

Brussels, 08 January 2018

**Interinstitutional files:
2016/0107 (COD)**

WK 14969/2017 REV 1

LIMITE

**DRS
COMPET
ECOFIN
FISC
CODEC**

WORKING PAPER

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

WORKING DOCUMENT

From:	Presidency
To:	Working Party on Company Law (CBCR)
N° prev. doc.:	ST 13685/17 REV1
N° Cion doc.:	ST 7949/16 + ADD 1 + ADD 2
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL amending Directive 2013/34/EU as regards disclosure of incoming tax information by certain undertaking and branches - Presidency NOTE on the subject

The only change in this REV version concerns the number of the previous document (ST 13685/17 REV1 instead of ST 13687/17 REV1).

Delegations will find attached a NOTE from the Presidency for further work in the legislative file Public CBCR

NOTE

Under Estonian Presidency, the Working Party on Company law convened on three occasions to examine the proposal of public CBCR. The progress made during that period is reflected in Presidency compromise text (doc.13687/17 REV).

The REV document fixes few cross reference mistakes and also changes a part of Art 48c (3) as follows:

“The information shall be attributed to each relevant tax jurisdiction on the basis of ~~the a~~ **legal presence**, the existence of a fixed place of business or of a permanent business activity which, arising from the activities of the group **or non-affiliated standalone undertaking**, can ~~give rise to income tax liability~~ **be subject to income tax** in that tax jurisdiction.

Where the activities of several affiliated undertakings can ~~give rise to a tax liability~~ **be subject to income tax** within a single tax jurisdiction, the information attributed to that tax jurisdiction shall represent the sum of the information relating to such activities of each affiliated undertaking and their branches in that tax jurisdiction.”

This change is intended to address situations where a jurisdiction has corporate income tax rate of zero and therefore no income tax liability can arise.

Due to a number of reservations from delegations, work on the proposal will continue under the Bulgarian Presidency, to whom we wish every success.

The outgoing Estonian Presidency recognizes that one issue, as outlined below, still deserves the attention of delegations.

In WK 12193/2017 INIT, we flagged our concern that the current text of Art 48b(3) makes it very easy for subsidiary undertakings of third countries ultimate parents undertakings to ignore the Directive, as they are required to take action if they are within its scope, but not to take steps to clarify whether that is the case. Consequently, we submitted the following question to delegations:

Should medium-sized and large subsidiary undertakings be first required to ask their third countries ultimate parents undertakings if they are within the 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?

However, similar problems also apply to branches. According to latest compromise text, Member States shall apply the rules set out in paragraph 4 of Art 48b to branches only where the criteria described in points (a) and (b) are met.

In the light of Art 48b paragraph (4) and in particular of point (a), delegations are invited to consider:

- if their national authorities would have sufficient information at their disposal to establish whether a branch fulfills the criteria described therein?

- should their national authorities not have sufficient information, should they be able to impose on branches of third country undertakings an obligation to provide additional information, in order to enable adequate enforcement of the proposed Directive?

A drafting proposal from NL delegation, partially addressing this issue, has been received after the Working Party on 14.11 and is in the Annex of this WK document.

The Estonian Presidency is extremely grateful for polite and constructive approach of all the delegations, as well as for valuable suggestions we received from you during the last six months.

We also wish to thank the Council Secretariat and Commission services for their impeccable professional support and reliability.

We wish you all a relaxing holiday and a successful New Year!

Text proposals of the Netherlands (changes are in *italic*)**Article 48b(3)**

Member States shall require the medium-sized and large subsidiary undertakings referred to in Article 3(3) and (4) ~~that~~ which are governed by their national laws and controlled by an ultimate parent undertaking which **on its balance sheet date exceeded for each of the last two consecutive financial years a total consolidated revenue of EUR 750 000 000 as reflected in its consolidated financial statements** has a consolidated net turnover exceeding EUR 750 000 000 and which is not governed by the law of a Member State, to publish **and make accessible** the a report on income tax information of that ultimate parent undertaking ~~on an annual basis~~ **as regards the later of the last two consecutive financial years, to the extent that ~~the~~ this information or report is available to the subsidiary undertaking.**

For that purpose the Member States shall require the subsidiary undertaking to request its ultimate parent undertaking if this undertaking exceeds on its balance sheet for each of the last two consecutive financial years a total consolidated revenue of EUR 750 000 000 as reflected in its consolidated financial statements and if so, to provide the subsidiary with all information required to enable it to meet its obligation. ~~When this information or report is not available, the subsidiary undertaking shall request its ultimate parent undertaking not governed by the law of a Member State to provide it with all information required to enable it to meet its obligation.~~

In case this information or report is not provided, the subsidiary undertakings shall publish and make accessible a statement as to why the report on income tax information could not be published and made accessible.

(NB. In paragraph 3a has to be amended accordingly: “as referred to in paragraph 3 subparagraph 2” has to be replaced by “as referred to in paragraph 3 subparagraph 3”.

Article 48b(4)

Member States shall require branches ~~which are~~ opened in their territories **and still operated** by an undertaking which is not governed by the law of a Member State to publish **and make accessible** ~~on an annual basis the a~~ report on income tax information of the ultimate parent undertaking **or the non-affiliated standalone undertaking** referred to in point (a) of ~~this~~ paragraph 5 of this Article **as regards the later of the last two consecutive financial years, to the extent that ~~the~~ this information or report is available to the person(s) designated to carry out the disclosure formalities referred to in Article 48e(2).**

For that purpose the Member States shall require the branch to request its ultimate parent undertaking or the standalone undertaking if this undertaking exceeds on its balance sheet for each of the last two consecutive financial years a total consolidated revenue of EUR 750 000 000 as reflected in its consolidated financial statements and if so, to provide the branch with all information required to enable it to meet its obligation.

~~*When the this information or report is not available, such person(s) shall request the ultimate parent undertaking not governed by the law of a Member State or the non-affiliated standalone undertaking referred to in point (a) of this paragraph to provide all information required to meet their obligations.*~~

In case ~~the~~ this information or report is not provided, the branches shall publish and make accessible a statement as to why the report on income tax information could not be published and made accessible ~~report shall contain an explanation as to why this is the case.~~

(...)

Article 48f

Member States ~~may require shall ensure~~ that, where the financial statements of an affiliated undertaking ~~governed by the law of a Member State referred to in Article 48b(1), (3) and (6)(b)~~ are ~~required to be~~ audited by one or more statutory auditor(s) or audit firm(s) pursuant to Article 34(1), the statutory auditor(s) or audit firm(s) also check ~~state(s) in the next audit report after publication or, if applicable after the expiration of the time limit for publication~~

- (a) whether ~~the subsidiary undertaking referred to in Article 48b(3) or the branch referred to in Article 48b(4)~~ has requested its ultimate parent undertaking or standalone undertaking if this undertaking exceeds on its balance sheet for each of the last two consecutive financial years a total consolidated revenue of EUR 750 000 000 as reflected in its consolidated financial statements and if so, to provide the subsidiary or branch with all information required to enable it to meet its obligation,*
- (b) whether the undertaking is required to draw up a report on income tax information in accordance with Article 48b,*
- (c) and if applicable, that the ultimate parent undertaking has refused to provide the information required.*