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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (CBCR) - Presidency compromise text

Delegations will find attached in Annex II a Presidency compromise text in view of the Working Party on Company Law on 24 October 2016.

It is based on the discussions of the Company Law Working Party of 28 April, 23 May, 22 June, 13 July and 19 September 2016 and on delegations' written comments.

Delegations are informed that changes compared to the Commission Proposal (doc. 7949/16) are indicated in **bold/underlined** and deletions are marked with ~~strike through~~.

Delegations will find in Annex I an explanatory note on the main elements of the compromise text.

It is understood that all delegations have a general scrutiny reservation.

DK, EE, FR, LT, SE entered a parliamentary scrutiny reservation.

Explanatory note
General statement

General statement

The Presidency has prepared a new compromise text of the proposed Directive following the discussions of the Working Party meetings and contributions received from delegations.

It is the view of the Presidency that the current text addresses most of the key questions raised by delegations while preserving the aim of the proposal, namely increased transparency and public scrutiny.

The approach chosen by the Presidency is to clarify the text and terminology for reporting purposes as it was requested by many delegations. It leaves the text unchanged where it already provides a solution addressing different and divergent views of the Member States thus avoiding changes without sufficient grounds at this stage.

Preamble

Recitals will be changed in light of the discussion of the Working Party meeting.

Text of the directive**Introduction**

Drafting changes on the content of the report on income tax information are aimed at avoiding some confusion on the meaning of certain concepts and wording that derive from the Directive 2011/16/EU (DAC 4) in relation to the existing concepts and wording of the Accounting Directive.

In light of delegations' comments, provisions concerning publication on the website are now included in the new paragraph 1a of Article 48d.

Article 48a

In Article 48a (2) a new definition is provided for the purpose of defining the scope of the reporting requirement. This definition is taking into account various definitions of the term "revenue" in the financial reporting frameworks on the basis of which financial statements of undertakings, including undertakings which are not governed by the law of a Member State, are prepared.

Article 48b

Changes were made in order to better specify the timeframe of the reporting requirements. It is clarified that when ultimate parent undertaking exceed the size criterion (revenue of EUR 750m) in year 1, a CBCR report on year 2 should be published and made accessible in year 3.

The drafting changes in the new subparagraph were made in order to distinguish the EU group from the non-affiliated undertakings. Furthermore, a rule on cross-border aspect for undertakings governed by the laws of a Member State was included to respond to a requirement of some delegations.

Paragraphs 4 and 5 concerning the branches have been merged for the purposes of clarity as requested by some delegations. A two-year period regime used when defining the medium-sized and large subsidiary undertakings was added, in order to align the requirements of branches with the requirements of other subsidiary undertakings from non-EU groups.

Article 48c

Definitions and the additional text in paragraph 2 were added for the purposes of the report on income tax information. Furthermore, it is clarified that the list of information is an exhaustive list. Revenues are defined using two alternatives depending on the financial reporting framework applied: (c) (i) include items stated in Annexes V and VI of the Accounting Directive, excluding value adjustments and dividends received from the affiliated undertakings; (c) (ii) based on definitions from the financial reporting framework, in order to facilitate the understanding of revenues for undertakings not applying the Accounting Directive.

DAC 4 report limited to information stated in Article 48c (2) is designed as an option for undertakings in the new paragraph 2a.

Following delegations' suggestions a safeguard clause is introduced in the new paragraph 3a, also, the possibility to use the threshold in euro is introduced for Member States that have not adopted the euro.

Article 48d

In response to delegations' requests that the time period for publication should be prolonged and take into account the time limit for the DAC 4 report, changes have been introduced.

Article 48f, Article 1a

Based on the change of the time period in Article 48d (1), it is clarified that in situations where the financial statements are required to be audited, the statutory auditor(s) or the audit firm(s) will state in the next audit report whether the report on income tax information has been published and made accessible. The title of the Article as well as the audit report defined in Article 28 of Directive 2006/43/EC are amended accordingly.

Article 48g

Taking into account concerns of majority of the delegations, the delegated act is replaced by an implementing act, while in the same time it will be specified in Recitals that due regards will be given to the list adopted by the Council in accordance with the Council conclusions on an external taxation strategy and measures against tax treaty abuse of 25 May 2016 in adopting the implementing acts. In this respect ongoing work within the Code of Conduct Working Party will be further examined.

Final provisions

As suggested by many delegations, the transposition period in Article 2 is set to be 24 months.

Concluding remarks

Remaining changes in the text of the Directive are of technical nature or for the purposes of clarity in particular with regard to non-affiliated undertakings.

As mentioned above, the Presidency will in a future compromise text also modify Recitals in order to provide an explanation and reflect changes made.

Article 1

Amendments to Directive 2013/34/EU

Directive 2013/34/EU is amended as follows:

(1) in Article 1, the following paragraph 1a is inserted:

‘1a. The coordination measures prescribed by Articles 2, 48a to 48g and 51 shall also apply to the laws, regulations and administrative provisions of the Member States relating to branches opened in a Member State by an undertaking which is not governed by the law of a Member State but which is of a legal form comparable with the types of undertakings listed in Annex I.’;

(2) the following Chapter 10a is inserted:

‘Chapter 10a
Report on Income tax information

Article 48a

Definitions relating to reporting on income tax information

1. For the purposes of this Chapter, the following definitions shall apply:

- (1) ‘ultimate parent undertaking’ means an undertaking which draws up the consolidated financial statements of the largest body of undertakings;
- (2) ‘consolidated financial statements’ means the financial statements prepared by a parent undertaking of a group in which the assets, liabilities, equity, income and expenses are presented as those of a single economic entity;
- (3) ‘tax jurisdiction’ means a State as well as a non-State jurisdiction which has fiscal autonomy in respect of corporate income tax.

2. For the purposes of Article 48b, the following definition shall apply:

‘revenue’ has the same meaning as:

- (1) the ‘net turnover’, for undertakings preparing their financial statements in accordance with this Directive, or**
- (2) the ‘revenue’ as defined by or within the meaning of the financial reporting framework on the basis of which financial statements are prepared, for other undertakings.**

Article 48b

Undertakings and branches required to report on income tax information

1. Member States shall require ultimate parent undertakings governed by their national laws **which on their balance sheet date exceeded total consolidated revenue of EUR 750 000 000¹ as reflected in their consolidated financial statements for that financial year** and having a consolidated net turnover exceeding EUR 750 000 000 as well as undertakings governed by their national laws that are not affiliated undertakings and having a net turnover exceeding EUR 750 000 000 to draw up, and publish **and make accessible** a report on income tax information **as regards the next financial year.** ~~on an annual basis.~~

Member States shall require undertakings governed by their national laws that are not affiliated undertakings and which on their balance sheet date exceeded total revenue of EUR 750 000 000 as reflected in their annual financial statements for that financial year to draw up, publish and make accessible a report on income tax information as regards the next financial year.

~~The report on income tax information shall be made accessible to the public on the website of the undertaking on the date of its publication.~~

¹ *tbc. whether it is necessary to clarify further in a Recital.*

- 1a. Member States shall not apply the rules set out in paragraph 1 to non-affiliated undertakings, ultimate parent undertakings and their affiliated undertakings where such undertakings operate only within the territory of a single Member State.**
2. Member States shall not apply the rules set out in paragraph 1 of this Article to **non-affiliated undertakings and** ultimate parent undertakings where such undertakings or their affiliated undertakings **disclose a report in accordance with** ~~are subject to~~ Article 89 of Directive 2013/36/EU ~~of the European Parliament and of the Council~~² and encompass, in a country ~~by country~~ **that** report, information on **all their activities and** all the activities of all the affiliated undertakings included in the consolidated financial statement of those ultimate parent undertakings.
3. Member States shall require the medium-sized and large subsidiary undertakings referred to in Article 3(3) and (4) which are governed by their national laws and controlled by an ultimate parent undertaking which **on its balance sheet date exceeded total consolidated revenue of EUR 750 000 000 as reflected in its consolidated financial statements for that financial year** ~~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 **as regards the next financial year.** ~~on an annual basis.~~
- ~~The report on income tax information shall be made accessible to the public on the date of its publication on the website of the subsidiary undertaking or on the website of an affiliated undertaking.~~

² Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

4. Member States shall require branches ~~which are~~ opened in their territories 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 undertaking** referred to in point (a) of **this** paragraph **as regards the next financial year**. ~~5 of this Article.~~

~~The report on income tax information shall be made accessible to the public on the date of its publication on the website of the branch or on the website of an affiliated undertaking.~~

Member States shall **not** apply the first subparagraph of this paragraph ~~only~~ to branches which ~~have~~ net turnover **did not** exceeding **at least for two consecutive financial years the** net turnover threshold defined by the law of each Member State pursuant to Article 3(2).

5. Member States shall apply the rules set out in **this** paragraph 4 only to a branch where the following criteria are met:

- (a) the undertaking which opened the branch is either an affiliated undertaking of a group ~~which is controlled by an~~ **whose** ultimate parent undertaking **is** not governed by the law of a Member State and which **on its balance sheet date exceeded total consolidated revenue of** EUR 750 000 000 **as reflected in its consolidated financial statements for that financial year** ~~has a consolidated net turnover exceeding~~ or an undertaking that is not an affiliated and which ~~has a net turnover exceeding~~ **on its balance sheet date exceeded total revenue of** EUR 750 000 000 **as reflected in its financial statements for that financial year; and**
- (b) the ultimate parent undertaking referred to in point (a) does not have a medium-sized or large subsidiary undertaking as referred to in paragraph 3.

6. Member States shall not apply the rules set out in paragraphs 3 and 4 of this Article where a report on income tax information drawn up on the basis of ~~in accordance with~~ Article 48c:
- (a) is made accessible:
- (i) to the public on the website of the ultimate parent undertaking or of the non-affiliated undertaking not governed by the law of a Member State;
 - (ii) in at least one of the official languages of the Union;
 - (iii) ~~within a reasonable period of time, which shall not exceed~~ 12 months after the balance sheet date of the financial year for which the report is drawn up; and
- (b) ~~where the report~~ identifies the name and the registered office of the single subsidiary undertaking or the name and the address of the single branch governed by the law of a Member State which has published the a report in accordance with Article 48d(1).
7. Member States shall require subsidiaries or branches not subject to the provisions of paragraphs 3 and 4 to publish and make accessible the a report on income tax information where such subsidiaries or branches have been established for the purpose of avoiding the reporting requirements set out in this Chapter.

Article 48c

Content of the report on income tax information

1. The report on income tax information shall include information relating to all the activities of the non-affiliated undertaking ~~and~~ or the ultimate parent undertaking, including activities those of all affiliated undertakings consolidated in the financial statement in respect of the relevant financial year.

2. The information referred to in paragraph 1 shall **be as follows**³ comprise the following:

(-a) the name of the ultimate parent undertaking or the non-affiliated undertaking, financial year concerned and the currency used;

- (a) a brief description of the nature of the activities;
- (b) the number of employees **which is the average number of employees during the financial year;**
- (c) the **revenues which are:** amount of the net turnover, which includes the turnover made with related parties;
 - (i) **the sum of the net turnover, other operating income, income from participating interests, excluding dividends received from affiliated undertakings, income from other investments and loans forming part of the fixed assets, other interest receivable and similar income as listed in Annexes V and VI of this Directive, or**
 - (ii) **the income as defined by or within the meaning of the financial reporting framework on the basis of which financial statements are prepared excluding value adjustments and dividends received from affiliated undertakings;**
- (d) the amount of profit or loss before income tax;
- (e) the amount of income tax accrued (current year), which is the current tax expense recognised on taxable profits or losses of the financial year by undertakings and branches resident for tax purposes in the relevant tax jurisdiction;
- (f) the amount of income tax paid **(on cash basis)** which is the amount of income tax paid during the relevant financial year by undertakings and branches resident for tax purposes in the relevant tax jurisdiction; and
- (g) the amount of accumulated earnings.

³ *tbc. whether to clarify in a Recital that this is an exhaustive list.*

For the purposes of point (c) of the first subparagraph the revenues shall include transactions with related parties.

For the purposes of point (e) of the first subparagraph the current tax expense shall relate only to the activities of an undertaking in the current financial year and shall not include deferred taxes or provisions for uncertain tax liabilities.

For the purposes of point (f) of the first subparagraph taxes paid shall include withholding taxes paid by other undertakings with respect to payments to undertakings and branches within a group.

For the purposes of point (g) of the first subparagraph the accumulated earnings shall mean the sum of the profit brought forward which was not decided for distribution to members as of the end of the relevant financial year. With regard to branches, accumulated earnings shall be reported by the undertaking which opened a branch.

2a. Member States shall permit that the information listed in paragraph 2 corresponds to the reporting specifications referred to in Annex III, Section III, Parts B and C of Directive 2011/16/EU.⁴

3. The report shall specify the reporting specifications used.⁵

The report shall present the information referred to in paragraph 2 separately for each Member State. Where a Member State comprises several tax jurisdictions, the information shall be combined at Member State level.

⁴ *tbc. whether to clarify in a Recital that companies may choose between data used for DAC 4 reporting or financial statement in the Accounting Directive.*

⁵ *tbc. whether to clarify in a Recital that the reporting specification used by companies should be made clear.*

The report shall also present the information referred to in paragraph 2 of this Article separately for each tax jurisdiction which, at the end of the previous financial year, is listed in the common Union list of certain tax jurisdictions⁶ drawn up pursuant to Article 48g, unless the report explicitly confirms, subject to the responsibility referred to in Article 48e below, that the affiliated undertakings of a group governed by the laws of such tax jurisdiction do not engage directly in transactions with any affiliated undertaking of the same group governed by the laws of any Member State.

The report shall present the information referred to in paragraph 2 on an aggregated basis for other tax jurisdictions.

The information shall be attributed to each relevant tax jurisdiction on the basis of the existence of a fixed place of business or of a permanent business activity which, arising from the activities of the group, can give rise to income tax liability in that tax jurisdiction.

Where the activities of several affiliated undertakings can give rise to a tax liability 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.

Information on any particular activity shall not be attributed simultaneously to more than one tax jurisdiction.

3a. Member States may allow information required to be disclosed by subparagraphs 2 and 3 of this Article to be omitted when its nature is such that it would be seriously prejudicial to any of the undertakings to which it relates. Any such omission shall be disclosed in the report.

⁶ *Language to be further examined in the light of ongoing work within the Code of Conduct Working Party.*

4. The report ~~shall~~ **may** include, **where applicable** at group level, an overall narrative providing explanations on material discrepancies between the amounts disclosed pursuant to points (e) and (f) of paragraph 2, if any, taking into account if appropriate corresponding amounts concerning previous financial years.
- ~~5. The report on income tax information shall be published and made accessible on the website in at least one of the official languages of the Union.~~
6. The currency used in the report on income tax information shall be the currency in which the consolidated financial statements **of the ultimate parent undertaking or the annual financial statements of the non-affiliated undertaking** are presented. Member States shall not require this report to be published in a different currency than the currency used in the financial statements.
7. Where Member States have not adopted the euro, the threshold referred to in Article 48b(1) ~~shall~~ **may** be converted into the national currency, **and if so should** ~~by~~ applying the exchange rate as at *[Publications Office- set the date = the date of the entry in force of this Directive]* published in the Official Journal of the European Union and by increasing or decreasing it by not more than 5 % in order to produce a round sum in the national currencies.

The thresholds referred to in Article 48b(3) and (4) shall be converted to an equivalent amount in the national currency of any relevant third countries by applying the exchange rate as at *[Publications Office - set the date = the date of the entry in force of this Directive]*, rounded off to the nearest thousand.

1. The report on income tax information shall be published **within 12 months after the balance sheet date of the financial year for which the report is drawn up** as laid down by the laws of each Member State in accordance with Chapter 2 of Directive 2009/101/EC, ~~together with documents referred to in Article 30(1) of this Directive and where relevant, with the accounting documents referred to in~~ **in accordance with** Article ~~7~~ ⁹ of Council Directive 89/666/EEC⁷.
- 1a. The report published in accordance with paragraph 1 shall also be made accessible to the public within 12 months after the balance sheet date of the financial year for which the report is drawn up:**
 - (a) on the website of the undertaking when Article 48b(1) applies, or**
 - (b) on the website of the subsidiary undertaking or on the website of an affiliated undertaking when Article 48b(3) applies, or**
 - (c) on the website of the branch or on the website of an affiliated undertaking when Article 48b(4) applies.**
2. The report referred to in Article 48b(1), (3), (4) and (6) shall remain accessible on the website for a minimum of five consecutive years.

⁷ Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ L 395, 30.12.1989, p. 36).

Article 48e

Responsibility for drawing up, publishing and making accessible the report on income tax information

1. Member States shall ensure that the members of the administrative, management and supervisory bodies of the ultimate parent undertaking **or the non-affiliated undertakings** referred to in Article 48b(1), acting within the competences assigned to them under national law, have collective responsibility for ensuring that the report on income tax information is drawn up, published and made accessible in accordance with Articles 48b, 48c and 48d.
2. Member States shall ensure that the members of the administrative, management and supervisory bodies of the subsidiary undertakings referred to in Article 48b(3) of this Directive and the person(s) designated to carry out the disclosure formalities provided for in Article 13 of Directive 89/666/EEC for the branch referred to in Article 48b(4) of this Directive, acting within the competences assigned to them by national law, have collective responsibility for ensuring that, to the best of their knowledge and ability, the report on income tax information is drawn up **on the basis of Article 48c, is** published and made accessible in accordance with Articles ~~48b, 48c and~~ 48d.

Article 48f

Independent check **statement**

Member States shall ensure that, where the financial statements of an ~~affiliated~~ undertaking **governed by the laws 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 after the expiration of the time limit for publication** whether, **as of the date of the audit report,** the report on income tax information ~~has been provided and made accessible in accordance with~~ **referred to in** Articles 48b, 48c and 48d **has been published**. The statutory auditor(s) or audit firm(s) ~~shall indicate in the audit report if the report on income tax information has not been provided or~~ **and** made accessible in accordance with those Articles **48b and 48d**.

Article 48g

Common Union list of certain tax jurisdictions⁸

~~The Commission shall be empowered to adopt delegated acts in accordance with Article 49 in relation to drawing up a common Union list of certain tax jurisdictions. That list shall be based on the assessment of the tax jurisdictions, which do not comply with the following criteria:~~

- 1. The Commission shall be empowered to adopt implementing acts identifying tax jurisdictions which do not comply with the criteria referred to in paragraph 2 of this Article.⁹ Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 50(2).**

⁸ *Language to be further examined in the light of ongoing work within the Code of Conduct Working Party.*

⁹ *Correspondent Recital - **The Commission should have due regards to the list adopted by the Council in accordance with the Council conclusions on an external taxation strategy and measures against tax treaty abuse of 25 May 2016 in adopting the implementing acts.***

2. The assessment of the tax jurisdictions shall be based on the non-compliance of certain tax jurisdictions with at least the following criteria:

- (1) Transparency and exchange of information, including information exchange on request and Automatic Exchange of Information of financial account information;
- (2) Fair **taxation** ~~tax competition~~;
- (3) ~~Standards set up by the G20 and/or the OECD~~ **Implementing of BEPS measures.**
- (4) ~~Other relevant standards, including international standards set up by the Financial Action Task Force.~~

3. The Commission shall regularly review the list **implementing acts referred to in paragraph 1** and, where appropriate, amend ~~it~~ **them** to take account of new circumstances.

Article 48h

Commencement date for reporting on income tax information

Member States shall ensure that laws, regulations and administrative provisions transposing Articles 48a to 48f apply, at the latest, from the commencement date of the first financial year starting on or after *[Publications Office- set the date = one year after the transposition deadline]*.

Article 48i

Report

The Commission shall report on the compliance with and the impact of the reporting obligations set out in Articles 48a to 48f. The report shall include an evaluation of whether the report on income tax information delivers appropriate and proportionate results, taking into account the need to ensure a sufficient level of transparency and the need for a competitive environment for undertakings.

The report shall be submitted to the European Parliament and to the Council by [*Publications Office- set the date = five years after the transposition date of this Directive*].’

(3) Article 49 is amended as follows:

(a) Paragraphs 2 and 3 are replaced by the following

‘2. The power to adopt delegated acts referred to in Article 1(2), Article 3(13) **and**, Article 46(2) ~~and Article 48g~~ shall be conferred on the Commission for an indeterminate period of time from the date referred to in Article 54.

3. The delegation of power referred to in Article 1(2), Article 3(13) **and**, Article 46(2) ~~and Article 48g~~ may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.’

(b) The following paragraph 3a is inserted:

‘3a. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of [*date*].’

(c) Paragraph 5 is replaced by the following:

‘5. A delegated act adopted pursuant to Article 1(2), Article 3(13) **or** Article 46(2) ~~or Article 48g~~ shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.’

Article 1a

Amendment of Directive 2006/43/EC as regards the audit report

Directive 2006/43/EC is amended as follows:

Point (h) is added in paragraph 2 of Article 28:

"(h) where appropriate, provide the statement referred to in Article 48f of Directive 2013/34/EU¹⁰."

Article 2

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*Publications Office - set the date = ~~one~~two years after entry into force*] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

¹⁰ **Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.**

Article 3

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg,

For the European Parliament

The President

For the Council

The President
