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Proposal for a

**COUNCIL DIRECTIVE**

**on a Common Consolidated Corporate Tax Base (CCCTB)**

{SWD(2016) 341 final}

{SWD(2016) 342 final}

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE PROPOSAL**

#### **• Reasons for and objectives of the proposal**

On 16 March 2011, the Commission proposed a Directive for a Common Consolidated Corporate Tax Base (CCCTB). The proposal, which is still pending in Council, is one of the Commission's REFIT initiatives and aims to provide companies with a single set of corporate tax rules for doing business across the internal market. The CCCTB proposal of 2011 would therefore allow companies to treat the Union as a single market for the purpose of corporate tax and thereby, facilitate their cross-border activity and promote trade and investment.

It has lately become clear to the international community that the current rules for corporate taxation no longer fit the modern context. Generally, corporate income is taxed at national level, but the economic environment has become more globalised, mobile and digital. Business models and corporate structures are more complex, making it easier to shift profits<sup>1</sup>. Furthermore, the divergence of national corporate tax systems has allowed aggressive tax planning to flourish over the last decade. Thus, when national rules are drafted without considering the cross-border dimension of business activities, mismatches are likely to arise in the interaction between disparate national corporate tax regimes. Such mismatches create risks of double taxation and double non-taxation and thereby distort the functioning of the internal market. In these circumstances, Member States find it increasingly difficult to fight effectively, through unilateral action, against aggressive tax planning practices<sup>2</sup> in order to protect their national tax bases from erosion and counter profit shifting.

Given that Europe's priority today is to promote sustainable growth and investment within a fair and better integrated market, a new framework is needed for a fair and efficient taxation of corporate profits. In this context, the CCCTB features as an effective tool for attributing income to where the value is created, through a formula based on three equally weighted factors (i.e. assets, labour, and sales). Since these factors are attached to where a company earns its profits, they are more resilient to aggressive tax planning practices than the widespread transfer pricing methods for allocating profit.

Alongside the anti-tax avoidance function of the CCCTB, the re-launched project would also retain its features as a corporate tax system which facilitates cross-border trade and investment in the internal market. Currently, businesses with cross-border activity have to comply with up to 28 divergent corporate tax systems. This is a burdensome process, both timing-wise and economically, and diverts the effort out of the main thrust of doing business. The re-launched CCCTB would continue to offer the advantages of the proposal of 2011 in terms of subjecting groups of companies with a taxable presence in at least one Member State to a single set of rules for calculating their tax base across the European Union (EU) and thereby, making them accountable to a single tax administration ('one-stop-shop'). Cross-border loss relief would still be an automatic outcome of consolidation and transfer pricing rules would not apply within the group, as the distribution of the group-wide revenues would be carried out through the formulary apportionment.

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<sup>1</sup> The Commission Staff Working Document ([SWD\(2015\) 121 final](#)) gives a detailed overview of the historical development and the current issues and challenges in the taxation of multinational profits.

<sup>2</sup> "Aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability" (Commission Recommendation of 6th December 2012 on aggressive tax planning, [C\(2012\)8806 final](#)).

The difference, as compared to the proposal of 2011, is that the re-launched initiative would lay down mandatory rules for groups above a certain size, in order to enhance the resilience of the system against aggressive tax planning practices. Having said this, it would also be important that the rules be made available, as an option, to entities which are subject to corporate tax in the Union but do not meet the criteria that would subject them to the common framework.

#### *Way forward towards a CCCTB*

The discussions in Council since 2011 have shown that the CCCTB proposal, being a very ambitious project, would be unlikely to get adopted, in its entirety, without a staged approach. Thus, various elements (especially, tax consolidation) have given rise to a difficult debate and could be holding back progress on other fundamental features of the system. In an effort to get round these delays in making progress, the Commission, in its Action Plan of June 2015, advocated a step-by-step approach to the CCCTB. According to this, it is suggested that work on consolidation be postponed until agreement is first secured on a mandatory set of rules for the common base, i.e. the common corporate tax base. This does not nonetheless change the fact that the Commission will submit the two proposals, i.e. for a common corporate tax base and a CCCTB, simultaneously and as part of a single initiative. The proposal of 2011 for a CCCTB, which is currently pending in Council, will be withdrawn at the same time as the Commission adopts the new proposals. In this regard, it is fundamental that tax consolidation remains an essential element of the CCCTB initiative, since the major tax obstacles faced by companies in the Union can most effectively be tackled within a consolidated group.

This proposal for a Directive focusses on the so-called 'second step' of the staged approach, i.e. after the elements of the common base have politically been agreed. Until this is achieved, the proposal for a CCCTB will remain pending for examination in Council. The CCCTB lays down the conditions for being in a group, sets out the possible forms that a group can take and includes rules on the technicalities of consolidation. In addition to providing for the necessary adjustments when entering and leaving the group, the text deals with business reorganisations, focussing on the particularities of cross-border groups and more precisely, the treatment of losses and unrealised capital gains. There are also provisions on the dealings between the group and other entities; these primarily relate to the treatment of withholding taxes and credit relief for double taxation. One of the principal elements of the proposal is the formulary apportionment, i.e. the mechanism of weights used for allocating the consolidated tax base of the group to the eligible Member States. Whilst, under the rules on the common base, companies may continue to apply, as a matter of principle, their national rules for administering their tax liability, the CCCTB would require a special administrative framework in order to accommodate the structures of cross-border groups.

- **Consistency with existing policy provisions in the policy area**

The re-launch of the CCCTB proposal lies at the heart of the Commission's Communication on an Action Plan for a Fair and Efficient Corporate Tax System in the EU, which was adopted on 17 June 2015. The Action Plan identified 5 key areas for action<sup>3</sup>. It reviews existing corporate tax policies in the Union and sets out the aim of establishing a system of corporate taxation in the EU whereby business profits are taxed in the jurisdiction where

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<sup>3</sup> Communication COM (2015) 302 final from the Commission to the European Parliament and the Council of 17 June 2015 on a fair and efficient corporate tax system in the European Union: 5 key areas for action,.

value is actually created. The CCCTB is presented as an overarching initiative which could be an extremely effective tool for meeting the objectives of fairer and more efficient taxation.

Furthermore, the re-launched proposal for a CCCTB would include rules to address some of the key Actions of the OECD initiative on Base Erosion and Profit Shifting (BEPS). These elements have now been incorporated, in the form of minimum standards, in the recently adopted Council Directive 2016/1164/EU (also referred to as Anti-Tax Avoidance Directive (ATAD))<sup>4</sup>. In fact, it should be expected that the CCCTB incorporate the anti-tax avoidance elements of the ATAD but within the new legal context. Namely, the norms would need to be part of a common EU-wide corporate tax system and lay down absolute rules, rather than minimum standards.

The present initiative of re-launching the CCCTB features prominently amongst the Commission's envisaged projects in the field of fairer taxation. It is planned to be presented to the public on the same day as a proposal for a Directive on hybrid mismatches involving third countries (which will amend the ATAD) and a Directive on dispute settlement. Furthermore, the proposal builds upon recently adopted tax projects; in addition to the ATAD, that is the Parent-Subsidiary Directive (PSD) revisions (2014 and 2015) and the Recast Proposal for the Interest & Royalties Directive (IRD) (2011). The PSD initiative and some of the amendments discussed in relation to the IRD reflect the current political priorities for reinforcing EU tax legislation against aggressive tax planning practices.

- **Consistency with other Union policies**

The CCCTB falls within the ambit of the Commission's initiatives for fairer taxation and would contribute to the elimination of obstacles which create distortions that impede the proper functioning of the internal market. On this premise, it is largely complementary to the EU-level legislation in company law and broadly fits with projects such as the Capital Markets Union and the several initiatives in tax transparency, the exchange of information and anti-money laundering.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**

This proposal falls within the ambit of Article 115 of the Treaty on the Functioning of the EU (TFEU). The text stipulates that the measures of approximation under this article shall directly affect the establishment or functioning of the internal market.

The re-launch of the CCCTB initiative aims to facilitate business within the EU by subjecting taxpayers to a single rulebook of corporate tax legislation to apply across the internal market and also make the system more robust and resilient to aggressive tax planning. Both objectives impact decisively and directly on to the internal market, precisely as they aim to eradicate distortions in its functioning.

- **Subsidiarity (for non-exclusive competence)**

This initiative complies with the principle of Subsidiarity.

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<sup>4</sup> Council Directive 2016/1164/EU of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ L 193, 19.7.2016, p. 1-14).

Although the problems and reasons for action, as explained in the previous sections, have distinct origins, it seems that their harmful effects can be tackled effectively only through a common solution: that is, the approximation of corporate tax regimes in the Union would mitigate distortions in the market by creating a fairer and more coherent tax environment for businesses to operate. It is evident that for this objective to come into fruition, action is necessary to be taken not separately by Member States in an uncoordinated fashion, but at the level of the Union instead. Initiatives, planned and implemented by each Member State individually, would only perpetuate, or even exacerbate, the current situation, as taxpayers would still need to deal with 28 diverse and sometimes, conflicting tax systems.

The envisaged re-launch of the CCCTB aims to respond to the need for increased growth and job creation in the internal market, as well as countering aggressive tax planning practices. All these objectives essentially seek to tackle problems beyond a single Member State and therefore, by nature require a common approach. In this light, any measures could only bring results if the rules were applied in a uniform fashion across the internal market. If not, the landscape in the field of corporate taxation would remain fragmented, allowing fiscal obstacles and unfair tax competition practices to continue to flourish.

What is more, tax avoidance practices are nowadays primarily set up in a cross-border context. It is indeed the interaction between different tax systems that generates opportunities for abuse or facilitates taking advantage of mismatches in the interaction of national corporate tax rules. In addition, the fact that the EU is an internal market with a high degree of integration presumes enhanced cross-border activity, which underscores the significance of agreeing to coordinated solutions.

Considering the scale and effects of the envisaged re-launch, its objectives, to attenuate the distortions resulting from the current interaction of 28 national tax regimes and create more favourable conditions for cross-border investment in the single market, would be better achieved at Union level.

Most key features of the CCCTB system could only be dealt with through collective action. For instance, mismatches in the legal qualification of entities or payments, leading to double taxation or double non-taxation, would be eradicated in relations amongst companies applying the common corporate tax rules. Separate action by Member States would only solve these issues bilaterally in the best case scenario. By definition, cross-border loss relief could work most effectively if all Member States engaged in giving it, even though one should neither exclude the bilateral approach as a second-best option. Furthermore, tax-free internal group restructurings, the elimination of complex intra-group transfer pricing as well as the apportionment of revenues by a formula at the level of a group have a cross-border underpinning and could only be addressed within a context of common regulation.

- **Proportionality**

The envisaged measures are both suitable and necessary for achieving the desired end. They do not go further than harmonising the corporate tax base, which is a prerequisite for curbing identified obstacles that distort the internal market. Furthermore, the re-launched CCCTB does not restrict Member States' sovereignty to determine their desired amount of tax revenues in order to meet their budgetary policy targets. In this regard, it does not affect Member States' right to set their own corporate tax rates.

Although the Commission has consistently promoted the need for coordinating national tax practices, it is clear that coordination alone would not be sufficient for eradicating tax-related distortions in the internal market. Experience has shown that coordination is a slow process and the results of past exercises have hitherto been modest. Moreover, tax coordination

typically addresses only specific, targeted issues and cannot cater for the wide variety of problems faced by companies in the internal market, which require a holistic solution.

It is foreseen that the mandatory scope of the re-launched CCCTB be delineated in a way that it only targets the necessary categories of taxpayers, i.e. groups of companies above a certain size. This is because groups with high revenues tend to own sufficient resources which would allow them to engage in aggressive tax planning strategies.

It follows that the envisaged rules would not exceed what is necessary to achieve the objectives of the Treaty for a better functioning of the internal market.

- **Choice of the instrument**

The distortions to the internal market, as identified earlier, may only be tackled through binding legal rules and through a common legislative framework. Soft law would be a risky choice, as Member States could decide not to implement it at all or it could lead to a piecemeal approach. Such an outcome would be highly undesirable. It would risk creating legal uncertainty for taxpayers as well as jeopardising the objectives for a coordinated and coherent corporate tax system in the internal market. In addition, as the architecture of the common tax base should be expected to impact on national budgets, especially through the formula apportionment, it is critical that the rules which define its composition be applied consistently and efficiently. This is far more likely to be achieved through binding law.

Based on Article 115 TFEU, "*the Council shall, acting unanimously ... issue directives for the approximation of laws, regulations and administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.*" The Treaty is therefore prescriptive that in direct taxation, legislation shall exclusively be in the form of directives. According to Article 288 TFEU, a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods for achieving this result. In this vein, the directive should remain general in nature since technicalities and the minute detail should be left to Member States to decide.

### **3. RESULTS OF STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Stakeholder consultations**

The Commission organised a public consultation to involve all stakeholders and offer interested parties the possibility of providing their input to the re-launch of the CCCTB. 175 participants contributed to this consultation process. Registered associations contributed the largest share of answers (37%), followed by individual companies (32%), the majority of which are SMEs; this underlines the interest of smaller companies in the proposal.

Depending on the type of respondent, there are differences in views on whether the CCCTB is the appropriate instrument for addressing profit shifting and reducing administrative burdens. While the proposal is overall seen positive, the emphasis of NGOs and public bodies is more on the impact of the CCCTB on tax planning activities. Businesses rather emphasize the importance of reducing compliance costs and creating a business-friendly environment for investment. Yet, they also highlight risks in incurring higher administrative costs if the rules against tax avoidance dominate the system.

The input received in the public consultation is reflected in the impact assessment: it is referred to in various sections as well as a dedicated annex.

- **Collection and use of expertise**

The impact assessment includes the results from three studies.

**1. The CORTAX study provided by the Joint Research Centre of the European Commission.** The CORTAX model is a general equilibrium model designed to evaluate the effects of corporate tax reforms in 28 EU countries, using detailed data from various data sources.

**2. Study by the Centre for European Economic Research (ZEW) on the effects of tax reforms on addressing the debt-equity bias on the cost of capital and effective tax rates.** The study focusses on the current extent of the corporate debt bias in tax systems of the EU28 Member States and analyses whether different reform options could in principle manage to address the debt bias and promote investment.

**3. Study by the Centre for European Economic Research (ZEW) on the impact of tax planning on effective tax rates.** The study derives average and marginal effective tax rates that incorporate the possibility of sophisticated tax planning strategies by multinational companies, including the use of preferential tax regimes such as.

- **Impact assessment**

The main policy option that has been considered is a proposal for a common consolidated corporate tax base. A key choice to be made relates to the scope of such a tax base, i.e. to whom it would apply. The main options that have been considered are to make the CCCTB mandatory for all firms or just a subset of firms. A variety of options have been considered to address the bias towards debt induced by current tax systems. Two principal actions are available: allowing deductibility of both debt and equity financing costs or disallowing both. With respect to R&D incentives, the central options consider a tax allowance for expenses for R&D investments with varying degrees of generosity.

Valuing the different options has led to a preferred option: a CCCTB mandatory for large companies, equipped with an 'Allowance for Growth and Investment' and with an allowance for R&D expenses. The Allowance for Growth and Investment grants deductions for financing costs for debt and equity within limits to avoid abuses and tax planning. The allowance for R&D expenses is designed to at least maintain existing R&D tax incentives. The analysis shows that the CCCTB has clear advantages over the alternative which would involve taking no action.

Implementing the preferred choice is expected to increase the fairness of tax systems and create a level-playing field as a result of effectively removing incentives for aggressive tax planning in the EU. This would facilitate to ensure that corporations pay their fair share of the tax burden and enhance taxpayer morale. Furthermore, cross-border tax obstacles would be effectively eliminated within the EU. The distortions in the financing decisions of companies are reduced with an Allowance for Growth and Investment, which puts equity and debt financing on similar footing. R&D tax incentives are not only maintained but also enhanced and streamlined.

The expected economic benefits of the proposal are positive. The common consolidated tax base with an Allowance for Growth and Investment would lead to an increase in investment and employment of up to 3.4% and 0.6%, respectively. Overall, growth would increase by up to 1.2%. Compliance costs are expected to decrease (10% in compliance time and 2.5% in

compliance costs). The cost of setting up a subsidiary would decrease by up to 67%, making it easier for companies (including SMEs) to go abroad.

There are no relevant environmental impacts expected from the preferred option. Social impacts will also be limited.

- **Regulatory fitness and simplification**

Tax compliance costs are an important burden for businesses and their reduction will be a major advantage in the implementation of the CCCTB. Estimated compliance costs for large companies amount to about 2% of taxes paid, while for SMEs the estimate was about 30% of taxes paid. Compliance costs are estimated to increase with cross-border activity and with the proliferation in the numbers of subsidiaries. Tax reform data show that numerous CIT reforms took place after the crisis and many measures were directed at reinforcing the international anti-abuse framework. In the light of this, the reduction of compliance costs when setting up an additional subsidiary remains a major advantage: Time costs for setting up a new subsidiary in a Member State are estimated to decrease by 62-67%. Focussing on recurring costs, i.e. ignoring one-off switching costs, the Impact Assessment estimates a decrease in time spent on compliance activities by 8% after implementation of the CCCTB. Based on these time reductions, one could endeavour a rough calculation of the order of total cost savings that would result under the CCCTB. If 5% of medium-sized companies expand abroad, a one-off cost saving of around EUR 1 billion could be expected. If all multinational entities apply the CCCTB recurring compliance costs could go down by about EUR 0.8 billion.

Tax administrations will benefit from reduced dealings with transfer pricing issues and a reduced number of cases to the extent that the tax affairs of a company group is mainly dealt with by the administration of the Member State where the parent resides. On the other side, as long as the CCCTB is not made mandatory for all firms, national administrations will experience additional compliance costs due to the required maintenance of two parallel systems.

To meet the objective of enhancing the fairness of the tax system in a proportionate manner, the preferred option for the CCCTB suggest to make it compulsory only for a subset of firms, based on their size. Thus, micro-enterprises as well as SMEs are exempted from the mandatory application of the CCCTB. Limiting the compulsory application to groups with a consolidated turnover above EUR 750 million serves the purpose of capturing the vast majority (ca. 64%) of turnover generated by groups while limiting the risk of including purely domestic groups. The threshold is coherent with the approach taken in other EU initiatives to counter tax avoidance. At the same time, the proposal offers those companies, for which the application of the CCCTB is not compulsory, the possibility to "opt-in" to the CCCTB system. This allows for a maximum of flexibility for SMEs and micro-enterprises, offering to benefit from the advantages of a CCCTB without making it compulsory for this set of companies.

#### **4. BUDGETARY IMPLICATIONS**

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



## 5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission will review the application of the Directive five years after its entry into force and report to Council on its operation. Member States should communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive

- **Explanatory documents (for directives)**

See Recital 18.

- **Detailed explanation of the specific provisions of the proposal**

This proposal is the 'second step' in a staged approach towards an EU-wide corporate tax system with cross-border consolidation of the tax results amongst members of the same group.

- **Scope:** differently from the proposal of 2011, which laid down an optional system for all, this proposal will be mandatory for groups of companies beyond a certain size. The criterion for fixing a size-related threshold will refer to the total consolidated revenue of the group which files consolidated financial statements and to which a company belongs. In addition, the common rules will be available, as an option, to a wide scope of groups that fall short of the size threshold.
- **Definition of group:** (unchanged compared to the proposal of 2011) Eligibility for the consolidated tax group will be determined in accordance with a two-part test based on (i) control (more than 50 percent of voting rights) and (ii) ownership (more than 75 percent of equity) or rights to profits (more than 75 percent of rights giving entitlement to profit). The two thresholds for control and ownership or profit rights shall be met throughout the tax year; otherwise, the failing company will have to leave the group immediately. There will also be a minimum requirement of nine consecutive months for establishing group membership.
- **Business reorganisations & taxation of losses and unrealised capital gains:** (unchanged compared to the proposal of 2011) The proposed framework chiefly involves the treatment of losses and unrealised capital gains on entering and leaving the group.

When a company enters the group, **pre-consolidation trading losses** will be carried forward to be set off against its apportioned share. When a company leaves the group, no losses incurred during the period of consolidation will be allocated to it. This proposal comes forward with a refinement of the rule of 2011: in cases of more extensive reorganisations where more than one company has to leave a loss-making group, a threshold is fixed, to determine under which conditions companies will no longer be leaving a group without losses but there will instead be a loss allocation across the consolidated group.

There are rules to deal with **unrealised capital gains** which have accrued to fixed assets where the assets are disposed of within a short period after their entry into, or exit from, a group. A Member State (in the case of an entry into a group) or the group (in the case of an exit from a group) are given the right to tax underlying capital gains to the extent those were created in their taxing territory. Moreover, the tax treatment of capital gains engrained in self-generated intangible assets calls for a

customised approach, which will involve assessing them on the basis of a suitable proxy, that is to say research and development, marketing and advertising costs over a specified period.

- **Withholding taxes:** (unchanged compared to the proposal of 2011) The proceeds of withholding taxes charged on interest and royalty payments made by taxpayers will be shared according to the formula of that tax year. Withholding taxes charged on dividends will not be shared since, contrary to interest and royalties, dividends are distributed after-tax and do not lead to any previous deduction borne by all group companies.
- **Preventing circumvention of tax exemptions:** (unchanged compared to the proposal of 2011) The tax exemption in favour of disposals of shares will be disallowed if this is illegitimately extended to sales of assets other than shares. This occurs if assets are moved within the group, without tax implications, to a group member which is then sold out of the group. The assets will then benefit, under the cover of a sale of company, from the tax exemption which is provided for share disposals. A similar treatment is provided for intra-group transfers of assets which are then sold out of the group within the current or following tax year. In this case, an adjustment will be made in order to treat the asset as having left the group from the Member State where it initially was located, i.e. prior to the intra-group transfer.
- **Formulary apportionment:** (unchanged compared to the proposal of 2011) It will comprise three equally weighted factors (i.e. labour, assets and sales by destination). This combination reflects a balanced approach to distributing taxable profits amongst eligible Member States. The labour factor will be divided into payroll and the number of employees (i.e. each item counting for half) in order to account for differences in the levels of wages across the Union and thereby allow for a fairer distribution. The asset factor will consist of all fixed tangible assets. Intangibles and financial assets will be excluded from the formula due to their mobile nature and the risks of circumventing the system. These factors and weightings should ensure that profits are taxed where they are actually earned. By exception, where the outcome of the apportionment does not fairly represent the extent of business activity, a safeguard clause will provide for an alternative method of income allocation.

As the general scheme of the formulary apportionment cannot address the specificities of certain industries, there will be rules on adjusted formulae, in order to better fit the needs of sectors such as financial services and insurance, oil and gas as well as shipping and air transport.

- **Administrative procedures:** differently from the proposal of 2011, the common administrative rules are limited to the consolidated group. As a matter of principle, single taxpayers, who opt to apply the rules under the 'first step', continue to fall within their national administrative provisions.

Groups will deal with a single tax administration ('principal tax authority') in the EU; this is also referred to as the 'one-stop-shop'. This will be based in the Member State where the parent company of the group ('principal taxpayer') is resident for tax purposes. Audits will be initiated and coordinated by the principal tax authority. The national authorities of any Member State in which the profits of a group member are 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 by the principal tax authority concerning the

notification that there is a group or an amended assessment. For this purpose, an action will be brought before the courts of the Member State of the principal tax authority. Disputes between taxpayers and tax authorities will 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.

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 European Commission,

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

Having regard to the opinion of the European Parliament<sup>5</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>6</sup>,

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 and interaction of 28 disparate corporate tax systems. Furthermore, tax planning structures have become ever-more sophisticated over time, as they develop across various jurisdictions and effectively take advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing the tax liability of companies. Although those situations highlight shortcomings that are completely different in nature, they both create obstacles which impede the proper functioning of the internal market. Action to rectify these problems should therefore address both these types of market deficiencies.
- (2) To support the proper functioning of the internal market, the corporate tax environment in the Union should be shaped in accordance with the principle that companies pay their fair share of tax in the jurisdiction(s) where their profits are generated. It is therefore necessary to provide for mechanisms that discourage companies from taking advantage of mismatches amongst national tax systems in order to lower their tax liability. It is equally important to also stimulate growth and economic development in the internal market by facilitating cross-border trade and corporate investment. To this end, it is necessary to eliminate both double taxation and double non-taxation risks in the Union through eradicating disparities in the interaction of national corporate tax systems. At the same time, companies need an easily workable tax and legal framework for developing their commercial activity and expanding it across borders in the Union. In that context, remaining cases of discrimination should also be removed.

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<sup>5</sup> OJ C , , p. .

<sup>6</sup> OJ C , , p. .

- (3) As pointed out in the proposal of 16 March 2011 for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)<sup>7</sup>, a corporate tax system which treats the Union as a single market for the purpose of computing the corporate tax base of companies would facilitate cross-border activity for companies resident in the Union and promote the objective of making it a more competitive location for investment internationally. The proposal of 2011 for a CCCTB focussed on the objective of facilitating the expansion of commercial activity for businesses within the Union. In addition to that objective, it should also be taken into account that a CCCTB can be highly effective in improving the functioning of the internal market through countering tax avoidance schemes. In this light, the initiative for a CCCTB should be re-launched in order to address, on an equal footing, both the aspect of business facilitation and the initiative's function in countering tax avoidance. Such an approach would best serve the aim of eradicating distortions in the functioning of the internal market.
- (4) Considering the need to act swiftly in order to ensure a proper functioning of the internal market by making it, on the one hand, friendlier to trade and investment and, on the other hand, more resilient to tax avoidance schemes, it is necessary to divide the ambitious CCCTB initiative into two separate proposals. At a first stage, rules on a common corporate tax base should be agreed, before addressing, at a second stage, the issue of consolidation.
- (5) Many aggressive tax planning structures tend to feature in a cross-border context, which implies that the participating groups of companies possess a minimum of resources. On this premise, for reasons of proportionality, the rules on a CCCTB should be mandatory only for groups of companies of a substantial size. For that purpose, a size-related threshold should be fixed on the basis of the total consolidated revenue of a group which files consolidated financial statements. In addition, in order to better serve the aim of facilitating trade and investment in the internal market, the rules on a CCCTB should also be available, as an option, to those groups that fall short of the size-related threshold.
- (6) Eligibility for the consolidated tax group should be determined in accordance with a two-part test based on (i) control (more than 50 percent of voting rights) and (ii) ownership (more than 75 percent of equity) or rights to profits (more than 75 percent of rights giving entitlement to profit). Such a test would ensure a high level of economic integration between group members. To guarantee the integrity of the system, the two thresholds for control and ownership or profit rights should be met throughout the tax year; otherwise, the failing company should leave the group immediately. To prevent a manipulation of the tax results through companies entering and leaving the group within a short-term, there should also be a minimum requirement of nine consecutive months for establishing group membership.
- (7) Rules on business reorganisations should ensure that the effect of such reorganisations on the existing taxing rights of Member States is kept to a minimum. Each time that a company joins a group, the Member States where other group members are resident for tax purposes or situated should therefore not bear the extra cost of losses that the company incurred under the rules of another corporate tax system which applied to that company prior to the rules of this Directive. Pre-consolidation trading losses of a

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<sup>7</sup> Proposal for a Council Directive COM (2011) 121 final/2 of 3.10.2011 on a Common Consolidated Corporate Tax Base.

company joining a group should thus be carried forward to be set off against that company's apportioned share. Accordingly, losses incurred by a group member during the period of consolidation should not exclusively be allocated to that group member but be shared across the group instead. In the case of more extensive reorganisations, where more than one company is leaving a loss-making group, it would be essential to fix a threshold, in order to determine under which conditions companies should no longer be leaving a loss-making group without being allocated any losses to carry forward. A similar adjustment should be made in respect of capital gains resulting from the disposal of certain assets within a short period after those assets joined, or departed from, a group alongside a joining or leaving company. In these cases, the Member State(s) where these gains accrued should be given the right to tax them, despite the fact that the assets may no longer be under their taxing jurisdiction. The tax treatment of capital gains engrained in self-generated intangible assets calls for a customised approach, since these assets are often not registered on a company's financial accounts and since there does not seem to be a way to precisely calculate their value. Accrued capital gains should therefore be assessed on the basis of a suitable proxy, namely the costs for research and development and for marketing and advertising over a specific period.

- (8) The revenue from withholding taxes on interest and royalty payments should be shared in accordance with the formula for the apportionment of the consolidated tax base of the tax year in which the withholding tax is due, in order to compensate for the fact that interest and royalty payments would have previously led to a deduction and the benefit would have been shared by the group. The revenue from withholding taxes on dividends, however, should not be shared. Contrary to interest and royalty payments, dividends are distributed from profits which have already been subjected to corporate taxation and therefore, a dividend distribution does not involve, for group members, any benefit consisting in a deduction of business expenses.
- (9) In order to prevent circumventing the tax exemption of the gains from the disposals of shares, this tax-free treatment should be disallowed where it is illegitimately extended to sales of assets other than shares. This situation would occur if assets are moved by way of intra-group transactions, without tax implications, to a group member with the plan to subsequently, sell the shares in that group member and include the assets in that sale. In such case, the assets would effectively benefit, under the cover of a sale of shares, from the tax exemption that applies to disposals of shares. Accordingly, it would also be necessary to cater for intra-group transfers of assets which are then sold out of the group within a period of up to two years. Namely, an adjustment should be made in order to treat an asset as having left the group from the Member State where it was located initially, i.e. prior to the intra-group transfer, and in this way, discourage the artificial intra-group transfer of assets (other than shares) towards Member States with beneficial tax regimes for capital gains from disposals of assets.
- (10) The formula apportionment for the consolidated tax base should comprise three equally weighted factors, namely labour, assets and sales by destination. Those equally weighted factors should reflect a balanced approach to distributing taxable profits amongst the relevant Member States and should ensure that profits are taxed where they are actually earned. Labour and assets should therefore be allocated to the Member State where the labour is performed or the assets are located, and would thereby give appropriate weight to the interests of the Member State of origin, whilst sales should be allocated to the Member State of destination of the goods or services. To account for differences in the levels of wages across the Union and thus allow for a

fair distribution of the consolidated tax base, the labour factor should comprise both payroll and the number of employees (i.e. each item counting for half). The asset factor, on the other hand, should comprise all fixed tangible assets, but not intangible and financial assets because of their mobile nature and the resulting risk that the rules of this Directive could be circumvented. Where, due to exceptional circumstances, the outcome of the apportionment does not fairly represent the extent of business activity, a safeguard clause should provide for an alternative method of income allocation.

- (11) Due to their specificities, certain sectors, such as the financial and insurance sector, the oil and gas sector as well as shipping and air transport, need an adjusted formula for the apportionment of the consolidated tax base.
- (12) To optimise the benefits of having a single set of corporate tax rules across the EU for determining the consolidated tax base of groups, groups should be able to deal with a single tax administration ('principal tax authority'). As a matter of principle, that principal tax authority should be based in the Member State where the parent company of the group is resident for tax purposes ('principal taxpayer'). It is essential in this context to lay down common procedural rules for the administration of the system.
- (13) Audits should in principle be initiated and coordinated by the principal tax authority, but given that the first stage consisting in the calculation of the tax base is performed locally, the national authorities of any Member State in which the profits of a group member are subject to tax should also be able to request the initiation of an audit. Accordingly, to protect the national tax base, the competent authority of the Member State in which a group member is resident for tax purposes or established in the form of a permanent establishment should be able to challenge before the courts of the Member State of the principal tax authority a decision of that tax authority concerning the notice to create a group or a decision concerning an amended tax assessment. Disputes between taxpayers and tax authorities should be dealt with by an administrative body at first instance, in order to reduce the number of cases that reach the courts. That body should be structured and operating in accordance with the law of the Member State of the principal tax authority is competent to hear appeals at first instance.
- (14) This Directive builds upon Council Directive 2016/xx/EU on a common corporate tax base (which lays down a common set of corporate tax rules for computing the tax base) and focusses on the consolidation of tax results across the group. It would thus be necessary to deal with the interaction between the two legislative instruments and cater for the transition of certain elements of the tax base into the new framework of the group. Such elements should include, in particular, the interest limitation rule, the switch-over clause and controlled foreign company legislation as well as hybrid mismatches.
- (15) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council<sup>8</sup>. Any processing of personal data carried out within the framework of this Directive must also comply with applicable national provisions on data protection implementing

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<sup>8</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

Directive 95/46/EC<sup>9</sup>, which will be replaced by Regulation (EU) 2016/679<sup>10</sup>, and with Regulation (EC) No 45/2001<sup>11</sup>.

- (16) In order to supplement or amend certain non-essential elements of this Directive, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission with respect of (i) taking into account changes to the laws of Member States concerning the company forms and corporate taxes and amend Annexes I and II accordingly; (ii) laying down additional definitions; and (iii) supplementing the rule on the limitation of interest deductibility with anti-fragmentation rules, to better address the tax avoidance risks which may emerge within a group. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council.
- (17) In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission (i) to adopt annually a list of third country company forms that are similar to the company forms listed in Annex I; (ii) to lay 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; (iii) to adopt an act establishing a standard form of the notice to create a group; and (iv) to lay down rules on the electronic filing of the consolidated tax return, the form of the consolidated tax return, the form of the single taxpayer's tax return and the supporting documentation required. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>12</sup>.
- (18) Since the objectives of this Directive, namely to improve the functioning of the internal market through countering practices of international tax avoidance and to facilitate businesses in expanding across borders within the Union, cannot be sufficiently achieved by the Member States acting individually and in a disparate fashion because coordinated action is necessary to obtain these objectives, but can rather, by reason of the fact that the Directive targets inefficiencies of the internal market that originate in the interaction between disparate national tax rules which impact on the internal market and discourage cross-border activity, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not

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<sup>9</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.1.1995, p. 31).

<sup>10</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

<sup>11</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1-22).

<sup>12</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).



go beyond what is necessary in order to achieve those objectives, especially considering that its mandatory scope is limited to groups beyond a certain size.

- (19) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents<sup>13</sup>, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (20) The Commission should be required to review the application of the Directive five years after its entry into force and report to Council on its operation. Member States should be required to communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive,

HAS ADOPTED THIS DIRECTIVE:

## CHAPTER I

### SUBJECT MATTER, SCOPE AND DEFINITIONS

#### *Article 1*

##### *Subject matter*

1. This Directive establishes a system for the consolidation of the tax bases, as referred to in Council Directive 2016/xx/EU,<sup>14</sup> of companies that are members of a group and lays down rules on how a common consolidated corporate tax base shall be allocated to Member States and administered by the national tax authorities.
2. A company that applies the rules of this Directive shall cease to be subject to the national corporate tax law in respect of all matters regulated by this Directive, unless otherwise stated.

#### *Article 2*

##### *Scope*

1. The rules of this Directive shall apply to a company that is established under the laws of a Member State, including its permanent establishments in other Member States, where the company meets all of the following conditions:
  - (a) it takes one of the company forms listed in Annex I;
  - (b) it is subject to one of the corporate taxes listed in Annex II or to a similar tax subsequently introduced;
  - (c) it belongs to a consolidated group for financial accounting purposes with a total consolidated group revenue that exceeded EUR 750 000 000 during the financial year preceding the relevant financial year;

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<sup>13</sup> Joint Political Declaration of the Member States and the Commission of 28 September 2011 on explanatory documents (OJ C 369, 17.12.2011, p. 14).

<sup>14</sup> [full title of the Directive (OJ L [ ], [ ], p. [ ])].

- (d) it qualifies as a parent company or qualifying subsidiary as referred to in Article 5 of this Directive and/or it has one or more permanent establishments as referred to in Article 5 of Directive 2016/xx/EU.
2. This Directive shall also apply to a company that is established under the laws of a third country in respect of its permanent establishments situated in one or more Member States where the company meets the conditions laid down in points (b) to (d) of paragraph 1.
- As regards whether a company meets the condition of point (a) in paragraph 1, it shall suffice that the company in a third country has a similar form to one of the company forms in Annex I. For the purposes of point (a) of paragraph 1, the Commission shall adopt annually a list of third country company forms that are similar to the company forms listed in Annex I. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 77(2). The fact that a third country company form is not included in that list shall not preclude the application of this Directive to that form.
3. A company that meets the conditions of points (a), (b) and (d) of paragraph 1, but does not meet the conditions of point (c) of that paragraph, may opt, including for its permanent establishments situated in other Member States, to apply the rules of this Directive for a period of five tax years. That period shall automatically be extended for successive terms of five tax years, unless there is a notice of termination as referred to in the second subparagraph of Article 47. The conditions under points (a), (b) and (d) of paragraph 1 shall be met each time the extension takes place.
4. The rules of this Directive shall not apply to a shipping company under a special tax regime. A shipping company under a special tax regime shall be taken into account for the purpose of determining the companies which are members of the same group as referred to in Articles 5 and 6.
5. The Commission shall be empowered to adopt delegated acts in accordance with Article 75 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* *Definitions*

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

- (1) 'taxpayer' as defined in point (1) of Article 4 of Directive 2016/xx/EU;
- (2) 'single taxpayer' means a company that is not subject to the rules of this Directive but has opted to apply Directive 2016/xx/EU;
- (3) 'non-taxpayer' as defined in point (2) of Article 4 of Directive 2016/xx/EU;
- (4) 'resident taxpayer' as defined in point (3) of Article 4 of Directive 2016/xx/EU;
- (5) 'non-resident taxpayer' as defined in point (4) of Article 4 of Directive 2016/xx/EU;
- (6) 'revenues' as defined in point (5) of Article 4 of Directive 2016/xx/EU;
- (7) 'expenses' as defined in point (6) of Article 4 of Directive 2016/xx/EU;
- (8) 'tax year' as defined in point (7) of Article 4 of Directive 2016/xx/EU;
- (9) 'profit' as defined in point (8) of Article 4 of Directive 2016/xx/EU;

- (10) 'loss' as defined in point (9) of Article 4 of Directive 2016/xx/EU;
- (11) 'principal taxpayer' means one of the following:
- (a) a resident taxpayer that forms a group with its qualifying subsidiaries, with one or more of its permanent establishments located in another Member State or Member States or with one or more permanent establishments of a qualifying subsidiary that is resident in a third country;
  - (b) a resident taxpayer designated by the group that is composed of only two or more resident taxpayers which are immediate qualifying subsidiaries of the same parent company resident in a third country;
  - (c) a resident taxpayer that is the qualifying subsidiary of a parent company resident in a third country, where that resident taxpayer forms a group with only one or more permanent establishments of its parent;
  - (d) a permanent establishment designated by a non-resident taxpayer that forms a group with only its permanent establishments located in two or more Member States;
- (12) 'consolidated group for financial accounting purposes' as defined in point (10) of Article 4 of Directive 2016/xx/EU;
- (13) 'research and development' as defined in point (11) of Article 4 of Directive 2016/xx/EU;
- (14) 'borrowing costs' as defined in point (12) of Article 4 of Directive 2016/xx/EU;
- (15) 'exceeding borrowing costs' as defined in point (13) of Article 4 of Directive 2016/xx/EU;
- (16) 'value for tax purposes' as defined in point (17) of Article 4 of Directive 2016/xx/EU;
- (17) 'market value' as defined in point (18) of Article 4 of Directive 2016/xx/EU;
- (18) 'fixed assets' as defined in point (19) of Article 4 of Directive 2016/xx/EU;
- (19) 'financial assets' as defined in point (20) of Article 4 of Directive 2016/xx/EU;
- (20) 'economic owner' as defined in point (28) of Article 4 of Directive 2016/xx/EU;
- (21) 'financial undertaking' as defined in point (29) of Article 4 of Directive 2016/xx/EU;
- (22) 'group member' means any taxpayer belonging to the same group, as referred to in Articles 5 and 6. Where a taxpayer maintains a taxable presence in one or more Member States other than that in which it is resident for tax purposes, each taxable presence shall be treated as a group member;
- (23) 'consolidated tax base' means the result of adding up the tax bases of all group members, as calculated in accordance with Directive 2016/xx/EU;
- (24) 'intra-group transaction' means any transaction between parties that are members of the same group at the time that the transaction is effected and that the associated revenues and expenses of that transaction fall to be recognised;
- (25) 'apportioned share' means the portion of the consolidated tax base of a group that is allocated to a group member in accordance with Chapter VIII;
- (26) 'competent authority' means the authority designated by each Member State to administer all matters related to the implementation of this Directive;

- (27) 'principal tax authority' means the competent authority of the Member State in which the principal taxpayer is resident for tax purposes or, where it concerns a permanent establishment of a non-resident taxpayer, the Member State in which that permanent establishment is situated;
- (28) 'national corporate tax law' as defined in point (32) of Article 4 of Directive 2016/xx/EU.

The Commission may adopt delegated acts in accordance with Article 75 in order to lay down definitions of more concepts.

## **CHAPTER II**

### **RESIDENCY AND TERRITORIALITY RULES**

#### *Article 4 Tax residence*

1. 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 in that Member State for tax purposes.
2. A company that is resident in more than one Member State for tax purposes shall be considered to be resident in the Member State in which it has its place of effective management.
3. Where the place of effective management of a group member engaged in shipping or in inland waterways transport is aboard a ship or boat, the group member shall be considered to be resident for tax purposes in the Member State of the home harbour of the ship or boat, or, where there is no such home harbour, in the Member State of residence for tax purposes of the operator of the ship or boat.
4. A resident taxpayer shall be subject to corporate tax on all income derived from any source, whether inside or outside the Member State where it is resident for tax purposes.
5. A non-resident taxpayer shall be subject to corporate tax on all income from an activity carried on through a permanent establishment in a Member State.

## **CHAPTER III**

### **CONSOLIDATION**

#### *Article 5 Parent company and qualifying subsidiaries*

1. A qualifying subsidiary means every immediate and lower-tier subsidiary in which the parent company holds the following rights:

- (a) it has a right to exercise more than 50 % of the voting rights; and
  - (b) it has an ownership right amounting to more than 75 % of the subsidiary's capital or it owns 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 lower-tier subsidiaries, the following rules shall be applied:
- (a) once the voting-right threshold is reached in respect of a subsidiary, the parent company shall be considered to hold 100 % of such rights;
  - (b) entitlement to profit and ownership of capital shall be calculated by multiplying the interests held, directly and indirectly, in 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 6*  
*Groups*

1. A resident taxpayer shall form a group with:
- (a) all its permanent establishments that are situated in a Member State;
  - (b) all permanent establishments that are situated in a Member State and belong to its qualifying subsidiaries that are resident in a third country for tax purposes;
  - (c) all its qualifying subsidiaries that are resident in a Member State for tax purposes, including the permanent establishments of those subsidiaries where such permanent establishments are situated in a Member State;
  - (d) other resident taxpayers, including their permanent establishments that are situated in a Member State, where all those resident taxpayers are qualifying subsidiaries of a non-taxpayer who is resident in a third country for tax purposes, has a similar form to one of the company forms in Annex I and meets the condition of point (c) of Article 2(1).
2. A non-resident taxpayer shall form a group in respect of all of its permanent establishments that are situated in one or more Member States and with all of its qualifying subsidiaries that are resident in a Member State for tax purposes, including the permanent establishments of those subsidiaries where such permanent establishments are also situated in one or more Member States.
3. A company in insolvency or liquidation may not become a group member. A taxpayer in respect of which a declaration of insolvency is made or that is liquidated shall leave the group immediately.

*Article 7*  
*Effect of consolidation*

1. The tax bases of all members of a group shall be added together into a consolidated tax base.
2. Where the consolidated tax base is negative, the loss shall be carried forward and be set off against the next positive consolidated tax base. Where the consolidated tax base is positive, it shall be apportioned in accordance with Chapter VIII.

### *Article 8*

#### *Timing*

1. A taxpayer who is a group member must meet the thresholds referred to in Article 5, without interruption, throughout the tax year.
2. A taxpayer shall become a member of a group on the date that the thresholds of Article 5 are reached. The thresholds must be met for at least nine consecutive months, failing which a taxpayer shall be treated as if it has never been a group member.
3. A taxpayer ceases to be a group member the day after it no longer meets the thresholds of Article 5.

### *Article 9*

#### *Elimination of intra-group transactions*

1. With the exception of the cases referred to in subparagraph 2 of Article 42 and Article 43, profits and losses arising from intra-group transactions shall be ignored when calculating the consolidated tax base.
2. Groups shall apply a consistent and adequately documented method for recording intra-group transactions. Groups may change the method only for valid commercial reasons and only at the beginning of a tax year.
3. The method for recording intra-group transactions shall enable all intra-group transfers and sales to be identified at the lowest cost for assets not subject to depreciation or the value for tax purposes for depreciable assets.
4. Intra-group transfers shall not change the status of self-generated intangible assets.

### *Article 10*

#### *Withholding taxes and other source taxation*

No withholding taxes or other source taxation shall be imposed on intra-group transactions.

## **CHAPTER IV**

### **ENTERING AND LEAVING THE GROUP**

#### *Article 11*

##### *Fixed assets when joining the group*

1. Where a taxpayer, on the date of joining a group, is the economic owner of non-depreciable or individually depreciable fixed assets, and where, within five years of the date on which that taxpayer joined the group, any of those assets is disposed of, the apportioned share of the group member that held the economic ownership over those assets on the date of entry shall be adjusted, by adding the proceeds of that disposal to that apportioned share and by deducting from that share the costs relating to non-depreciable assets and the value for tax purposes of depreciable assets. The adjustment shall take place in the tax year during which the disposal of the assets took place.

2. The adjustment referred to in paragraph 1 shall also be made in respect of financial assets, with the exception of own shares and of participations that give rise to tax exempt income.
3. The adjustment referred to in paragraph 1 shall not be made where the taxpayer joining the group came from another group that was subject to the rules of this Directive.
4. The taxpayer that, as a result of a business reorganisation, no longer exists or no longer has a permanent establishment in the Member State in which it was resident for tax purposes on the date that it joined the group, shall be considered to have a permanent establishment in that Member State for the purpose of applying this Article.

#### *Article 12*

##### *Long-term contracts when joining the group*

1. Revenues and expenses which pursuant to Article 22(2) and (3) of Directive 2016/xx/EU are considered to have accrued or been incurred before the rules of this Directive became applicable to the taxpayer, 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 apportioned share of the relevant group member in accordance with the timing rules of national law.
2. Revenues which have been taxed under national corporate tax law before the rules of this Directive became applicable to the taxpayer at an amount higher than what would have been included in the tax base pursuant to Article 22(2) of Directive 2016/xx/EU, shall be deducted from the apportioned share of the relevant group member in the first tax year of application of the rules of this Directive.
3. Where the share apportioned to a group member in a tax year is not sufficient to offset fully the deductible amounts referred to in paragraphs 1 and 2, the unrelieved amounts shall be carried forward for future years until they are set off against the share apportioned to that group member.

#### *Article 13*

##### *Provisions, revenues and deductions when joining the group*

1. Provisions and bad-debt deductions as referred to in Articles 23 and 25 of Directive 2016/xx/EU shall be deductible only to the extent that they arise from activities or transactions that have been carried out after the rules of this Directive became applicable to the taxpayer.
2. Revenues which pursuant to Article 16 of Directive 2016/xx/EU are considered to have accrued before the rules of this Directive became applicable to the taxpayer, but were not yet included in the tax base under the national corporate tax law previously applicable to the taxpayer, shall be added to the apportioned share of the relevant group member in accordance with the timing rules of the national corporate tax law.
3. Expenses incurred after the rules of this Directive became applicable to the taxpayer, but in relation to activities or transactions that were carried out before and for which no deduction was given under the applicable national corporate tax law, shall be deductible only against the apportioned share of the relevant group member, unless those expenses are incurred more than five years after the taxpayer joined the group.

Expenses incurred under national corporate tax law that had not yet been deducted when the rules of this Directive became applicable to the taxpayer shall be deductible only against the apportioned share of the relevant group member, as computed in accordance with this Directive, in equal amounts spread over five years. Expenses that involve borrowing costs shall be deductible in accordance with Article 13 of Directive 2016/xx/EU.

Where the share that has been apportioned to a group member in a tax year is not sufficient to fully deduct the amounts referred to in the first and second subparagraphs, the unrelieved amounts shall be carried forward for future years until they are set off against the apportioned share of that group member.

4. Amounts deducted before the rules of this Directive became applicable to the taxpayer may not be deducted again.

#### *Article 14*

##### *Timing for depreciation when joining or leaving a group*

The depreciation of the assets of a taxpayer that joins or leaves a group in the course of a tax year shall be computed in proportion to the number of calendar months during which the taxpayer belonged to the group in the tax year.

#### *Article 15*

##### *Pre-entry losses*

Unrelieved losses that have been incurred by a group member in accordance with national corporate tax law or Directive 2016/xx/EU before the rules of this Directive became applicable to that group member may be set off against the apportioned share of that group member if and to the extent that this is provided for under the national corporate tax law or Directive 2016/xx/EU.

#### *Article 16*

##### *Termination of a group*

The tax year of a group shall end when the group is dissolved. The consolidated tax base and any unrelieved losses of the group shall be allocated to each group member in accordance with Chapter VIII, on the basis of the values of the apportionment factors in the tax year of termination.

#### *Article 17*

##### *Depreciation upon termination of a group*

Where a group terminates, the depreciation of its assets in the tax year of termination shall be computed in proportion to the number of calendar months that the group operated in that tax year.

#### *Article 18*

##### *Losses after the group terminates*

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

- (a) the losses of a taxpayer who opts for applying the rules of Directive 2016/xx/EU shall be carried forward and be set off in accordance with Article 41 of that Directive;



- (b) the losses of a taxpayer joining another group shall be carried forward and be set off against the relevant group member's apportioned share, subject to the restrictions of Article 41(3) of Directive 2016/xx/EU;
- (c) the losses of a taxpayer returning to national corporate tax law shall be carried forward and be set off in accordance with the national corporate tax law becoming applicable, as if those losses had arisen while the taxpayer was subject to that law.

#### *Article 19*

##### *Fixed assets when leaving the group*

The proceeds of non-depreciable or individually depreciable fixed assets, except for those that gave rise to a reduced exemption under Article 24, that are disposed of within three years after the departure from the group of the taxpayer who holds the economic ownership over those assets shall be added to the consolidated tax base of the group in the year of disposal. The costs related to non-depreciable fixed assets and the value for tax purposes of individually depreciable fixed assets shall be deducted from that tax base.

The same rule shall apply to financial assets, with the exception of own shares and of participations that give rise to tax exempt income.

The proceeds of those disposals that are added to the consolidated tax base of the group shall not be taxable otherwise.

#### *Article 20*

##### *Self-generated intangible assets*

Where a taxpayer who 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 as it stands at the end of the tax year. 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 treated in accordance with the national corporate tax law that subsequently becomes applicable to that taxpayer or, if that taxpayer joins another group, those costs shall be attributed in the tax year that the taxpayer joined that other group.

#### *Article 21*

##### *Losses on leaving the group*

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

## **CHAPTER V**

### **BUSINESS REORGANISATIONS**

#### *Article 22*

##### *Business reorganisations within a group*

1. A business reorganisation within a group or the transfer of the legal seat of a taxpayer shall not give rise to profits or losses for the purposes of determining the consolidated tax base.

2. Where, as a result of a business reorganisation or of a series of transactions between group members within a period of two years, substantially all the assets of a taxpayer are transferred to another Member State, leading to a substantial change in the asset factor, the transferred assets shall be attributed to the asset factor of the transferring taxpayer for a maximum period of five years following that transfer as long as a group member continues to be the economic owner of the assets.
3. For the purpose of applying this Article, the transferring taxpayer referred to in paragraph 2 that no longer exists or no longer has a permanent establishment in the Member State from which the assets were transferred shall be considered to have a permanent establishment in that Member State.

#### *Article 23*

#### *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 group members, become part of another group, any unrelieved losses of the previously existing group or groups shall be allocated to each of the group members in accordance with Chapter VIII and on the basis of the factors as they stand at the end of the tax year in which the business reorganisation takes place. Unrelieved losses of the previously existing group or groups shall be carried forward for future years.

Where two or more group members become part of another group, no unrelieved losses of the first group shall be allocated as referred to in subparagraph 1, provided that the joint value of the asset and labour factors of the departing group members amounts to less than 20 % of the value of these two factors for the entire first group.

2. Where two or more principal taxpayers merge within the meaning of points (i) and (ii) of Article 2(a) of Council Directive 2009/133/EC<sup>15</sup>, any unrelieved losses of a group shall be allocated to its members in accordance with Chapter VIII, on the basis of the factors as they stand at the end of the tax year in which the merger takes place. Unrelieved losses shall be carried forward for future years.

## **CHAPTER VI**

### **DEALINGS BETWEEN THE GROUP AND OTHER ENTITIES**

#### *Article 24*

#### *Disallowance of exempt share disposals*

1. Where, as a result of a disposal of shares, a taxpayer leaves the group and during that or the previous tax year, the taxpayer acquired, in an intra-group transaction, one or more fixed assets, other than assets depreciated in a pool, an amount corresponding to those fixed assets shall be excluded from the tax exemption laid down in point (c)

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<sup>15</sup> Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (OJ L 310, 25.11.2009, p. 34).

of Article 8 of Directive 2016/xxx/EU, unless it is demonstrated that the intra-group transaction was carried out for valid commercial reasons.

2. The amount excluded from the tax exemption referred to in paragraph 1 shall be the market value of the fixed asset or assets at the moment that the taxpayer leaves the group, less the value for tax purposes of the fixed assets or the costs referred to in Article 19 of Directive 2016/xx/EU.
3. Where the beneficial owner of the shares that were disposed of is a non-taxpayer or a non-resident taxpayer with those shares attributed to its head office or permanent establishment in a third country, the market value of the asset or assets at the time of the disposal of the shares, 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.

#### *Article 25*

##### *Tax credit relief*

1. A tax credit as referred to in Article 55(1) of Directive 2016/xx/EU shall be shared amongst the group members in accordance with Chapter VIII;
2. The tax credit referred to in paragraph 1 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 where the taxpayer is resident for tax purposes or where the permanent establishment is situated.

#### *Article 26*

##### *Withholding tax*

Interest and royalties paid by a group member to a recipient outside the group may be subject to a withholding tax, in accordance with the applicable rules of national law and any applicable double tax convention, in the Member State where the group member is resident for tax purposes or situated, as the case may be. The withholding tax shall be shared amongst the Member States, in accordance with Chapter VIII, using the formula applicable in the tax year in which the tax is charged.

## **CHAPTER VII**

### **TRANSPARENT ENTITIES**

#### *Article 27*

##### *Rules for determining transparency in the case of third country entities*

The treatment of an entity located in a third country in which at least two group members hold an interest shall be determined by an agreement between the relevant Member States. The principal tax authority shall decide where there is no agreement.

## CHAPTER VIII

### APPORTIONMENT OF THE COMMON CONSOLIDATED CORPORATE TAX BASE

#### *Article 28*

##### *General rules*

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:

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

2. The consolidated tax base of a group shall be shared only where 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.
5. When determining the apportioned share of a group member, equal weight shall be given to the factors of sales, labour and assets.

#### *Article 29*

##### *Safeguard clause*

As an exception to the rule set out in Article 28, if the principal taxpayer or a competent authority considers that the outcome of the apportionment of the consolidated tax base to a group member does not fairly represent the extent of the business activity of that group member, the principal taxpayer or competent authority may request the use of an alternative method for calculating the tax share of each group member. An alternative method can be used only if, following consultations among the competent authorities and, where applicable, discussions held in accordance with Articles 77 and 78, all these authorities agree to that alternative method. The Member State of the principal tax authority shall inform the Commission about the alternative method used.

#### *Article 30*

##### *Joining and leaving the group*

The apportioned share of a taxpayer joining or leaving a group during a tax year shall be calculated in proportion to the number of calendar months during which the taxpayer belonged to the group in the tax year.

*Article 31*  
*Transparent entities*

The factors used in calculating the apportioned share of a group member holding an interest in a transparent entity shall include the sales, labour and assets of the transparent entity, in proportion to the taxpayer's participation in the profits and losses of that entity.

*Article 32*  
*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 payroll relating to that employee shall be allocated to the labour factor of the same 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 33*  
*Allocation of employees and payroll*

1. Employees shall be included in the labour factor of the group member from which they receive remuneration.
2. By way of derogation from 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 as well as the amount of payroll related to them shall be included in the labour factor of the former group member.

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

- (a) the employment lasts for an uninterrupted period of at least three months;
  - (b) those employees represent at least 5 % of the overall number of employees of the group member from which they receive remuneration.
3. Employees shall include persons who, although not employed directly by a group member, perform tasks similar to those performed by employees.
  4. Payroll shall include all costs of salaries, wages, bonuses and all other employee compensation, including related pension and social security costs borne by the employer as well as expenses of the employer corresponding to the cost of persons as referred to in paragraph 3.
  5. Payroll costs shall be valued at the amount of expenses that are treated as deductible by the employer in a tax year.

*Article 34*  
*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 joining 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 joining the group.

*Article 35*  
*Allocation of assets*

1. Without prejudice to Article 22(2) and (3), an asset shall be included in the asset factor of its economic owner. Where the economic owner cannot be identified, the asset shall be included in the asset factor of the legal owner.  
  
However, an asset that is not effectively used by its economic owner shall be included in the factor of the group member that effectively uses that asset, provided that the asset represents more than 5 % of the value for tax purposes of all fixed tangible assets of the group member that effectively uses it.
2. Except in the case of leases between group members, leased assets shall be included in the asset factor of the group member that is the lessor or the lessee of the asset. The same shall apply to rented assets.

*Article 36*  
*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 number of months that the asset was included in the asset factor of that group member.
3. The pool of fixed assets, as referred to in Article 37 of Directive 2016/xx/EU, shall be valued at the average of its value for tax purposes at the beginning and at the end of a tax year.
4. The renter or lessee of an asset of which it is not the economic owner shall value that rented or leased asset at eight times the net annual rental or lease payment due, less any amounts receivable from sub-rentals or sub-leases.  
  
A group member renting out or leasing an asset of which it is not its economic owner shall value that rented or leased asset at eight times the net annual rental or lease payment due.
5. An asset sold by a group member to a person outside the group following an intra-group transfer in the same or the previous tax year shall be included in the asset

factor of the transferring group member for the period between the intra-group transfer and the sale to the person outside the group, except where the group members concerned demonstrate that the intra-group transfer was made for genuine commercial reasons.

#### *Article 37*

##### *Composition of the sales factor*

1. The sales factor shall consist of the total sales allocated to a group member, including permanent establishments that are considered to exist pursuant to Article 22(3), 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 in the sales factor.
3. Sales shall be valued in accordance with Article 20 of Directive 2016/xx/EU.

#### *Article 38*

##### *Sales by destination*

1. Sales of goods shall be included in the sales factor of the group member located in the Member State where the dispatch or transport of the goods to the person acquiring them ends. Where that place cannot be determined, 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 or actually supplied.
3. Exempt revenues, interest, dividends and royalties and the proceeds from the disposal of fixed assets that are included in the sales factor shall be attributed to the beneficiary of those revenues, interest, dividends, royalties and proceeds.
4. Where there is no group member in the Member State where the goods are delivered or the services are supplied, or where goods are delivered or services are supplied in a third country, the sales of goods and supplies of services shall be included in the sales factor of all group members in proportion to their labour and asset factors.
5. Where there is more than one group member in the Member State where the goods are delivered or the services are supplied, 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 39*

##### *Detailed rules on the 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 77(2).

#### *Article 40*

##### *Calculation of the asset and sales factors for financial institutions*

1. The asset factor of a financial institution, as referred to in point (29)(a), (d), (e), (f), (g), (h) and (i) of Article 4 of Directive 2016/xx/EU, shall be 10 % of the value of financial assets, with the exception of own shares and of participations that give rise to tax exempt income. Financial assets shall include assets held for trading as referred to in Article 21 of Directive 2016/xx/EU. Financial assets shall be included in the asset factor of the group member that had those assets recorded in its books when it became a member of the group.
2. The sales factor of a financial institution, as referred to in point (29)(a), (d), (e), (f), (g), (h) and (i) of Article 4 of Directive 2016/xx/EU, shall be 10 % of its revenues in the form of interest, fees, commissions and revenues from securities, excluding value added tax, other taxes and duties. Intra-group sales shall not be included. For the purposes of Article 38(2), financial services shall be considered to be carried out, in the case of a secured loan, in the Member State in which the security is situated or, if that Member State cannot be identified, the Member State in which the security is registered. Other financial services shall be considered to be carried out in the Member State of the borrower or of the person who pays fees, commissions or other revenue. Where 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 41*

##### *Calculation of the asset and sales factors for insurance undertakings*

1. The asset factor of insurance undertakings, as referred to in point (29)(b) and (c) of Article 4 of Directive 2016/xx/EU, shall be 10 % of the value of the financial assets referred to in Article 40(1).
2. The sales factor of an insurance undertaking, as referred to in point (29)(b) and (c) of Article 4 of Directive 2016/xx/EU, shall be 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 38(2), insurance services shall be considered 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 42*

##### *Oil and gas*

By way of derogation from Article 38(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.

By way of derogation from Article 38(4) and (5), where 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 that 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 43*

##### *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 be excluded from the consolidated tax base and not be apportioned in accordance with the rules laid down in Article 28. Instead, those revenues, expenses and other deductible items shall be attributed to that group member on a transaction-by-transaction basis and be subject to adjustments for pricing in accordance with Article 56 of Directive 2016/xx/EU.

Participations in and by the group member shall be taken into account for the purpose of determining whether there is a group as referred to in Articles 5 and 6.

#### *Article 44*

##### *Items deductible from the apportioned share*

The following items shall be deducted from the apportioned share:

- (a) unrelieved losses incurred by a taxpayer before becoming subject to the rules of this Directive, as referred to in Article 15;
- (b) unrelieved losses incurred at the level of the group, as referred to in Article 15 in conjunction with point (b) of Article 18 and in Article 23;
- (c) amounts related to the disposal of fixed assets as referred to in Article 11, revenues and expenses related to long-term contracts as referred to in Article 12 and future expenses as referred to in Article 13(3);
- (d) in the case of insurance undertakings, optional technical provisions as referred to in point (d) of Article 28 of Directive 2016/xx/EU;
- (e) gifts and donations to charitable bodies which are deductible under national law as referred to in Article 9(4) of Directive 2016/xx/EU;
- (f) pension provisions which are deductible under national law as referred to in Article 24 of Directive 2016/xx/EU.

#### *Article 45*

##### *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 in accordance with Article 44, and further reduced with the deductions provided for in Article 25.

## **CHAPTER IX**

### **ADMINISTRATION AND PROCEDURES**

#### *Article 46*

##### *Notice to create a group*

1. The principal taxpayer shall give a notice of the creation of a group to the principal tax authority on behalf of the remaining group members at least three months before

the beginning of the tax year in which the group shall begin applying the rules of this Directive.

2. The notice referred to in paragraph 1 shall cover all group members, except for the shipping companies referred to in Article 2(4).
3. The principal tax authority shall transmit the notice immediately to the competent authorities of all Member States in which group members are resident for tax purposes or situated in the form of a permanent establishment. Those authorities may submit their views and any relevant information on the validity and scope of the notice to the principal tax authority within one month of its transmission.
4. If no notice is given, the principal tax authority shall issue assessments, within six months of the discovery of the absence of a notice, for the tax years during which the group is deemed to have existed. In no circumstances may these assessments go further than the previous five tax years.

#### *Article 47*

##### *Term of a group*

1. This Directive shall start applying to a group one month after the notice to create a group was received, as referred to in Article 46(3), by the competent authorities of all Member States in which group members are resident for tax purposes or situated in the form of a permanent establishment. The principal tax authority shall inform the principal taxpayer in this regard.
2. A group shall apply the rules of this Directive in so far as it remains liable thereto in accordance with Article 2(1) and (2). The principal taxpayer shall give a notice of termination to the principal tax authority where the group to which it belongs as a whole no longer fulfils the conditions of Article 2(1) and (2) for applying the rules of this Directive.
3. A taxpayer that is no longer subject to the rules of this Directive may opt to continue applying those rules provided that the taxpayer meets the conditions of Article 2(3). That taxpayer may also opt to apply the rules of Directive 2016/xx/EU if it does not meet the condition of point (d) of Article 2(1).
4. The principal taxpayer that has opted to apply the rules of this Directive in accordance with Article 2(3) and that decides to discontinue that application shall notify the principal tax authority at the end of the term of five tax years.
5. The principal taxpayer of a group that has opted to apply the rules of this Directive in accordance with Article 2(3) and that decides to extend that application at the end of the term of five tax years shall provide the principal tax authority with evidence that the conditions under points (a), (b) and (d) of Article 2(1) are met.

#### *Article 48*

##### *Information in the notice to create a group*

The following information shall be included in the notice to create a group:

- (a) identification of the group members;
- (b) proof of fulfilment of the criteria laid down in Articles 5 and 6;

- (c) information on any associated enterprises as referred to in Article 56 of Directive 2016/xx/EU;
- (d) the legal form, statutory seat and place of effective management of the taxpayers;
- (e) the tax year of the creation of the group.

The Commission may adopt an act establishing a standard form of the notice to create a group. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 77(2).

#### *Article 49*

##### *Examination of the notice to create a group*

1. The principal tax authority to which the notice to create a group has validly been submitted shall examine whether, on the basis of the information contained in the notice, the group fulfils the requirements of this Directive. The notice shall be considered to have been accepted if it has not been rejected by the principal tax authority within three months of its receipt.
2. Provided that the taxpayer has fully disclosed all the information required by Article 48, any subsequent determination that the disclosed list of group members is incorrect shall not invalidate the notice to create a group. Any incorrect notice shall be corrected and all other necessary measures shall be taken from the beginning of the tax year in which the error was discovered.
3. Where no full disclosure has been made, the principal tax authority, in agreement with the other competent authorities concerned, may invalidate the original notice, in which case amended assessments of the tax liability of the group/group members shall be issued in accordance with the time limits laid down in Article 56.

#### *Article 50*

##### *Tax year*

1. All group members shall have the same tax year.
2. In the year in which it joins a group, a taxpayer shall bring its tax year into line with that of the group it is joining. The apportioned share of the taxpayer for that tax year shall be calculated in proportion 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 in proportion to the number of calendar months during which the company belonged to the group.

#### *Article 51*

##### *Tax returns and tax assessments*

1. The principal taxpayer shall file the consolidated tax return of the group with the principal tax authority.
2. The consolidated tax return shall be treated as an assessment of the tax liability of each group member ('tax assessment'). 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 to 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 that is resident for tax purposes or situated there in the form of a permanent establishment, issue an instrument of national law authorising enforcement in that 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 tax assessment. The procedure shall be governed by the national law of the relevant Member State.
4. The principal taxpayer shall be responsible for all procedural obligations relating to the taxation of permanent establishments as referred to in Article 11(4) or Article 22(3).
5. The consolidated tax return shall be submitted to the principal tax authority in the nine months that follow the end of the tax year.

#### *Article 52*

##### *Content of the consolidated tax return*

The consolidated tax return shall comprise the following information:

- (a) identification of the principal taxpayer;
- (b) identification of all group members;
- (c) identification of any associated enterprises as referred to in Article 56 of Directive 2016/xx/EU;
- (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 53*

##### *Notification of errors in the consolidated tax return*

The principal taxpayer shall notify the principal tax authority of errors in the consolidated tax return. The principal tax authority shall issue an amended tax assessment in accordance with Article 56(3) where appropriate.

#### *Article 54*

##### *Failure to file a tax return*

Where the principal taxpayer fails to file a consolidated tax return, the principal tax authority shall issue a tax assessment based on an estimate and taking into account the available information. The principal taxpayer may appeal against that assessment.

## *Article 55*

### *Electronic filing, tax returns and supporting documentation*

The Commission may adopt acts laying down rules on the electronic filing of the consolidated tax return, on the form of the consolidated tax return, on the form of the single taxpayer's tax return and on the supporting documentation required. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 77(2).

## *Article 56*

### *Amended tax assessments*

1. The principal tax authority shall verify that the consolidated tax return complies with the requirements laid down in Article 52.
2. Where required, the principal tax authority shall issue an amended tax assessment not later than three years after the final date for submission of the consolidated tax return or, where no return was submitted before that date, not later than three years following issuance of a tax assessment pursuant to Article 54.

An amended tax assessment may not be issued for the same group more than once in any period of twelve months.

3. Paragraph 2 shall not apply where an amended tax assessment is issued as a result of a decision of the courts of the Member State of the principal tax authority as referred to in Article 65 or as a result of a mutual agreement or arbitration procedure with a third country. Those amended tax assessments shall be issued within twelve months of the decision of the courts of the principal tax authority or of the completion of the mutual agreement or arbitration procedure.
4. By way of derogation from paragraph 2, an amended tax assessment may be issued within six years of the final date for filing the consolidated tax return where that is justified by a deliberate or grossly negligent misstatement on the part of the taxpayer, or within twelve years of that date where the misstatement is the subject of criminal proceedings. That amended tax assessment shall be issued within twelve 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 tax assessment shall relate solely to the subject matter of the misstatement.
5. Prior to issuing an amended tax assessment, the principal tax authority shall consult the competent authorities of the Member States in which a group member is resident for tax purposes or situated in the form of a permanent establishment. 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 for tax purposes or situated in the form of a permanent establishment may call on the principal tax authority to issue an amended tax assessment. Failure of the principal tax authority to notify within three months of that call to the competent authority that it undertakes to issue that amended tax assessment shall be treated as a refusal.

6. No amended tax assessment shall be issued in order to adjust the consolidated tax base where the difference between the declared consolidated tax base and the corrected consolidated tax base does not exceed the lower of EUR 5,000 or 1 % of the consolidated tax base.

No amended tax 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 57*  
*Central database*

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

*Article 58*  
*Change of the principal taxpayer*

The principal taxpayer may not be changed, unless the principal taxpayer ceases to meet the criteria of point (11) of Article 3. A new principal taxpayer shall then be designated by the group.

In exceptional circumstances, the competent tax authorities of the Member States in which the group members are resident or in which they have a permanent establishment may, within six months of the notice referred to in Article 46 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 59*  
*Record-keeping*

Each group member shall keep records and supporting documents in sufficient detail to ensure the proper implementation of this Directive and to allow audits, as referred to in Article 64(2), to be carried out.

*Article 60*  
*Provision of information to the competent authorities*

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

*Article 61*  
*Request for an opinion from the competent authority*

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

The opinion issued by the competent authority shall be binding on it where all relevant information concerning the planned transaction or series of transactions is

disclosed, unless the courts of the Member State of the principal tax authority subsequently decide otherwise pursuant to Article 65. A taxpayer disagreeing with the opinion may act in accordance with its own interpretation but must draw attention to that fact in the 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 62*

##### *Communication between competent authorities*

1. Information communicated pursuant to the rules of 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. A competent authority that receives a request, pursuant to Council Directive 2011/16/EU<sup>16</sup>, for cooperation or exchange of information concerning a group member shall respond in accordance with the time limits laid down in Article 7 of that Directive.

#### *Article 63*

##### *Secrecy clause*

1. All information made known to a Member State pursuant to the rules of this Directive shall be covered by the obligation of official secrecy in that Member State and enjoy the protection extended to similar information under the domestic legislation of that Member State. That information:
  - (a) may be made available only to the persons directly involved in the tax assessment or in the administrative control of that tax assessment;
  - (b) may in addition be made known only in connection with judicial or administrative proceedings that may involve penalties and are undertaken with a view to, or relating to, the preparation or review of a tax assessment and only to persons who are directly involved in those proceedings; that information may, however, be disclosed during public hearings or in judgements if the competent authority of the Member State communicating the information raises no objection;
  - (c) shall in no circumstances be used for purposes other than taxation or in connection with judicial or administrative proceedings that may involve penalties and are undertaken with a view to, or in relation to, the preparation or review of a tax assessment.

In addition, Member States may provide that the information referred to in the first subparagraph be used for the assessment of other levies, duties and taxes covered by Article 2 of Directive 2011/16/EU.

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<sup>16</sup> Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64/1, 11.3.2011, p. 1).

2. With permission of the competent authority of the Member State communicating information pursuant to Directive 2011/16/EU, and only in so far as this is allowed under the legislation of the Member State of the competent authority receiving the information, information received pursuant to Directive 2011/16/EU may be used for other purposes than those referred to in paragraph 1. Such permission shall be granted if the information can be used for similar purposes in the Member State of the competent authority communicating the information.

#### *Article 64*

##### *Audits*

1. The principal tax authority may initiate and coordinate audits of group members. An audit may also be initiated at 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 to ensure a proper implementation of the rules of this Directive. Those audits may include inquiries, inspections or examinations of any kind for the purpose of verifying the compliance of a taxpayer with the rules of this Directive.
3. The principal tax authority shall compile the results of all audits.

#### *Article 65*

##### *Disagreement between Member States*

1. Where the competent authority of the Member State in which a group member is resident for tax purposes or situated in the form of a permanent establishment disagrees with a decision of the principal tax authority made pursuant to Articles 49 or 56(2) or (4) or the second subparagraph of Article 56(5) 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 those enjoyed by a taxpayer under the law of that Member State in proceedings against a decision of the principal tax authority.

#### *Article 66*

##### *Appeals*

1. A principal taxpayer may appeal, amongst others, against the following acts:
  - (a) a decision rejecting a notice to create a group;
  - (b) a notice requesting the disclosure of documents or information;
  - (c) an amended tax assessment;
  - (d) an assessment of the failure to file a consolidated tax return;
  - (e) an invalidation of the original notice to create a group by the principal tax authority as referred to in Article 49(2).



The appeal shall be lodged within sixty 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. By way of derogation from Article 56(2), an amended tax assessment may be issued to give effect to the result of an appeal.

#### *Article 67*

#### *Administrative appeals*

1. Appeals against amended tax assessments or tax assessments made pursuant to Article 54 shall be heard by an administrative body that according to the law of the Member State of the principal tax authority is competent to hear appeals at first instance. That administrative body shall be independent from the tax authorities in the Member State of the principal tax authority. Where there is no such administrative body in that Member State, the principal taxpayer may lodge a judicial appeal directly.
2. In making submissions to the administrative body referred to in paragraph 1, the principal tax authority shall act in close consultation with the other competent authorities.
3. The administrative body referred to in paragraph 1 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 referred to in paragraph 1 varies the decision of the principal tax authority, the varied decision shall replace the original decision of the principal tax authority and shall be treated as the decision of that principal tax authority.
5. The administrative body referred to in paragraph 1 shall decide on 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 has been 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 sixty days of the receipt of the decision of the administrative appeals body referred to in paragraph 1.
7. Where the decision is annulled, the administrative body referred to in paragraph 1 shall remit the matter to the principal tax authority. That principal tax authority shall take a new decision within sixty 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 sixty days of receipt of the decision. If the principal tax authority does not take a new decision within sixty 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 68*  
*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 consult with the other competent authorities.
3. A national court may 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 X**

### **INTERACTION WITH DIRECTIVE 2016/xx/EU**

*Article 69*  
*Interest limitation rule*

1. For the purposes of this Directive, a group shall be treated as one single taxpayer under Article 13 of Directive 2016/xx/EU. The group shall be represented by the principal taxpayer.
2. Where paragraph 1 applies, the exceeding borrowing costs and EBITDA shall be calculated at the level of the group and comprise the results of all group members. The amount of EUR 3 000 000 referred to in Article 13 of Directive 2016/xx/EU shall be increased to 5 000 000.
3. The Commission may adopt delegated acts in accordance with Article 75 to lay down more detailed anti-fragmentation rules for the deductibility of exceeding borrowing costs.

*Article 70*  
*Valuation*

For the purposes of this Directive, Article 20(2) of Directive 2016/xx/EU shall not apply to a group if all group members are located in Member States that have not adopted the Euro (EUR), in which case the principal taxpayer shall determine which currency applies.

*Article 71*  
*Loss relief and recapture*

1. Article 41 of Directive 2016/xx/EU on loss relief and recapture shall automatically cease to apply when this Directive comes into force.
2. Transferred losses which have not yet been recaptured when this Directive enters into force shall remain with the taxpayer to which they have been transferred.

*Article 72*  
*Switch-over*

For the purposes of this Directive, the reference to the statutory corporate tax rate that the taxpayer would have been subject to in the first subparagraph of Article 53(1) of Directive 2016/xx/EU shall not apply and shall be replaced by the average statutory corporate tax rate applicable amongst all Member States instead.

*Article 73*  
*Controlled foreign company legislation*

For the purposes of this Directive, the scope of controlled foreign company legislation under Article 59 of Directive 2016/xx/EU shall be limited to relations between group members and entities that are resident for tax purposes, or permanent establishments that are situated, in a third country.

*Article 74*  
*Hybrid mismatches*

For the purposes of this Directive, the scope of the rules on hybrid mismatches under Article 61 of Directive 2016/xx/EU shall be limited to relations between group members and non-group members that are associated enterprises, as referred to in Article 56 of Directive 2016/xx/EU.

## CHAPTER XI

### FINAL PROVISIONS

*Article 75*  
*Exercise of the delegation*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Articles 2(5), 3 and 69(3) shall be conferred on the Commission for an indeterminate period of time from the date of entry into force of this Directive.
3. The delegation of power referred to in Articles 2(5), 3 and 69(3) may be revoked at any time by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it to the Council.
5. A delegated act adopted pursuant to Articles 2(5), 3 and 69(3) shall enter into force only if no objection has been expressed by the Council within a period of three months from the notification of that act to the Council or before the expiry of that period if the Council has informed the Commission that it will not object. That period shall be extended by two months at the initiative of the Council.

*Article 76*  
*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, and of the revocation of that delegation of powers by the Council.

*Article 77*  
*Committee procedure*

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

*Article 78*  
*Consultations on Article 29*

The Committee established by Article 77 may also discuss the application of Article 29 in a given case.

*Article 79*  
*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 VIII of this Directive on the apportionment of the tax bases between the Member States.

*Article 80*  
*Transposition*

1. Member States shall adopt and publish, by 31<sup>st</sup> December 2020 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.  
They shall apply those provisions from 1<sup>st</sup> January 2021.  
When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
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 81*  
*Entry into force*

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

*Article 82*  
*Addressees*

This Directive is addressed to the Member States.

Done at Strasbourg,

*For the Council*  
*The President*