



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

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.

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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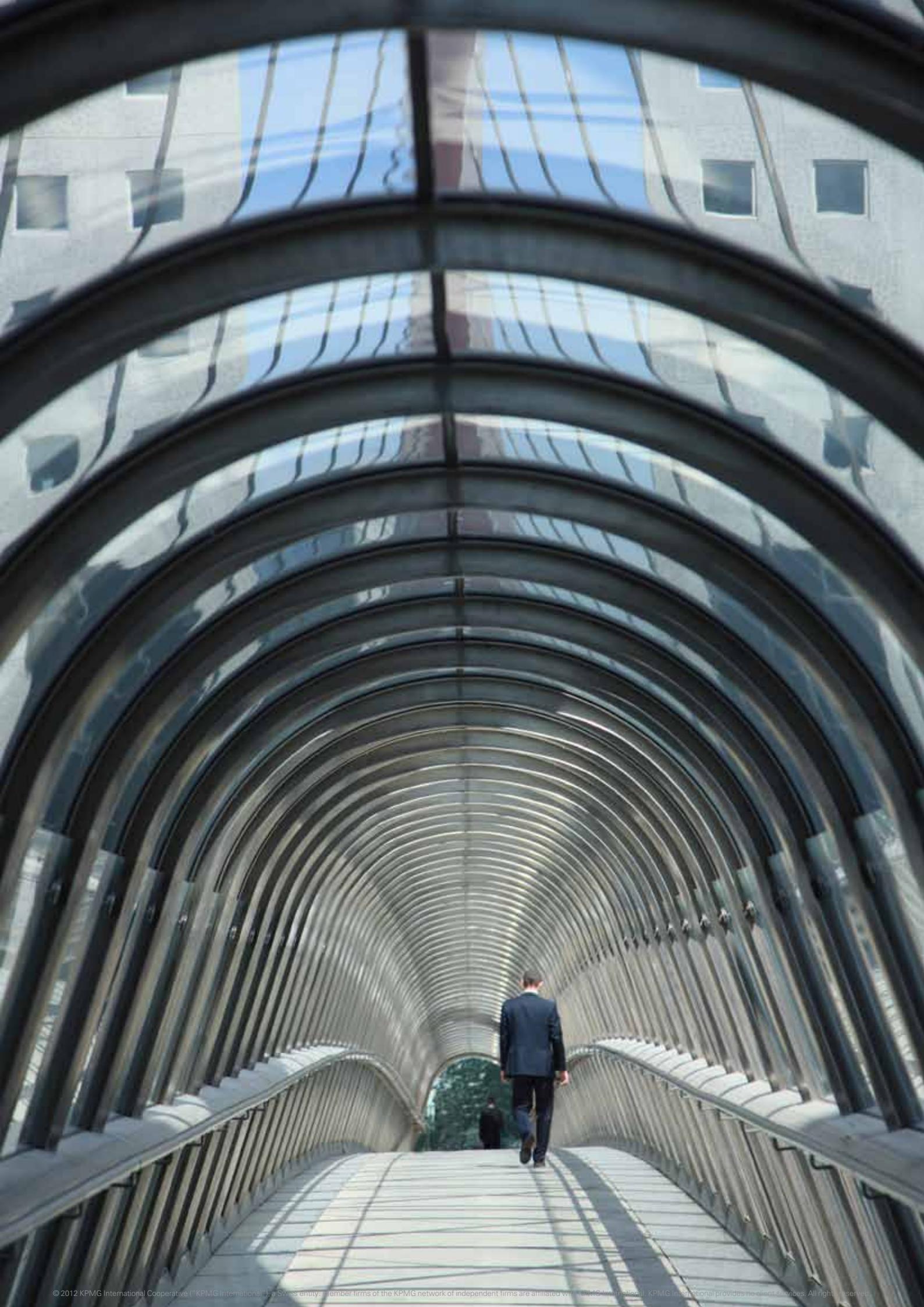
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PART 2



CHAPTER FOUR

General System and Key Concepts

KPMG's EU Tax Centre

1. The CCCTB System

1.1. Introduction

The CCCTB is a proposed system of standardised rules for computing the tax base of a corporate group with subsidiaries and/or permanent establishments in a Member State of the European Union (EU). The CCCTB allows an EU group of companies to consolidate its profits and losses. This consolidated figure is then allocated by means of an apportionment formula to the group members in the Member States in which the group has a taxable presence. The Member States then apply their own national tax rates to the allocated amounts to calculate the tax due in each Member State.

The rules are set out in a proposal for a Directive published by the European Commission on March 16, 2011.¹ Numerous background documents have also been issued by the Commission arising from various consultation processes carried out prior to that date (see Appendix 4).

The system means that a group of companies will only have to comply with one EU system for computing its taxable profits and will only be required to file a single tax return with a single tax authority.

Member states will retain autonomy in setting the tax rates.

The CCCTB acronym reflects the following elements:

Common: One single set of rules for companies operating in all EU Member States

Consolidated: EU-wide consolidation of a group's profits and losses

Corporate: The proposal only affects companies

Tax Base: The amount of the group's profit or loss chargeable to tax.

1.2. Structure of the Directive

The Directive comprises 136 articles, which can be grouped under the following headings:

- scope of the proposal (Chapter I and Chapter III)
- substantive rules for calculating the tax base (Chapters IV–VIII and Chapters X–XV)
- consolidation rules (Chapter IX)
- rules governing the apportionment process (Chapter XVI)
- administration and procedures (Chapter XVII–XVIII)
- concepts and definitions (Chapter II).

There are three annexes to the Directive: Annex I lists qualifying corporate forms in the various Member States; Annex II lists qualifying national corporate taxes; and Annex III lists non-deductible national taxes.

The full text of the Directive is set out in Appendix 1.

¹ 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.

The Directive is comparatively short given the scope of the matters dealt with, particularly when compared with equivalent rules under Member States' national systems. Recognising that the Directive's framework may need to be expanded with more detailed rules, the Directive provides for the possibility of amending or supplementing certain provisions pursuant to two related procedures: one known as 'comitology' (Arts. 131-132) and the other referred to as 'delegated acts' (Arts. 127-130). For simplicity in this publication, unless otherwise stated, these procedures are referred to collectively as the comitology procedure. For a more in-depth discussion of these procedures, see Chapter 2.

As noted, terms that are defined by the Directive appear in italic type in this publication, and the corresponding definitions are set out in Appendix 3.

1.3. Interaction with national and international law

Once a *group* or *single taxpayer* opts into the CCCTB system, the Directive's corporate tax rules will take precedence over the current national Member State rules unless otherwise stated (Art. 7). Article 8 of the Directive states that the provisions of the Directive will apply notwithstanding any provision to the contrary in any agreement concluded between Member States. The Directive is silent on the position of agreements between third countries and Member States, although the impact assessment paper accompanying the Directive states that such agreements will override the Directive.²

As in the case of all directives under EU law, the CCCTB Directive must be transposed into the national law of each Member State and apply as from a given date. No tentative effective dates are included in the current text of the Directive.

Unlike those directives, the CCCTB lists will be dynamic as both annexes may be amended under the comitology procedure.

2. Eligibility to Apply CCCTB (Art. 2)

Whilst early drafts of the proposal concentrated on large multinational corporations in the EU, the final text of the Directive has been extended to apply to companies, irrespective of size, ranging from small and medium-sized enterprises to large corporate groups.

Although there is no condition regarding size, in order to apply the CCCTB system, a company must:

- have a qualifying corporate form, and
- be subject to a specified EU Member State corporate tax.

Companies satisfying these conditions are referred to as '*eligible companies*'.

An *eligible company* can be established under the laws of either an EU Member State or of a third country. In the latter case, the first condition noted above is adapted so that the company must have a similar form to the list in Annex I. The company must also be subject to one of the corporate taxes listed in Annex II. This definition obviously covers the case where the company is resident in an EU Member State and accordingly subject to its corporate tax; presumably, it is also intended to cover the situation where the company is resident outside the EU but is subject to tax in respect of a *permanent establishment* in an EU Member State. The Directive provides that the Commission will draw up an annual, non-exhaustive list of third country forms under the comitology procedure.

The above approach is similar to those of the EU Parent Subsidiary Directive³ and EU Interest and Royalty Directive:⁴ qualifying corporate forms and corporate taxes are listed in annexes, in the case of the CCCTB, Annex I and Annex II, respectively. Unlike those directives, the CCCTB lists will be dynamic as both annexes may be amended under the comitology procedure. Also, unlike those directives, there is no additional condition that the company cannot have the possibility to be exempt from (or have an option to be exempt from) tax.

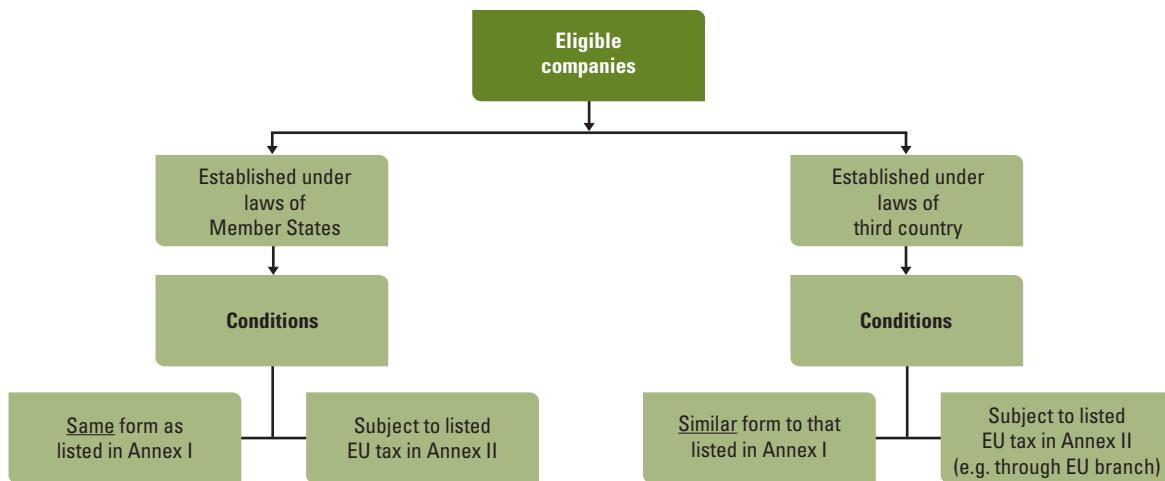
2 Commission Staff Working Document Impact Assessment, SEC(2011) 315 final.

3 Council Directive 90/435/EEC (as amended).

4 Council Directive 2003/49/EC.

The Directive does not state whether the 'subject to tax' test should be applied on the basis of the national law of the Member State concerned or on the basis of the rules laid down in the Directive (see Section 3). Logically, it would have to be the former. In most cases, it would make no difference. However, the issue would make a difference in cases where, for example, the jurisdictional scope under national law differs

from that of the Directive or where national law provides for exemptions that are not provided for under the Directive. If the national rules were applied, Member States would be able to preserve existing exempt companies' status; on the other hand, an otherwise taxable company that can elect for exemption would then appear to lose this possibility under the CCCTB rules.



Provided the above conditions are satisfied, an *eligible company* can be resident either in an EU Member State or in a third country. The practical difference relates to the consequences of opting for the CCCTB and the jurisdictional scope of the CCCTB rules as regards the profits of the company in question. This aspect is addressed in Section 3 below.

Example: third country eligible company

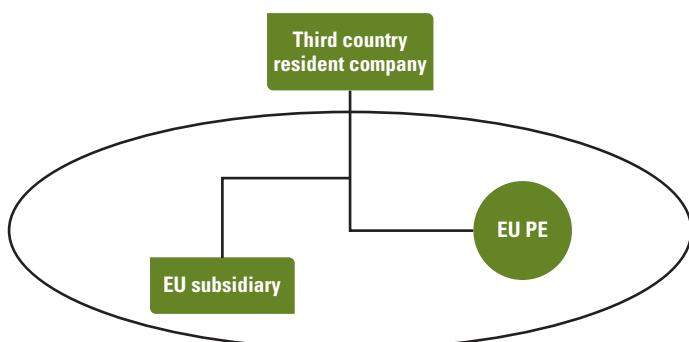
In the example pictured below, parent and subsidiary both qualify as *eligible companies*, assuming the parent has a similar form to companies established under the laws of a Member State and is subject to a listed EU corporate tax in respect of its *permanent establishment*.

3. Opting for the CCCTB (Art. 6)

3.1. Background

The CCCTB is an optional system. As not all companies have a cross-border presence or belong to cross-border groups, the European Commission decided an optional system is preferable as it does not compel these companies to incur the unnecessary cost of adopting a new system. The Commission also took the view that a compulsory CCCTB would not be in line with the principle of subsidiarity as it would mean that EU measures were being introduced to cover purely domestic, as well as EU-level, activity.⁵ However, there is nothing to prevent a company with no cross-border activity or a *group* that does not belong to a cross-border EU *group* from opting to apply the CCCTB.

An optional system implies that companies will have the choice to have their taxable base computed under the CCCTB rules or to remain fully governed by the national systems. Consequently, countries will have to administer two corporate tax systems in tandem.



⁵ Questions and answers on the CCCTB (Memo 11/171).

3.2. Conditions and procedure

Any EU resident company, or company resident in a third country, that satisfies the eligibility requirements outlined above may opt to apply CCCTB. In the case of a non-EU resident company, the option applies in respect of its EU *permanent establishments*. In the previous example, the third country parent can therefore opt in respect of its *permanent establishment*. Equally, the third country parent's subsidiary can also opt for the CCCTB.

In the case of a *group*, the election is made by the *principal taxpayer* and this election covers all *group members*. Importantly, this election is not optional for the *group members*: the intention is that they would be bound to apply CCCTB once the *principal taxpayer* has opted, i.e. an 'all-in all-out' approach. Although the *principal taxpayer* would typically be the highest EU resident company in the corporate chain, this is not necessarily so. The *group* concept is described below in Section 4. For more details on the all-in all-out approach, the definition of a *principal taxpayer*, and the opting procedure in general, see Chapter 13.

3.3. Consequences of opting and jurisdictional scope

Opting means a company will apply the CCCTB system as laid down in the Directive.

The Directive provides that a company opting for the CCCTB system shall cease to be subject to the national corporate tax arrangements in respect of all matters regulated by the Directive (Art. 7). In particular, this applies in regards to tax rates, which are not governed by the Directive. The tax base, on the other hand, will be determined by the Directive. The same applies for many of the procedural aspects of corporate tax. Whether or not the Directive replaces all aspects of corporate tax, such as taxes levied at sub-national level, is unclear.

Whilst the tax will be nominally that of the Member State of residence, computed according to its rate or rates, the income will be computed according to the rules of the Directive.

A company resident in a Member State that opts for the system will be subject to corporate tax in that Member State on its worldwide income, whether derived from inside or outside its Member State of residence. However, this

treatment is without prejudice to any exemptions that may apply, such as the exemption for third country *permanent establishment* profits (see Chapter 5). Whilst the tax will be nominally that of the Member State of residence, computed according to its rate or rates, the income will be computed according to the rules of the Directive.

A company resident in a third country which opts for the system will be subject to corporate tax on all income from an activity carried on through a *permanent establishment* in a Member State. As the third country resident and its EU *permanent establishment* are treated under the Directive as *associated enterprises*, the profits attributable to the PE will be computed according to the arm's length principle as set out in Article 79 (see Chapter 10).

3.4. Residence and non-residence

The Directive provides its own definition of residence, i.e. independent of any national law definition in a particular EU Member State (Art. 6(3)). In order to be resident in a Member State, a company must:

- have its registered office, place of incorporation, or place of effective management in that Member State, and
- not be tax resident in a third country under an agreement between that Member State and the third country.

A tie-breaker provision would resolve cases of double taxation between Member States in favour of the country where the place of effective management is located.

4. Group Concept

The concept of a *group* is relevant for determining which companies automatically have to apply the CCCTB system once an election is made and for determining which companies have to consolidate their results. The definition of *group* is the same for both purposes.

The basic idea is that a *group* consists of the company opting to apply the CCCTB and all its *qualifying subsidiaries*. However, as explained below, detailed rules are provided to cover situations where third countries and permanent establishments are involved. Before dealing with the definition of a *group*, in the next section, we discuss the key concept of a *qualifying subsidiary*.

4.1. Qualifying subsidiaries (Art. 54)

A *qualifying subsidiary* must satisfy two conditions. *Qualifying subsidiaries* are defined as all immediate and lower-tier subsidiaries in which the parent company holds a minimum percentage of voting rights, together with a minimum percentage of either ownership or *profit* entitlement rights.

Specifically, the parent must hold the following rights in order for the subsidiary to qualify:

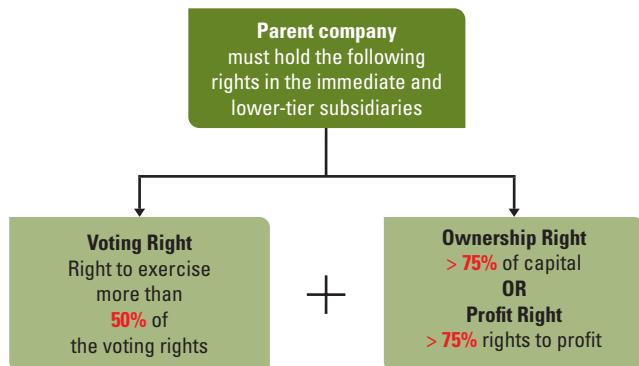
- (a) a right to exercise more than 50% of the voting rights, and
- (b) an ownership right amounting to more than 75% of the company's capital

or

more than 75% of the rights giving entitlement to *profit*.

The term 'subsidiary' used above is not defined in the Directive. A subsidiary does not necessarily have to satisfy any of the conditions for an *eligible company*, described in Section 2 above, in order to be a *qualifying subsidiary*. However, a *qualifying subsidiary* will only be able to apply the CCCTB system if it is also an *eligible company*.

Similarly, the Directive does not attach a residence condition to the status as a subsidiary or as a *qualifying subsidiary*. Accordingly, in principle, a subsidiary or a *qualifying subsidiary* may be resident in the EU or in a third country. However, as noted, only an *eligible company* would be allowed to apply the CCCTB system and can only be a member of a CCCTB *group* and, for example, consolidate its tax base. The fact that a company can be a *qualifying subsidiary* without also being an *eligible company* is of importance for indirect shareholdings, as explained further below.



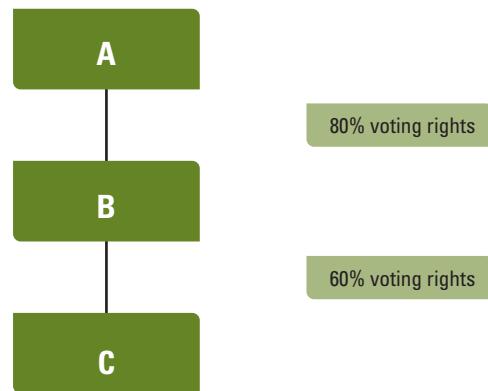
The above thresholds generally must be met throughout the year (Art. 58). However, a special rule applies for a company joining the *group* during the course of a year. In that case, the company becomes a member of the *group* on the date that the conditions are satisfied. If the conditions are not satisfied for at least nine consecutive months, the subsidiary will be treated as never having belonged to the *group*. No provision is made for temporary failures to satisfy the conditions, such as a short-term drop in voting rights.

4.1.1. Voting Rights: Control

The first part of the test is satisfied once the parent company has the right to exercise more than 50% of the voting rights in any immediate or lower-tier subsidiary. As explained above, in principle, such a subsidiary may be resident in the EU or a third country. This voting right threshold would exclude, for example, a 50/50 joint venture company from forming a *group* with either joint venture partner.

The Directive provides that once this voting right threshold is met in respect of immediate and lower-tier subsidiaries, the parent company is deemed to hold 100% of such rights. This appears to require the threshold to be met at each level in order for this deeming provision to apply.

Consider the following example. B is a *qualifying subsidiary* of A because A directly holds more than 50% of the voting rights (assuming the ownership/profit test is also satisfied). C is also a *qualifying subsidiary* of A even though A indirectly only holds 48% of the voting rights in D (80% x 60%). As explained above, B or, in principle, C could be resident outside the EU and still be a *qualifying subsidiary*.



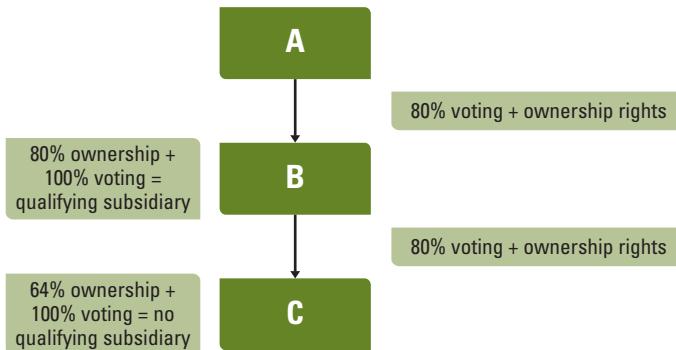
The Directive does not deal with the situation where 50% or less of the voting rights are held at a particular level other than to the effect that such holdings are not deemed to give 100% voting entitlement. Presumably, the intention is that such rights should not be taken into account, given that control is an 'all-or-nothing' concept, as was originally proposed.⁶

4.1.2. Ownership Rights

The ownership rights criterion is an alternative to the *profit* entitlement criterion described below. A company will be a *qualifying subsidiary* provided that one of these tests is satisfied as well as the voting control test.

This part of the test is satisfied once the parent company holds ownership rights of more than 75% of the company's capital. In the case of indirect shareholdings, ownership is calculated by multiplying the interests held in an intermediate subsidiary at each tier.

So even if the threshold is satisfied at each intermediate level, as in the following example, an indirectly held company will not qualify if the product of the interests is below the threshold. Unlike the voting control test, ownership rights that exceed the relevant threshold (in this case 75%) are not deemed to be 100%.

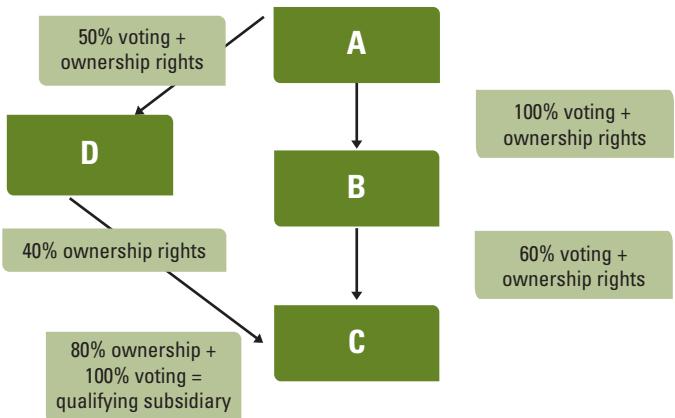


Whilst ownership rights that exceed the relevant threshold (in this case 75%) are not deemed to be 100%, the Directive specifically provides that ownership rights amounting to 75% or less held directly or indirectly by the parent company should also be taken into account. For these purposes, the Directive expressly states that interests held through an intermediate company resident in a third country may also be taken into account. There is no explicit requirement that the latter company be eligible to apply CCCTB, or indeed any similar requirement. There is also no explicit statement as regards the residence of intermediate companies in which the 75% condition is satisfied, but, as explained above, there is no condition as regards residence attached to the concept of a subsidiary or *qualifying subsidiary*, and so interests held through such companies resident in third countries would seem to be included.

However, unless the interest held through D is also taken into account, the ownership test is not satisfied in respect of C because A's indirect ownership interest only amounts to 60% (100% x 60%).

In the following example, the voting condition is satisfied through A's indirect interest in C held through B: because more than 50% of the voting rights are held at each level, A is deemed to hold a 100% voting interest in C. However, unless the interest

held through D is also taken into account, the ownership test is not satisfied in respect of C because A's indirect ownership interest only amounts to 60% (100% x 60%). If the interest held through D is taken into account, A's indirect ownership interest amounts to 80% (50% x 40% (D) + 100% x 60% (B)). C is therefore a *qualifying subsidiary* of A. As explained above, it is not relevant whether D or B are resident in the EU or a third country. B is also a *qualifying subsidiary* of A since it satisfies both the voting and ownership tests, again, regardless of whether it is resident in the EU. However, the latter may be relevant to whether it is an *eligible company* for the purposes of applying the CCCTB system and for whether it can be included in a CCCTB *group* (as explained in the next section under definition of a *group*). D is not a *qualifying subsidiary* of A because A does not hold more than 50% of the voting rights.



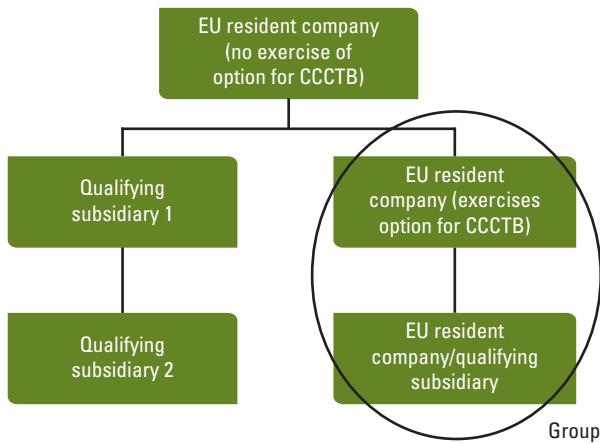
4.1.3. Profit Entitlement Rights

This part of the test is satisfied once the parent company holds more than 75% of the rights giving entitlement to *profit*. Like the ownership rights test, the threshold does not have to be met at each intermediate level and can be satisfied indirectly by multiplying the interests together. Presumably, like the ownership right tests, shareholdings held through non-EU resident companies may also be taken into account.

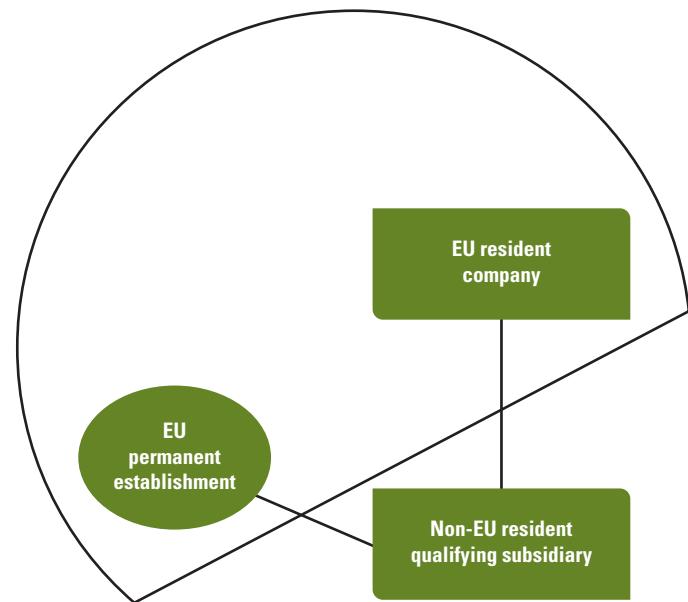
4.2. Definition of a CCCTB group (Art. 55)

The Directive defines a *group* broadly by reference to the company that heads the *group*, i.e. the company that is highest in the chain of companies making up the *group*, together with its *qualifying subsidiaries*. The Directive requires this company to be either a *resident taxpayer* or a *non-resident taxpayer*. A *taxpayer* (whether resident or non-resident) is defined as a company which has opted to apply the CCCTB system. Thus, a company that has not so opted cannot head a CCCTB *group*. This means, for example, that a third country resident company with no EU *permanent*

establishment – that is not eligible to opt – could not head a CCCTB *group*. The same would apply to an EU resident company that has not opted for CCCTB, even though it is an *eligible company* and could do so, as illustrated in the following example:



2. all permanent establishments located in the Member State of its *qualifying subsidiaries* resident in a third country, as illustrated below:

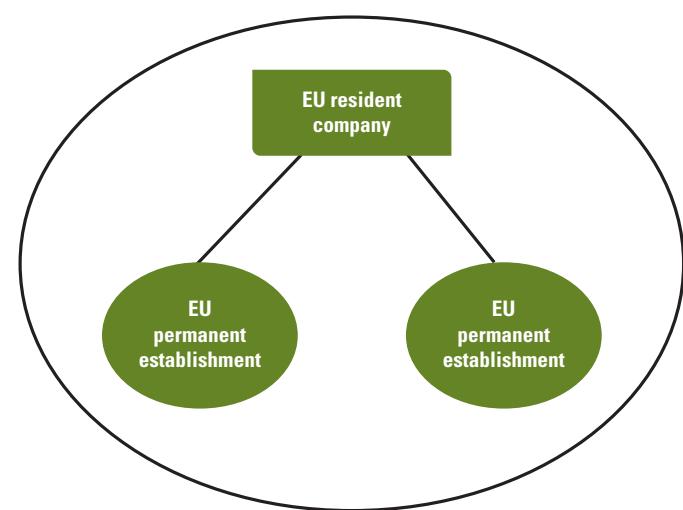


The concept of a *qualifying subsidiary*, as described above, is central to the definition of a *group* for CCCTB purposes and accordingly for which companies have to apply the system. The concept of a *permanent establishment*, as defined by the Directive (Art. 5), plays a similar function. Note that, although the Directive includes a definition of *permanent establishment* (broadly in line with the definition in Article 5 of the 2010 OECD Model Convention), this definition refers only to permanent establishments within a Member State of a company resident in another Member State; possibly, the intention is that, in the case of third countries, the treaty definition would apply (if different).

4.2.1. Resident taxpayer (Art. 55(1))

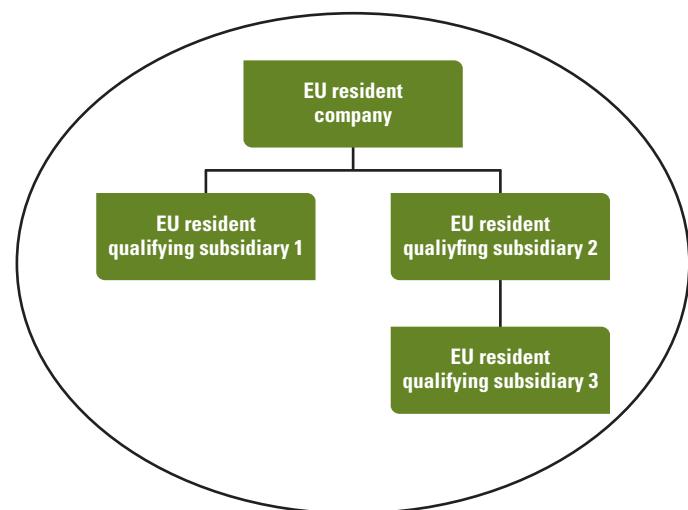
A *resident taxpayer* will form a *group* with:

1. all its permanent establishments located in other Member States, as illustrated below:



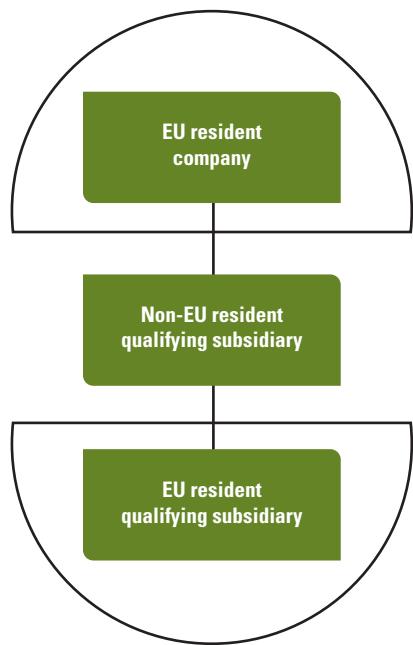
Article 55(1) of the Directive does not indicate whether the third country *qualifying subsidiary* must satisfy the conditions for being an *eligible company*. However, since a non-EU company can only apply CCCTB if it is also an *eligible company*, it seems that it would have to satisfy those conditions.

3. all its *qualifying subsidiaries* resident in one or more Member States (direct and indirect), as illustrated below:



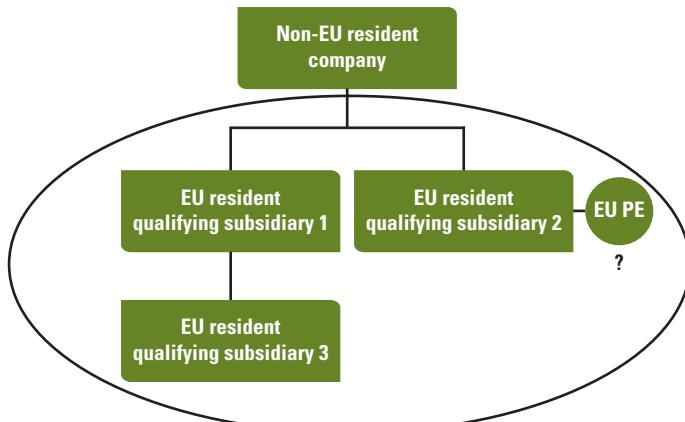
Again, since a company can only apply CCCTB if it is an *eligible company*, the EU resident subsidiaries in the above example must also be *eligible companies*, as defined.

Apparently, this category is also intended to cover intermediate third country subsidiaries, such as in the following example:



Assuming both subsidiaries in the above example fulfil the conditions described above for a *qualifying subsidiary*, the EU resident subsidiary will form a *group* with its indirect EU parent. However, no additional conditions are prescribed by the Directive for the non-EU resident company in this kind of situation.⁷ The Directive also contains anti-abuse provisions in relation to third countries that could be relevant (see Chapter 12).

4. a *resident taxpayer* and all other *resident taxpayers* that are *qualifying subsidiaries* of the same company that is resident in a third country. Although not stated, it is presumably intended that permanent establishments of these *qualifying subsidiaries* in other Member States would also be included in the *group*, as illustrated below:

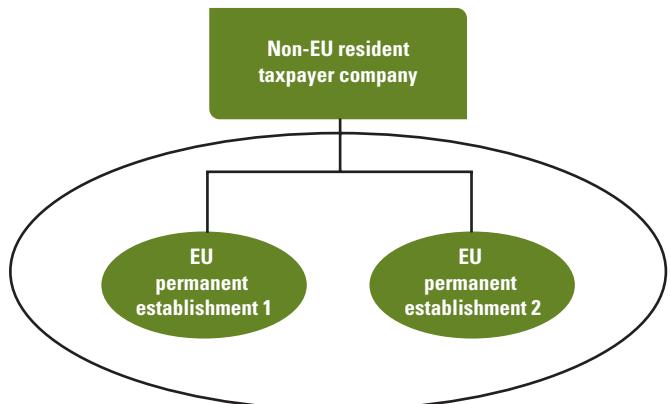


In this case, Article 55(1)(d) specifies that the third country company must have a corporate form similar to a listed EU corporate form. This condition also forms part of the definition of an *eligible company*, but since the third country company will not itself apply the CCCTB, it does not have to be an *eligible company* and so does not have to satisfy the other condition of an *eligible company*, i.e. it does not have to be subject to a listed EU tax.

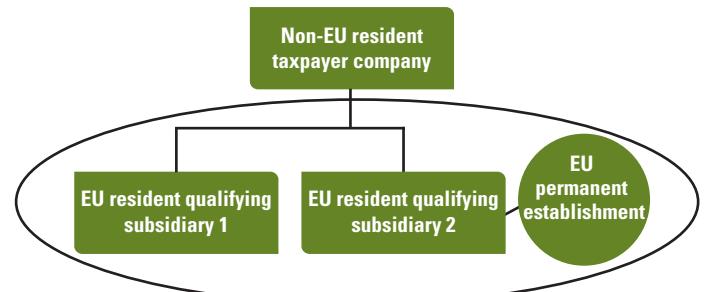
4.2.2. Non-resident taxpayer

A *non-resident taxpayer* will form a *group* with:

1. all its permanent establishments located in Member States, as illustrated below:



2. all its *qualifying subsidiaries* resident in one or more Member States, including the permanent establishments of the latter located in Member States, as illustrated below:



Shipping companies subject to a special tax regime may be excluded from the *group* (Art. 104(3)).

4.3. Insolvency (Art. 56)

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.

⁷ It was originally proposed that interposed third country entities would only be taken into account where the third country exchanges information on request to the standard of the EU Mutual Assistance Directive (EEC 77/799) (CCCTB/RD/001/doc/en).

CHAPTER FIVE

Calculation of the Tax Base

KPMG's EU Tax Centre

1. Introduction

This chapter discusses the common tax rules for calculating the corporate tax base for a single, stand-alone company. Group consolidation is dealt with in Chapter 6.

Computation of the stand-alone tax base followed by consolidation form the first of the CCCTB's two-pronged approach. The second prong is the sharing mechanism to apportion the *consolidated tax base* among the members of the *group* and thus, indirectly, to apportion this base between the Member States (see Chapter 11). In this chapter, we begin by addressing the relationship between the CCCTB and accounting principles.

2. Interaction with Accounting Principles

2.1. Starting point for CCCTB

Most EU Member States require individual companies to draw up their annual financial statements in accordance with local generally accepted accounting principles (GAAP). Since 2005, listed EU companies have been required to draw up their consolidated accounts in accordance with international accounting standards.⁸ The standards adopted for these purposes are essentially those embodied in the IAS and IFRS as issued by the International Accounting Standards Board. Member States may either permit or require unlisted companies to use IAS in their consolidated accounts and may either permit or require listed and/or unlisted companies to use IAS in their individual accounts.

Commission summary⁸

The 'tax base' (i.e. the individual tax results of each group member)

- **all revenues are taxable** except if expressly listed as **exempt**; in addition, taxable revenues are **reduced by deductible (business) expenses** and certain **other items** treated as deductible.
- **Exempt** items include: received **distributions of dividends**; proceeds from the **disposal of shares**; and income from a **branch in a third country**. **Deductible business expenses** commonly involve all costs relating to sales and expenses linked to the production, maintenance

and securing of income. The CCCTB extends deductibility to costs for research and development (**R&D**) and for **raising equity or debt** for the purposes of the business.

- **Fixed assets are depreciable for tax purposes** subject to certain **exceptions**. Depreciable assets are distinguished between those subject to depreciation **individually** and those **placed in a pool**. **Long-life tangible and intangible fixed assets are individually depreciated** while the **remaining** assets go into a **pool**.
- Losses may be **carried forward indefinitely**. **No loss carry-back** is allowed

⁸ Commission Staff Working Document Impact Assessment, SEC(2011) 315 final.
⁹ (EC) Regulation 1606/2002.

The introduction of IAS/IFRS led the European Commission to consider using IAS/IFRS as a starting point for a common consolidated corporate tax base.

A number of objections to this approach have been made, including the following:

- (a) The International Accounting Standards Committee is a private organisation and it may be questioned whether EU legislation should be influenced by bodies outside the public domain.
- (b) The IAS/IFRS rules focus on investor information and so they may not be a suitable measure for the tax base.
- (c) Not all Member States permit the use of IAS/IFRS for individual company accounts.
- (d) Having the tax base determined by IAS/IFRS would lead to a major loss of fiscal sovereignty.

Consequently, the Directive does not make a formal link between IAS/IFRS and CCCTB.¹⁰ Having said that, these standards have clearly been used as guidance or as a ‘tool’ in developing the common tax base rules because the standards ‘provide a common language and some common definitions’.¹¹ The question arises to what extent the guidance contained in these standards should serve to interpret the CCCTB rules.

CCCTB will not impact the financial accounts of the companies that apply it. Companies will therefore continue to draw up their individual accounts using existing accounting rules, in most cases, using local GAAP.

Most EU companies use financial accounts as the basis for computing the corporate tax base, and this will likely continue under CCCTB. These financial accounts may be brought into line with the CCCTB rules using adjustments or ‘bridges’. The Directive does not lay down rules for these bridges between all the different national GAAPs it describes the intended final result – the base itself. Ultimately, it will be up to each Member State to decide how it will implement the rules, which, in principle, could result in up to 27 different sets of bridges. The European Commission has acknowledged this but has stated that it is unavoidable¹² as there is no accounting harmonisation in the EU.

3. Computing the Tax Base

3.1. A ‘revenue’ approach

The CCCTB computation rules adopt a ‘profit and loss’ approach rather than a ‘balance sheet’ approach. Unlike some national tax systems, they do not derive taxable profits from a comparison between the beginning and end of year balances; but instead, they focus on a company’s profit and loss position.

The tax base is defined as *revenues less exempt revenues, less deductible expenses* and other deductible items:

Revenues	x
Less exempt revenues	(x)
Less deductible expenses	(x)
Total tax base	x

Consequently, the Directive does not make a formal link between IAS/IFRS and CCCTB

3.2. Revenues (Art. 4(8))

Revenues are defined to include proceeds of *sales* and of any other transactions, net of value added tax and other taxes and duties, including proceeds from disposal of assets, interests, dividends and other profit distributions, proceeds of liquidation, royalties and subsidies. *Revenues* do not include equity raised by the *taxpayer* or debt repaid to it.

Some national tax systems in the EU distinguish between active and passive income and apply different rates of tax accordingly. The Directive does not make such a distinction. The Commission stated that such a distinction would increase the complexity of the system and open possibilities for profit shifting within a *group*.¹³ It is unclear how a Member State that applies different rates to active and passive income (or a similar distinction) under its existing tax rules, could continue to do so under the CCCTB system.

10 COM (2006) 157 final.

11 Ibid.

12 CCCTB/WP/059/draft/en.

13 CCCTB/WP060/doc\en.

3.3. Exempt revenues (Art. 11)

The following items are treated as *exempt revenues*:

(a) subsidies directly linked to the acquisition, construction or improvement of fixed assets, subject to depreciation in accordance with the Directive rules

The exempt subsidy is deducted against the depreciation base of the related fixed asset (Art. 33(3)). Therefore, although the subsidy is exempt, it reduces a deductible amount so the net effect is that the income is taxable over time.

(b) proceeds from the disposal of assets that are depreciated in a pool, including the market value of non-monetary gifts

This provision does not mean that gains on the disposal of such assets fall outside the tax base. The proceeds from the disposal of pooled assets reduce the balance of the pool to be depreciated in future years, therefore indirectly taxing the gains over time. Only to the extent that the balance of the pool is negative as a result of such disposals would the gain be currently taxed. (For more details, see Section 4.2.2 below.)

(c) received profit distributions

The Directive does not explain what qualifies as a '*profit distribution*'. The same term is used in the EU Parent Subsidiary Directive, where it is equally undefined. Rather than leave the term to be defined by the European Court of Justice, as has happened in the case of the Parent Subsidiary Directive, it would be helpful to provide guidance as to whether the term includes, for example, deemed dividends.

The Directive is silent on the treatment of third country PE losses; presumably, the intention is that these losses would also be exempt.

There is no minimum shareholding requirement for this exemption to apply, in contrast to similar exemptions included in the domestic rules of many countries and under the Parent Subsidiary Directive.

The Directive provides that the exempt amount may be taken into account in determining the tax rate applicable to the *taxpayer* (Art. 72). Obviously, this will only be relevant to Member States applying progressive corporate tax rates.

The exemption may be replaced by taxation subject to a credit ('switch-over') in certain circumstances (see Chapter 9).

(d) proceeds from a disposal of shares

As is the case in the previous category, there is also no minimum shareholding requirement for this exemption. The

Directive does not expressly state how losses on a disposal of shares would be treated. On the basis of the rules on deduction of costs on non-depreciable assets (Art. 20), it appears such losses would be non-deductible (see above).

Again, the exemption may be replaced by taxation subject to a credit ('switch-over') in certain circumstances (see Chapter 9).

The Directive provides that the exempt amount may be taken into account in determining the tax rate applicable to the *taxpayer* (Art. 72), which is only relevant to Member States applying progressive corporate tax rates.

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

Although there is a trend among countries toward exempting foreign *permanent establishment* income, some still tax this income under their national law while providing double taxation relief in the form of a credit. The CCCTB system would replace the latter rules as regards non-EU *permanent establishments* so that an exemption would apply. Although the Directive defines '*permanent establishment*', the definition is drafted so as to refer only to *permanent establishments* within a Member State. It may be intended that, in the case of third countries, the treaty definition would apply.

It should be noted that this rule does not affect *permanent establishments* in another Member State (in this regard, see Chapter 9).

The Directive does not explicitly address the computation of the foreign *permanent establishment* profits for the purposes of this provision. In order to respect tax treaty obligations towards third countries it might be assumed that it is intended that the 'normal' OECD/treaty rules would apply, rather than the CCCTB rules. However, the position is uncertain, in particular, since the Directive explicitly provides that third country permanent establishment profits that are taxable under the switch-over provision noted below are to be computed according to the CCCTB rules. At any rate, it is clear that the definition of *associated enterprise* in Article 78 includes a third country *permanent establishment*, in respect of which the arm's length principle will apply (Art. 79).

The Directive is silent on the treatment of third country *permanent establishment* losses; presumably, the intention is that these losses would also be exempt. The transitional arrangements provided for 'pre-entry' losses (see Chapter 7) would presumably cover foreign *permanent establishment* losses that are included in *loss carry-forwards* at the time of joining the CCCTB system. However, it is not clear how this *permanent establishment* exemption will apply in the case of pre-entry *loss recapture* where a Member State applies this mechanism to recapture earlier foreign *permanent establishment* losses in a future year.

The Directive provides that the exempt amount may be taken into account in determining the tax rate applicable to the *taxpayer* (Art. 72), which is only relevant to Member States applying progressive corporate tax rates.

The exemption may be replaced by taxation subject to a credit ('switch-over') in certain circumstances (see Chapter 9).

3.4. Deductible expenses

The Directive specifies that *deductible expenses* shall include all costs of *sales* and expenses net of deductible VAT incurred by the *taxpayer* with a view to obtaining or securing income (Art. 12). The use of 'shall include' suggests that this definition is not exhaustive and that certain expenses may still be deductible, even where they were not incurred with a view to obtaining or securing income. Although no further guidance is provided, Article 12 also provides that the costs of research and development (R&D) and the costs incurred in raising equity or debt for the purposes of the business are also deductible. It is therefore not necessary to capitalise these items under the CCCTB system and rely on depreciation deductions (if allowed) to obtain relief. Gifts to charities may also be deducted subject to certain conditions (see below for more details). This avoids the need to demonstrate that such gifts are made in order to obtain or secure income.

The use of 'shall include' suggests that this definition is not exhaustive and that certain expenses may still be deductible, even where they were not incurred with a view to obtaining or securing income.

3.4.1. R&D

R&D expenses are expressly deductible, and so they do not need to be capitalised (Art. 12).

3.4.2. Costs of raising capital

The costs of raising equity or debt for the purposes of the business are expressly deductible (Art. 12). Whether this would cover the costs of raising capital for other members of the *group* would depend on whether this activity was considered part of the business of the company raising the equity or debt.

3.4.3. Charitable bodies

Certain gifts to *charitable bodies* (Art. 16), may qualify as *deductible expenses*.

The charitable bodies must be established in a Member State or in a third country with a qualifying information exchange arrangement.

The maximum deductible expense for monetary donations to such bodies shall be 0.5% of *revenues* in the tax year. It is unclear whether this limitation intentionally refers only to 'monetary' donations and not also donations-in-kind.

3.4.4. Fixed assets

Costs related to depreciable assets may be deducted by way of the Directive's rules on depreciation (Art. 13) (see Section 4 below). For other *fixed assets*, the cost of acquisition, construction or improvement is deductible in the tax year in which the assets are disposed of, provided the disposal proceeds are included in the tax base (Art. 20).

3.5. Non-deductible expenses (Art. 14)

The Directive specifies a number of expenses that are to be treated as non-deductible. The interaction between this provision and the general provision on deduction in Article 12 is not explained by the Directive. Article 12 provides that *deductible expenses* shall include expenses incurred 'with a view to obtaining or securing income'. It may be inferred that, insofar as the expressly non-deductible items are incurred with a view to obtaining income, the expense is nevertheless non-deductible. Other items may have been included simply for the avoidance of doubt. The following items are specifically 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 exempt income (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. It may be questioned whether this fictional estimate of such expenses is appropriate for (or even intended for) items other than received *profit* distributions. The provision is similar to one included in the EU Parent Subsidiary Directive (Art. 4(2)) as regards received *profit* distributions, except that the latter allows Member States to deny all expenses related to the income in question and provides the 5% proxy only as an alternative
- (h) monetary gifts and donations other than those made to *charitable bodies* as defined in Article 16

- (i) except for a proportional deduction of the depreciation of *fixed assets* and costs related to non-depreciable assets (Art. 20), costs relating to the acquisition, construction or improvement of *fixed assets* are non-deductible except those relating to R&D. This suggests that the residual cost of depreciable assets (after depreciation deductions) cannot be deducted when computing the gain (or *loss*) on the sale of such assets. However, this is clearly not the intention, as provision is made for the deduction of the book value from the tax base in the tax year in which the asset is disposed of (Art. 37)
- (j) taxes listed in Annex III, with the exception of excise duties imposed on energy. These taxes include various operational taxes listed by Member States, such as stamp and registration duties and property taxes. Member States may provide for these taxes to be deductible (Art. 14(2)), but, in the case of a CCCTB *group* the deduction is made from the share of the consolidated *profit* apportioned to that Member State rather than from the *consolidated tax base* itself
- (k) products, alcohol and alcoholic beverages, and manufactured tobacco.

The provision also uses a similar but not identical test to determine whether the rule covers the relationship with the taxpayer company.

In addition to the above, benefits granted to certain shareholders and other persons are non-deductible to the extent that they would not be granted to an independent third party (Art. 15). This provision appears to be an example of the arm's length principle that is set out in more detail elsewhere in the Directive (Art. 78 and 79) (see Chapter 10). The provision also uses a similar but not identical test to determine whether the rule covers the relationship with the *taxpayer company*.

3.6. Timing and valuation

3.6.1. General rules

Revenues are to be computed for each tax year unless otherwise provided. A tax year is not necessarily a calendar year but must be a twelve-month period, unless otherwise provided (Art. 9(4)).

Profits and losses may only be recognised when realised (Art. 9(1)), in contrast to the rules in many countries that allow

recognition of losses before realisation. The Directive provides for this to an extent by allowing a deduction for 'exceptional depreciation' (Art. 41). (See Section 4.9 below.)

In principle, *revenues* and expenses are recognised in the year they accrue or are incurred. (Art. 17).

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.

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*.

An exception to the accruals principle in Art. 17 is provided for *financial assets and liabilities held for trading* (Art. 23). These are to be valued at fair value on an annual basis (see Section 3.6.10 below).

The exact relationship between the realisation principle (Art. 9) and the accruals principle (Art. 17) is not explained in the Directive. Although these are sometimes seen as opposing principles, the intention appears to be that the accruals principle, as used in the context of the Directive, is an instance of the realisation principle. (See Chapter 3.)

3.6.2. Fixed assets

Special timing rules are provided for the deduction of costs related to *fixed assets*. For depreciable assets, this is done in accordance with the Directive's rules on depreciation (Art. 13) (see Section 4 below). For other *fixed assets*, the cost of acquisition, construction or improvement is deductible in the tax year in which the assets are disposed of, provided the disposal proceeds are included in the tax base (Art. 20).

3.6.3. Stock and work-in-progress (Art. 21 and 29)

The 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 (Art. 21). This is standard accounting practice so as to match income with the relevant expenditure. The effect is to deduct opening stock from income and add closing stock to income.

Article 29 of the Directive provides guidance on the measurement and valuation of *stock and work-in-progress*. This guidance appears to be inspired by IAS 2.

When items of inventory are not interchangeable or produced and segregated for specific projects, cost is determined on an individual item basis. This is appropriate for unique items, such as antiques and property developments. For other circumstances, the Directive prescribes a FIFO (first-in, first-out) or weighted-average cost method.

Inventories are valued on the last day of the tax year at the lower of cost and net realisable value. Cost includes purchase costs, direct conversion costs, and other direct costs in bringing inventory to its present location and condition. It appears that indirect costs may only be taken into account if a *taxpayer* has previously done this before applying the CCCTB system. 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. The costs of sale typically include relevant marketing and distribution costs.

Cost includes purchase costs, direct conversion costs, and other direct costs in bringing inventory to its present location and condition.

The Directive provides that the same valuation method should be used for similar *stocks and work-in-progress* and, more generally, that valuation should be done on a consistent basis.

No adjustment shall be made in respect of *stocks and work-in-progress* relating to *long-term contracts* (Art. 21).

3.6.4. Provisions (Art. 25)

The Directive provides special rules for provisions. These rules are inspired by the accounting treatment of IAS 37. Provisions are deductible subject to the following conditions.

- There is a legal or probable future legal obligation.
- The provisions they arise from activities or transactions carried out in that or previous years.
- The amount can be estimated reliably.
- It is expected to result in a deductible expense.

Where the obligation relates to an activity or transaction that would continue over future years, such as an obligation related to final clean-up costs, the deduction would be spread over the estimated duration of the activity or transaction. For example, a provision is recognised for the expected cost of dismantling an oil rig when the rig is installed. A deduction can be taken over the cost of dismantling the rig.

A reliable estimate means the expected expenditure required to settle the obligation, based on all relevant factors, including past experience of the company, *group* or industry. Additional guidance includes:

- (a) risks and uncertainties
- (b) discount for provisions exceeding 12 months
- (c) future events
- (d) future benefits.

3.6.5. Pensions (Art. 26)

Actuarial methods must be used for pension provisions.

Rules are also provided for discounting pension provisions for obligations with a maturity of 12 months.

3.6.6. Bad debts (Art. 27)

A deduction is allowed for a bad debt receivable subject, broadly, to the following conditions.

- (a) The *taxpayer* has taken all reasonable steps to pursue payment and reasonably believes that the debt will not be satisfied, or, in the case of similar debts, the *taxpayer* can reasonably estimate the bad debt percentage using all relevant factors, such as past experience.
- (b) The debtor is not a member of the same *group* as the *taxpayer*.
- (c) No claim for exceptional depreciation has been made (see Art. 41).
- (d) In the case of trade receivables, the debt has already been included in the tax base.

The Directive provides guidance for determining whether all reasonable steps to pursue payment have been made, such as whether the costs of collection are disproportionate to the debt.

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.

3.6.7. Insurance undertakings (Art. 30)

Additional rules are provided for *insurance undertakings*. The tax base for such undertakings would be measured by reference to the underlying investment assets and would include annual valuation differences, gains and losses on those investments, and certain provisions.

3.6.8. Long-term contracts (Art. 24)

Special rules apply regarding the recognition of *revenues* from *long-term contracts*. By way of exception to the general CCCTB rule as to when revenue accrues, the Directive applies the percentage of completion method to such contracts. These are, broadly, manufacturing or similar contracts exceeding 12 months.

The Directive suggests the following methods can be used to determine the stage of completion depending on the nature of the contract:

- percentage of contract costs incurred in relation to total estimated contract costs
- reference to an expert evaluation.

Costs are to be taken into account in the tax year in which they are incurred.

3.6.9. Hedging (Art. 28)

Special rules are provided for hedging transactions. Provided there is a hedging relationship (as defined), gains and losses follow the hedged item. This is presumably the case both as regards the qualification of the transaction as taxable or non-taxable as well as in terms of timing.

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

The Directive provides specific rules for computing the tax base in respect of *financial assets and liabilities held for trading*. These rules reflect the accounting treatment under IAS 39.

The basic idea is to include results from such items in the tax base on a mark-to-market basis ('fair value'). Fair value is not defined in the Directive, but, for the purposes of IAS 39, it means the amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in an arm's length transaction. Therefore, unrealised gains and losses would be recognised, notwithstanding the general timing rules for *revenues* and expenses described in Section 3.6.1 above.

On disposal of such assets or liabilities, the sale proceeds are added to the tax base with a deduction of the fair value as at the beginning of the year (or market value if purchased during the year).

3.6.11. Valuation (Art. 22)

The Directive provides guidance for how transactions will be valued for purposes of calculating the tax base. In so doing, it distinguishes transactions carried out for monetary consideration from those carried out for non-monetary consideration. The former are valued at the monetary consideration whilst the latter are valued at market value. This guidance also covers the valuation of *financial assets and liabilities held for trading*, which are to be valued at their fair value (see also Section 3.6.10 above).

3.6.12. Transfer pricing (Art. 78 and 79)

The Directive has separate transfer pricing provisions governing the pricing of transactions between *associated enterprises* (see Chapter 10).

4. Depreciation of Assets

A proportional deduction is allowed in respect of the cost depreciation of *fixed assets* (Art. 13).

4.1. Depreciable assets

Fixed assets includes both tangible and intangible assets. *Fixed assets* must be able to be valued independently and must be used by the business in the production, maintenance or securing of income for more than 12 months. Although the wording is unclear, it appears that the latter condition applies to both tangible and intangible assets. Assets with a cost of less than EUR 1,000 are excluded from the *fixed assets* definition (Art. 4(14)).

Self-produced intangible assets are not depreciable. Own goodwill cannot therefore be depreciated.

Self-produced intangible assets are not depreciable. Own goodwill cannot therefore be depreciated. This is in line with IAS 38.48, which provides that internally generated goodwill is never recognised as an asset because it is not an identifiable resource controlled by an entity that can be measured reliably at cost.

Whether acquired goodwill can be depreciated would depend on whether or not it satisfied the abovementioned conditions, in particular, the ability to be independently valued.

Although *fixed assets* also include *financial assets*, the Directive provides that the latter are not depreciable (Art. 40).

In addition, no depreciation can be claimed in respect of assets that are not subject to wear and tear and obsolescence, such as land, fine arts etc. (Art. 40).

4.2. Depreciation methods and rates

The Directive draws a basic distinction between individually depreciable *fixed assets* and other *fixed assets*. This implies that other *fixed assets* are not individually depreciated. Instead, they are included in a single pool, the balance of which forms the depreciation basis of all the assets in the pool. The distinction also relates to the depreciation rates and methods.

4.2.1. Individual asset depreciation (Art. 36)

Individual depreciation of *fixed assets* is prescribed for buildings, other *long-life fixed tangible assets*, and intangible assets. Individually depreciable *fixed assets* are depreciated according to the straight-line method over their useful life.

Long-life (fixed) tangible assets are defined as fixed tangible assets with a useful life of 15 years or more. Buildings, aircraft and ships are deemed to be *long-life fixed tangible assets*. The depreciation period is:

- buildings: 40 years
- other long-life tangible assets: 15 years.

Individual depreciation applies to intangible assets, whether or not they are long-life assets. The depreciation period is then the period for which the asset enjoys protection or for which the right is granted. If this period cannot be determined, the period is 15 years.

Special rules apply to determine the depreciation period if the above assets are acquired second-hand. For tangible assets,

the above periods apply unless the *taxpayer* can demonstrate a shorter remaining useful life. For intangible assets, the period is 15 years unless the period of legal protection or for which the right is granted can be determined. *Second-hand assets* are defined as *fixed assets* with a useful life that had partly become exhausted when acquired and that are suitable for further use in their current state or after repair (Art. 4(17)).

4.2.2. Pooled asset depreciation (Art. 39)

Tangible *fixed assets* other than buildings with a useful life of less than 15 years are pooled and depreciated together under the declining balance method at an annual rate of 25%.

The depreciation base at the end of the tax year consists of the tax written down value of the assets pool (*value for tax purposes*) at the end of the previous tax year, plus acquisition, construction or *improvement costs* of assets acquired during the year, less the *sales* proceeds of assets disposed of, or compensation received for the *loss* or destruction of assets in that year.

The effect of this mechanism is that a gain on the disposal of assets is only added to the tax base once the pool becomes negative. Before then, any gain on disposal (included in the disposal proceeds) is deducted from the depreciation base of the pool. Indirectly, this results in taxable income insofar as it results in lower depreciation over time. A gain on disposal will result in a negative depreciation base to the extent the disposal proceeds exceed the remaining balance of expenditure in the pool. This amount must be added back to the pool to bring it to zero and an equivalent amount added to the tax base. This amount is then taxable. This treatment is illustrated in the following simple example. Column A shows the computation where the disposal does not lead to a negative pool base, and column B shows the computation where it does result in a negative pool base.

Calculation of Depreciation Base		
	A	B
Opening pool balance for tax purposes	100	100
Add:		
cost of assets acquired during the year	50	40
acquisition, construction or improvement costs of assets	5	5
Less:		
proceeds of disposal of assets	(20)	(100)
any compensation received for loss or destruction of an asset	(10)	(60)
Depreciation base	125	(15)
Add amount to bring pool balance to nil	n/a	15
Adjusted depreciation base	125	0
Less: Depreciation (25% x base)		(31.25)
Closing pool balance for tax purposes	93.75	0

4.3. Depreciation base

The depreciable base consists of the costs directly connected with the acquisition, construction or improvement of the asset (Art. 33). Indirect costs may be included in the depreciation base insofar as they are not otherwise deductible. The aim of this limitation to 'not otherwise deductible' is not further explained. It is likely not intended as an exception to the prohibition on deduction of costs related to exempt income (Art. 14(1)(g)).

Costs incurred in respect of R&D are not included in the depreciation base (Art. 14(1)(i)) but may be expensed immediately (Art. 12). Deductible VAT is also not included in the depreciation base. Given the definition of *fixed assets*, assets with a cost less than EUR 1,000 would also be excluded from the depreciable base.

'*Improvement costs*' means any additional expenditure on a fixed asset that materially increases the capacity of the asset, materially improves its functioning, or represents more than 10% of the initial depreciation base of the asset (Art. 4(18)). *Improvement costs* are depreciated as though the improved asset were a newly acquired asset (Art. 35).

This *economic owner* is defined as the person who holds substantially all the benefits and risks attaching to an asset, regardless of whether that person is the legal owner.

Presumably, the prohibition on deduction of costs related to exempt income (including indirect costs) would also apply to depreciation (Art. 14(1)(g)). This is expressly provided in the case of exceptional depreciation of *fixed assets* not subject to depreciation (Art. 41(1)).

The acquisition, construction or *improvement costs* of a fixed asset, together with the relevant date, should be recorded in a fixed asset register separately for each fixed asset (Art. 32).

4.4. Commencement of depreciation (Art. 37(1))

A full year's depreciation of an asset is deductible in the year of acquisition or when the asset enters into use, whichever is later. There is no pro rata allocation of the depreciation base, so if a company brings an asset into use on 31 December 2012, a full year's depreciation is deductible in 2012.

4.5. Entitlement to depreciate (Art. 34)

Depreciation is not optional, and so it cannot be disclaimed. Depreciation can generally only be deducted by the *economic*

owner. This *economic owner* is defined as the person who holds substantially all the benefits and risks attaching to an asset, regardless of whether that person is the legal owner. A person who has the right to possess, use and dispose of the asset and who bears the burden of the risk of its *loss* or destruction would be regarded as the *economic owner* (Art. 4 (20)). A fixed asset may not be depreciated by more than one *taxpayer* at the same time. The latter provision would particularly affect the ability to 'double-dip' under cross-border leases by taking advantage of disparities between existing national depreciation rules. If the *economic owner* cannot be identified, the legal owner is entitled to deduct depreciation. The Directive specifically provides for the possibility of more detailed rules on leasing being made under the comitology procedure (see Chapter 2 on this procedure).

4.6. Disposal of assets

When an asset is disposed of 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 should be deducted from the corporate tax base of the company in that year (Art. 37(2)). *Value for tax purposes* means the depreciation base less depreciation deducted.

In general, the sale proceeds will constitute *revenues* and be included in the tax base in the same year. A similar deduction rule applies for non-depreciable assets (Art. 20). Note that the rule for depreciable assets applies whether the disposal is voluntary or involuntary, whereas the rule for non-depreciable assets applies only to disposals. The former would therefore clearly apply, for example, where an asset is destroyed. Whether a difference is intended is not clear.

No depreciation may be deducted in the year of disposal (Art. 37(1)). However, this is not a disadvantage as the remaining tax base (*value for tax purposes*) is in any case fully deductible in that year.

Illustration: fixed asset loss

Taxpayer company acquires a machine in November 2013 at a cost of EUR 15,000 and, having used it for a number of years in its business, sells it in May 2016 for EUR 10,000. The corporate tax base without taking into account the machine in 2016 is EUR 50,000.

	EUR
Cost Nov. 2013	15,000
Depreciation (1/15)	(1,000)
Tax value 31.12.2013	14,000
Depreciation (1/15)	(1,000)
Tax value 31.12.2014	13,000
Depreciation (1/15)	(1,000)
Tax value 31.12.2015	12,000

No depreciation is charged in the year of disposal (2016).

The *value for tax purposes* at the beginning of 2016 (EUR 12,000) is deducted from the corporate tax base (EUR 50,000) in that year.

The proceeds of the disposal (EUR 10,000) are treated as taxable revenue in 2016 and added to the tax base.

	EUR
Corporate tax base	50,000
Proceeds of disposal	10,000
Tax value 31.12.2015	(12,000)
Net tax base	48,000

The net effect is to reduce the corporate tax base by the *loss* of EUR 2,000 realised on the machine.

Illustration: fixed asset gain

If the machine had been sold for more than the *value for tax purposes*, this would have resulted in an increase in the tax base.

Assume in the previous example that the sale proceeds are now EUR 14,000.

	EUR
Corporate tax base	50,000
Proceeds of disposal	14,000
Tax value 31.12.2015	(12,000)
Net tax base	52,000

The net effect is to increase the corporate tax base by the gain of EUR 2,000 realised on the machine.

4.7. Relief for replacement assets (Art. 38)

If an individually depreciable asset is sold and replaced with an asset used for the same or similar purposes, any gain may be deferred.

The relief works as follows.

1. The excess of proceeds over the tax written down value is deducted from the tax base in the year of disposal (thereby avoiding an increase in taxable profits).
2. The depreciation base of the new asset is reduced by the same amount.

The proceeds must be re-invested in a replacement asset before the end of the second tax year after the tax year of the disposal. The wording of the Directive suggests that the relief is conditional on there being an intention at the time of disposal to re-invest the proceeds. The purchase of the replacement asset may precede the disposal by one year.

Illustration: replacement asset

An asset is sold for EUR 30,000. *Value for tax purposes* (VTP) was EUR 12,000.

A similar replacement asset was acquired for EUR 25,000.

	EUR
Cost of replacement asset	25,000
Less (Proceeds – VTP)	18,000
Depreciation base new asset	7,000

The EUR 18,000 is deducted from the tax base, and the depreciation base (VTP) of the new asset is EUR 7,000.

4.8. Assets not subject to depreciation (Art. 40)

Article 40 of the Directive states that the following assets are not subject to depreciation:

- (a) tangible assets not subject to wear and tear such as land, fine art, antiques or jewellery
- (b) *financial assets*.

4.9. Exceptional depreciation (Art. 41)

Where there has been a permanent decrease in the value of a non-depreciable fixed asset as at the end of the tax year, the *taxpayer* may deduct an amount equal to the decrease in value. This provision does not apply to assets where the proceeds from the disposal are exempt. The deduction must be recaptured in the event of a subsequent increase in value.

5. Treatment of Losses (Art. 43)

A *loss* incurred by a *taxpayer* or a *permanent establishment* of a *non-resident taxpayer* in a tax year may be carried forward without time limit, unless the Directive provides otherwise.

There is no carry-back of losses to previous years.

The consolidation mechanics of the Directive override this *single taxpayer* carry-forward rule. (For more details, see Chapter 6.) There are also special rules for companies joining or leaving the CCCTB system or a CCCTB *group*. (See Chapter 7 and 8 respectively.) In the context of CCCTB groups, the Directive provides a number of specific rules for losses that do not impact the stand-alone tax base of the company, i.e. the tax base computed prior to consolidation, but, rather, the tax base that is allocated to the *taxpayer* under the apportionment mechanism. (See Chapter 11.)

6. Transparent Entities

6.1. Allocating income of transparent entities (Art. 84)

The Directive provides specific rules for the allocation of income to *taxpayers* holding an interest in a transparent entity. These rules provide the following.

1. A *taxpayer* holding an interest in the entity shall include its share of the income of the entity in its tax base.
2. Transactions between a *taxpayer* and the entity shall be disregarded in proportion to the *taxpayer's* share of the entity.
3. The *taxpayer* will be entitled to relief for double taxation in accordance with the rules for interest, royalties and any other income taxed at source.

These rules apply when the Member State where the entity in which the *taxpayer* holds an interest is located treats the entity as transparent. This treatment suggests that the qualification of an entity as transparent or non-transparent should be determined at the level of the Member State where it is located. However, as this is not expressly stated, it is not clear how the converse case should be treated, i.e. where the Member State of the *taxpayer* treats the entity in which it holds an interest as transparent. This lack of clarity could give rise to problems if the other Member State treats the entity as non-transparent.

The Directive does not provide specific rules for allocating the income of transparent entities in third countries to taxpayers holding an interest in such entities.

The Directive provides that the income of the transparent entity should be computed under the rules of the Directive. In other words this treatment applies whether or not the transparent entity's profits are already computed under the CCCTB system. It is unclear whether the provision under which the *taxpayer* is granted double taxation relief refers to relief from taxation levied by the Member State where the transparent entity is located (on the *taxpayer's* share of its income) or from taxation levied by other countries or Member States on income received by the transparent entity.

Transactions between the *taxpayer* and the transparent entity are disregarded, but only to the extent of the former's interest in the latter. For the remaining interest the transaction has to be recognised in relation to the parties holding the other interests in the entity, and the resulting income has to be adjusted, if necessary, according to the arm's length principle (Art. 84(2)).

6.2. Transparent entities in third countries (Art. 85)

Where an entity is located in a third country, the question of 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 shall be determined by common agreement among the relevant Member States. If there is no agreement, the *principal tax authority* shall decide.

The Directive does not provide specific rules for allocating the income of transparent entities in third countries to *taxpayers* holding an interest in such entities. Presumably such income would be exempt where the taxpayer's interest constituted a permanent establishment.

CHAPTER SIX

Group Consolidation and Intra-group Transactions

KPMG's EU Tax Centre

1. Introduction

The Directive provides that the tax bases of the members of a *group* should be consolidated (Art. 57). For the definition of a *group*, see Chapter 4.

The Directive does not provide detailed guidance as to how the consolidation should take place. However, it does provide that profits and losses arising from transactions directly carried out between members of a *group* should be ignored (Art. 59(1)). This seems to be more of a corollary of the consolidation process rather than a prescription of how this process is to be carried out.

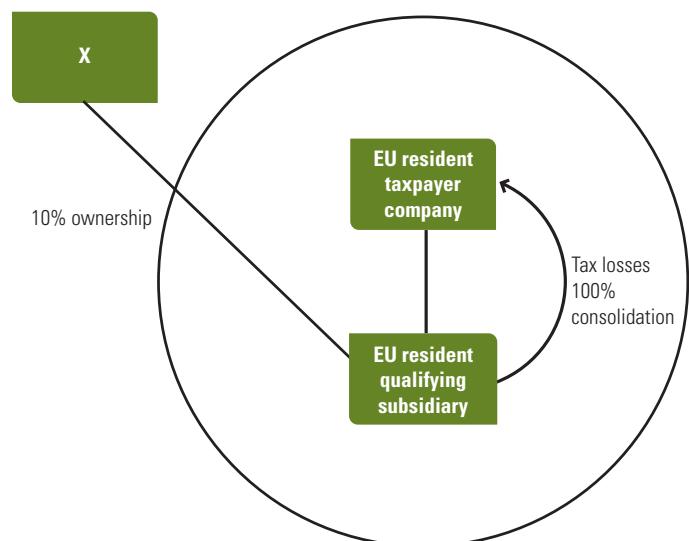
2. Consolidated Profits (Art. 57(2))

In the case of an overall *profit* after consolidation, this is apportioned among the *group members* in accordance with the apportionment mechanism provided by the Directive (see Chapter 11).

The consolidation affects the entire tax base of each *group member*, even if non-*group members* also hold an interest in a particular member, irrespective of whether the minority shareholder itself applies CCCTB or whether it is resident in the EU.

Example: consolidated profits

In the following example, the losses of the CCCTB *group subsidiary* are fully included in the *group's consolidated tax base*, prior to being apportioned between the *group members*, notwithstanding that 10% of the subsidiary is owned by a third party.



Commission summary¹⁴

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 eligible. 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.

¹⁴ Commission Staff Working Document Impact Assessment, SEC(2011) 315 final.

3. Consolidated Losses (Art. 57(2))

The consolidation mechanism effectively overrides the provision for unlimited carry-forward by the *taxpayer* incurring the *loss* (Art. 43). However, it does not affect the treatment of pre-group losses (see Chapter 8).

In the first instance, a *loss* will be set off against any profits elsewhere in the *group* by way of the consolidation process. In the case of an overall *loss*, i.e. when the *consolidated tax base* is negative, the *loss* shall be carried forward and set off against the next positive *consolidated tax base*. The *loss* is therefore not apportioned back to the *group members* in the way an overall *profit* would be apportioned (see Chapter 11). The idea behind this pooling of consolidated losses is to avoid stranded losses. If a consolidated *loss* was apportioned to *group members* to be offset against their respective shares of apportioned future profits, there would be a risk of unrelieved losses in some *group members* whilst others would have to report taxable profits.¹⁵

4. Withholding Taxes (Art. 60)

The Directive provides that no withholding taxes or other source taxation should be charged on transactions between *group members*.

5. Group Business Reorganisations and Intra-group Transfers

Transfers of assets within a *group* can generally be made without tax consequences. The Directive clearly states that profits and losses arising from transactions directly carried out between members of a *group* should be ignored (Art. 59(1)). This treatment is consistent with the idea that a CCCTB *group* shall be treated as a unity. It also avoids the need to evaluate such transactions in terms of transfer pricing.

There are three possible approaches to factoring intra-group transactions out of the tax base:

1. ignore intra-group transactions
2. record intra-group transactions at cost
3. net profits and losses on consolidation.

However, the Directive does not specify which method should be applied, and it is not clear whether *taxpayers* will be free to choose. It would certainly not be practical if Member States could require a particular method to be used as this could result in a *group* having to apply different methods in different Member States. In view of the need to document intra-group transactions, as explained in the next section, the first option appears to offer no benefits. This option would also lead to a *loss* of potentially relevant accounting information.

Commission summary¹⁶

- Intra-group transactions are eliminated,
- 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**.

- (i) **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;
- (ii) **Unrealised gains**: the capital gains are **taxable upon realisation** and **shared** across the group;

B. Companies leaving the group

- (i) **Group trading losses**: **nothing** is attributed to the **leaving company**; losses produced during the period of consolidation remain **at group level**;
- (ii) **Unrealised gains**: capital gains are **taxable upon realisation** at the level of the **company leaving the group**;

C. Reorganisation within a group

- (i) **Trading losses** incurred during consolidation: **no impact**;
- (ii) **Pre-consolidation** losses remaining unrelieved continue to be **ring-fenced**;
- (iii) **Unrealised gains**: **tax neutrality** is the overarching principle

15 CCCTB/WP057/doc\en.

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

The Directive also specifically provides that a business reorganisation or transfer of the legal seat shall not give rise to profits or losses for the purposes of determining the *consolidated tax base* (Art. 70). However, the Directive does not give further guidance as to what constitutes a business reorganisation for these purposes.

Despite the general rule that intra-group transactions are tax-neutral, the Directive contains a number of provisions whereby such transfers can have tax consequences. These provisions are mostly aimed at preventing abuse of the rules. In particular, these provisions apply in the context of a company joining or leaving a *group* in circumstances where the company is involved in an intra-group transfer of assets (e.g. Art. 61 and Art. 75) (see Chapter 8). The Directive also has a specific rule designed to counter manipulation of the

apportionment factors by taking advantage of the ability to transfer assets within a *group* without triggering tax (Art. 70). This is explained in more detail in Chapter 11.

6. Documentation Requirements (Art. 59(3) and (4))

Even though intra-group transactions are generally tax-neutral, the Directive requires groups to record such transactions by applying a consistent and adequately documented method. This method should enable all intra-group transfers and sales to be identified at the lower of cost and *value for tax purposes*.



CHAPTER SEVEN

Transitional Rules on Joining or Leaving the CCCTB System

KPMG's EU Tax Centre

1. Introduction

The differences between the CCCTB system and the national systems of Member States require special rules to deal with the transition from one system to another, in particular where a company begins or ceases to apply the CCCTB rules. This chapter addresses those rules. Similar issues arise when a company joins or leaves a *group*. These are addressed in Chapter 8.

2. Valuation

Generally, assets and liabilities are recognised at their value according to the applicable national rules immediately prior to applying the CCCTB system (Art. 44). Conversely, when a

company leaves the CCCTB system, they are recognised at their value under the CCCTB rules (Art. 49). It is clear that these rules govern the tax treatment (initial valuation and 'exit' valuation) under the CCCTB rules. As such, they would avoid any charge to tax as a result of leaving the system. However, although the wording could be clearer, presumably they are also intended to ensure there is no charge to tax under the respective national tax system as a result of entering the system.

3. Depreciation Method

The Directive provides rules to resolve possible differences between the depreciation treatment of assets prior to entering the CCCTB system and the treatment that would apply in principle once they are covered by the CCCTB system ('notional CCCTB treatment'). This treatment is summarised in the following table:

National treatment	Notional CCCTB treatment	Required CCCTB treatment
Individual depreciation	Individual depreciation	Treat as <i>second-hand assets</i>
Individual depreciation	Pooled depreciation	Pooled depreciation
Pooled depreciation	Pooled or individual depreciation	Pooled depreciation
Not depreciated/depreciable	Depreciable	Individual or pooled depreciation (as appropriate)

On leaving the CCCTB system, the Directive provides that the company should continue the pooling approach under the respective national tax system if this approach was used under the CCCTB system. This applies not only as regards the asset pool and its depreciation base but also as regards

the applicable method (declining balance) and rate (25%). No equivalent provisions have been laid down for individually depreciable assets.

4. Long-term Contracts

The Directive provides special rules for reconciling divergent treatment of *long-term contracts* under national tax systems and the CCCTB system, either on joining or leaving the CCCTB system (Art. 46 and Art. 51). This could arise due to the percentage-of-completion method prescribed for *long-term contracts* under the Directive, which could result in either double counting or undercounting of total expenses or income.

5. Provisions and Other Deductible Items

In order to avoid double counting, the Directive provides that provisions, pension provisions and bad-debt deductions are only deductible to the extent they arise from activities or transactions carried out by the *taxpayer* after entering the CCCTB system (Art. 47). Conversely, other expenses that relate to activities or transactions carried out prior to entering the system, but for which no deduction was made, may be deducted under the CCCTB system. Amounts deducted prior to entering the system may not be deducted again. Similarly, expenses deducted whilst covered by the CCCTB system may not be deducted again (Art. 52).

6. Losses

Losses incurred prior to entering the CCCTB system that have not been fully set off against taxable profits can be carried forward and set off against the tax base under the CCCTB system, but only for as long as carry forward is allowed under the rules of the respective national tax system. This treatment contrasts with the indefinite carry-forward that applies to losses arising whilst under the CCCTB system (Art. 48).

This rule would appear to be overridden in the case of a taxpayer leaving a group.

On leaving the CCCTB system, losses incurred by the *taxpayer* that have not yet been set off against profits under the CCCTB system must be carried forward in accordance with the respective national tax law (Art. 53). Presumably, where the Member State concerned only allows carry-forward for a limited number of years, this period would commence when the losses actually arose, even though this was at a time when the national tax rules did not apply. This rule would appear to be overridden in the case of a *taxpayer* leaving a *group* (Art. 69; see Chapter 8).



CHAPTER EIGHT

Transitional Rules on Joining or Leaving a CCCTB Group

KPMG's EU Tax Centre

1. Introduction

In view of the special rules that apply to *taxpayers* within a CCCTB *group*, special rules are needed to deal with the transition from not being a *group member* to being a *group member* (i.e. joining a *group*) and from being a *group member* to not being a *group member* (i.e. leaving a *group*). This may be an issue in respect of companies that are fully outside the system before or after joining the *group* or in respect of companies that already apply the CCCTB either as stand-alone *taxpayers* or as members of other CCCTB groups. This chapter addresses those rules. Some of these rules are designed to prevent abuse of the rules, whilst others are designed to prevent over-taxation or under-taxation arising through disparities between the CCCTB and national tax systems. Similar issues arise when a company begins or ceases to apply the CCCTB rules (see Chapter 7).

2. Joining a CCCTB Group

2.1. Hidden reserves relating to fixed assets (Art. 61)

The Directive provides rules for certain types of assets with hidden reserves or capital gains held by a company prior to its joining a CCCTB *group*. These rules are designed to ensure that such gains are taxable in the Member State that would have been able to tax them prior to the company joining the *group*. When a company joins a *group*, the book value of

its assets will generally be carried over, either because the company already applies the CCCTB system or under the rules for companies entering the CCCTB system (Art. 44; see Chapter 7). However, because of the consolidation and apportionment mechanism under the CCCTB rules, a gain realised by one *group member* may end up being fully or partly apportioned to another *group member*, and thus potentially taxed by a different Member State.

The rules apply as follows:

- where a *taxpayer* owns non-depreciable or individually depreciable *fixed assets* before joining a CCCTB *group*, and
- any of those assets are disposed of by that company or another *group company* within five years of joining, then
- the proceeds of such disposal will be added to the joining company's *apportioned share* in the *group* in the year of disposal
- the costs relating to non-depreciable assets and the *value for tax purposes* of depreciable assets shall be deducted.

This treatment could lead to overkill as the 'ring-fenced' gain includes not only any hidden gains at the date of entering the *group* but also any gains arising during the following five years.

Illustration: hidden gains on fixed assets

Company A has a fixed asset on its balance sheet with an unrealised or 'hidden' gain. It joins a CCCTB *group* (A,B,C) in 2011 and subsequently sells the asset in 2012 for EUR 1,000. The *value for tax purposes* of the asset is EUR 200 in 2012.

	Company A	Company B	Company C	Total
Apportioned share	EUR 5,000	EUR 7,000	EUR 2,000	EUR 14,000
Fixed Asset Proceeds	1,000	-	-	
<i>Value for tax purposes</i>	(200)	-	-	
Total share subject to relevant tax rate	EUR 5,800	EUR 7,000	EUR 2,000	

The gain on sale of the asset is ring-fenced to Company A's *apportioned share* (EUR 5,000) as the sale occurred within five years of it joining the *group*. The result would have been the same even if there had been no hidden gain in the asset at the date of joining the *group* but the gain accrued after joining.

If Company A disposed of the asset after the end of the fifth year it was a member of a *group*, the proceeds would be added to the *consolidated tax base* (EUR 14,000) and shared among the members of the *group* according to the apportionment formula.

If 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*, the taxpayer is deemed to have a *permanent establishment* there for the purposes of applying these rules.

The rules applying to the carry-forward (e.g. as regards time limits) are either the CCCTB rules or the national rules, as applicable.

The rules also apply to *financial assets* with the exception of shares in affiliated undertakings, participating interests, and own shares (although the latter would often be exempt).

2.2. Long-term contracts (Art. 62)

The Directive provides special rules for dealing with *revenues* and expenses in relation to *long-term contracts* accrued prior to a company entering the CCCTB system (Art. 46; see Chapter 7). The Directive adapts those rules for when a company not only enters the CCCTB system, but also joins a CCCTB *group*; the intention is that those *revenues* and expenses should only impact the share of the consolidated *profit* (excluding those items) that is apportioned to the company in question.

2.3. Provisions and deductions (Art. 63)

A similar provision is made for provisions and deductions (such as those described above) with regard to *long-term contracts*, although the ring-fencing is limited to the first five years after joining the *group*.

2.4. Pre-group losses (Art. 64)

The Directive provides specific rules for losses incurred by a company before it joins a CCCTB *group*. The aim of these rules is to ring-fence such losses to the company that

incurred them, rather than allowing them to be set off against the consolidated *profit* of the *group*.

The rules state that unrelieved losses of either a *taxpayer* or a *permanent establishment* before entering a *group* may not be set off against the *consolidated tax base*. Instead, they must be set off against the share of the consolidated profits that are apportioned to the *taxpayer* or *permanent establishment* in question.

This treatment applies both to losses that have arisen under the CCCTB system (but before the company joined the CCCTB *group*) and to losses that have arisen under a national tax system. The rules applying to the carry-forward (e.g. as regards time limits) are either the CCCTB rules or the national rules, as applicable.

3. Leaving a CCCTB Group

3.1. Introduction

As regards a company leaving the *group*, the Commission was not in favour of a systematic recapture mechanism.¹⁷ It considered such a mechanism would imply complex recalculation/pricing of all transactions according to the normal rules, which would make CCCTB less attractive. Accordingly, the Directive only addresses a number of specific aspects in this regard. Some of these refer to the termination of a *group* and others simply to a *taxpayer* leaving a *group*. No guidance is given as to when a *group* terminates, but it seems that it is not intended that a *group* will terminate simply by reason of one of its members leaving.

3.2. Termination – general rule (Art. 65)

The Directive provides that the tax year shall be deemed to end upon termination of a *group*. The *consolidated tax base* and any unrelieved losses of the *group* must then be shared between each *group member* on the basis of the apportionment formula applicable to that year. This rule is an exception to the normal rule for *group losses* under which these are carried forward at *group* level rather than apportioned back to *group members* (Art. 57(2)).

3.3. Termination – losses (Art. 66)

What happens to losses once they have been apportioned under the above mentioned rules depends on the tax system applicable to the *taxpayer*.

Losses will be treated as follows.

- (a) If the *taxpayer* continues to apply the common tax rules but outside a *group* (e.g. as a single entity), the losses shall be carried forward and deducted in subsequent years.

¹⁷ CCCTB/WP/048/doc/en.

- (b) If the *taxpayer* joins another *group*, the losses shall be carried forward and set off against its *apportioned share*.
- (c) If the *taxpayer* leaves the CCCTB system, the losses shall be carried forward and set off according to the corporate tax law that becomes applicable. This means that the national law time limits are applicable. It is unclear whether the losses would have to be recalculated under the rules of that national system.

The ability to carry forward losses on a stand-alone basis after the *group* terminates is an exception to the rules for companies leaving a *group*, which provide that no losses may be attributed to the leaving member (Art. 69). It is unclear which provision would prevail in the event of a *group* terminating as a result of all its members leaving. However, common sense suggests that Article 65 would then prevail.

3.4. Leaving a group – losses (Art. 69)

No losses shall be attributed to a *group member* leaving a *group* (Art. 69). It appears that there is an exception to this where the *group* also terminates (see Section 3.3 above). The losses are carried forward by the *group* and set off against future consolidated profits. This rule does not distinguish between a company leaving the *group* and continuing to apply the CCCTB system and such a company that does not continue to apply it.

The apparent aim is that this gain would then be taken into account in computing the consolidated tax base.

The Directive is silent on the treatment of unrelieved pre-entry losses incurred by a *taxpayer* when that *taxpayer* leaves a CCCTB *group*. Presumably, these losses would remain with the leaving company and be governed by the applicable national tax system.

3.5. Leaving a group – assets

3.5.1. Fixed assets

The Directive provides two sets of rules to allocate back to the *group* gains on certain assets held by companies at the time of leaving a *group*.

The first set of rules includes anti-avoidance rules aimed at preventing the tax-free sale of an asset by transferring the asset to a *group member* and then selling the shares in the *group member* under the exemption provided in Article 11 (Art. 75).

These rules apply where the *taxpayer* has acquired, from another *group member*, a non-depreciable or individually depreciable fixed asset prior to leaving the *group*. There is some discussion as to whether the intention is to cover any previously acquired assets or only those acquired in the current

and preceding year. The exemption is reduced by the implicit or hidden gain calculated at the time the asset was acquired. Where the exemption is not applicable (because the shares are held by a non-resident), the gain is attributed to the *taxpayer* from which the asset was acquired. The apparent aim is that this gain would then be taken into account in computing the *consolidated tax base*. There is a rebuttal provision disapplying the rule where it is demonstrated that the intra-group transactions were carried out for valid commercial reasons.

The second set of rules – which only apply if the first set do not – are also designed to tax gains on non-depreciable or individually depreciable *fixed assets* held by companies at the time of leaving a *group* (Art. 67). Under this alternative, there is no requirement that the assets be acquired from another *group member*. Also, unlike the first approach, this provision only applies if the assets are disposed of within three years of leaving the *group*. The gain or *loss* on disposal is then added to or deducted from the *consolidated tax base* of the *group* in the year of disposal. This gain or *loss* may have partly or fully accrued after the company leaves the *group*. These rules also apply to *financial assets* with the exception of shares in affiliated undertakings, participating interests and own shares. There is no rebuttal possibility under these rules.

3.5.2. Self-generated intangible assets (Art. 68)

The Directive provides specific rules for when a company leaves a *group* with self-generated intangible assets. The object of these rules is to ensure that the Member States do not effectively give relief for expenses on intangible assets generated within a CCCTB *group*, the future exploitation of which is taxable by a single Member State.¹⁸

The rules provide that where a *taxpayer* that 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*. This aspect of the rules is designed broadly to reverse the tax deduction previously granted. The amount is capped at the value of the assets at the time of leaving.

The costs concerned are then attributed to the leaving *taxpayer* and treated in accordance with the corporate tax law which becomes applicable to the *taxpayer* or the CCCTB rules if applicable.

4. Apportionment

Joining or leaving a *group* also has consequences for the *taxpayer's* share of the consolidated profits under the apportionment process. The Directive provides that where a company joins or leaves a *group* during a tax year, its *apportioned share* shall be computed proportionately (Art. 88). There are also special rules for allocating a *group loss* where a *group* or the *group members* join another *group* (Art. 71; see Chapter 11).

¹⁸ CCCTB/RD\002\doclen.

CHAPTER NINE

The International Dimension

KPMG's EU Tax Centre

1. Relationship between CCCTB and International Agreements

The Directive provides that its provisions override existing agreements between Member States (Art. 8). This does not mean that tax treaties between Member States would no longer be applicable, if there was no conflict with the Directive. For example, a treaty limitation on withholding tax paid outside a CCCTB *group* would still limit any national withholding tax liability since the Directive does not prohibit such withholding tax. However, a treaty exemption for foreign *permanent establishment* income would be ineffective as regards a *permanent establishment* in a Member State since such income is fully taxable under the CCCTB rules.

In some cases, a treaty may be applicable but have no effect, for example, as regards withholding tax on interest and similar payments within a CCCTB *group*, since no withholding tax may be levied under the CCCTB rules (Art. 60); any treaty provision dealing with withholding tax would therefore be irrelevant.

The Directive is silent on how to deal with conflicts between the CCCTB rules and agreements between Member States and third countries. However, the Commission considers that EU Member States would be able to continue to apply treaties with third countries if they conflict with the CCCTB rules.¹⁹

2. Residents and Non-residents

A company resident in a Member State that opts for the CCCTB system is subject to corporate tax under that system on all income derived from any source, whether inside or outside its Member State of residence (Art. 6(6)). Non-EU residents that opt for the CCCTB system are subject to corporate tax under that system on all income from an activity carried on through a *permanent establishment* in a Member State (Art. 6(7)). Where the *taxpayer* belongs to a CCCTB *group* and the income is received from a *group member*, the Directive prescribes that any *profit* and *loss* arising from such transactions are to be ignored as part of the consolidation process (Art. 59(1)).

Commission summary²⁰

- **Tax Treaties with third countries will override conflicting rules** of the Directive, meaning that a MS will not be hampered from fulfilling its commitments vis-à-vis a third country.
- **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.
- **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**
- **Transactions between associated enterprises** will be **subject to pricing adjustments in line with the arm's length principle**.

19 CCCTB/WP/68/en.

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

Where the income is received from a company that does not apply CCCTB or is outside the *taxpayer's group* and the companies are *associated enterprises*, the Directive's transfer pricing rules apply (see Chapter 10). These transfer pricing rules apply irrespective of whether the parties are resident in the same or different countries.

3. EU Permanent Establishments

Income of a *resident taxpayer* from all sources, whether inside or outside its Member State of residence, is included in the taxable base of that *taxpayer* (Art. 6(6)). This would seem to include income from a *permanent establishment* in another Member State.

However, the Directive provides for the tax base of EU *permanent establishments* to be computed in the same way as the income of a corporate *group*, i.e. through consolidation of the individual tax bases of the members of the *group* (including any *permanent establishments*) and an apportionment of the *consolidated tax base* between those members, in accordance with the procedure described in Chapter 11, treating any *permanent establishments* as if they were members of the *group* (Art. 4(7)). For these purposes profits and losses arising from 'transactions' between the head office and permanent establishment would be ignored just as transactions between other group members are ignored (Art. 59).

However, the Directive provides that the exempt amount may be taken into account in determining the tax rate applicable to the taxpayer (Art. 72).

The tax base apportioned to a company having a *permanent establishment* in another Member State, and accordingly taxable in that Member State, would not include the tax base attributable to the *permanent establishment*. The tax base apportioned to the *permanent establishment* would be taxable in the Member State where the *permanent establishment* was located (although the Directive does not

specifically provide for this in Art. 6). Any tax treaty between the two Member States that would otherwise govern the allocation of profits or their taxation would be, to that extent, inapplicable (Art. 8). Thus, the Directive would not need to include additional provisions on double taxation relief.

4. Third Country Permanent Establishments

4.1. General rule: exemption

Notwithstanding the provision that income of a *resident taxpayer* from all sources is included in the taxable base of that *taxpayer* (Art. 6(6)), income of a *resident taxpayer* from a *permanent establishment* in a third country generally is exempt from corporate tax (Art. 11(e)). However, the Directive provides that the exempt amount may be taken into account in determining the tax rate applicable to the *taxpayer* (Art. 72). This will obviously only be relevant to Member States that apply progressive corporate tax rates. The Directive is silent as regards the treatment of *permanent establishment* losses, but presumably the intention is that these would also be exempt. As indicated in the context of *exempt revenues* in Chapter 5, although the Directive includes a definition of *permanent establishment*, it refers only to *permanent establishments* within a Member State. This may be because it is intended that, in the case of third countries, the treaty definition would apply.

4.2. Computation of profits

Unlike the position described below where *permanent establishment* profits are taxable, the Directive does not indicate whether the exempt third country *permanent establishment* profits should be computed according to the CCCTB rules or the applicable national rules. See further Chapter 5, Section 3.3.

The Directive's transfer pricing rules apply as if a third country *permanent establishment* was an *associated enterprise* (Art. 78(1)). These rules would presumably be relevant for computing the amount of exempt *permanent establishment* profits. Although not expressly stated, it seems likely that the arm's length principle prescribed by the Directive under these rules (Art. 79) would be applied in accordance with OECD principles.

4.3. Switch-over for low-taxed profits

The Directive also provides for a 'switch-over' from this exemption method to taxation in the case of 'low-taxed' *permanent establishments* (Art. 73). The Commission's rationale for the switch-over mechanism is to act as a gatekeeper, which is meant to discourage the inflow of *revenues* through low-tax countries. This is achieved by making inflows of otherwise exempt third country income subject to tax.²¹ The practical impact of this provision may be limited to the extent that a tax treaty with the third country in question would not permit application of the switch-over, subject to the still open question of how the Directive will ultimately interact with third country tax treaties.

Although not expressly stated, it seems likely that these expenses should be deducted from the permanent establishment profits.

A *permanent establishment* will be 'low-taxed' for these purposes if, in the country in which it is situated, it is subject 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.

Unlike the Directive's controlled foreign company (CFC) provisions, there is no exception under these rules for low-taxed European Economic Area (EEA) countries, whether or not there is an applicable information exchange agreement. The average corporate tax rate applicable in the Member States will be published by the Commission annually.

Where foreign *permanent establishment* profits are taxable under the switch-over provision, a credit will be given where the income has been taxed in the third country (Art. 76(1)).

Where the *taxpayer* belongs to a CCCTB *group*, the credit is apportioned to the *group members* in the same way as profits (Art. 76(2); see Chapter 11). The credit is computed separately for each *group member*/Member State and type of income, and it is a type of ordinary credit. This means that the credit is limited for each *taxpayer* or *permanent establishment* to an amount equal to the income that is attributed multiplied by the corporate tax rate applicable in the Member State of the *taxpayer's* residence or where the *permanent establishment* is situated. In computing this limit, a deduction is allowed for expenses of 2% of the income, unless the *taxpayer* proves otherwise (Art. 76(3) and (4)). Although not expressly stated, it seems likely that these expenses should be deducted from the *permanent establishment* profits. An overall limitation applies equal to the final tax liability of the *taxpayer* unless otherwise provided in a tax treaty. The Directive does not state whether this is the final tax liability in respect of the income in question or the overall final tax liability.

For the purposes of computing the credit, the profits of the third country *permanent establishment* should be computed according to the CCCTB rules (Art. 74). It is not clear whether this rule also applies for computing the *permanent establishment* profits when the switch-over does not apply and the profits are exempt under Article 11.

4.4. Transfers of assets

The Directive specifically addresses the tax treatment of a transfer of assets from a *resident taxpayer* to its third country *permanent establishment* and from an EU *permanent establishment* by a *non-resident taxpayer* to a third country (typically, this would cover a transfer of the asset to the latter's head office) (Art. 31). Such transfers would be deemed to be disposals and therefore taxable under the CCCTB system, except where the third country is an EEA state with which there is a qualifying information exchange agreement.

5. Passive Income and Gains

5.1. General rule: exemption

Profit distributions received from an EU company outside the *taxpayer's group* or from a third country company are exempt under the CCCTB system (Art. 11(c)).

5.2. Switch-over for low-taxed profits (Art. 73)

As in the case of third country *permanent establishments*, the Directive provides for a switch-over from the exemption method to taxation where the entity that made the *profit* distribution is low-taxed. Although the exemption for *profit* distributions applies irrespective of the country of residence of the distributing company, the switch-over is limited to distributions from third countries. A similar switch-over rule applies as regards the exemption for the disposal of shares (Art. 11(d)). As in the case of low-taxed permanent establishments there is no exception to the switch-over for EEA countries.

5.3. Withholding tax credit on receipts (Art. 76)

Withholding tax on interest, royalties and other income that is taxed at source either in another Member State or in a third country (including income that is taxable under the switch-over provision described above) is creditable according to the same rules as described above for taxable third country *permanent establishments* (i.e. to which the switch-over rule applies). This treatment does not apply to withholding tax on exempt dividend income. These rules provide that where income derived by a *taxpayer* has been taxed in a Member State or a third country, a deduction shall be allowed from the tax liability of the *taxpayer*. The credit is also apportioned among the *group members*, if applicable, in the same way as for taxable third country *permanent establishments*. It

does not appear that underlying corporate tax on a dividend paid by a third country company, which is taxable under the switch-over clause, would be creditable according to these provisions; it is the underlying profits rather than the income derived by the *taxpayer* (the dividend income) that has been subject to the foreign corporate tax. There is no provision for a carry-forward of unused credits.

5.4. No withholding tax on intra-group payments (Art. 60)

There is no withholding tax allowed on transactions between members of a *group*.

5.5. Withholding tax on payments outside the group (Art. 77)

Interest and royalties paid by a *taxpayer* to a recipient outside the *group* (whether or not to another company applying the CCCTB system) may be subject to withholding tax in the Member State of source according to national rules and subject to applicable tax treaties. Strictly speaking, this provision could also apply to payments made to a recipient in the same Member State as the payor if the national rules so provide. The withholding tax is then shared among the Member States according to the formula applicable in the tax year in which the tax is charged. There is no equivalent provision for withholding tax on dividends.



CHAPTER TEN

Transfer Pricing

KPMG's EU Tax Centre

1. Introduction

The removal of transfer pricing formalities is a commonly cited benefit of the CCCTB system for *taxpayers*. The Commission comments in this regard in the explanatory memorandum to the proposal as follows:

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 Commission goes on to point out that governments would also benefit as the CCCTB will leave fewer opportunities for tax planning by companies using transfer pricing.

2. Alternative to Arm's Length Principle

The Directive aims to achieve these transfer pricing benefits by making the profits of an individual company belonging to a CCCTB *group* no longer relevant to the final amount of its taxable profits. The Directive provides that in calculating the *consolidated tax base*, profits and losses arising from transactions directly carried out between members of a *group* should be ignored (Art. 59(1)) (see Chapter 6).

This means the prices charged between members of a CCCTB *group* would no longer impact on the final tax liability, and so there would be no incentive for *taxpayers* to manipulate these prices and no need for an adjustment mechanism – in the form of the arm's length principle – for the tax authorities.

Instead, the taxable profits of a *group member* would be determined on the basis of the consolidation and

apportionment mechanisms under the Directive. This would result in the *group's total profit* being apportioned back to the *group members* (and therefore the respective taxing Member States) based on a formula that is not sensitive to the intra-group prices (see Chapter 11).

3. Dealings with Non-Group Members

The above treatment does not eliminate the need for transfer pricing, and the Directive contains its own transfer pricing rules. This is because related party transactions will not be restricted to members of a CCCTB *group*. For example, transactions may be carried out with:

- related companies in third countries
- related EU companies that have not opted to apply the CCCTB system
- related EU companies that have opted to apply the CCCTB system but that are not sufficiently closely related to belong to the same *group*.

The latter situation can arise because of a difference between the threshold for group membership and the lower-related party (or *associated enterprise*) threshold adopted by the Directive for the application of the transfer pricing rules.

The Directive's transfer pricing rules, like the other CCCTB rules affecting the common tax base, replace the corresponding national Member State rules (Art. 7).

4. Definition of Associated Enterprises

The Directive rules follow closely the *associated enterprises* provision in Article 9 of the OECD Model Tax Convention. Like the OECD rules, the CCCTB rules apply to a *taxpayer* and an *associated enterprise* where:

- a *taxpayer* participates directly in the management, control or capital of a *non-taxpayer*, or a *taxpayer* which is not in the same *group*; or
- the same persons participate directly in the management, control or capital of a *taxpayer* and a *non-taxpayer*, or of *taxpayers* which are not in the same *group* (Art. 78).

Unlike in the OECD Model, these concepts are defined in the Directive:

- **Control** = a holding exceeding 20% of the voting rights
- **Capital** = right of ownership exceeding 20% of the capital
- **Management** = being in a position to exercise a significant influence in the management of the *associated enterprise*
- **Connected persons** = an individual, his or her spouse, and his or her lineal ascendants or descendants shall be treated as a single person.

There is no provision for a decrease in profits based on the arm's length principle. Unlike the OECD Model, there is also no provision for secondary adjustments.

The reason for excluding *taxpayers* from the same *group* from the definition of *associated enterprises* is that, as explained above, the consolidation and apportionment mechanisms would apply to *taxpayers* within the same *group*. As a result, the *group members*' reported profits would no longer need to be adjusted on the basis of the arm's length principle. Instead, these profits would be consolidated and apportioned back to the *group members* (and therefore the respective Member States) based on a formula that is not sensitive to the internal pricing practice.

The concept of *associated enterprise*, as defined above, is not limited to cross-border relationships. For example, it can also apply to a relationship between a *taxpayer* resident in a particular Member State and another *taxpayer* resident in the same Member State but not belonging to the same *group* as the first *taxpayer*.

5. Permanent Establishments

Like the OECD rules, the transfer pricing rules also apply in relation to *permanent establishments*. For these purposes, a *taxpayer* (presumably resident in a Member State) is treated as an *associated enterprise* to its *permanent establishment* in a third country. A *non-resident taxpayer* is treated as an *associated enterprise* to its *permanent establishment* in a Member State (Art. 78). A *resident taxpayer* and its *permanent establishment* in another Member State will not be treated as *associated enterprises* and so will not have to apply these transfer pricing rules. This is because the company and *permanent establishment* will be treated as members of a CCCTB *group* and will be subject to the consolidation and apportionment mechanism as described above for *taxpayers* from the same *group*.

6. The Adjustment Mechanism

The transfer pricing adjustment permitted under the CCCTB rules uses the same wording as that of the OECD Model Convention, i.e. it allows an increase in profits where the conditions imposed between the *associated enterprises* differ from what would be applicable between independent parties. There is no provision for a decrease in profits based on the arm's length principle. Unlike the OECD Model, there is also no provision for secondary adjustments.

7. Documentation Requirements

Whilst there are no traditional transfer pricing rules within a CCCTB *group*, transactions between *group members* (including *permanent establishments* in other Member States) must be adequately documented in a consistent way and the chosen transfer pricing method may only be changed for valid commercial reasons at the beginning of the tax year (Art. 59(3)). The method should enable all intra-group transfers and sales to be identified at the lower of cost and *value for tax purposes* (Art. 59(4)).

8. Advance Rulings (Art. 119)

The Directive provides the possibility for *taxpayers* to obtain an advance opinion on the implementation of the Directive to a planned transaction or transactions. Provision is also made for bilateral rulings. It may be presumed that such rulings would extend to the Directive's transfer pricing provisions.

9. The practical impact on transfer pricing procedures

The Commission's replacement of the arm's length principle with a formulary apportionment model for CCCTB groups is the subject of debate within governments, the business community and the academic community, as well as among practitioners, politicians and tax authorities. Although the formulary apportionment method is applied in certain cases, such as under United States state taxation, it might be noted that it was rejected by the OECD in drawing up its 2010 Model, in particular on grounds of its failure to adequately take into account market conditions and other factors affecting profitability, as well as practical considerations such as compliance and interaction with non-formulary apportionment regimes (see Section 3 above).²²

In this respect it may be questioned whether the formulary apportionment approach proposed in the Directive sufficiently takes account of the realities of multinational businesses and the way these carry out their activities. Particular areas of concern include:

- the allocation of profits to intangibles, financial assets and stocks, as these are currently ignored in applying the apportionment factors;
- recognising the different value contribution of different factors, such as employees, taking into account functions, risks, etc.

There is also a concern that the possibility to allow alternative sharing methods (see Art. 87), where it is considered that the outcome does not fairly represent the extent of the business activity of a particular group member, may lead to difficult and protracted discussions or disputes.

It should also be noted that even where the proposed formulary apportionment method 'replaces' the arm's length principle, much of the existing work that has to be done in order to comply with the latter principle, or at least a similar exercise, will still have to be carried out. This is particularly evident as regards the apportionment factors and how these are distributed within the group: this exercise will have to be carried out using functional analysis techniques similar to those currently employed in arm's length based transfer pricing. Furthermore, even aside from the obligation to document transactions provided for under the Directive (see Section 7 above), group companies in the EU will need to continue to invoice each other for transfers of goods, services, intangibles, loans, guarantees, etc. for internal management purposes.

These and other similar considerations for multinationals' transfer pricing practice that arise from the CCCTB proposal will be addressed in detail in an upcoming contribution to this publication.

²² OECD Transfer Pricing Guidelines for Multinational Enterprises and Goversments, OECD, July 2010, para. 1.21-1.31.

CHAPTER ELEVEN

Apportionment and Computation of the Tax Liability

KPMG's EU Tax Centre

1. Introduction

Under the OECD-based arm's length principle, prices charged between related parties may be adjusted to what independent parties in comparable circumstances would have charged. Strictly speaking, where national tax consolidation is applied, arm's length pricing is not necessary as under-pricing or over-pricing by one *group* entity will be neutralised by a corresponding entry by the *group* counter-party.

Most national tax systems do not provide for cross-border tax consolidation. Under such tax systems, taxable profits of *group* companies in different countries are based on separate accounting (i.e. as if each company operates as an independent entity) and prices are subject to the limitations of the arm's length principle. The CCCTB system aims to achieve the same result as national tax consolidation in an international context, so that arm's length pricing would no longer be necessary.

As well as removing transfer pricing obstacles, consolidation also results in the set off of *group* losses against *group*

profits. This clearly impacts the overall tax liability of the *group*. In a purely domestic context, consolidation generally would not further affect the *group*'s liability. However, in an international context, the situation is different because *group members* may be located in different countries subject to different national tax rates. The question then arises as to how the *consolidated tax base* between the competing tax jurisdictions should be distributed.

The Directive does this by apportioning the tax base between the members of the *group* – and thus indirectly between the respective Member States – based on the 'formulary apportionment' approach. This will generally result in a different tax base being apportioned to *group members* than their tax base computed on a separate accounting basis, and accordingly a different tax liability, given the different tax rates applied between Member States.

Adopting a formulary apportionment approach in an international context therefore has far-reaching implications, both for *taxpayers* and for governments. The approach leads to a redistribution of tax revenue between the countries concerned and a change in the distribution of companies' tax burdens.

Commission summary²³

- The FA comprises 3 equally-weighted factors (i.e. assets, payroll, and sales):
 - (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;
 - (iii) Sales** are taken into account to increase the taxing entitlement of the **MS of destination**.

²³ Commission Staff Working Document Impact Assessment, SEC(2011) 315 final.

2. Objectives of the Apportionment Mechanism

The European Commission considers there to be a number of disadvantages to separate accounting. In the preamble to the Directive, the Commission notes that companies that seek to do business encounter 'serious obstacles and market distortions' due to their need to comply with multiple tax laws. According to the Commission, this leads to high compliance costs and represents a barrier to cross-border economic activity. Furthermore, the costs of complying with more than one system may discourage small and medium-sized enterprises from engaging in cross-border activity. The Commission considers that formulary apportionment, whereby the *consolidated tax base* is shared among the various members of the *group*, can solve these problems.

Furthermore, the costs of complying with more than one system may discourage small and medium-sized enterprises from engaging in cross-border activity.

The Commission has commented that

*The sharing mechanism itself is not the purpose of the comprehensive tax reform, but a necessary and unavoidable consequence of the consolidation.*²⁴

The idea behind the sharing mechanism is that companies should pay taxes in proportion to their economic presence in a country. Accordingly, the effective tax rate applied to the

consolidated tax base is a weighted average of the tax rates in the different jurisdictions in which *group* entities operate, with the weight given by the presence of the apportionment factors of the *group* in each jurisdiction relative to its total factors.

The sharing mechanism objectives are:²⁵

- to be as simple as possible to apply for *taxpayers* and tax administrations
- to be easy to audit for tax administrations
- to be difficult to manipulate by *taxpayers*
- to distribute the tax base among the various entities concerned in a way that can be considered to be fair and equitable
- not to lead to undesirable effects in terms of tax competition.

Despite these objectives, it has been argued that formulary apportionment is not totally immune to strategic tax planning.²⁶

3. The Apportionment Formula (Art. 86)

The Directive provides that the *consolidated tax base* shall be shared between the *group members* in each tax year on the basis of a formula for apportionment (Art. 86). As noted, the formulary apportionment approach seeks to share the tax by using three equally weighted factors: labour, assets and *sales*.

The choice of the factors in the apportionment formula is important as the factor determines the distribution of the tax base across jurisdictions. For example, a more labour-intensive country will receive a larger share of profits from the labour factor.

The formula is as follows:

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

²⁴ CCCTB/WP060\doc\en.

²⁵ Ibid.

²⁶ Spengel and Wendt, A Common Consolidated Corporate Tax Base for Multinational Companies in the European Union: some issues and options, Oxford University Centre for Business Taxation, 2007.

The *consolidated tax base* is only shared when it is positive. A negative *consolidated tax base* would be carried forward at *group* level and be set off against future consolidated profits (Art. 57(2)).

The calculations for sharing the *consolidated tax base* are done at the end of the *group's* tax year.

4. Safeguard Clause (Art. 87)

In recognition of the potential budgetary impact of the apportionment approach on individual Member States and the sensitivity of governments as regards their tax revenues, the Directive provides a 'safeguard' clause that acts as an exception to the formulary apportionment approach.

These losses can then be carried forward and set off against each of those companies' share of consolidated profit in the new group.

The rule states that if the *principal 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 authority may request the use of an alternative method.

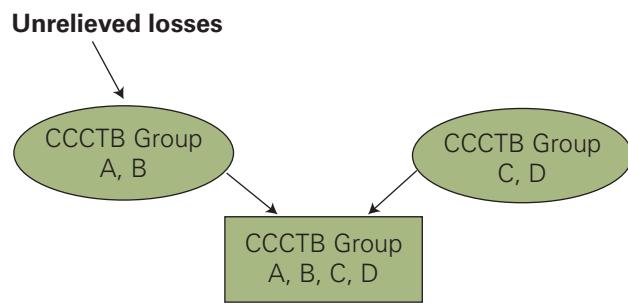
5. Entering and Leaving the Group (Art. 88)

Although the Directive provides that the sharing of the *consolidated tax base* shall be done at the end of the tax year of the *group*, specific rules deal with the situation where a company enters or leaves a *group* during a tax year. In this case, the company's *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. A period of 15 days or more in a calendar month shall be considered as a whole month.

6. Groups or Group Members Joining another Group (Art. 71)

The Directive has specific rules for unrelieved *group losses* 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*. Under these rules, any unrelieved losses of the previously existing *group* or groups are allocated to each of the members of the *group* that incurred them in accordance with the apportionment formula that applied in the tax year in which the business reorganisation took place. These losses can then be carried forward and set off against each of those companies' share of consolidated *profit* in the new *group*.



Apportionment formula that applied in the tax year in which the business reorganisation took place:

	Sales	Labour	Employees	Asset
Company A	30	40	10	20
Company B	90	120	10	40
Total	120	160	20	60

Assume the CCCTB *group A B* has losses of EUR 30m. After the merger with the *group C D*, these losses will be allocated to A and B as follows:

$$\text{Loss of A} = \left(\frac{1}{3} \frac{\text{Sales}^A}{\text{Sales}^{\text{Group}}} + \frac{1}{3} \left(\frac{1}{2} \frac{\text{Payroll}^A}{\text{Payroll}^{\text{Group}}} + \frac{1}{2} \frac{\text{No of employees}^A}{\text{No of employees}^{\text{Group}}} \right) + \frac{1}{3} \frac{\text{Assets}^A}{\text{Assets}^{\text{Group}}} \right) * 30m = \text{EUR } 9.59m$$

$$\text{Loss of A} = \frac{1}{3} \frac{30}{120} + \frac{1}{3} \frac{1}{2} \frac{40}{160} + \frac{1}{3} \frac{10}{20} + \frac{1}{3} \frac{20}{60} * 30m = \text{EUR } 9.59m$$

$$\text{Loss of B} = \text{EUR } 20.41m (\text{EUR } 30m - \text{EUR } 9.59m)$$

7. Apportionment Factors

7.1. Labour

7.1.1. Composition of the labour factor

The labour factor is subdivided into two elements, each being given equal weight: *payroll* of the work force and number of employees (Art. 90). 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*. The number of employees shall be measured at the end of the tax year.

To calculate the share of the tax base for a given entity on the basis of the labour factor, it is necessary to know the *payroll* cost and the number of the qualifying employees attributable to that entity (numerator) and compare that value with the *payroll* cost and the number of qualifying employees attributable to the entire *group* (denominator).

$$\text{Share of labour} = \frac{1}{3} \frac{1}{2} \frac{\text{Payroll}^A}{\text{Payroll}^{\text{Group}}} + \frac{1}{2} \frac{\text{No. of employees}^A}{\text{No. of employees}^{\text{Group}}}$$

7.1.2. Definition of employee

The Directive does not define what constitutes an *employee*. Rather, it leaves it to the national law of the Member State where the employment is exercised to apply its own definition (Art. 90(3)). Although not explicitly stated, this is presumably a reference to labour law rather than tax law. The Commission took the view that it would be extremely burdensome to harmonise national legislation in order to reach a common definition of an employee.²⁷ The Commission also believed that differences in national labour legislation are not material or relevant for this purpose.

However, the Commission clearly recognised the concept of 'economic employer', as used by some countries for tax purposes, as distinct from the legal employer, and formulated its own definition as explained in the following section. Rather than amend the definition of an employee to take account of this concept, the Directive reallocates the employee from the legal employer to the economic employer, so that the employee is included in the labour factor of the latter.

Although there is no definition of the term *employee*, the Directive includes under this term persons who are not employed directly by a *group member* but who perform tasks similar to those performed by employees (Art. 91(3)). Although not stated, it is presumably the intention that what applies for employees applies mutatis mutandis to such persons.

7.1.3. Allocation of employees (Art. 91)

Employees are not automatically allocated to the *group member* that employs them. Instead, the general rule is that they are allocated to the *group member* from which they receive their remuneration and accordingly are included in that *group member*'s labour factor (Art. 91(1)).

However, as indicated above, there is an exception to this for 'economic employers'. If employees physically exercise their employment under the control and responsibility of a *group member* other than 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 (Art. 91(2)). In principle, this would be the case where an employee is seconded to a *group member* and works under its supervision and control. However, the rule will not apply unless the following conditions are also met.

- (a) The 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.

7.1.4. Valuation (Art. 91)

The amount to be taken into account for the '*payroll*' factor is the amount that is tax-deductible from the employer's tax base for the employees concerned, in accordance with CCCTB rules on the calculation of the taxable income (Art. 91(5)). The figure should include the cost of salaries, wages, bonuses and all other employee compensation, including related pension and social security costs borne by the employer (Art. 91(4)).

7.2. Assets

7.2.1. Composition of the asset factor

The asset factor consists 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 assets* owned, rented or leased by a *group* as its denominator.

$$\text{Share of assets} = \frac{1}{3} \frac{\text{Assets}^A}{\text{Assets}^{\text{Group}}}$$

7.2.2. Scope of qualifying assets

The European Commission opted to only include fixed tangible assets in the formula for 'reasons of practicality and simplicity'.²⁸ They excluded *financial assets* from the formula due to their

²⁷ CCCTB\WP056\doc\en.

²⁸ Ibid.

mobile nature and risk of circumventing the system. Intangible assets were also excluded for a number of reasons

- Valuation difficulties, especially as regards self-generated intangible assets resulting in complexity and high compliance costs. Furthermore, notwithstanding externally purchased intangible assets that can be easily measured, there was a concern that including these assets would lead to an unfair advantage over companies that use self-generated intangible assets.
- Uncertainty regarding location and difficulties of attribution to a particular entity, e.g. the brand name of a *group*.
- Mobility of intangible assets that could result in manipulation of the asset factor and a consequent shift of profits to low-tax jurisdictions. Stock and other current assets were also excluded for similar reasons.

Under the CCCTB system, when a group member sells a particular asset outside the group and realises a gain, this is included in its tax base and added to the consolidated tax base of the group.

Notwithstanding the above, the Directive includes a concession for self-generated intangible assets prior to joining a *group*. This rule provides that 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* (Art. 92(2)). No similar provision is made for costs incurred after joining the *group*.

7.2.3. Allocation of assets (Art. 93)

An asset shall be included in the asset factor of its *economic owner*, i.e. broadly speaking, the person who has substantially all the benefits and risks attached to the asset. This is also the person entitled to depreciate under the CCCTB rules (Art. 34). If the *economic owner* cannot be identified, the assets are allocated to the legal owner. If the *economic owner* does not effectively use the assets, they are allocated to the *group member* that does, provided the assets represent more than five percent of the value of the latter's fixed tangible assets. A specific provision applies for leased assets (Art. 93(3)).

7.2.4. Valuation (Art. 94)

Land and other non-depreciable fixed tangible assets are valued at their original cost.

An individually depreciable fixed tangible asset is valued at the average of its tax written down value (*value for tax purposes*), i.e. historical cost less accumulated tax depreciation, at the

beginning and at the end of a tax year. If necessary, this value is apportioned over the year. A similar rule (without the apportionment) would apply to pooled assets.

A specific provision applies for the valuation of leased assets (Art. 94(4)).

7.2.5. Anti-avoidance

The Directive includes two specific provisions designed to prevent manipulation of the asset factor. Under the CCCTB system, when a *group member* sells a particular asset outside the *group* and realises a gain, this is included in its tax base and added to the *consolidated tax base of the group*. However, that company is not necessarily taxable in respect of that gain. Which *group member* or members finally have to include the gain in their taxable income depends on whether the gain is apportioned to them under the apportionment mechanism. Because assets can be transferred within a CCCTB *group* without triggering a taxable gain, a *group* has the ability to influence the *group member* – and therefore the Member State – to which a gain on an asset or income generated by an asset is allocated for tax purposes, by shifting assets to the most favourable jurisdiction.

Intra-group transfer and subsequent disposal to a third party (Art. 94(5))

This provision is aimed at the following types of transaction:

- (a) An asset is transferred at its tax written down value to an entity of the *group* in a Member State applying a relatively low tax rate: no taxation triggered.
- (b) The asset is sold to a third party at a gain: a larger portion of the *consolidated profit* (and therefore also the gain) would be attributed to the company located in the low-tax Member State because of the location of the asset.

To counter such transactions the Directive provides that if following an intra-group transfer of an asset in the same or previous tax year, where a *group member* sells an asset outside the *group*, the asset is 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 if the *group members* can demonstrate that the intra-group transfer took place for genuine commercial reasons.

Intra-group business reorganisation (Art. 70(2))

This provision is aimed at the following types of transactions:

- (a) All assets have been substantially transferred to another Member State, within the *group* either to a *permanent establishment* of the same *taxpayer* or to another *taxpayer*,
- (b) The transfer was the result of a business reorganisation or of a series of intra-group transactions over two years, and
- (c) The asset factor would be substantially changed as a result of such transfer or series of transfers.

Due to the provision, in the five years following the transfer, the transferred assets are attributed to the asset factor of the transferring *taxpayer*, as long as a member of the *group* continues to be the *economic owner* of the assets.

If the transferring company no longer has a taxable presence in the Member State concerned for the purposes of the Directive, the *taxpayer* shall be deemed to have a *permanent establishment* there to ensure that the appropriate part of the asset factor is allocated to that Member State so that it can tax its share of the income.

7.3. Sales

7.3.1. Composition of the sales factor (Art. 95)

The *sales* factor consists of the total *sales* of a *group member* divided by the total *sales* of the *group* (Art. 95(1)).

$$\text{Share of sales} = \frac{1}{3} \frac{\text{Sales}^A}{\text{Sales}^{\text{Group}}}$$

7.3.2. Definition of sales (Art. (95(2)))

‘*Sales*’ are defined as the proceeds of all *sales* outside the *group* of goods and supplies of services after discounts and returns, excluding value added tax, other taxes and duties.

Exempt revenues, interest, dividends, and royalties and proceeds from disposing of *fixed assets* shall not be included in the *sales* factor unless they are *revenues* earned in the ordinary course of business.

Intra-group *sales* of goods and services are not included as they would otherwise have to be accounted for applying arm’s length principles, which would re-introduce transfer pricing complications.

7.3.3. Allocation of sales

The Directive adopts the principle of ‘*sales* by destination’ for allocating the *sales* factor to *group members* (Art. 96). This may be summarised as follows.

Sale Destination	Treatment
Sale of goods by <i>group member</i> located in Member State	Included in <i>sales</i> factor of the <i>group member</i> where dispatch or transport of the goods to the person acquiring them ends
Sale of goods where last place of dispatch or transport not identifiable	Included in <i>sales</i> factor of the <i>group member</i> where the last identifiable location of the goods was situated
Supply of services by <i>group member</i> located in Member State	Included in the <i>sales</i> factor of the <i>group member</i> located in the Member State where the services are physically carried out
Supply of goods or services to place where <i>group</i> is not physically present	Included in the <i>sales</i> factors of all <i>group members</i> in proportion to their labour and asset factors (‘spread throw-back rule’)
Supply of goods or services to more than one <i>group member</i> in Member State	Included in <i>sales</i> factor of all <i>group members</i> located in that Member State in proportion to their labour and asset factors
<i>Exempt revenues</i> , interest, dividends, royalties, proceeds of sale included in <i>sales</i> factor	Included in <i>sales</i> factor attributable to beneficiary

The spread throw-back rule works as follows:

A CCCTB *group* is made up of two companies: A and B, resident in Member State A and B respectively.

company’s *sales* factor based on the destination principle, thus giving Company A a *sales* factor of 20% and B a *sales* factor of 80%. Company A also sells goods to a place where the *group* is not physically present (in this case a third country). The spread throw-back rule operates by taking those *sales* into account in the *group members*’ relative share of *payroll* and assets (A/B: 60/40).

Company A’s *sales* factor: $20 + [60\% \times 80] = 68/180$

Company B’s *sales* factor: $80 + [40\% \times 80] = 112/180$

(Total *sales* = 180 (20 + 80 + 80))

This rule would prevent manipulation of the factors or an arbitrary allocation of profits that could otherwise result if the throw-back *sales* were allocated to the last *group member* involved in the sale.

Both companies sell goods in their own Member State in the proportion 20:80: these *sales* would be included in each

7.3.4. Valuation

The figure to be included in the formula is the one taken into account for the purpose of calculating the tax base in accordance with Article 22 of the Directive.

8. Sector-specific Formulae

The Directive provides for specific formulae for a number of business sectors. This recognises a concern that a single apportionment formula covering all economic sectors would not adequately reflect the various factors generating profits in each sector.²⁹ The factors in the sector-specific formulae are adapted variants of the general factors rather than a completely different method.

8.1. Financial institutions (Art. 98)

8.1.1. Scope

The following entities are regarded as *financial institutions*:

- (a) authorised credit institutions;
- (b) entities, except for *insurance undertakings*, which hold *financial assets* amounting to 80% or more of all their *fixed assets*.

8.1.2. Factor adjustments

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

The *sales* factor of a *financial institution* includes 10% of its *revenues* in the form of interest, fees, commissions and *revenues* from securities, excluding value added tax, other taxes and duties. Presumably, this is without prejudice to the general rule that *exempt revenues*, interest etc. be included in the *sales* factor where derived in the ordinary course of trade or business (Art. 95(2)).

8.1.3. Allocation

Specific rules govern where certain services provided by *financial institutions* are considered to take place for purposes of the destination principle described above, and accordingly to which *group member* they are allocated for purposes of the *sales* factor. These may be summarised as follows.

Type of Sale	Treatment
Supply of financial services in the case of a secured loan	Included in <i>sales</i> factor of the <i>group member</i> where the security is situated
Supply of financial services in the case of a secured loan where location of security unidentified	Included in <i>sales</i> factor of the <i>group member</i> where the security is registered
Other financial services	Included in the <i>sales</i> factor of the <i>group member</i> located in the Member State of the borrower or of the person who pays fees, commissions or other revenue
Other financial services where borrower or the person who pays fees, commissions or other revenue unidentified	Included in the <i>sales</i> factors of all <i>group members</i> in proportion to their labour and asset factors ('spread throw-back rule')

8.2. Insurance undertakings (Art. 99)

8.2.1. Scope

The term '*insurance undertakings*' means those undertakings authorised to operate in the EU.³⁰

The *sales* factor of *insurance undertakings* includes 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.

8.2.2. Factor adjustments

The asset factor of *insurance undertakings* includes 10% of the value of *financial assets* as described above for *financial institutions*.

8.2.3. Allocation

For purposes of applying the destination principle described above, insurance services are deemed to be carried out in the Member State of the policyholder. Other *sales* are attributed to all *group members* in proportion to their labour and asset factors.

29 'CCCTB: possible elements of the sharing mechanism', WP060.

30 Directive 73/239/EEC for non-life insurance, 2002/83/EC for life insurance and Directive 2005/68/EC for reinsurance.

8.3. Oil and gas (Art. 100)

For purposes of applying the destination principle described above for a *group member* conducting its principal business

in the field of the exploration or production of oil or gas, the Directive prescribes the following rules:

Sales	Treatment
<i>Sales of a group member</i>	Included in <i>sales factor</i> of the <i>group member</i> in the Member State where the oil or gas is to be extracted or produced.
<i>Sales of a group member where no group member in Member State of production/exploration</i>	Included in <i>sales factor</i> of the <i>selling group member</i>
<i>Sales of a group member where production/exploration in third country but no permanent establishment in third country</i>	Included in <i>sales factor</i> of the <i>selling group member</i>

8.4. Shipping, inland waterways transport, and air transport (Art. 101)

The apportionment process does not apply to 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. Instead, the *revenues*, *expenses*, etc. are attributed to that *group member*.

9. Items Deductible Against Apportioned Share

Article 102 provides an overview of items that may be deductible against an entity's *apportioned share*. In most cases, these items have already been specifically dealt with elsewhere in the Directive. These are summarised below:

- pre-grouping losses (Art. 64);
- unrelieved losses where *taxpayer* joins new *group* after former *group* terminated or where one *group* joins another *group* (Art. 66(b) and Art. 71);
- disposal within five years of assets held on joining *group* (Art. 61);
- accrued *revenues* and expenses on *long-term contracts* on joining *group* (Art. 62);
- provisions and deductions in relation to activities or transactions prior to joining *group* (Art. 63);
- in the case of *insurance undertakings*, optional technical provisions as provided for in the Directive (Art. 30(c));
- the taxes listed in Annex III to the Directive where a deduction is provided for under national rules.

10. Calculating the Tax Liability

Once a company opts for the CCCTB system, its tax liability will be determined by the CCCTB rules in the Directive. The otherwise applicable national tax system or systems will no longer apply as regards the matters regulated in the Directive, unless otherwise stated (Art. 7).

In the case of a stand-alone company, its tax liability will be based on the tax base as computed under the Directive. In the case of a *group*, each member's tax liability will be based on its *apportioned share* of the CCCTB.

Since tax rates are not regulated by the Directive, they will continue to be governed by the respective Member States' own tax systems. This is also explicitly stated in the Directive in respect of *group* companies, to the effect that the tax liability of each *group member* shall be the outcome of the application of the national tax rate to the *apportioned share* (Art. 103). Where a Member State applies different rates to different types of income, it is unclear how they will interact with the common tax base computed under the Directive.

Article 103 goes on to state that the tax liability of each *group member* shall then be adjusted for amounts that the Directive requires to be set off against the *apportioned share* (see Art. 102) and further reduced by the deductions for double tax relief (see Art. 76). This provision seems no more than a summary (for CCCTB groups) of what is already provided under the applicable provisions elsewhere in the Directive. No similar summary is provided for stand-alone companies, but again, strictly speaking, this is not necessary.

Schematically, for CCCTB groups, this treatment can be presented as follows:

The <i>apportioned share</i> as calculated per the formula less any items deductible from <i>apportioned share</i>	x (x)
less any double taxation relief for income taxed at source	(x)
Adjusted <i>apportioned share</i>	x

Multiplied by national tax rate = tax liability of *group member*

CHAPTER TWELVE

Anti-abuse Rules

KPMG's EU Tax Centre

1. Introduction

The Directive lays down a number of anti-abuse rules. It might have been expected that the Commission would have applied the principles set out in its 2007 Communication to the Council on the application of anti-abuse measures in the area of direct taxation.³¹ Important aspects of these principles are paraphrased under the following three sub-paragraphs:

Avoidance and abuse

In the ECJ's case law, the notion of tax avoidance is limited to 'wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned'. Furthermore, in order to be lawful national tax rules must be *proportionate* and serve the specific purpose of preventing *wholly artificial arrangements*.

Wholly artificial arrangements

The ECJ has confirmed that it is quite legitimate for tax considerations to play a role in business decisions. The objective of minimising one's tax burden is in itself a valid commercial consideration as long as arrangements entered into with a view to achieving it do not amount to artificial transfers of profits.

The Commission developed the ideas set out in its 2007 Communication and prepared a working document that was used in the 2010 workshops.

The detection of a wholly artificial arrangement therefore in effect amounts to a substance-over-form analysis. There is a requirement to evaluate transactions in accordance with their substance, rather than only their legal form, and their

objectives and purposes must be evaluated in the light of the objectives and purposes underlying the arrangements entered into.

Proportionality

The *taxpayer* must be given the opportunity to produce evidence of any commercial justification for that arrangement. It is also important that, in the interest of proportionality, the result of the relevant tax authority can be made subject to an independent judicial review.

The Commission developed the ideas set out in its 2007 Communication and prepared a working document that was used in the 2010 workshops.³² Interestingly, the anti-abuse rules in the Directive do not necessarily reflect the above principles. For example, not all of the anti-abuse rules include the opportunity to provide evidence of a commercial motivation.

The Directive applies a two-pronged approach to combat perceived abuse:

1. a general anti-avoidance rule (GAAR)
2. specific anti-abuse rules to target identified problems.

The rules described below are contained in a dedicated chapter in the Directive on anti-abuse rules. Others are contained in other chapters of the Directive and are addressed in this publication under the appropriate heading. In some of the latter cases, the rules are not expressly designated as targeting abusive situations.

The relationship between these specific anti-abuse rules and the GAAR is not explained in the Directive. For example, it is not clear whether it only applies to situations outside the scope of the specific anti-abuse rules, or whether it operates in addition to those rules so that a transaction that is not caught by one of the specific rules could still be caught by the GAAR. The Commission's statement that the GAAR 'should only be considered if a potentially abusive practice does not fall within the scope of any of the specific rules',³³ although somewhat ambiguous, suggests that the former interpretation is intended.

31 Communication from the Commission to the Council, COM(2007) 785.

32 CCCTB/RD\004\doc\en.

33 Ibid.

Commission summary³⁴

- 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) legislation requires that the CFC, resident in a low-tax third country, is **controlled at 50%** of its voting rights, **owned at 50%** of its capital and gives **50% profit entitlement** to the taxpayer. In addition, **30% of CFC income** should be **tainted**.

2. General Anti-abuse Rule (GAAR) (Art. 80)

The Directive's GAAR is formulated as follows: Artificial transactions carried out for the sole purpose of avoiding taxation shall be ignored for the purposes of calculating the tax base.

It should be noted that by advocating the use of the 'sole purpose' test rather than, for example, a main purpose test, the Commission has taken a fairly narrowly based rule. This choice appears to have been taken in order to best align the CCCTB rule with the ECJ's anti-avoidance principle of 'wholly artificial arrangements'.³⁵ However, it is at variance with, for example, the EU Merger Directive which adopts a 'principal objective' test for tax avoidance.

The Directive provides an exception from the general rule, to the effect that it will not apply to 'genuine commercial activities' where the *taxpayer* could have chosen two or more possible transactions which have the same commercial result, but which produce different taxable amounts. The Commission's explanation was that to the extent that tax planning incorporates elements of a genuine conduct of trade, it is in principle allowed, regardless of whether a scheme is in essence designed to mitigate tax.³⁶ However, given that the general rule only applies to artificial transactions, it may be argued that this exception is no more than a corollary of the main rule, and therefore strictly speaking unnecessary.

Unlike the specific anti-abuse rules described below, the GAAR is not expressly limited to third country relationships, so could, for example, in principle, apply to arrangements between a CCCTB *taxpayer* and another EU company that is outside the CCCTB system.

3. Specific Anti-abuse Rules

The Directive provides a number of specific anti-abuse rules.

Two of these specific rules, outlined below, are included in the Directive's chapter dedicated to anti-abuse rules. Others, such as the switch-over provisions for low-taxed third country income, may be found in other chapters of the Directive. These specific rules do not all contain a commercial purpose exception or rebuttal provision; see, for example, the transfer pricing provisions (Art. 78–79) and the CFC provisions (Art. 82–83). But this is not always the case, as may be seen from the provision on disallowance of exempt share disposals (Art. 75). The Directive does not contain thin capitalisation rules, earnings stripping rules, or a specific rule to address the risk of double deductions within a CCCTB *group* that includes non-CCCTB entities (referred to as 'sandwich' cases), although the latter may be caught by one of the other anti-abuse rules.

³⁴ Commission Staff Working Document Impact Assessment, SEC(2011) 315 final.

³⁵ CCCTB/RD\004\doc\en.

³⁶ Ibid.

3.1. Disallowance of interest deductions (Art. 81)

Interest paid to an *associated enterprise* in a third country shall not be deductible where there is no qualifying information exchange agreement and where one of the following conditions is met.

- (a) The statutory corporate tax rate in the third country is lower than 40% of the average statutory rate in the EU, or
- (b) A special regime applies that provides for a substantially lower level of taxation than the general regime.

The average corporate tax rate applicable in the Member States is to be published by the Commission annually.

There is an escape clause to this provision. Interest paid to a third country resident with which there is no comparable information exchange agreement will still be deductible if:

- (a) the interest is included in the tax base of the *taxpayer* as CFC income in accordance with the CFC rules (see below),
- (b) the interest is paid to a company whose principal class of shares is regularly traded on one or more recognised stock exchanges, or
- (c) the interest is paid to an entity engaged in the active conduct of trade or business in its country of residence.

The Directive is silent on how a *taxpayer* should demonstrate that these conditions are satisfied, particularly in view of the absence of an applicable information exchange mechanism.

3.2. Controlled foreign companies (Art. 82-83)

3.2.1. Overview

The Directive includes specific controlled foreign company (CFC) rules. Member States that already had such rules may see their rules expanded or restricted, and those without such rules will now have such rules incorporated into their tax base.

Like most CFC rules, the CCCTB rules work by including in the shareholder's tax base a proportionate share of non-distributed earnings of the CFC. These rules only apply to companies resident in a foreign (i.e. third) country.

Third country *permanent establishments* are not covered by the CFC rules. They are covered by the switch-over provisions that have effectively the same result (see Chapter 9).

It is not clear whether, if CFC income is included in the taxpayer's tax base, a credit will be allowed for any third country tax on those profits under the Directive's double tax relief provisions (Art. 76).

Losses of the foreign entity are not included in the *taxpayer's* tax base, but will reduce apportionable income in the future.

It is not clear whether, if CFC income is included in the *taxpayer's* tax base, a credit will be allowed for any third country tax on those profits under the Directive's double tax relief provisions (Art. 76). Although it may be argued that this is the case on the basis of the text of the Directive, there would be a different treatment of foreign profits taxed under the CFC rules (or low-taxed profits of a third country establishment), and such profits when they are distributed to *taxpayers*, since the latter would be taxed under the switch-over clause but would not satisfy the conditions for a foreign tax credit.

3.2.2. Control

An entity will only be covered by the rules if the *taxpayer*, by itself or together with its *associated enterprises*:

- holds a direct or indirect participation of more than 50% of the voting rights,
- owns more than 50% of the capital, or
- is entitled to receive more than 50% of the profits of that entity.

3.2.3. Low-tax test

An entity will only be covered by the rules if, 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. An entity is also covered if it is subject to a special regime that allows for a substantially lower level of taxation than that of the general regime. This is the same test used for the switch-over rules for exempt income (see Chapter 9).

3.2.4. Tainted income

An entity will only be covered by the rules if more than 30% of the income accruing to the entity is 'tainted'. Such income is computed according to the rules for computing the common

tax base under the Directive, i.e. not under the applicable rules of the foreign tax system. Potentially tainted income is divided into categories. Income of a particular category will only be treated as tainted income if more than 50% of the income in that category comes from transactions with the *taxpayer* or its *associated enterprises*.

Once these thresholds are reached, all non-distributed income, i.e. not just the tainted income, will be covered by the CFC rules. For these purposes, the categories of tainted income consist of the following:

- (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
- (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.

3.2.5. Exceptions

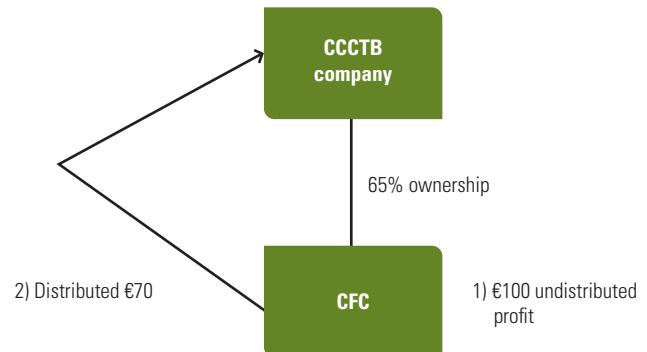
Unlike the interest deduction rules described above, there is no general exception from the CFC rules where a qualifying information exchange agreement is in place with the third country. However, CFCs resident in an EEA country with which there is such an agreement are not covered by the rules. There is no commercial purpose test, so that the rules would still apply even if there was economic substance and no ‘wholly artificial arrangement’. There is an exception for CFCs whose shares are regularly traded on a recognised stock exchange.

3.2.6. Double counting rules

When the foreign entity subsequently distributes profits to the *taxpayer*, the amounts of income previously included in the tax base under the CFC rules are deducted from the tax base when calculating the *taxpayer's* tax liability on the distributed income. A similar adjustment should be made when computing the *taxpayer's* tax liability on a disposal of the shares in a CFC.

These rules are designed to prevent double counting of taxable income where this has already been included in the *taxpayer's* tax base. Although these two categories of income (dividends and proceeds of share disposals) would normally be exempt under the Directive (Art. 11), this will not be the case for CFCs. This is because the switch-over rules – which disapply the exemption rules – adopt the same definition of ‘low-taxed’ foreign profits as under the CFC rules. Therefore, if the CFC rules apply to a foreign entity, the switch-over rules will also be triggered. It is for the same reason that third country *permanent establishments* are not covered by the CFC rules: if the PE profits are low-taxed, the switch-over rules would apply and the income would already be included in the *taxpayer's* tax base. For a foreign entity, this would not be the case as the income would only be included in the *taxpayer's* tax base if and when distributed or if and when the shares were sold.

Example: double counting rules



In the above example, a CCCTB entity owns 65% of a CFC. In 2013, the CFC had EUR 100 of undistributed *profit*. The Directive requires that the income to be included in the tax base of the CCCTB *group* is EUR 65 (Art. 82).

In 2014, the CFC distributes profits to the CCCTB entity of EUR 70. In principle, this amount is not exempt under Article 11(c), but it is taxable under the switch-over clause (Art. 73).

However, the EUR 65 that was previously included in the tax base should be deducted from the tax base when calculating the *taxpayer's* liability to tax on the distributed income (Art. 83(4)).

The *taxpayer* is taxed on distributed income of EUR 5 (70 - 65).

CHAPTER THIRTEEN

Administration and Procedure

KPMG's EU Tax Centre

1. Introduction

One of the main objectives behind the CCCTB proposal is the reduction of compliance costs for *taxpayers*, in particular for cross-border groups. Under the current rules, such groups need to deal with up to 27 different tax authorities across the EU. Apart from the simplification entailed in replacing these 27 different tax systems with a single set of rules, a key element of the CCCTB proposal is that such groups would only have to deal with a single tax authority, or *principal tax authority* ('one-stop-shop'). Each *group* would be represented in its dealings with the *principal tax authority* by a single *group member*, the *principal taxpayer*.

This chapter outlines the basic rules for the administration and procedural aspects of the CCCTB.

2. Principal Taxpayer

The *principal taxpayer* has the primary responsibility for ensuring that a *group* complies with the administrative requirements laid down by the Directive. The *principal taxpayer* has the responsibility for opting for the CCCTB system and terminating the *group*. The *principal taxpayer* is

the point of contact with the tax authorities, e.g. as regards filing, provision of information, and the appeal procedure.

The *principal taxpayer* of a *group* depends on the structure of the *group*. In some cases, the *group* can choose which *group member* is the *principal taxpayer*, whilst in other cases there is no such choice. In the case of a *group* that has a single resident parent company, there is no choice and the *principal taxpayer* is that resident company. The Directive therefore defines a *principal taxpayer* as:

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 (Art. 4(6)(a)).

This definition covers three variations of the *group* concept as defined in the Directive (Art. 55(1)(a), (b) and (c)) (see Chapter 4).

Consider the following example, in which the parent of the *group* has opted for the CCCTB system and is therefore a *resident taxpayer*. The parent forms a *group* with its EU resident direct and indirect *qualifying subsidiaries* (Art. 55(1)(c)), with its directly held EU *permanent establishment* (Art. 55(1)(a)), and with an EU *permanent establishment* held indirectly through its *qualifying subsidiary* in a third country (Art. 55(1)(b)). The parent is accordingly the *principal taxpayer* for this *group*.

Commission summary³⁷

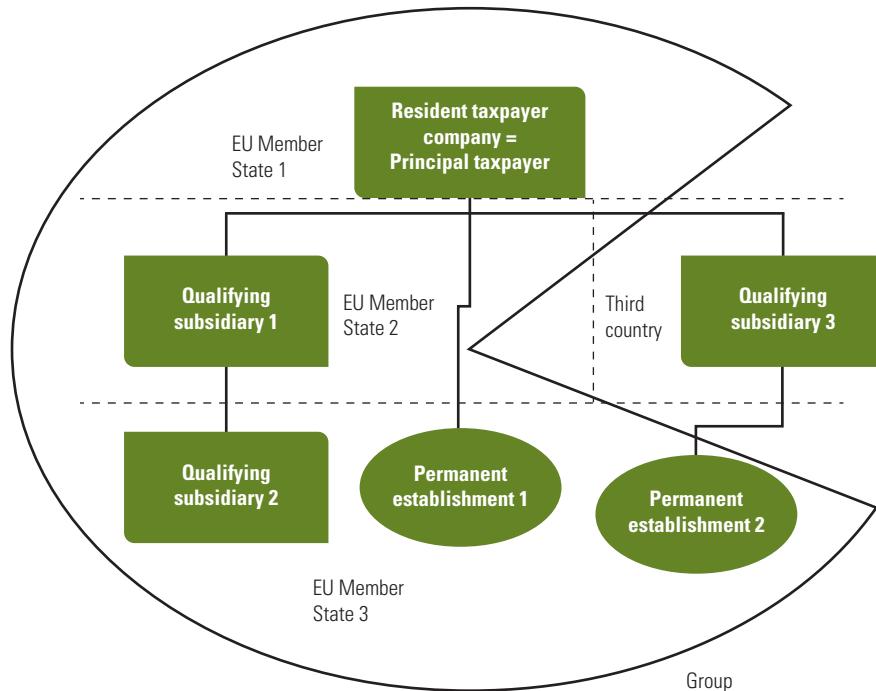
- The 'one-stop-shop' practice will allow groups with a taxable presence in more than one MS to deal with a single tax authority across the EU (i.e. *principal tax authority* (PTA)), being that of the EU parent of the *group* termed '*principal taxpayer*'. A consolidated tax return will be filed with that authority.
- The Directive 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) A **ruling mechanism**, coupled with an **interpretation panel** and a scheme for the **exchange of information**, will be operated by the competent authority (CA) in each *group member*;

(iii) Audits will be initiated and coordinated by the PTA;

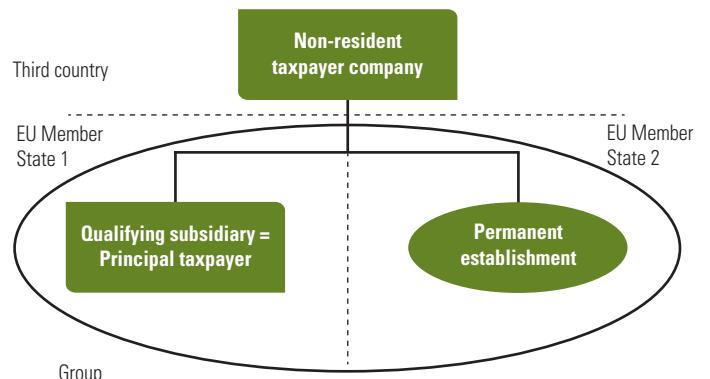
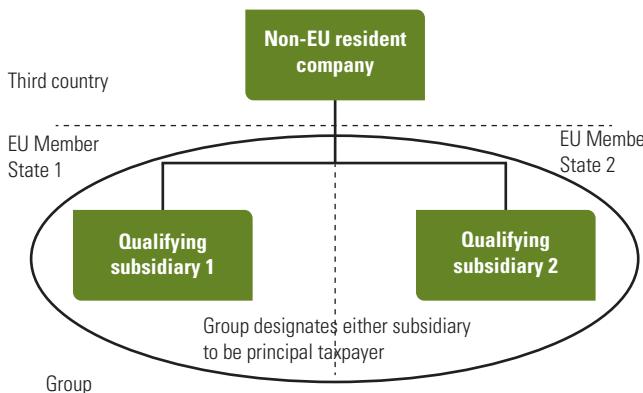
(iv) In terms of **dispute settlement**, disputes **between MS** will be referred to **Arbitration** whilst those **between taxpayers and MS** will be dealt with by an **Administrative Appeals Body** at a 1st instance and, at a 2nd instance, will have to be brought before the **national courts of the principal taxpayer**.

³⁷ Commission Staff Working Document Impact Assessment, SEC(2011) 315 final.

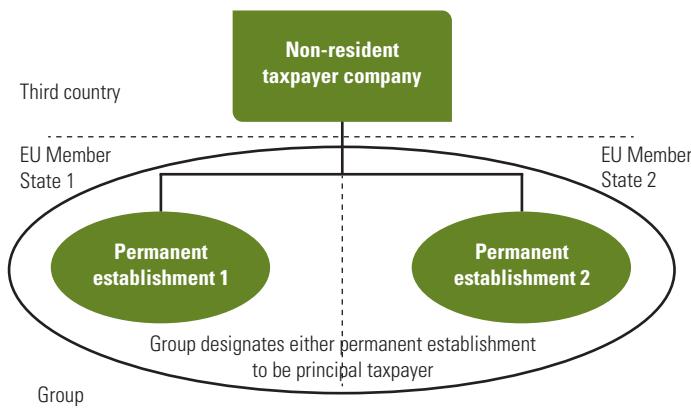


Conversely, where the *group* is composed only of two or more *resident taxpayers* that are immediate *qualifying subsidiaries* of the same parent company resident in a third country, the *group* can designate one of the resident subsidiaries as the *principal taxpayer* (Art. 4(6)(b)), as illustrated in the following example. This situation corresponds with another variation of the *group* concept as defined in the Directive (Art. 55(1)(d)), except that it is somewhat more restrictive in referring to a *group* composed 'only' of one or more *taxpayers* that are immediate *qualifying subsidiaries*. For example, there seems to be no reason to exclude from this provision groups comprising indirectly held subsidiaries (which would qualify as a *group* under Art. 55(1)(d)).

The Directive describes two additional *group* structures headed by third country companies. The first involves a *resident taxpayer* that is the *qualifying subsidiary* of a parent company resident in a third country, where the (EU) *resident taxpayer* forms a *group* solely with one or more *permanent establishments* of its parent. In this case, there is no choice: the *principal taxpayer* is the (EU) resident subsidiary. The parent company would have the status of a *non-resident taxpayer company* (by reason of its EU *permanent establishments*) and form a *group* in respect of those *permanent establishments* and its EU resident subsidiary. This is illustrated in the following example.

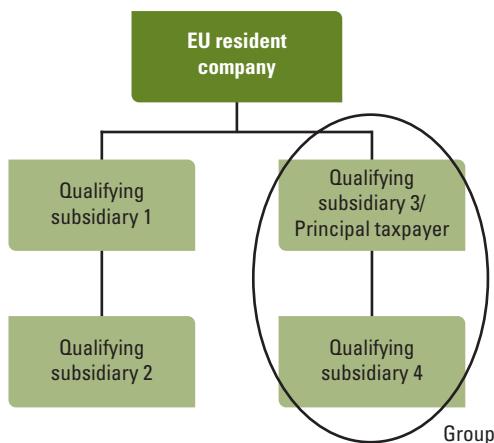


The second situation is where a third country resident forms a *group* solely in respect of its *permanent establishments* located in two or more Member States (Art. 4(6)(d)). As in the previous example, the third country resident would again have the status of a *non-resident taxpayer*, by reason of its *permanent establishments*. In this case, the *non-resident taxpayer* can designate which *permanent establishment* is the *principal taxpayer*. This is illustrated in the following example:



The above definitions do not seem to cover all relevant variations. For example, a *group* comprising more than one EU resident *qualifying subsidiary* of a third country parent together with one or more EU *permanent establishments* of the parent is not covered. Similarly, a *group* consisting of a third country parent and one or more *qualifying subsidiaries* and one or more EU *permanent establishments* of such subsidiaries is not covered.

In view of the optional nature of the CCCTB system and taking into account the definition of a *group* (Art. 55) and a *principal taxpayer* (Art. 4(6)), it would be possible to form a *group* comprising a *principal taxpayer* at a lower level than the highest possible *principal taxpayer* according to the above definition. For example, a sub-group of the *group* could opt for the CCCTB system whilst the remainder of the *group* stays outside the system, as illustrated in the following example.



Where a *principal taxpayer* is designated as such in accordance with the Directive, the designation may not subsequently be changed (Art. 116). However, where the *principal taxpayer* ceases to meet the applicable criteria, a new *principal taxpayer* must be designated by the *group*.

If, following a reorganisation, there are two or more designated *principal taxpayers* that continue to qualify, the *group* should choose one of them as *principal taxpayer*.

3. Competent and Principal Authority

3.1. Competent authority (Art. 4(21))

A *competent authority* is the authority designated by each Member State to administer all matters related to the implementation of the Directive.

3.2. Principal tax authority (Art. 4(22))

The *principal tax authority* is the *competent authority* of the Member State in which the *principal taxpayer* is resident (or where a *permanent establishment* of a *non-resident taxpayer* is situated).

4. Option to Apply CCCTB

4.1. Notice to opt (Art. 104 and Art. 106)

A *single taxpayer* shall opt for the system by giving notice to the *competent authority* of the Member State where it is resident or in the case of a *permanent establishment* of a *non-resident taxpayer*, where that establishment is situated (Art. 104).

In the case of a *group*, the *principal taxpayer* shall give notice on behalf of the *group* to the *principal tax authority* (Art. 104). This notice covers all *group members*. This provision ensures the 'all-in-all-out' principle, since it has the effect of opting in all members of the *principal taxpayer's group*.

Notice shall be given at least three months before the beginning of the tax year in which the *taxpayer* or the *group* wishes to apply the system.

The notice to opt must include the following information (Art. 106):

- the identification of the *taxpayer* or the members of the *group*
- in respect of a *group*, proof of fulfilment of the criteria such as providing full details of the ownership structure, including shareholdings and voting rights
- identification of any *associated enterprises*

- (d) the legal form, statutory seat and place of effective management of the *taxpayers*
- (e) the tax year to be applied.

Unless the notice to opt is rejected by the *principal tax authority* within six months of its receipt, it shall be deemed to be accepted.

4.2. Term of a group (Art. 105)

The Directive lays down specific rules governing the term of a *group*.

When the notice to opt has been accepted, the *single taxpayer* or *group* shall apply the system for an initial term of five years. Upon expiration, the initial term will be automatically renewed for successive periods of three years unless a termination notice is given.

The Directive provides that all members of a group shall have the same tax year. In joining an existing group, a taxpayer shall bring its tax year into line with that of the group.

Where a company joins a *group*, the term of the *group* is not affected. The joining company would be deemed to opt for the remainder of the term. Where a *group* joins another *group*, the enlarged *group* continues to apply the system until the later of the expiry dates of the terms of the groups.

Where *taxpayer* leaves a *group*, the *taxpayer* shall continue to apply the system for the remainder of the current term of the *group*. The same applies on termination of a *group*.

5. Tax Return

5.1. Submission (Art. 109)

Administration will be based on a system of self-assessment. A *taxpayer* is responsible for filing its own tax return unless it is a member of a *group*. *Single taxpayers* must file their tax return with the *competent authority*. In the case of a *group*, the *principal taxpayer* must file the consolidated tax return of the *group* with the *principal tax authority*.

The return shall be treated as an assessment of the tax liability of each *group member*. An assessment issued by the *principal*

tax authority would be directly recognised and automatically treated as an instrument permitting enforcement of tax liability in the relevant Member State.

The return must be filed within nine months of the end of the tax year.

Where the *principal taxpayer* fails to file a consolidated tax return, the *principal tax authority* issues an assessment within three months based on an estimate, taking into account such information as is available (Art. 112). The *principal taxpayer* may appeal against such an assessment.

5.2. Tax year (Art. 108)

Tax years do not always correspond to calendar years. Some Member States may currently have a different tax year, either fixed by law or by the *taxpayer* itself. The Commission stated³⁸ that as the CCCTB will not be formally linked to the financial accounts, there is no need to specify a particular date for companies' year-ends.

The Directive provides that all members of a *group* shall have the same tax year. In joining 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*.

Where a *single taxpayer* joins a *group*, it shall be treated as though its tax year terminated on the day before joining.

5.3. Content (Art. 110)

Single taxpayer

The tax return of a *single taxpayer* should 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*.

Group

The consolidated tax return should include the following information:

- (a) the identification of the *principal taxpayer*
- (b) the identification of all *group members*
- (c) identification of any *associated enterprises*
- (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*.

5.4. Errors (Art. 111)

The *principal taxpayer* must notify the *principal tax authority* of errors in the consolidated tax return. The *principal tax authority* shall, where appropriate, issue an amended assessment.

6. Amended Assessments (Art. 114)

The *principal tax authority* may issue an amended assessment no later than three years after the final date for filing the consolidated tax return, or where no return was filed before that date, no later than three years following the issuance of an assessment by the *principal tax authority* (see Art. 112). However, if the amended assessment is issued as a result of one of the following:

- a decision of the courts of the Member State of the *principal tax authority*,
- a mutual agreement, or
- an arbitration procedure with a third country,

such amended assessments must be issued within 12 months of the decision or completion of the procedure.

Failure to issue such an assessment within three months shall be deemed to be a refusal to do so.

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*. The assessment period may be extended to 12 years where the misstatement is the subject of criminal proceedings. The amended assessment must 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.

Prior to issuing an amended assessment, the *principal tax authority* should 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.

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%.

7. Cross-border Audits (Art. 122)

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

The Directive provides that in the case of a *single taxpayer* an *audit* shall be governed by the law of the Member State in which it is resident or in which it has a *permanent establishment* (Art. 114). In the case of a *group*, an *audit* shall be conducted in accordance with the national legislation of the Member State in which it is carried out, subject to adjustments to ensure proper implementation of the Directive (Art. 122).

8. Recordkeeping (Art. 117)

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

9. Provision of Information (Art. 118)

Taxpayers and *principal taxpayers* must provide all information relevant to their tax liability (or that of the *group* or a *group member*) on request.

10. Secrecy (Art. 121)

All information made known to a Member State under the Directive shall be kept secret in that Member State in the same way as information received under its national legislation. The Directive also prescribes limitations on the use of such information that would in any case apply, such as restricting it to the persons directly involved in the assessment of the tax or in the administrative control of the assessment. Member States may derogate from these limitations in certain cases.

11. Advance Rulings (Art. 119)

A *taxpayer* may request an opinion from the *competent authority* on the implementation of the Directive to a specific transaction to be carried out. It may also request an opinion regarding the proposed composition of a *group*.

The opinion is binding provided all relevant information is disclosed, unless the courts of the Member State of the principal tax authority decide otherwise.

The opinion is binding, provided all relevant information is disclosed, unless the courts of the Member State of the *principal tax authority* decide otherwise. If a *taxpayer* disagrees with the opinion, it may act in accordance with its own interpretation, but it must draw attention to that fact in its tax return.

Where two or more *group members* in different Member States are directly involved in a specific transaction, the competent authorities of those Member States shall agree on a common opinion.

12. Cooperation between Tax Authorities

12.1. Central database (Art. 115)

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

12.2. Disputes (Art. 123)

Where there is a dispute between a *competent authority* as to the validity or scope of a notice to opt or the necessity or content of any proposed amended assessment of a consolidated tax return, the *competent authority* may challenge that decision before the courts of the Member State of the *principal tax authority* within a period of three months.

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*.

12.3. Exchange of information (Art. 120)

The Commission stated³⁹ that the exchange of information will be essential in setting up a transparent and trustworthy system in which Member States can rely on each other. Accordingly, where a *competent authority* receives a request for cooperation or exchange of information concerning a *group member*, it shall respond no later than three months following the date of receipt of the request.

12.4. Advance rulings (Art. 119)

As explained above, where two or more *group members* in different Member States are directly involved in a specific transaction, the competent authorities of those Member States shall agree on a common opinion.

13. Appeals by Taxpayers

13.1. Scope and procedure (Art. 124)

A *principal taxpayer* may appeal against the following actions:

- (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.

An appeal shall not have any suspensive effect on the tax liability of a *taxpayer*. An amended assessment could be issued to give effect to the result of an appeal, notwithstanding the expiry of the three year period for issuing an amended assessment.

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

13.2. Administrative appeals (Art. 125)

Appeals in the first instance would be heard by an administrative appeals body.

An administrative appeals body may order evidence to be provided by the *principal taxpayer* and the *principal tax authority* on the tax affairs of the *group members* and other *associated enterprises* and on the law and practices of the other Member States concerned.

The appeals body must 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.

The appeals body can confirm the decision of the *principal tax authority*, vary it, or annul it and remit the matter back to the *principal tax authority* for a new decision. The *principal taxpayer* can appeal against any such new decision under the normal rules or could choose to appeal directly to the courts within 60 days following receipt of the decision.

If there is no competent administrative body, the *principal taxpayer* may directly lodge a judicial appeal.

13.3. Judicial appeals (Art. 126)

Judicial appeals against decisions of the *principal tax authority* would be governed by the national rules of the Member State, subject to the provision on evidence described below.

A national court hearing the appeal may order evidence to be provided by the *principal taxpayer* and the *principal tax authority* on the tax affairs of the *group members* and other *associated enterprises* and on the law and practices of the other Member States concerned. The other competent authorities would have a duty to provide all necessary assistance to the *principal tax authority* for the purposes of the appeal.

APPENDIX 1

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

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 Market² and was identified in the Annual Growth Survey³ 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.

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 Europe⁴. 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.

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).

- (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 than 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

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.

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 Parliament⁵,

Having regard to the opinion of the European Economic and Social Committee⁶,

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 growth⁷. 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.

(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/EEC⁸ and 83/349/EEC⁹ and Regulation of the European Parliament and of the Council 1606/2002/EC¹⁰.

(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.

on an agreement comparable to Council Directive 2011/16/EU¹¹ concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums¹² 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 data¹³ 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 powers¹⁴.
- (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.

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

- (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.

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

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;

- (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.

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

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.

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/EEC¹⁵ for non-life insurance, Directive 2002/83/EC of the European Parliament and of the Council¹⁶ for life insurance, and Directive 2005/68/EC of the European Parliament and of the Council¹⁷ 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 91/674/EEC¹⁸ 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.

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.

Article 38

Rollover relief for replacement assets

- 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.

- 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.

- 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

- 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.
- 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).

- 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:

- fixed tangible assets not subject to wear and tear and obsolescence such as land, fine art, antiques, or jewellery;
- financial assets.

Article 41

Exceptional depreciation

- 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.
- 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

- 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.
- A reduction of the tax base on account of losses from previous tax years shall not result in a negative amount.
- The oldest losses shall be used first.

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

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.

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.

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

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.

¹⁹ OJ L 310, 25.11.2009, p. 34.

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.

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;

- (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:

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

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.

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).

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;

- (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).

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.
2. 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.

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,

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.

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.

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.

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

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.

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 felelősségi társaság”, “részvénnytársaság”, “egyesülés”, “közhasznú társaság”, “szövetkezet”;

(s) companies under Maltese law known as: “Kumpaniji ta’ Responsabilita Limitata”, “Soċjetajiet en commandite li I-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 państowe”;

(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: “societăți pe acțiuni”, “societăți în comandită pe acțiuni”, “societăți 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 spoločnosť”, “spoločnosť s ručením obmedzeným”, “komanditná spoločnosť”, “verejná obchodná spoločnosť”, “družstvo”;

(aa) companies under Finnish law known as “osakeyhtiö”, “aktiebolag”, “osuuskunta”, “andelslag”, “säästöpankki”, “sparbank” and “vakuutusyhtiö”, “försäkringsbolag”;

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

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

Annex II

Belgien/Belgique

impôt des sociétés/vennootschapsbelasting

България

корпоративен данък

Česká republika

Daň z príjmu právnických osob

Danmark

selskabsskat

Deutschland

Körperschaftsteuer

Eesti

Tulmaks

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 mokesčis

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

Daň z príjmov právnických osôb

Suomi/Finland

yhteisöjen tulovero/inkomstskatten för samfund

Sverige

statlig inkomstskatt

United Kingdom

Corporation Tax

Annex III

List of non-deductible taxes under Article 14

Belgien/Belgique

Droits d'enregistrement – Registratierrechten

България

None

Česká republika

None

Danmark

Registreringsafgift af motorkøretøjer

Kommunal grundskyld

Kulbrinteskatt

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 iparúzésiadó

Malta

Taxes on Holding Gains

Nederland

Overdrachtsbelasting

Overige productgebonden belastingen neg – (energy split)

Österreich

Kommunalsteuer

Polka

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

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 structure²⁷

Taxation Policy (ABB05)

1.3. Nature of the proposal/initiative

- 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.

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 a 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 unacceptable 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.

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
- 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) envisaged²⁹

- Centralised direct management** by the Commission
- Centralised indirect management** with the delegation of implementation tasks to:
 - executive agencies
 - bodies set up by the Communities³⁰
 - 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
- 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.

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

- 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

– 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 5³¹ 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	1.75						

3.2.3.2. Estimated requirements of human resources

– 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 FullTime 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				
	– 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 Délegation" (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).

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

- 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 framework³⁵.

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

3.2.5. Third-party contributions

- 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

- 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.

APPENDIX 2

European Commission Description of basic elements of CCCTB¹

<http://eur-lex.europa.eu>, © European Union, 1998–2011

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.

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 losses 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).

- 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;

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%).

- 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).

APPENDIX 3

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 the purpose 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.

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.

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;

(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.

Qualifying 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.

(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.

APPENDIX 4

List of CCCTB Working Group working papers¹

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)
CCCTB/WP/005	Intangible assets (2)
Annex1 CCCTB/WP/005	Intangible assets Annex Table (2)
Annex2 CCCTB/WP/005	Annex – Potential Structure (2)
CCCTB/WP/006	Reserves, Provisions and Liabilities (2)
CCCTB/WP/007	Overview of SG1 January meeting (2)
CCCTB/WP/008	
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.

CCCTB/WP/019	International aspects (5)
CCCTB/WP/020	Progress and future plan (5)
CCCTB/WP/021	Overview of SG2 October meeting (5)
CCCTB/WP/022	Overview of SG3 November meeting (5)
CCCTB/WP/023	Financial assets (5)
Annex CCCTB/WP/023	Annex 1 –Table (5)
Annex CCCTB/WP/023	Annex 2 –Table (5)
CCCTB/WP/024	Chair Record of 071205 meeting (5)
CCCTB/WP/025	Summary Record of 081205 meeting (5)
CCCTB/WP/026	Territorial scope of the CCCTB (6)
CCCTB/WP/027	Financial Institutions (6)
CCCTB/WP/028	Overview of SG3 February meeting (6)
CCCTB/WP/029	Overview of SG4 February meeting (6)
CCCTB/WP/030	Administrative and legal framework (questionnaire) (6)
CCCTB/WP/031	Summary Record of March 2006 Meeting (6)
CCCTB/WP/032	Overview of SG1 April 2006 meeting (7)
CCCTB/WP/033	Overview of SG4 April 2006 meeting (7)
CCCTB/WP/034	Overview of SG3 May 2006 meeting (7)
CCCTB/WP/035	Group Taxation (7)
CCCTB/WP/036	Point for discussion Administrative and Legal Framework (7)
CCCTB/WP/037	Summary Record of 1 June 2006 meeting (7)
CCCTB/WP/038	Chair Record of 2 June 2006 meeting (8)
CCCTB/WP/039	Business reorganisations (9)

CCCTB/WP/040	Scope of the CCCTB (9)
CCCTB/WP/041	Related parties in CCCTB (10)
CCCTB/WP/042	Dividends (9)
CCCTB/WP/043	Overview of SG3 June 2006 meeting (9)
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CCCTB/WP/045	Summary Record of 12 September 2006 meeting (9)
CCCTB/WP/046	Progress and future plan (10)
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CCCTB/WP/055	Summary Record of 13 March 2007 meeting (11)
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CCCTB/WP/057	CCCTB: Possible elements of a technical outline (12)
CCCTB/WP/057	ANNOTATED CCCTB: Possible elements of a technical outline (13)
CCCTB/WP/058	Input from national tax administrations (12)
CCCTB/WP/059	Summary Record of 27–28 September 2007 meeting (12)
CCCTB/WP/060	Sharing mechanism: Possible elements of a technical outline (13)
CCCTB/WP/061	Administrative Framework: Possible elements of a technical outline (13)
CCCTB/WP/062	Explanatory note on the comitology procedure
CCCTB/WP/063	Summary Record of 12 December 2007 meeting
CCCTB/WP/064	Summary Record of 10–11 December 2007 meeting
CCCTB/WP/065	Anti-abuse rules
CCCTB/WP/066	Various detailed aspects of the CCCTB
CCCTB/WP/067	Request of input from national tax administrations for the Impact Assessment of the reforms at the EU level of corporate tax systems
CCCTB/WP/068	Summary Record of 14–15 April 2008 meeting (13)



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