrected, and all other necessary measures shall be taken, from the beginning of the tax year when the discovery is made. Where there has not been full disclosure, the principal tax authority, in agreement with the other competent authorities concerned, may invalidate the original notice to opt.

Article 108
Tax year

1. All members of a group shall have the same tax year.
2. In the year in which it joins an existing group, a taxpayer shall bring its tax year into line with that of the group. The apportioned share of the taxpayer for that tax year shall be calculated proportionately having regard to the number of calendar months during which the company belonged to the group.
3. The apportioned share of a taxpayer for the year in which it leaves a group shall be calculated proportionately having regard to the number of calendar months during which the company belonged to the group.
4. Where a single taxpayer joins a group, it shall be treated as though its tax year terminated on the day before joining.

Article 109
Filing a tax return

1. A single taxpayer shall file its tax return with the competent authority.

   In the case of a group, the principal taxpayer shall file the consolidated tax return of the group with the principal tax authority.
2. The return shall be treated as an assessment of the tax liability of each group member. Where the law of a Member State provides that a tax return has the legal status of a tax assessment and is to be treated as an instrument permitting the enforcement of tax debts, the consolidated tax return shall have the same effect in relation to a group member liable for tax in that Member State.
3. Where the consolidated tax return does not have the legal status of a tax assessment for the purposes of enforcing a tax debt, the competent authority of a Member State may, in respect of a group member which is resident or situated there, issue an instrument of national law authorising enforcement in the Member State. That instrument shall incorporate the data in the consolidated tax return concerning the group member. Appeals shall be permitted against the instrument exclusively on grounds of form and not to the underlying assessment. The procedure shall be governed by the national law of the relevant Member State.
4. Where a permanent establishment is deemed to exist pursuant to the third paragraph of Article 61, the principal taxpayer shall be responsible for all procedural obligations relating to the taxation of such a permanent establishment.
5. The tax return of a single taxpayer shall be filed within the period provided for in the law of the Member State in which it is resident or in which it has a permanent establishment. The consolidated tax return shall be filed in the nine months that follow the end of the tax year.

Article 110
Content of tax return

1. The tax return of a single taxpayer shall include the following information:
   (a) the identification of the taxpayer;
   (b) the tax year to which the tax return relates;
   (c) the calculation of the tax base;
   (d) identification of any associated enterprises as referred to in Article 78.
2. The consolidated tax return shall include the following information:
   (a) the identification of the principal taxpayer;
   (b) the identification of all group members;
   (c) identification of any associated enterprises as referred to in Article 78;
   (d) the tax year to which the tax return relates;
   (e) the calculation of the tax base of each group member;
   (f) the calculation of the consolidated tax base;
   (g) the calculation of the apportioned share of each group member;
   (h) the calculation of the tax liability of each group member.

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Article 111
Notification of errors in the tax return

The principal taxpayer shall notify the principal tax authority of errors in the consolidated tax return. The principal tax authority shall, where appropriate, issue an amended assessment according to Article 114(3).

Article 112
Failure to file a tax return

Where the principal taxpayer fails to file a consolidated tax return, the principal tax authority shall issue an assessment within three months based on an estimate, taking into account such information as is available. The principal taxpayer may appeal against such an assessment.

Article 113
Rules on electronic filing, tax returns and supporting documentation

The Commission may adopt acts laying down rules on electronic filing, on the form of the tax return, on the form of the consolidated tax return, and on the supporting documentation required. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 131(2).

Article 114
Amended assessments

1. In relation to a single taxpayer, audits and assessments shall be governed by the law of the Member State in which it is resident or in which it has a permanent establishment.
2. The principal tax authority shall verify that the consolidated tax return complies with Article 110(2).
3. The principal tax authority may issue an amended assessment not later than three years after the final date for filing the consolidated tax return or, where no return was filed before that date, not later than three years following issuance of an assessment pursuant to Article 112.

   An amended assessment may not be issued more than once in any period of 12 months.
4. Paragraph 3 shall not apply where an amended assessment is issued in compliance with a decision of the courts of the Member State of the principal tax authority according to Article 123 or with the result of a mutual agreement or arbitration procedure with a third country. Such amended assessments shall be issued within 12 months of the decision of the courts of the principal tax authority or the completion of the procedure.
5. Notwithstanding paragraph 3, an amended assessment may be issued within six years of the final date for filing the consolidated tax return where it is justified by a deliberate or grossly negligent misstatement on the part of a taxpayer, or within 12 years of that date where the misstatement is the subject of criminal proceedings. Such an amended assessment shall be issued within 12 months of the discovery of the misstatement, unless a longer period is objectively justified by the need for further inquiries or investigations. Any such amended assessment shall relate solely to the subject-matter of the misstatement.
6. Prior to issuing an amended assessment, the principal tax authority shall consult the competent authorities of the Member States in which a group member is resident or established. Those authorities may express their views within one month of consultation.

   The competent authority of a Member State in which a group member is resident or established may call on the principal tax authority to issue an amended assessment. Failure to issue such an assessment within three months shall be deemed to be a refusal to do so.
7. No amended assessment shall be issued in order to adjust the consolidated tax base where the difference between the declared base and the corrected base does not exceed the lower of EUR 5,000 or 1% of the consolidated tax base.

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

Article 115
Central data base

The consolidated tax return and supporting documents filed by the principal taxpayer shall be stored on a central data base to which all the competent authorities shall have access. The central data base shall be regularly updated with all further information and documents and all decisions and notices issued by the principal tax authority.

Article 116
Designation of the principal taxpayer

The principal taxpayer designated in accordance with Article 4(6) may not subsequently be changed. However, where the principal taxpayer ceases to meet the criteria in Article 4(6) a new principal taxpayer shall be designated by the group.

In exceptional circumstances the competent tax authorities of the Member States in which the members of a group are resident or in which they have a permanent establishment may,

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within six months of the notice to opt or within six months of a reorganisation involving the principal taxpayer, decide by common agreement that a taxpayer other than the taxpayer designated by the group shall be the principal taxpayer.

Article 117
Record-keeping

A single taxpayer and, in the case of a group, each group member shall keep records and supporting documents in sufficient detail to ensure the proper implementation of this Directive and to allow audits to be carried out.

Article 118
Provision of information to the competent authorities

On a request from the competent authority of the Member State in which it is resident or in which its permanent establishment is situated, a taxpayer shall provide all information relevant to the determination of its tax liability. On a request from the principal tax authority, the principal taxpayer shall provide all information relevant to the determination of the consolidated tax base or of the tax liability of any group member.

Article 119
Request for an opinion by the competent authority

1. A taxpayer may request an opinion from the competent authority of the Member State in which it is resident or in which it has a permanent establishment on the implementation of this Directive to a specific transaction or series of transactions planned to be carried out. A taxpayer may also request an opinion regarding the proposed composition of a group. The competent authority shall take all possible steps to respond to the request within a reasonable time.

   Provided that all relevant information concerning the planned transaction or series of transactions is disclosed, the opinion issued by the competent authority shall be binding on it, unless the courts of the Member State of the principal tax authority subsequently decide otherwise pursuant to Article 123. If the taxpayer disagrees with the opinion, it may act in accordance with its own interpretation but must draw attention to that fact in its tax return or consolidated tax return.

2. Where two or more group members in different Member States are directly involved in a specific transaction or a series of transactions, or where the request concerns the proposed composition of a group, the competent authorities of those Member States shall agree on a common opinion.

Article 120
Communication between competent authorities

1. Information communicated pursuant to this Directive shall, to the extent possible, be provided by electronic means, through making use of the common communication network/common system interface (CCN/CSI).
2. When a competent authority receives a request for cooperation or exchange of information concerning a group member pursuant to Directive 2011/16/EU, it shall respond no later than in three months following the date of receipt of the request.

Article 121
Secrecy clause

1. All information made known to a Member State under this Directive shall be kept secret in that Member State in the same manner as information received under its domestic legislation. In any case, such information:
   (a) may be made available only to the persons directly involved in the assessment of the tax or in the administrative control of this assessment;
   (b) may in addition be made known only in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or relating to, the making or reviewing the tax assessment and only to persons who are directly involved in such proceedings; such information may, however, be disclosed during public hearings or in judgements if the competent authority of the Member State supplying the information raises no objection;
   (c) shall in no circumstances be used other than for taxation purposes or in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or in relation to, the making or reviewing the tax assessment.

   In addition, Member States may provide for the information referred to in the first subparagraph to be used for assessment of other levies, duties and taxes covered by Article 2 of Council Directive 2008/55/EC.[21]

2. Notwithstanding paragraph 1, the competent authority of the Member State providing the information may permit it to be used for other purposes in the requesting State, if, under the legislation of the informing State, the information could, in similar circumstances, be used in the informing State for similar purposes.

21 OJ L 150, 10.6.2008, p. 28.

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Article 122
Audits

1. The principal tax authority may initiate and coordinate audits of group members. An audit may also be initiated on the request of a competent authority.

   The principal tax authority and the other competent authorities concerned shall jointly determine the scope and content of an audit and the group members to be audited.

2. An audit shall be conducted in accordance with the national legislation of the Member State in which it is carried out, subject to such adjustments as are necessary in order to ensure proper implementation of this Directive.

3. The principal tax authority shall compile the results of all audits.

Article 123
Disagreement between member states

1. Where the competent authority of the Member State in which a group member is resident or established disagrees with a decision of the principal tax authority made pursuant to Articles 107 or Article 114 paragraphs (3), (5) or (6) second subparagraph, it may challenge that decision before the courts of the Member State of the principal tax authority within a period of three months.

2. The competent authority shall have at least the same procedural rights as a taxpayer enjoys under the law of that Member State in proceedings against a decision of the principal tax authority.

Article 124
Appeals

1. A principal taxpayer may appeal against the following acts:

   (a) a decision rejecting a notice to opt;

   (b) a notice requesting the disclosure of documents or information;

   (c) an amended assessment;

   (d) an assessment on the failure to file a consolidated tax return.

   The appeal shall be lodged within 60 days of the receipt of the act appealed against.

2. An appeal shall not have any suspensory effect on the tax liability of a taxpayer.

3. Notwithstanding Article 114(3), an amended assessment may be issued to give effect to the result of an appeal.

Article 125
Administrative appeals

1. Appeals against amended assessments or assessments made pursuant to Article 112 shall be heard by an administrative body which is competent to hear appeals at first instance according to the law of the Member State of the principal tax authority. If, in that Member State, there is no such competent administrative body, the principal taxpayer may lodge directly a judicial appeal.

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

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

4. Where the administrative body varies the decision of the principal tax authority, the varied decision shall take the place of the latter and shall be treated as the decision of the principal tax authority.

5. The administrative body shall decide the appeal within six months. If no decision is received by the principal taxpayer within that period, the decision of the principal tax authority shall be deemed to have been confirmed.

6. Where the decision is confirmed or varied, the principal taxpayer shall have the right to appeal directly to the courts of the Member State of the principal tax authority within 60 days of the receipt of the decision of the administrative appeals body.

7. Where the decision is annulled, the administrative body shall remit the matter to the principal tax authority, which shall take a new decision within 60 days of the date on which the decision of the administrative body is notified to it. The principal taxpayer may appeal against any such new decision either pursuant to paragraph 1 or directly to the courts of the Member State of the principal tax authority within 60 days of receipt of the decision. If the principal tax authority does not take a new decision within 60 days, the principal taxpayer may appeal against the original decision of the principal tax authority before the courts of the Member State of the principal tax authority.

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Article 126
Judicial appeals

1. A judicial appeal against a decision of the principal tax authority shall be governed by the law of the Member State of that principal tax authority, subject to paragraph 3.
2. In making submissions to the courts, the principal tax authority shall act in close consultation with the other competent authorities.
3. A national court may, where appropriate, order evidence to be provided by the principal taxpayer and the principal tax authority on the fiscal affairs of the group members and other associated enterprises and on the law and practices of the other Member States concerned. The competent authorities of the other Member States concerned shall provide all necessary assistance to the principal tax authority.

CHAPTER XVIII
Final Provisions

Article 127
Exercise of the delegation

1. The power to adopt delegated acts referred to in Articles 2, 14, 34 and 42 shall be conferred on the Commission for an indeterminate period of time.
2. As soon as the Commission adopts a delegated act, it shall notify it to the Council.
3. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in Articles 128, 129 and 130.

Article 128
Revocation of the delegation

1. The delegation of powers referred to in Articles 2, 14, 34 and 42 may be revoked at any time by the Council.
2. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the Official Journal of the European Union.

Article 129
Objection to delegated acts

1. The Council may object to a delegated act within a period of three months from the date of notification.
2. If, on the expiry of this period, the Council has not objected to the delegated act, it shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein.

   The delegated act may be published in the *Official Journal of the European Union* and enter into force before the expiry of that period if the Council has informed the Commission of its intention not to raise objections.
3. If the Council objects to a delegated act, it shall not enter into force. The Council shall state the reasons for objecting to the delegated act.

Article 130
Informing the European Parliament

The European Parliament shall be informed of the adoption of delegated acts by the Commission of any objection formulated to them, or the revocation of the delegation of powers by the Council.

Article 131
Committee

1. The Commission shall be assisted by a Committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.[22]
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Article 132
Consultations on Article 87

The Committee established by Article 131 may also discuss the application of Article 87 in a given case.

22 OJ L 55, 28.2.2011, p. 13.

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Article 133
Review

The Commission shall, five years after the entry into force of this Directive, review its application and report to the Council on the operation of this Directive. The report shall in particular include an analysis of the impact of the mechanism set up in Chapter XVI of this Directive on the distribution of the tax bases between the Member States.

Article 134
Transposition

1. Member States shall adopt and publish, by [date] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

   They shall apply those provisions from […].

   When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 135
Entry into force

This Directive shall enter into force on the […] day following that of its publication in the *Official Journal of the European Union*.

Article 136
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the Council

The President

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ANNEXES

Annex I

(a) The European company or Societas Europaea (SE), as established in Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)[23] and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees,[24]

(b) The European Cooperative Society (SCE), as established in Council Regulation (EC) No 1435/2003 of 22 July 2003 on the European Cooperative Society (SCE)[25] and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees,[26]

(c) companies under Belgian law known as "société anonyme"/"naamloze vennootschap", "société en commandite par actions"/"commanditaire vennootschap op aandelen", "société privée à responsabilité limitée"/"besloten vennootschap met beperkte aansprakelijkheid" "société coopérative à responsabilité limitée"/"coöperatieve vennootschap met beperkte aansprakelijkheid", "société coopérative à responsabilité illimitée"/"coöperatieve vennootschap met onbeperkte aansprakelijkheid", "société en nom collectif"/"vennootschap onder firma", "société en commandite simple"/ "gewone commanditaire vennootschap", public undertakings which have adopted one of the abovementioned legal forms, and other companies constituted under Belgian law subject to the Belgian Corporate Tax;

(d) companies under Bulgarian law known as: **"събирателното дружество", "командитното дружество", "дружеството с ограничена отговорност", "акционерното дружество", "командитното дружество с акции", "кооперации","кооперативни съюзи", "държавни предприятия"** constituted under Bulgarian law and carrying on commercial activities;

(e) companies under Czech law known as: "akciová společnost", "společnost s ručením omezeným", "veřejná obchodní společnost", "komanditní společnost", "družstvo";

(f) companies under Danish law known as "aktieselskab" and "anpartsselskab". Other companies subject to tax under the Corporation Tax Act, in so far as their taxable income is calculated and taxed in accordance with the general tax legislation rules applicable to "aktieselskaber";

(g) companies under German law known as "Aktiengesellschaft", "Kommanditgesellschaft auf Aktien", "Gesellschaft mit beschränkter Haftung", "Versicherungsverein auf Gegenseitigkeit", "Erwerbs- und Wirtschaftsgenossenschaft", "Betriebe gewerblicher Art von juristischen Personen des öffentlichen Rechts", and other companies constituted under German law subject to German corporate tax;

(h) companies under Estonian law known as: "täisühing", "usaldusühing", "osaühing", "aktsiaselts", "tulundusühistu";

(i) companies under Greek law known as "ανώνυμη εταιρεία", "εταιρεία περιωρισμένης ευθύνης (Ε.Π.Ε.)";

(j) companies under Spanish law known as "sociedad anónima", "sociedad comanditaria por acciones", "sociedad de responsabilidad limitada", and those public law bodies which operate under private law;

(k) companies under French law known as "société anonyme", "société en commandite par actions", "société à responsabilité limitée", "sociétés par actions simplifiées", "sociétés d'assurances mutuelles", "caisses d'épargne et de prévoyance", "sociétés civiles" which are automatically subject to corporation tax, "coopératives", "unions de coopératives", industrial and commercial public establishments and undertakings, and other companies constituted under French law subject to the French Corporate Tax;

(l) companies incorporated or existing under Irish laws, bodies registered under the Industrial and Provident Societies Act, building societies incorporated under the Building Societies Acts and trustee savings banks within the meaning of the Trustee Savings Banks Act, 1989;

(m) companies under Italian law known as "società per azioni", "società in accomandita per azioni", "società a responsabilità limitata", "società cooperative", "società di mutua assicurazione", and private and public entities whose activity is wholly or principally commercial;

(n) under Cypriot law: "εταιρείες" as defined in the Income Tax laws;

(o) companies under Latvian law known as: "akciju sabiedrība", "sabiedrība ar ierobežotu atbildību";

(p) companies incorporated under the law of Lithuania;

(q) companies under Luxembourg law known as "société anonyme", "société en commandite par actions", "société à responsabilité limitée", "société coopérative", "société

23 OJ L 294, 10.11.2001, p. 1.
24 OJ L 294, 10.11.2001, p. 22.
25 OJ L 207, 18.8.2003, p. 1.
26 OJ L 207, 18.8.2003, p. 25.

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coopérative organisée comme une société anonyme", "association d'assurances mutuelles", "association d'épargne-pension", "entreprise de nature commerciale, industrielle ou minière de l'État, des communes, des syndicats de communes, des établissements publics et des autres personnes morales de droit public", and other companies constituted under Luxembourg law subject to the Luxembourg Corporate Tax;

(r) companies under Hungarian law known as: "közkereseti társaság", "betéti társaság", "közös vállalat", "korlátolt felelősségű társaság", "részvénytársaság", "egyesülés", "közhasznú társaság", "szövetkezet";

(s) companies under Maltese law known as: "Kumpaniji ta' Responsabilita Limitata", "Soċjetajiet en commandite li l-kapital tagħhom maqsum f'azzjonijiet";

(t) companies under Dutch law known as "naamloze vennootschap", "besloten vennootschap met beperkte aansprakelijkheid", "Open commanditaire vennootschap", "Coöperatie", "onderlinge waarborgmaatschappij", "Fonds voor gemene rekening", "vereniging op coöperatieve grondslag" and "vereniging welke op onderlinge grondslag als verzekeraar of kredietinstelling optreedt", and other companies constituted under Dutch law subject to the Dutch Corporate Tax;

(u) companies under Austrian law known as "Aktiengesellschaft", "Gesellschaft mit beschränkter Haftung", "Versicherungsvereine auf Gegenseitigkeit", "Erwerbs und Wirtschaftsgenossenschaften", "Betriebe gewerblicher Art von Körperschaften des öffentlichen Rechts", "Sparkassen", and other companies constituted under Austrian law subject to Austrian corporate tax;

(v) companies under Polish law known as: "spółka akcyjna", "spółka z ograniczoną odpowiedzialnością", "spółdzielnia", "przedsiębiorstwo państwowe";

(w) commercial companies or civil law companies having a commercial form, cooperatives and public undertakings incorporated in accordance with Portuguese law;

(x) companies under Romanian law known as: "societăţi pe acţiuni", "societăţi în comandită pe acţiuni", "societăţi cu răspundere limitată;

(y) companies under Slovenian law known as: "delniška družba", "komanditna delniška družba", "komanditna družba", "družba z omejeno odgovornostjo", "družba z neomejeno odgovornostjo";

(z) companies under Slovak law known as: "akciová spoločnost' ", "spoločnost' s ručením obmedzeným", "komanditná spoločnost' ", "verejná obchodná spoločnost' ", "družstvo";

(aa) companies under Finnish law known as "osakeyhtiö"/"aktiebolag", "osuuskunta"/"andelslag", "säästöpankki"/"sparbank" and "vakuutusyhtiö"/"försäk ringsbolag";

(bb) companies under Swedish law known as "aktiebolag", "försäkringsaktiebolag", "ekonomiska föreningar", "sparbanker", "ömsesidiga försäkringsbolag";

(cc) companies incorporated under the law of the United Kingdom.

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Annex II

Belgien/Belgique

impôt des sociétés/vennootschapsbelasting

България

корпоративен данък

Česká republika

Daňz příjmů právnických osob

Danmark

selskabsskat

Deutschland

Körperschaftsteuer

Eesti

Tulumaks

Éire/Ireland

Corporation Tax

Ελλάδα

Φόρος εισοδήματος νομικών προσώπων κερδοσκοπικού χαρακτήρα

España

Impuesto sobre sociedades

France

Impôt sur les sociétés

Italia

Imposta sul reddito delle società

Cyprus/Kibris

Φόρος Εισοδήματος

Latvija

uzņēmumu ienākuma nodoklis

Lietuva

pelno mokestis

Luxembourg

impôt sur le revenu des collectivités

Magyarország

Társasági adó

Malta

Taxxa fuq l-income

Nederland

vennootschapsbelasting

Österreich

Körperschaftsteuer

Polska

Podatek dochodowy od osób prawnych

Portugal

imposto sobre o rendimento das pessoas colectivas

România

impozit pe profit

Slovenija

Davek od dobička pravnih oseb

Slovensko

Daňz príjmov právnických osôb

Suomi/Finland

yhteisöjen tulovero/inkomstskatten för samfund

Sverige

statlig inkomstskatt

United Kingdom

Corporation Tax

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Annex III

List of non-deductible taxes under Article 14

Belgien/Belgique

Droits d'enregistrement – Registratierechten

България

None

Česká republika

None

Danmark

Registreringsafgift af motorkøretøjer

Kommunal grundskyld

Kulbrinteskat

Deutschland

Grunderwerbsteuer

Grundsteuer B

Gewerbesteuerumlage

Versicherungsteuer

Eesti

None

Éire/Ireland

Stamp Duties

Vehicle Registration Tax

Residential Property Tax

Ελλάδα

Φόρος Μεταβίβασης Ακινήτων

España

Impuesto sobre Bienes Inmuebles (IBI)/Recargo sobre el IBI

Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados

France

Foncier bati

Taxe professionnelle

Taxe sur les salaires

Taxe d'habitation

Italia

Imposta comunale sugli immobili (ICI) – Fabbricati

Imposta regionale sulle attività produttive (IRAP) – (employers' split)

Κύπρος/Kibris

Taxes on Holding Gains

Latvija

None

Lietuva

None

Luxembourg

Taxe d'abonnement sur les titres de société

Impôt commercial communal

Magyarország

Különadó

Helyi iparűzésiadó

Malta

Taxes on Holding Gains

Nederland

Overdrachtsbelasting

Overige productgebonden belastingen neg – (energy split)

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Österreich

Kommunalsteuer

Polska

Podatek od nieruchomości

Portugal

None

România

None

Slovenija

Davek na izplačane plače

Slovensko

None

Suomi/Finland

None

Sverige

Fastighetsskatt

Allmän löneavgift

Särskild löneskatt

United Kingdom

National Non-Domestic Rates from Businesses

Capital Levies

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Legislative Financial Statement for Proposals

1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

1.1. Title of the proposal/initiative

Legislative proposal for a Common Consolidated Corporate Tax Base (CCCTB)

1.2. Policy area(s) concerned in the ABM/ABB structure[27]

Taxation Policy (ABB05)

1.3. Nature of the proposal/initiative

X The proposal/initiative relates to **a new action**

☐ The proposal/initiative relates to **a new action following a pilot project/ preparatory action**[28]

☐ The proposal/initiative relates to **the extension of an existing action**

☐ The proposal/initiative relates to **an action redirected towards a new action**

1.4. Objectives

1.4.1. The Commission's multiannual strategic objective(s) targeted by the proposal/initiative

The CCCTB will contribute to the re-launching of the single market and the Europe 2020 flagship initiative on the Industrial Policy and contributes to the achievement of the broad objectives for the Union's industrial policy, as set out in Europe 2020'.

The CCCTB is a tax policy measure at the simplification of tax rules, the reduction of compliance cost and the removal of tax obstacles for companies operating cross-border.

1.4.2. Specific objective(s) and ABM/ABB activity(ies) concerned

Specific objective No.

Objective 2: To reduce administrative cost and to tackle tax obstacles in the Internal Market

ABM/ABB activities concerned

Tax Policy (ABB05)

27 ABM: Activity-Based Management – ABB: Activity-Based Budgeting.
28 As referred to in Article 49(6)(a) or (b) of the Financial Regulation.

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1.4.3. Expected result(s) and impact

Specify the effects which the proposal/initiative should have on the beneficiaries/groups targeted.

To provide companies with the option to apply a common system for taxation in the union (a common and consolidated tax base for the determination of the corporate profits)

Introduce a one-stop shop approach for tax declarations and assessment

Allow cross-border loss-offset

Reduce transfer pricing compliance obligations

Reduce occurrences of double or over taxation

Reduce undue or unintended tax planning opportunities for companies by the parallel application of 27 corporate tax systems in the Union

1.4.4. Indicators of results and impact

Specify the indicators for monitoring implementation of the proposal/initiative.

Complete and appropriate implementation of the CCCTB Directive by the Member States

Proper application of the CCCTB provisions in practice

1.5. Grounds for the proposal/initiative

1.5.1. Requirement(s) to be met in the short or long term

Adoption of the CCCTB as included in the Commission work plan for 2011 (as a flagship initiative) and according to the timeline in the published roadmap by 31.3.2011

1.5.2. Added value of EU involvement

The introduction of a common consolidated corporate tax base in 27 Member States cannot be achieved by unilateral (domestic) or bilateral (cross-border) measures and agreements between Member States.

1.5.3. Lessons learned from similar experiences in the past

The introduction of a comprehensive and complex set of rules and provisions to facilitate cross-border trade and investments and abolish tax obstacles (e.g. over taxation or lack of loss-offset) in the internal market is difficult task due to the unanimity requirement for legislative proposals in direct taxation. Similar proposals in the past which mainly proposed mandatory implementation and application by Member State did not meet willingness for a political discussion or were found acceptable in Council.

The CCCTB proposal is built upon an optional and well prepared approach (studies, expert working group meetings, public consultations) over a period of nearly nine years.

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1.5.4. Coherence and possible synergy with other relevant instruments

It is a secondary legislative proposal which can stand alone, but there are close links to other tax policy initiatives in the company tax area such as the work of the Code of Conduct Group and more specific measures (e. g. corporate tax Directives targeted to deal with specific matters and coordination initiatives).

1.6. Duration and financial impact

☐ Proposal/initiative of **limited duration**

– ☐ Proposal/initiative in effect from [DD/MM]YYYY to [DD/MM]YYYY

– ☐ Financial impact from YYYY to YYYY

X Proposal/initiative of **unlimited duration**

– Implementation with a start-up period from 2011 to 2015,

– followed by full-scale operation.

1.7. Management mode(s) envisaged[29]

☐ **Centralised direct management** by the Commission

☐ **Centralised indirect management** with the delegation of implementation tasks to:

– ☐ executive agencies

– ☐ bodies set up by the Communities[30]

– ☐ national public-sector bodies/bodies with public-service mission

– ☐ persons entrusted with the implementation of specific actions pursuant to Title V of the Treaty on European Union and identified in the relevant basic act within the meaning of Article 49 of the Financial Regulation

X Shared management with the Member States

☐ **Decentralised management** with third countries

☐ **Joint management** with international organisations ***(to be specified)***

If more than one management mode is indicated, please provide details in the "Comments" section.

Comments

After adoption in Council it is the responsibility of the Member States to properly implement and apply the rules and provisions of the CCCTB Directive.

The Commission services have to monitor and closely follow the developments in the area of corporate taxation and any possible problems encountered in the field of the CCCTB.

29 Details of management modes and references to the Financial Regulation may be found on the BudgWeb site: http://www.cc.cec/budg/man/budgmanag/budgmanag_en.html

30 As referred to in Article 185 of the Financial Regulation.

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2. MANAGEMENT MEASURES

2.1. Monitoring and reporting rules

Specify frequency and conditions.

It is the general approach in tax legislation to demand correlation tables from Member States.

Member States have to communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

2.2. Management and control system

2.2.1. Risk(s) identified

An implementation risk plan for the CCCTB Directive has been prepared and is attached to the CIS-Net Consultation.

2.2.2. Control method(s) envisaged

General approach for legislation proposals in the tax area.

2.3. Measures to prevent fraud and irregularities

Specify existing or envisaged prevention and protection measures.

Not applicable at EU level for this proposal.

3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

NONE

3.2. Estimated impact on expenditure

3.2.1. Summary of estimated impact on expenditure

NONE

3.2.2. Estimated impact on operational appropriations

– **X** The proposal/initiative does not require the use of operational appropriations

– ☐ The proposal/initiative requires the use of operational appropriations, as explained below:

3.2.3. Estimated impact on appropriations of an administrative nature

3.2.3.1. Summary

– ☐ The proposal/initiative does not require the use of administrative appropriations

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– **X** The proposal/initiative requires the use of administrative appropriations, as explained below:

EUR million (to 3 decimal places)

	Year 2016	Year 2017	Year 2018	Year 2019	2020 to 2022			TOTAL
HEADING 5 of the multiannual financial framework								
Human resources								
Other administrative expenditure	0.250	0.250	0.250	0.250	0.250	0.250	0.250	**1.75**
Subtotal HEADING 5 of the multiannual financial framework	0.250	0.250	0.250	0.250	0.250	0.250	0.250	**1.75**
Outside HEADING 5[31] of the multiannual financial framework								
Human resources								
Other expenditure of an administrative nature								
Subtotal outside HEADING 5 of the multiannual financial framework								
TOTAL	**0.250**	**0.250**	**0.250**	**0.250**	**0.250**	**0.250**	**0.250**	**1.75**

3.2.3.2. Estimated requirements of human resources

– **X** The proposal/initiative does not require the use of human resources

– ☐ The proposal/initiative requires the use of human resources, as explained below:

Estimate to be expressed in full amounts (or at most to one decimal place)

	Year N	Year N+1	Year N+2	Year N+3	… enter as many years as necessary to show the duration of the impact (see point 1.6)		
• Establishment plan posts (officials and temporary agents)							
XX 01 01 01 (Headquarters and Commission's Representation Offices)							
XX 01 01 02 (Delegations)							
XX 01 05 01 (Indirect research)							
10 01 05 01 (Direct research)							
• External personnel (in Full Time Equivalent unit: FTE)[32]							
XX 01 02 01 (CA, INT, SNE from the "global envelope")							
XX 01 02 02 (CA, INT, JED, LA and SNE in the delegations)							
XX 01 04 *yy*[33] – at Headquarters[34]							
XX 01 04 *yy*[33] – in delegations							
XX 01 05 02 (CA, INT, SNE – Indirect research)							
10 01 05 02 (CA, INT, SNE – Direct research)							
Other budget lines (specify)							
TOTAL							

XX is the policy area or budget title concerned.

31 Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former "BA" lines), indirect research, direct research.
32 CA = Contract Agent; INT = agency staff (*"Intérimaire"*); JED = *"Jeune Expert en Délégation"* (Young Experts in Delegations); LA = Local Agent; SNE = Seconded National Expert.
33 Under the ceiling for external personnel from operational appropriations (former "BA" lines).
34 Essentially for Structural Funds, European Agricultural Fund for Rural Development (EAFRD) and European Fisheries Fund (EFF).

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The human resources required will be met by staff from the DG who are already assigned to management of the action and/or have been redeployed within the DG, together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

Description of tasks to be carried out:

Officials and temporary agents	The staff currently assigned to the Unit TAXUD D1 will be charge of the proposal until adoption in Council in line with the tasks described in the mission statement for the unit.
External personnel	As for officials and temporary agents

3.2.4. Compatibility with the current multiannual financial framework

– **X** Proposal/initiative is compatible the current multiannual financial framework.

– ☐ Proposal/initiative will entail reprogramming of the relevant heading in the multiannual financial framework.

Explain what reprogramming is required, specifying the budget lines concerned and the corresponding amounts.

– ☐ Proposal/initiative requires application of the flexibility instrument or revision of the multiannual financial framework[35].

Explain what is required, specifying the headings and budget lines concerned and the corresponding amounts.

3.2.5. Third-party contributions

– **X** The proposal/initiative does not provide for co-financing by third parties

– The proposal/initiative provides for the co-financing estimated below:

Appropriations in EUR million (to 3 decimal places)

	Year N	**Year N+1**	**Year N+2**	**Year N+3**	… enter as many years as necessary to show the duration of the impact (see point 1.6)			**Total**
Specify the co-financing *body*								
TOTAL appropriations cofinanced								

3.3. Estimated impact on revenue

X Proposal/initiative has no financial impact on revenue.

☐ Proposal/initiative has the following financial impact:

– ☐ on own resources

– ☐ on miscellaneous revenue

35 See points 19 and 24 of the Interinstitutional Agreement.

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APPENDIX 2

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European Commission Description of basic elements of CCCTB[1]

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Only European Union legislation printed in the paper edition of the Official Journal of the European Union is deemed authentic.

ANNEX 5. THE BASIC ELEMENTS DEFINING THE COMPREHENSIVE POLICY OPTIONS CONSISTING IN A COMMON CONSOLIDATED CORPORATE TAX BASE

The following provides for a description of the policy option for a **Common Corporate Tax Base (CCTB)**, and for an **optional Common Consolidated Corporate Tax Base** (**CCCTB**). The other policy options analysed in this Impact Assessment are also implicitly described here, by selecting or dropping the corresponding elements (i.e. a compulsory system would ignore the element of optionality).

5.1. Common Corporate Tax Base (CCTB)

The basic elements of a Common Corporate Tax Base.

***The rules for defining the common tax base**

- There is no formal link between the base and International Accounting Standards/IFRS. The rules for the common tax base would therefore define the tax base itself but not the methodology for adjusting the accounts (sometimes called the 'bridge') to arrive at the tax base. That would not be possible as companies will potentially be starting from financial accounts prepared under 27 different national GAAP. However, it should be noted that the work for defining the common tax base has made constant reference to IAS/IFRS. Further, unless uniform treatment is explicitly provided for in the legislation, the tax base would be computed by reference to the general principles in the Directive.
- Resident taxpayers (i.e. EU-resident companies) shall be subject to corporate tax on their worldwide income. Non-resident taxpayers (i.e. third country companies) shall be subject to tax on business income attributable to their EU-located PE(s), as defined in the OECD Model (subject to existing treaty obligations with third countries).
- The tax base shall be calculated as revenues less exempt revenues, deductible expenses and other deductible items. As a matter of principle, the tax base would be calculated for each tax year.
- Revenues include proceeds of any kind, whether monetary or non-monetary. That is, not only trading income but also proceeds from disposals of assets and rights, interest, dividends and other profit distributions, royalties, subsidies and grants, gifts, compensation and ex-gratia payments.
- Deductible expenses shall mean all expenses incurred by the taxpayer for business purposes in the production, maintenance or securing of income, including costs of research and development or costs for raising equity or debt for business purposes. The definition is accompanied by an exhaustive list of non-deductible expenses.
- Fixed assets are all tangibles, those intangibles acquired for a value and financial assets where they are capable of being valued independently and are used in the business in the production, maintenance or securing of income for more than 12 months. Such assets would be depreciated. However, where the cost of its acquisition, construction or improvement is less than EUR 1,000, an asset would not be treated as a fixed asset and would be immediately deductible.
- Fixed assets with a useful life longer than 15 years shall be depreciated on an individual basis whereas short- to medium-term assets shall be pooled for depreciation purposes.
- Tangible assets not subject to wear and tear and obsolescence such as land, fine art, antiques, or jewellery and intangible assets with an indefinite life and financial assets shall not be depreciated unless the taxpayer demonstrates that they have permanently decreased in value; by exception, financial assets which, if disposed of,

1 Annex 5 from the Commission Staff Working Document Impact Assessment. Accompanying document to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), SEC(2011) 315 final.

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give rise to exempt gains would not be depreciable under any circumstances.

- Income and expenses shall be recognised on an accruals basis in the tax year to which they relate. Generally speaking, the expense should be established and the amount known in order to be accrued. However, when an amount arising from a legal obligation or a likely legal obligation relating to activities or transactions carried out in the current or previous tax years, such as potential warranty claims, can be reliably estimated, the expense would be deductible in the current tax year. An appropriate deduction shall be allowed for a bad debt receivable by the taxpayer when certain conditions are met.
- Income and expenditure shall be measured by reference to:
  - the monetary consideration for the relevant transaction, such as the price of goods or services,
  - the market price where the consideration for the transaction is wholly or partly non-monetary,
  - the arm's length price in the case of transactions between related parties,
  - the fair value of financial assets and liabilities held for trading.
- Tax base, income and expenses shall be measured in EUR or translated into EUR on the last day of the tax year.
- Inventories shall be valued on the last day of the tax year at the lower of cost and net realisable value. The total amount of deductible expenses for a tax year would be increased by the value of inventories at the beginning of the tax year and reduced by the value of inventories at the end of the tax year.
- CCTB losses shall be eligible for carry forward indefinitely. No loss carry-back shall be allowed and the oldest loses shall be used first. Transitional arrangements may be necessary for losses incurred under the National system where a CCTB would be mandatory.
- A CCTB would not involve a consolidation of tax results or the apportionment of the tax base using the three factor formula.
- A CCTB would not solve the major issues facing companies operating cross border such as loss relief, double taxation or remove barriers to the smooth functioning of the Internal Market.

5.2. Optional Common Consolidated Corporate Tax Base (CCCTB)

The **optional Common Consolidated Corporate Tax Base** aims to provide groups of companies with the option to apply a common set of rules across the EU for determining their taxable base, which would be consolidated for their EU-wide activities. The scheme consists of three basic elements: (i) optionality, (ii) common rules to determine the taxable income and (iii) consolidation and allocation of taxable shares by formulary apportionment (FA). The administrative framework envisaged for the CCCTB is also briefly described

* Scope

The Directive shall apply to EU companies listed in an annex which are subject to national corporate income taxes (or similar subsequently introduced taxes) listed in another annex. It would also apply to third country companies which have a similar form to EU companies and which maintain a taxable presence in the EU through a PE.

* Optionality

Under an optional system, eligible companies, resident in the EU, may opt for the common rules. Eligible companies not resident in the EU may opt in respect of their EU-located PEs. The option shall be valid for 5 years and be automatically renewed for successive periods of 3 years unless notice is given to the contrary. Companies that fulfil the requirements for consolidation must either all opt into the CCCTB or not apply the system at all.

* The rules for defining the common tax base

- There is no formal link between the base and International Accounting Standards/IFRS. The rules for the common tax base would therefore define the tax base itself but not the methodology for adjusting the accounts (sometimes called the 'bridge') to arrive at the tax base. That would not be possible as companies will potentially be starting from financial accounts prepared under 27 different national GAAP. However, it should be noted that the work for defining the common tax base has made constant reference to IAS/IFRS. Further, unless uniform treatment is explicitly provided for in the legislation, the tax base would be computed by reference to the general principles in the Directive.
- Resident taxpayers (i.e. EU-resident companies) shall be subject to corporate tax on their worldwide income. Non-resident taxpayers (i.e. third country companies) shall be subject to tax on business income attributable to their EU-located PE(s), as defined in the OECD Model (subject to existing treaty obligations with third countries).

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- The tax base shall be calculated as revenues less exempt revenues, deductible expenses and other deductible items. As a matter of principle, the tax base would be calculated for each tax year.
- Revenues include proceeds of any kind, whether monetary or non-monetary. That is, not only trading income but also proceeds from disposals of assets and rights, interest, dividends and other profit distributions, royalties, subsidies and grants, gifts, compensation and ex-gratia payments.
- Deductible expenses shall mean all expenses incurred by the taxpayer for business purposes in the production, maintenance or securing of income, including costs of research and development or costs for raising equity or debt for business purposes. The definition is accompanied by an exhaustive list of non-deductible expenses.
- Fixed assets are all tangibles, those intangibles acquired for a value and financial assets where they are capable of being valued independently and are used in the business in the production, maintenance or securing of income for more than 12 months. Such assets would be depreciated. However, where the cost of its acquisition, construction or improvement is less than EUR 1,000, an asset would not be treated as a fixed asset and would be immediately deductible.
- Fixed assets with a useful life longer than 15 years shall be depreciated on an individual basis whereas short- to medium-term assets shall be pooled for depreciation purposes.
- Tangible assets not subject to wear and tear and obsolescence such as land, fine art, antiques, or jewellery and intangible assets with an indefinite life and financial assets shall not be depreciated unless the taxpayer demonstrates that they have permanently decreased in value; by exception, financial assets which, if disposed of, give rise to exempt gains would not be depreciable under any circumstances.
- Income and expenses shall be recognised on an accruals basis in the tax year to which they relate. Generally speaking, the expense should be established and the amount known in order to be accrued. However, when an amount arising from a legal obligation or a likely legal obligation relating to activities or transactions carried out in the current or previous tax years, such as potential warranty claims, can be reliably estimated, the expense would be deductible in the current tax year. An appropriate deduction shall be allowed for a bad debt receivable by the taxpayer when certain conditions are met.
- Income and expenditure shall be measured by reference to:

  – the monetary consideration for the relevant transaction, such as the price of goods or services,

  – the market price where the consideration for the transaction is wholly or partly non-monetary,

  – the arm's length price in the case of transactions between related parties,

  – the fair value of financial assets and liabilities held for trading.
- Tax base, income and expenses shall be measured in EUR or translated into EUR on the last day of the tax year.
- Inventories shall be valued on the last day of the tax year at the lower of cost and net realisable value. The total amount of deductible expenses for a tax year would be increased by the value of inventories at the beginning of the tax year and reduced by the value of inventories at the end of the tax year.
- CCCTB losses shall be eligible for carry forward indefinitely. No loss carry-back shall be allowed.

*** Consolidation**

A **2-part test** determines the entitlement to participation in the group. The deciding factors are **control** (>50% of voting rights) and either **ownership** (>75% of capital), or **rights to profits** (>75% of rights giving entitlement to profit). EC-located branches (of third-country companies) are treated as individual group members in the allocation of their apportioned share and all inbound and outbound group payments. The 2 thresholds have to be met **throughout the year**. Otherwise, the company has to leave the group. There is also a **9-month minimum requirement** for being a group member (i.e. the taxpayer joins when the 2 thresholds are met but, if those are not reached for at least 9 months without interruption, the taxpayer will be treated as never having been part of the group).

- **Intra-group transactions are eliminated**, meaning that no pricing adjustments will be required in line with the 'arm's length' principle. Further, **no withholding tax or other source taxation** will apply to transactions within the same group.
- **Business reorganisations:**

A. Companies entering the group

The **underlying rationale** is to create a **bridge** between the national tax system and the CCCTB scheme. The aim is to strike a **balance** between MS **individual taxing rights** and the concept of a **consolidated shared tax base.**

(iii) **Pre-consolidation trading losses** are **ring-fenced** and carried forward to be set off against the taxpayer's apportioned share. The idea behind this is that the MS participating in the consolidated group do not have to bear the cost of losses already incurred;

(iv) **Hidden reserves:** the capital gains are **taxable upon realisation** and **shared** across the group;

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The draft proposal contains **rules put in place to protect the taxing rights of individual MS** in connection with values largely built up under their national tax systems (i.e. before a company opted for consolidation);

A **proxy (i.e. R&D, marketing and advertising costs over a specified period)** is used to deal with the problem of **self-generated intangible assets.** Those are difficult to identify because they are not registered and do not appear separately in companies' accounts.

B. Companies leaving the group

(iii) **Group trading losses**: **nothing** is attributed to the **leaving company**; losses produced during the period of consolidation remain **at group level**;

(iv) **Hidden reserves:** capital gains are **taxable upon realisation** at the level of the **company leaving the group**;

The draft proposal contains **rules put in place to protect the consolidated tax base** in connection with values largely built up during the period of consolidation. Namely, since all group members have borne part of the cost linked to the creation of those values, they should be given a taxing right over the gain when realised.

A **proxy** is used to deal with the problem of **self-generated intangible assets:** the concern is that potential future profits may risk not **being taxed at all under the tax system that succeeds consolidation.** Further, those profits will have been funded by the group in the sense that they gave rise to expense deductions shared by all MS over the past years.

C. Reorganisation within a group

(iv) **Trading losses** incurred during consolidation have **no impact** from a tax point of view;

(v) **Pre-consolidation** losses remaining unrelieved continue to be **ring-fenced**;

- **Hidden reserves: tax neutrality** is the overarching principle [coupled with certain **interventions** in the **allocation of taxing rights** within the group for the purpose of avoiding stripping the 'departing' MS of its taxing entitlement (if no branch is left in its territory as a result of the reorganisation)].

***Transactions between the group and entities outside the group**

- **Relief by exemption** will be given for third-country located **branch income**; inbound **dividend** distributions; and the proceeds from the **disposal of shares** held in a company outside the group.[2]
- **Relief by credit** for inbound **interest** and **royalty** payments; the credit is **shared** among the group members according to the **formula** (without inclusion in the consolidated base).
- **Withholding taxes** charged on **outbound interest and royalties** will be **shared** among the group members according to the **formula** (without inclusion in the consolidated base); in the case of **dividends**, the withholding tax will **not** be **shared** (since, contrary to interest and royalties, dividends have not led to a previous deduction borne by all group companies).
- **Transactions between associated enterprises** will be subject to **pricing adjustments** in line with the **'arm's length'** principle.

***Anti-Abuse**

- A **General Anti-Abuse Rule** (GAAR) is supplemented by measures designed to curb abusive practices of a cross-border nature:

  (i) **Limitations** apply **to the deductibility of interest** paid to associated enterprises in a low-tax third country which does not exchange information with the Member State of the payer; specific rules define the concept of a 'low-tax third country';

  (ii) **Controlled Foreign Companies** (CFCs)[3] legislation requires that the CFC, resident in a low-tax third country, is **controlled** at more than **50%** of its voting rights, **owned** at more than **50%** of its capital and gives more than **50% profit entitlement** to the taxpayer. In addition, **30% of CFC income** should be '**tainted'**.

***Formulary Apportionment (FA)**

- The consolidated tax base shall be shared through a formula, uniform to all Member States, between each individual taxpayer of a group and each EU permanent establishment which is situated in a different jurisdiction from that of the taxpayer's headquarters.

---

2 A number of **anti-avoidance provisions** apply to curb potentially abusive tax practices. An example is the **'switch-over clause': exemption switches over to credit** where the received dividends, the entity of which the shares are disposed of or the branch were subject to low or no taxation in the state of source. Specific rules define the concept of 'low taxation'.

3 For the purpose of the Draft Proposal, a CFC is a company under the 'definitive influence' of a group member which is tax resident in a low-tax third country without exchange of information. Further, the CFC does not engage in genuine commercial activity which, in the Draft Proposal, is evidenced by the fact that it earns more than 30% of its income from certain sources identified as 'tainted' (e.g. passive income from interest and royalties coming from transactions with associated companies at more than 50%).

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- The consolidated tax base of a group shall only be shared when it is positive.
- The FA comprises 3 equally-weighted factors (i.e. assets, payroll and sales)[4]:
  - **(i) Labour** is computed based on both **payroll** and the **number of employees** (each item counts for half);
  - **(ii) Assets** consist of **all fixed tangible assets**, meaning that intangibles and financial assets are excluded from the FA; the reason for this exclusion mainly lies with the mobile nature of those assets and the risks of circumventing the system;
  - **(iii) Sales** are taken into account to increase the taxing entitlement of the **MS of destination.**

To apportion the tax base to a given jurisdiction, the company must have a taxable presence (i.e. a PE or subsidiary).

*Administration

- The **'one-stop-shop'** practice will allow groups with a taxable presence in more than one MS to deal with **a single tax authority across the EU** (i.e. principal tax authority (PTA)), being that of the EU parent of the group termed 'principal taxpayer'. A consolidated tax return will be filed with that authority.
- The draft proposal contains procedural rules on various matters:
  - **(i)** How taxpayers should submit their **notice to opt** into the CCCTB and subsequently their **annual tax returns**;
  - **(ii)** Amended assessments shall be issued by the PTA, in agreement with the other concerned tax authorities, and shall be enforced by individual tax authorities.
  - **(iii)** A **ruling mechanism,** coupled with an **interpretation panel** and a scheme for the **exchange of information,** shall be operated by the competent authority (CA) in each group member;
  - **(iv) Audits** shall be **initiated and coordinated** by the PTA; CAs of other group members may also request the initiation of audits; the PTA and all relevant CAs shall have to agree, by joint decision, to the scope and content of an audit as well as the group members to be audited. The PTA shall be compiling the results of all audits carried out locally ahead of issuing an amended assessment;
  - **(v)** In terms of **dispute settlement,** disputes **between MS** shall be referred to **Arbitration** whilst those between **taxpayers and MS** shall be dealt with by an **Administrative Appeals Body** at a first instance and, at a second instance, shall have to be brought before the **national courts of the principal taxpayer**.

4 There is provision for **sector-specific formulae;** in practice, those are adjustments of the mainstream FA customised to serve features peculiar to certain industries (i.e. credit institutions, insurance undertakings, shipping, inland waterways transport and air transport and the oil and gaz industry).

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APPENDIX 3

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Defined terms

Apportioned share (Art. 4(12)):

The portion of the consolidated tax base of a group which is allocated to a group member by application of the formula set out in Articles 86-102.

Associated enterprise(s) (Art. 78):

1. If a taxpayer participates directly or indirectly in the management, control or capital of a non-taxpayer, or a taxpayer which is not in the same group, the two enterprises shall be regarded as associated enterprises.

   If the same persons participate, directly or indirectly, in the management, control or capital of a taxpayer and a non-taxpayer, or of taxpayers not in the same group, all the companies concerned shall be regarded as associated enterprises.

   A taxpayer shall be regarded as an associated enterprise to its permanent establishment in a third country. A non-resident taxpayer shall be regarded as an associated enterprise to its permanent establishment in a Member State.

2. For the purposes of paragraph 1, the following rules shall apply:

   (a) participation in control shall mean a holding exceeding 20% of the voting rights;

   (b) participation in the capital shall mean a right of ownership exceeding 20% of the capital;

   (c) participation in management shall mean being in a position to exercise a significant influence in the management of the associated enterprise.

   (d) an individual, his spouse and his lineal ascendants or descendants shall be treated as a single person.

   In indirect participations, the fulfilment of the requirements in points (a) and (b) shall be determined by multiplying the rates of holding through the successive tiers. A taxpayer holding more than 50% of the voting rights shall be deemed to hold 100%.

Audit (Art. 4(23)):

Inquiries, inspections or examinations of any kind conducted by a competent authority for thepurpose of verifying the compliance of a taxpayer with this Directive.

Charitable bodies (Art.16):

A body shall qualify as charitable where the following conditions are met:

(a) it has legal personality and is a recognised charity under the law of the State in which it is established;

(b) its sole or main purpose and activity is one of public benefit; an educational, social, medical, cultural, scientific, philanthropic, religious, environmental or sportive purpose shall be considered to be of public benefit provided that it is of general interest;

(c) its assets are irrevocably dedicated to the furtherance of its purpose;

(d) it is subject to requirements for the disclosure of information regarding its accounts and its activities;

(e) it is not a political party as defined by the Member State in which it is established.

Competent authority (Art. 4(21)):

The authority designated by each Member State to administer all matters related to the implementation of this Directive.

Consolidated tax base (Art. 4.11):

The result of adding up the tax bases of all group members as calculated in accordance with Article 10.

Deductible expenses (Art. 12):

Deductible expenses shall include all costs of sales and expenses net of deductible value added tax incurred by the taxpayer with a view to obtaining or securing income, including costs of research and development and costs incurred in raising equity or debt for the purposes of the business.

Deductible expenses shall also include gifts to charitable bodies as defined in Article 16 which are established in a Member State or in a third country which applies an agreement on the exchange of information on request comparable to the provisions of Directive 2011/16/EU. The maximum deductible expense for monetary gifts or donations to charitable bodies shall be 0.5% of revenues in the tax year.

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Economic owner (Art. 4(20)):

Means the person who has substantially all the benefits and risks attached to a fixed asset, regardless of whether that person is the legal owner. A taxpayer who has the right to possess, use and dispose of a fixed asset and bears the risk of its loss or destruction shall in any event be considered the economic owner.

Eligible companies/company (Art. 2):

1. This Directive shall apply to companies established under the laws of a Member State where both of the following conditions are met:

   (a) the company takes one of the forms listed in Annex I;

   (b) the company is subject to one of the corporate taxes listed in Annex II or to a similar tax subsequently introduced.

2. This Directive shall apply to companies established under the laws of a third country where both of the following conditions are met:

   (a) the company has a similar form to one of the forms listed in Annex I;

   (b) the company is subject to one of the corporate taxes listed in Annex II.

3. The Commission may adopt delegated acts in accordance with Article 127 and subject to the conditions of Articles 128, 129 and 130 in order to amend Annexes I and II to take account of changes to the laws of the Member States concerning company forms and corporate taxes.

Exempt revenues (Art. 11):

The following shall be exempt from corporate tax:

(a) subsidies directly linked to the acquisition, construction or improvement of fixed assets, subject to depreciation in accordance with Articles 32 to 42;

(b) proceeds from the disposal of pooled assets referred to in Article 39(2), including the market value of non-monetary gifts;

(c) received profit distributions;

(d) proceeds from a disposal of shares;

(e) income of a permanent establishment in a third country

Financial assets (Art. 4(15)):

Means shares in affiliated undertakings, loans to affiliated undertakings, participating interests, loans to undertakings with which the company is linked by virtue of participating interests, investments held as fixed assets, other loans, and own shares to the extent that national law permits their being shown in the balance sheet.

Financial assets and liabilities held for trading (Art. 23):

1. A financial asset or liability shall be classified as held for trading if it is one of the following:

   (a) acquired or incurred principally for the purpose of selling or repurchasing in the near term;

   (b) part of a portfolio of identified financial instruments, including derivatives, that are managed together and for which there is evidence of a recent actual pattern of short-term profit-taking.

Financial Institution(s) (Art. 98):

1. The following entities shall be regarded as financial institutions:

   (a) credit institutions authorised to operate in the Union in accordance with Directive 2006/48/EC of the European Parliament and of the Council;[1]

   (b) entities, except for insurance undertakings as defined in Article 99, which hold financial assets amounting to 80% or more of all their fixed assets, as valued in accordance with the rules of this Directive.

Fixed assets (Art. 4(14)):

All tangible assets acquired for value or created by the taxpayer and all intangible assets acquired for value where they are capable of being valued independently and are used in the business in the production, maintenance or securing of income for more than 12 months, except where the cost of their acquisition, construction or improvement are less than EUR 1,000. Fixed assets shall also include financial assets.

Group (Art. 55):

1. A resident taxpayer shall form a group with:

   (a) all its permanent establishments located in other Member States;

   (b) all permanent establishments located in a Member State of its qualifying subsidiaries resident in a third country;

   (c) all its qualifying subsidiaries resident in one or more Member States;

   (d) other resident taxpayers which are qualifying subsidiaries of the same company which is resident in a third country and fulfils the conditions in Article 2(2)(a).

1 OJ L 177, 30.06.2006, p. 1.

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2. A non-resident taxpayer shall form a group in respect of all its permanent establishments located in Member States and all its qualifying subsidiaries resident in one or more Member States, including the permanent establishments of the latter located in Member States.

Group member(s) (Art. 4(7)):

Any taxpayer belonging to the same group, as defined in Articles 54 and 55. Where a taxpayer maintains one or more permanent establishments in a Member State other than that in which its central management and control is located, each permanent establishment shall be treated as a group member.

Improvement costs (Art. 4(18)):

Any additional expenditure on a fixed asset that materially increases the capacity of the asset or materially improves its functioning or represents more than 10% of the initial depreciation base of the asset.

Insurance undertaking(s) (Art. 99):

1. The term 'insurance undertakings' shall mean those undertakings authorised to operate in the Member States in accordance with Directive 73/239/EEC for non-life insurance, 2002/83/EC for life insurance and Directive 2005/68/EC for reinsurance.

Long-life fixed tangible assets (Art. 4(16)):

Fixed tangible assets' with a useful life of 15 years or more. Buildings, aircraft and ships shall be deemed to be long-life fixed tangible assets.

Long-term contracts (Art. 24):

1. A long-term contract is one which complies with the following conditions:

   (a) it is concluded for the purpose of manufacturing, installation or construction or the performance of services;

   (b) its term exceeds, or is expected to exceed, 12 months.

Loss (Art. 4(10)):

means an excess of deductible expenses and other deductible items over revenues in a tax year.

Non-deductible expenses (Art. 14):

1. The following expenses shall be treated as non-deductible:

   (a) profit distributions and repayments of equity or debt;

   (b) 50% of entertainment costs;

   (c) the transfer of retained earnings to a reserve which forms part of the equity of the company;

   (d) corporate tax;

   (e) bribes;

   (f) fines and penalties payable to a public authority for breach of any legislation;

   (g) costs incurred by a company for the purpose of deriving income which is exempt pursuant to Article 11; such costs shall be fixed at a flat rate of 5% of that income unless the taxpayer is able to demonstrate that it has incurred a lower cost;

   (h) monetary gifts and donations other than those made to charitable bodies as defined in Article 16;

   (i) save as provided for in Articles 13 and 20, costs relating to the acquisition, construction or improvement of fixed assets except those relating to research and development;

   (j) taxes listed in Annex III, with the exception of excise duties imposed on energy products, alcohol and alcoholic beverages, and manufactured tobacco.

2. Notwithstanding point (j) of paragraph 1 a Member State may provide for deduction of one or more of the taxes listed in Annex III. In the case of a group, any such deduction shall be applied to the apportioned share of the group members resident or situated in that Member State.

3. The Commission may adopt delegated acts in accordance with Article 127 and subject to the conditions of Articles 128, 129 and 130 to amend Annex III as is necessary in order to include all similar taxes which raise more than 20 % of the total amount of corporate tax in the Member State in which they are levied.

   Amendments to Annex III shall first apply to taxpayers in their tax year starting after the amendment.

Non-resident taxpayer (Art. 4(5)):

A taxpayer which is not resident for tax purposes in a Member State according to Article 6(3) and (4).

Non-taxpayer (Art.4(3)):

A company which is ineligible to opt or has not opted to apply the system provided for by this Directive.

Payroll (Art. 91(4)):

The term 'payroll' shall include the cost of salaries, wages, bonuses and all other employee compensation, including related pension and social security costs borne by the employer.

Permanent establishment(s) (Art. 5):

1. A taxpayer shall be considered to have a 'permanent establishment' in a State other than the State in which its central management and control is located when it has a fixed place in that other State through which the business is wholly or partly carried on, including in particular:

   (a) a place of management;

   (b) a branch;

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(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

2. A building site or construction or installation project shall constitute a permanent establishment only if it lasts more than twelve months.

3. Notwithstanding paragraphs 1 and 2, the following shall not be deemed to give rise to a permanent establishment:

   (a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the taxpayer;

   (b) the maintenance of a stock of goods or merchandise belonging to the taxpayer solely for the purpose of storage, display or delivery;

   (c) the maintenance of a stock of goods or merchandise belonging to the taxpayer solely for the purpose of processing by another person;

   (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the taxpayer;

   (e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the taxpayer, any other activity of a preparatory or auxiliary character;

   (f) the maintenance of a fixed place of business solely for any combination of activities mentioned in points (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

4. Notwithstanding paragraph 1, where a person – other than an agent of an independent status to whom paragraph 5 applies – is acting on behalf of a taxpayer and has, and habitually exercises, in a State an authority to conclude contracts in the name of the taxpayer, that taxpayer shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the taxpayer, unless the activities of such person are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

5. A taxpayer shall not be deemed to have a permanent establishment in a State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

6. The fact that a taxpayer which is a resident of a State controls or is controlled by a taxpayer which is a resident of another State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either taxpayer a permanent establishment of the other.

Principal tax authority (Art. 4(22)):

The competent authority of the Member State in which the principal taxpayer is resident or, if it is a permanent establishment of a non-resident taxpayer, is situated.

Principal taxpayer (Art. 4(6)):

(a) a resident taxpayer, where it forms a group with its qualifying subsidiaries, its permanent establishments located in other Member States or one or more permanent establishments of a qualifying subsidiary resident in a third country; or

(b) the resident taxpayer designated by the group where it is composed only of two or more resident taxpayers which are immediate qualifying subsidiaries of the same parent company resident in a third country; or

(c) a resident taxpayer which is the qualifying subsidiary of a parent company resident in a third country, where that resident taxpayer forms a group solely with one or more permanent establishments of its parent; or

(d) the permanent establishment designated by a non-resident taxpayer which forms a group solely in respect of its permanent establishments located in two or more Member States.

Profit (Art. 4.9):

means an excess of revenues over deductible expenses and other deductible items in a tax year.

Qualifiying subsidiary/subsidiaries (Art. 54):

1. Qualifying subsidiaries shall be all immediate and lower-tier subsidiaries in which the parent company holds the following rights:

   (a) a right to exercise more than 50% of the voting rights;

   (b) an ownership right amounting to more than 75% of the company's capital or more than 75% of the rights giving entitlement to profit.

2. For the purpose of calculating the thresholds referred to in paragraph 1 in relation to companies other than immediate subsidiaries, the following rules shall be applied:

   (a) once the voting-right threshold is reached in respect of immediate and lower-tier subsidiaries, the parent company shall be deemed to hold 100% of such rights.

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(b) entitlement to profit and ownership of capital shall be calculated by multiplying the interests held in intermediate subsidiaries at each tier. Ownership rights amounting to 75% or less held directly or indirectly by the parent company, including rights in companies resident in a third country, shall also be taken into account in the calculation.

Resident (Art. 6(3)):

[…] a company that has its registered office, place of incorporation or place of effective management in a Member State and is not, under the terms of an agreement concluded by that Member State with a third country, regarded as tax resident in that third country shall be considered resident for tax purposes in that Member State.

Resident taxpayer (Art.4(4)):

A taxpayer which is resident for tax purposes in a Member State according to Article 6(3) and (4).

Revenues (Art. 4(8)):

Proceeds of sales and of any other transactions, net of value added tax and other taxes and duties collected on behalf of government agencies, whether of a monetary or non-monetary nature, including proceeds from disposal of assets and rights, interest, dividends and other profits distributions, proceeds of liquidation, royalties, subsidies and grants, gifts received, compensation and ex-gratia payments. Revenues shall also include non-monetary gifts made by a taxpayer. Revenues shall not include equity raised by the taxpayer or debt repaid to it.

Sales (Art. 95(2)):

Sales shall mean the proceeds of all sales of goods and supplies of services after discounts and returns, excluding value added tax, other taxes and duties. Exempt revenues, interest, dividends, royalties and proceeds from the disposal of fixed assets shall not be included in the sales factor, unless they are revenues earned in the ordinary course of trade or business. Intra-group sales of goods and supplies of services shall not be included.

Second-hand assets (Art. 4(17)):

Fixed assets with a useful life that had partly been exhausted when acquired and which are suitable for further use in their current state or after repair.

Single taxpayer (Art.4(2)):

A taxpayer not fulfilling the requirements for consolidation.

Stocks and work-in-progress (Art. 4(19):

Assets held for sale, in the process of production for sale or in the form of materials or supplies to be consumed in the production process or in the rendering of services.

Taxpayer (Art. 4(1)):

A company which has opted to apply, the system provided for by this Directive.

Value for tax purposes (Art. 4(13)):

The depreciation base less total depreciation deducted to date.

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APPENDIX 4

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List of CCCTB Working Group working papers[1]

http://ec.europa.eu/taxation_customs/taxation/company_tax/common_tax_base/index_en.htm

CCCTB/WP/001	General Tax Principles (1.2)
CCCTB/WP/001/Rev1	General Tax Principles Revised (1.2)
CCCTB/WP/002	Draft Terms of Reference & Rules of Procedure (1.2)
CCCTB/WP/003	Draft Work Programme (1.2)
CCCTB/WP/004	Assets and Tax Depreciation (1)
Annex CCCTB/WP/004	Assets and Tax Depreciation – Annex (Table) (1)
CCCTB/WP/005a	Summary Record of Nov 2004 meeting (1)
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Annex1 CCCTB/WP/005	Intangible assets Annex Table (2)
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CCCTB/WP/009	Summary Record of March 2005 meeting (2)
CCCTB/WP/010	Capital Gains (3)
CCCTB/WP/011	Overview of SG2 April meeting (3)
CCCTB/WP/012	Overview of SG1 – Two meetings (3)
CCCTB/WP/013	Summary Record of June 2005 meeting (3)
CCCTB/WP/014	Overview of SG1 July meeting (4)
CCCTB/WP/015	Overview of SG2 June meeting (4)
CCCTB/WP/016	Concept of Tax balance sheet (4)
CCCTB/WP/017	Taxable income (4)
CCCTB/WP/018	Summary Record of September 2005 meeting (4)

1 From Annex 1 from the Commission Staff Working Document Impact Assessment. Accompanying document to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), SEC(2011) 315 final.

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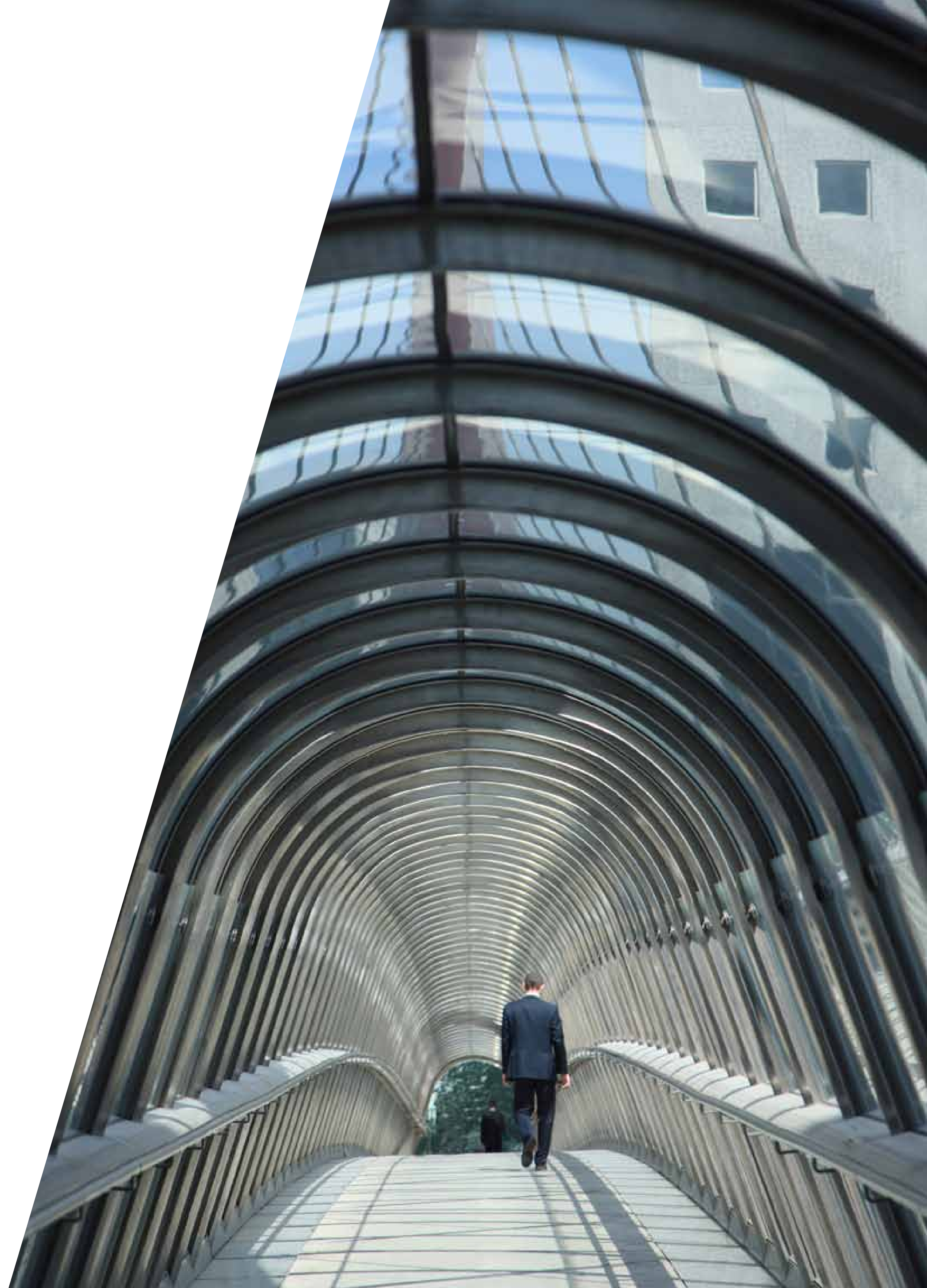

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