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To:	Working Party on Tax Questions - Direct Taxation
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Subject:	Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)

Delegations will find attached a new version of the Presidency consolidated text of a possible split from the CCCTB proposal related to the international anti-BEPS aspects following the Working Party on Tax Questions (WPTQ) - Direct taxation meeting of 20 November 2015.

The explanatory notes are included in doc. 14544/15 ADD 1.

ANNEX

CHAPTER I
SCOPE AND DEFINITIONS

Article 1

Scope

This Directive lays down rules against base erosion and profit shifting which directly affect the functioning of the internal market.

Article 2

De minimis application

This Directive sets out minimum standards and shall not preclude the application of domestic or agreement-based provisions aimed at preventing base erosion and profit shifting.

Article 3

Eligible corporate entities

1. This Directive shall apply to corporate entities established under the laws of a Member State where both of the following conditions are met:

(a) the corporate entity takes one of the forms listed in Annex I;

(b) the corporate entity is subject to one of the corporate taxes listed in Annex II or to a similar tax subsequently introduced.

2. This Directive shall apply to corporate entities established under the laws of a third country where both of the following conditions are met:

(a) the corporate entity has a similar form to one of the forms listed in Annex I;

(b) the corporate entity is subject to one of the corporate taxes listed in Annex II.

3. The Commission may adopt delegated acts in accordance with Article 13 and subject to the conditions of Articles 14, 15 and 16 in order to amend Annexes I and II to take account of changes to the laws of the Member States concerning corporate entity forms and corporate taxes.

4. The Commission shall adopt annually a list of third country corporate entity forms which shall be considered to meet the requirements laid down in subparagraph (2)(a). That implementing act shall be adopted in accordance with the examination procedure referred to in Article 17(2).

5. The fact that a company form is not included in the list of third country corporate entity forms referred to in paragraph 4 shall not preclude the application of this Directive to that form.

Article 4

Definitions

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

(1) 'taxpayer' means a corporate entity covered under the scope of this Directive;

(2) 'person' means an individual or corporate entity whether its legal form is covered or not under the scope of this Directive and includes non-corporate entities;

(3) [subject to the provisions of Article 6, 'permanent establishment' means a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on in so far as the profits of that place of business are subject to tax in the Member State in which it is situated by virtue of the relevant bilateral tax treaty or, in the absence of such a treaty, by virtue of national law];

(4) a person 'associated' to a taxpayer means a situation where the first person holds a participation of more than [25]% in the second, or there is a third person that holds a participation of more than [25]% in both;

(5) [a person 'closely related' to a taxpayer means a situation where, based on all the relevant facts and circumstances, one has direct or indirect control of the other or both are under the direct or indirect control of the same persons or taxpayers. This means the situation where the taxpayer holds a direct or indirect participation of more than 50% of the voting rights or owns directly or indirectly more than 50% of capital or is entitled to receive more than 50% of the profits of that entity;]

(6) 'borrowing costs' means interest expenses and other economically equivalent costs that a taxpayer incurs in connection with the borrowing of funds.;

(7) 'exceeding borrowing costs' means the excess of borrowing costs over interest or other taxable revenues from financial assets;

(8) 'EBITDA' means earnings before interest, tax, depreciation and amortisation and is calculated by adding back to taxable income the tax values for net interest expenses and other costs equivalent to interest as well as the tax values for depreciation and amortisation. Tax exempt income shall be excluded from a taxpayer's EBITDA;

(9) 'financial institutions' means credit institutions authorised to operate in the Union in accordance with Directive 2006/48/EC of the European Parliament and of the Council; and entities, except for insurance undertakings as defined below, which hold financial assets amounting to 80 percent or more of all their fixed assets, as valued in accordance with national law;

(10) 'insurance undertakings' means those undertakings authorised to operate in Member States in accordance with Directive 73/239/EEC for non-life insurance, 2002/83/EC for life insurance and Directive 2005/68/EC for reinsurance.

(11) 'market value' means the amount for which an asset can be exchanged or mutual obligations can be settled between willing unrelated buyers and sellers in a direct transaction and shall be calculated by reference to the tax year of the transfer and include goodwill, to incorporate functions and risks, in transfers of tax residence or of a permanent establishment;

(12) 'transparent entity' means an entity:

- that is not a taxable entity and where income derived, and expenditure incurred, by or through the entity are treated, for tax purposes, as income and expenditure of the holders of equity interests in the entity, in proportion to their respective interests, or
- where the entity is disregarded as a separate entity, in the sense of being treated for tax purposes as a part or branch of the entity that owns it;

(13) 'hybrid entity' means an entity that is treated for tax purposes as being transparent by one Member State and as not being transparent by another Member State;

(14) 'hybrid permanent establishment' means a situation where the business activities of an entity either:

- are not recognised as carried on through a permanent establishment in the Member State where those activities are carried on (the Member State of source) but are recognised as carried on through a permanent establishment in the Member State where the company is a resident (the Member State of residence), or
- are recognised as carried on through a permanent establishment in the Member State where those activities are carried on (the Member State of source) but are not recognised as carried on through a permanent establishment in the Member State where the company is a resident (the Member State of residence);

(15) 'mismatch situation' means a situation where, for two Member States:
- in relation to a hybrid entity, the mismatched treatments of that entity by the two Member States, as being transparent and as not being transparent, are relevant to the treatment for tax purposes of a transaction involving the entity, or
- in relation to a hybrid permanent establishment, the mismatched treatment by the two Member States of business activities of an enterprise as carried on through the permanent establishment is relevant to the treatment for tax purposes of profits from business activities of the company;

(16) a 'double deduction' means a situation where a deduction or other tax relief is given in each of two Member States for the same payment, expense or loss:
- made or incurred by a hybrid entity, insofar as that payment, expense or loss is deducted from or relieved against income that is not received by the hybrid entity, or
- attributed to a hybrid permanent establishment, insofar as that payment, expense or loss is deducted from or relieved against income that is not attributed to the hybrid permanent establishment;

(17) a 'deduction without inclusion' means a situation where so much of a payment or expense for which a deduction or other tax relief is given by a Member State but for which there is not a corresponding receipt recognized for tax purposes by any Member State or other State;

(18) 'non-taxation without inclusion' means a situation where the profits from business activities are not taxed in the Member State of source as such activities are treated as not being carried on through a permanent establishment, while those profits are exempt from tax in the Member State of residence as profits attributable to a permanent establishment.

Any term not defined herein shall have the meaning that it has under the law of the Member State applying this directive.

CHAPTER II
RULES AGAINST BASE EROSION AND PROFIT SHIFTING

Article 5

General anti-abuse rule

1. A Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

2. For the purposes of paragraph 1, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

3. Where arrangements or a series of arrangements are ignored according to paragraph 1, the tax liability of the taxpayer shall be determined in accordance with national law.

[*Article 6*

Artificial avoidance of permanent establishment status

1. 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;

f) the maintenance of a fixed place of business solely for any combination of activities mentioned in points (a) to (e);

or, in the case of point f, the overall activity of the fixed place of business is of auxiliary or preparatory character.

2. A fixed place of business that is used or maintained by a taxpayer shall be deemed to give rise to a permanent establishment if the same taxpayer or a closely related person carries on business activities at the same place or at another place in the same State and

a) that place or other place constitutes a permanent establishment for the taxpayer or the closely related person under the provisions of this Article, or

b) the overall activity resulting from the combination of the activities carried on by the taxpayer and the closely related person at the same place, or by the same taxpayer or closely related persons at the two places, is not of a preparatory or auxiliary character,

provided that the business activities carried on by the taxpayer and the closely related person at the same place, or by the same taxpayer or closely related persons at the two places, constitute complementary functions that are part of a cohesive business operation.

3. Where a person is acting in a State on behalf of a taxpayer and, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the taxpayer, and these contracts are:

a) in the name of the taxpayer, or

b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that taxpayer or that the taxpayer has the right to use, or

c) for the provision of services by that 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 of auxiliary or preparatory character so that, 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.

4. Paragraph 3 shall not apply where the person acting in a State on behalf of a taxpayer of the other State carries on business in the first-mentioned State as an independent agent and acts for the taxpayer in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more taxpayers to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such taxpayer.]

Article 7

Interest limitation rule

1. Borrowing costs can always be deducted to the extent the taxpayer receives interest or other taxable revenues from financial assets.

2. Exceeding borrowing costs shall only be deductible in the current tax year up to [30]% of the EBITDA of the taxpayer (fixed ratio rule) or up to an amount of EUR [1 million] (de minimis rule), whichever is higher.

[3. The EBITDA of a tax year which is not fully absorbed by the borrowing costs incurred by the taxpayer in that or previous tax years may be carried forward for a maximum of five tax years.]

4. Borrowing costs which cannot be deducted in the current tax year under paragraph 3 above shall be deductible up to the [30]% of the EBITDA in subsequent tax years in the same way as the borrowing costs for those years.

5. Paragraphs 2 to 4 do not apply to financial institutions and insurance undertakings. Notwithstanding paragraph 1, borrowing costs incurred by financial institutions and insurance undertakings shall not be deducted at an amount equal to the entity's borrowing costs multiplied by the ratio of tax-exempt financial assets over all financial assets.

[6. Notwithstanding paragraph 2, Member States may allow to fully deduct exceeding borrowing costs if the entity can demonstrate that the ratio of its equity over its total assets is equal to or higher than the equivalent ratio of the group (carve-out rule). Where the entity's ratio is lower than that of the group, the entity remains subject to the fixed ratio rule according to paragraph 2.

The following shall be taken into account for the purpose of applying the rule of the first subparagraph:

a) the ratio of the entity's equity over its total assets shall be considered to be equal to the equivalent ratio of the group if the former is lower by up to 2 percentage points;

b) a group, for the purposes of this Article, shall consist of all (domestic and foreign resident) entities which file audited consolidated financial statements drawn up according to the International Financial Reporting Standards (IFRS) or the national financial reporting system of a Member State or the US Generally Accepted Accounting Principles (GAAP);

c) All assets and liabilities must be valued using the same method as in the consolidated financial statements. The Commission may adopt delegated acts in accordance with Article 13 and subject to the conditions of Articles 14, 15 and 16 in order to lay down more detailed rules on the necessary adjustments to an entity's equity and totals assets;

d) The entity's equity and total assets shall be reduced by contributions made in the six months preceding the relevant balance sheet date insofar as these contributions are matched by withdrawals or distributions during the six months that follow the relevant balance sheet date;

e) An entity shall always remain subject to the fixed ratio rule in connection with interest payments to associated persons according to national law unless such payments do not exceed 10 percent of the group's total net interest expense.]

Article 8

Switch-over clause

1. Foreign [passive] income shall not be exempted but shall instead be taxed, with a deduction of the tax paid in a third country on this income,

a) where the third-country entity which made the profit distributions, the third-country 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 a tax on profits at an effective tax rate lower than [40]% of the effective tax rate that would have been applied in the Member State of the taxpayer, and

b) where the entity's country of residence or the country in which the permanent establishment is situated has not concluded with the Member State of the taxpayer an agreement on automatic exchange of information equivalent to the automatic exchange of information provided for in Directive 2011/16/EU, as amended and currently in force.

2. The effective corporate tax rate which would apply to proceeds from a disposal of shares shall be calculated with reference to all years of holding by the taxpayer making the disposal.

3. Where the conditions of paragraph 1 above have been fulfilled, the following losses shall fall outside the scope of this article:

a) losses incurred by the permanent establishment of a resident taxpayer situated in a third country; and

b) losses from the disposal of shares in an entity which is tax resident in a third country.

Article 9

Controlled foreign companies

1. The tax base of a taxpayer shall include the non-distributed income of any 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 directly or indirectly more than 50% of capital or is entitled to receive more than 50% of the profits of that entity;

b) profits are subject to an effective tax rate lower than [40]% of the effective tax rate that would have been applied in the Member State of the taxpayer;

c) more than [50]% of the income accruing to the entity falls within one or more of the categories set out in paragraph 3; for financial institutions and insurance undertakings, 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 persons;

d) [the company is not a company, whose principal class of shares is regularly traded on one or more recognised stock exchanges.]

2. Paragraph 1 shall not apply where the third country is party to the European Economic Area Agreement and the third country has concluded with the European Union an agreement on automatic exchange of information equivalent to the automatic exchange of information provided for in Directive 2011/16/EU, as amended and currently in force.

3. The following categories of income shall be taken into account for the purposes of point (c) of paragraph 1:

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;

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 goods and services rendered to the taxpayer or its associated person.

4. The income to be included in the tax base shall be calculated in proportion to the entitlement of the taxpayer to receive profits of the entity, and in proportion to the period of entitlement.

5. The income to be included in the tax base shall be calculated according to the rules of the corporate tax law in the Member State where the taxpayer is resident for tax purposes.

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

7. The Member State of the taxpayer shall allow a tax credit for equivalent foreign taxes actually paid by the entity.

8. If the taxpayer disposes of its shareholding 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.

9. The losses of the entity may only be offset against its own profits or against the profits of another entity which meets the requirements of paragraph 1 and which is established in the same country.

Article 10

Exit taxation

1. A taxpayer shall be assessed to tax in the Member State of origin on the amount equal to the market value of transferred assets less its value for tax purposes in the following cases:

a) a taxpayer transfers assets from its head office to its permanent establishment in another Member State or in a third country; or

b) a taxpayer transfers assets from its permanent establishment in a Member State to its head office or another permanent establishment in another Member State or in a third country; or

c) a taxpayer transfers its tax residence to another Member State or to a third country, except for those assets which remain connected with a permanent establishment in the Member State of the taxpayer. Any subsequent transfer of these assets out of the permanent establishment which are effectively connected with a third country shall be deemed to be a disposal at market value; or

d) a taxpayer transfers the business carried out by its permanent establishment out of a Member State.

2. The Member State shall authorise the taxpayer either to defer the payment of the taxes due for a period of five years following the date of the transfer, or to pay the taxes due by instalments, spread out in five years, in the following cases:

a) a taxpayer transfers assets to its permanent establishment in another Member State or in a third country which is party to the European Economic Area Agreement; or
b) a taxpayer transfers assets from its permanent establishment in a Member State to another Member State or in a third country which is party to the European Economic Area Agreement; or
c) a taxpayer transfers its tax residence to another Member State or to a third country which is party to the European Economic Area Agreement; or
d) a taxpayer transfers its permanent establishment to another Member State or to a third country which is party to the European Economic Area Agreement;

provided that, in the case of third countries which are party to the European Economic Area Agreement, they have concluded with the European Union an agreement on automatic exchange of information equivalent to the automatic exchange of information provided for in Directive 2011/16/EU, as amended and currently in force, and an agreement on the mutual assistance for the recovery of tax claims, equivalent to the mutual assistance provided for in Directive 2010/24/EU.

3. In the case of a payment by instalments or deferred payment of the tax pursuant to paragraph 2 above, the amount of interest due shall be equal to what would apply in the Member State of the taxpayer or of the permanent establishment.

4. If there is a risk of non-recovery, taxpayers may be required to provide a proportionate guarantee as a condition for receiving a deferred payment or payment by instalments.

5. A taxpayer shall be disqualified from the advantage of deferred payment of the tax or payment by instalments and be assessed to tax in accordance with paragraph 1 in cases of:
a) bankruptcy or liquidation; or
b) a subsequent transfer within 5 years following the initial transfer of the taxpayer's assets to a third country; or
c) a subsequent transfer within 5 years following the initial transfer of the taxpayer's tax residence or its permanent establishment to a third country; or
d) an omission to pay in due course annual instalments.

6. Where there is a transfer of assets, tax residence or permanent establishment to another Member State, the market value of the transferred assets shall be recognised in the Member State to which they are transferred, as this has already been computed in the Member State of exit.

Article 11

Rules for determining the treatment of hybrid mismatches for tax purposes between Member States

1. To the extent that a hybrid mismatch situation results in double deduction, the relevant Member States shall treat the hybrid entity as not being transparent or the business activity concerned as not carried on through a permanent establishment.

2. To the extent that a hybrid mismatch situation results in deduction without inclusion, the relevant Member States shall treat the hybrid entity as being transparent.

3. To the extent that a hybrid mismatch situation results in non-taxation without inclusion, the relevant Member States shall treat the business activity concerned as not carried on through a permanent establishment.

Article 12

Rules for determining the treatment of hybrid mismatches for tax purposes in cases involving third countries

1. To the extent that a hybrid mismatch situation involving a third country results in double deduction:

- where the third country concerned treats the entity as not being transparent, the Member States concerned shall treat that entity as not being transparent;
- where the third country concerned treats the entity as being transparent, the Member States concerned shall treat that entity as being transparent;
- [where the third country concerned treats the business activity concerned as not carried on through a permanent establishment, the Member States concerned shall treat the business activity concerned as not carried on through a permanent establishment;

- where the third country concerned treats the business activity concerned as carried on through a permanent establishment, the Member States concerned shall treat the business activity concerned as carried on through a permanent establishment.]

2. To the extent that a hybrid mismatch situation involving a third country results in deduction without inclusion:

- where the third country concerned treats the hybrid entity as being transparent, the Member States concerned shall treat the hybrid entity as being transparent;
- where the third country concerned treats the hybrid entity as not being transparent, the Member States concerned shall treat the hybrid entity as not being transparent.

[3. To the extent that a hybrid mismatch situation involving a third country results in non-taxation without inclusion:

- where the third country concerned treats the business activity concerned as carried on through a permanent establishment, the Member States concerned shall treat the business activity concerned as carried on through a permanent establishment;
- where the third country concerned treats the business activity concerned as not carried on through a permanent establishment, the Member States concerned shall treat the business activity concerned as not carried on through a permanent establishment.]

CHAPTER III
FINAL PROVISIONS

Article 13

Exercise of the delegation

1. The power to adopt delegated acts referred to in Articles 3 [and 7] shall be conferred on the Commission for an indeterminate period of time.

2. As soon as the Commission adopts a delegated act, it shall notify it to the Council.

3. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in Articles 14, 15 and 16.

Article 14

Revocation of the delegation

1. The delegation of powers referred to in Articles 3 [and 7] may be revoked at any time by the Council.

2. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the Official Journal of the European Union.

Article 15

Objection to delegated acts

1. The Council may object to a delegated act within a period of three months from the date of notification.

2. If, on the expiry of this period, the Council has not objected to the delegated act, it shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein.
The delegated act may be published in the Official Journal of the European Union and enter into force before the expiry of that period if the Council has informed the Commission of its intention not to raise objections.

3. If the Council objects to a delegated act, it shall not enter into force. The Council shall state the reasons for objecting to the delegated act.

Article 16

Informing the European Parliament

The European Parliament shall be informed of the adoption of delegated acts by the Commission of any objection formulated to them, or the revocation of the delegation of powers by the Council.

Article 17

Committee

1. The Commission shall be assisted by a Committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/201122.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Article 18

Review

The Commission shall, five years after the entry into force of this Directive, review its application and report to the Council on the operation of this Directive.

Article 19

Transposition

1. Member States shall adopt and publish, by [date] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.
They shall apply those provisions from […].
When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication.

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

Article 20

Entry into force

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

Article 21

Addressees

This Directive is addressed to the Member States.