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Proposal for a  
**COUNCIL DIRECTIVE**  
**on a Common Corporate Tax Base (CCTB)**

## 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 (CCTB). This does not nonetheless change the fact that the Commission will submit the two proposals, i.e. for a CCTB and 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 for a CCTB and CCCTB. 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 'first step' of the staged approach. It is thus limited to the elements of the CCTB, i.e. the rules for calculating the corporate tax base, including certain provisions against tax avoidance and on the international dimension of the proposed tax system. Two additional topics are covered, as compared to the proposal of 2011: there are rules against debt bias and a super-deduction is given for research and development (R&D). Consolidation is envisaged to be addressed in a separate proposal for a Directive (i.e. second step), due for examination at a second stage, i.e. after the elements of the CCTB are politically agreed. Until then, the proposal for a CCCTB will remain pending for examination in Council. To make up for temporarily depriving taxpayers from the benefits of tax consolidation, there is provision for a mechanism of cross-border loss relief with subsequent recapture. This would be due to remain in force until the introduction of the consolidated tax base (CCCTB), which makes cross-border loss relief an automatic outcome of applying the rules.

- **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 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

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<sup>3</sup> COM (2015) 302 final.

adopted Council Directive 2016/xxxx/EU of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (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.

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.

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<sup>4</sup> OJ L [...], [...] [...]

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 piece-meal 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, but the implications of the first stage without consolidation have also been assessed. 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. While consolidation is clearly an important element to reduce tax avoidance, the CCTB would already put an end to some forms of profit shifting, such as exploiting mismatches in the interaction amongst tax systems. 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. A common corporate tax base with cross-border loss relief and an allowance for growth and investment would lead to an increase in investment and employment of about 3.1% and 0.4%, respectively. Overall, growth would increase by around 1.1%. Compliance costs are expected to decrease, notably under the CCCTB (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 22.



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

This proposal is the 'first step' (CCTB) in a 2-stage approach towards an EU-wide corporate tax system and lays down common corporate tax rules for computing the tax base of companies and permanent establishments in the Union.

- **Scope:** differently from the proposal of 2011, which laid down an optional system for all, this directive will be mandatory for companies which belong to groups beyond a certain size. The criterion for fixing a size-related threshold will refer to the total consolidated revenue of a group which files consolidated financial statements. Furthermore, to reach a degree of coherence between the two steps (i.e. CCTB and CCCTB), companies will be required to meet the conditions for consolidation in order to fall within the mandatory scope of the CCTB. This will ensure that once the full initiative materialises with the adoption of consolidation and the apportionment formula, all taxpayers under the CCTB will automatically move into the CCCTB scheme. These common rules will also be available, as an option, for the companies which do not comply with these conditions.
- **Definition of a permanent establishment:** the concept of a permanent establishment in this Directive is defined closely to the post-BEPS recommended definition of permanent establishment in the OECD Model Tax Convention. Differently from the proposal of 2011, the revised definition covers only permanent establishments situated within the Union and belonging to a taxpayer who is resident for tax purposes within the Union. The aim would be to ensure that all concerned taxpayers share a common understanding and to exclude the possibility of a mismatch due to divergent definitions. It was not seen as essential to put forward a common definition of permanent establishments situated in a third country, or in the Union but belonging to a taxpayer who is resident for tax purposes in a third country. The third-country dimension is thus left to be dealt with in bilateral tax treaties and national law.
- **Tax base:** it is designed broadly. All revenues will be taxable unless expressly exempted. Income consisting in dividends or proceeds from the disposal of shares held in a company outside the group will be exempt for participations of at least 10 percent, in order to prevent the double taxation of foreign direct investment. In the same vein, the profits of permanent establishments will also be exempt from tax in the state of the head office.

**Taxable revenues** will be reduced by business expenses and certain other items. The new proposal for a CCTB will also replicate, with some necessary adjustments to ensure consistency, the list of non-deductible expenses that features in the proposal of 2011. To support innovation in the economy, this re-launch initiative will introduce a **super-deduction for R&D costs** into the already generous R&D regime of the proposal of 2011. The baseline rule of that proposal on the deduction of R&D costs will thus continue to apply; so, R&D costs will be fully expensed in the year incurred (with the exception of immovable property). In addition, taxpayers will be entitled, for R&D expenditure up to EUR 20 000 000, to a yearly extra super-deduction of 50%. To the extent that R&D expenditure reaches beyond EUR 20 000 000, taxpayers may deduct 25% of the exceeding amount.

Considering that one of the key policy initiatives relating to the functioning of the single market is to support small and innovative entrepreneurship, the re-launch proposal for a CCTB will grant an **enhanced super-deduction for start-up companies**. In that context, taxpayers who qualify as start-ups may deduct 100% of

their R&D costs in so far as these do not exceed EUR 20 000 000 and provided that these taxpayers do not have any associated enterprises.

- **Interest limitation rule:** this is a new rule (absent from the proposal of 2011) which features in the ATAD and was analysed in detail as part of the BEPS initiative. It limits the deductibility of interest (and other financial) costs, in order to discourage practices of profit shifting towards low-tax countries. The rule envisages to allow the full deductibility of interest (and other financial) costs to the extent that they can be offset against taxable interest (and other financial) revenues. Any surplus of interest costs will be subject to deductibility restrictions, to be determined by reference to a taxpayer's taxable earnings before interest, tax, depreciation and amortisation (EBITDA).
- **Allowance for Growth and Investment (AGI):** The re-launch initiative aims to tackle the asymmetry whereby interest paid out on loans is deductible (subject to some limits) from taxpayers' CCTB whilst this is not the case for profit distributions. The outcome is a definitive advantage in favour of financing through debt as opposed to equity. Given the risks that such a situation entails for the indebtedness of companies, the re-launch proposal for a CCTB will include a rule against debt bias, in order to neutralise the current framework that discourages equity financing. Taxpayers will be given an allowance for growth and investment according to which increases in their equity will be deductible from their taxable base subject to certain conditions, such as measures against potential cascading effects and anti-tax avoidance rules.
- **Depreciation:** the thrust of the rule according to which fixed assets shall be depreciable for tax purposes, subject to certain exceptions, remains the same as in the proposal of 2011. Yet, more assets will now fall within the scope of individual depreciation as medium-life fixed tangible assets have been removed from the pool system.
- **Losses:** as under the proposal of 2011, taxpayers are allowed to carry losses forward indefinitely without restrictions on the deductible amount per year. The Directive draws a link between the interest limitation rules and the tax treatment of losses. A policy choice was thus made to draft a highly effective interest limitation rule, to the effect that any amounts qualifying as a loss reflect the outcome of trading activity. The rule has also been reinforced with an anti-abuse provision to discourage attempts to circumvent the rules on loss deductibility through purchasing loss-making companies.

**Temporary loss relief with recapture:** in order to partially make up for the absence of the benefits of cross-border consolidation during the 'first step', there will be a possibility to consider, under strict conditions, losses incurred by an immediate subsidiary or permanent establishment situated in other Member States. This relief will be temporary since the parent company will add back to its tax base, considering the amount of losses previously deducted, any subsequent profits made by its immediate subsidiaries or permanent establishments. Furthermore, if the incorporation does not occur within a certain number of years, the deducted losses will anyway be reincorporated automatically.
- **Anti-tax avoidance:** similarly to the proposal of 2011, the system will include an array of rules against tax avoidance. The General Anti-Abuse Rule (GAAR) is drafted in line with the text featuring in the ATAD and is supplemented by measures designed to curb specific types of tax avoidance. To prevent discriminatory situations, it will be critical to ensure in practice that the GAAR applies to domestic situations, within the

Union and vis-à-vis third countries in a uniform manner, so that their scope and results of application in domestic and cross-border situations do not differ.

As far as **specific anti-tax avoidance measures** are concerned, it usually is necessary to address the level of taxation on the other side of the border, in order to determine whether the taxpayer is liable to tax on foreign generated income. The rules include a switch-over clause, which is targeted against certain types of income originating in a third country. It aims to ensure that income is taxable in the Union if it was taxed below a certain level in the third country. Controlled foreign company legislation (CFC) largely refers to the rule in the ATAD and has the effect of re-attributing the income of a low-taxed controlled subsidiary to its parent company in an effort to discourage profit shifting. CFC rules extend to the profits of permanent establishments where those profits are not subject to tax or are tax exempt in the Member State of the taxpayer.

- **Hybrid mismatches:** Given that mismatches generate from national differences in the legal qualification of certain types of entities or financial payments, they should normally not occur amongst companies which apply the common rules of the CCTB for calculating their tax base. Since, however, mismatches are likely to persist in the interaction between the CCTB and national or third-country corporate tax systems, this directive lays down rules whereby one of the two jurisdictions in a mismatch deny the deduction of a payment or ensures that the corresponding income is included in the corporate tax base.

Proposal for a

## **COUNCIL DIRECTIVE**

### **on a Common Corporate Tax Base (CCTB)**

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 those problems should therefore address both 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.
- (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

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

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

<sup>7</sup> COM(2011) 121 final/2, 3.10.2011.

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 ('CCTB') should be enacted, 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 CCTB should be mandatory only for companies which belong to a group 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, to ensure coherence between the two steps of the CCCTB initiative, rules on a CCTB should be mandatory for companies which would be considered as a group should the full initiative materialise. In order to better serve the aim of facilitating trade and investment in the internal market, the rules on a CCTB should also be available, as an option, to companies which do not meet those criteria.
- (6) It is necessary to define the concept of a permanent establishment situated in the Union and belonging to a taxpayer who is resident for tax purposes within the Union. The aim would be to ensure that all concerned taxpayers share a common understanding and to exclude the possibility of a mismatch due to divergent definitions. On the contrary, it should not be seen as essential to have a common definition of permanent establishments situated in a third country, or in the Union but belonging to a taxpayer who is resident for tax purposes in a third country. This dimension should better be left to bilateral tax treaties and national law due to its complicated interaction with international agreements.
- (7) To mitigate tax avoidance risks, which distort the functioning of the internal market, a CCTB should be designed broadly. Based on this premise, all revenues should be taxable unless expressly exempted. As regards participations of at least 10 %, income consisting in dividends or proceeds from the disposal of shares held in a company outside the group should be exempt, in order to prevent double taxation in foreign direct investment. In the same vein, the profits of permanent establishments should also be exempt from tax in the state of the head office. It is also considered that the exemption of income earned abroad meets the need for simplicity for businesses. Indeed, in giving relief for double taxation, most Member States currently exempt dividends and proceeds from the disposal of shares, thereby avoiding computing the taxpayer's entitlement to a credit for the tax paid abroad, in particular where such

entitlement must take account of the corporation tax paid by the company distributing the dividends.

- (8) Taxable revenues should be reduced by business expenses and certain other items. Deductible business expenses should normally include all costs relating to sales and expenses linked to the production, maintenance and securing of income. To support innovation in the economy and modernise the internal market, enhanced deductions should be provided for research and development costs, including super-deductions, which should be fully expensed in the year incurred (with the exception of immovable property). In order to ensure legal certainty, there should also be a list of non-deductible expenses.
- (9) Recent developments in international taxation have highlighted that, in an effort to reduce their global tax liability, multinational groups of companies have increasingly engaged in tax avoidance arrangements leading to base erosion and profit shifting, through excessive interest payments. It is therefore necessary to limit the deductibility of interest (and other financial) costs, in order to discourage such practices. In that context, the deductibility of interest (and other financial) costs should only be allowed without restrictions to the extent that those costs can be offset against taxable interest (and other financial) revenues. Any surplus of interest costs should however be subject to deductibility restrictions, to be determined by reference to a taxpayer's taxable earnings before interest, tax, depreciation and amortisation ('EBITDA').
- (10) The fact that interest paid out on loans is deductible from the tax base of a taxpayer whilst this is not the case for profit distributions creates a definitive advantage in favour of financing through debt as opposed to equity. Given the risks that this entails for the indebtedness of companies, it is critical to provide for measures which neutralise the current bias against equity financing. In this light, it is envisaged to give taxpayers an allowance for growth and investment according to which increases in a taxpayer's equity should be deductible from its taxable base subject to certain conditions. Thus, it would be essential to ensure that the system does not suffer cascading effects and to this end, it would be necessary to exclude the tax value of a taxpayer's participations in associated enterprises. Finally, to make the scheme of the allowance sufficiently robust, it would also be required to lay down anti-tax avoidance rules.
- (11) Fixed assets should be depreciable for tax purposes, subject to certain exceptions. Whilst long- and medium-life fixed tangible and intangible assets should be depreciated individually, all other depreciable assets should be placed in a pool. Depreciation in a pool simplifies matters for both the tax authorities and taxpayers since it avoids the need to establish and maintain a list of every single type of fixed asset and its useful life.
- (12) In order to discourage the shifting of passive (mainly, financial) income out of highly-taxed companies, any losses that such companies may incur at the end of a tax year should be presumed to mostly correspond to the results of trading activity. Based on that premise, taxpayers should be allowed to carry losses forward indefinitely without restrictions on the deductible amount per year. Since the carry-forward of losses is intended to ensure that a taxpayer pays tax on its real income, there is no reason to place a time limit on carry forward. Regarding the prospect for a loss carry-back, no such a rule would need to be introduced because that this is relatively rare in the practice of Member States, and tends to lead to excessive complexity. Furthermore, an anti-abuse

provision should be laid down in order to prevent, thwart or counter attempts to circumvent the rules on loss deductibility through purchasing loss-making companies.

- (13) In order to facilitate the cash-flow capacity of businesses – for instance, by compensating start-up losses in a Member State with profits in another Member State – and encourage the cross-border expansion within the Union, taxpayers should be entitled to temporarily take into account the losses incurred by their immediate subsidiaries and permanent establishments situated in other Member States. For that purpose, a parent company or head office located in a Member State should be able to deduct from its tax base, in a given tax year, the losses incurred in the same tax year by its immediate subsidiaries or permanent establishments situated in other Member States in proportion to its holding. The parent company should then be required to add back to its tax base, considering the amount of losses previously deducted, any subsequent profits made by those immediate subsidiaries or permanent establishments. As it is vital to safeguard national tax revenues, the deducted losses should also be reincorporated automatically if this has not already occurred after a certain number of years or if the requisites to qualify as an immediate subsidiary or permanent establishment are no longer met.
- (14) To avoid the base erosion of higher tax jurisdictions through shifting profits via inflated transfer prices towards lower tax countries, transactions between a taxpayer and its associated enterprise(s) should be subject to pricing adjustments in line with the 'arm's length' principle, which is a generally applied criterion.
- (15) It is crucial to provide for appropriate anti-tax avoidance measures in order to reinforce the resilience of the rules on a CCTB against aggressive tax planning practices. Specifically, the system should include a general anti-abuse rule ('GAAR'), supplemented by measures designed to curb specific types of avoidance. Given that GAARs have the function of tackling abusive tax practices that have not yet been dealt with through specifically targeted provisions, they fill in gaps, which should not affect the applicability of specific anti-avoidance rules. Within the Union, GAARs should be applied to arrangements that are not genuine. It is furthermore important to ensure that the GAAR apply in a uniform manner to domestic situations, cross-border situations within the Union and cross-border situations involving companies established in third countries, so that their scope and results of application do not differ.
- (16) As far as specific anti-tax avoidance measures are concerned, it is often necessary to ascertain the level of taxation on the other side of the border, in order to determine whether the taxpayer is liable to pay tax on foreign generated income. This would create a level-playing field regarding the level of tax and competition within the internal market and also protect the market from base erosion vis-à-vis third countries. In this context, it is necessary to provide for a switch-over clause targeting some types of income earned in a third country, such as profit distributions and proceeds from the disposal of shares, in order to ensure that income be taxable in the Union if it has been taxed below a certain level in a third country. Controlled foreign company ('CFC') legislation is also an indispensable element of a corporate tax system and has the effect of re-attributing the income of a low-taxed controlled subsidiary to its parent company in an effort to discourage profit shifting. In that regard, it is necessary that CFC rules extend to the profits of permanent establishments where those profits are not subject to tax or are tax exempt in the Member State of the taxpayer.
- (17) Taking into account that the effect of hybrid mismatches is usually a double deduction (i.e. deduction in both states) or a deduction of the income in one state without

inclusion in the tax base of another, such situations clearly affect the internal market by distorting its mechanisms and creating loopholes for tax avoidance practices to flourish. Given that mismatches generate from national differences in the legal qualification of certain types of entities or financial payments, they normally do not occur amongst companies which apply the rules of a CCTB for calculating their tax base. Mismatches would however persist in the interaction between the CCTB and national or third-country corporate tax systems. To neutralise the effects of hybrid mismatch arrangements, it is necessary to lay down rules whereby one of the two jurisdictions in a mismatch deny the deduction of a payment or ensures that the corresponding income is included in the corporate tax base.

- (18) 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 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>.
- (19) 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; (iii) enacting detailed rules against tax avoidance in a number of specified fields relevant to the allowance for growth and investment ; (iv) defining the concepts of legal and economic ownership of leased assets in more detail; (v) calculating the capital and interest elements of lease payments and the depreciation base of leased assets; and (vi) defining more precisely the categories of fixed assets subject to depreciation. 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.
- (20) In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission to adopt annually a list of third country company forms that are similar to the company forms listed in Annex

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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).

<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).



I. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>12</sup>.

- (21) 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 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.
- (22) 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.
- (23) The Commission should be required to review the application of the Directive five years after its entry into force and report to the 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 of a common base for the taxation of certain companies and lays down rules for the calculation of that base.
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.

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<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).

<sup>13</sup> OJ C 369, 17.12.2011, p. 14.

## *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;
  - (d) it qualifies as a parent company or qualifying subsidiary as referred to in Article 3 and/or has one or more permanent establishment in other Member States as referred to in Article 5.
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 State where the company meets the conditions laid down in points (b) to (d) of paragraph 1.

As regards whether the 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 68(2). The fact that a third country company form is not included in that list shall not preclude the application of the rules of this Directive to that form.
3. A company that meets the conditions of points (a) and (b) of paragraph 1, but does not meet the conditions of points (c) or (d) 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 Article 65(3). The conditions under points (a) and (b) 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 Article 3.
5. The Commission shall be empowered to adopt delegated acts in accordance with Article 66 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*

### *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 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 these 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 4*  
*Definitions*

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

- (1) 'taxpayer' means a company that meets the conditions of Article 2(1) or (2), or has opted for applying the rules of this Directive in accordance with Article 2(3);
- (2) 'non-taxpayer' means a company that does not meet the conditions of Article 2(1) or (2) and has not opted for applying the rules of this Directive in accordance with Article 2(3);
- (3) 'resident taxpayer' means a taxpayer that is resident for tax purposes in a Member State;
- (4) 'non-resident taxpayer' means a taxpayer that for tax purposes is not resident in a Member State;
- (5) 'revenues' means proceeds of sales and of any other transactions, net of value added tax and other taxes and duties collected on behalf of government agencies, whether of a monetary or non-monetary nature, including proceeds from disposals of assets and rights, interest, dividends and other profits distributions, proceeds of liquidations, royalties, subsidies and grants, gifts received, compensations and ex-gratia payments. Revenues shall also include non-monetary gifts made by a taxpayer. Revenues shall not include equity raised by the taxpayer or debt repaid to it;
- (6) 'expenses' means decreases in net equity of the company during the accounting period in the form of outflows or a reduction in the value of assets or in the form of a recognition or increase in the value of liabilities, other than those relating to monetary or non-monetary distributions to shareholders or equity owners in their capacity as such.
- (7) 'tax year' means a calendar year or any other appropriate period for tax purposes;
- (8) 'profit' means an excess of revenues over deductible expenses and other deductible items in a tax year;
- (9) 'loss' means an excess of deductible expenses and other deductible items over revenues in a tax year;
- (10) 'consolidated group for financial accounting purposes' means all entities that are fully included in consolidated financial statements drawn up in accordance with the International Financial Reporting Standards or a national financial reporting system;

- (11) 'research and development' means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any particular application or use in view (basic research); original investigation undertaken in order to acquire new knowledge but directed primarily towards a specific, practical aim or objective (applied research); systematic work, drawing on knowledge gained from research and practical experience and producing additional knowledge, which is directed to producing new products or processes or to improving existing products or processes (experimental development);
- (12) 'borrowing costs' means interest expenses on all forms of debt, other costs economically equivalent to interest and expenses incurred in connection with the raising of finance, as defined in national law, including payments under profit participating loans, imputed interest on convertible bonds and zero coupon bonds, payments under alternative financing arrangements, the finance cost elements of finance lease payments, capitalised interest included in the balance sheet value of a related asset, the amortisation of capitalised interest, amounts measured by reference to a funding return under transfer pricing rules, notional interest amounts under derivative instruments or hedging arrangements related to an entity's borrowings, the notional yield on net equity increases as referred to in Article 11 of this Directive, certain foreign exchange gains and losses on borrowings and instruments connected with the raising of finance, guarantee fees for financing arrangements, arrangement fees and similar costs related to the borrowing of funds;
- (13) 'exceeding borrowing costs' means the amount by which the deductible borrowing costs of a taxpayer exceed taxable interest revenues and other taxable revenues that the taxpayer receives and which are economically equivalent to interest revenues;
- (14) 'transfer of assets' means an operation whereby a Member State loses the right to tax the transferred assets, whilst the assets remain under the legal or economic ownership of the same taxpayer;
- (15) 'transfer of tax residence' means an operation whereby a taxpayer ceases to be resident for tax purposes in a Member State, whilst acquiring tax residence in another Member State or third country;
- (16) 'transfer of a business carried on by a permanent establishment' means an operation whereby a taxpayer ceases to have taxable presence in a Member State whilst acquiring such presence in another Member State or third country without becoming resident for tax purposes in that Member State or third country;]
- (17) 'value for tax purposes' means the depreciation base of a fixed asset or asset pool, less total depreciation deducted;
- (18) 'market value' means the amount for which an asset can be exchanged or mutual obligations can be settled between willing unrelated parties in a direct transaction.
- (19) 'fixed assets' means tangible assets acquired for value or created by the taxpayer and intangible assets acquired for value that are capable of being valued independently and that are used in the business for producing, maintaining or securing income for more than 12 months, except where their acquisition or construction cost is less than EUR 1,000. Fixed assets shall also include financial assets, with the exception of financial assets held for trading in accordance with to Article 21;
- (20) 'financial assets' means shares in, and loans to, associated enterprises as referred to in Article 56 of this Directive, participating interests as defined in Article 2(2) of

Directive 2013/34/EU of the European Parliament and of the Council<sup>14</sup>, loans to undertakings with which the taxpayer is linked by virtue of participating interests, investments held as fixed assets, other loans, and own shares to the extent that national law permits their being shown in the balance sheet;

- (21) 'acquisition or construction cost' means the amount of cash or cash equivalents paid or payable or the value of other assets given in exchange for or consumed to acquire a fixed tangible asset at the time of its acquisition or construction.
- (22) 'long-life fixed tangible assets' means fixed tangible assets with a useful life of 15 years or more. Buildings, aircraft and ships shall be considered to be long-life fixed tangible assets;
- (23) 'medium-life fixed tangible assets' means fixed tangible assets that do not qualify as long-life fixed tangible assets under point 22 and have a useful life of eight years or more.
- (24) 'second-hand assets' means fixed assets with a useful life that was partly exhausted when they were acquired and that are suitable for further use in their current state or after repair;
- (25) 'useful life' means the period for which an asset is expected to be available for use or the number of production or similar units that a taxpayer expected to obtain from the asset ;
- (26) 'improvement costs' means any additional expenditure on a fixed asset that substantially increases the capacity of the asset or substantially improves its functioning or represents more than 10 percent of the initial depreciation base of the asset;
- (27) 'stocks and work-in-progress' means assets for sale or in the process of production for sale or in the form of materials or supplies to be consumed in the production process or in the rendering of services;
- (28) 'economic owner' means the person who receives substantially all the benefits and bears all the risks attached to a fixed asset, regardless of whether that person is the legal owner. A taxpayer who has the right to possess, use and dispose of a fixed asset and bears the risk of its loss or destruction shall in any event be considered the economic owner;
- (29) 'financial undertaking' means any of the following entities:
  - (a) a credit institution or an investment firm as defined in point (1) of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council<sup>15</sup>, an AIFM as defined in point (b) of Article 4(1) of Directive 2011/61/EU of the

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<sup>14</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

<sup>15</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

European Parliament and of the Council<sup>16</sup>, or a management company as defined in point (b) of Article 2(1) of Directive 2009/65/EC of the European Parliament and of the Council<sup>17</sup>;

- (b) an insurance undertaking as defined in point (1) of Article 13 of Directive 2009/138/EC of the European Parliament and of the Council<sup>18</sup>;
- (c) a reinsurance undertaking as defined in point (4) of Article 13 of Directive 2009/138/EC;
- (d) an institution for occupational retirement provision as defined in point (a) of Article 6 of Directive 2003/41/EC of the European Parliament and of the Council<sup>19</sup>, unless a Member State has chosen not to apply that Directive in whole or in part to that institution in accordance with Article 5 of that Directive, or the delegate of an institution for occupational retirement provision as referred to in Article 19(1) of Directive 2003/41/EC;
- (e) a pension institution operating pension schemes which qualify as social security schemes covered by Regulation (EC) No 883/2004 of the European Parliament and of the Council<sup>20</sup> and by Regulation (EC) No 987/2009 of the European Parliament and of the Council<sup>21</sup>, as well as any legal entity set up for the purpose of investment in such pension schemes;
- (f) an AIF as defined in point (a) of Article 4(1) of Directive 2011/61/EU, which is managed by an AIFM as defined in point (b) of Article 4(1) of Directive 2011/61/EU, or an AIF supervised under national law;
- (g) a UCITS as defined in Article 1(2) of Directive 2009/65/EC;
- (h) a CCP as defined in point (1) of Article 2 of Regulation (EU) No 648/2012 of the European Parliament and of the Council<sup>22</sup>;
- (i) a central securities depository as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council<sup>23</sup>;

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<sup>16</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

<sup>17</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

<sup>18</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

<sup>19</sup> Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ L 235, 23.9.2003, p. 10).

<sup>20</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 200, 7.6.2004, p. 1).

<sup>21</sup> Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 on laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ L 284, 30.10.2009, p. 1).

<sup>22</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

<sup>23</sup> Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

- (30) 'entity' means any legal arrangement to carry on business through either a company or a structure that is transparent for tax purposes;
- (31) 'hybrid mismatch' means a situation between a taxpayer and an associated enterprise or a structured arrangement between parties in different tax jurisdictions where the following outcome is attributable to differences in the legal characterisation of a financial instrument or entity, or the treatment of a commercial presence as a permanent establishment:
- (a) a deduction of the same payment, expenses or losses from the taxable base occurs both in the jurisdiction in which the payment has its source, the expenses are incurred or the losses are suffered and in the other jurisdiction ('double deduction'); or
  - (b) a deduction of a payment from the taxable base in the jurisdiction in which the payment has its source without a corresponding inclusion for tax purposes of the same payment in the other jurisdiction ('deduction without inclusion'); or,
  - (c) in case of differences in the treatment of a commercial presence as a permanent establishment, non-taxation of income which has its source in a jurisdiction without a corresponding inclusion for tax purposes of the same income in the other jurisdiction ('non-taxation without inclusion').

A hybrid mismatch only arises to the extent that the same payment deducted, expenses incurred or losses suffered in two jurisdictions exceed the amount of income that is included in both jurisdictions and which can be attributed to the same source.

A hybrid mismatch also includes the transfer of a financial instrument under a structured arrangement involving a taxpayer where the underlying return on the transferred financial instrument is treated for tax purposes as derived simultaneously by more than one of the parties to the arrangement, who are resident for tax purposes in different jurisdictions, giving rise to the following outcome:

- (a) a deduction of a payment connected with the underlying return without a corresponding inclusion for tax purposes of such payment, unless the underlying return is included in the taxable income of one of the parties involved; or
  - (b) a relief for tax withheld at source on a payment derived from the transferred financial instrument to more than one of the parties involved;
- (32) 'structured arrangement' means an arrangement involving a hybrid mismatch where the mismatch is priced into the terms of the arrangement or an arrangement that has been designed to produce a hybrid mismatch outcome, unless the taxpayer or an associated enterprise could not reasonably have been expected to be aware of the hybrid mismatch and did not share in the value of the tax benefit resulting from the hybrid mismatch;
- (33) 'national corporate tax law' means the statute of a Member State which provides for one of the taxes listed in Annex II.

The Commission may adopt delegated acts in accordance with Article 66 in order to lay down definitions of more concepts.

## Article 5

### *Permanent establishment in a Member State of a taxpayer who is resident for tax purposes in the Union*

1. A taxpayer shall be considered to have a permanent establishment in a Member State other than the Member State in which it is resident for tax purposes when it has a fixed place in that other Member State through which it carries on its business, wholly or partly, including in particular:
  - (a) a place of management;
  - (b) a branch;
  - (c) an office;
  - (d) a factory;
  - (e) a workshop;
  - (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
2. A building site or construction or installation project shall constitute a permanent establishment only if it lasts more than twelve months.
3. The term 'permanent establishment' shall not include the following activities, provided that such activities are or, the overall activity of the fixed place of business in the case of point (f) is, of auxiliary or preparatory character:
  - (a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the taxpayer;
  - (b) the maintenance of a stock of goods or merchandise belonging to the taxpayer for the sole purpose of storage, display or delivery;
  - (c) the maintenance of a stock of goods or merchandise belonging to the taxpayer for the sole purpose of being processed by another person;
  - (d) the maintenance of a fixed place of business for the sole purpose of purchasing goods or merchandise for the taxpayer or for collecting information for the taxpayer;
  - (e) the maintenance of a fixed place of business for the sole purpose of carrying on any other activity for the taxpayer;
  - (f) the maintenance of a fixed place of business for the sole purpose of any combination of activities mentioned in points (a) to (e);
4. Without prejudice to paragraph 5, where a person is acting in a Member State on behalf of a taxpayer and, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the taxpayer, the taxpayer shall be deemed to have a permanent establishment in that Member State in respect of the activities undertaken by that person for the taxpayer.

The contracts under the first subparagraph shall be concluded:

- (a) in the name of the taxpayer, or
- (b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that taxpayer or that the taxpayer has the right to use, or



(c) for the provision of services by the taxpayer.

The first and second subparagraphs shall not apply if the activities of that person are auxiliary or preparatory as referred to in paragraph 3 so that, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

5.

(a) Paragraph 4 shall not apply where the person acting in a Member State on behalf of a taxpayer carries on business in that Member State as an independent agent and acts for the taxpayer in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more taxpayers to which it is 'closely related', that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to these taxpayers.

(b) For the purposes of this Article, a person is 'closely related' to a taxpayer if one possesses, directly or indirectly, a right to exercise more than 50 % of the voting rights in the other or an ownership right amounting to more than 50 % of the other's capital or more than 50 % of the rights giving entitlement to profit.

6. The fact that a taxpayer who is resident for tax purposes in a Member State controls, or is being controlled by, a taxpayer who is tax resident in another Member State or carries on business in that other Member State (whether through a permanent establishment or otherwise), shall not of itself mean that any of the taxpayers is a permanent establishment of the other.

## CHAPTER II

### CALCULATION OF THE TAX BASE

#### *Article 6*

#### *General principles*

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

#### *Article 7*

#### *Elements of the tax base*

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

*Article 8*  
*Exempt revenues*

The following revenues shall not be included in the tax base:

- (a) subsidies directly linked to the acquisition, construction or improvement of fixed assets that are subject to depreciation in accordance with Articles 31 to 41;
- (b) proceeds from the disposal of pooled assets referred to in Article 37(2), including the market value of non-monetary gifts;
- (c) proceeds from a disposal of shares, provided that the taxpayer has maintained a minimum holding of 10 % in the capital or 10 % of the voting rights of the company during the 12 months preceding the disposal, with the exception of proceeds resulting from a disposal of shares held for trading as referred to in Article 21(3) and of shares held by life insurance undertakings in accordance with point (b) of Article 28;
- (d) received profit distributions, provided that the taxpayer has maintained a minimum holding of 10 % in the capital or 10 % of the voting rights of the distributing company for 12 consecutive months, with the exception of profit distributions from shares held for trading as referred to in Article 21(4) and profit distributions received by life insurance undertakings in accordance with point (c) of Article 28;
- (e) income of a permanent establishment received by the taxpayer in the Member State where the taxpayer is resident for tax purposes.

*Article 9*  
*Deductible expenses*

1. Expenses shall be deductible only to the extent that they are incurred in the direct business interest of the taxpayer.
2. The expenses referred to in paragraph 1 shall include all costs of sales and all expenses, net of deductible value added tax, that the taxpayer incurred with a view to obtaining or securing income, including costs for research and development and costs incurred in raising equity or debt for the purposes of the business.
3. In addition to the amounts which are deductible as costs for research and development in accordance with paragraph 2, the taxpayer may also deduct, per tax year, an extra 50% of such costs that it incurred during that year. To the extent that costs for research and development reach beyond EUR 20 000 000, the taxpayer may deduct 25% of the exceeding amount.

By way of derogation from the first subparagraph, the taxpayer may deduct an extra 100% of its costs for research and development up to EUR 20 000 000 where that taxpayer meets all of the following conditions:

- (a) it is an unlisted enterprise with fewer than 50 employees and an annual turnover and/or annual balance sheet total that does not exceed EUR 10 000 000;
- (b) it has not been registered for longer than five years. If the taxpayer is not subject to registration, the period of five years may be taken to start at the moment that the enterprise either starts, or is liable to tax for, its economic activity;
- (c) it has not been formed through a merger;
- (d) it does not have any associated enterprises.

4. Member States may provide for the deduction of gifts and donations to charitable bodies.

*Article 10*  
*Other deductible items*

A deduction shall be made in respect of the depreciation of fixed assets referred to in Articles 30 to 40.

*Article 11*  
*Allowance for growth and investment ('AGI')*

1. For the purposes of this Article, 'AGI equity base' means, in a given tax year, the difference between the equity of a taxpayer and the tax value of its participation in the capital of associated enterprises as referred to in Article 56.
2. For the purposes of this Article, 'equity' means any of the following:
  - (a) 'capital and reserves', as described in letter A., under 'Capital, reserves and liabilities' in Annex III to Directive 2013/34/EU of the European Parliament and of the Council<sup>24</sup>;
  - (b) 'capital and reserves', as described in letter L. in Annex IV to Directive 2013/34/EU;
  - (c) 'equity', as defined in the International Financial Reporting Standards which are adopted and used in the Union pursuant to Regulation (EC) No 1606/2002 of the European Parliament and of the Council<sup>25</sup>.
3. An amount equal to the notional yield on the allowance for growth and investment ('AGI') equity base increases shall be deductible from the taxable base of a taxpayer according to paragraphs 1 to 6. If there is an AGI equity base decrease, an amount equal to the notional yield on the AGI equity base decrease shall become taxable.
4. AGI equity base increases or decreases shall be calculated, for the first ten tax years that a taxpayer is subject to the rules of this Directive, as the difference between its current level of AGI equity base and its AGI equity base on the first day of the first tax year under the rules of this Directive. After the first ten tax years, the reference to the amount of AGI equity base that shall be deductible against the current level of AGI equity base shall annually be moved forward by one tax year.
5. The notional yield referred to in paragraph 3 shall be [equal to the yield of the euro area 10-year government benchmark bond in December of the relevant tax year, as published by the European Central Bank. A floor of zero per cent shall apply where the curve of the annual yield is negative].
6. The Commission shall be empowered to adopt delegated acts in accordance with Article 66 to lay down more detailed rules against tax avoidance, and more particularly in the following fields relevant to the AGI:

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<sup>24</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

<sup>25</sup> Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243, 11.9.2002, p. 1).

- (a) intra-group loans and loans involving associated enterprises;
- (b) cash contributions and contributions in kind;
- (c) transfers of participations;
- (d) the re-categorisation of old capital as new capital through liquidations and the creation of start-ups;
- (e) the creation of subsidiaries;
- (f) acquisitions of businesses held by associated enterprises;
- (g) double-dipping structures combining interest deductibility and deductions under the AGI;
- (h) increases in the amount of loan financing receivables towards associated enterprises as compared to the amount of such receivables at the reference date.

*Article 12*  
*Non-deductible items*

By way of derogation from Articles 9 and 10, the following items shall be non-deductible:

- (a) profit distributions and repayments of equity or debt;
- (b) 50 % of entertainment costs, up to an amount that does not exceed [x] % of revenues in the tax year;
- (c) the transfer of retained earnings to a reserve that forms part of the equity of the company;
- (d) corporate tax and similar taxes on profits;
- (e) bribes and other illegal payments;
- (f) fines and penalties, including charges for late payment, that are due to a public authority for breach of any legislation;
- (g) expenses incurred by a company for the purpose of deriving income that is exempt pursuant to points (c), (d) and (e) of Article 8;
- (h) gifts and donations other than those referred to in Article 9(4);
- (i) acquisition or construction costs or cost connected with the improvement of fixed assets which are deductible under Articles 10 and 18, except for the cost related to research and development. The costs referred to in point (a) of Article 33(1) and points (a) and (b) of Article 33(2) shall not be treated as costs related to research and development;
- (j) losses incurred by a permanent establishment in a third country.

*Article 13*  
*Interest limitation rule*

1. Borrowing costs shall be deductible up to the amount of the interest or other taxable revenues from financial assets received by the taxpayer.
2. Exceeding borrowing costs shall be deductible in the tax year in which they are incurred for maximum of 30 % of the taxpayer's earnings before interest, tax,

depreciation and amortisation ('EBITDA') or for a maximum amount of EUR 3 000 000, whichever is higher.

For the purposes of this Article, where a taxpayer is permitted or required to act on behalf of a group, as defined in the rules of a national group taxation system, the entire group shall be treated as a taxpayer. In those circumstances, exceeding borrowing costs and the EBITDA shall be calculated for the entire group. The amount of EUR 3 000 000 shall also be considered for the entire group.

3. The EBITDA shall be calculated by adding back to the tax base of the taxpayer the tax-adjusted amounts for exceeding borrowing costs, as well as the tax-adjusted amounts for depreciation and amortisation. Tax-exempt revenues shall be excluded from the EBITDA of a taxpayer.
4. By way of derogation from paragraph 2, a taxpayer who qualifies as a standalone company shall be entitled to fully deduct its exceeding borrowing costs. A standalone company means a taxpayer who is not part of a consolidated group for financial accounting purposes and has no associated enterprises or permanent establishments.
5. By way of derogation from paragraph 2, exceeding borrowing costs shall be fully deductible if they are incurred on:
  - (a) loans concluded before [date of political agreement on this directive], with the exclusion of any subsequent modifications of those loans;
  - (b) loans used to fund long-term public infrastructure projects, where the project operator, borrowing costs, assets and income are all in the Union.

For the purposes of point (b), a long-term public infrastructure project shall mean a project to provide, upgrade, operate or maintain a large-scale asset that a Member State considers to be in the general public interest.

Where point (b) applies, any income arising from a long-term public infrastructure project shall be excluded from the EBITDA of the taxpayer.

6. Exceeding borrowing costs that cannot be deducted in a given tax year shall be carried forward without time limitation.
7. Paragraphs 1 to 6 shall not apply to financial undertakings, including those that are part of a consolidated group for financial accounting purposes.

#### *Article 14*

##### *Expenditure incurred for the benefit of shareholders, direct relatives of those shareholders or associated enterprises*

Benefits granted to a shareholder who is an individual, to his or her spouse, to his or her lineal ascendant or descendant or granted to an associated enterprise as referred to in Article 56, shall not be treated as deductible expenses where such benefits would not be granted to an independent third party.

## CHAPTER III

### TIMING AND QUANTIFICATION

#### *Article 15* *General principles*

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

#### *Article 16* *Accrual of revenues*

1. Revenues shall accrue at the moment that the right to receive them has arisen and they can be measured reliably, irrespective of whether the relevant amounts have actually been paid.
2. Revenues resulting from trade in goods shall be considered to have been accrued in accordance with paragraph 1 when the following conditions are fulfilled:
  - (a) the taxpayer has transferred to the buyer the ownership of the goods sold;
  - (b) the taxpayer does not retain effective control over the goods sold;
  - (c) the amount of revenue can be measured reliably;
  - (d) it is probable that the economic benefits associated with the transaction will flow to the taxpayer;
  - (e) the costs incurred or to be incurred in respect of the transaction can be measured reliably.
3. Revenues resulting from the supply of services shall be considered to have accrued to the extent that the services have been provided and when the following conditions have been fulfilled:
  - (a) the amount of revenue can be measured reliably;
  - (b) it is probable that the economic benefits associated with the transaction will flow to the provider;
  - (c) the stage of completion of the transaction at the end of the tax year can be measured reliably;
  - (d) the costs incurred or to be incurred in respect of the transaction can be measured reliably.

Where the criteria set out in points (a) to (d) are not met, revenues arising from the supply of services shall be considered to have accrued only to the extent that they can be matched to deductible expenses.

4. Where revenues arise from payments to the taxpayer which are scheduled to be carried out at several stages, revenues shall be considered to accrue when each of the individual instalments becomes due.

*Article 17*  
*Incurrence of deductible expenses*

Deductible expenses are incurred at the moment that all of the following conditions are met:

- (a) the obligation to make the payment has arisen; where an expense consists of payments by the taxpayer at several stages, the obligation to make a payment shall arise when each of the individual instalments becomes due;
- (b) the amount of the obligation can be quantified with reasonable accuracy;
- (c) in the case of trade in goods, the significant risks and rewards of ownership over the goods have been transferred to the taxpayer and, in the case of supplies of services, the latter have been received by the taxpayer.

*Article 18*  
*Costs related to non-depreciable assets*

Acquisition or construction costs of fixed tangible assets as referred to in Article 38, or costs for the improvement of those assets, shall be deductible in the tax year in which those assets are disposed of, provided that the disposal proceeds are included in the tax base.

*Article 19*  
*Measuring stocks and work-in-progress*

1. The total amount of deductible expenses for a tax year shall be increased with the value of stocks and work-in-progress at the beginning of the tax year and decreased with the value of stocks and work-in-progress at the end of the same tax year, with the exception of stocks and work-in-progress relating to long-term contracts as referred to in Article 22.
2. The costs of stocks and work-in-progress shall be measured consistently by using the first-in first-out method or the weighted-average cost method.
3. The cost of stocks and work-in-progress involving items that ordinarily are not interchangeable and goods or services which are produced or supplied respectively and segregated for specific projects shall be measured individually.

*Article 20*  
*Valuation*

1. The tax base shall be calculated on the basis of the following elements:
  - (a) the monetary consideration for the transaction, such as the price of the goods sold or the services provided;
  - (b) the market value, where the consideration for the transaction is wholly or partly non-monetary;
  - (c) the market value, in the case of a non-monetary gift;
  - (d) the market value of financial assets and liabilities held for trading.
2. The tax base, including revenues and expenses, shall be expressed in EUR during the tax year or on the last day of the tax year, at the annual average exchange rate for the calendar year issued by the European Central Bank or, if the tax year does not coincide with the calendar year, at the average of daily observations issued by the European Central Bank through the tax year.

3. Paragraph 2 shall not apply to a taxpayer in a Member State that has not adopted the EUR.

#### *Article 21*

##### *Financial assets and liabilities held for trading (trading book)*

1. A financial asset or liability shall be treated as held for trading if it is one of the following:
  - (a) it is acquired or incurred principally for the purpose of selling it or repurchasing it in the short term;
  - (b) it is part of a portfolio of identified financial instruments, including derivatives, that are managed together and for which there is evidence of a recent actual pattern of short-term profit-taking.
2. By way of derogation from Articles 16 and 17, any differences between the market value of financial assets or liabilities held for trading, calculated at the beginning of a tax year or at the date of purchase if later, and their market value calculated at the end of the same tax year, shall be included in the tax base of that tax year.
3. The proceeds of a financial asset or liability held for trading that is disposed of shall be added to the tax base. The market value of that asset or liability at the beginning of the tax year or at the date of purchase if later shall be deducted from the tax base.
4. Where profit distributions are received in respect of a participation held for trading, the exemption from the tax base referred to in point (d) of Article 8 shall not apply.
5. By way of derogation from point (c) of Article 8, any differences between the market value of a financial asset or liability that is no longer held for trading but is still held as a fixed asset, calculated at the beginning of a tax year or at the date of purchase if later, and its market value calculated at the end of the same tax year, shall be included in the tax base of that tax year.

By way of derogation from point (c) of Article 8, any differences between the market value of a financial asset or liability that is no longer held as a fixed asset but is still held for trading, calculated at the beginning of a tax year or at the date of purchase if later, and its market value calculated at the end of the same tax year, shall be included in the tax base of that tax year.

The market value of a financial asset or liability at the end of the tax year during which it transitioned from fixed asset to an asset or liability held for trading and vice versa shall also be its market value at the beginning of the year following the transition.
6. The period referred to in point (c) of Article 8 shall begin or be interrupted when the financial asset or liability is no longer held for trading or is no longer a fixed asset .

#### *Article 22*

##### *Long-term contracts*

1. A long-term contract is one which complies with all of the following conditions:
  - (a) it is concluded for the purpose of manufacturing, installing or constructing, or for performing services;
  - (b) its term exceeds, or is expected to exceed, 12 months.



2. By way of derogation from Article 16, revenues relating to a long-term contract shall be considered to have been accrued for the amount that corresponds to the part of the long-term contract that has been completed in the relevant tax year. The percentage of completion of the long-term contract shall be determined by reference to the ratio of costs of that year to the overall estimated costs.
3. Costs relating to long-term contracts shall be deductible in the tax year in which they are incurred.

*Article 23*  
*Provisions*

1. By way of derogation from Article 17, where at the end of a tax year it is established that the taxpayer has a legal obligation, or a probable future legal obligation, arising from activities or transactions carried out in that, or previous tax years, any amount arising from that obligation which can be reliably estimated shall be deductible, provided that the eventual settlement of the amount is expected to result in a deductible expense.

For the purposes of this Article, a legal obligation may derive from any of the following:

- (a) a contract;
- (b) legislation;
- (c) an administrative act of general nature or addressed to a specific taxpayer;
- (d) another operation of law.

Where the obligation relates to an activity or transaction which will continue over future tax years, the provision shall be spread proportionately over the estimated duration of the activity or transaction.

Provisions under this Article shall be reviewed and adjusted at the end of every tax year. In calculating the tax base in future tax years, account shall be taken of amounts that have already been deducted pursuant to this Article.

2. A reliably estimated amount as referred to in paragraph 1 shall be the expected expenditure required to settle the present legal obligation at the end of the tax year, provided that that estimation is based on all relevant factors, including past experience of the company, group or industry. In estimating the amount of a provision, the following shall apply:
  - (a) account shall be taken of all risks and uncertainties, but uncertainty shall not justify the creation of excessive provisions;
  - (b) if the term of the provision is 12 months or longer and there is no agreed discount rate, the provision shall be discounted at the yearly average of the Euro Interbank Offered Rate (Euribor) for obligations with a maturity of 12 months, as published by the European Central Bank, in the calendar year in the course of which the tax year ends;
  - (c) future events shall be taken into account where they can reasonably be expected to occur;
  - (d) future benefits directly linked to the event giving rise to the provision shall be taken into account.

3. Provisions shall not be deducted for the following:
  - (a) contingent losses;
  - (b) future cost increases.

*Article 24*  
*Pensions*

Member States may provide for the deduction of pension provisions.

*Article 25*  
*Bad debt deductions*

1. A deduction shall be allowed for a bad debt receivable where the following conditions are met:
  - (a) at the end of the tax year, the taxpayer has taken all reasonable steps, as outlined in paragraph 2 of this Article, to pursue payment and it is probable that the debt will not be satisfied wholly or partially, or the taxpayer has a large number of homogeneous receivables which all derive from the same sector of business activity and is able to reliably estimate the amount of the bad debt receivable on a percentage basis, provided that the value of each homogeneous receivable is lower than 0.1 % of the value of all homogeneous receivables. In order to arrive at a reliable estimate, the taxpayer shall take into account all relevant factors, including past experience;
  - (b) the debtor neither has a relation with the taxpayer as referred to Article 3, nor are the debtor and the taxpayer associated enterprises as referred to in Article 56. If the debtor is an individual, the debtor, his or her spouse or his or her lineal ascendant or descendant shall not participate in the management or control of the taxpayer, or directly or indirectly in his or her capital, as referred to in Article 56;
  - (c) no deduction has been claimed under Article 39 in relation to the bad debt;
  - (d) where the bad debt relates to a trade receivable, an amount corresponding to the debt shall be included in the tax base as revenue.
2. In determining whether all reasonable steps to pursue payment have been made, the elements listed in points (a) to (e) shall be taken into account, provided that they are based on objective evidence:
  - (a) whether the costs of collection are disproportionate to the debt;
  - (b) whether there is any prospect of successful collection;
  - (c) whether it is reasonable, in the circumstances, to expect the taxpayer to pursue collection;
  - (d) the time that has elapsed following the date of maturity of the obligation;
  - (e) whether the debtor has been declared insolvent or legal action has been initiated or a debt collector has been engaged.
3. Where a claim previously deducted as a bad debt is settled, the amount recovered shall be added to the tax base in the year of settlement.

## *Article 26*

### *Hedging*

1. Gains and losses on a hedging instrument, which result from a valuation or acts of disposal, shall be treated in the same manner as the corresponding gains and losses on the hedged item. There is a hedging relationship where both of the following conditions are met:
  - (a) the hedging relationship is formally designated and documented in advance;
  - (b) the hedge is expected to be highly effective and the effectiveness can reliably be measured.
2. Where the hedging relationship is interrupted or an already held financial instrument is subsequently treated as a hedging instrument, leading to its transition to a different tax regime, any difference between the new value of the hedging instrument, to be determined according to Article 20 at the end of the tax year, and the market value at the beginning of the same tax year shall be included in the tax base.

The market value of the hedging instrument at the end of the tax year during which that instrument transitioned to a different tax regime shall coincide with its market value at the beginning of the year following that transition.

## *Article 27*

### *Valuation of stocks and work-in-progress*

1. A taxpayer shall consistently use the same method for the valuation of all stocks and work-in-progress having a similar nature and use.

The cost of stocks and work-in-progress shall comprise all costs of purchase, direct costs of conversion and other direct costs incurred in bringing them to the location and condition in which they are found in the relevant tax year.

Costs shall be net of deductible value added tax.

A taxpayer who has included indirect costs in valuing stocks and work-in-progress before becoming subject to the rules of this Directive may continue to apply the indirect cost approach.
2. Stocks and work-in-progress shall be valued on the last day of the tax year at the lower of cost and net realisable value.

The net realisable value is the estimated selling price in the ordinary course of business, less the estimated costs of completion and the estimated costs necessary to make the sale.

## *Article 28*

### *Insurance undertakings*

Insurance undertakings that are authorised to operate in a Member State in accordance with Council Directive 73/239/EEC<sup>26</sup> for non-life insurance, Directive 2002/83/EC of the European

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<sup>26</sup> First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ L 228, 16.8.1973, p. 3).

Parliament and of the Council<sup>27</sup> for life insurance, and Directive 2005/68/EC of the European Parliament and of the Council<sup>28</sup> for reinsurance, shall be subject to the following additional rules:

- (a) the tax base shall include the difference in the market value, as measured at the end and the beginning of the same tax year, or upon completion of the purchase if later, of assets in which investment is made for the benefit of life insurance policyholders bearing the investment risk and which are held by life insurance undertakings;
- (b) the tax base shall include the difference in the market value, as measured at the time of disposal and the beginning of the tax year, or upon completion of the purchase if later, of assets in which investment is made for the benefit of life insurance policyholders bearing the investment risk and which are held by life insurance undertakings;
- (c) the tax base shall include profit distributions received by life insurance undertakings;
- (d) the technical provisions of insurance undertakings established in accordance with Council Directive 91/674/EEC<sup>29</sup> shall be deductible, with the exception of equalisation provisions. A Member State may provide for the deduction of equalisation provisions. Amounts deducted shall be reviewed and adjusted at the end of every tax year. Amounts already deducted shall be taken into account when calculating the tax base in future years.

*Article 29*  
*Exit taxation*

1. An amount equal to the market value of transferred assets, at the time of exit of the assets, less their value for tax purposes, shall be treated as accrued revenues in any of the following circumstances:
  - (a) where a taxpayer transfers assets from its head office to its permanent establishment in another Member State or in a third country;
  - (b) where a taxpayer transfers assets from its permanent establishment in a Member State to its head office or another permanent establishment in another Member State or in a third country, to the extent that, due to the transfer, the Member State of the permanent establishment no longer has the right to tax the transferred assets;
  - (c) where a taxpayer transfers its tax residence to another Member State or to a third country, except for those assets which remain effectively connected with a permanent establishment in the first Member State;
  - (d) where a taxpayer transfers the business carried on by its permanent establishment from a Member State to another Member State or to a third country, to the extent that, due to the transfer, the Member State of the permanent establishment no longer has the right to tax the transferred assets.

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<sup>27</sup> Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ L 345, 19.12.2002, p. 1).

<sup>28</sup> Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC (OJ L 232.9.12.2005, p. 1).

<sup>29</sup> Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (OJ L 374, 19.12.1991, p. 1).

2. The Member State to where the assets, tax residence or the business carried on by a permanent establishment are transferred shall accept the value established by the Member State of the taxpayer or of the permanent establishment as the starting value of the assets for tax purposes.
3. This Article shall not apply to asset transfers related to the financing of securities, assets posted as collateral or where the asset transfer takes place in order to meet prudential capital requirements or for the purpose of liquidity management where those assets are set to revert to the Member State of the transferor within a period of 12 months.

## **CHAPTER IV**

### **DEPRECIATION OF FIXED ASSETS**

#### *Article 30*

##### *Fixed asset register*

1. Acquisition or construction costs or improvement costs, together with the relevant date, shall be recorded in a fixed asset register for each fixed asset separately.
2. When a fixed asset is disposed of, details of the disposal, including the date of disposal, and any proceeds or compensation received as a result of the disposal, shall be recorded in the fixed asset register.
3. The fixed asset register shall be kept in a manner that provides sufficient information, including depreciation data, to calculate the tax base.

#### *Article 31*

##### *Depreciation base*

1. The depreciation base shall comprise costs directly connected with the acquisition, construction or improvement of a fixed asset. Those costs shall not include deductible value added tax. Acquisition or construction costs or improvement costs of a fixed asset shall not include interest.
2. The depreciation base of an asset received as a gift shall be its market value as included in revenues.
3. The depreciation base of a fixed asset subject to depreciation shall be reduced by deducting the amount of any public subsidy directly linked to the acquisition, construction or improvement of the asset, as referred to in (a) point of Article 8.
4. The depreciation of fixed assets that are not available for use shall not be taken into account.

#### *Article 32*

##### *Entitlement to depreciate*

1. Subject to paragraph 3, depreciation shall be deducted by the economic owner.
2. In the case of leasing contracts in which the economic and legal ownership do not coincide, the economic owner shall be entitled to deduct the interest element of the

lease payments from its tax base, unless that element is not included in the tax base of the legal owner.

3. If the economic owner of an asset cannot be identified, the legal owner shall be entitled to deduct depreciation. In that case both the interest and capital element of the lease payments shall be included in the tax base of the legal owner and be deductible by the lessee.
4. A fixed asset may not be depreciated by more than one taxpayer at the same time, unless either the legal or the economic ownership is shared between more taxpayers.
5. A taxpayer may not disclaim depreciation.
6. The Commission shall be empowered to adopt delegated acts in accordance with Article 66 concerning:
  - (a) the definition of legal and economic ownership, in particular in relation to leased assets;
  - (b) the calculation of the capital and interest elements of the lease payments;
  - (c) the calculation of the depreciation base of a leased asset.

### *Article 33*

#### *Individually depreciable assets*

1. Without prejudice to paragraph 2 and Articles 37 and 38, fixed assets shall be depreciated individually over their useful lives on a straight-line basis. The useful life of a fixed asset shall be determined as follows:
  - (a) commercial, office and other buildings, as well as any other type of immovable property in use for the business, with the exception of industrial buildings and structures: 40 years;
  - (b) industrial buildings and structures: 25 years;
  - (c) long-life fixed tangible assets, other than the assets referred to in points (a) and (b): 15 years;
  - (d) medium-life fixed tangible assets: 8 years;
  - (e) fixed intangible assets: the period for which the asset enjoys legal protection or for which the right has been granted or, where that period cannot be determined, 15 years.
2. Second-hand buildings and other types of immovable property, second-hand long-life fixed tangible assets, second-hand medium-life fixed tangible assets and second-hand fixed intangible assets shall be depreciated in accordance with the following rules:
  - (a) second-hand commercial, office or other buildings, as well as any other type of immovable property in use for the business, with the exception of industrial buildings and structures: 40 years, , unless the taxpayer demonstrates that the estimated remaining useful life of the asset is shorter than 40 years, in which case it shall be depreciated over that shorter period.
  - (b) second-hand industrial buildings and structures: 25 years, unless the taxpayer demonstrates that the estimated remaining useful life of the asset is shorter than 25 years, in which case it shall be depreciated over that shorter period;

- (c) second-hand long-life fixed tangible assets, other than the assets referred to in points (a) and (b): 15 years, unless the taxpayer demonstrates that the estimated remaining useful life of the asset is shorter than 15 years, in which case it shall be depreciated over that shorter period;
- (d) second-hand medium-life fixed tangible assets: 8 years, unless the taxpayer demonstrates that the estimated remaining useful life of the asset is shorter than 8 years, in which case it shall be depreciated over that shorter period;
- (e) second-hand fixed intangible assets: 15 years, unless the remaining period for which the asset enjoys legal protection or for which the right has been granted can be determined, in which case it shall be depreciated over that period.

#### *Article 34*

##### *Timing*

1. A full year's depreciation shall be deducted in the year of acquisition or entry into use of the fixed asset, whichever comes later. No depreciation shall be deducted in the year of disposal.
2. The value for tax purposes of a fixed asset that is disposed of, or damaged to an extent that it can no longer be used for the business, and the value for tax purposes of any improvement costs incurred in relation to that asset, shall be deducted from the tax base in the year of the disposal or damage.
3. Where a fixed tangible asset not subject to depreciation has given rise to an exceptional decrease in value under Article 39, the deductible costs under Article 18 shall be reduced to take into account the exceptional deduction that a taxpayer has already received.

#### *Article 35*

##### *Rollover relief for replacement assets*

1. Where the proceeds from the disposal, including compensation for damage, of an individually depreciable asset or fixed tangible asset not subject to wear and tear and obsolescence, as referred to in point (a) of Article 38, are to be re-invested in a similar asset used for the same or a similar business purpose before the end of the second tax year after the tax year in which the disposal took place, the amount by which those proceeds exceed the value for tax purposes of the asset may be deducted in the year of disposal. The depreciation base of the replacement asset shall be reduced by the same amount.

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

2. The replacement asset referred to in paragraph 1 may be purchased in the tax year prior to the disposal. Where the replacement asset is not purchased before the end of the second tax year after the year in which the disposal of the asset took place, the amount deducted in the year of disposal, increased by 10 %, shall be added to the tax base in the second tax year after the disposal took place.

*Article 36*  
*Depreciation of improvement costs*

1. Improvement costs shall be depreciated in accordance with the rules applicable to the fixed asset which has been improved as if they related to a newly acquired fixed asset. Notwithstanding this, improvement costs concerning rented immovable property shall be depreciated according to Article 32 and Article 33(2)(a).
2. Where the taxpayer demonstrates that the estimated remaining useful life of an individually depreciated fixed asset is shorter than the useful life of the asset specified in Article 33(1), improvement costs for that asset shall be depreciated over that shorter period.

*Article 37*  
*Asset pool*

1. Fixed assets other than those referred to in Articles 33 and 38 shall be depreciated together in one asset pool at an annual rate of 25 % of the depreciation base.
2. The depreciation base of the asset pool at the end of a tax year shall be its value for tax purposes at the end of the preceding tax year, adjusted for assets entering and leaving the pool during the relevant tax year. Acquisition or construction costs and costs of improvement of assets shall be added to the depreciation base, whereas the proceeds of a disposal of assets and any compensation received for the loss or destruction of an asset shall be deducted.
3. Where the depreciation base as calculated in accordance with paragraph 2 is negative, an amount shall be added until the depreciation base is zero. The same amount shall be added to the tax base.

*Article 38*  
*Assets not subject to depreciation*

The following assets shall not be subject to depreciation:

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

*Article 39*  
*Exceptional decrease in value*

1. A taxpayer who demonstrates that a fixed tangible asset not subject to depreciation, as referred to in point (a) of Article 38, has decreased in value at the end of a tax year due to force majeure or criminal activities by third parties may deduct from the tax base an amount equal to that decrease in value. However, no such deduction may be made in respect of assets the proceeds from the disposal of which are exempt from taxation.
2. Where the value of an asset that, in a preceding tax year, has been subject to depreciation as referred to in paragraph 1 subsequently increases, an amount equivalent to that increase shall be added to the tax base in the year in which that increase takes place. However, any such addition or additions, taken together, shall not exceed the amount of the deduction originally granted.



*Article 40*  
*Precision of categories of fixed assets*

The Commission shall be empowered to adopt delegated acts in accordance with Article 66 to define more precisely the categories of fixed assets referred to in this Chapter.

## CHAPTER V

### LOSSES

*Article 41*  
*Losses*

1. Losses incurred in a tax year by a resident taxpayer or a permanent establishment of a non-resident taxpayer may be carried forward and deducted in subsequent tax years, unless otherwise provided by this Directive.
2. A reduction of the tax base as a result of considering losses from previous tax years shall not result in a negative amount.
3. Losses incurred by a resident taxpayer or by a permanent establishment of a non-resident taxpayer in previous years shall not be deducted where all of the following conditions are met:
  - (a) another company acquires a participation in the taxpayer as a result of which the acquired taxpayer becomes a qualifying subsidiary of the acquirer as referred to in Article 3;
  - (b) there is a major change of activity of the acquired taxpayer, which means that the acquired taxpayer discontinues a certain activity which accounted for more than [60 %] of its turnover in the previous tax year or embarks on new activities which amount to more than [60 %] of its turnover in the tax year of their introduction or the following tax year.
4. The oldest losses shall be deducted first.

*Article 42*  
*Loss relief and recapture*

1. A resident taxpayer that is still profitable after having deducted its own losses pursuant to Article 41 may additionally deduct losses incurred, in the same tax year, by its immediate qualifying subsidiaries, as referred to in Article 3(1), or by permanent establishment(s) situated in other Member States. This loss relief shall be given for a limited period of time in accordance with paragraphs 3 and 4 of this Article.
2. The deduction shall be in proportion to the holding of the resident taxpayer in its qualifying subsidiaries as referred to in Article 3(1) and full for permanent establishments. In no case shall the reduction of the tax base of the resident taxpayer result in a negative amount.
3. The resident taxpayer shall add back to its tax base, up to the amount previously deducted as a loss, any subsequent profits made by its qualifying subsidiaries as referred to in Article 3(1) or by its permanent establishments.

4. Losses deducted pursuant to paragraphs 1 and 2 shall automatically be reincorporated into the tax base of the resident taxpayer in any of the following circumstances:
- (a) where, at the end of the fifth tax year after the losses became deductible, no profit has been reincorporated or the reincorporated profits do not correspond to the full amount of losses deducted;
  - (b) where the qualifying subsidiary as referred to in Article 3(1) is sold, wound up or transformed into a permanent establishment;
  - (c) where the permanent establishment is sold, wound up or transformed into a subsidiary;
  - (d) where the parent company no longer fulfils the requirements of Article 3(1).

## **CHAPTER VI**

### **RULES ON ENTERING AND LEAVING THE SYSTEM OF THE TAX BASE**

#### *Article 43*

##### *Recognition and valuation of assets and liabilities*

All assets and liabilities shall be recognised at their value, as calculated in accordance with national tax rules immediately prior to the date on which the rules of this Directive start to be applied to the taxpayer.

#### *Article 44*

##### *Qualification of fixed assets for depreciation purposes*

In addition to Articles 30 to 40, the following rules shall apply in connection with the depreciation of fixed assets which transition from national corporate tax law to the system of the tax base:

- (a) fixed assets that are individually depreciable both under the national corporate tax law previously applicable to the taxpayer and under the rules of this Directive shall be depreciated according to Article 33(2);
- (b) fixed assets that were individually depreciable under the national corporate tax law previously applicable to the taxpayer but not under the rules of this Directive shall enter the asset pool referred to in Article 37;
- (c) fixed assets that were included in an asset pool for depreciation purposes under the national corporate tax law previously applicable to the taxpayer shall enter into in the asset pool referred to in Article 37, irrespective of whether they would be individually depreciable under the rules of this Directive;
- (d) fixed assets that were not depreciable or were not depreciated under the national corporate tax law previously applicable to the taxpayer but are depreciable under the rules of this Directive shall be depreciated in accordance with Article 33(1) or Article 37, as the case may be;
- (e) assets that were individually depreciable or included in an asset pool for depreciation purposes under the national corporate tax law previously applicable to the taxpayer but are not depreciable under the rules of this Directive shall be recognised at their tax

value, as calculated in accordance with the national tax rules immediately prior to the date on which the rules of this Directive start to be applied to the taxpayer. The tax value of those assets shall be deductible in the tax year in which the assets are disposed of, provided that the disposal proceeds are included in the tax base.

#### *Article 45*

##### *Long-term contracts*

1. Revenues and expenses which pursuant to Article 22(2) and (3) 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 tax base in accordance with the national legislation previously applicable to the taxpayer.
2. Revenues which had been taxed under national corporate tax law before the taxpayer became subject to the rules of this Directive at a higher amount than the amount that would have been included in the tax base pursuant to Article 22(2) shall be deducted from the tax base in the first tax year that the rules of this Directive become applicable to the taxpayer.

#### *Article 46*

##### *Provisions, revenues and deductions*

1. Provisions as referred to in Article 23 and bad-debt deductions as referred to in Article 25 shall be deductible only to the extent that they arise from activities or transactions carried out after the rules of this Directive became applicable to the taxpayer.
2. Revenues which pursuant to Article 16 are considered to have accrued before the taxpayer became subject to the rules of this Directive but were not yet included in the tax base under the national corporate tax law previously applicable to the taxpayer shall be added to the tax base in accordance with the national legislation previously applicable to the taxpayer..
3. Expenses incurred after the rules of this Directive became applicable to the taxpayer but in relation to activities or transactions carried out prior to the application of the Directive and for which no deduction was made shall be deductible.
4. Amounts that have already been deducted by a taxpayer before the rules of this Directive became applicable to him or her may not be deducted again.

#### *Article 47*

##### *Pre-entry losses*

A taxpayer bringing forward unrelieved losses incurred before the rules of this Directive became applicable to him or her, may deduct those losses from its tax base if and to the extent that the national legislation applicable to the taxpayer and according to which those losses were incurred, allow for such deduction.

*Article 48*  
*Recognition of assets and liabilities*

The assets and liabilities of a taxpayer to whom the rules of this Directive no longer apply, shall be recognised at their value, as calculated according to the rules of this Directive, unless otherwise stated in this Directive.

*Article 49*  
*Recognition of the asset pool of a taxpayer*

The asset pool of a taxpayer to whom the rules of this Directive no longer apply, shall be recognised, for the purposes of the national tax rules subsequently applicable, as one asset pool which shall be depreciated in accordance with the declining balance method at an annual rate of 25 %.

*Article 50*  
*Revenues and expenses arising from long-term contracts*

The revenues and expenses arising from long-term contracts of a taxpayer to whom the rules of this Directive no longer apply shall be treated in accordance with the national corporate tax law subsequently applicable. However, revenues and expenses already taken into account for tax purposes in accordance with the rules of this Directive shall not be taken into account again.

*Article 51*  
*Provisions, revenues and deductions*

1. Expenses of a taxpayer to whom the rules of this Directive no longer apply and which have already been deducted in accordance with Articles 9, 23 and 25 may not be deducted again under the national corporate tax law subsequently applicable.
2. Revenues of a taxpayer to whom the rules of this Directive no longer apply and which the taxpayer has already included in its tax base in accordance with Article 4(5) and Article 16 may not be included again under the national corporate tax law subsequently applicable.
3. Expenses incurred by the taxpayer in accordance with the rules of this Directive and which remain partly unrelieved after the rules of this Directive are no longer applicable to the taxpayer shall be deductible according to the rules of this Directive.

*Article 52*  
*Losses on exit*

Unrelieved losses incurred by the taxpayer in accordance with the rules of this Directive shall be carried forward in accordance with the national corporate tax law subsequently applicable.

## CHAPTER VII

## RELATIONS BETWEEN THE TAXPAYER AND OTHER ENTITIES

### *Article 53 Switch-over*

1. By way of derogation from points (c) and (d) of Article 8, a taxpayer shall not be exempt from tax on foreign income that the taxpayer received as a profit distribution from an entity in a third country or as proceeds from the disposal of shares held in an entity in a third country where that entity in its country of tax residence is subject to a statutory corporate tax rate lower than half of the statutory tax rate that the taxpayer would have been subject to, in connection with such foreign income, in the Member State of its residence for tax purposes.

The first subparagraph shall not apply where a convention for the avoidance of double taxation between the Member State in which the taxpayer is resident for tax purposes and the third country where that entity is resident for tax purposes does not allow switching over from a tax exemption to taxing the designated categories of foreign income.

2. Where paragraph 1 applies, the taxpayer shall be subject to tax on the foreign income with a deduction of the tax paid in the third country from its tax liability in the Member State where it is resident for tax purposes. The deduction shall not exceed the amount of tax, as computed before the deduction, which is attributable to the income that may be taxed.
3. Member States shall exclude losses from the scope of this Article in the event of a disposal of shares in an entity that has its residence for tax purposes in a third country.

### *Article 54 Computation of income of a foreign permanent establishment*

Where Article 53 applies to the income of a permanent establishment in a third country, its revenues, expenses and other deductible items shall be determined according to the rules of this Directive.

### *Article 55 Interest and royalties and any other income taxed at source*

1. A deduction from the tax liability ('tax credit') of a taxpayer shall be allowed where that taxpayer derives income that has been taxed in another Member State or in a third country, other than income that is exempt under points (c), (d) or (e) of Article 8.
2. In calculating the tax credit, the amount of the income shall be decreased by related deductible expenses.
3. The tax credit for the tax liability in a third country may not exceed the final corporate tax liability of a taxpayer, unless an agreement concluded between the Member State in which the taxpayer has its residence for tax purposes and a third country states otherwise.

## CHAPTER VIII

### TRANSACTIONS BETWEEN ASSOCIATED ENTERPRISES

#### *Article 56*

##### *Associated enterprises*

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

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

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

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

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

For the purposes of Article 61, where there is a hybrid mismatch involving a hybrid entity, the participation under points (a) and (b) of the first subparagraph shall mean a holding exceeding 50 % of the voting rights or a right of ownership exceeding 50 % of the capital.

#### *Article 57*

##### *Adjustment of pricing in relations between associated enterprises*

1. Where conditions are made or imposed in relations between associated enterprises that differ from those that would have been made between independent enterprises, any income that would have accrued to the taxpayer but because of those conditions has not so accrued, shall be included in the income of that taxpayer and taxed accordingly.
2. Income attributable to a permanent establishment is what the permanent establishment would be expected to earn, in particular in its dealings with other parts of the same taxpayer, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the

functions performed, assets used and risks assumed by the taxpayer through the permanent establishment and through other parts of the same taxpayer.

## CHAPTER IX

### ANTI-ABUSE RULES

#### *Article 58*

##### *General anti-abuse rule*

1. For the purposes of calculating the tax liability under the rules of this Directive, a Member State shall disregard an arrangement or a series of arrangements which, having been put in place for the essential purpose of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine, having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.
2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put in place for valid commercial reasons that reflect economic reality.
3. Arrangements or a series thereof that are disregarded in accordance with paragraph 1 shall be treated, for the purpose of calculating the tax base, by reference to their economic substance.

#### *Article 59*

##### *Controlled foreign companies*

1. An entity, or a permanent establishment of which the profits are not subject to tax or are exempt from tax in the Member State of its head office', shall be treated as a controlled foreign company where the following conditions are met:
  - (a) in the case of an entity, the taxpayer itself, or together with its associated enterprises, holds a direct or indirect participation of more than 50 % of the voting rights, or owns directly or indirectly more than 50 % of capital or is entitled to receive more than 50 % of the profits of that entity; and
  - (b) the actual corporate tax paid by the entity or permanent establishment on its profits is lower than the difference between the corporate tax that would have been charged on the profits of the entity or permanent establishment in accordance with the rules of this Directive and the actual corporate tax paid on those profits by the entity or permanent establishment.

For the purposes of point (b) of the first subparagraph, in computing the corporate tax that would have been charged on the profits of the entity according to the rules of the Directive in the Member State of the taxpayer, the income of any permanent establishment of the entity that is not subject to tax or is exempt from tax in the jurisdiction of the controlled foreign company shall not be taken into account.

2. Where an entity or permanent establishment is treated as a controlled foreign company under paragraph 1, non-distributed income of the entity or permanent establishment shall be subject to tax to the extent that it is derived from the following categories:

- (a) interest or any other income generated by financial assets;
- (b) royalties or any other income generated from intellectual property;
- (c) dividends and income from the disposal of shares;
- (d) income from financial leasing;
- (e) income from insurance, banking and other financial activities;
- (f) income from invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises and add no or little economic value.

The first subparagraph shall not apply to a controlled foreign company that is resident or situated in a Member State or in a third country that is party to the EEA Agreement where the controlled foreign company has been set up for valid commercial reasons that reflect economic reality. For the purposes of this Article, the activity of the controlled foreign company shall reflect economic reality to the extent that that activity is supported by commensurate staff, equipment, assets and premises.

3. An entity or permanent establishment shall not be treated as a controlled foreign company as referred to in paragraph 1 where not more than one third of the income accruing to the entity or permanent establishment falls within categories (a) to (f) of paragraph 2.

Financial undertakings shall not be treated as controlled foreign companies under paragraph 1 where not more than one third of the income accruing to the entity or permanent establishment from categories (a) to (f) of paragraph 2 comes from transactions with the taxpayer or its associated enterprises.

#### *Article 60*

##### *Computation of the income of a controlled foreign company*

1. The income to be included in the tax base shall be calculated according to the rules of this Directive. Losses of the entity or permanent establishment shall not be included in the tax base but shall be carried forward and taken into account when applying Article 59 in subsequent tax years.
2. Where the controlled foreign company is an entity, the income to be included in the tax base shall be calculated in proportion to the entitlement of the taxpayer to a share in the profits of the foreign entity. Where the controlled foreign company is a permanent establishment, all income shall be included in the tax base.
3. The income of the entity or permanent establishment shall be included in the tax base of the tax year in which the tax year of the entity or permanent establishment ends.
4. Where the entity distributes profits to the taxpayer out of income previously included in the tax base of the taxpayer pursuant to Article 59 and the taxpayer is liable to tax on these distributed profits, the amounts of income previously included in the tax base pursuant to Article 59 shall be deducted from that tax base when calculating the taxpayer's liability to tax on the distributed profits.
5. Where the taxpayer disposes of its participation in the entity, the proceeds shall be reduced, for the purpose of calculating the taxpayer's liability to tax, by any undistributed amounts that have already been included in the tax base.



*Article 61*  
*Hybrid mismatch*

1. To the extent that a hybrid mismatch between Member States results in a double deduction of the same payment, expenses or losses, the deduction shall be given only in the Member State where such payment has its source, the expenses are incurred or the losses are suffered.

To the extent that a hybrid mismatch involving a third country results in a double deduction of the same payment, expenses or losses, the Member State concerned shall deny the deduction of such payment, expenses or losses, unless the third country has already done so.

2. To the extent that a hybrid mismatch between Member States results in a deduction without inclusion, the Member State of the payer shall deny the deduction of such payment.

To the extent that a hybrid mismatch that involves a third country results in a deduction without inclusion:

- (a) if the payment has its source in a Member State, that Member State shall deny the deduction, or
- (b) if the payment has its source in a third country, the Member State concerned shall require the taxpayer to include such payment in the taxable base, unless the third country has already denied the deduction or has required that payment to be included.

3. To the extent that a hybrid mismatch between Member States involving a permanent establishment results in non-taxation without inclusion, the Member State in which the taxpayer is resident for tax purposes shall require the taxpayer to include in the taxable base the income attributed to the permanent establishment.

To the extent that a hybrid mismatch involving a permanent establishment situated in a third country results in non-taxation without inclusion, the Member State concerned shall require the taxpayer to include in the taxable base the income attributed to the permanent establishment in the third country.

4. To the extent that a payment by a taxpayer to an associated enterprise in a third country is set off directly or indirectly against a payment, expenses or losses which due to a hybrid mismatch are deductible in two different jurisdictions outside the Union, the Member State of the taxpayer shall deny the deduction of the first mentioned payment from the taxable base, unless one of the third countries involved has already denied the deduction of the payment, expenses or losses that would be deductible in two different jurisdictions.

5. To the extent that the corresponding inclusion of a deductible payment by a taxpayer to an associated enterprise in a third country is set off directly or indirectly against a payment which, due to a hybrid mismatch, is not included by the payee, the Member State of the taxpayer shall deny the deduction of the first mentioned payment from the taxable base, unless one of the third countries involved has already denied the deduction of the non-included payment.

6. To the extent that a hybrid mismatch results in a relief for tax withheld at source on a payment derived from a transferred financial instrument to more than one of the parties involved, the Member State of the taxpayer shall limit the benefit of such relief in proportion to the net taxable income regarding such payment.

7. For the purposes of this Article, 'payer' means the entity or permanent establishment where the payment has its source, the expenses are incurred or the losses are suffered.

*Article 61a*  
*Tax residency mismatches*

To the extent that a payment, expenses or losses of a taxpayer who is resident for tax purposes in both a Member State and a third country, in accordance with the laws of that Member State and that third country, are deductible from the taxable base in both jurisdictions and that payment, those expenses or losses can be set-off in the Member State of the taxpayer against taxable income that is not included in the third country, the Member State of the taxpayer shall deny the deduction of the payment, expenses or losses, unless the third country has already done so.

## CHAPTER X

### TRANSPARENT ENTITIES

*Article 62*  
*Allocation of the income of transparent entities to taxpayers holding an interest*

1. Where an entity is treated as transparent in the Member State where it is established, a taxpayer holding an interest in the entity shall include its share in the income of the entity in its tax base. For the purpose of this calculation, the income shall be computed in accordance with the rules of this Directive.
2. Transactions between a taxpayer and the entity referred to in paragraph 1 shall be disregarded in proportion to the taxpayer's share in the entity. Accordingly, the income of the taxpayer derived from those transactions shall be considered to be a proportion to the amount that would be agreed between independent enterprises calculated on an arm's length basis which corresponds to the third party ownership of the entity.
3. The taxpayer shall be entitled to relief for double taxation in accordance with Article 55.

*Article 63*  
*Determining transparency in the case of third country entities*

The question whether an entity that is located in a third country is transparent or not shall be determined according to the law of the Member State of the taxpayer.

## CHAPTER XI

### ADMINISTRATION AND PROCEDURES

#### *Article 64*

##### *Notice to competent authorities on the application of the rules of this Directive*

A company as referred to in Article 2(1), (2) or (3) shall notify the competent authority of the Member State in which it is tax resident or in which its permanent establishment is situated that it falls under the scope of this Directive.

#### *Article 65*

##### *Term of the notice*

1. A taxpayer shall apply the rules of this Directive in so far as it remains liable thereto, in accordance with Article 2(1) and (2).
2. 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).
3. A taxpayer that has opted to apply the rules of this Directive in accordance with Article 2(3) and that decides to discontinue that application at the end of the term of five tax years shall notify the competent authority of the Member State in which it is tax resident, or the competent authority of the Member State in which its permanent establishment is situated, as the case may be.
4. A taxpayer 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 competent authority of the Member State in which it is tax resident, or the competent authority of the Member State in which its permanent establishment is situated, as the case may be, with evidence that the conditions under points (a) and (b) of Article 2(1) are met.

## CHAPTER XII

### FINAL PROVISIONS

#### *Article 66*

##### *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), 4(5), 11(6), 32(5) and 40 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), 4(5), 11(6), 32(5) and 40 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), 4(5), 11(6), 32(5) and 40 shall enter into force only if no objection has been expressed by the Council within a period of [two months] of notification of that act to the Council or if, before the expiry of that period, 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 67*

##### *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 a delegation of powers by the Council.

#### *Article 68*

##### *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 69*

##### *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.

#### *Article 70*

##### *Transposition*

1. Member States shall adopt and publish, by 31<sup>st</sup> December 2019 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 2020.  
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 main provisions of national law which they adopt in the field covered by this Directive.
3. Member States whose currency is not the euro may opt to calculate, where this Directive mentions a monetary amount in euros (EUR), the corresponding value in the national currency on the date of adoption of this Directive.

*Article 71*  
*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 72*  
*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the Council*  
*The President*