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NOTE

from:	Presidency
to:	Working Party on Tax Questions - Direct Taxation
Subject:	Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) - Presidency comments on the compromise proposal

Delegations will find in the Annex comments from the Presidency on the compromise proposal as set out in doc. 8387/12 FISC 49.

The Presidency intends to discuss this document (together with doc. 8387/12 FISC 49) at the Working Party on Tax Questions on 25 April 2012.

CHAPTER II
FUNDAMENTAL CONCEPTS

Article 4

Definitions

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

(1) 'taxpayer' means a company which has opted to apply, the system provided for by this Directive;

(2) 'single taxpayer' means a taxpayer not fulfilling the requirements for consolidation;

(3) 'non-taxpayer' means a company which is ineligible to opt or has not opted to apply the system provided for by this Directive;

(4) 'resident taxpayer' means a taxpayer which is resident for tax purposes in a Member State according to Article 6(3) and (4);

(5) 'non-resident taxpayer' means a taxpayer which is not resident for tax purposes in a Member State according to Article 6(3) and (4);

(6) 'principal taxpayer' means:

(a) a resident taxpayer, where it forms a group with its qualifying subsidiaries, its permanent establishments located in other Member States or one or more permanent establishments of a qualifying subsidiary resident in a third country; or

(b) the resident taxpayer designated by the group where it is composed only of two or more resident taxpayers which are immediate qualifying subsidiaries of the same parent company resident in a third country; or

(c) a resident taxpayer which is the qualifying subsidiary of a parent company resident in a third country, where that resident taxpayer forms a group solely with one or more permanent establishments of its parent; or

(d) the permanent establishment designated by a non-resident taxpayer which forms a group solely in respect of its permanent establishments located in two or more Member States.

(7) 'group member' means any taxpayer belonging to the same group, as defined in Articles 54 and 55. Where a taxpayer maintains one or more permanent establishments in a Member State other than that in which ~~its central management and control is located~~**it is resident for tax purposes**, each permanent establishment shall be treated as a group member;

(8) '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 disposal of assets and rights, interest, dividends and other profits distributions, proceeds of liquidation, royalties, subsidies and grants, gifts received, compensation 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;

(9) 'profit' means an excess of revenues over deductible expenses and other deductible items in a tax year;

(10) 'loss' means an excess of deductible expenses and other deductible items over revenues in a tax year;

(11) 'consolidated tax base' means the result of adding up the tax bases of all group members as calculated in accordance with Article 10;

(12) 'apportioned share' means the portion of the consolidated tax base of a group which is allocated to a group member by application of the formula set out in Articles 86-102;

(13) 'value for tax purposes' of a fixed asset or asset pool means the depreciation base less total depreciation deducted to date;

(14) 'fixed assets' means all tangible assets acquired for value or created by the taxpayer and all intangible assets acquired for value where they are capable of being valued independently and are used in the business in the production, maintenance or securing of income for more than 12 months, except where the cost of their acquisition, construction or improvement are less than EUR 1,000. **Assets acquired for value include assets received as gifts, subsidies and grants. Notwithstanding the first sentence above, f**~~F~~ixed assets shall ~~also~~ include **all** financial assets**, except for financial assets held for trading according to Article 23 and assets held by life insurance undertakings according to Article 30**;

(15) 'financial assets' means shares in affiliated undertakings **in accordance with paragraph 1 of Article 41 of Council Directive 83/349/EC**[1], loans to affiliated undertakings, participating interests **in accordance with Article 17 of Council Directive 78/660/EC**[2], loans to undertakings with which the company is linked by virtue of participating interests, investments held as fixed assets, other loans, and own shares to the extent that national law permits their being shown in the balance sheet;

(16) 'long-life fixed tangible assets' means fixed tangible assets' with a useful life of 15 years or more. Buildings, aircraft and ships shall be deemed to be long-life fixed tangible assets;

[1] **OJ L 193, 18.7.1983, p.1.**
[2] **OJ L 222, 14.8.1978, p.11.**

(17) 'second-hand assets' means fixed assets with a useful life that had partly been exhausted when acquired and which are suitable for further use in their current state or after repair;

(18) 'improvement costs' means any additional expenditure on a fixed asset that materially increases the capacity of the asset or materially improves its functioning or represents more than 10% of the initial depreciation base of the asset;

(19) 'stocks and work-in-progress' means assets held for sale, in the process of production for sale or in the form of materials or supplies to be consumed in the production process or in the rendering of services;

(20) 'economic owner' means the person who has substantially all the benefits and risks attached to a fixed asset, regardless of whether that person is the legal owner. A taxpayer who has the right to possess, use and dispose of a fixed asset and bears the risk of its loss or destruction shall in any event be considered the economic owner;

(21) 'competent authority' means the authority designated by each Member State to administer all matters related to the implementation of this Directive;

(22) 'principal tax authority' means the competent authority of the Member State in which the principal taxpayer is resident or, if it is a permanent establishment of a non-resident taxpayer, is situated;

(23) 'audit' means inquiries, inspections or examinations of any kind conducted by a competent authority for the purpose of verifying the compliance of a taxpayer with this Directive.

Presidency comments to Article 4

<u>Article 4(7)</u>: It is proposed to change the criteria in the definition of 'group member' to align the provision with Article 4 of the OECD model, i.e. where a taxpayer maintains one or more permanent establishments in a Member State other than that in which <u>it is resident for tax purposes,</u> each permanent establishment shall be treated as a group member.

<u>Article 4(14)</u>: Several Member States have raised the question how gifts are treated according to the directive. In order to clarify the directive it is specified that fixed assets include assets received as gifts, subsidies and grants. Reference is made to the comments to Article 22.

Furthermore the amendments secure that financial assets are treated as fixed assets also if the 1000 EUR limit is not met. Finally a reference is inserted to Article 23 and 30 to clarify that financial assets held for trading and assets held by life insurance undertakings are not treated as fixed assets.

<u>Article 4(15)</u>: A reference is inserted to Article 41 in Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts in order to specify the meaning of affiliated undertakings. Likewise a reference is made to Article 17 of Council Directive 78/660/EC based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies (78/660/EEC) in order to specify the meaning of participating interests.

Article 5

Permanent establishment

1. A taxpayer shall be considered to have a 'permanent establishment' in a State other than the State in which ~~its central management and control is located~~**<u>it is resident for tax purposes</u>** when it has a fixed place in that other State through which the business is wholly or partly carried on, including in particular:

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

2. A building site or construction or installation project shall constitute a permanent establishment only if it lasts more than twelve months.

3. Notwithstanding paragraphs 1 and 2, the following shall not be deemed to give rise to a permanent establishment:

a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the taxpayer;

b) the maintenance of a stock of goods or merchandise belonging to the taxpayer solely for the purpose of storage, display or delivery;

c) the maintenance of a stock of goods or merchandise belonging to the taxpayer solely for the purpose of processing by another person;

d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the taxpayer;

e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the taxpayer, any other activity of a preparatory or auxiliary character;

f) the maintenance of a fixed place of business solely for any combination of activities mentioned in points (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

4. Notwithstanding paragraph 1, where a person - other than an agent of an independent status to whom paragraph 5 applies - is acting on behalf of a taxpayer and has, and habitually exercises, in a State an authority to conclude contracts in the name of the taxpayer, that taxpayer shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the taxpayer, unless the activities of such person are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

5. A taxpayer shall not be deemed to have a permanent establishment in a State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

6. The fact that a taxpayer which is a resident of a State controls or is controlled by a taxpayer which is a resident of another State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either taxpayer a permanent establishment of the other.

Presidency comments to Article 5

Reference is made to the comments to Article 4(7).

[…]

CHAPTER IV

CALCULATION OF THE TAX BASE

Article 9

General principles

1. In computing the tax base, profits and losses shall be recognised only when realised.

2. Transactions and taxable events shall be measured individually.

3. The calculation of the tax base shall be carried out in a consistent manner unless exceptional circumstances justify a change.

4. The tax base shall be determined for each tax year unless otherwise provided. A tax year shall be any twelve-month period, unless otherwise provided.

Article 10

Elements of the tax base

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

Article 11

Exempt revenues

The following shall be exempt from corporate tax:

(a) <u>**public**</u> subsidies <u>**and grants**</u> directly linked to the acquisition, construction or improvement of fixed assets, subject to depreciation in accordance with Articles 32 to 42;

(b) proceeds from the disposal of pooled assets referred to in Article 39(2), including the market value of non-monetary gifts;

(c) received profit distributions **provided a minimum holding of 10%. This shall not apply to profit distributions from shares held for trading in accordance with paragraph 4 of Article 23 and profit distributions received by life insurance undertakings in accordance with Article 30 (c)**;

(d) proceeds from a disposal of shares **provided a minimum holding of 10%. This shall not apply to disposal of shares held for trading in accordance with paragraph 3 of Article 23 and of shares held by life insurance undertakings in accordance with Article 30 (b)**;

(e) income of a permanent establishment in a third country.

Presidency comments to Article 11

Several Member States have raised the question which subsidies are covered by Article 11(a). The proposed amendments to Article 11(a) in accordance to which "public subsidies and grants" shall be exempt aim at clarifying the article.

It has furthermore been discussed among the Member States whether received profit distributions and proceeds from disposal of shares as proposed by the Commission should be exempt without limitations. A number of Member States are of the opinion that there should be a threshold, i.e. the exemption should only be granted provided a certain level of participation.

The Presidency suggests a threshold of 10% corresponding to the holding requirements in the Parent-Subsidiary Directive 90/435/EEC, i.e. both direct and indirect participations are taken into account when deciding whether the threshold criterion is fulfilled. Received profit distributions and proceeds from disposal of shares when the holding is less than 10% will hereby not be exempt.

Finally it is clarified that profit distributions and proceeds from disposal of shares held for trading in accordance with Article 23(3) and (4) are not exempt. The same applies to profit distributions and proceeds from disposal of shares received by life insurance undertakings in accordance with Article 30(b) and (c).

Article 12

Deductible expenses

Deductible expenses shall include all costs of sales and expenses net of deductible value added tax incurred by the taxpayer with a view to obtaining or securing income, including costs of research and development and costs incurred in raising [equity or] debt for the purposes of the business.

Deductible expenses shall also include gifts **or donations** to charitable bodies as defined in Article 16 which are established in a Member State or in a third country which applies an agreement on the exchange of information on request comparable to the provisions of Directive 2011/16/EU. The maximum deductible expense for ~~monetary~~ gifts or donations to charitable bodies shall be 0.5% of revenues in the tax year.

Presidency comments to Article 12

In the view of the Presidency the question could be raised whether costs incurred in raising equity shall be deductible according to Article 12 and 'equity or' is therefore put in square brackets.

Furthermore it is clarified that gifts and donations to charitable bodies are equally treated in the directive.

Finally several Member States have emphasized that monetary and non-monetary gifts and donations should be treated in the same manner. Accordingly the wording of the last sentence is adjusted, i.e. non-monetary gifts and donations to charitable bodies are also covered by the 0.5% limit. Reference is made to the comments to Article 22 and the proposed amendments to this article securing that non-monetary gifts and donations to charitable bodies are also when calculating the tax base valuated at market value, i.e. in the same manner as monetary gifts and donations.

Article 13

Other deductible items

A proportional deduction may be made in respect of the depreciation of fixed assets in accordance with Articles 32 to 42.

Article 14

*Non-deductible ~~expenses~~**items***

1. The following ~~expenses~~**items** shall be treated as non-deductible:

(a) profit distributions and repayments of equity or debt;

(b) 50% of entertainment costs;

(c) the transfer of retained earnings to a reserve which forms part of the equity of the company;

(d) corporate tax **and similar taxes on profits**;

(e) bribes;

(f) fines and penalties payable to a public authority for breach of any legislation;

(g) ~~costs~~**<u>expenses</u>** incurred by a company for the purpose of deriving income which is exempt pursuant to Article 11 **<u>(c), (d) and (e)</u>**;~~such costs shall be fixed at a flat rate of 5% of that income unless the taxpayer is able to demonstrate that it has incurred a lower cost;~~

(h) ~~monetary~~ gifts and donations other than those made to charitable bodies as defined in Article 16;

(i) save as provided for in Articles 13 and 20, costs relating to the acquisition, construction or improvement of fixed assets except those relating to research and development;

<u>(j) losses incurred by a permanent establishment in a third country.</u>

~~(j) taxes listed in Annex III, with the exception of excise duties imposed on energy products, alcohol and alcoholic beverages, and manufactured tobacco.~~

~~2. Notwithstanding point (j) of paragraph 1 a Member State may provide for deduction of one or more of the taxes listed in Annex III. In the case of a group, any such deduction shall be applied to the apportioned share of the group members resident or situated in that Member State.~~

~~3. The Commission may adopt delegated acts in accordance with Article 127 and subject to the conditions of Articles 128, 129 and 130 to amend Annex III as is necessary in order to include all similar taxes which raise more than 20 % of the total amount of corporate tax in the Member State in which they are levied.~~

~~Amendments to Annex III shall first apply to taxpayers in their tax year starting after the amendment.~~

Presidency comments to Article 14

Article 14(d): Several Member States have raised the question whether the wording of Article 14(d) is too narrow. It is proposed to insert 'similar taxes on profit'.

Article 14(g): A concern among the Member States has been the fixed flat rate of 5% in Article 14(g). In the view of the Presidency expenses incurred by a company for the purpose of deriving income which is tax exempt shall be non-deductible. Accordingly it is proposed that the 5% flat rate rule is left out of Article 14(g).

In continuation hereof the Presidency proposes to introduce an interest limitation rule in the directive securing the distinction between interest expenses attributable to exempt and taxable income respectively. Reference is made to the proposed Article 14 a below and the comments to this article.

Article 14(j) and paragraph 2 and 3: It is proposed to leave out Article 14(j) and paragraph 2 and 3. In the view of the Presidency taxes others than corporate tax and similar taxes shall be deductible according to the criteria outlined in Article 12. The deleted parts of the article would give rise to arbitrary results e.g. due to the 20% rule in paragraph 3.

Article 14(new j): It is clarified that losses incurred by a PE in a third country are not deductible. With regard to losses of a PE subject to CFC taxation according to Article 82 the loss carry-forward rule in Article 83 applies.

Furthermore 'monetary' is left out in Article 14(h). Finally small adjustments are proposed to improve the wording of the article. Reference is made to the comments to Article 12.

Article 14 a

[Interest limitation rule

1. **A taxpayer can deduct borrowing costs up to the amount of received interest or other taxable revenues from financial assets. Excess borrowing costs are only deductible up to the maximum threshold.**

2. **Borrowing costs include interest expenses and other costs that a taxpayer incurs in connection with the borrowing of funds. Borrowing costs include any difference between the borrowed funds and the maturity amount and the interest element in a leasing contract where the economic owner is entitled to deduct such interest.**

3. **The maximum threshold is calculated as an amount equivalent to [x pct. - index] of the following items:**

(a) **The value for tax purposes of individually depreciable fixed assets at the end of the tax year;**

(b) **The depreciation base of the asset pool at the end of the tax year;**

(c) **The cost of acquisition, construction or improvement of non-depreciable fixed assets excluding financial assets;**

(d) **The value of stocks and work in progress at the end of the tax year;**

(e) **Losses, excluding borrowing costs, incurred in the current tax year and losses carried forward according to Article 43.**

4. **Deductible borrowing costs as calculated according to paragraphs 1-3 and excess unrelieved borrowing costs from previous years are only deductible in the current tax year up to 60% of the positive tax base before deduction of borrowing costs. Excess unrelieved borrowing costs may be deducted in subsequent tax years.**

5. **Notwithstanding paragraphs 1-4 borrowing costs below EUR 1 million for a single taxpayer can always be deducted.]**

[Note: special rules will have to be drafted for groups.]

Presidency comments to Article 14 a

The current draft as presented by the Commission allows full financing of activities in subsidiaries resident for tax purposes in third countries with full deduction of the borrowing costs in the common tax base.

Several Member States have emphasized the need to address the inherent asymmetry in the Directive proposal as to the taxation of income from activities inside the EU (taxable) and income from activities outside the EU (non-taxable) and the asymmetry in the taxation due to the exemption from corporate tax of dividends and capital gains on shares realised by companies in order to alleviate economical double taxation on corporate income.

With the basic aim to reflect the principle in article 14, that expenses related to tax exempt items cannot be deducted it is proposed that an interest limitation rule is introduced in the directive.

According to paragraph 1 borrowing costs can be deducted up to the amount of received interest or other taxable revenues from financial assets. The intention is that all types of financial assets shall be taken into account also financial assets held for trading. Excess borrowing costs are only deductible up to the maximum threshold.

The threshold is calculated as [x pct. – index] of the following items measured at the end of the year: (a) Individually depreciable fixed assets; (b) the depreciation base of the asset pool; (c) costs of acquisition, construction or improvement of non-depreciable fixed assets excluding financial assets; (d) the value of stocks and work in progress; (e) losses excluding borrowing costs incurred in the current tax year and losses carried forward according to Article 43.

The items above are all tax relevant items where there could be a need for debt financing. All debt would first and foremost be allocated to those items – in practice 100% debt financing is allowed under paragraph 1-3 – but only of tax relevant items as defined. To the asset base is only added the value for tax purposes. Hereby it is secured, that there will be no double deduction, i.e. both depreciations and interest deductions concerning loans not repaid concurrent with the income obtained. A further advantage is that all figures used for the calculation are already available. No new valuation of assets would be needed.

Shares where the shareholding is more than 10% are not included in the asset base, as dividends and proceeds from disposal of these shares are not included in the tax base (Article 11(c) and (d)).

Likewise other financial assets including portfolio shares are not included in the asset base. Profit distributions and proceeds from disposal of shares are included in the calculation under paragraph 1 (taxable revenues) in the same manner as e.g. interest income, i.e. only the actual taxable income is taken into account.

As a supplement is added an earnings stripping provision to protect against thin capitalisation. Borrowing costs are only deductible in the current tax year to the extent positive taxable income before deduction of borrowing costs is not reduced more than a certain percentage.

I.e. according to paragraph 4 and 5 deductible borrowing costs as calculated according to paragraph 1-3 can always be deducted in current tax years up to a maximum of 1 million Euros for a single taxpayer.

The intention is that any interest expense below 1 million Euro shall be fully deductible. This could be clarified by changing the reference in paragraph to paragraphs 2-4.

Exceeding borrowing costs are only deductible up to 60% of the positive tax base before deduction of borrowing costs. These thresholds are corresponding to the thresholds in Article 43. Contrary to the overall ceiling excess unrelieved borrowing costs may by carried forward to subsequent tax years.

The effects of the interest limitation rule are illustrated by the example below.

It is the view of the Presidency that further discussions are needed and the article is therefore put in square brackets.

Finally please note, that special rules will have to be drafted for groups.

Interest limitation according to Article 14 a - Example

Interest rate according to Article 14a(3): 10%

Balance primo:

Assets		**Liabilities**	
Depreciable Assets	1.000.000.000	Equity	200.000.000
Shares subsidiary	1.000.000.000	Loan	1.800.000.000

Received tax free dividends 300.000.000

Taxable income before limitation:

Revenue taxable	200.000.000
Depreciation	(150.000.000)
Income before interest	50.000.000
Net Interest expense 9%	(162.000.000)
Taxable income before limitation	(112.000.000)

Maximum threshold:

Asset tax base primo	1.000.000.000
Depreciation	(150.000.000)
Asset tax base ultimo	850.000.000
Max threshold (10% of asset base ultimo)	85.000.000

Interest deduction cut off – Article 14a(1):

Interest expense	162.000.000
Max threshold	(85.000.000)
Interest deduction cut off Article 14(1)	77.000.000

Income before interest 50.000.000
Max deduction not deferred - 60% 30.000.000

Deferred interest deduction – Article 14a(4):

Max interest deduction (threshold)	85.000.000
Max deduction not deferred 60%	(30.000.000)
Deferred interest deduction Article 14(4)	55.000.000

Taxable income after interest limitation article 14a:

Taxable income before limitation	(112.000.000)
Interest deduction cut off 14a(1)	77.000.000
Deferred interest deduction 14a(4)	55.000.000

Article 15

Expenditure incurred for the benefit of shareholders

Benefits granted to a shareholder who is an individual, his spouse, lineal ascendant or descendant or associated enterprises, holding a direct or indirect participation in the control, capital or management of the taxpayer, as referred to in Article 78, shall not be treated as deductible expenses to the extent that such benefits would not be granted to an independent third party.

Article 16

Charitable bodies

A body shall qualify as charitable where the following conditions are met:

(a) it has legal personality and is a recognised charity under the law of the State in which it is established;

(b) its sole or main purpose and activity is one of public benefit**.**~~;an educational, social, medical, cultural, scientific, philanthropic, religious, environmental or sportive purpose shall be considered to be of public benefit provided that it is of general interest~~ **The purpose and activity shall only be considered to be of public benefit if the purpose is included in the list in Annex III and it is of general interest**;

(c) its assets are irrevocably dedicated to the furtherance of its purpose;

(d) it is subject to requirements for the disclosure of information regarding its accounts and its activities;

(e) it is not a political party as defined by the Member State in which it is established.

Presidency comments to Article 16

The Presidency proposes to align the definition of charitable bodies in the directive with is in accordance with the definition of charitable bodies in the proposal for a European Foundation Statue (FE)[1] *presented by the Commission February 2012.*

The proposed amendments are supplemented by the list enclosed in Annex III to the directive.

CHAPTER V
TIMING AND QUANTIFICATION

Article 17

General principles

Revenues, expenses and all other deductible items shall be recognised in the tax year in which they accrue or are incurred, unless otherwise provided for in this Directive.

Article 18

Accrual of revenues

Revenues accrue when the right to receive them arises and they can be quantified with reasonable accuracy, regardless of whether the actual payment is deferred.

The following rules apply subject to the provisions of Article 24 relating to long term contracts:

1. Profits resulting from ordinary activities consisting of the sale of goods shall be considered to be accrued when the following conditions are fulfilled:

[1] COM(2012)35 final http://ec.europa.eu/internal_market/company/docs/eufoundation/proposal_en.pdf

a) the entity has transferred to the buyer the significant risks and rewards of ownership of the goods;

b) the entity retains neither continuing managerial involvement to the degree usually associated with ownership nor effective control over the goods sold;

c) the amount of revenue can be measured reliably;

d) it is probable that the economic benefits associated with the transaction will flow to the entity;

e) the costs incurred or to be incurred in respect of the transaction can be measured reliably.

2. Profits resulting from the supply of services shall be considered to be accrued when the services are fully carried out.

Presidency comments to Article 18

It is proposed to clarify the principle of accrual of revenues in accordance with the international accounting rules (IAS 18). The amendments are based on proposals from France.

Article 19
Incurrence of deductible expenses

A deductible expense is incurred at the moment that the following conditions are met:

(a) the obligation to make the payment has arisen;

(b) the amount of the obligation can be quantified with reasonable accuracy;

(c) in the case of trade in goods, the significant risks and rewards of ownership over the goods have been transferred to the taxpayer and, in the case of supplies of services, the latter have been received by the taxpayer.

Article 20

Costs related to non-depreciable assets

The costs relating to the acquisition, construction or improvement of fixed assets not subject to depreciation according to Article 40 shall be deductible in the tax year in which the fixed assets are disposed of, provided that the disposal proceeds are included in the tax base.

Article 21

Incurrence of expenses on s~~*S*~~*tocks and work-in-progress*

The total amount of deductible expenses for a tax year shall be increased by the value of stocks and work-in-progress at the beginning of the tax year and reduced by the value of stocks and work-in-progress at the end of the same tax year. No adjustment shall be made in respect of stocks and work-in-progress relating to long-term contracts.

Presidency comments to Article 21

Improvement of the wording.

Article 22

Valuation

1. For the purposes of calculating the tax base, **the following valuation rules shall apply**~~transactions shall be measured at~~:

   (a) the monetary consideration for the transaction, such as the price of goods or services;

(b) the market value where the consideration for the transaction is wholly or partly non-monetary;

(c) the market value in the case of a non-monetary gift ~~received by a taxpayer~~;

~~(d) the market value in the case of non-monetary gifts made by a taxpayer other than gifts to charitable bodies;~~

(**d**~~e~~) the ~~fair~~**market** value of financial assets and liabilities held for trading**.**~~;~~

~~(f) the value for tax purposes in the case of non-monetary gifts to charitable bodies.~~

2. The tax base, income and expenses shall be measured in EUR during the tax year or translated into EUR on the last day of the tax year at the annual average exchange rate for the calendar year issued by the European Central Bank or, if the tax year does not coincide with the calendar year, at the average of daily observations issued by the European Central Bank through the tax year. This shall not apply to a single taxpayer located in a Member State which has not adopted the EUR. Nor shall it apply to a group if all group members are located in ~~the same~~ Member State**s** ~~and~~ that ~~state~~ ha**ve**~~s~~ not adopted the EUR.

Presidency comments to Article 22

It is proposed to use 'market value' and 'fair value'. The Presidency suggests that only market value is used for valuation purposes while it is unclear what the difference actually is between market and fair value.

Furthermore it is proposed that Article 22(f) is left out. It is the opinion that the value should correspond to the market value also in the case of non-monetary gifts to charitable bodies. Reference is made to the comments to Article 14(h).

Finally the amendments aim at improving the wording of the article.

Article 23

Financial assets and liabilities held for trading (trading book)

1. A financial asset or liability shall be classified as held for trading if it is one of the following:

   (a) acquired or incurred principally for the purpose of selling or repurchasing in the near term;

   (b) part of a portfolio of identified financial instruments, including derivatives, that are managed together and for which there is evidence of a recent actual pattern of short-term profit-taking.

2. Notwithstanding Articles 18 and 19, any differences between the ~~fair~~**<u>market</u>** value at the end of the tax year and the ~~fair~~**<u>market</u>** value at the beginning of the same tax year, or at the date of purchase if later, of financial assets or liabilities held for trading shall be included in the tax base.

3. When a financial asset or liability held for trading is disposed of, the proceeds shall be added to the tax base. The ~~fair~~**<u>market</u>** value at the beginning of the tax year, or the market value at the date of purchase if later, shall be deducted.

<u>4. When profit distributions are received in respect of a holding held for trading the exemption from corporate tax referred to in Article 11(c) shall not apply.</u>

Presidency comments to Article 23

Reference is made to the comments to Article 11(c) and Article 22.

Article 24

Long-term contracts

1. A long-term contract is one which complies with the following conditions:

   (a) it is concluded for the purpose of manufacturing, installation or construction or the performance of services;

   (b) its term exceeds, or is expected to exceed, 12 months.

2. Notwithstanding Article 18, revenues relating to a long-term contract shall be recognised, for tax purposes, at the amount corresponding to the part of the contract completed in the respective tax year. The percentage of completion shall be determined ~~either~~ by reference to the ratio of costs of that year to the overall estimated costs ~~or by reference to an expert evaluation of the stage of completion at the end of the tax year~~.

3. Costs relating to long-term contracts shall be taken account of in the tax year in which they are incurred.

Presidency comments to Article 24

According to the directive proposal revenues relating to a long-term contract shall be recognised, for tax purposes, at the amount corresponding to the part of the contract completed in the respective tax year. The directive proposal leaves two possibilities as to how the percentage of completion shall be determined: Either by reference to the ratio of costs of that year to the overall estimated costs or by reference to an expert evaluation of the stage of completion at the end of the tax year.

Several Member States have expressed as their opinion that the second method should not be a possibility while it would counteract the aim of harmonizing the tax base and be administrative burdensome.

It is therefore proposed to leave out the possibility to determine the percentage of completion by reference to an expert evaluation.

Article 25

Provisions

1. Notwithstanding Article 19, where at the end of a tax year it is established that the taxpayer has a legal obligation, or a probable future legal obligation, arising from activities or transactions carried out in that, or previous tax years, any amount arising from that obligation which can be reliably estimated shall be deductible, provided that the eventual settlement of the amount is expected to result in a deductible expense.

   Where the obligation relates to an activity or transaction which will continue over future tax years, the deduction shall be spread proportionately over the estimated duration of the activity or transaction, having regard to the revenue derived therefrom.

   Amounts deducted under this Article shall be reviewed and adjusted at the end of every tax year. In calculating the tax base in future years account shall be taken of amounts already deducted.

2. A reliable estimate shall be the expected expenditure required to settle the present obligation at the end of the tax year, provided that the estimate is based on all relevant factors, including past experience of the company, group or industry. In measuring a provision the following shall apply:

   (a) account shall be taken of all risks and uncertainties. However, uncertainty shall not justify the creation of excessive provisions;

(b) if the term of the provision is 12 months or longer and there is no agreed discount rate, the provision shall be discounted at **[**the yearly average of the Euro Interbank Offered Rate (Euribor) for obligations with a maturity of 12 months, as published by the European Central Bank, in the calendar year in the course of which the tax year ends**]**;

(c) future events shall be taken into account where they can reasonably be expected to occur;

(d) future benefits directly linked to the event giving rise to the provision shall be taken into account.

Presidency comments to Article 25

Member States have discussed the rate by which provisions shall be discounted. It is the view of the Presidency that further discussions are needed and this part is therefore put in square brackets.

Article 26

Pensions

~~In case of pension provisions actuarial techniques shall be used in order to make a reliable estimate of the amount of benefits that employees have earned in return for their service in the current and prior period.~~

~~The pension provision shall be discounted by reference to Euribor for obligations with a maturity of 12 months, as published by the European Central Bank. The calculations shall be based on the yearly average of that rate in the calendar year in the course of which the tax year ends.~~

A Member State may provide for the deduction of pension provisions. In the case of a group, any such deduction of pension provisions shall be applied to the apportioned share of the group members resident or situated in that Member State.

[Note: corresponding amendments in Article 102 will have to be drafted.]

Presidency comments to Article 26

It has been discussed among the Member States whether pension provisions in case of a group are to be deducted in the common tax base or not. A number of Member States have expressed as their opinion that this should not be the case.

The Presidency suggests that deduction of pension provisions – provided that the Member State allows such deductions – shall be applied only to the apportioned share of the group members resident or situated in that Member State.

Please note that corresponding amendments in Article 102 will have to be drafted.

Article 27

Bad debt deductions

1. A deduction shall be allowed for a bad debt receivable where the following conditions are met:

   (a) at the end of the tax year, the taxpayer has taken all reasonable steps to pursue payment and reasonably believes that the debt will not be satisfied wholly or partially; or the taxpayer has a large number of homogeneous receivables and is able to reliably estimate the amount of the bad debt receivable on a percentage basis, through making reference to all relevant factors, including past experience where applicable;

   (b) the debtor is not a member of the same group as the taxpayer;

   (c) no deduction has been claimed under Article 41 in relation to the bad debt;

(d) where the bad debt relates to a trade receivable, an amount corresponding to the debt shall have been included as revenue in the tax base.

2. In determining whether all reasonable steps to pursue payment have been made, the following shall be taken into account:

(a) whether the costs of collection are disproportionate to the debt;

(b) whether there is any prospect of successful collection;

(c) whether it is reasonable, in the circumstances, to expect the company to pursue collection.

3. Where a claim previously deducted as a bad debt is settled, the amount recovered shall be added to the tax base in the year of settlement.

Article 28

Hedging

__1.__ Gains and losses on a hedging instrument shall be treated in the same manner as the corresponding gains and losses on the hedged item. In the case of taxpayers which are members of a group, the hedging instrument and hedged item may be held by different group members. There is a hedging relationship where both the following conditions are met:

(a) the hedging relationship is formally designated and documented in advance;

(b) the hedge is expected to be highly effective and the effectiveness can reliably be measured.

2. **Where a derivative based on shares or share index is not treated as a hedging instrument in accordance with paragraph 1, a loss incurred on the derivative shall only be deductible against gains on similar derivatives. Unrelieved losses may be carried forward to subsequent years.**

Presidency comments to Article 28

Article 28 prescribes that gains and losses on a hedging instrument shall be treated in the same manner as the corresponding gains and losses on the hedged item. I.e. when the hedged item is shares exempt according to Article 11(d) gains and losses on the hedging instrument is exempt as well.

However taxation according to Article 28 provides that the hedging relationship is formally designated and documented in advance, i.e. the Directive leaves a possibility for the tax payer to "choose" taxation of the hedging instrument in accordance with Article 23 (trading book).

In order to protect the common tax base against erosion due to this possible asymmetry in the taxation of shares and derivatives either because the hedged item is exempt or due to different principles of calculation of profits and losses the Presidency suggests that a taxpayer where a derivative based on shares or share index is not treated as a hedging instrument in accordance with 28(1), i.e. the derivative is not treated in the same manner as the corresponding gains and losses on the hedged item, a loss incurred on the derivative shall only be deductible against gains on similar derivatives.

In cases where a taxpayer does not have gains on derivatives based on shares or share index and the losses for that reason is not deductible in the current tax year, the unrelieved losses may be carried forward to subsequent years.

Article 29

__Valuation of s__~~S~~tocks and work-in-progress

1. The cost of stock items and work-in-progress that are not ordinarily interchangeable and goods or services produced and segregated for specific projects shall be measured individually. The costs of other stock items and work-in-progress shall be measured by using the first-in first-out (FIFO) or weighted-average cost method.

2. A taxpayer shall consistently use the same method for the valuation of all stocks and work-in-progress having a similar nature and use. The cost of stocks and work-in-progress shall comprise all costs of purchase, direct costs of conversion and other direct costs incurred in bringing them to their present location and condition. Costs shall be net of deductible Value Added Tax. ~~A taxpayer who has included indirect costs in valuing stocks and work-in-progress before opting for the system provided for by this Directive may continue to apply the indirect cost approach.~~

3. The valuation of stocks and work-in-progress shall be done in a consistent way.

4. Stocks and work-in-progress shall be valued on the last day of the tax year at the lower of cost and net realisable value. The net realisable value is the estimated selling price in the ordinary course of business less the estimated costs of completion and the estimated costs necessary to make the sale.

Presidency comments to Article 29

In order to simplify and to a greater extent obtain a harmonized/common tax base it is proposed to leave out the possibility for a taxpayer to continue including indirect costs in valuing stocks and work-in-progress after opting for the CCCTB.

I.e. the taxpayer should in any case follow the main rule in paragraph 2, that cost of stocks and work-in-progress shall comprise all costs of purchase, direct costs of conversion and other direct costs incurred in bringing them to their present location and condition. Costs shall be net of deductible Value Added Tax.

Article 30

Insurance undertakings

Insurance undertakings that have been authorised to operate in the Member States, in accordance with Council Directive 73/239/EEC[1] for non-life insurance, Directive 2002/83/EC of the European Parliament and of the Council[2] for life insurance, and Directive 2005/68/EC of the European Parliament and of the Council[3] for reinsurance, shall be subject to the following additional rules:

(a) the tax base shall include the difference in the market value, as measured at the end and the beginning of the same tax year, or upon completion of the purchase if later, of assets ~~in which investment is made for the benefit of life insurance policyholders bearing the investment risk~~**held by life insurance undertakings**;

(b) the tax base shall include the difference in the market value, as measured at the time of disposal and the beginning of the tax year, or upon completion of the purchase if later, of assets ~~in which investment is made for the benefit of life insurance policyholders bearing the investment risk~~**held by life insurance undertakings**;

(c) the tax base shall include profit distributions received by life insurance undertakings;

1 OJ L 228, 16.8.1973, p. 3.
2 OJ L 345, 19.12.2002, p. 1.
3 OJ L 232.9.12.2005, p. 1.

(**d**~~e~~) the technical provisions of insurance undertakings established in compliance with Directive 91/674EEC[1] shall be deductible, with the exception of equalisation provisions. A Member State may provide for the deduction of equalisation provisions. In the case of a group, any such deduction of equalisation provisions shall be applied to the apportioned share of the group members resident or situated in that Member State. Amounts deducted shall be reviewed and adjusted at the end of every tax year. In calculating the tax base in future years account shall be taken of amounts already deducted.

Presidency comments to Article 30

In order to secure a robust tax base it is proposed that all assets held by life insurance undertakings and profit distributions received by such undertakings shall be included in the tax base.

The proposal secures the correlation between provisions of insurance undertakings and the taxation of investments serving as cover for future liabilities. This is in particular important when the items invested in by the insurance company is tax exempt but also to secure use of the marked-to-market principle on portfolio shares.

Article 31

Transfers of assets towards a third country

1. The transfer of a fixed asset by a resident taxpayer to its permanent establishment in a third country shall be deemed to be a disposal of the asset for the purpose of calculating the tax base of a resident taxpayer in relation to the tax year of the transfer. The transfer of a fixed asset by a non-resident taxpayer from its permanent establishment in a Member State to a third country shall also be deemed to be a disposal of the asset.

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1 OJ L 374, 19.12.1991, p. 1.

<u>Where an asset other than a fixed asset is transferred by a resident taxpayer to its permanent establishment in a third country or by a non-resident taxpayer from its permanent establishment in a Member State to a third country, an amount equal to the market value of the asset less any unrelieved expenses related to the asset shall be added to the tax base as revenue in the tax year of the transfer.</u>

[2. Paragraph 1 shall not apply where the third country is party to the European Economic Area Agreement and there is an agreement on the exchange of information between that third country and the Member State of the resident taxpayer or of the permanent establishment, comparable to Directive 2011/16/EU.]

Presidency comments to Article 31

Firstly it is proposed to broaden the scope of the exit taxation by including all assets, i.e. not only fixed assets.

Secondly in order to clarify the exit taxation in cases where the transfer concerns an asset other than a fixed asset an additional point is inserted in paragraph 1 according to which an amount equal to the market value of the asset less any unrelieved expenses related to the asset shall be added to the tax base as revenue in the tax year of the transfer.

The taxation hereby outlined equals the taxation of transfers of fixed assets but specify that any unrelieved expenses related to the asset shall be deductible in the same manner as costs related to fixed assets (Article 20).

Finally the Presidency takes notice of the current court cases concerning exit tax involving several Member States. Due to these cases the discussion of Paragraph 2 has to a great extent been postponed. Therefore the paragraph is put in square brackets for discussion at a later stage.

CHAPTER VI

DEPRECIATION OF FIXED ASSETS

Article 32

Fixed asset register

Acquisition, construction or improvement costs, together with the relevant date, shall be recorded in a fixed asset register for each fixed asset separately.

Article 33

Depreciation base

1. The depreciation base shall comprise any cost directly connected with the acquisition, construction or improvement of a fixed asset.

   Costs shall not include deductible value added tax.

   ~~In the case of fixed assets produced by the taxpayer, the indirect costs incurred in production of the asset shall also be added to the depreciation base in so far as they are not otherwise deductible.~~

2. The depreciation base of an asset received as a gift shall be its market value as included in revenues.

3. The depreciation base of a fixed asset subject to depreciation shall be reduced by any **public** subsidy **or grant** directly linked to the acquisition, construction or improvement of the asset as referred to in Article 11(a).

Presidency comments to Article 33

In the view of the Presidency the aim of the last part of paragraph 1 is unclear while indirect costs incurred in production of the asset are assumed to be deductible according to the general rules in the directive, i.e. Article 12. Thus it is proposed to leave out the last sentence in paragraph 1.

Regarding the amendments in paragraph 3 reference is made to the comments to Article 11.

Article 34
Entitlement to depreciate

1. Subject to paragraph 3, depreciation shall be deducted by the economic owner.

2. In the case of leasing contracts in which economic and legal ownership does not coincide, the economic owner shall be entitled to deduct the interest element of the lease payments from its tax base. The interest element of the lease payments shall be included in the tax base of the legal owner.

3. A fixed asset may be depreciated by no more than one taxpayer at the same time. If the economic owner of an asset cannot be identified, the legal owner shall be entitled to deduct depreciation. In that case the interest element of the lease payments shall not be included in the tax base of the legal owner.

4. A taxpayer may not disclaim depreciation.

5. The Commission may adopt delegated acts in accordance with Article 127 and subject to the conditions of Articles 128, 129 and 130 in order to lay down more detailed rules concerning:

   (a) the definition of legal and economic ownership, in relation in particular to leased assets;

(b) the calculation of the capital and interest elements of the lease payments;

(c) the calculation of the depreciation base of a leased asset.

Article 35

Depreciation of improvement costs

Improvement costs shall be depreciated in accordance with the rules applicable to the fixed asset which has been improved as if they related to a newly acquired fixed asset. **Improvement costs to immovable property rented by a taxpayer shall be depreciable according to the rules in Article 36 (2)(a).**

Presidency comments to Article 35

Member States have raised the question whether improvement costs to immovable property are depreciable according to Article 35.

In order to clarify the directive it is specified that improvement costs to immovable property rented by a taxpayer shall be depreciable according to the rules in Article 36(2)(a).

Article 36

Individually depreciable assets

1. Without prejudice to paragraph 2 and Articles 39 and 40, 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) ~~buildings~~**immovable property**: 40 years;

(b) long-life tangible assets other than buildings: 15 years;

(c) intangible assets: the period for which the asset enjoys legal protection or for which the right is granted or, if that period cannot be determined, 15 years.

2. Second-hand ~~buildings~~**<u>immovable property</u>**, second-hand long-life tangible assets and second-hand intangible assets shall be depreciated in accordance with the following rules:

(a) a second-hand ~~building~~**<u>immovable property</u>** shall be depreciated over 40 years unless the taxpayer demonstrates that the estimated remaining useful life of the ~~building~~**<u>immovable property</u>** is shorter than 40 years, in which case it shall be depreciated over that shorter period;

(b) a second-hand long-life tangible asset shall be depreciated over 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;

(c) a second-hand intangible asset shall be depreciated over 15 years, unless the remaining period for which the asset enjoys legal protection or for which the right is granted can be determined, in which case it shall be depreciated over that period.

Presidency comments to Article 36

Improvement of the wording as buildings could be seen as too narrow. Hereby e.g. runways, quays, bridges etc. are covered by the provision.

Article 37

Timing ***for individual depreciable assets***

1. A full year's depreciation shall be deducted in the year of acquisition or entry into use, whichever comes later. No depreciation shall be deducted in the year of disposal.

2. Where an asset is disposed of~~, voluntarily or involuntarily,~~ during a tax year, its value for tax purposes and the value for tax purposes of any improvement costs incurred in relation to the asset shall be deducted from the tax base in that year.~~ Where a fixed asset has given rise to an exceptional deduction under Article 41, the deduction under Article 20 shall be reduced to take into account the exceptional deduction already received.~~

Presidency comments to Article 37

Improvement of the wording. Regarding the amendments in paragraph 2 reference is made to the comments to Article 41.

Article 38

Rollover relief for replacement assets

1. Where the proceeds from the disposal**, including compensation for damage,** of an individually depreciable asset are to be re-invested before the end of the second tax year after the tax year in which the disposal took place in an asset used for the same or a similar purpose, the amount by which those proceeds exceed the value for tax purposes of the asset shall be deducted in the year of disposal. The depreciation base of the replacement asset shall be reduced by the same amount.

   An asset which is disposed of voluntarily must have been owned for a minimum period of three years prior to the disposal.

2. The replacement asset may be purchased in the tax year prior to the disposal.

If a replacement asset is not purchased before the end of the second tax year after the year in which the disposal of the asset took place, the amount deducted in the year of disposal, increased by 10%, shall be added to the tax base in the second tax year after the disposal took place.

3. If the taxpayer leaves the group of which it is a member or ceases to apply the system provided for by this Directive within the first year, without having purchased a replacement asset, the amount deducted in the year of disposal shall be added to the tax base. If the taxpayer leaves the group or ceases to apply the system in the second year, that amount shall be increased by 10%.

Presidency comments to Article 38

Member States have raised the question whether situations where compensation for damage is reinvested is covered by the rollover relief.

It is proposed to specify that this is the case.

Article 39

Asset pool

1. Fixed assets other than those referred to in Articles 36 and 40 shall be depreciated together in one asset pool at an annual rate of 25% of the depreciation base.

2. The depreciation base of the asset pool at the end of the tax year shall be its value for tax purposes at the end of the previous year, adjusted for assets entering and leaving the pool during the current year. Adjustments shall be made in respect of acquisition, construction or improvement costs of assets (which shall be added) and the proceeds of disposal of assets and any compensation received for the loss or destruction of an asset (which shall be deducted).

3. If the depreciation base as calculated in accordance with paragraph 2 is a negative amount, an amount shall be added, so that the depreciation base is zero. The same amount shall be added to the tax base.

Article 40

Assets not subject to depreciation

The following assets shall not be subject to depreciation:

(a) fixed tangible assets not subject to wear and tear and obsolescence such as land, fine art, antiques, or jewellery;

(b) financial assets.

~~*Article 41*~~

~~*Exceptional depreciation*~~

~~1. If, in exceptional circumstances, a taxpayer demonstrates that the value of a fixed asset not subject to depreciation has permanently decreased at the end of a tax year, it may deduct an amount equal to the decrease in value. However, no such deduction may be made in respect of assets the proceeds from the disposal of which are exempt.~~

~~2. If the value of an asset which has been subject to such exceptional depreciation in a previous tax year subsequently increases, an amount equivalent to the increase shall be added to the tax base in the year in which the increase takes place. However, any such addition or additions, taken together, shall not exceed the amount of the deduction originally granted.~~

Presidency comments to Article 41

The Article is found to be superfluous next to the previous articles in Chapter VI (especially Article 27 on bad debt deductions) and administrative burdensome. It is therefore proposed to leave out Article 41 of the directive.

Article 42

Precision of categories of fixed assets

The Commission may adopt delegated acts in accordance with Article 127 and subject to the conditions of Articles 128, 129 and 130 in order to define more precisely the categories of fixed assets referred to in this Chapter.

CHAPTER VII

LOSSES

Article 43

Losses

1. A loss incurred by a taxpayer or a permanent establishment of a non-resident taxpayer in a ~~fiscal~~**tax** year may be ~~deducted~~**carried forward** in subsequent tax years, unless otherwise provided by this Directive.

2. **<u>In a tax year losses carried forward may be deducted up to a maximum of EUR 1 million for a single taxpayer and any exceeding loss can only be deducted up to 60% of the remaining tax base.</u>**~~A reduction of the tax base on account of losses from previous tax years shall not result in a negative amount.~~

3. The oldest losses shall be used first.

[Note: special rules will have to be drafted for groups, including rules for change of ownership/mergers.]

Presidency comments to Article 43

According to Article 43 in the directive proposal losses may be deducted in subsequent tax years without limitations.

In order to protect the CCCTB tax base it is proposed to introduce a loss limitation rule in Article 43 similar to the loss limitation rules introduced in a number of Member States.

According to the proposal losses incurred in a fiscal year can always be deducted in subsequent tax years up to a maximum of 1 million Euros for a single taxpayer, unless otherwise provided by this Directive. Exceeding losses can be deducted up to 60% of the remaining tax base. Any losses still remaining are deferred to subsequent tax years.

The limit of 1 million Euros is equivalent to the limit in the safe haven clause in the proposed interest limitation rule (new Article 14 a commented above).

The proposed loss limitation rule secures that companies pay a certain amount of tax and at the same time keep the right to deduct their expenses. It is important to notice, that losses may be deducted in subsequent tax years without time limitations. Thus losses deferred to subsequent tax years are not lost, but companies meet the disadvantage of the postponement of the deduction, i.e. the advanced tax payment.

The proposed loss limitation rule interacts with the proposed interest limitation rule (new Article 14 a) while losses not deducted due to the loss limitation rule affects the calculation of the asset tax base (Article 14 a (3)(e)). While losses carried forward according to Article 43 are taken into account when calculating the maximum threshold the effect will be a reduction of the interest limitation.

Please note that special rules will have to be drafted for groups, including rules for change of ownership/mergers. These questions will not be discussed at this stage.

The effects of the loss limitation rule are illustrated by the example below.

Example: Limitation to the use of losses in Article 43(2)

In a tax year losses carried forward may be deducted up to a maximum of EUR 1 million for a single taxpayer and any exceeding loss can only be deducted up to 60% of the remaining tax base.

		Year 1	Year 2
Tax base in the tax year		-2,000,000	1,500,000
Deduction of losses in tax year	1 mio. can always be used	-	-1,000,000
	60% of the remaining tax base	-	-300.000[*]
Taxable income		-	200,000
Loss carry forward		-2,000,000	-700,000[**]

[*] (60% of (1,500,000-1,000,000))
[**] 2,000,000 – 1,000,000 – 300,000

[…]

CHAPTER XII

DEALINGS BETWEEN THE GROUP AND OTHER ENTITIES

Article 72

Exemption with progression

Without prejudice to Article 75, revenue which is exempt from taxation under Article 11(c), (d) or (e) may be taken into account in determining the tax rate applicable to a taxpayer.

Article 73

Switch-over clause

With the exception of participations falling within the scope of Article 82(1)(a), Article 11(c)~~,~~ **or** (d) ~~or (e)~~ shall not apply where the entity which made the profit distributions~~,~~ **or** the entity the shares in which are disposed of ~~or the permanent establishment~~ were subject, in the entity's country of residence~~, or the country in which the permanent establishment is situated,~~ to one of the following:

(a) a tax on profits, under the general regime in that third country, at a statutory corporate tax rate lower than **[**40% of the average statutory corporate tax rate applicable in the Member States**]**;

(b) a special regime in that third country that allows for a ~~substantially~~ lower level of taxation than the general regime.

The average statutory corporate tax rate applicable in the Member States shall be published by the Commission annually. It shall be calculated as an arithmetic average. For the purpose of this Article and Article~~s 81 and~~ 82, amendments to the rate shall first apply to taxpayers in their tax year starting after the amendment.

~~*Article 74*~~

~~*Computation of income of a foreign permanent establishment*~~

~~Where Article 73 applies to the income of a permanent establishment in a third country, its revenues, expenses and other deductible items shall be determined according to the rules of the system provided for by this Directive.~~

Presidency comments to Articles 73 and 74

It is proposed to reserve the Switch-over clause to received profit distributions and proceeds from a disposal of shares exempt according to Article 11(c) or (d). Reference is made to the comments below to Articles 73, 74, 82 and 83 (see below Article 83).

Article 75

Disallowance of exempt share disposals

Where, as a result of a disposal of shares, a taxpayer leaves the group and that taxpayer has within the current or previous tax years acquired in an intra-group transaction one or more fixed assets other than assets depreciated in a pool, an amount corresponding to those assets shall be excluded from the exemption unless it is demonstrated that the intra-group transactions were carried out for valid commercial reasons.

The amount excluded from exemption shall be the market value of the asset or assets when transferred less the value for tax purposes of the assets or the costs referred to in Article 20 relating to fixed assets not subject to depreciation.

When the beneficial owner of the shares disposed of is a non-resident taxpayer or a non-taxpayer, the market value of the asset or assets when transferred less the value for tax purposes shall be deemed to have been received by the taxpayer that held the assets prior to the intra-group transaction referred to in the first paragraph.

[Note: Article 75 has not been discussed.]

Article 76

Interest and royalties and any other income taxed at source

1. Where a taxpayer derives income which has been taxed in another Member State or in a third country, other than income which is exempt under Article 11(c), (d) or (e), a deduction from the tax liability of that taxpayer shall be allowed.

2. The deduction shall be shared among the members of a group according to the formula applicable in that tax year pursuant to Articles 86 to 102.

3. The deduction shall be calculated separately for each Member State or third country as well as for each type of income. It shall not exceed the amount resulting from subjecting the income attributed to a taxpayer or to a permanent establishment to the corporate tax rate of the Member State of the taxpayer's residence or where the permanent establishment is situated.

4. In calculating the deduction, the amount of the income shall be decreased by related deductible expenses~~, which shall be deemed to be 2% thereof unless the taxpayer proves otherwise~~.

~~5. The deduction for the tax liability in a third country may not exceed the final corporate tax liability of a taxpayer, unless an agreement concluded between the Member State of its residence and a third country states otherwise.~~

[Note: Article 76 (2) has not been discussed.]

Presidency comments to Articles 76

It is proposed to leave out the 2% flat rate rule in Article 76(4). I.e. the deductible expenses shall be measured as the actual expenses related to the income.

Furthermore the Presidency proposes to leave out Article 76(5). It is the view of the Presidency that tax treaties entered by a Member State deviating from the directive, i.e. treaties that prescribe e.g. full credit, should not override the principle of the directive set out in Article 75(1) og (3).

Article 77

Withholding tax

Interest and royalties paid by a taxpayer to a recipient outside the group may be subject to a withholding tax in the Member State of the taxpayer according to the applicable rules of national law and any applicable double tax convention. The withholding tax shall be shared among the Member States according to the formula applicable in the tax year in which the tax is charged pursuant to Articles 86 to 102.

[Note: Article 77 has not been discussed.]

CHAPTER XIII
TRANSACTIONS BETWEEN ASSOCIATED ENTERPRISES

Article 78

Associated enterprises

1. If a taxpayer participates directly or indirectly in the management, control or capital of a non-taxpayer, or a taxpayer which is not in the same group, the two enterprises shall be regarded as associated enterprises.

   If the same persons participate, directly or indirectly, in the management, control or capital of a taxpayer and a non-taxpayer, or of taxpayers not in the same group, all the companies concerned shall be regarded as associated enterprises.

A taxpayer shall be regarded as an associated enterprise to its permanent establishment in a third country. A non-resident taxpayer shall be regarded as an associated enterprise to its permanent establishment in a Member State.

2. For the purposes of paragraph 1, the following rules shall apply:

(a) participation in control shall mean a holding exceeding 20% of the voting rights;

(b) participation in the capital shall mean a right of ownership exceeding 20% of the capital;

(c) participation in management shall mean being in a position to exercise a significant influence in the management of the associated enterprise.

(d) an individual, his spouse and his lineal ascendants or descendants shall be treated as a single person.

In indirect participations, the fulfilment of the requirements in points (a) and (b) shall be determined by multiplying the rates of holding through the successive tiers. A taxpayer holding more than 50% of the voting rights shall be deemed to hold 100%.

Article 79

Adjustment of pricing in relations between associated enterprises

<u>1.</u> Where conditions are made or imposed in relations between associated enterprises which differ from those that would be made between independent enterprises, then any income which would, but for those conditions, have accrued to the taxpayer, but, by reason of those conditions, has not so accrued, shall be included in the income of that taxpayer and taxed accordingly.

2. **Income attributable to a permanent establishment is the income the permanent establishment might be expected to earn, in particular in its dealings with other parts of the taxpayer, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the taxpayer through the permanent establishment and through the other parts of the taxpayer.**

Presidency comments to Article 79

It is proposed to include a specific provision dealing with the allocation of profits to a permanent establishment in the proposal directive corresponding to Article 7 in the OECD model.

CHAPTER XIV
ANTI-ABUSE RULES

Article 80

General anti-abuse rule

A~~rtificial~~ transaction~~s~~ **or series of transactions** carried out for the sole **or main** purpose of avoiding taxation shall be ignored for the purposes of calculating the tax base.

The first paragraph shall not apply to genuine commercial activities carried out for valid commercial reasons.

Where the first paragraph applies, the tax base shall be calculated in accordance with the economic substance of the transactions involved in accordance with Chapter IV of this directive.

~~The first paragraph shall not apply to genuine commercial activities where the taxpayer is able to choose between two or more possible transactions which have the same commercial result but which produce different taxable amounts.~~

Presidency comments to Article 80

Several Member States have expressed as their opinion that the general anti-abuse rule needs a broader scope than proposed by the Commission.

Aiming at this the following amendments based on a ***DELETED*** *proposal received by the Presidency are proposed concerning the General anti-abuse rule:*

Instead of "Artificial transactions" it is proposed that "A transaction or series of transactions carried out for the sole or main purpose of avoiding taxation" should be the point of reference for the GAAR, unless it is in fact genuine commercial activities carried out for valid commercial reasons.

Subsequently it is proposed that where transactions are carried out for the sole or main purpose of avoiding taxation transactions and therefor shall be ignored for the purposes of calculating the tax base, the tax base shall be calculated in accordance with the economic substance of the transactions involved in accordance with Chapter IV of the directive (Calculation of the tax base).

~~Article 81~~

~~Disallowance of interest deductions~~

~~1. Interest paid to an associated enterprise resident in a third country shall not be deductible where there is no agreement on the exchange of information comparable to the exchange of information on request provided for in Directive 2011/16/EU and where one of the following conditions is met:~~

~~(a) a tax on profits is provided for, under the general regime in the third country, at a statutory corporate tax rate lower than 40% of the average statutory corporate tax rate applicable in the Member States;~~

~~(b) the associated enterprise is subject to a special regime in that third country which allows for a substantially lower level of taxation than that of the general regime.~~

~~2. The term "interest" means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest.~~

~~3. Notwithstanding paragraph 1, interest paid to an entity resident in a third country with which there is no agreement on the exchange of information comparable to the exchange of information on request provided for in Directive 2011/16/EU shall be deductible, in an amount not exceeding that which would be stipulated between independent enterprises, where one of the following conditions is met:~~

~~(a) the amount of that interest is included in the tax base as income of the associated enterprise in accordance with Article 82;~~

~~(b) the interest is paid to a company whose principal class of shares is regularly traded on one or more recognized stock exchanges;~~

~~(c) the interest is paid to an entity engaged, in its country of residence, in the active conduct of a trade or business. This shall be understood as an independent economic enterprise carried on for profit and in the context of which officers and employees carry out substantial managerial and operational activities.~~

Presidency comments to Article 81

Article 81 is replaced by an interest limitation rule in Article 14 a. Reference is made to the comments above to this article.

Article 82

Controlled foreign companies ***and permanent establishments in low tax countries***

1. The tax base shall include the ~~non-distributed~~ income of an entity resident in a third country where the following conditions are met:

   (a) the taxpayer by itself, or together with its associated enterprises, holds a direct or indirect participation of more than 50% of the voting rights, or owns more than 50% of capital or is entitled to receive more than 50% of the profits of that entity**, or holds because of an agreement with other investors more than 50% of the voting rights, or has because of an agreement the full control over the financial and operating policies of the entity, or has the authority to appoint or dismiss members of the board of directors jointly holding more than 50% of the voting rights in the board of directors, or power to cast more than 50% of the votes in the board of directors**;

   (b) under the general regime in the third country, profits are taxable at a statutory corporate tax rate lower than **[**40% of the average statutory corporate tax rate applicable in the Member States**]**, or the entity is subject to a special regime that allows for a ~~substantially~~ lower level of taxation than that of the general regime;

(c) more than 30% of the income accruing to the entity falls within one or more of the categories set out in paragraph ~~3~~**2; for credit institutions according to Article 98(1)(a) and insurance undertaking according to Article 99(1), only in so far as more than 50% of the entity's income in these categories comes from transactions with the taxpayer or its associated enterprises.**

~~(d) the company is not a company, whose principal class of shares is regularly traded on one or more recognized stock exchanges.~~

~~2. Paragraph 1 shall not apply where the third country is party to the European Economic Area Agreement and there is an agreement on the exchange of information comparable to the exchange of information on request provided for in Directive 2011/16/EU.~~

2~~3~~. The following categories of income shall be taken into account for the purposes of point (c) of paragraph 1~~, in so far as more than 50 % of the category of the entity's income comes from transactions with the taxpayer or its associated enterprises~~:

(a) interest or any other income generated by financial assets;

(b) royalties or any other income generated by intellectual property;

(c) dividends and income from the disposal of shares;

(d) income from ~~movable property~~**financial leasing**;

(e) income from immovable property~~, unless the Member State of the taxpayer would not have been entitled to tax the income under an agreement concluded with a third country~~;

(f) income from insurance, banking and other financial activities~~.~~**;**

(g) income from tradable permits.

3. The tax base shall include profits from a permanent establishment in a third country where the conditions in points (b) and (c) in paragraph 1 and paragraph 2 are fulfilled.

Article 83

Computation

1. The income to be included in the tax base shall be calculated according to the rules of ~~Articles 9 to 15~~**this directive**. Losses of the foreign entity **and the permanent establishment** shall not be included in the tax base but shall be carried forward and taken into account when applying Article 82 in subsequent years.

2. The income to be included in the tax base shall be calculated in proportion to the entitlement of the taxpayer to share in the profits of the foreign entity.

3. The income shall be included in the tax year in which the tax year of the foreign entity ends.

4. Where the foreign entity subsequently distributes profits to the taxpayer, the amounts of income previously included in the tax base pursuant to Article 82 shall be deducted from the tax base when calculating the taxpayer's liability to tax on the distributed income.

5. If the taxpayer disposes of its participation in the entity, the proceeds shall be reduced, for the purposes of calculating the taxpayer's liability to tax on those proceeds, by any undistributed amounts which have already been included in the tax base.

Presidency comments to Articles 73, 74, 82 and 83 - CFC and Switch-over clause

In the opinion of the Presidency CFC taxation plays a key role in avoiding unacceptable tax planning by moving tax base to subsidiaries in low tax countries a proper designed. Deferral of CFC-taxation is not possible. On the other hand there is a trade of between administrative burdens and the scope of CFC taxation: CFC taxation should only cover income of mobile character, where the ownership of the assets generating the taxable income is easily transferred to a low tax country.

In the view of the Presidency, the Commission by and large has succeeded in designing a robust CFC taxation. The Danish Presidency suggests that all the income defined as CFC income counts as "tainted income" possibly triggering CFC taxation, and not only income from trade with associated companies. For banks and life insurance companies it is still required that more than 50% of the transactions are intra-group transactions, otherwise all banks and insurance companies in a low tax jurisdiction would be covered by the CFC taxation.

The threshold for the tax rate to be considered low is in itself rather low. Depending on the final design of the CCCTB it might be appropriate to make another (higher) threshold than 40% the average national tax rates within the CCCTB which is foreseen to constantly decline.

As regards the included income the category "tradable permits" is included. Such instruments are traded the same way as financial instruments and are very liquid. Further the interest charge in financial leasing is included on the same footing as interest. All income from immovable property is also included.

To avoid circumvention of the criteria for control language from the IFRS is inserted to supplement the direct or indirect ownership of shares and voting-rights:

"or holds because of an agreement with other investors more than 50% of the voting rights, or has because of an agreement the full control over the financial and operating policies of the entity, or has the authority to appoint or dismiss members of the board of directors jointly holding more than 50% of the voting rights in the board of directors, or power to cast more than 50% of the votes in the board of directors;".

The exemption for companies traded on a stock exchange is deleted since this does not affect the need for CFC taxation.

The exemption for companies resident in an EEA country with an exchange of information agreement is also deleted since it is not relevant for the need to apply CFC taxation whether a country exchanges information or not - it is just easier when this is the case. Whether such an exemption is needed according to the jurisprudence of the ECJ has to be seen in a court case, there could be other reasons to justify a restriction than just lack of exchange of information. One reason could be lack of commitment to the code of conduct.

Further it is suggested that income earned by permanent establishments in third countries are covered by the CFC-taxation (except for the holding requirement). This has the very important effect that losses cannot be imported but only carried forward in future CFC income according to article 83(1).

Losses from a PE in a third country not covered by the CFC taxation are not carried forward according Article 83 but are comprised by Article 14 (j).

Participations falling outside the scope of the CFC provision in Article 82(1)(a) are still covered by the switch-over clause in Article 73. It is hereby secured that e.g. "moneybox" companies that do not meet the participation criteria under Article 82 will be covered by the switch-over clause, i.e. profit distributions and proceeds from disposal of shares are not exempt according to Article 11(c) and (d).

Article 74 (Computation of income of a foreign permanent establishment) is left out due to the proposal to reserve the Switch-over clause to received profit distributions and proceeds from a disposal of shares exempt according to Article 11(c) or (d).

Article 83a

Hybrid mismatch

1. **A taxpayer shall not deduct payments directly or indirectly accrued to its associated enterprise as the beneficial owner of the payment if the payment is not taxable according to this directive or the national tax law which the associated enterprise is subject to due to a different qualification of the payment (hybrid instruments) or a different qualification of the payer and recipient (hybrid entities).**

2. **Notwithstanding paragraph 1(c) of Article 11, where the payment of the profit distribution has been deducted in the taxable income of its associated enterprise, the profit distribution shall be included in the tax base.**

Presidency comments to Article 83 a

This article is about counteracting deduction of expenses not included in the taxable income of the recipients due to different qualification of the payment. An example would be if a CCCTB company is considered to be a transparent entity according to the tax provisions for the parent company not being a CCCTB company. In that case (interest) expenses paid to the parent company will be deductible by the payer but regarded as tax free internal payment by the recipient. In that case there will be a strong incentive to place all equity of a group in such a structure leading to deductions of arbitrarily large amounts. Here the different qualification of the payments is a consequence of the different qualification of the entity (hybrid entities).

Another variation of this theme is where the payment is qualified in differently for example where the payer regards the payment as interest on debt, but the recipient regards the received payment as dividends on invested capital (hybrid payments). Again there will be a strong incentive to place all equity of a group in such a structure leading to deductions of arbitrarily large amounts.

To protect the CCCTB base against such undermining tax planning its simply suggested that a taxpayer may not deduct payments directly or indirectly received by its associated enterprise as the beneficial owner of the payment if the payment is not taxable according to this directive or the national tax law which the associated enterprise is subject to due to a different qualification of the payment (hybrid instruments) or a different qualification of the payer and recipient (hybrid entities) (Article 83(1)).

The tax planning described above is discussed in for the time being in the OECD group for Aggressive tax planning (ATP), and is also touched upon in the consultation paper from the Commission "The internal market: factual examples of double non-taxation cases"

The described provisions above only deals with "outbound" payments from the CCCTB company and not "inbound" payments, where tax exempt dividends for the same reasons are regarded as deductible payments by subsidiary not covered by the common tax base. Here one way to ensure tax once will be to tax the received profit distribution if it has been deducted in the taxable income of the payer (Article 83(2)).

A variation of tax planning through asymmetric treatment across borders is the so called dual consolidated losses. Here the loss of a (CCCTB) company is deducted in a third country affiliated company and at the same time surrendered to other CCCTB companies through the CCCTB consolidation. The need for protection against these arbitrary deductions through tax planning are the same as for the situations covered be the suggested Article 83, but since the situation is linked to consolidation it will be more appropriate to draft such a provision for the chapter on consolidation at a later stage. Also this problem is discussed in the OECD work and mentioned in the Commission consultation paper on double non-taxation.

CHAPTER XV
TRANSPARENT ENTITIES

Article 84

Rules for allocating the income of transparent entities to taxpayers holding an interest

1. Where an entity is treated as transparent in the Member State of its location, a taxpayer holding an interest in the entity shall include its share in the income of the entity in its tax base. For the purpose of this calculation, the income shall be computed under the rules of this Directive.

2. Transactions between a taxpayer and the entity shall be disregarded in proportion to the taxpayer's share of the entity. Accordingly, the income of the taxpayer derived from such transactions shall be considered to be a proportion of the amount which would be agreed between independent enterprises calculated on an arm's length basis which corresponds to the third party ownership of the entity.

3. The taxpayer shall be entitled to relief for double taxation in accordance with Article 76(1),(2),(3) and (5).

Article 85

Rules for determining transparency in the case of third country entities

Where an entity is located in a third country, the question whether or not it is transparent shall be determined according to the law of the Member State of the taxpayer. If at least two group members hold an interest in the same entity located in a third country, the treatment of the latter shall be determined by common agreement among the relevant Member States. If there is no agreement, the principal tax authority shall decide.

[…]

ANNEX III

LIST OF PUBLIC BENEFIT ACTIVITIES

1. **Arts, culture or historical preservation,**

2. **Environmental protection,**

3. **Civil or human rights,**

4. **Elimination of discrimination based on gender, race ethnicity, religion, disability, sexual orientation or any other legally prescribed form of discrimination,**

5. **Social welfare, including prevention or relief of poverty,**

6. **Humanitarian or disaster relief,**

7. **Development aid and development cooperation,**

8. **Assistance to refugees or immigrants,**

9. **Protection of, and support for, children, youth or the elderly,**

10. **Assistance to, or protection of, people with disabilities,**

11. **Animal protection,**

12. **Science and research,**

13. **Education and training,**

14. **European and international understanding,**

15. **Health, physical well-being and medical care,**

16. **Assistance to, or protection of, vulnerable and disadvantaged persons,**

17. **The promotion of philanthropy.**