



cutting through complexity

The KPMG Guide to CCCTB

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* Fidal is a separate and distinct organization from KPMG International and KPMG member firms and should be described as such

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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PART 3

CHAPTER FOURTEEN

Focus on: US experience with formulary apportionment

Ann Holley, KPMG in the United States

The US system of apportionment has its roots not in income tax, but in property tax.¹ Apportionment mechanisms were initially used to divide the value of railroads between the states for purposes of assessing a tax on the value of property in the state. Over time, the need to attribute income to multiple states led to the use of apportionment for income-based taxes. As a result, the US apportionment rules are designed to directly apportion the tax base to a particular state.² The CCCTB's primary apportionment mechanism, on the other hand, attributes income to group members. The definition of group members results in an indirect attribution of income to various countries. This subtle difference (direct versus indirect attribution of income to jurisdictions) between the state apportionment formula and that of the CCCTB apportionment formula may not have profound differences in application, but nevertheless represents a theoretical difference.

The US system of apportionment has its roots not in income tax, but in property tax.

Another critical distinction between the CCCTB proposal and the state experience is a result of the US federal system of government. Generally, each state determines its own tax policies.³ Various organisations have developed "model" apportionment rules, but states are not required to adopt the model rules. As a result, there are significant variations in how

the states apportion income and these differences can create planning opportunities for taxpayers. The CCCTB proposal, on the other hand, provides for a standard apportionment mechanism across all jurisdictions. In this chapter, we will examine the differences between the common US rules (some of which may or may not derive from the model provisions) and the CCCTB apportionment provisions.

Deviations in apportionment factor weighting – The proposed CCCTB apportionment model calls for an equally weighted three-factor formula consisting of labour, assets and sales. One of the first US model apportionment rules also called for an equally-weighted three factor formula of payroll, property and sales.⁴ Currently, the overwhelming majority of states deviate from the equally-weighted three-factor formula. States that deviate typically increase the weighting of the sales factor. Numerous states have moved (or are moving) to a sales-only apportionment factor. Why? States view increased sales factor weighting as an economic development tool. In states that give increased weighting to the sales factor, a company that invests in property or hires employees in the state is not "penalized" for such investments by having more of their income attributed to the state.

Deviations in the computation of the labour factor

– The US system often refers to the labour factor as the "payroll factor." The US payroll factor consists solely of compensation.⁵ The payroll factor does not take into account the number of employees. Generally, payroll is attributed to only one state according to a series of rules that are based on where the employee's services are performed.⁶ These rules are designed to attribute payroll to the same

¹ 2 Jerome R. Hellerstein and Walter Hellerstein, *State Taxation* ch. 9 (3d ed. 2001 & Cum. Supp. 2010). 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 the like should be read accordingly.

² Some states that require combined or consolidated returns ultimately attribute the in-state income and/or tax to the various legal entities. The attribution of income and/or tax to the legal entities, however, is not the focus of the apportionment mechanism.

³ Absent specific Congressional action, the states' ability to set their own tax rules is only limited by the US Constitution. See, e.g., *Quill Corp. v. North Dakota*, 504 US 298 (1992) (interpreting the dormant Commerce Clause of the Constitution to require a physical presence in the state before an out-of-state mail-order catalog vendor may be compelled to collect use tax).

⁴ Multistate Tax Compact, ("UDITPA"), Art. IV, available at [http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT\(1\).pdf](http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf). UDITPA provides model rules for allocating and apportioning a multistate business' income among the states in which it earned income.

⁵ UDITPA, Art. IV, § 13.

⁶ UDITPA, Art. IV, § 14.

state where state unemployment taxes are remitted for the employee. Unlike the CCCTB, payments to independent contractors or others performing activities similar to employees are not included in the factor.

While some controversy exists on how much compensation should be included in the factor, the majority of state issues concern whether or not someone is an employee and thus includable in the payroll factor of a particular legal entity. These

issues often occur when one legal entity employs all the employees of an enterprise while employees provide services for other legal entities. The CCCTB, however, addresses this situation by (i) including in an entity's labour factor persons who perform tasks similar to employees and (ii) providing rules for attributing payroll to entities who exercise control and responsibility over the employee but do not provide the remuneration (Art. 91).

Deviations in the computation of the property factor

Generally, the US property factor, like the CCCTB asset factor (Art. 92-94), includes the average value of real and tangible personal property. The following chart summarizes some of

the common differences between the state property factor rules⁷ and the CCCTB proposal.⁸

	CCCTB Proposal	US Property Factor
Depreciation	Taken into consideration	Not taken into account
Mobile property	Excluded	Included based on total time within the state during the tax year
Inventory	Excluded	Included
Intangibles	Excluded primarily due to mobile nature	Excluded ⁹
Research and Development, Marketing and Advertising Expenditures	Included for 5 years following a taxpayer's entry into the group (amount included equals costs incurred for 6 year period prior to entering group)	Not included unless amounts are capitalized for federal income tax purposes
Economic versus legal owners	Assets included in factor of the economic owner	Assets included in factor of the legal owner

Deviations in and issues with the computation of the sales factor

Comparing the CCCTB proposed revenue factor to the US sales factor is more difficult than comparing the asset/property and payroll/labour factors, due to the fact that there are significant variations in the sales factor between the states. Of the three factors, more state controversy surrounds the computation of the sales factor than either the payroll or property factor. A few common areas of controversy and the proposed treatment under the CCCTB are discussed below.

Sales of goods

Both the CCCTB proposal (Art. 96) and the states determine the numerator of the sales factor based on the destination

of the goods.¹⁰ Generally, the states look to the ultimate destination of the goods while the CCCTB proposal looks to "where dispatch or transport of the goods to the person acquiring them ends." Applying either of these rules in practice can prove difficult. For example, if the taxpayer's customer drives a truck to the taxpayer's location and picks up the goods, is the sale included in the numerator of the member/state where the goods are received or where the customer ultimately takes the goods? In the US, most states do not include the sale in the numerator of the state where the goods are actually received by the customer. Instead, the sales are included in the numerator of the state where the customer ultimately takes the goods.

⁷ UDITPA, Art. IV, § 10.

⁸ Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) – COM(2011) 121 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 the like should be read accordingly.

⁹ As discussed later in this chapter, some states have adopted rules for financial institutions that do include the value of loans in the property factor.

¹⁰ *Id.* 2 Jerome R. Hellerstein and Walter Hellerstein, *State Taxation* ch. 9 (3d ed. 2001 & Cum. Supp. 2010).

In some instances, the seller may be unaware of where the customer is taking the goods, thereby making it difficult, if not impossible, to accurately apply the state apportionment rules. In contrast, the CCCTB proposal provides a solution. In situations where the place of dispatch or transport of goods is not identifiable, the proposal calls for the sale of the goods to be attributed to the group member located in the Member State of the last identifiable location of the goods.

"No where sales"

Theoretically, the differences in state rules can result in less than 100 percent of an entity's income being attributed to the various states. For example, if a company is making sales into a state where the taxpayer does not file income tax returns, such a sale may not be included in the numerator of any state's sales factor. As a result, income could be attributed to a state where the taxpayer does not file. To combat such "no where" income, states have adopted "throwback" and "throw out" provisions. The CCCTB proposal has a similar provision, commonly referred to as a throwback provision, but it operates differently from the state provision. The CCCTB proposal calls for sales destined to a state where no member is located to be included in the sales factor of all group members in proportion to their labour and asset factors. In a state throwback provision, if a taxpayer is not taxable in the destination state, the sale is included in the numerator of the state from which the goods were shipped.¹¹ Under throw out rules, if the taxpayer is not taxable in the state of destination, the sale is not included in either the numerator or the denominator of the sales factor.¹²

Sales of services and intangibles

States generally attribute receipts from services and intangibles based on either (i) where the costs are incurred to generate the associated revenue, or (ii) based on the market for the services or intangibles.¹³ Despite the fact that states generally adopt one of these two approaches, the application of these methods can vary greatly from state to state. For example, in states that look to the location of costs incurred to generate the revenue, some states look to costs incurred for

each individual transaction while others look to costs incurred for running the entire business.¹⁴ For states that employ market sourcing, some states look to where the benefit of the service is received, while others looked to the location of the purchaser.¹⁵

Throw out rules provide that if the taxpayer is not taxable in the state of destination, the sale is not included in either the numerator or the denominator of the sales factor.

Under the CCCTB proposal, services are generally sourced to the group member located in the Member State where the services are physically carried out (Art. 96). Income from intangibles, such as interest, dividends, and royalties is only included in the sales factor if it is earned in the ordinary course of trade or business, in which case it is treated as sales income of the beneficiary (Arts. 95 and 96). While the CCCTB proposal differs slightly from the typical US methods for sourcing services and intangibles, similar issues will no doubt arise. For example, if a company provides consulting services and performs those services at its headquarters as well as multiple locations of the client, where are the benefits of such services received? Where are those services physically carried out? Should the income from the services be prorated between the various locations? While the CCCTB proposal does not expressly address this, in at least some states, some sort of proration would likely be accepted.

Inclusion of gross receipts

Most states include in the sales factor total gross receipts derived by taxpayers in the ordinary course of their trade or business.¹⁶ Several courts have been asked to address the proper sales factor treatment of short term investments

11 UDITPA, Art. IV, § 16.

12 *Id. See, e.g.*, W.V. Code § 11-24-7(e)(11)(B) (stating "All other sales of tangible personal property delivered or shipped to a purchaser within a state in which the taxpayer is not taxed . . . shall be excluded from the denominator of the sales factor").

13 UDITPA, Art. IV, § 17. California, Illinois, and Michigan use a market-based sourcing approach. Cal. Rev. & Tax. Code § 25136(b); 35 Ill. Comp. Stat. 5/304(a)(3)(C-5)(iv); Mich. Comp. Laws § 206.665.

14 AT&T Corp. v. Dep't of Revenue, No. 4814, 2011 WL 2536462 (Or. T.C. June 28, 2011) (finding that the costs of performance analysis applied to each transaction rather than to the taxpayer's overall service of providing interstate and international calls); *but cf.* AT&T Corp. v. Comm'r of Revenue, No. C293831, 2011 WL 2243933 (Mass. App.Tax.Bd. June 8, 2011) (finding that the statutory cost of performance test applies to a taxpayer's overall business activity).

15 For example, service receipts are included in the numerator of the Michigan sales factor if the recipient of the service receives the benefit of the service in Michigan. If the benefit is received in more than one state, the receipts are included to the extent the benefit is received in Michigan. Mich. Comp. Laws § 206.665. In Maryland, gross receipts from contracting or service-related activities are included in the numerator if the receipts are derived from customers in Maryland. Md. Code Regs. 03.04.03.08(C)(3)(c).

16 See, e.g., Cal. Code Regs. tit., 18, § 25134.

and commodity trading.¹⁷ Specifically, the issue is whether the gross amount from such transactions is included in the sales factor or the net gain. For example, if a company invests USD1 billion in a short-term debt instrument, but sells that security before maturity for USD1,000,150,000, is the proper amount included in the sales factor USD150,000 or USD1,000,150,000? Generally, courts have held that the statutory provisions require inclusion of the gross amount (i.e., the USD1,000,150,000), but in many instances the result is distortive.¹⁸ As a result, states can deviate from the statutory formula and require the inclusion of net gains.¹⁹ This raises at least two issues under the CCCTB proposal. First, what would be the proper amount to include? The CCCTB defines sales as including the “proceeds of all sales of goods and services.” Are “proceeds” tantamount to “receipts”? While interest is generally excluded from the factor, it appears to be included in the factor if it is earned “in the ordinary course of trade or business.” States have generally found that the investment of working capital is income earned in the ordinary course of business and is therefore included in the sales factor. Would the same hold true under the CCCTB proposal? Finally, states that have required the inclusion of net gains as opposed to gross receipts have generally done so based on “equitable apportionment” provisions.²⁰ These provisions allow the states (and arguably taxpayers) to deviate from the prescribed apportionment rules when the result does not accurately reflect in-state activities. The CCCTB proposal also contains an equitable apportionment provision. How and when this provision can be invoked will be critical in the implementation of the CCCTB.

Treatment of special industries

The CCCTB proposal includes special apportionment rules for four industries: financial institutions; insurance; oil and gas and shipping; inland waterway transport and air transport. It is not uncommon for states to have special apportionment rules for certain industries; however, the industries differ from those proposed in the CCCTB. For example, model apportionment rules exist for airlines, construction, publishing, television and radio broadcasting, trucking, and financial institutions.²¹ Some states also have special rules for mutual fund service providers.²² The differences between the states’ “regular” apportionment rules and their rules for the special industries are often fairly significant.

For example, the model apportionment regulations for financial institutions include specific sourcing provisions for a wide range of revenue streams, including receipts from investment and trading activities.²³ For the property factor, loans (including participations and syndications) and credit card receivables are included in the property factor at their outstanding balance.²⁴ Loans and credit card receivables are generally assigned where there is a “preponderance of substantive contacts” as determined by the location of solicitation, investigation, negotiations, approval and administration of the loan.²⁵ To the extent a taxpayer is engaged in an industry with special apportionment rules, such rules can create very different results than the standard apportionment mechanism.

¹⁷ Microsoft Corp. v. Franchise Tax Bd., 139 P.3d 1169 (Cal. 2006); Sherwin-Williams v. Oregon Dep’t of Revenue, 996 P.2d. 500 (Or. 2000); Sherwin-Williams Co. v. Johnson, 989 S.W.2d 710 (Tenn. Ct. App. 1998); Gen. Motors Corp. v. Franchise Tax Bd., 139 P.3d 1183 (Cal. 2006).

¹⁸ Microsoft Corp. v. Franchise Tax Bd., 139 P.3d 1169 (Cal. 2006).

¹⁹ *Id.* at 1182.

²⁰ *Id.* at 1177.

²¹ Multistate Tax Commission Reg. IV.18, available at <http://www.mtc.gov/Uniformity.aspx?id=496>.

²² Mass. Regs. Code tit. 830, § 63.38.7(4)(c).

²³ Multistate Tax Commission Reg. IV.18.(i), Sec. 3.

²⁴ *Id.* Sec. 4(c).

²⁵ *Id.* Sec. 4(g), (h).

CHAPTER FIFTEEN

Transfer Pricing

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1. Sales of services and intangibles

Part III elaborates on the specific transfer pricing aspects of the Directive. The major practical difficulties with respect to the implementation of the CCCTB system are discussed. Part III is divided into the following sections:

- Compliance requirements and compliance costs under CCCTB
- Sharing mechanism
- Exit taxation under CCCTB
- Risk of artificial profit shifting under the CCCTB.

The above does not eliminate the need for transfer pricing and the Directive therefore contains its own transfer pricing rules for inter-company transactions with related parties outside the CCCTB group. For example, transactions may be carried out with:

- Companies or permanent establishments in third countries.
- Related EU companies that have not opted to apply the CCCTB system.
- EU companies that have opted to apply the CCCTB system but which are not sufficiently closely related to belong to the same CCCTB group. This situation can arise because of a difference between the threshold for group membership and the lower-related party threshold adopted by the Directive for the application of the transfer pricing rules.

Furthermore, it is worth noting that the Directive does not completely eliminate the need for documenting transactions within the CCCTB group; Article 59(3) states that groups shall apply a consistent and adequately documented method for recording intra-group transactions. It is clear that groups may also want to maintain the latter documentation and recording for management reporting purposes.

Practical difficulties and related compliance costs in regard to the interaction of CCCTB with non-CCCTB systems remain.

The removal of transfer pricing formalities is a commonly cited and assumed benefit of the CCCTB system for taxpayers. However, practical difficulties and related compliance costs in regard to the interaction of CCCTB with non-CCCTB systems remain. In the Explanatory Memorandum to the Directive, the European Commission notes that:

"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."

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While the main objective of the Directive is to reduce heavy compliance requirements and related high compliance costs, an empirical study conducted by an independent party has revealed the following:²⁷

- Adopting a CCCTB would increase the average compliance costs for businesses because of the additional costs of preparing the consolidated tax return.
- In addition to the increased average compliance costs, businesses would also incur substantial one-off costs during the transition to the new system.
- Although some savings would occur in the area of transfer pricing, businesses reported that those savings could, in fact, be eroded by the additional costs associated with managing the impact of the introduction of formulary apportionment.
- The majority of businesses found that their corporate income tax burden would increase under a CCCTB. This was primarily due to the fact that the apportionment mechanism means that a greater proportion of income would be apportioned to, and taxed in, Member States with higher corporate tax rates.

Finally, it should be noted that if one would move towards a Common Corporate Tax base (CCTB) by deleting the rather controversial consolidation element – possibly by way of enhanced cooperation – the outcome would be the retention, rather than the elimination of, transfer pricing formalities, and the resultant compliance costs within the European Union.

3. Sharing mechanism

3.1. Apportionment factors

Under the Directive, the CCCTB group's taxable results would be apportioned to the following factors:

- tangible assets
- sales
- labour.

The European Commission argues that the idea behind the sharing mechanism is that profits are taxed where they are earned. However, the sharing mechanism may have some fundamental flaws that are not easily repairable, for example:

- a sharing mechanism does not determine the precise origin of the income and the result may be subject to arbitrariness
- it assumes that all apportionment factors are equally relevant and earn the same rate of return

- there is no strong theoretical basis for why profits must be allocated based on a percentage of designated factors; e.g. payroll, property and sales.

The effects of the apportionment factors are discussed below.

(i) Tangible assets

In comparison to the arm's length principle, the apportionment formula does not reflect the functions performed, risks assumed and intangible assets owned by the CCCTB group companies. This will favour more tangible asset intensive companies (for example contract manufacturers) and will apportion less taxable profits to companies managing such companies (for example, the entrepreneurial company of the group which would generally receive the residual profit/loss from an arm's length perspective). Therefore, under the CCCTB apportionment system, multinationals with a high value adding complex functional and risk profile driving value in the value chain, may receive an insufficient and therefore non-arm's length return for their efforts.

Furthermore, it may not be appropriate to apply the apportionment formula to certain industries. For example, as a result of the development of e-commerce, certain industries have become less tangible asset intensive, or have started generating more profits through less tangible asset intensive activities. The question that then arises is whether allocation based on tangible assets will reflect the realities of today's businesses or whether formula-based allocation can better mirror the new key value drivers or the value of new generation intangibles arising out of e-commerce businesses.

(ii) Sales

The sales factor is the most controversial of the three apportionment factors.

The key taxation issues are the same as those dealt with in discussions on permanent establishments and source-of-income problems arising from e-commerce and similar businesses. As a result of the nearly instantaneous transmission of information and the effective removal of physical boundaries, it has become more difficult for tax authorities to identify, trace and quantify cross-border transactions.

One concern is that apportioning sales by destination digresses from the current principle of attributing the ultimate taxing rights to the source state and would favour larger Member States (with higher consumption) over smaller ones. The source state has long been the guiding principle for the OECD in respect of international taxation. Moreover, this principle has a strong conceptual basis among EU Member States. The OECD has emphasized that the sales destination has never been attributed much importance in treaty negotiations on the allocation of taxing rights.

It is also not clear whether sales, as an apportionment factor, can be applied fairly in relation to reselling activities with

²⁷ Ernst & Young LLP, "Common Consolidated Corporate Tax Base, A study on the impact of the Common Consolidated Corporate Tax Base proposals on European business taxpayers" (January 2011).

different risk profiles. For example, it is extremely difficult to distinguish between revenue centres (limited risk distributors, agents, commissionaires) and profit centres (fully fledged distributors or principal entities) when allocating profits based on sales figures, owing to the fact that revenue centres operate with the sole aim of increasing revenue and are not entitled to residual profits, whereas profit centres may focus on increasing the profits and are entitled to residual profits.

(iii) Labour (i.e. payroll and number of employees)

The Directive completely disregards “significant people functions” (“SPFs”), as defined by the OECD for attributing profits to permanent establishments. These SPFs are relevant to the assumption of risk and the economic ownership of assets. They vary per business sector (e.g. such functions are unlikely to be the same for an oil extraction company and a bank), and per enterprise within sectors (e.g. not all oil extraction companies or all banks are the same). Because of the special relationship between risks and financial assets in those specific sectors, the authorised OECD approach applies the “key entrepreneurial risk-taking function” (KERT function) terminology in describing the functions relevant to the attribution of both risks and assets in the financial services sector, but that terminology is not used for other sectors. Outside the financial services sector, risks may be less linked to assets, so that there may be less overlap between the significant people functions relevant to the assumption of risk and those relevant to the economic ownership of the assets. It is clear that the impact of people on the generation of value and profits is equally valid for qualifying subsidiaries.

It is acknowledged that the use of the payroll factor in the formula might – to some extent – reflect the relative value of employees. However, it is unclear whether this will offset the subjectivity involved in using the number of employees in the formula, which has a 16.6 percent impact on the final results, as the CCCTB relates to countries with both high and low labour costs. This may therefore adversely affect the allocation of profits to group entities based on a predetermined formula.

3.2. The treatment of intangibles, financial assets and stocks

The Directive does not provide sufficient guidance and long-term views on the treatment of intangibles, financial assets, and stocks. In practice, the use of formulary apportionment (e.g. in the US) shows that, when dealing with intangibles, financial assets or stocks, the apportionment formula is often adjusted by leaving out some apportionment factors. However, this

does not appear to be a reasonable solution in today's business environment. Any solution should ideally have the following characteristics: reliability, ease of compliance and fairness. The current apportionment formula provides ease of compliance, but its reliability and fairness are under discussion.

The European Commission argues that the idea behind the sharing mechanism is that profits are taxed where they are earned.

A significant issue with formula-based approaches such as the CCCTB or global formulary apportionment is that they generally fail to properly capture the importance of intangibles in the global economy. In fact, because the valuation of intangibles is complex and often uncertain, the European Commission has proposed excluding intangibles from the formula, without offering any satisfactory solutions. It should be noted that if a fair market valuation of intangibles were to become one of the factors in the apportionment formula, it is not likely that such an approach would provide the ease of compliance, certainty and protection against artificial profit shifting that the European Union seeks to achieve.

3.3. Global formulary apportionment

The proposed CCCTB legislation is in fact similar to global formulary apportionment (“GFA”), which was rejected in the July 2010 version of the OECD Guidelines due to its lack of fairness, lack of predictability, lack of ease of compliance and high compliance costs.²⁸

The following arguments that were used in the OECD Guidelines to rule out global formulary apportionment deserve attention in that they offer better insight into what other risks might emerge during the CCCTB process. According to the OECD Guidelines, the transition to a GFA system would present enormous political and administrative complexity and require a level of international cooperation that is unrealistic to expect in the field of international taxation. Such multilateral coordination would require the inclusion of all major countries where MNEs operate. If all the major countries failed to agree to move to global formulary apportionment, MNEs would be faced with the burden of complying with two totally different systems.

On the other hand, the profit-split methodology currently supported by the OECD Guidelines also uses allocation keys and is similar to the sharing mechanism in the Directive. Therefore, rather than developing a whole new system, it would be preferable to improve and develop current OECD Guidelines and the application of the arm's length principle within the European Union. As regards the latter, the EU Joint Transfer Pricing Forum may play a key role. For example, an application of a trimmed-down version of the CCCTB could be discussed and developed in an OECD forum and included in the OECD Guidelines through a more simplified residual profit split/predetermined profit split mechanism, without abandoning the fundamental principle of a functional analysis (e.g. the notion of control of risks and intangibles) and the resulting application of the arm's length principle. This alternative approach could be applied as follows:

- firstly, the entities within the consolidated group are characterized or attributed a functional and risk profile on the basis of a traditional comparability analysis
- secondly, a TNMM is applied to allocate the profits to the routine functions of these entities in line with an EU-wide uniform approach through standard returns, safe harbours, industry averages/economic indicators
- thirdly, residual profit is shared based on a formula/allocation keys that capture(s) all the relevant elements, including control of risks and intangibles.

4. Exit taxation under CCCTB

4.1. Intra-CCCTB group transactions versus transactions with associated enterprises

Article 59(1) of the Directive provides that in calculating the consolidated tax base, profits and losses arising from transactions directly carried out between members of a group shall be ignored. This is broadly applicable to business reorganisations as defined under Article 70. In this respect it could be argued that not all business reorganisations would qualify as a transaction with associated enterprises.

Contrary to Article 59, Article 79 employs the arm's length principle for price adjustments in relations between associated enterprises. For example, in case of a transfer of assets to a third country, Article 79 of the Directive (adjustment of pricing in relations between associated enterprises) or the arm's length principle will apply. Therefore, the Directive itself acknowledges that the use of the arm's length principle largely remains in place for the inter-company transactions taking place outside the CCCTB group.

Furthermore, Article 78 of the CCCTB directive states that a taxpayer shall be regarded as an associated enterprise to its permanent establishment in a third country, and a non-resident taxpayer shall be regarded as an associated enterprise to its permanent establishment in a Member State. In connection with this article, Article 31 states that 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.

4.2. Business Reorganisations

The Directive does not define the term "business reorganisations". Had the European Commission included such a definition, it could have made clear that the term includes all reorganisations relating to a "transfer of business assets or shares" within the context of a business reorganisation ("catch all rule"). It is currently not clear from the Directive whether all business reorganisations qualify as an inter-company transaction.

On the other hand, Article 70(1) of the Directive states that a business reorganisation within a group, or the transfer of the legal seat of a taxpayer which is a member of a group, does not give rise to profits or losses for the purposes of determining the consolidated tax base. The second sentence of the same article refers to the requirement to record inter-company transactions, as laid down in Article 59(3) of the Directive, being applicable to any business reorganisations or transfer of a legal seat. It may be questioned whether it would extend to the transfer of the actual or "real" seat of a company. However, the transfer of the actual seat may lead to a transfer of all the assets to another Member State which will have a huge impact on the asset factor of the apportionment formula. In this case, Article 70(2) of the draft Directive would apply.

In light of the above, it is interesting to note that the transfer of functions and risks should not result in any immediate taxation even in the case where, for example, a full risk distributor is restructured into a limited risk distributor. Depending on the case at hand, this differs from chapter IX of the 2010 OECD Guidelines where the taxpayer should be able to demonstrate the arm's length nature of the restructuring by way of such factors as business rationale, and realistically available options, and to document functions performed, risks assumed and assets employed before and after the restructuring. The Directive seems to not only provide a tax neutral option to restructure the CCCTB group, but would also reduce related documentation compliance costs.

Another point which deserves attention is that, if a taxpayer leaves the group and has within the last 2 years acquired fixed assets other than pooled assets, then the untaxed difference on these fixed assets will be excluded from exemption, unless the taxpayer demonstrates that the incorporation was carried out for valid commercial reasons. This will make business reorganisations more difficult compared with the current situation under the 2010 OECD Guidelines.

5. Risk of artificial profit shifting under the CCCTB

The proposed rules strive to limit tax abuse by linking the factors for the attribution of profit directly to the source Member States, for example, physical location of employees, the location of third party customers and the location of the usage of property. It is acknowledged that a three-factor formulary approach makes

it more difficult for companies to manipulate their market, but differences in effective corporate tax rates may be more significant in the European Union than the United States, Canada or Switzerland (where currently some form of formulary apportionment is applied) and therefore provide more incentives for companies to shift profits. A safeguard clause or escape clause has been included for exceptional cases where the outcome of the apportionment would obviously lead to an unfair or unrepresentative result for the business activities carried out in the various countries concerned. However it remains to be seen whether detection of any misuse of apportionment factors would be an easy task.

An example of a relatively straightforward way to manipulate the taxation rights of a Member State is to transfer the employees within a CCCTB group to a low tax jurisdiction (in particular, in respect of labour intense industries). As explained under section 4.2. such a transfer would generally not lead to any exit taxation.

CHAPTER SIXTEEN

CCCTB and tax treaties

Otto Marres, KPMG in the Netherlands

1. Introduction

Adoption of the CCCTB will affect the process of concluding double tax treaties as well as the application of the treaties. If we assume that the CCCTB as proposed by the Commission (i.e. including the element of consolidation) is adopted, then the traditional tax treaty or arm's length approaches to the allocation of profits within the EU will, in principle, no longer be necessary, in cases where the taxpayer has opted for the application of the CCCTB. Given the optional character of the CCCTB, allocation of taxing rights over profits is however still required for situations where the CCCTB is not applied. The double tax treaties concluded between Member States will therefore, in all likelihood, continue to cover corporate income tax.

Since the CCCTB also deals with the taxation of non-EU residents carrying on a business through a permanent establishment in an EU Member State, as well as the taxation of income sourced in third countries, the relation between third countries and Member States is also relevant.²⁹ The first question that arises is to what extent the Member States will still be competent to conclude treaties on corporate income tax with third countries. Other questions are: how conflicts between treaties and the Directive are to be resolved? And what other issues – such as entitlement to treaty benefits – may arise from a third country perspective? These questions are dealt with below.

2. Exclusive Competence of the Union?

Under CJEU settled case law, EU Member States cannot assume obligations outside the framework of Community institutions that might affect or alter the scope of Community rules promulgated for the attainment of the objectives of the EC Treaty.³⁰ This is codified in Article 3(2) TFEU, which

states that the Union shall have exclusive competence for the conclusion of an international agreement, not only when its conclusion is provided for in a legislative act of the Union, but also if this is necessary “to enable the Union to exercise its internal competence,” or “insofar as its conclusion may affect common rules or alter their scope.” One may argue that this will also be the case after the CCCTB has entered into force, as the CCCTB also deals with the avoidance of double corporate income tax, and a tax treaty would therefore affect these common rules. If so, the Union would have the exclusive competence to conclude double tax treaties with third countries, insofar as they relate to corporate income tax (at least for cases where the CCCTB is applied).

3. Conflicting Rights and Obligations of EU Member States Under Double Tax Treaties and the Directive

3.1. Potential conflicts

Within the EU, the consolidated tax base would be shared among the Member States on the basis of an apportionment formula (see chapters 7–10). This system deviates from the system of attribution of profits that exists under double tax treaties.

With regard to the relationship between Member States and third countries, various conflicts may arise between the obligations of Member States under the CCCTB and their obligations under double tax treaties, for example:

- (i) Treaties may provide for the exemption of dividends paid by a resident of the other contracting state, whereas Article 73 of the Directive prescribes switch-over from the exemption method to the credit method.³¹

²⁹ The same is true for Member States that do not apply the CCCTB; this may be the case if the CCCTB is introduced in at least nine Member States on the basis of ‘enhanced cooperation’ (Articles 326-334 TFEU).

³⁰ Case 22/70, *Commission v Council* (ERTA) [1971] ECR 263, para. 22.

³¹ European Commission, 26 July 2007, ‘CCCTB: possible elements of a technical outline’, working document prepared for the meeting of 27-28 September 2007, in Brussels, CCCTB/WP057/doc/en, para. 139. See also European Commission, 1 September 2010 ‘Transactions and dealings between the group and entities outside the group’, room document prepared for the workshop on the common consolidated corporate tax base (CCCTB) of 20 October 2010 in Brussels, CCCTB/IRD/003/doc.en, para. 9.

- (ii) Treaties may provide for the exemption of profits attributed to a permanent establishment in the other contracting state, whereas Article 73 of the Directive prescribes switch-over from the exemption method to the credit method.³²
- (iii) The definition of the term 'permanent establishment' in a treaty may be *broader* than the definition in Article 5 of the Directive, and consequently the treaty may provide for double tax relief (by the Member State), whereas the Directive does not provide for such relief.
- (iv) The definition of the term 'permanent establishment' in a treaty may be *narrower* than the definition in Article 5 of the Directive, and consequently the treaty may not allocate taxing rights to the Member State, whereas under the Directive there is a taxable presence in the EU.
- (v) Under the Directive, the profit attributed to a foreign permanent establishment in a third country may differ from (i.e. be more than or less than) that attributed under the tax system of the third country.
- (vi) A treaty may provide for a tax sparing credit where the Directive makes no such provision. It is questionable whether the CFC provision of Article 82 Directive conforms with double tax treaties.³³

3.2. Classification of the conflict

One may regard a potential conflict between the Directive and tax treaties as a treaty conflict, since the Directive is binding on the Member States on the basis of the TFEU and is therefore inextricably linked to the TFEU. One may however argue that the Directive should be regarded as domestic law,³⁴ as provisions of EU law that are directly applicable, form part of the national legislation of the Member States.³⁵

From an EU perspective, it would be extremely undesirable for EU law to be subordinate to treaties, as this would jeopardize the uniformity of the CCCTB rules.

If the latter position is taken, EU law would be subordinate to treaties. With regard to treaties concluded between Member States, this consequence would be most undesirable.

If the former position is taken, Article 30 of the Vienna Convention on the Law of Treaties comes into play. This Article provides for the application of successive treaties relating to the same subject matter. Paragraph 3 addresses the situation where all the parties to the earlier treaty are also parties to the later treaty. In that case, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. Paragraph 4 addresses the situation where the parties to the later treaty do not include all the parties to the earlier one. In that case, the same rule as in paragraph 3 applies to the states that are parties to both treaties. In those situations where one state is party to both treaties and another state is party to only one of the treaties, the treaty to which *both* states are party will govern their mutual rights and obligations. Were this rule to be applied analogously to a conflict between the CCCTB (which is binding on the basis of the TFEU) and a double tax treaty concluded prior to the adoption of the CCCTB, it would mean that:

- for treaties concluded between Member States, the earlier treaty would not apply
- for treaties concluded between a Member State and a third country, the treaty would govern their mutual rights and obligations

From an EU perspective, it would be extremely undesirable for EU law to be subordinate to treaties, as this would jeopardize the uniformity of the CCCTB rules. Not surprisingly, the CJEU has taken the position that EU law is supreme and that treaties concluded by Member States cannot be applied to the detriment of the objectives of EU law (see below).

3.3. Tax treaties concluded between Member States

Article 8 of the Directive provides that the Directive overrides treaties concluded between Member States: "The provisions of this Directive shall apply notwithstanding any provision to the contrary in any agreement to the contrary in any agreement concluded between Member States." This issue was also addressed in a footnote to one of the working papers: "The Directive would override conflicting provisions in any agreement concluded between Member States."³⁶ Since any analysis of or reference to international law is absent, it would appear

³² European Commission, 1 September 2010 'Transactions and dealings between the group and entities outside the group', room document prepared for the Workshop on the Common Consolidated Corporate Tax Base (CCCTB) of 20 October 2010 in Brussels, CCCTB\RD\003\doc.en, para. 9.

³³ Cf. e.g. the *Schneider* case, where the French Conseil d'Etat, 28 June, 2002, concluded that the French CFC rules violated the France-Switzerland double tax treaty, since France taxed the profits of a Swiss company which were only taxable in Switzerland under the treaty. There is however case law with an opposite outcome. Cf. Luc de Broe e.a., *Tax Treaties and Tax Avoidance: Application of Anti-Avoidance Provisions*, *Bulletin for International Fiscal Documentation*, Vol. 65 (2004), nr. 7, para. 4.2.

³⁴ See Jan Klabbers, *Treaty Conflict and the European Union*, Cambridge University Press, New York, 2009, p. 194-196, 210 and 211.

³⁵ Ibid., p. 210.

³⁶ European Commission, 26 July 2007, 'CCCTB: possible elements of a technical outline', working document prepared for the meeting of 27-28 September 2007, in Brussels, CCCTB\WP057\doc\en, footnote 37.

that this statement is not an interpretation of international law, but merely a reference to CJEU settled case law, where EU law takes precedence over agreements concluded between Member States.³⁷ In other words: the Member States should meet the requirements of the Directive, notwithstanding conflicting obligations under tax treaties concluded with other Member States.

However, one should note that individuals and companies are not bound to a directive, i.e. directives do not have 'reverse vertical effect.' Directives are addressed to Member States and not to individuals or companies. Member States may therefore not invoke the provisions of a directive against an individual or company³⁸ if the Directive is implemented in national law; individuals and companies are obviously bound to this national law, but it is up to the national constitutional law to decide whether the obligations under national law take precedence over the treaty provisions. This conflict can be resolved as follows:

- (i) either by having companies waive their rights under tax treaties by opting for the CCCTB (which only works if the CCCTB is introduced as an optional tax system)
- (ii) by an amendment to the tax treaties concluded between member states, to the effect that they agree to apply the Directive to their mutual relations.³⁹

3.4. Tax treaties concluded between a Member State and a third country

The TFEU contains a provision on conflicts between treaties and the TEU and TFEU. Article 351 TFEU states that the rights and obligations arising from agreements concluded before 1 January 1958 (or date of later accession) between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the TFEU and the TEU. In case of conflicts, the Member State(s) concerned must take all appropriate steps to eliminate the incompatibilities established.

According to CJEU settled case law, EU law is supreme in case of a conflict with treaties concluded *after* 1 January 1958 (or date of later accession).⁴⁰ In the *Netherlands v. Parliament and Council* case the CJEU concluded: "It is common ground that, as a rule, the lawfulness of a Community instrument does not depend on its conformity with an international agreement to which the Community is not a party."⁴¹ And in the *Matteucci* case it noted that "the application of Community law cannot be precluded on the ground that it would affect the implementation of a cultural agreement between two Member States."⁴²

But what about a conflict between secondary EU Law and a treaty predating the EU law instrument? Should Article 351 TFEU be applied analogously to secondary EU law? This would mean that the rights and obligations arising from pre-existing double tax treaties concluded with third parties will not be affected by the CCCTB. Advocate General Kokott argued as follows in her opinion in the *Intertanko* case:

"(...) there is no discernible legal basis for examining secondary law on the basis of international law obligations of the Member States which the Community has not itself assumed. (...) Accordingly, the Community can in principle require the Member States to take measures that run counter to their obligations under international law. This is already demonstrated by Article 307 EC (...)."⁴³

It is common ground that, as a rule, the lawfulness of a Community instrument does not depend on its conformity with an international agreement to which the Community is not a party.

Therefore, *in principle*, the EU can require Member States to take measures, but could there be an exception to this rule? Apparently so, again according to Advocate General Kokott in the *Commune de Mesquer/Total* case:

"A mutatis mutandis application of the first paragraph of Article 307 EC (...) is conceivable where an international obligation on the part of a Member State conflicts with a subsequently agreed measure of secondary law."⁴⁴

The issue of a potential conflict between the Directive and pre-existing tax treaties is addressed in the Working Documents. Working Document WP057 leaves room for a temporary derogation from the Directive:⁴⁵

"(...) The rules on foreign income in the Directive would seek to balance the need to provide an adequate level of protection for the base, while minimising potential conflict with existing treaties. Nevertheless it would still be necessary to allow Member States in certain cases to derogate temporarily in order to respect existing obligations under agreements with third countries."

³⁷ Cf. Case 10/61, *Commission v. Italy* [1962] ECR 1, para. II B, Case 82/72, *Walder* [1973] ECR 599, para. 8, Case 286/86, *Deserbais* [1988] ECR 4907, para. 18; Case 235/87, *Matteucci* [1988] ECR 5589, para. 22, Case C-533/08, *TNT Express Nederland BV v. AXA Versicherung AG* [2010] ECR I-00000, para. 52.

³⁸ Case 80/86, *Kolpinghuis Nijmegen BV* [1987] ECR 3969.

³⁹ Cf. Article 27(2) of the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters and Articles 11(5).

⁴⁰ See Jan Klubbers, *Treaty Conflict and the European Union*, Cambridge University Press, New York, 2009, p. 10-11 and 212.

⁴¹ Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR 7079, para. 52.

⁴² Case 235/87, *Matteucci* [1988] ECR 5589, para. 14.

⁴³ Opinion Advocate General Kokott, case C-308/06, *Intertanko* [2007] ECR I-04057, para. 76-77.

⁴⁴ Opinion Advocate General Kokott, case C-188/07, *Commune de Mesquer/Total* [2008] ECR I-04501, para. 95.

⁴⁵ European Commission, 26 July 2007, 'CCCTB: possible elements of a technical outline', Working Document prepared for the meeting of 27-28 September 2007, in Brussels, CCCTB/WP057/doc\en, para. 117.

And:⁴⁶

"(...) it would be necessary to allow Member States in certain respects to derogate temporarily from the rules adopted in order to respect existing obligations (example: a threshold for exemption for major shareholdings in existing double tax treaties that is lower than the 10% threshold suggested above)."

Room Document RD003 goes even further and simply states that tax treaties with third countries will not be affected:⁴⁷

"To the extent that [agreements between Member States and third countries concluded before the Directive enters into force] may incorporate rights and obligations that are not in line with the Directive, those agreements will not be affected."

If this means that tax treaties with third countries are to be respected by EU Member States, even if they conflict with the Directive, then this would obviously harm the uniformity of the CCCTB.

arises as to whether third countries would be inclined to limit treaty benefits to the extent that the income is apportioned to group members that are not entitled to similar treaty benefits. Limitations on benefit provisions generally seek to prohibit third country residents from obtaining treaty benefits by establishing a legal entity in a contracting state. A taxpayer should satisfy one or more tests in order to prove that it has sufficient nexus to that state and/or a business motivation for the structure in order to obtain the treaty benefits. For example, in many tax treaties concluded by the USA, non-qualified persons/companies may be entitled to treaty benefits only if the shares are held by equivalent beneficiaries, and where that part of the income paid to non-equivalent beneficiaries (a complex concept in itself) does not exceed a certain threshold.⁴⁸

Furthermore, many treaties contain a 'triangular provision' that stipulates that the general treaty rate for income such as interest and royalties does not apply (generally, a rate of 15 percent applies instead), if that income is attributable to a permanent establishment in a third jurisdiction, and the combined tax that is actually paid in the third jurisdiction and the state of residence is less than a certain percentage (typically 50 percent or 60 percent) of the tax that would have been payable in the state of residence if the income

Limitations on benefit provisions generally seek to prohibit third country residents from obtaining treaty benefits by establishing a legal entity in a contracting state.

were not attributable to the permanent establishment in the third jurisdiction.⁴⁹ An exception generally applies if there is a sufficient link between the income and the third country:

- in respect of interest: if the income is derived in connection with the active conduct of a trade or business carried on by the permanent establishment

Even if the Directive and tax treaties do not conflict, the CCCTB system may give rise to difficulties. A number of these are set out below.

4.1. Access to treaty benefits

From an outbound investment perspective (i.e. from the EU to a third country), there is a risk that third countries may be reluctant to reduce their domestic tax rates under a tax treaty in respect of income paid to a resident of an EU Member State, if the income is partly apportioned to group members that are not entitled to the same treaty benefits. The question arises whether a third country would be willing to accept the EU-recipient (applying the CCCTB) as beneficial owner, since the item of income is introduced in a larger pool and apportioned on the basis of a formula (see chapter 18 on US tax implications, paragraph 3.1.). A similar question

⁴⁶ European Commission, 26 July 2007, 'CCCTB: possible elements of a technical outline', working document prepared for the meeting of 27-28 September 2007, in Brussels, CCCTB\WP057\doc\en, para. 139.

⁴⁷ European Commission, 1 September 2010 'Transactions and dealings between the group and entities outside the group', room document prepared for the Workshop on the Common Consolidated Corporate Tax Base (CCCTB) of 20 October 2010 in Brussels, CCCTB\RD003\doc.en.

⁴⁸ See for example the treaties concluded between the US and Belgium (Art. 21.3), Bulgaria (Art. 21.3), Hungary (Art. 22.4), Iceland (Art. 21.3), Ireland (Art. 23.5), Luxembourg (Art. 24.4), Malta (Art. 22.3) and the Netherlands (26.3).

⁴⁹ See for example the treaties concluded between the US and Belgium (Art. 21.6), Bulgaria (Art. 21.5), Germany (Art. 28.5), Hungary (Art. 22.6), Iceland (Art. 21.5), Ireland (Art. 23.7), Luxembourg (Art. 24.5), Malta (Art. 22.5) and the Netherlands (Articles 12.8 and 13.6).

- in respect of royalties: if they are received as payment for the use of, or the right to use, intangible property manufactured or developed by the permanent establishment itself

The ‘triangular provision’ is generally aimed at tax avoidance schemes and not at structures with a bona fide economic substance. Were triangular provisions to be triggered as a result of the CCCTB apportionment provisions, for example where income is apportioned to a permanent establishment in a low taxing Member State, similar treaty entitlement problems could arise.

The above examples show that, in a fundamental sense, the allocation and apportionment of income pursuant to CCCTB principles may lead to situations that some countries regard as being in direct conflict with the underlying principles of relevant tax treaties. For example, apportionment of income within the CCCTB on the basis of a formula may in certain circumstances lead to a situation where a considerable part of the income derived by a taxpayer in EU Member State A is apportioned to EU Member State B, which has concluded a less favourable treaty with the non-EU source state, and which taxes the income at low rates. Will introduction of the CCCTB therefore lead to a further limitation on benefits by third countries? This is a difficult question to answer and any response would be speculative. On the one hand, it can be argued that, as a general rule, the effect of the apportionment is unintentional and therefore not abusive (except for situations where the apportionment criteria are manipulated; however one might expect the EU Member States to try to prevent such manipulation). On the other hand, third countries may fear that residents of an EU Member State may contribute debt claims and other intangible property to

a company resident in another EU Member State in order to claim favourable treaty benefits, although only a relatively small part of the income is actually apportioned to and taxed in that same Member State.

4.2. Double taxation relief

From an inbound investment perspective (i.e. into the EU) there is a risk that third countries may be reluctant to credit the full amount of tax computed over the apportioned tax base of a group member, if the profit attributable to that group member is lower than the apportioned tax base (see chapter 18 on US tax implications, para. 2.2). Although this situation already exists (different states may compute the profit of a domestic taxpayer or permanent establishment in a different way), there is an additional consideration: the tax base is apportioned on the basis of a formula that deviates from the OECD approach. As a general rule, pursuant to Article 7(2) of both the 2008 and 2010 version of the OECD Model Convention, both contracting states should attribute to a permanent establishment the profits it might expect to make if it were a separate enterprise. Clearly, this amount can differ significantly from the apportioned tax base.

The ‘triangular provision’ is generally aimed at tax avoidance schemes and not at structures with a bona fide economic substance.

CHAPTER SEVENTEEN

Corporate Law Implications

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1. Introduction

The formation of a CCCTB tax group for the purposes of consolidating its members' tax bases does not entail legal recognition of this group. The group will have neither a legal nor a tax personality of its own. Moreover, under the CCCTB, the consolidating company is not necessarily the parent company of the other members of the consolidated tax group, even though this legal parent/subsidiary link is required under certain domestic systems. Each group member maintains its own legal existence. As such, the election for consolidation must not compromise the individual corporate interests of each member, and the rights of their creditors and any minority shareholders must be protected. This is even more important given that the ownership threshold for including a subsidiary in the group does not exclude the presence of minority shareholders; subsidiaries can be consolidated as long as the parent company holds more than 50 percent of the voting rights and more than 75 percent of the equity, or more than 75 percent of the rights to profits.

The juxtaposition of the purely tax-based collective interest on the one hand, and the member's individual corporate interests on the other, can therefore lead to conflicts or divergent interests during the life of the group and in the event of an exit from the group.

According to the Directive, each group member's tax base is calculated according to common rules.

1.1. Diverging interests during the life of the group

According to the Directive, each group member's tax base is calculated according to common rules. A consolidation is then carried out whereby losses are offset on a cross-border basis and intra-group transactions are eliminated.

The group's tax base is subsequently apportioned among its members. If the consolidated tax base is negative, the loss is carried forward and offset against the following positive consolidated tax base. If the consolidated tax base is positive, it is apportioned between the members.

The members' individual corporate interests can be affected by the rules governing this apportionment, since these rules will serve to determine the tax liability of each member and therefore diminish their distribution capacity, which can harm the interests of the member's minority shareholders.

Moreover, the group has a mere quasi existence for corporate income tax purposes, whereas the taxpayers themselves remain subject to other taxes on a standalone basis and also have labour law obligations, such as the employee profit-sharing requirements applicable to French subsidiaries. This can be a source of practical difficulties.

1.1.1. *Apportionment of the consolidated tax base*

According to the current drafting of the Directive, the apportionment is carried out annually among the group members using the following formula: each member's share in the consolidated tax base will be equal to the consolidated base multiplied by one-third of its proportional turnover, plus one-third of the proportional size of its labour force, plus one-third of the proportional amount of its assets. Any unrelieved losses incurred by a member before joining the group can be deducted from this share.

⁵⁰ Fidal is a separate and distinct organization from KPMG International and KPMG member firms and should be described as such.

This apportionment formula applies criteria that reflect the source of income generation, *not* the level of profits per territory. An alternative method may be used in exceptional circumstances. The member's taxable income can however differ markedly from its pre-tax accounting income.

The question that arises is whether this apportionment method is compatible with the interests of individual group members and minority shareholders. The corporate income tax paid by the member can be significantly higher than what it would have paid if the CCCTB rules had not applied. In certain extreme cases, it is even conceivable that the member company might be considered under certain legal systems to have misappropriated company assets, on the grounds that the dividend it receives has been abnormally reduced because of the CCCTB tax liability, which includes the tax that another company of the group should have paid against its income for financial reporting purposes.

There is nothing in the Directive that allows the group's members to be put back into the situation they would have had in the absence of consolidation. In transposing the Directive, each Member State would have to re-establish some sort of correlation between the stand-alone result and the corporate income tax paid under the CCCTB rules. A similar difficulty arises regarding tax savings relating to losses incurred prior to consolidation: in certain situations these could end up benefitting the group more than the company's minority shareholders. Although the pre-entry losses themselves are ring-fenced, if the apportioned profits are more than they would have been *without* the consolidation/apportionment mechanism, this will result in the losses being used more quickly, and as such the company in question may end up having to pay tax sooner than would otherwise be the case. In effect, its tax losses have been used in the earlier years to shelter other group members' profits.

From the text of the Directive it appears that the collective interest prevails over individual interests; a situation that is harmful to the interests of minority shareholders. Under certain legal systems, this may be challenged in court.

It is therefore worthwhile considering the means available to Member States to resolve this difficulty, by briefly analysing the mechanisms currently in place in France, the Netherlands, the United Kingdom (UK) and Germany regarding the apportionment of a domestic group's tax liability between its member companies, in the framework of tax consolidation or equivalent systems.

In the case of a consolidation system, the income is determined on a standalone basis at the level of each member company and the results are combined and adjusted at the group level. The parent company is liable to pay the group's tax on behalf of the entire group.

The corporate income tax paid by the member can be significantly higher than what it would have paid if the CCCTB rules had not applied.

This is the situation under the French system, where the group's parent company is liable for the group's tax charges. On the other hand, each group company (other than the parent) is jointly liable for the group's tax liability, but only up to the amount it should have paid had it been taxed as a standalone entity. By contrast, the Directive provides that a consolidated tax return simply reflects the tax liability of *each group member* (Art. 110). The respective contributions of the various consolidated companies to the group's tax burden may be determined on the basis of an agreement.

In the absence of such an agreement, the rule is that the companies are taxed as if they had not been consolidated, i.e. on the basis of their standalone taxable income. This means that all the benefits or disadvantages resulting from the tax consolidation regime accrue to the consolidating parent.

Where there is such an agreement, French regulations allow group members to share the group's tax liability as they see fit, provided that the agreed method does not harm the minority shareholders' interests or does not reflect the individual interest of each company (notion of abnormal act of management).

Such agreements therefore primarily allow loss-making subsidiaries, vis-à-vis the consolidating company, to use their losses to calculate their contribution to the payment of the group's tax liability, or to immediately receive from the parent company the tax savings that their losses created for the group.

The Dutch system is similar. In practice, there will be an intercompany booking. Although the parent of a tax group is primarily responsible for paying the corporate income tax to the tax authorities, the individual members are jointly and severally liable for the corporate income tax liability. However, there is no rule that stipulates that the parent can or should recharge the tax liability within the group.

The UK applies a group relief system that enables the transfer of tax losses from one group company to another. Each company in the group files its own tax return and pays its own tax.

Under the UK system, there is no obligation for a company to pay for the group relief it receives from another group company. However, any payment is tax neutral; it will not be taxable for the recipient and is non-deductible. Since the group relief mechanism entails the definitive transfer of the tax loss from one company to another company, the transferring company loses a potential tax saving and is legally entitled to indemnification (especially if there are minority shareholders). If minority interests are involved, a payment for group relief would usually be made.

The UK applies a group relief system that enables the transfer of tax losses from one group company to another. Each company in the group files its own tax return and pays its own tax.

This is also the case in Germany. Setting up an 'Organschaft' requires the companies belonging to the Organschaft to conclude a profit and loss agreement, whereby a group member transfers all its annual profits or losses to the parent company, as a result of which its net income is nil. If these companies have minority shareholders (which is frequently the case, as a company that is more than 50 percent controlled may be included in the scope of the Organschaft), this profit and loss transfer may result in complex mechanisms of indemnification. This is one of the main criticisms of the German system.

1.1.2. *Compatibility of certain labour-related measures*

The stand-alone taxable income can sometimes be used to calculate other charges or taxes, and even to calculate supplementary employee compensation.

For example, the French Labour Code provides that companies with more than 50 employees must pay their employees a share of the profits. Incentive payments are also possible, though on a voluntary basis.

This profit-sharing is calculated on the basis of the net taxable profit, which corresponds to the taxable profit minus the amount of tax owed. In a French consolidated group, the two components (i.e. the tax year's taxable profit and the corporate income tax owed) are calculated as if the company had been taxed separately.

In order to meet these obligations, the French tax consolidation system requires each consolidated company to file a declaration on a stand-alone basis. The profit-sharing is calculated on the basis of that stand-alone declaration.

Once again, the implementation of the CCCTB rules will no doubt disrupt this mechanism; it will be necessary to recalculate these elements under domestic tax rules, which will certainly have a complicating effect.

2. Diverging Interests on Exit

Diverging interests regarding the treatment of losses can arise when a member company leaves the group.

Any pre-consolidation losses a taxpayer incurred that could not be offset against its share of the group result during the consolidation period will presumably still belong to the taxpayer individually and may be carried forward under the standard rules (see chapter 8, section 3.4).

However, the losses realized during the consolidation are not, as a general rule, available at an individual group member level but rather at a consolidated level.

As an exception to this rule, any unrelieved group losses are to be allocated between the various members in the event of: a termination of the group; a business reorganisation between two or more groups; or a merger between two or more 'principal' taxpayers.

In these specific cases, the allocation is carried out based on the apportionment factors⁵¹ applicable to the tax year in which the event took place. However, as the allocation is made on the basis of the apportionment factors, this may also result in a different taxable income being allocated to a particular group member, potentially to the detriment of minority shareholders.

Apart from these cases, the losses arising from the consolidation may only be offset against consolidated profits. As a result, the tax liability of a departing taxpayer that becomes profitable after leaving the consolidation will be higher than it would have been had the taxpayer never been in the group. The taxpayer's consolidation period will therefore have a negative impact that will affect its distribution capacity and harm its minority shareholders or, where shares are disposed of, its new shareholders.

By comparison, the domestic consolidation systems provide various solutions for this issue. In France, for example, consolidation agreements contain compensation clauses. These clauses are aimed at quantifying the disadvantages caused by the surrender of losses and set out the terms of an indemnity payment.

This indemnity, paid by the consolidating parent to its subsidiary, tends to compensate for the additional tax liability the latter will have to bear after leaving the group, due to its inability to carry forward, against its own profits, the losses generated by its activity during its consolidation period that have been kept by the parent company.

Apart from these cases, the losses arising from the consolidation may only be offset against consolidated profits.

Many other questions remain open: e.g. a taxpayer that had apportioned profits during the consolidation period and that subsequently becomes loss-making after leaving the group. Will it be able to carry back (assuming the tax rules of its Member State allow such a tactic) its future losses against earlier profits that arose from the consolidation and that were apportioned to it according to the labour, asset and sales factors?

3. Conclusion

As the above analysis shows, the 'group' notion and the method of apportioning the consolidated base among the taxpayers – which is completely separate from the profit and loss statement – raise issues of compatibility with the corporate interests of the various group members; these issues will need to be resolved. They also disrupt the implementation of systems or mechanisms based on the member company's stand-alone tax income. While it is primarily up to the Member States to take these issues into account when transposing the Directive, the questions they raise include: how should purchase agreements for shares in a member company of a CCCTB group be drafted? How should a tax due diligence on that company be conducted? And how should a tax warranty be applied after the purchase has occurred?

51 Cf. the apportionment rules set out in section 1.1.1.

CHAPTER EIGHTEEN

US Tax implications

David McCarthy and Seth Green, KPMG in the United States

1. United States Perspective

1.1. Introduction

While the concept of the CCCTB is designed, in part, to simplify the tax burdens and administration of EU groups, the extent to which US multinationals would elect into such a system is questionable. In general, the US will continue to treat each EU company as a separate entity, so that many of the US tax issues associated with owning controlled foreign corporations ("CFCs") would require a separate computation of the very issues that CCCTB is attempting to simplify. Naturally, this will vary according to each party's unique set of facts and circumstances.

Depending on the extent of US ownership, transactions between the members of a CCCTB group and timing of transactions with a US party, US rules and regulations may have significant and practical impact on any CCCTB application. CCCTB may also give rise to certain unique issues with any US-inbound investment or transactions.

This chapter is intended to be a general overview of certain US tax implications (both technical and practical) associated with the CCCTB regime. It is in no way exhaustive.

1.2. General principles

The US employs a worldwide system of tax on US resident taxpayers, meaning that US domestic corporations are taxed in the US on income from all sources, both foreign (i.e. non-US) and domestic. Further, the US does not implement any form of *participation exemption* on income (e.g. dividends) received from non-US sources, although it does grant a credit against the US tax liability for foreign income taxes paid on foreign source income.

As a result of the worldwide system and a relatively high corporate tax rate (currently a 35 percent federal statutory income tax rate), many US taxpayers opt to postpone repatriating income back to the US from foreign subsidiaries. Consequently the US has implemented certain anti-deferral regimes, notably the CFC and passive foreign investment company ("PFIC") rules.

As a general rule, US tax law is not designed to recognize the concepts of a consolidation or group tax base as they apply under foreign country law. For example, although country X might consolidate all its resident member entities as a single taxpayer, a US ultimate owner generally views the members as separate companies. So while intra-company transactions may be disregarded for CCCTB purposes, they may nonetheless remain relevant according to US tax law.

The check-the-box ("CTB") regulations were introduced to make it simpler for both the IRS and taxpayers to classify certain entities. This change added a degree of flexibility into tax planning.

The CTB regulations allow, with certain limitations, a foreign entity to choose its taxable status from a US tax perspective. For example, a Netherlands BV (*besloten vennootschap*) entity, which is by its very nature a corporate entity in the Netherlands, may elect to be treated as transparent for US tax purposes. If that BV is a wholly-owned subsidiary of a US company, then the US would simply view it as a Dutch branch of its US head office.

As a general rule, US tax law is not designed to recognize the concepts of a consolidation or group tax base as they apply under foreign country law.

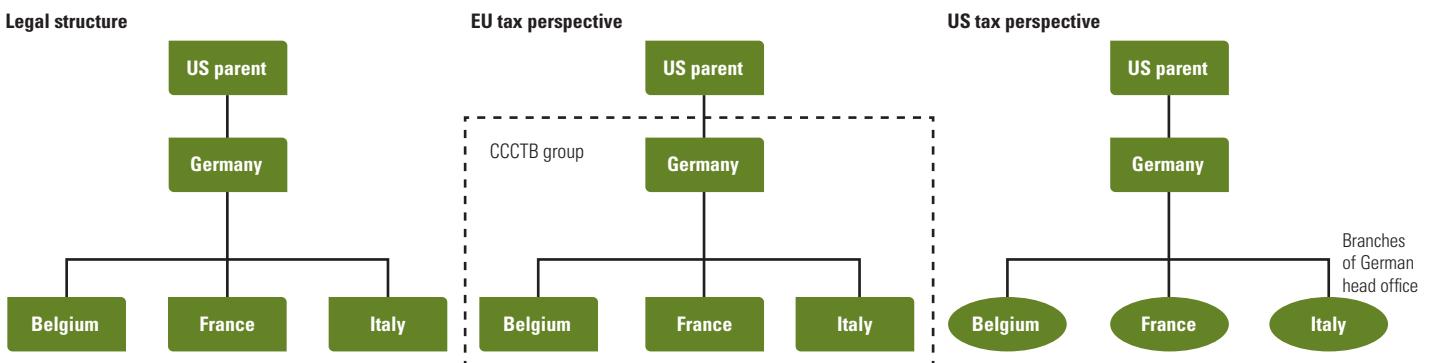
The CTB regulations provide US taxpayers a degree of flexibility with regard to structuring non-US operations, and their use has become common in multinational structures. Under this system, a US taxpayer may be able to replicate (solely for US tax purposes) many of the effects that the CCCTB is intended to introduce. In doing so, the CTB regulations can serve to eliminate some if not all of the complications associated with subpart F and the PFIC rules (see further). US-owned CCCTB groups may be expected to try to employ CTB strategies to reflect general CCCTB treatment from a US perspective. The degree to which this is feasible or advisable may vary according to the US taxpayer's unique situation and structure.

To illustrate how this might work in practice, see the charts below. In this case, elections have been filed to treat the subsidiaries in Belgium, France and Italy as transparent from a US tax perspective. As a result, any intra-European transactions are viewed as transactions between the German company and itself.

Although the CTB system does allow US taxpayers to adapt their structures to a certain extent, it does not provide an all-encompassing solution to CCCTB issues. Other concerns should be expected to persist in both US-outbound and US-inbound situations.

2. US Outbound Investment into the EU

Certain issues might arise with respect to the CCCTB for any US-outbound multinational, or for any multinational in which a US taxable entity resides in ownership of a member of a CCCTB. This is primarily a function of the US worldwide system of tax and its comprehensive foreign tax credit system. Furthermore, the broad approach to consolidation proposed by the CCCTB should create some specific issues in this regard.



Because the US disregards the intercompany transactions in this case, many of the CCCTB's intended goals are achieved. For example, it should no longer be necessary to separately compute taxable income for each foreign entity, and intercompany transactions within the CCCTB may generally be disregarded (a transfer pricing consideration).

However, CCCTB and the CTB regulations do not both have the same effects. Under the CTB regulations there are specific limitations on eligibility for elections, and treating a foreign entity as transparent may create unique (or possibly unfavourable) situations regarding foreign tax credits, reorganizations, earnings repatriation and eventual exit strategy.

2.1. Controlled Foreign Corporations

The US CFC regime is both thorough and complex. CFC regulations are generally designed to accelerate US taxation of certain income that has not yet been repatriated back to the US. Broadly speaking, this is done in the form of a deemed dividend in an amount equal to the CFC's "subpart F income".

A CFC is a non-US corporation of which more than 50 percent of (i) the total combined voting power of all classes of stock, or (ii) the value of the corporation's stock, is owned, directly or through attribution, by one or more US shareholders on any day during the tax year. A US shareholder is defined as a US person who owns, directly or indirectly, at least

10 percent of the total combined voting power of all classes of a foreign corporation's stock that is entitled to vote. The US shareholders of a CFC are taxed on a current basis on their shares of the CFC's "subpart F income."

"Subpart F income" may be generated in several ways but consists of two primary categories: (i) Foreign Personal Holding Company income, which is generally passive in nature (e.g. dividends, interest, royalties); and (ii) Foreign Base Company income. This second category is rather broad, and may include receipts from retail sales, performing services and other income generally associated with conducting an active trade or business. The rules generally apply when a group's income-producing activities from a single line of business are split between two or more related corporations. This may prove particularly troublesome in a CCCTB context as it may be triggered by intercompany transactions that, for CCCTB purposes, might otherwise be disregarded. Such transactions might include situations where related parties within a CCCTB setting are selling products in one country that were manufactured in another, or are performing services in one country on behalf of another group member.

Example

Suppose that Spain CFC, a brother/sister company to France CFC, performs technical services in Germany on behalf of France CFC based on a warranty contract between France CFC and the ultimate German customer. Both Spain CFC and France CFC have elected to apply the CCCTB system but are ultimately owned by a US parent corporation.

Under the US CFC rules, France CFC may be deemed for US tax purposes to have made a dividend payment to its ultimate US parent company. As a result, the US may tax the deemed dividend payment in the current year, regardless of the fact that no payment has actually been made.

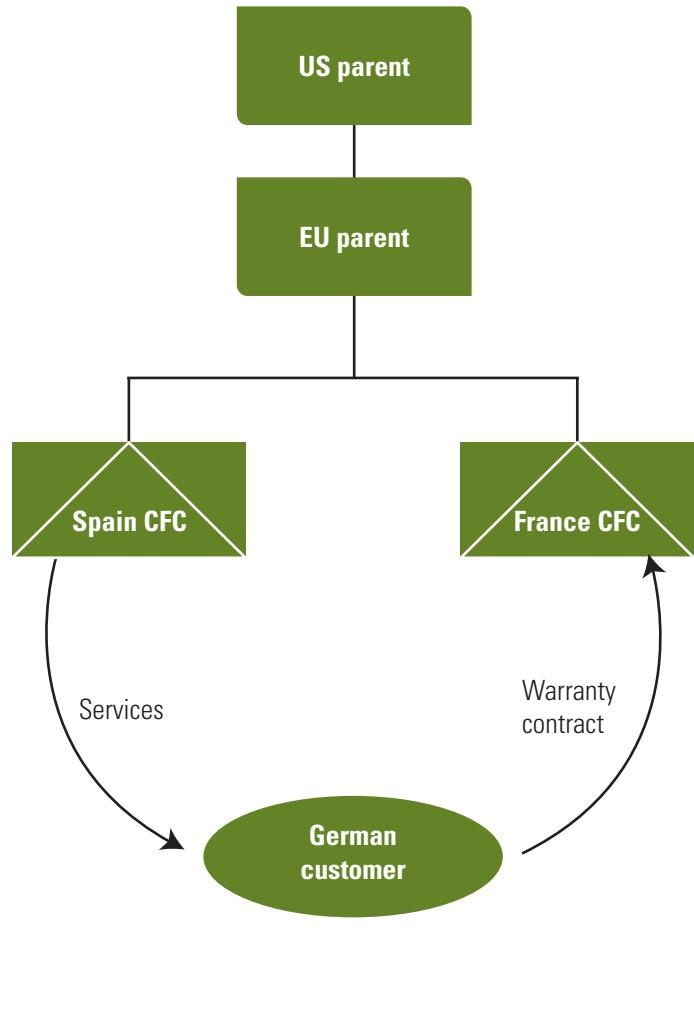
A key feature of the CCCTB is that, within the group, intercompany transactions may be disregarded. This is intended to alleviate many of the internal and external measures (such as transfer pricing) that come with monitoring such transactions.

However, the results of the above example persist regardless of the fact that a CCCTB election has been made to treat Spain CFC and France CFC as a single party for EU tax purposes. Therefore, while the CCCTB obscures the distinctions between the individual activities of Spain CFC and France CFC, these distinctions nonetheless exist from a US tax perspective as if the CCCTB had never been implemented. It could, therefore, be argued that efficiencies realised in implementing the CCCTB are/would be effectively neutralised by underlying US tax law principles.

Example

Contrast this with a situation where a single EU parent exists beneath the US parent company, and Spain CFC and France CFC have filed CTB elections to be treated as transparent from a US tax perspective. In this case, the US recognises only the EU parent company, and the transactions between Spain CFC and France CFC are disregarded.

In many cases, no subpart F income should result, and the CCCTB goals of disregarding intercompany transactions may also be achieved from a US tax perspective.



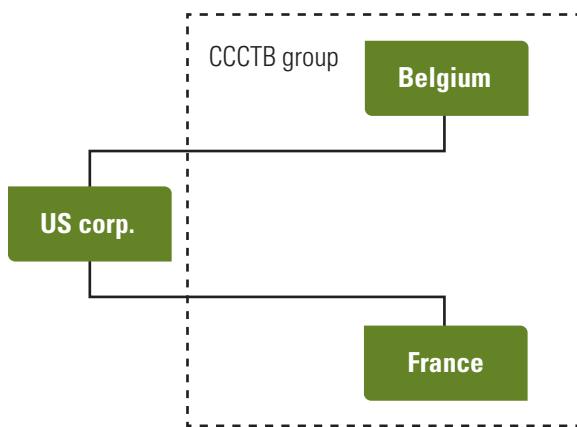
In practice, the rules on CFC determination and subpart F income recognition are highly intricate and detailed, and therefore the application and magnitude may vary according to each party's unique facts.

2.2. Foreign Tax Credits

The US foreign tax credit system has undergone significant legislative change in recent years, generally designed to combat perceived abuses that lead to a lower US tax liability.

As a general rule, the US will permit a credit against US tax liability for foreign income taxes paid on foreign source income. When calculating foreign income and using foreign tax credits, the US will compute income based on its own tax principles, and not those of the foreign tax jurisdiction(s). Consequently foreign taxable income (under CCCTB calculation) may differ considerably from foreign taxable income (under US principles).

The US has recently directed increased attention to "tax splitting" scenarios – generally situations where the foreign tax credit is separated from the income to which it ultimately relates; keeping in mind that the US will recalculate foreign income according to its own principles. This focus, in conjunction with the wide application of consolidation principles within the CCCTB, permits potential discrepancies according to US standards. The examples below illustrate this:



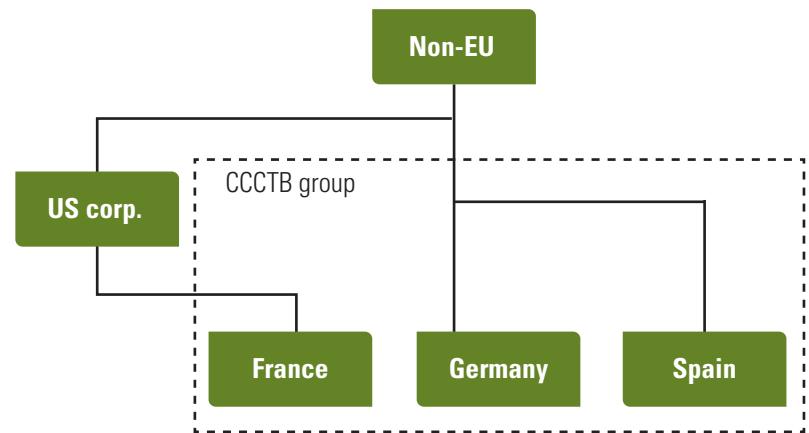
In these examples, while France theoretically comprises part of a single group for CCCTB purposes, the US does not recognize this consolidation. It is therefore possible that the CCCTB allocates income to France to a higher degree than the US regards as appropriate. This results in a higher amount of tax actually paid in France. The question is, therefore, how much of this tax should the US allow as a credit against US domestic tax liability, if the CCCTB income calculation differs significantly from US principles?

From a US perspective the CCCTB introduces a possible discrepancy, as the actual tax liability is shifted to France and is a "compulsory" payment by the French subsidiary. As tax law currently stands, it is difficult to state with certainty how the US might regard the US company's foreign tax credit position.

As indicated above, the US tax authorities have become increasingly concerned with situations where the mechanical foreign tax credit rules create pools of earnings associated with taxes (as determined under US tax principles) at an effective rate of tax that may exceed what is actually paid on the economic income that gives rise to such earnings. Such a situation could arise due to a mismatch like that described above between US and EU principles in allocating income to a subsidiary in a higher-tax EU Member State. Although the full scope and precise application of these new initiatives remains unclear, it is conceivable that the IRS would attempt to apply the initiatives in these circumstances.

3. US Inbound Investment from the EU

Unless mitigated via a US domestic tax law exemption or through a US tax treaty, an item of Fixed, Determinable, Annual or Periodical ("FDAP") income will generally be subject to US withholding tax at 30 percent of the gross amount. Therefore, structuring a US-inbound investment requires careful consideration and planning, especially with regard to tax treaty implementation.



Although it is a founding member of the OECD, the US has historically applied its own Model Tax Treaty ("the US Model") instead of relying on the OECD model – as most Western countries have generally done. As a result, qualification for benefits under a tax treaty tends to be more difficult on a US-inbound investment than it might be with another country.

3.1. Beneficial Ownership

US tax treaties tend to contain a general stipulation that the recipient of the item of income (e.g. dividend, interest, royalty, etc.) is “beneficially entitled” to the income or is its “beneficial owner”.

The concept of a “beneficial owner” of an item of income is not always clear and is invariably undefined in US tax treaties. Furthermore, the Treasury Department Technical Explanations for most treaties provide that the term “beneficial owner” is defined according to the law of the state of source (i.e. the US). For US tax purposes, “beneficial owner” is also not defined under the Internal Revenue Code, but rather borne out of the history of case law. As a general principle, beneficial ownership requires that the recipient party obtain *complete dominion and control* over the payment rather than mere physical possession.

The CCCTB therefore introduces an unusual complication regarding beneficial ownership. The allocation and apportionment of income within a CCCTB environment may call into question whether the recipient of the income is actually its beneficial owner (according to the US) for US tax treaty purposes. The income is no longer distinguishable at the level of the recipient, but rather introduced into a much larger and somewhat indiscriminate pool, and allocated/apportioned in a manner that should vary according to each party's unique circumstances.

3.2. Tax Treaties

There is a variety of ways in which the US might address perceived conflicts between the CCCTB and its existing tax treaties. But there is also precedence to be drawn upon for insight.

US tax treaties, particularly recent ones, often contemplate a situation commonly referred to as a “triangular case.” A triangular case may develop where there is US-source FDAP (eligible for treaty relief) that is paid to a branch of the recipient. This branch is resident in a comparatively lower-tax jurisdiction and its head office does not tax the income of the branch (see also chapter 16, section 4.1).

The US has historically perceived this scenario as a potential abuse of its tax treaty network, and has begun introducing “triangular provisions” into treaties. Generally, withholding tax in applicable situations is reduced to no less than 15 percent of the gross amount of the income. This is less than the default 30 percent (in the absence of any treaty benefits), but generally more punitive than a situation where full benefits would be allowed.

What is notable about a triangular case is that it does contemplate a scenario where, as with a CCCTB, income for treaty purposes may be effectively taxed in a jurisdiction other than where it is actually received. In such cases, the US will not simply deny all treaty benefits, but rather restrict them to an extent that it believes will generally discourage any behaviour perceived as potentially abusive. Therefore the general triangular provision presents a valuable insight into how the US may choose to adapt to a CCCTB in a treaty context.

To the extent it is deemed necessary, the US may look to amend certain treaties to be sensitive to CCCTB concerns. However, amending a large number of tax treaties may prove to be a cumbersome and time-consuming process. It is therefore also possible that the US addresses such issues directly via domestic legislation. There is certainly precedence for this sort of action (e.g. *the Foreign Investment in Real Property Tax Act of 1980*).

Another possible alternative is to negotiate a comprehensive tax treaty between the US and the European Union. This approach may be viewed as similar to prior suggestions to treat the European Union as “one country” for subpart F purposes. It may be difficult to imagine that the US and the EU would enter into any type of comprehensive tax treaty, since the CCCTB does not imply that the individual tax systems of each country are eliminated.

In summary, the US may view the CCCTB as potentially conflicting with its existing tax treaty system. There are various mechanisms by which the US may address this challenge. However, some restriction in overall treaty benefits might be anticipated, to the extent that income is allocated in a manner inconsistent with general treaty principles.

The allocation and apportionment of income within a CCCTB environment may call into question whether the recipient of the income is actually its beneficial owner (according to the US) for US tax treaty purposes.

4. State and Local Considerations

Any discussions about US tax as a general concept generally refer to federal tax law. However, any complete discussion of US tax should respect the innumerable US state and local taxing jurisdictions.

As a general rule, US states are not required to follow the principles of federal tax law. For example, they may or may not recognise consolidated groups, implement a separate depreciation methodology or even apply the principles of US tax treaties. Some may implement a franchise tax based on equity or apply a gross receipts tax on sales. Some do not tax income at all. A US taxpayer's mix of state and local tax filings tend to make each party's complete US tax situation unique.

Therefore, it must be noted that there are many US perspectives on CCCTB. It is difficult to predict how the various state and local tax jurisdictions will view the CCCTB, although the majority might be expected to follow federal principles by default.

5. Future Developments

To date, the US taxing authorities have not released any interpretative guidance regarding the US perspective on the CCCTB regime. Depending on if and how the CCCTB evolves toward its final form, there may be certain official guidance with regard to US tax treatment. The extent and format to which such guidance might be communicated is not immediately clear.

There is certain precedence where US tax authorities may give specific guidance relating to tax regimes existing within the EU. For example, US Treasury Department technical explanations to tax treaties often elaborate on the applicability of certain treaty provisions within the EU parent/subsidiary directives.

If and when the CCCTB nears implementation, we may see increasing clarity on US tax issues that might be expected to arise as a result. Whether this takes the form of cooperative US/EU guidance or unilateral US procedures – or both – remains to be determined.

Depending on if and how the CCCTB evolves toward its final form, there may be certain official guidance with regard to US tax treatment.

6. Conclusion

The US tax system is not generally equipped to accommodate foreign consolidated groups, let alone a CCCTB-type proposal. Therefore, a CCCTB group with a US tax presence (whether inbound or outbound) may create a number of US tax issues.

For each taxpayer, these issues will be unique according to its particular facts and circumstances. However, the US tax authorities would be expected to intervene with respect to any perceived avenues for abuse or avoidance of US tax. It is uncertain what exact form these interventions will take.

CHAPTER NINETEEN

Reorganisation provisions

Joel Phillips, KPMG in the United Kingdom

1. Introduction

The Directive contains provisions dealing with

- (business) reorganisations within a CCCTB group
- the transfer of the legal seat of a taxpayer that is part of such a group
- the treatment of losses where (1) a business reorganisation results in one CCCTB group acquiring another or (2) two or more principal taxpayers merge

Article 59(1) states that: “[i]n calculating the consolidated tax base, profits and losses arising from transactions directly carried out between members of a group should be ignored.” For that reason, Article 70(1) appears largely unnecessary: it is difficult to think of many arrangements that would be expected to be “business reorganisations within a group” without being “transactions directly carried out between members of a group”.

As drafted, Article 70(1) eliminates only CCCTB liabilities. It has no effect on other taxes, whether direct or indirect. So taxpayers will still need to consider whether any transfer taxes, VAT or third country taxes could arise.

Before moving on, it is worth noting that the final sentence of Article 70(1) states that “Article 59(3) shall apply.” This is a reference to the requirement for intra-group transactions to be documented consistently and adequately. It is unclear why the Directive draws specific attention to this point.

2.2. Transfer of a taxpayer’s legal seat

The transfer of a taxpayer’s legal seat is a topical issue given recent CJEU case law in this area. Under the real seat theory, the legal capacity of a company (i.e. its existence as a creature of law) is determined by the place where the company’s actual centre of administration (its seat) is established. By contrast, under the incorporation principle the company’s legal capacity is determined by reference to where the company was incorporated. Certain civil law jurisdictions permit a company’s legal seat to be transferred from one jurisdiction to another; in such cases the company ceases to exist as a creature of the transferring jurisdiction’s law, and continues instead as a creature of the transferee jurisdiction’s law.

Such transfers can give rise to ‘exit’ tax charges under the current tax laws of certain Member States.

In the absence of provisions to the contrary, it might be asked whether such tax charges would continue to apply where a taxpayer has opted into the CCCTB. Article 70(1) therefore provides that “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.” This is helpful, but it would be preferable if the provision could also make it clear that the transfer has no effect on existing tax attributes such as carried-forward tax losses (e.g. under Art. 64) and asset values for tax purposes.

Article 70(1) lays down a general rule that “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.”

This is subject to an anti-avoidance provision in Article 70(2) that is intended to prevent taxpayers from undertaking transactions to move assets – and therefore apportioned profits – from one Member State to another.

2.1. Business reorganisations within a CCCTB group

The term “business reorganisation” is left undefined, and will hopefully be clarified in a subsequent version of the Directive or under the comitology procedure (the committee system that oversees the delegated acts implemented by the European Commission). It appears likely that both the transfer of shares (e.g. in operating companies) and the transfer of assets (of those companies) should be capable of qualifying as a business reorganisation, provided these transfers are intra-group.

It is consistent with the general rule in Article 59(1) to exclude profits or losses that arise from the consolidated tax base:

2.3. Anti-avoidance

Article 70(2) is an anti-avoidance provision designed to prevent taxpayers from transferring assets, and therefore apportioned profits (by operation of the asset factor) from one Member State to another. Such a transfer could be beneficial if the transferee Member State has a low headline tax rate or if there are pre-consolidation losses that can be used there.

It applies 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”.

Where the anti-avoidance provision applies, the transferred assets are attributed to the asset factor of the transferring taxpayer until (1) a member of the group ceases to be the economic owner of the assets, or (2) five years have passed. If the transferring taxpayer no longer exists, or no longer has a permanent establishment in the Member State from where the assets were transferred, a permanent establishment is deemed to exist (so that it is possible to increase the asset factor of the Member State in which the deemed permanent establishment exists).

Presumably only the asset factor is considered relevant because it is thought unlikely (or acceptable, in the light of the fundamental freedoms) that a taxpayer, in reorganising its business, would transfer external revenues, employees or payroll costs.

At the outset it is worth noting that the anti-avoidance provision lacks any motive test, so that if the conditions it lays down are satisfied then it must be applied (even if the transactions that cause it to apply were entirely commercially motivated and were not intended to give rise to a tax advantage).

Based on its wording, the anti-avoidance provision may be triggered not only by business reorganisations that fall within Article 70(1) but also by transactions between members of a group (such transactions may not be business reorganisations but Article 59(1) would nevertheless eliminate them from the consolidated tax base, so it is understandable that they should be treated in the same way).

It is unclear whether the transfer of a taxpayer’s legal seat could also cause Article 70 (2) to apply. Based on the strict wording of Article 70(2) this appears unlikely unless the transfer is associated with one or more other transactions (and therefore forms part of a “series of transactions”). However, it is questionable whether this is the intended result, as the transfer of a taxpayer’s legal seat may well cause all its assets to transfer from one Member State to another.

The requirements for “substantially all the assets of a taxpayer” to be transferred and for the asset factor to be “substantially changed” raise several questions:

- What does “substantially” mean? Can it be reduced to a percentage threshold?
- When should the tests be applied? The most logical time would appear to be immediately before the business reorganisation in question or at the end of the series of transactions (in which case presumably the comparison is with the position before the first of those transactions, and it will be necessary to determine when this is)
- As regards the asset-transfer test, which is relevant: the assets’ open market value, their book value (in which accounts?), or something else (e.g. their value for tax purposes)?
- And will the anti-avoidance apply if assets are transferred to multiple Member States given that the asset-transfer test refers to the transfer being to “another Member State”?
- Regarding the asset-factor test, it is unclear whose asset factor is relevant. This could be that of the Member State of the transferring taxpayer (which appears most likely), or also that of the transferee taxpayer(s)

It is unclear whether the transfer of a taxpayer’s legal seat could also cause Article 70(2) to apply.

As discussed in chapter 13, section 11, Article 119 entitles taxpayers to request an opinion on how the Directive will apply to a specific transaction or series of transactions and, where there is a cross-border element, requires the Member States concerned to agree on a common position. This should go some way to resolving the uncertainties listed above, but it will not necessarily ensure that Member States adopt consistent interpretations and does not compensate for the lack of a motive test. Moreover, it remains to be seen how quickly any such opinion would in practice be provided, as competent authority proceedings often take months or years. It is hoped that mandatory time limits will be laid down in the Directive or under the comitology procedure.

The five-year add back is arbitrary and may be larger or smaller than any tax savings. Although application of the provision is presumably intended to disadvantage the taxpayer, this may not be the case (e.g. if assets are transferred from a jurisdiction with a low headline rate to a high headline rate).

3. Treatment of Losses Where A Business Reorganisation Takes Place Between Two or More Groups (Art. 71)

Article 71 affects the use of losses following either a business reorganisation involving two or more groups (Art. 71(1)) or a merger pursuant to the Merger Directive (Art. 71(2)).

It requires the unrelieved losses of the relevant groups (as to which groups are relevant, see below) to be allocated to their members based on the factors applicable to the tax year in which the business reorganisation or merger takes place. For a worked example see chapter 11, section 6. Those members may carry forward the losses and set them against future profits apportioned to them. The lack of flexibility afforded to such losses as compared to consolidated, unallocated losses may mean they are relieved much later or not at all. The difference in headline tax rates between Member States may further increase the cost to the taxpayer.

3.1. Merger of principal taxpayers

It is most practical to begin with Article 71(2) as this lays down relatively straightforward conditions.

Article 71(2) applies where “two or more principal taxpayers merge within the meaning of Article 2(a) (i) and (ii) of the Merger Directive (Council Directive 2009/133/EC).

The difference between the two mergers relates to the identity of the surviving entity. In an Article 2(a) (i) merger the surviving entity is an existing company that issues securities (and potentially some cash) to the shareholders of the target companies. The Merger Directive describes the transaction as follows:

“one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company in exchange for the issue to their shareholders of securities representing the capital of that other company, and, if applicable, a cash payment not exceeding 10% of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities”

An Article 2(a) (ii) merger is similar, but involves the use of a newly formed company as the surviving entity:

“two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, in exchange for the issue to their shareholders of securities representing the capital of that new company, and, if applicable, a cash payment not exceeding 10 percent of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities”

In either case, unrelieved losses of the groups previously headed by the relevant (since merged) principal taxpayers must be allocated among their members.

3.2. Business reorganisations

By contrast, Article 71(1) provides that:

“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 [a prescribed allocation mechanism]”

This drafting creates a number of uncertainties.

As discussed above, the term “business reorganisation” is undefined, and it is therefore unclear what the words “as a result of a business reorganisation” add to the requirement for a group (or two or more members of a group) to become part of another group. It is possible that, for Article 71(1) to apply, all of the groups (or group members) involved in the reorganisation must be under common ownership beforehand (so that the owners are reorganising – and retaining – their existing economic interests).

Assuming, then, that Article 71(1) does apply to a particular transaction, which losses does it require to be allocated?

Certainly the unrelieved losses of the acquired group must be allocated between its members (this will of course be relevant only where the acquired group is a CCCTB group). But is the same true of the losses of the acquiring group? It is unclear whether the “previously existing group or groups” are the acquired group or groups or whether they also include the acquiring group.

The reference to “two or more members of a group” becoming part of another group does not help matters. Article 69 states that losses are not attributed to a group member that leaves a group, so that on an initial reading, if the business reorganisation involves members of one group becoming part of another, then the only unrelieved losses in point can be those of the acquiring group.

If losses of the acquiring group are required to be allocated to its members, then this is a surprising result. We can understand that, as a policy matter, Member States should have some protection against loss-buying transactions. In the absence of Article 71, a profitable CCCTB group could acquire another CCCTB group that has carried-forward consolidated losses. The acquired CCCTB group’s losses would not be pre-consolidation losses (so Art. 64 would not prevent them being set against the combined group’s consolidated tax base) and the general anti-abuse rule in Article 80 would apply only in extreme circumstances. But although such concerns arguably justify ring-fencing the losses of the acquired group, they do not obviously justify ring-fencing the losses of the acquiring group.

An alternative explanation could be that the quoted words are intended to override Article 69 and thereby permit losses to be attributed to group members when they leave one CCCTB group and join another, provided they do so as a result of a business reorganisation. On that reading, the reference to “unrelieved losses of the previously existing group or groups” would refer to the unrelieved losses of the group to which the “two or more members” belonged prior to the reorganisation.

We hope these uncertainties will be clarified in a subsequent version of the Directive or under the comitology procedure.

CHAPTER TWENTY

Accounting implications

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1. Introduction

This chapter discusses the accounting implications that derive from the Directive for current and deferred taxes. The discussion focuses on the recognition of deferred taxes in accordance with IAS 12 “Income Taxes”, assuming that companies that opt for the CCCTB rules for financial reporting purposes issue financial statements in accordance with IFRS.

CCCTB rules provide that each group entity is liable to tax on its share of the consolidated profit. Therefore each entity accounts for current taxes and deferred taxes. According to the CCCTB rules for determining the CCCTB tax base, a separate tax balance sheet is not required but is necessary for determining the accounting tax base to account for deferred taxes. Under CCCTB rules, switching from the present tax regime to a group wide tax system leads to a change in the tax status and has to be accounted for respectively.

The chapter starts with the discussion of recognition and measurement of income taxes for accounting purposes in general, and then describes classification and presentation requirements. The chapter ends with a brief discussion of accounting implications arising from the change in the tax status.

Please refer to chapter 5, section 2 regarding the interaction of the CCCTB rules with accounting principles.

2. Recognition and Measurement of Income Taxes

2.1. Recognition and Measurement of Current Taxes

Current tax represents the amount of income taxes that are payable or recoverable in respect of the taxable profit or loss for a period.⁵² Therefore a current tax liability or a current tax asset is recognised for income tax payable or income tax paid (but recoverable) not only for the current period but also for all prior periods.

Generally, current tax liabilities or assets are measured at the amount expected to be paid to or recovered from the tax authorities. As in the case of deferred taxes, the measurement of current tax liabilities and assets is based on tax rates and tax laws that are enacted or substantively enacted at the reporting date.

The CCCTB tax consolidation permits groups in the CCCTB definition comprising a parent entity and its wholly-owned subsidiaries to elect in effect to be treated as a single entity for income tax purposes (“tax consolidated group”). Because the definition of a parent entity and a subsidiary for tax purposes is different when there are less than half of the voting rights⁵³ or when there are no voting rights⁵⁴ for financial reporting purposes, the entities included in

52 KPMG (editor); Insights to IFRS, 8th edition, 2011/12, 3.13.15.10, p. 590.

53 E.g. associated companies.

54 E.g. special purpose entities, which have to be fully consolidated following IAS 27 and SIC-12.

a CCCTB tax-consolidated group could deviate from the entities consolidated in the group's financial statements (see chapter 4, section 4.2).

Under the CCCTB, a tax-consolidated group prepares a single consolidated annual tax base ("CCCTB tax base"). However, each group member remains liable for taxes with its share in the CCCTB tax base (see chapter 11J), and therefore accounts for current taxes.⁵⁵

The CCCTB has to be differentiated from cases where the parent entity will become liable for the income tax liabilities of the entire group. The entities in such a tax-consolidated group may enter into a tax-sharing agreement, including a tax funding or contribution agreement, in order to allocate tax expenses of the past to subsidiaries on a predetermined, ongoing basis to show the allocated taxes in their income statement. In the absence of specific guidance in IFRS, an entity should in this case choose an accounting policy – to be applied consistently – to accounting for income taxes in the separate financial statements of the subsidiaries within the tax group.⁵⁶

2.2. Recognition of Deferred Taxes

Deferred taxes are recognized for the estimated future tax effects of temporary differences, unused tax losses carried forward and unused tax credits carried forward. The CCCTB impacts temporary differences and unused tax losses carried forward.

2.2.1. Temporary differences

A temporary difference is the difference between the tax carrying amount ("tax base" according to IAS 12) of an asset or liability and its carrying amount in the financial statements that will result in taxable or deductible amounts in future periods when the carrying amount is recovered or settled.⁵⁷ For example, when the carrying amount of an asset exceeds its tax base, the amount of taxable economic benefits will exceed the amount that will be allowed as a deduction for tax purposes. This difference is a taxable temporary difference and the obligation to pay the resulting income taxes in future periods is a deferred tax liability. Temporary differences may be either taxable (i.e. will result in taxable amounts in future periods and therefore lead to a deferred tax liability) or deductible (i.e. will result in deductions in future periods and therefore lead to a deferred tax asset).

In determining the amount of deferred tax to be recognized, the analysis focuses on the carrying amounts in the statement of financial position (i.e. "balance sheet approach") rather than on the differences between comprehensive income and taxable profits (i.e. "income statement approach").

CCCTB rules for determining the CCCTB tax base are based on an income-oriented view (see chapter 5). This view, which differs from a balance sheet-oriented view (where the income

tax takes into consideration a tax balance sheet), is in contrast to the determination of temporary differences based on the balance sheet approach.

As outlined above, tax carrying amounts are relevant for determining temporary differences. According to CCCTB rules, there are no such tax-carrying amounts because of the income-oriented view. However, these tax carrying amounts exist implicitly for deriving the income-oriented CCCTB tax base. Accordingly, the tax carrying amounts have to be carried on as a kind of 'shadow' tax accounting.

Determining the tax base

The CCCTB Directive regards the tax base as the amount of the group's profit or loss assessable to tax. However, according to IAS 12, when determining deferred tax, the tax base of an asset or a liability is the amount attributed to that asset or liability for tax purposes. The tax base of an asset is the amount that will be deductible for tax purposes against any taxable economic benefits that will flow to an entity when it recovers the carrying amount of the asset. The tax base of a liability is its carrying amount, less any amount that will be deductible for tax purposes in future periods. Some items have a tax base even though they are not recognized as assets or liabilities for financial reporting purposes. For example, German tax law allows a reserve for insurance compensation (*Rücklage für Ersatzbeschaffung*).

As IFRS were used as a guideline to develop the CCCTB tax base rules, fewer temporary differences are expected to occur in comparison to the non-CCCTB tax regimes that use different tax base rules.

Temporary differences only arise in cases where the CCCTB values deviate from the IFRS values, for example, with regards to the CCCTB values for the following:

- Goodwill, which may be depreciated over its useful life on a straight line basis. If that period cannot be determined, Goodwill has to be depreciated over 15 years
- Buildings, which are depreciated over a useful life of 40 years
- Long life fixed assets, which are depreciated on a straight line basis of 15 years

This difference is a taxable temporary difference and the obligation to pay the resulting income taxes in future periods is a deferred tax liability.

⁵⁵ And as a consequence for deferred taxes.

⁵⁶ With regard to acceptable approaches, see KPMG (editor); Insights to IFRS, 8th edition, 2011/12, 3.13.640.30, p. 636.

⁵⁷ KPMG (editor); Insights to IFRS, 8th edition, 2011/12, 3.13.30.10, p. 591.

- Fixed assets other than buildings, long-life tangible assets and intangible assets, which are depreciated together in one asset pool at an annual rate of 25 percent of the depreciation base
- Discounting of long-term provisions at the yearly average of the Euro Interbank Offered Rate (Euribor)
- Discounting pension obligations with reference to Euro Interbank Offered Rate (Euribor)

Intra-group transactions also need to be analyzed, as to whether they create differences that need to be accounted for by recognizing deferred taxes. Usually this should not be the case, as intra-group transactions are eliminated at the consolidated group level as well as for tax purposes (see Chapter 6).

2.2.2. Other differences

In some cases a non-temporary difference arises between IFRS and the corresponding tax treatment, because an item that impacts the financial accounting will not be taxable or deductible in the future. While there is no definition of such items in IFRS, often in practice they are referred to as “permanent” differences.

With regards to the CCCTB this is the case for (see chapter 5, section 3.5):

- Profit distributions and repayments of equity or debt
- 50 percent of entertainment costs
- Bribes
- Corporate tax
- Transfer of retained earnings to equity reserve
- Penalties payable to a public authority for breach of any legislation
- Costs incurred by a company for the purpose of deriving income that is exempt; such costs shall be fixed at a flat rate of 5 percent of that income unless the taxpayer is able to demonstrate that it has incurred a lower cost
- Monetary gifts and donations – other than those made to charitable bodies as defined in Article 16 of the Directive.
- Except for a proportional deduction of the depreciation of fixed assets and costs relating to non-depreciable assets, costs relating to the acquisition, construction or improvement of fixed assets are non-deductible except those relating to research and development.
- Taxes listed in Annex III of the Directive, with the exception of excise duties imposed on energy
- Alcohol, alcoholic beverages and manufactured tobacco.

2.2.3. Unused tax losses

In assessing whether a deferred tax asset arising from unused tax losses may be recognised, it is necessary to consider the sources of taxable profit in respect of deductible temporary differences.

A deferred tax asset is recognised for the unused tax losses carried forward, to the extent that it is probable that future taxable profits will be available.

According to the CCCTB rules a trading loss is computed in the same way as a trading profit. A negative consolidated tax base would be carried forward at group level without time limits, and be off-set against future consolidated profits. Therefore a deferred tax asset should be recognised – apportioned to group entities in case of separate financial statements – to the extent that it is probable that future taxable profits will be available.

Pre-consolidation tax losses

Under the concept of the CCCTB, each group entity remains tax liable for its share in the CCCTB consolidated tax base. The EU commission states that the ring-fencing of pre-consolidation tax losses is a policy choice that takes account of national interests. Therefore pre-entry tax losses could remain with the company where the losses incurred and could be offset on a standalone basis. The pre-consolidation tax losses shall be carried forward and may be offset against the apportioned consolidated tax base (Art. 64). As a result, if the recognition requirements are fulfilled, a deferred tax asset (that has been set up for pre-consolidation tax losses) can also be used during the CCCTB regime and therefore must not be written off.

The pre-consolidation tax losses shall be carried forward and may be offset against the apportioned consolidated tax base (Art. 64).

At the end of every reporting period, an entity assesses whether it has any previously unrecognised deferred tax assets that are recognised as probable future taxable profits. The entity recognises any previously unrecognised deferred tax assets to the extent that future taxable profit will probably allow the deferred tax assets to be recovered.

2.3. Measurement of Deferred Taxes

Deferred tax assets and liabilities are measured based on:

- The expected manner of recovery (in case of an asset) or settlement (in case of liability)
- The tax rate expected to apply when the underlying asset is recovered or the underlying liability is settled, based on rates that are enacted or substantively enacted at the reporting date.

EU member states retain autonomy in setting their tax rates. Accordingly, when measuring the amount of deferred tax in the separate financial statements of member states entities, one must consider the expected autonomous tax rate that applies when the temporary difference reverses.

According to CCCTB rules, the CCCTB 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; the weight is determined by the presence of the apportionment factors of the firm in each jurisdiction relative to its total factors. However, when calculating current taxes, it is necessary to apply the statutory tax rate of the single entity within the consolidated group – and *not* the effective tax rate from the group's perspective.

3. Classification and Presentation of Current and Deferred Taxes

General

Tax assets and tax liabilities are presented separately from other assets and liabilities in the financial statement. In addition, current tax assets and current tax liabilities should be distinguished from deferred tax assets and deferred tax liabilities in the financial statement the latter should be classified as non-current.

Offsetting

Current tax assets and current tax liabilities are offset only when:

- The entity has a legally enforceable right to set off current tax assets against current tax liabilities; this will only be the case when the tax payable or receivable relates to income taxes levied by the same taxation authority *and* the taxation authority permits the entity to make or receive a single net payment
- The entity intends to either settle on a net basis, or to realize the asset and settle the liability simultaneously

Accordingly, deferred tax liabilities and assets are offset where the entity has a legally enforceable right to offset current tax liabilities and assets, *and* the deferred tax liabilities and assets relate to income taxes levied by the same tax authority on either:

- The same taxable entity
- Different taxable entities; where these entities intend to settle current tax liabilities and assets on a net basis, or where their tax assets and liabilities will be realized simultaneously for each future period in which these differences reverse.

The CCCTB makes each group entity liable for income tax to national tax authorities; therefore there should be no accounting implications arising from the current situation, with regard to the offsetting of current and deferred taxes.

IAS 12 further explains that the offsetting requirements for deferred taxes allow a single entity to offset deferred taxes only if they relate to income taxes levied by the same taxation authority, *and* the entity has a legally enforceable right to offset current tax assets against current tax liabilities (as is often the case with federal and state tax systems; e.g. under Germany's corporate tax and trade tax).

4. Change in the Tax Status

A change in the tax regime of an entity causes consequent changes in current and deferred tax, according to the following general principles: the change in current and deferred tax is recognised in profit or loss except to where it relates to an item (e.g. a revaluation of property, plant and equipment) recognised *outside* profit or loss in the current or previous period(s).

There may be a delay between the date of the management decision to enter the CCCTB regime and the date that the entity actually enters the regime. In our view, the entity should measure deferred taxes at the entry tax rate from the date of the management decision, provided that there are no substantive conditions for entering the CCCTB that are outside the control of the entity. Conversely, if entry to the CCCTB regime is subject to conditions that are not within the control of management (e.g. shareholder approval, regulatory approvals etc.), then in our view the entity should consider whether those conditions are substantive. Depending on the outcome of that assessment, it may be necessary to continue to calculate deferred taxes at the prevailing tax rate until the substantive conditions are met.

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 príjmů 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

Polska

Podatek od nieruchomości

Portugal

None

România

None

Slovenija

Davek na izplačane plače

Slovensko

None

Suomi/Finland

None

Sverige

Fastighetsskatt

Allmän löneavgift

Särskild löneskatt

United Kingdom

National Non-Domestic Rates from Businesses

Capital Levies

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 yy³³	– 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)
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CCCTB/WP/045	Summary Record of 12 September 2006 meeting (9)
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CCCTB/WP/047	Formulary apportionment (10)
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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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