Council of the European Union
General Secretariat

Brussels, 14 March 2017

WK 2848/2017 INIT

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MEETING DOCUMENT

From:	Presidency
To:	Working Party on Tax Questions (Direct Taxation – CCTB)
Subject:	Temporary cross-border loss relief – Article 42 CCTB

Delegations will find attached a document from the Presidency on Article 42 (Temporary cross-border loss relief), in view of the meeting of the Working Party on Tax Questions (Direct Taxation - CCTB) on 23 March 2017.

Common Corporate Tax Base (CCTB) - Article 42
Temporary cross-border loss relief

1. On 6 December 2016, the ECOFIN Council (doc. 15315/16) invited Member States to, as a start, "*concentrate their efforts on the rules for calculating the tax base and, in particular, on the new elements of the relaunched initiative (chapters I to V)*".

2. At the last WPTQ meeting on 16 February 2017, the new elements of the relaunched CCTB proposal were examined article by article, including Article 42 relating to cross-border loss relief with recapture.

3. At this occasion and in subsequent bilateral contacts, dDelegations raised the following preliminary comments:
    a. some delegations noted that in the past, they experienced practical difficulties in applying a loss recapture rule. It was also noted that it would be necessary to improve administrative cooperation amongst Member States, in order to facilitate the implementation of such a rule. On the other hand, the Commission has undertaken to explain in a room document how/why the proposed provision should not be expected to raise complexities in its application;
    b. two delegations insisted that cross-border loss relief is naturally linked to consolidation and should therefore be left to be addressed in that context;
    c. one delegate also noted that the formulation of the Article as currently drafted may not be in conformity with the principles enunciated by the Marks & Spencer Case with respect to the treatment of final losses, whilst another referred to the recent ECJ ruling in the Timac Agro case (C-388/14);
    d. some delegations raised potential concerns related to impact on tax revenues, given risks of artificial shifting of losses to Member States where the corporate income tax rate is the highest, and stressed the desirability to strengthen the anti-abuse elements related to the application of this rule.

4. Considering the mandate received from ECOFIN in December 2016 (see above), the Presidency is of the view that it would only be appropriate to continue concentrating its efforts on the new elements of the relaunched initiative, also with a view of stabilising the text of this Article by the end of June 2017.

5. Doc WK2563/2017 from DG TAXUD explains in some detail the salient features of Article 42 and how such rules could interact with national group taxation systems, which aspect featured prominently in preliminary remarks put forward by delegates on this Article so far.

6. It also appropriate to point out that the CCTB does not otherwise provide for other kinds of tax consolidation or group relief provisions, and Article 42 would be the only mechanism catering for loss-offset/mitigation until the consolidation phase kicks-in. Most tax systems tend to treat profits and losses asymmetrically: profits are taxed for the tax year in which they are earned but the tax value of a loss is not refunded by the tax administration when the loss is incurred. Many a time therefore, it is found necessary to set off losses against another positive tax base within the company or within the group of companies in order to avoid "over-taxation". Article 42 is the only rule within the CCTB that tries (albeit temporary) to mitigate the cash-flow disadvantages resulting from the time lag it takes in taking into account of the loss in comparison with an immediate set-off against another positive tax base. As such therefore, this article appears to be an important component in retaining attractiveness of the CCTB system, pending the entry of the consolidation phase.

7. At the same time, the Commission has also explained that nothing in the proposals prohibits taxpayers from continuing to apply their national group taxation systems. The latter is also supported by the fact that Article 1 provides that; *"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"* (emphasis added)

8. In this endeavour, the Presidency wishes to put forward the following **questions** with regard to the approach and legal drafting of the proposal:

Para (1)

Article 42 aims to provide for a temporary loss-relief with recapture rule for cross-border situations until the tax consolidation aspect comes into force under the CCCTB. Would delegates agree that there may be merit in clarifying further the cross-border nature of such rule? (Art42(1) "in other Member States" – is meant to be linked not solely for PEs)

Would delegates agree that the "upward loss transfer towards immediate controlling shareholders'" formulation is a robust way of ensuring simplicity and practical application of

the mechanism cross-border? If not, can delegates explain what complexity they see with this approach?

Is there merit adding further criteria as to how the taxpayer`s use of such rule ought to be exercised in practice? (e.g. (a) per MS or for all immediate qualifying subs?; (b) given that the CCTB allows certain special rules at MSs level (e.g. Art24) should this possibility (art42) be limited to the portion of loss re-computed as per rules in the MS of the parent company?)

The Commission paper explains the interaction with national group taxation systems. Are there aspects where further clarifications/refinements could be necessary? (e.g. (a) national systems taking the form of a group-loss relief approaches; (b) interrelation with tax groupings having different qualifying shareholdings (as opposed to Art3(1)); (c) a targeted anti-abuse rule against double consolidated losses, etc.)

Para 2 & 3

The transfer is temporary and due to last a maximum of 5 tax years. There is thus only a timing advantage for the taxpayer. Would delegates agree that the general design features of the rule are well balanced and that this Article ought not extend to the permanent transfer of final losses?

Para 4

Are the circumstances referred to in Art 42(4) dealing with reincorporation clear and comprehensive enough? If not what other aspects ought to be considered?

9. Feedback from delegations on the above questions will help the Presidency in preparing a preliminary compromise text for this Article at the subsequent WPTQ meeting.