Council of the European Union
General Secretariat

Brussels, 21 April 2017

WK 4623/2017 INIT

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MEETING DOCUMENT

From:	Presidency
To:	Working Party on Tax Questions (Direct Taxation – CCTB)
Subject:	Proposal for a Council Directive on a Common Corporate Tax Base - Draft Presidency compromise on Article 11

Delegations will find attached a document from the Presidency in view of the meeting of the Working Party on Tax Questions (Direct Taxation - CCTB) on the morning of 26 April 2017.

Delegations will find in Annex a preliminary draft Presidency compromise on Article 11 of the Proposal for a Council Directive on a Common Corporate Tax Base (doc. 13730/16)

New text (compared to the European Commission's proposal) is marked **<u>bold and underlined</u>**, deletions are marked with ~~strikethrough~~.

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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 **book value of the** equity of a taxpayer and ~~the tax value~~ **that** of its participation in the capital of associated enterprises as referred to in Article 56.

Presidency comments:
• *One delegation mentioned that this notion of tax value does not match with the definition of 'value of tax purposes' in Article 4(17) since participations which amount to a minimum of 10% of voting rights or capital lead to tax exempt distributions of dividends and tax free disposals of shares. The presidency proposes to use accounting values for both, as in the case of the Italian ACE.*
• *Alternatively it could be opted for a definition of the equity in terms of value for tax purposes, but this would mean to change the concept of 'equity' by e.g. that of its taxable 'assets and liabilities' - as proposed by one delegation.*

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[1];

   (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[2].**]**

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   (a) [Where the taxpayer is a company, the share capital of the taxpayer, any share premium, positive retained earnings, loans or other debt borrowed by the taxpayer which do not bear interest, and any other reserves resulting from a contribution to the taxpayer; and

   (b) where the taxpayer is a permanent establishment, the term shall mean the capital of that taxpayer which is attributable to the permanent establishment.]

1 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).

2 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).

Presidency comments:

- *Some delegations noted that the definitions of the relevant concepts in Directive 2013/34/EU are quite weak and suggested a reference to national accounting laws. The PRES welcomes any comments and discussions in this respect.*
- *One alternative option could be that of providing for a self-standing (and delimited) definition of "equity" which is used for the purposes of this Article; with a view of having a more standardised application across all Member States.*

3. An amount equal to the defined yield on the 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 defined yield on the AGI equity base decrease shall become taxable **provided that where the AGI equity base decrease is due to a loss, the AGI equity base shall be determined without regard to such loss. The latter provision shall apply mutatis mutandis in respect of losses brought forward from previous tax years. In this context, decreases in the AGI equity base due to losses shall be computed according to the rules provided for in this directive.**

Presidency comments:

- *The interest limitation ceiling in Article 13 will also apply to the AGI following the mention of 'notional interest amounts' under the definition of 'borrowing costs' in Article 4(12). The same applies with regard to carry-forward rules in Article 13.*
- *The taxability of the defined yield resulting from equity base decreases, was considered as pro-cyclical by a number of delegations.*
- *One option which the Presidency invites the group to consider in this context is that of "freezing" the AGI equity base when the reduction in the equity value for that year emanates from a loss. With reference to the example contained in doc. WK 2837/2017; were as at end 31/12/2021 the equity base decreased to 900 is entirely due to a loss of 400, the equity value would link with that of 31/12/2020; i.e. 1300. In this case, the defined yield for the year ended 31/12/2021 will be 0. Such approach would limit the generation of negative defined yields (i.e. taxable income) to non-loss reductions in the equity base, mitigating the pro-cyclical nature of the mechanism.*

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 AGI equity base at the end of the relevant tax year 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 AGI equity base at the end of the relevant tax year shall annually be moved forward by one tax year.

Presidency comment:
Some delegations have suggested a reduction of the period of 10 years to for instance 5 years: views of other delegations on this issue would be welcome. A 10-year period may potentially lapse statute of limitation periods of certain Member States, thereby complicating compliance aspects.

5. The defined 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 year preceding the relevant tax year, as published by the European Central Bank, increased by a risk premium of two percentage points. A floor of two 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~~ **By derogation to paragraphs 1 to 5, the following shall be excluded from the AGI equity base where the arrangement or a series of arrangements have been put in place for the essential purpose of obtaining a tax advantage under this Article**:

(a) intra-group loans and loans involving associated enterprises**, as referred to in Article 56**;

(b) **intra-group** cash contributions and contributions in kind;

(c) **intra-group** transfers of **assets and** 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**, in full or part,** 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.

Presidency comments:

- *Most delegations opposed the prospect of delegated acts for laying down detailed rules against tax avoidance and requested these rules to be spelled out in the CCTB directive.*
- *Occurrences under Art 11(6)(a-h) cannot automatically be considered as abusive. One possible approach would be to mandate MSs to have targeted anti-abuse rules for those (a-h) instances which are solely tax-motivated, leaving however detailed rules to be provided upon transposition. Such approach would also cater for the request of some delegates who requested that the Article should not hinder those MSs who may wish to apply a higher level of protection for their domestic corporate tax bases (provided a minimum level of protection is however provided for by all MSs).*
- *Some minor adjustments are being suggested in the list of indents (a to h); inspired by comments made by delegates so far. .*
- *The Presidency acknowledges that if the detailed anti-abuse rules are to be provided within the Directive itself, much more work at technical level will be needed. Written contributions by delegations would in this respect be most welcome.*