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**MEETING DOCUMENT**

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From:	Presidency
To:	Working Party on Tax Questions (Direct Taxation – CCTB)
Subject:	First Presidency compromise on provisions for evaluating impact on national tax revenues

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With a view to the meeting of Working Party on Tax Questions on 8 March 2018, delegations will find attached the first Presidency compromise on provisions for evaluating impact on national tax revenues.

During the meeting of the HLWP on 28 February 2018 the Member States decided to limit the scope of immediate work to stabilizing/freezing some specific provisions which are relevant and key for evaluating the impact of the CCTB on national tax revenues. The discussion at the WPTQ meeting of 1 February 2018 on the impact of CCTB on national tax revenues through the CORTAX model (see doc. WK 990/2018) allowed to identify these key parameters:

- a. Article 2.1.c: whether the scope of EUR 750 million is maintained or not;
- b. Article 3.1.a: whether the qualifying subsidiary should have a right to exercise more than 50% of the voting rights;
- c. Articles 4: a number of definitions, notably 5-6-12-13-19-22-23;
- d. Article 7: elements of the tax base;
- e. Article 8.d: exempt revenues;
- f. Article 10: other deductible items;
- g. Article 12.a-c-d: non-deductible items;
- h. Article 33: individually depreciable assets.

The above parameters have been identified by the Commission as key for the evaluation of national tax revenues through the CORTAX model (see doc. WK 990/2018).

In this respect the Presidency tables a compromise text on the provisions listed above. For the sake of clarity during the discussion of the compromise the Presidency has included the above articles in their entirety and not only the paragraphs or letters relevant to the evaluation. However, the Presidency will aim at stabilizing/freezing only the provisions listed above.

Member states should also note that such a stabilised/frozen compromise text would not pre-empt the decision of delegations on the final text to be adopted by the Council.

# CHAPTER I

## SUBJECT MATTER, SCOPE AND DEFINITIONS

(...)

### *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.

#### *Presidency comment:*

*The Presidency prefers in this respect to keep the scope unchanged following discussion at the WPTQ meeting of 1 February 2018. Member States may in this respect unilaterally adjust their national CIT system to the CCTB. See doc. WK 979/2018.*

#### ***Question***

*Do delegations agree that Article 2.1.c can be considered stabilised/frozen for the purpose of evaluating the impact on national tax revenues? If not, the Presidency kindly asks delegations to explain their views and welcomes wording proposals.*

(...)

### 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 **at the end of the financial year preceding the relevant financial year**:
  - (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.

#### Presidency comment:

*Text clarification with respect to the relevant date for calculation of participation/ownership.*

*Alignment with the wording in Article 2.1.c.*

#### **Question**

*Do delegations agree that Article 3.1.a can be considered stabilised/frozen for the purpose of evaluating the impact on national tax revenues? If not, the Presidency kindly asks delegations to explain their views and welcomes wording proposals.*

(...)

### Article 4

#### Definitions

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

(...)

- (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;

Presidency comment:

*One delegation suggested to include hidden profit distributions, in particular cases where a corporation waives appropriate payment for performance it has rendered (deliberately avoiding an increase in net assets). See also Articles 8(d) and 12. Based on the PSD, the common interpretation is that the above reference to other profit distributions includes hidden profit distributions.*

**Question**

*Do delegations agree that this definition can be considered stabilised/frozen for the purpose of evaluating the impact on national tax revenues? If not, the Presidency kindly asks delegations to explain their views and welcomes wording proposals.*

- (6) 'expenses' means decreases in net equity of the company during the **tax year** ~~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.

Presidency comment:

*One delegation suggested to replace "accounting period" by "tax year". The Directive is not based on accounting rules.*

**Question**

*Do delegations agree that this definition can be considered stabilised/frozen for the purpose of evaluating the impact on national tax revenues? If not, the Presidency kindly asks delegations to explain their views and welcomes wording proposals.*

- (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 defined 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;

*Presidency comment:*

*The Presidency is of the view that the two definitions do not differ in substance from the already adopted Directive 2016/1164 (ATAD). In this connection the Presidency does not propose to amend the two definitions.*

***Question***

*Do delegations agree that these two definitions can be considered stabilised/frozen for the purpose of evaluating the impact on national tax revenues? If not, the Presidency kindly asks delegations to explain their views and welcomes wording proposals.*

- (19) 'fixed assets' means tangible assets acquired or created by the taxpayer and intangible assets acquired that are capable of being valued independently and that are **expected to be** 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.

~~Fixed assets consisting of identifiable component parts, each of which meets the criteria for a fixed asset, may be broken down into its component parts and each component can be treated as a separate fixed asset.~~

*Presidency comments:*

- The Presidency proposes a text clarification in line with discussions at the WPTQ on 22 February aiming to avoid concerns by some Member States on the interpretation of “used in the business”.*

- *Text correction.*
- *Second paragraph transferred to Article 30.*
- *One delegation referred to Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, and suggested that fixed assets shall also include financial assets, with the exception of investments. This would bring the need to reflect on the use of the term 'financial assets held for trading' in the entire Directive. Views of delegations would be welcome.*

### ***Question***

*Do delegations agree that this definition can be considered stabilised/frozen for the purpose of evaluating the impact on national tax revenues? If not, the Presidency kindly asks delegations to explain their views and welcomes wording proposals.*

- (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.
- (23a) 'short-life fixed tangible assets' means fixed tangible assets that do not qualify as long-life or medium-life fixed tangible assets under points 22 and 23, and have a useful life of less than eight years.

### ***Presidency comment:***

*The Presidency does not propose to amend the definition in paragraphs 22 and 23. The definition in paragraph 23a follows from the discussion of the first draft compromise text at the WPTQ meeting on 22 February 2018.*

### ***Questions***

*1. Do delegations agree that the definitions in paragraphs 22 and 23 can be considered stabilised/frozen for the purpose of evaluating the impact on national tax revenues? If not, the Presidency kindly asks delegations to explain their views and welcomes wording proposals.*

*2. Do delegations agree that the addition of the definition in paragraph 23a can be considered stabilised/frozen for the purpose of evaluating the impact on national tax revenues? If not, the Presidency kindly asks delegations to explain their views and welcomes wording proposals.*

## **CHAPTER II**

### **CALCULATION OF THE TAX BASE**

(...)

#### *Article 7*

##### *Elements of the tax base*

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

#### *Presidency comment:*

*One delegation suggested the following alternative legal drafting: "The tax base shall be defined as the difference between the carrying amount of (net) business assets at the end of the tax year and the carrying amount of (net) business assets at the end of the preceding tax year, plus the value of any repayments of nominal capital and profit distributions and minus any additions to business assets made pursuant to corporate law. The calculation is to be performed in observance of the rules on taxexemption of revenues, on the deductibility of expenses, on recognition and valuation and on depreciation". The Presidency is of the view that this would introduce a completely different approach. Views of other delegations would be welcome.*

#### **Question**

*Do delegations agree that this Article can be considered stabilised/frozen for the purpose of evaluating the impact on national tax revenues? If not, the Presidency kindly asks delegations to explain their views and welcomes wording proposals.*

#### *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 30 ~~31~~ to 40 ~~41~~;

Presidency comments:

*Technical correction. This should be reflected in further compromises.*

- (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 **with the exception of hidden 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;

Presidency comments:

- *Some delegations noted an overlap with the Parent-Subsidiary Directive (PSD) and referred to the Denkavit case. Views of delegations would be welcome to which extent a parallel or equal application to the PSD should be sought.*
- *One delegation raised the issue of the interaction with conflicting tax treaty provisions for participations below the 10% threshold. The Presidency would welcome views of delegations on this matter.*
- *The same delegation raised the issue whether a taxpayer which has a direct participation below the 10% threshold could benefit from the tax exemption if it indirectly holds a participation of more than 10%. The Presidency welcomes views of delegations on this matter.*
- *In connection with comments made to Article 4(5) the amendment is aimed at preventing hidden profit distributions from being exempted from tax.*

- *For memo, these points - included in the 2016 CCTB proposal - reflect the approach chosen in the latest Presidency compromise on this Article (Italian Presidency).*

***Question***

*Do delegations agree that Article 8.d can be considered stabilised/frozen for the purpose of evaluating the impact on national tax revenues? If not, the Presidency kindly asks delegations to explain their views and welcomes wording proposals.*

- (e) income of a permanent establishment received by the taxpayer in the Member State where the taxpayer is resident for tax purposes.

(...)

*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.

***Question***

*Do delegations agree that Article 10 can be considered stabilised/frozen for the purpose of evaluating the impact on national tax revenues? If not, the Presidency kindly asks delegations to explain their views and welcomes wording proposals.*

(...)

*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;

***Question***

*Do delegations agree that Article 12(a), (c) and (d) can be considered stabilised/frozen for the purpose of evaluating the impact on national tax revenues? If not, the Presidency kindly asks delegations to explain their views and welcomes wording proposals.*

- (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.
- (...)

## **CHAPTER IV**

### **DEPRECIATION OF FIXED ASSETS**

(...)

*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) short-life fixed tangible assets: {5} years;
- (f) fixed intangible assets [~~including acquired goodwill~~]: 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.

*Presidency comments:*

- *Following discussions at the WPTQ meeting of 1 February 2018 in point e) square brackets have been removed.*
- *For the purposes of impact assessment and having in mind the discussions of the previous meeting, where the Member States expressed divergent opinions, the Presidency considers appropriate not to address issues related to the acquired goodwill*

***Questions***

*1. Do you support the Presidency proposal not to include goodwill amortization in the CCTB provisions for the purpose of evaluating the impact on national tax revenue?*

*Based on the discussions at last WPTQ meeting the Presidency is of the view that in case amortization of (acquired) goodwill is included the following issues should then be discussed in depth:*

- *definition of (acquired) goodwill for the purposes of the CCTB in order to avoid divergent interpretations;*
- *methods of calculation of (acquired) goodwill*
- *useful life of (acquired) goodwill.*

*The useful life could be:*

- *15 years (like for intangible assets in Article 33(1)(f)), or*
- *as provided in Directive 2013/34 the maximum period shall not be shorter than five years and shall not exceed 10 years. This requires a choice on the part of the Member States which will lead to different useful life and different tax base in the different Member States. Alternatively the delegations could fix a useful life between five and ten years; or*
- *another useful life.*

*The discussion on these issues will take time and the achievement of a stabilised/frozen text could be slowed down.*

*2. If delegations do not support the proposal of the Presidency which of the following options could be preferable:*

*2.1. including acquired goodwill except when deriving from the purchase of shares with useful life of 15 years;*

*2.2. including acquired goodwill except when deriving from the purchase of shares with useful life of 10 years;*

*2.3. another proposal (the Presidency would appreciate concrete arguments and proposals for wording).*

2. Second-hand buildings and other types of immovable property, second-hand long-life fixed tangible assets, second-hand medium-life fixed tangible assets, **second-hand short-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 short-life fixed tangible assets: {5} years, unless the taxpayer demonstrates that the estimated remaining useful life of the asset is shorter than {5} years, in which case it shall be depreciated over that shorter period;

- (f) 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.

Presidency comment:

*Following discussions at the WPTQ meeting of 1 February 2018 in point e) square brackets have been removed. Proposed alignment of the text with letter (e).*