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From:	Presidency
To:	Working Party on Company Law (CBCR)
N° prev. doc.:	WK 10862/2017
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Subject:	Explanatory Note on the Presidency compromise proposal in doc. 13685/17

Delegations will find attached an Explanatory Note from the Presidency as regards the latest changes introduced in doc. 13685/17.

Explanatory Note

This Note aims at presenting the changes made to compromise text between 11.10.2017 and 14.11.2017.

1. „**Solo** undertaking“ changed to „**standalone** undertaking“ throughout the text, as per recommendation from UK.
2. **Recital 8:** Sentence „The provisions of Chapter 10a of this Directive do not affect the provisions regarding annual financial statements and consolidated financial statements“ is returned, as per requests from DE, MT and SE.
3. **Recital 9:** Two last sentences merged.
4. **Recital 12a:** redrafted, reference to global disaggregation removed.

„(12a) To ensure the full functioning of the internal market and a level playing field between the European Union and third-country multinational enterprises, the Commission should continue to explore possibilities of increasing fairness and tax transparency.“

5. **Art 48a (4):** added words „within the meaning of Article 2 paragraph 11“ (as per DE request).
6. **Art 48b (2):** returned subparagraph explaining „accumulated earnings“ as per several requests, but slightly changed its wording to avoid repetition:

„For the purposes of point (g) of the first subparagraph the accumulated earnings shall mean the sum of the profits of past financial years and the relevant financial year not decided for distribution. With regard to branches, accumulated earnings shall be reported by the undertaking which opened a branch.“

7. **Art 48b (3a):** added words „subparagraph 2“, „draw up“ and „make accessible“, as per requests from DE and PL, respectively.
8. **Art 48b (7):** redrafted to make clear no dual reporting is intended:

„(7) Without prejudice to paragraph 1a of this Article, Member States may require subsidiaries and or branches governed by the law of that Member State and being controlled by one ultimate parent undertaking to draw up, publish and make accessible a report on income tax information where the sum of their revenues as reflected on their financial statements exceeds EUR 750 000 000 for each of the last two consecutive financial years and where no report on income tax information has been drawn up, published and made accessible as required by this Article.“

9. **Art 48d (2):** added word „relevant“ (to accommodate comment from DK).

10. **Art 48c (3a)** is no longer a MS option, to eliminate possibility of uneven application.

Delegations are also invited to comment on an alternative drafting suggestion by France, included in WK 12197/2017, next to the respective paragraph.

11. **Art 48f** and **Recital 11**: redrafted to make auditor's statement a MS option:

"(11) To ensure public awareness on the scope of and on compliance with reporting obligations, Member States might require that statutory auditor(s) or audit firm(s) state whether an undertaking is required to draw up a report on income tax information."

"Article 48f

Statement by statutory auditor

Member States may require that, where the financial statements of an undertaking governed by the law of a Member State are required to be audited by one or more statutory auditor(s) or audit firm(s), the statutory auditor(s) or audit firm(s) state(s) in the audit report whether the undertaking is required to draw up a report on income tax information in accordance with Article 48b."

Comment: Several Member States have expressed a view that the check of statutory auditor would still be valuable because it would enable the national competent authorities to identify subsidiaries and branches established in their MS, which are covered by the provisions of the Directive, hence making enforcement of the Directive easier. Justified concern has been expressed that the Member States may not have access to information about the group subsidiary undertakings are part of, particularly where the ultimate parent is established in a third country.

In the Presidency's understanding, even the subsidiaries mentioned in Art 48b (3) may neither know nor be able to find out whether they belong to a group whose consolidated revenue exceeds the 750M€ threshold, should the ultimate parent in a third country choose to withhold this information from them. (Current drafting of Art 48b (3) reflects this problem to a degree.) In such a case, it won't be possible, in our understanding, for a statutory auditor of that subsidiary to ascertain this either.

Therefore, Recital 11 and Article 48f are currently drafted to refer only to obligation to "draw up" the report. This would restrict the scope of auditor's check only to cases referred to in paragraphs 1, 3a (and potentially 7) of Article 48b – in all those cases, relevant info is available for both the Member State, the auditor and (with possible exception of paragraph 7) indeed to any reader of that undertaking's financial statements.

However, the Presidency wishes to flag to the delegations concern that the current text of Art 48b (3) makes it very easy for subsidiary undertakings of ultimate parents from third countries to completely ignore the Directive.

They are required to take action if they are within its scope, but not to take steps to clarify whether that is the case.

Should medium-sized and large subsidiary undertakings be first required to ask their ultimate parents in third countries whether they are, in fact, in scope of the Directive - and possibly report the consolidated revenue of the MNE group (or the fact that they were not given this info) within their financial statements?