To the Finance Standing Committee of the
Lower House of Parliament

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Amsterdam, 15 November 2016


Dear members of the Committee,

It was with interest that the Dutch Association of Tax Advisors (hereinafter: the Association) took note of the proposals by the European Commission regarding directives for a Common Consolidated Corporate Tax Base, a Common Corporate Tax Base, Double Taxation Dispute Resolution Mechanisms and the amendment of the Anti-Tax Avoidance Directive (ATAD) for hybrid mismatches with third countries.

The European Commission had already presented a proposal for a Common Consolidated Corporate Tax Base (CCCTB) in 2011. This proposal met with a lot of resistance from various Member States and it was not successful. In light of this, it can be expected that the political discussion in the Netherlands and the other Member States of the European Union will primarily focus on the conceptual aspects of a CCCTB and the implications for the Dutch economy and the investment climate. For that reason the Association has opted to keep its comments on the CCCTB and the CCTB in line with this.

Our comments are structured as follows:
I. CCCTB/CCTB
   a. Association comments on the CCCTB/CCTB proposals from a macro-economic perspective
   b. Legal certainty/uncertainty
   c. Separate issues
II. Double Taxation Dispute Resolution Mechanisms
   a. Prior consultation
   b. General observations
   c. Article-by-article observations

III. Amendment of the ATAD for hybrid mismatches with third countries

Appendix: Striking similarities and differences between the Dutch (annual) profit concept and that of the CCTB Directive

I. CCCTB/CCTB
   a. Association comments on the CCCTB/CCTB proposals from a macro-economic perspective

Objectives of the CCCTB/CCTB
   - The CCCTB has several objectives, such as the filing of a single corporate income tax return for the entire EU (which will greatly reduce the administrative burden on international companies), cross-border loss set off, reducing the number of transfer pricing issues and countering international tax avoidance structures. In addition, a (more) level playing field is created because all large companies are taxed on a profit tax base determined in a uniform manner.

CCTB is the first step to a CCCTB
   - The European Commission’s first proposal concerns the Common Corporate Tax Base (CCTB), but it is clear that the objective is to arrive at a CCCTB. The EC had presented this two-pronged approach in its tax avoidance action plan dated 17 June 2015. The impact of the CCCTB on the public finances of the Member States is much greater than that of the CCTB, because the consolidated tax base for profit tax is shared among the EU Member States according to an apportionment formula. This apportionment formula uses traditional factors of production (tangible fixed assets, sales and labour) and the fixed profit apportionment means that profit is not always taxed where value is created. The Association firstly questions whether it is desirable that this approach deviates from the OECD-agreed approach, i.e. taxing profit where value is created.

Impact analysis
   - The impact analysis performed by the European Commission shows that overall economic growth is estimated at 1.2 percent (under CCCTB) and 1.3 percent (under CCTB). This growth would be the result of additional investment and more employment. Furthermore, the compliance costs of businesses would fall. The question is how the growth in both scenarios would impact the Netherlands (please also refer below to the section on the apportionment formula).
The CCCTB proposal has already been subject to an impact analysis in the past. It had a negative impact on the economies of the EU Member States and especially on the Netherlands (minus 2 percent GDP, see the following diagram):

![Graph showing the effect on GDP for different countries]


The decline in GDP was primarily caused by the apportionment formula used, which mostly disadvantages smaller and service-oriented economies. There is no reason to believe that the impact of a CCCTB would be any different now for the Netherlands. The Association would like to remind you that in 2011 the Lower House gave the CCCTB a ‘yellow card’ precisely because of this impact.

The European Commission’s impact analysis asserts that the CCCTB will make the EU’s business climate more attractive by lowering compliance costs, by the additional R&D credit and the credit for ‘Allowance for Growth and Investment’. However, the proposals also contain various elements that increase the tax burden, which means that the CCCTB can also result in activities and investment being shifted to countries outside the EU.
In the following table several aspects of the CCTB and the current Dutch regime for determining the profit for tax purposes have been compared.

<table>
<thead>
<tr>
<th>Item</th>
<th>CITA (Dutch corporate income tax)</th>
<th>CCTB</th>
</tr>
</thead>
<tbody>
<tr>
<td>Participation exemption</td>
<td>100% exempt if interest is at least 5%</td>
<td>100% exempt if interest is at least 10%</td>
</tr>
<tr>
<td></td>
<td>No annual holding requirement</td>
<td>Annual holding requirement</td>
</tr>
<tr>
<td></td>
<td>No switch-over</td>
<td>Switch-over. Tax credit applies if national tax rate is less than 50%</td>
</tr>
<tr>
<td>Liquidation losses</td>
<td>Deductible</td>
<td>Unclear</td>
</tr>
<tr>
<td>Participation costs</td>
<td>Deductible</td>
<td>Non-deductible</td>
</tr>
<tr>
<td>Permanent establishment losses EU</td>
<td>Non-deductible</td>
<td>Deductible with recapture after 5 years</td>
</tr>
<tr>
<td>Member States</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Losses EU subsidiaries</td>
<td>Non-deductible</td>
<td>Deductible with recapture after 5 years</td>
</tr>
<tr>
<td>Loss set-off</td>
<td>1 year carry back, 9 year carry forward</td>
<td>Unlimited carry forward</td>
</tr>
<tr>
<td>Loss set off limitations</td>
<td>Combats trade in loss-making entities</td>
<td>Combats trade in loss-making entities</td>
</tr>
<tr>
<td></td>
<td>(criteria somewhat less severe; &gt;75% criterion)</td>
<td></td>
</tr>
<tr>
<td>Donations</td>
<td>Deductible up to a total of EUR 100,000, provided made to a public welfare institution (in Dutch: ANBI)</td>
<td>Not subject to a deduction limitation, provided they are made to a charity</td>
</tr>
<tr>
<td>Income from qualifying IP</td>
<td>80% exempt (Innovation Box)</td>
<td>Regular taxation</td>
</tr>
<tr>
<td>Expenses for qualifying IP</td>
<td>Only 80% is effectively deductible</td>
<td>Expenses appear to be immediately deductible at normal rate</td>
</tr>
<tr>
<td></td>
<td>First capitalise, then depreciate</td>
<td>Above this, 50% additional deduction up to EUR 20 million</td>
</tr>
<tr>
<td></td>
<td></td>
<td>100% additional deduction for start-ups</td>
</tr>
<tr>
<td>Fiscal unity / consolidation</td>
<td>Yes, fiscal unity</td>
<td>Fiscal unity rules of Member State appear possible</td>
</tr>
<tr>
<td>Interest deduction limitation (assuming ATAD 1 has taken effect)</td>
<td>In accordance with Anti-Tax Avoidance Directive (ATAD)</td>
<td>Deviates from ATAD. Unclear why.</td>
</tr>
<tr>
<td>Costs employee options</td>
<td>Non-deductible</td>
<td>Deductible</td>
</tr>
<tr>
<td>Receivables to and from associated enterprises</td>
<td>In principle, to be written down with retention of claim</td>
<td>No write-down</td>
</tr>
<tr>
<td>Transfer Pricing</td>
<td>Both downward and upward adjustments</td>
<td>Only upward adjustments possible (appears to be an omission)</td>
</tr>
<tr>
<td>Notional interest deduction</td>
<td>Not applicable</td>
<td>Minimum of 2% on increase in equity during the last 10 years</td>
</tr>
<tr>
<td>Acquired goodwill</td>
<td>Deductible/depreciable over a 10-year period</td>
<td>Non-deductible (French system)</td>
</tr>
<tr>
<td>Public-sector companies</td>
<td>Taxed regardless of legal form (governed by public or by private law)</td>
<td>Legal entities governed by public law do not fall under the CCTB, legal entities governed by private law do</td>
</tr>
<tr>
<td>Base erosion (assuming ATAD 1 and ATAD 2 have been implemented)</td>
<td>Covered</td>
<td>Covered</td>
</tr>
<tr>
<td>Informal capital contributions</td>
<td>Costs deduction</td>
<td>No deduction (or wording of Directive unclear)</td>
</tr>
<tr>
<td>Annual profit - tax base</td>
<td>Prudence principle</td>
<td>Only realised results are taken into account</td>
</tr>
<tr>
<td>Annual profit - provisions</td>
<td>Foreseeable costs deductible (Baksteen judgement)</td>
<td>Only legally enforceable obligations deductible</td>
</tr>
<tr>
<td>Tax returns in functional currency</td>
<td>Yes, this is possible</td>
<td>No, only tax returns in euros possible.</td>
</tr>
</tbody>
</table>
- This overview shows that for small companies which perform R&D (IP development), the CCTB is more favourable than the current Dutch profit provisions. For large companies (with high profits from IP) the current Dutch regime (with its Innovation Box) is more favourable. To ensure that the Innovation Box remains attractive, the Netherlands could, during the consultation on the proposed CCCTB/CCTB Directives, make a strong case for allowing taxpayers that fall under the CCCTB/CCTB to introduce a special low rate for income which qualifies for the Innovation Box, given that neither Directive sets tax rates and in light of the importance of the Innovation Box for the investment climate. The Association notes in this respect that it is not entirely clear how a separate rate compares to Article 1(2) of both the CCCTB and the CCTB Directive (“A company that applies the rules of this Directive shall cease to be subject to the national corporate tax law in respect of all matters regulated by this Directive, unless otherwise stated”). It can be assumed that this does not cover the rate. Another possible interpretation could be that the CCTB already contains a special tax credit for innovation and it is therefore not permissible to grant an additional incentive for innovation by way of a separate tax rate, in circumvention of the CCCTB/CCTB. According to the Association, there is however ample leeway to introduce a special rate for the Innovation Box. In light of the implications for the Dutch and the European investment climate, the Association believes this is a crucial point that the Netherlands should draw attention to during the deliberations on the proposal (in the ECOFIN). Other countries, where the current patent box has already been incorporated into a rate measure, are expected to also deal with this in the same way.

- With regard to the super deduction of R&D expenditure, it will be necessary to further assess how this compares to the current R&D remittance reduction (in Dutch: WBSO) for non-payroll costs. After all, the Netherlands made a conscious choice to transfer the old R&D deduction in the corporate income tax to the WBSO.

- Other notable differences appear in the participation exemption. These are discussed under c.1 below.

- The table shows that the politically-motivated deduction limitations contained in the Dutch tax base provision, such as the non-deductibility of employee options, which was introduced in the Netherlands in 2006, have not been included in the CCTB proposal. This means that for businesses that must fall under the CCTB – or that have elected to do so – the costs of employee options will once again be deductible.

- The impact analysis could not take account of the outcome of the US presidential elections, which took place on November 8, 2016. President-elect Trump intends to bring back jobs to the US by, for example, lowering the profit tax rate to 15 percent (is currently 34 to 35 percent). It is likely that a bill on this will be adopted, given Republican control of both the House of Representatives and the Senate. The Association wonders how such a reduction will affect the EU’s business climate and how US multinationals will respond to this and,
finally, to what extent this will affect the impact analysis that was carried out by the European Commission. Because much IP is developed in the US and a more than proportionate share of the most successful and profitable companies are established in the US, this could mean that the development and ownership of IP will in future remain in the US (as well as the associated highly-skilled employment). The CCCTB’s apportionment formula (see below) excludes IP, focusing, in addition to sales, on traditional production factors such as labour and fixed assets (such as buildings and equipment). The combination of the CCCTB apportionment formula and a low US profit tax rate enhance this effect.

Apportionment formula
- The apportionment formula that was used in the previous proposals for a CCCTB from 2011, negatively impacted the Netherlands. The apportionment formula is based on fixed assets, sales and number of employees (payroll costs). This is no different in the new CCCTB proposal, especially if intangible fixed assets are not part of the apportionment formula. This will give an advantage to Member States with large populations and lots of fixed assets (i.e. large, older economies).
- Another important point is that because the apportionment formula is fixed, this can lead to profit not being taxed where value is added and profit is generated. This is not in line with the objective of the European Commission or the OECD’s BEPS project. A simple example to illustrate this:

A business established in the Netherlands has, in addition to its place of business in the Netherlands, a subsidiary in Member State A and Member State B. The business in the Netherlands and in Member State B are successful and profitable. The business in Member State A is not performing well and incurs a loss for accounting purposes. The CCCTB apportionment formula would simply apportion a one-third share to each country.

<table>
<thead>
<tr>
<th>Profit</th>
<th>Rate</th>
<th>CIT</th>
<th>CCCTB</th>
<th>CIT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Profit in the Netherlands</td>
<td>100</td>
<td>25%</td>
<td>25</td>
<td>40</td>
</tr>
<tr>
<td>Loss Member State A</td>
<td>-60</td>
<td>25%</td>
<td>0</td>
<td>40</td>
</tr>
<tr>
<td>Profit Member State B</td>
<td>80</td>
<td>25%</td>
<td>20</td>
<td>40</td>
</tr>
<tr>
<td>Total</td>
<td>120</td>
<td>45</td>
<td>120</td>
<td>30</td>
</tr>
</tbody>
</table>

Because of the way the apportionment formula work, part of the profit from the Netherlands and from Member State B is apportioned to Member State A, although it has incurred a loss. The disproportionate distribution of the profit also occurs if Member State B does not incur a loss, but realises relatively less profit. In that case, the Netherlands and Member State B will see part of “their profit” taxed in Member State A. The more fixed assets (buildings) and staff or payroll costs Member State A has (compared to the Netherlands and Member
The Committee on Legislative Proposals of the Dutch Association of Tax Advisors uses the expertise of their members to provide solicited and unsolicited commentary on legislative proposals (and their preparatory stages). Important touchstones are legal certainty (including retroactive effect), compatibility with law, feasibility, effectiveness and efficiency, administrative burden and implications for the investment climate.

State B), the worse this effect will be, because more than one-third of the group profit in Member State A will be taxed.

The apportionment formula does not take any account of added value and the creation of value (intellectual property) and risks that are run. The Dutch economy is primarily a first-rate knowledge economy and this first-rate knowledge is – unlike the high payroll component – not included in the profit distribution among the countries. The Association considers that this has a detrimental effect on the Dutch treasury and moreover is not, or is not sufficiently in keeping with the taxing of profit where the value is created.

Limiting flexibility and impairing sovereignty
- By opting for a CCCTB/CCTB now, all Member States will relinquish part of their sovereignty over taxation. This limits the freedom to make policy on profit tax and deprives Member States of the opportunity to distinguish themselves from other Member States. The flexibility of determining the tax base will disappear, because each subsequent amendment will have to be approved by all Member States, given that unanimous approval is required in the area of taxation.
- Any fiscal leeway large companies may have had with regard to national legislation has thus disappeared. And if the corporate income tax regime or parts thereof need to be modernised, the Netherlands will no longer be able to realise this. As such, the Netherlands will no longer be able to respond to economic developments, such as an economic crisis, because all Member States must unanimously approve each change. The experience with VAT has shown how difficult this can be.
- Partly relinquishing fiscal sovereignty also means that the Netherlands will no longer be able to rely on its existing tax incentives, which are precisely what make the Netherlands such an attractive business location (in particular the participation exemption). The Deputy Minister of Finance has also repeatedly made clear that these tax incentives are essential for the Netherlands if it wants to continue to attract foreign investment.
- Lastly, the Association would again like to point out the limitation on the deduction of employee options, as this has applied in the Netherlands since 2006 (Section 10(1)(j) Corporate Income Tax Act 1969). In the CCCTB/CCTB proposals, these costs are simply deductible. This is one of the many issues over which the national legislator will no longer be able to exercise any direct influence nor take any independent decisions.

CCTB: implications of a harmonised tax base without harmonised tax rates
- After the CCTB has been implemented, the corporate income tax base for large businesses will be harmonised but the tax rates won’t be. Tax plays an important role in a business’ choice of location. While it is now not always easy to make a comparison (because the tax base rules differ), it will be once the CCTB has been implemented. This will favour countries with a low rate, such as Ireland (12.5 percent). It is essential for the Dutch economy and labour market that the Netherlands is and remains an attractive location for foreign businesses. The introduction of the CCTB impairs this attractiveness, and countries with a
The low rate will benefit to the detriment of the Netherlands. In this respect we refer to the rate reductions announced by the United Kingdom (UK) and Belgium. Lastly, it should be noted that partly in the light of the UK’s decision to leave the EU, many businesses that are currently resident in the UK will reconsider their place of business after Brexit has become a fact. The Netherlands should remain on their shortlist.

The CCCTB/CCTB results in two parallel systems
- If Member States wish to neutralise the difference between the CCTB tax base and the national tax base, this will require them to maintain two different tax rates. The tax authorities of the Member States will face a more complex system. The costs of this must be borne by the citizens of the EU Member States. Two different corporate income tax regimes will operate alongside one another, given that the CCCTB/CCTB will not apply to all businesses. This also creates a potential inequality between relatively comparable businesses.

b. Legal certainty/uncertainty

Current corporate income tax arose over the course of approximately 100 years. During that time, rules were added, amended and elaborated on. Definitions have been clarified in case law and legislation has been fine-tuned. If the current corporate income tax legislation for large companies is completely replaced, we will have to start again from the beginning. All issues on which case law provided clarity, will again be open to debate. Taxpayers and the Dutch tax authorities can re-litigate these issues before the courts, including the Court of Justice of the European Union. This will lead to decades of legal uncertainty. A recent example is the Supreme Court case law on the non-business motivated loan. It has taken years for the many aspects of these rules to become clear. This will soon have to be repeated. Another example is the replacement of the Dutch open standard for sound business practice - elaborated on in case law and smoothly adjusting to changing circumstances - by the tightly framed CCTB definition of profit, which will not easily adapt to changing circumstances. See in this respect the large amount of case law on the treatment of options under the participation exemption, temporal ringfencing under the participation exemption, etc., etc. What must be feared is a scenario in which everything to do with corporate income tax that is currently clear and has been elaborated on, can once again be subject to debate right up to the Court of Justice of the European Union. The preference by far is to not go down that road.

c. Separate issues

Below we will briefly comment on several elements of the CCTB proposal. These comments are not exhaustive, but contain some noteworthy aspects about the proposals. It concerns differences with the EU Anti-BEPS Directive that was adopted in June, possible conflicts with other EU law or comments of a more technical nature.
The Association would firstly like to make the general comment that certain Dutch corporate income tax rules do not appear at all in the proposals. For example, there are no rules for mergers and divisions and there is no possibility of forming a fiscal unity. Even the proposals for rules that have been included are sketchy. In this respect, the Association refers to a crucial key question, i.e. what is the scope of Article 1(2) CCTB: “a company (...) shall cease to be subject to the national corporate tax law in respect of all matters regulated by this Directive”. The Association infers from this that CCTB taxpayers will continue to be partial national (subjective) taxpayers. It is however unclear to what extent this will be the case – in other words: when does this involve “matters regulated” – and thus which national provisions still (or could still) apply. Does this mean that, with regard to any rules about which the draft Directive has something to say, a CCTB taxpayer is not bound by or cannot invoke additional provisions on those same rules in national law?

The Association also notes that the expression “national corporate tax law” is, by virtue of Article 4(33) CCTB, defined as “the statute of a Member State”. This appears to only concern legislation. What is unclear in this respect are the implications for national rules and case law.

As an example of sketchy rules in the draft Directive, the Association refers to the participation exemption and the related switch-over provision. Together they barely take up one page. In the current Dutch Corporate Income Tax Act they take up approximately 10 pages. Although more legislation is not always better legislation, this does indicate that the drafters of the current proposals ignored all sorts of issues and situations that have been provided for by the Dutch legislator. Seen in that light, the proposal looks more like a ‘superficial exercise’, rather than well thought-out and modern corporate income tax legislation. As noted in Section 1 of our comments, this is all the more objectionable because once it has been implemented, any necessary changes will only be possible if unanimously approved. In effect, this means it will be almost impossible to make any changes, unless it becomes possible to do so during the implementation process. The problem with this is that there is less opportunity for the various EU Member States to contribute input.
c.1. Participation exemption (Article 8(c) and (d) CCTB) and switch-over clause (Article 53 CCTB).

 Participation exemption
The proposal contains an exemption for profit distributions and profits realised from the sale of shares. Unlike the European Commission’s CCCTB proposal from 2011, this exemption only applies if the taxpayer holds at least 10 percent of the capital or 10 percent of the voting rights in the subsidiary during at least 12 months. This makes the participation exemption proposed by the European Commission more stringent than the current Dutch participation exemption, which in principle applies from a holding of at least 5 percent of the (nominal paid-in) capital in the subsidiary. Under Dutch law there is also no minimum period during which the holding must be held. Furthermore, current Dutch law provides for the participation exemption to be legally expanded. For example, the participation exemption can also apply even if the taxpayer itself does not hold at least 5 percent of the capital in the subsidiary, but this is held by another company that is part of the group. Expansion is also possible by virtue of case law: for example, options can, under certain conditions, also fall under the participation exemption. Were the CCTB to be implemented, the 10 percent threshold and the minimum period proposed by the European Commission will become the absolute standard and it will not be possible for the Netherlands to maintain more flexible criteria. This means a loss of sovereignty in respect of – in the words of the Dutch government – one of the cornerstones of the Dutch business climate.

There is also extensive Dutch case law on the reimbursements and allowances that are covered by the participation exemption. As noted in the general section, if the CCTB is introduced this case law will probably no longer be relevant, with lengthy legal proceedings and extreme legal uncertainty as a consequence.

 Switch-over clause
The EC also proposes taxing profit distributions and capital gains realised with the sale of a low-taxed subsidiary established outside the EU and to only grant a deduction for the tax paid abroad (switch-over to a credit regime). A subsidiary is low-taxed within the meaning of this provision if the statutory rate to which it is subject in its state of establishment is less than half of the statutory rate to which the taxpayer itself would have been subject. This provision is similar to the switch-over clause proposed by the EC in its proposal for an Anti-Tax Avoidance Directive (ATAD) presented on 28 January 2016. Because of major disagreements between the EU Member States on this point, it did not survive and was not included in the final proposal adopted in June. Moreover, this time the EC has set a stricter floor of less than 50 percent (of the statutory corporate income tax rate in the relevant Member State) instead of less than 40 percent. However in the CCTB proposal it does suggest an exemption, on the basis of which the switch-over rule will not apply if there is a tax treaty between the taxpayer’s Member State and the third country, which does not allow the switch-over from an exemption to a credit regime. This appears to exclude, in principle, any conflict with existing bilateral tax treaties.
For the rest, the objections set out in the comments to the draft ATAD dated 28 January 2016 apply. These objections essentially relate to the following. The Netherlands has opted to exempt the profit from operating (“real”) activities and to tax profits from passive activities unless these are subject to an effective rate of at least 10 percent. This means our participation exemption is an important tax consideration for investors to locate in the Netherlands. If a common participation exemption is implemented throughout the entire EU, the Netherlands will lose this competitive advantage. Moreover, it is objectionable that the CCTB proposal does not distinguish between passive and active activities. If the Netherlands levies “additional tax”, active participations will no longer be able to compete under equal conditions in that other country, and this will have severe implications for Dutch businesses. Many Member States, including the Netherlands, had also objected to this when the EC presented its ATAD proposal. One of the last compromise proposals of the Dutch presidency dated 24 May 2016, therefore contained a switch-over clause that did not cover income generated from an “active business”. The switch-over clause was ultimately not included in the ATAD. It is therefore remarkable that the EC is introducing this provision again and has thereby not even bothered to distinguish between active and passive activities.

c.2. CFC rules (Article 59 and 60 CCTB)

The CCTB proposal contains a measure (just like the ATAD) on the basis of which the taxable income is increased by the non-distributed passive income of a low-taxed subsidiary established outside the EU, if the taxpayer, to put in briefly, holds an interest of more than 50 percent in this subsidiary. The subsidiary is regarded as low-taxed if it is subject to an effective profit tax rate that is less than 50 percent of the rate to which the taxpayer itself is subject. The switch-over clause avoids low-taxed profit originating from third countries being exempt at the recipient. CFC rules go a step further and tax, in advance at the shareholder, profit that still has to be distributed.

The Association asks why such far-reaching CFC rules are necessary within the EU. In its comments to the draft ATAD dated 28 January 2016, the Association pointed to the negative impact of such CFC rules, especially in combination with the switch-over clause, on the Dutch and on the European business climate as a whole. As substantiated in detail in those comments, the expectation is that multinationals will leave Europe if the EU Member States automatically tax low-taxed foreign profit.
c.3. Exit tax (Article 29 CCTB)

The CCTB proposal contains an exit tax, which requires Member States, to be put it briefly, to tax the untaxed gains and reserves of assets if a taxpayer moves these assets or its tax place of business to another Member State or a state outside the European Union, even if the untaxed gains and reserves were not yet realised at the time of the relocation. In light of case law of the Court of Justice of the European Union, such a tax is, in principle, in line with EU treaty freedoms, provided a deferral of payment is granted for relocation within the European Union or the European Economic Area (EEA). The exit tax provision in the ATAD therefore provides – in accordance with this case law – for a deferral of payment upon relocation within the EU/EEA, based on which the taxpayer can pay in instalments spread over a period of five years. Remarkably, there is no such provision in the CCTB proposal.

c.4. Permanent establishment (Article 5 CCTB)

The proposed CCTB Directive contains a detailed definition of the term “permanent establishment”. This definition is largely the same as the treaty definition in BEPS Action 7 recommended by the OECD. This definition is especially important for the question whether a business from one state has a taxable presence in another state and whether the first state must grant double tax relief (see “double tax relief” below). Different interpretations can trigger double tax and not treating businesses from other states the same should therefore be avoided as much as possible. The fact that the term “permanent establishment” also appears in numerous provisions in the proposed directives (e.g. hybrid mismatches, CFCs and the definition of a CCCB group) certainly shows how important this is.

It should be noted that the OECD definition is broader than that in the CCTB Directive, in the sense that a combination of activities in a certain state will result in a permanent establishment sooner. Although the definition proposed in the Directive must provide for a common definition, it should be noted that this definition only applies among Member States. For other situations, for example where a non-EU resident business is active in a Member State, the relevant tax treaty or national law applies. It can be expected that insofar as the treaties of Member States maintain different definitions to the CCTB Directive, these will not be applied. It is important that treaties between Member States and third countries are respected, but attention should nevertheless be paid to the fact that a level playing field is currently not fully attainable due to the differences that can arise.
c.5. Cross-border losses (Article 42 CCTB)

As is the case under current Dutch legislation (the source exemption), losses incurred by a permanent establishment resident in a third country cannot be deducted in the Member State of the head office.

Unlike current Dutch legislation, the proposed CCTB Directive contains a provision on the basis of which a CCTB taxpayer may deduct losses incurred by a directly held qualifying subsidiary or permanent establishment in another Member State. Incidentally, the Association also notes that the proposed text needs to clarify the condition concerning subsidiaries that are situated in another Member State. As a result of the words “as referred to in Article 3(1)” being added to Article 42(1) CCTB, the condition “situated in other Member States” as it applies to subsidiaries appears more from recital 13, rather than from Article 42(1) CCTB itself.

These losses are – briefly put – recaptured against later profit and otherwise after five years (or upon earlier dissolution, sale, etc.). This provision is intended as a concession for not immediately implementing the consolidation rules under the CCCTB. Similar rules applied in the Netherlands until the source exemption for permanent establishments was introduced. By employing the word ‘may’ in Article 42(1) CCTB, the Association considers that it is not entirely clear whether the CCTB is providing a choice. This needs to be clarified.

The proposed rules also lack important details, such as whether recapture must take place according to an overall, per country or per entity method. Clarity on the proposed rules would expedite legal certainty and lessen the risk of Member States implementing and interpreting this differently. Limiting this to directly held qualifying subsidiaries appears to be an unwanted limitation of the scope of the rules.

There are moreover reservations about the practical usefulness of these rules, given the mandatory recapture after five years. This obligation appears to thwart the objective: paying tax on economic profit and the facilitation of the cash flow capacity. Furthermore, the mandatory recapture may not be in line with case law of the Court of Justice of the European Union in this area. This case law requires, to put it briefly, that losses from a foreign (EU) subsidiary can be credited in the Member State of the parent company if these cannot be credited in the source state. As such, a change is not only preferable but necessary.

Technical legislative points:
- Article 42(1) CCTB talks about “immediate qualifying subsidiaries” and recital 13 about “immediate subsidiaries”. However, Articles 42(2) to (4) CCTB refer to “qualifying subsidiaries”. As, by virtue of Article 3(1) CCTB, the latter term covers both “immediate” and “lower-tier subsidiary”, the terminology used in Article 42 is not consistent. Please also refer to our comments on the scope of the rules.
- Article 42(4) CCTB should make clear that the scope of the ‘automatic reincorporation’ refers to the losses still available for recapture at that time. The present wording is “losses deducted (…) shall automatically be reincorporated”, i.e. the entire amount that was once deducted, irrespective of profits (and thus add-backs) in the first five years. This is obviously not what was intended.

c.6. Avoidance of double taxation (Article 8(e) CCTB)

The proposed CCTB Directive provides for an exemption for profit-making permanent establishments. This exemption appears to be too limited. Current Dutch legislation or treaties provide for an exemption for immovable property located abroad and offshore activities. The Association would like to know what the status of tax treaties among EU Member States and the proposed CCCTB/CCTB system is. In that light, extending or clarifying that area would be desirable.

The profit attributed to a permanent establishment is firstly important for the purposes of determining the taxable profit in the state of residence of the permanent establishment and, secondly, for the purposes of determining the profit for which the state of the head office must grant double tax relief. The proposed CCTB Directive contains a provision that is in line with the currently applicable provision in the OECD Model Tax Convention for the attribution of profit to a permanent establishment. As a result of this, the Commentary to the OECD Model Convention is in danger of losing its status as a global interpretation tool by having the current treaty provisions ‘replaced’ by an EU Directive. We therefore recommend that reference be made to the OECD Commentary on this point.

c.7. Depreciation intangibles (Article 10 CCTB in conjunction with Article 30ff CCTB)

*Technical legislative point:*

The definition of “acquisition or construction cost” contained in Article 4(21) CCTB only refers to a “fixed tangible asset” and not to fixed intangible assets. Using the expression “acquisition or construction cost” in Articles 30 and 31 CCTB, and also in Article 12(i) CCTB, could give the impression that it is not possible to depreciate intangibles. This is however not in keeping with, for example:

- Recital 11, which states that intangible assets must also be depreciated.
- The definition of fixed assets in Article 4(19) CCTB and the reference to ‘acquisition or construction cost’ in that Article.
- Article 10 CCTB, which in general terms talks about “depreciation of fixed assets”.
- The depreciation period for intangibles explicitly prescribed in Article 33(1)(e) CCTB.
- Articles 30 through 32 CCTB, which consistently refer to “fixed assets”.

Furthermore, the “acquisition or construction costs” are a basis for inclusion in the “fixed asset register”, but inclusion in the fixed asset register is not a condition for depreciation. By using
“fixed asset” in the name of the register a direct relationship is made with the definition in Article 4(19) CCTB, i.e. including (certain) intangibles. The definition of “improvement costs” (Article 4(26) CCTB), the other basis for inclusion in the fixed asset register, only refers to the broader concept of fixed asset.

In short, there appears to be an unintentional flaw that could and should be easily fixed by deleting the word “tangible” in Article 4(21) CCTB. All this should not affect the depreciability of (certain) intangibles.

c.8. Non-deductible items (Article 12 CCTB)

Technical legislative point:
The second sentence of Article 12(i) appears to be incongruent, given that no reference is made to Article 33(1)(b) CCTB, but reference is made to Article 33(2) CCTB (second-hand buildings, etc.).

II. Double Taxation Dispute Resolution Mechanisms

a. Prior consultation


The Association submitted its response on 9 May 2016, which was published on its website www.nob.net. The Association suffices here with a reference to this response.

b. General observations

The proposal elaborates on the EU Arbitration Convention, which only applies if there is a transfer pricing adjustment between affiliated companies that are established within the EU. By virtue of this Convention, arbitration is mandatory if, as part of a mutual agreement procedure, the competent authorities cannot reach agreement within a two-year period. The proposal expands this mandatory arbitration to cover, in principle, all cases of cross-border double taxation of an ‘income tax’ on business profits. This reflects one of the areas of improvement identified by the Association in its abovementioned response under a. As stated in this response, the aim should firstly be a mandatory and binding agreement procedure for all cases of cross-border double taxation. The Association believes that the scope of the proposal referred to in the preceding sentence should be further expanded, so that it also applies to individuals, who are increasingly being confronted with positions taken by tax authorities that trigger double taxation.
Unfortunately, another area of improvement identified by the Association has still not been given any consideration. The Association is of the opinion that a major improvement in the existing agreement procedure can be achieved by allowing taxpayers – individuals or legal entities – to join the agreement procedure as an *amicus curiae*. This will immensely improve the accountability of the procedure, which is characterised as a government-to-government procedure. The Associations considers this an important objection, which the proposal does not satisfy. The preference is to create an opportunity, or at least an alternative, for taxpayers to join the arbitration procedure as an *amicus curiae*.

In the BEPS package dated 5 October 2012, the OECD also made recommendations (minimum standards and best practices) to make international dispute settlement in tax matters more effective. Arbitration is a key element in this. It is at the very least just as essential that the pre-arbitration stage, during which the states involved participate in an agreement procedure and try to reach agreement, is effective. Almost all the OECD recommendations relate to this stage. The Association considers that these minimum standards and best practices are amenable for inclusion in the present proposal.

Furthermore, the Association would like to reiterate here that ideally taxpayers – either individuals or legal entities – who are confronted with double taxation in a cross-border situation, should be able to approach an independent body themselves, for example, to be located at the Permanent Court of Arbitration, whose task is to ensure a satisfactory outcome for taxpayers, to which all the countries involved are bound. On this point, the Association refers to its response to the abovementioned consultation.

Some of the provisions in the proposal refer to the national courts. The Association is of the opinion that on this point the proposal does not provide sufficient insight into the obligations of Member States in the event that national law does not provide for one of the identified national legal remedies.

Lastly, the Association would like to draw attention to the interest on tax due aspect, as described in the response to the abovementioned consultation. The proposal has failed to take this aspect into account.

c. Article-by-article observations

*Article 3(3)*

This provision contains a large number of requirements with which an objection must comply (admissibility requirements). The Association believes that the requirement to state reasons contained in paragraphs c and e in particular is too detailed. Furthermore, the taxpayer must as fully and as quickly as possible meet all the relevant requests of the competent authorities, otherwise its objection will be declared inadmissible. By virtue of paragraph f, the taxpayer must also provide specific additional information if so requested by the competent authorities. This additional information is not even subject to the requirement that it be relevant.
The Committee on Legislative Proposals of the Dutch Association of Tax Advisors uses the expertise of their members to provide solicited and unsolicited commentary on legislative proposals (and their preparatory stages). Important touchstones are legal certainty (including retroactive effect), compatibility with law, feasibility, effectiveness and efficiency, administrative burden and implications for the investment climate.

The Association considers that the requirement stipulated in paragraph d, that the taxpayer provide information on applicable national rules and tax treaties, should not be stipulated. It can be assumed that the competent authorities of the Member States are aware of this information.

The Association is of the view that because the requirement to state reasons is effectively limitless, one can no longer talk about effective legal protection. The Association advocates for a substantially less encompassing requirement to state reasons, which is more in line with the rules in the General Administrative Law Act.

In addition to this, the Association also believes that information lacking in submitted objections should not immediately lead to them being declared inadmissible, provided this deficiency is rectified within a reasonable period imposed for this.

**Article 5(3)**
This provision concerns the possibility of appealing the rejection of a notice of objection. It is sometimes the case in practice that although a request is upheld formally, it is in fact only partly upheld; the request is deviated from or there are things that are unclear about its being upheld. The present provision does not provide for an appeal in such cases. The taxpayer could then file a new, second notice of objection, after which – if it is rejected – it could be appealed. The Association believes that it would be more efficient if the present provision would allow taxpayers to appeal negative decisions or decisions it does not agree with.

**Article 10**
According to this Article, although the taxpayer is indeed informed, it is not offered an opportunity to contribute any input or file a notice of objection. The Association refers to the comment under b. above.

The Association also wonders why the taxpayer is informed only when the mutual agreement procedure is unsuccessful. The truth is that insight into the position papers of the Member States is always useful and contributes to more transparency of the agreement procedure.

**Article 15**
The Association considers that it goes without saying that the arbitration procedure cannot be used where there is fraud, as stated in Article 15(6). However, the Association notes that there is no opportunity for the taxpayer to appeal a decision by (one of) the States that one of the situations described in Article 15(6) is present.

By virtue of Article 8 of the current EU Arbitration Convention, Member States are not required to cooperate with a mutual agreement or arbitration procedure if judicial or administrative proceedings have established that one of the enterprises is liable to a serious penalty. The Ministry of Finance defines this as including criminal proceedings based on Article 68 GTA. The definition included in the proposal is therefore considerably broader. Moreover, by using the term ‘tax fraud’ it appears that an imposed negligence penalty could be reason to deny access to the consultation and arbitration procedures. The Association does not believe that this is the intention.
III. Amendment of the ATAD for hybrid mismatches with third countries

Conceptually, there is a strong case for combating hybrid mismatches. After all, hybrid mismatches often trigger relatively low taxes on certain investments by multinationals; this effect does not occur where enterprises only operate in one Member State. This means there is no level playing field between enterprises that operate in one country and those that operate in more than one country. However, a low tax burden can also be achieved by financing and structuring investments from countries with a low nominal tax rate. Requiring countries with a relatively high tax rate to combat hybrid mismatches gives an advantage to countries with a low nominal tax rate in the battle for international investments. The Netherlands is not part of this.

Many hybrid structures appear in the relationship with the United States (hereinafter: US), including the CV (limited partnership)/BV (private limited liability company). If a Dutch company (for example a BV) pays interest or royalties (for example, to a CV) that, due to a hybrid mismatch, are for the time being not taxed in the US, the Netherlands will not be permitted to allow these expenses to be deducted under these proposals. Consequently, the Netherlands will tax an artificially high profit, which, in principle, belongs to the US (and from which the interest expenses and/or royalty expenses incurred to realise the profit were not deducted). This is contrary to the principle propagated by the Netherlands that profit must be taxed where it is realised. Furthermore, the US will start taxing this profit when it is eventually distributed to the US. Only then will the US reduce the US tax by the amount of the tax paid in the Netherlands. This tax is relatively high due to the fact that the deduction of the abovementioned interest and royalty expenses was not allowed. This reduces the tax payable in the US and the Netherlands has thus levied a tax at the expense of the US treasury.

Partly in light of the outcome of the US presidential elections (a Republican president and Republican control of Congress) it is plausible that US tax legislation will be amended for multinationals in the sense that it will become attractive to no longer keep income in hybrid entities (deferral), but to immediately have it taxed. This means that US multinationals which currently use CV/BV structures will, in future, convert these if US legislation is indeed amended. At present the Dutch activities of US multinationals make an important contribution to the Dutch economy. Many of these US multinationals benefit from a CV/BV structure. Simply implementing the ATAD for hybrid mismatches with third countries on 1 January 2019 will result in these structures being shifted to countries with a lower tax rate than the Netherlands and thus job losses in the Netherlands and a reduction of the taxable basis of multinationals for the Netherlands. This impact has still not been mentioned or quantified as part of this amendment. The Association recommends that the government investigate this.

The amendment of the ATAD for hybrid mismatches with third countries does not provide for transitional rules. However, under pressure from Ireland, this does take account of the implementation of an exit tax being postponed until 1 January 2010 and the implementation of the interest deduction limitation being postponed until 1 January 2024 due to pressure from Belgium.
In line with these postponement requests, the Association proposes that the amendment of the ATAD for hybrid mismatches with third countries be postponed for the Netherlands until 1 January 2024 (this is the same as the Belgian proposal). This should enable the US to amend its legislation and to proceed to implementation. This also enables the Netherlands to do justice to the principle that income must be taxed where it is created for one of the most important trading partners of the Netherlands (and the EU). Finally, this may leave the current employment provided by US multinationals in the Netherlands intact as much as possible.

With regard to mismatches in permanent establishment situations (no foreign permanent establishment is recognised, although the Netherlands does recognise a permanent establishment), the Netherlands is forced to include the income in the Dutch tax base. How does this compare to the application of tax treaties in which the Netherlands has often relinquished to right to tax the profits of permanent establishments, without it being important whether the relevant foreign country includes the profit of the permanent establishment in its local taxes.

Some countries opted to grant a tax incentive for local investment by not regarding the activities as a permanent establishment. From a Dutch perspective, there is then a permanent establishment that the Netherlands will, in principle, not tax. As a result of the anti-hybrid provision the Netherlands will have to start taxing this. Quite apart from the treaty issue this raises (see above), the Netherlands removes the effect of the local deliberately introduced incentive and as such harms the tax climate of the country involved.

The Association requests that you ask the Deputy Minister to respond to the abovementioned points.

A copy of this letter van sent to the Deputy Minister of Finance today.

The Association would naturally be pleased to explain the above in more detail.

Yours sincerely,
the Dutch Association of Tax Advisors

Mr. R.A. van der Jagt
Chairperson of the Committee on Legislative Proposals
Appendix - Striking similarities and differences between the Dutch (annual) profit concept and that of the CCTB Directive

DEFINITIONS
Improvement costs are distinguished from maintenance costs in the sense that the first category must be capitalised, while the second category may be charged directly to the profit. In the Directive, improvement costs are defined as expenditure that substantially increases the production capacity of an asset, substantially improves the way it functions or that represent more than 10 percent of the initial depreciation base of the asset.

Especially the latter addition – which is not stated so explicitly under the principle of sound business practice (hereinafter SBP) – provides clarification and prevents many common disputes on this point.

Economic owner: the person to whom all benefits of a fixed asset substantially accrue and who bears all risks in respect of that asset.

Of significance is the addition of ‘substantially’, an addition which is missing in the Dutch definition. This nuance means that minor, negligible encroachments of the 100 percent economic interest can be extracted.

THE TAX BASE
According to Article 6, only realised profits and losses are taken into account when determining the tax base.

This principle is at odds with the SBP prudence principle that allows the entrepreneur to also take unrealised actual losses into consideration.

By virtue of Article 9, costs related to R&D are not included in the Innovation Box. They are normally deductible. There is an additional 50 percent investment deduction up to EUR 20 million, and 25 percent above EUR 20 million. In addition, a 100 percent super investment deduction may be obtained.

The conditions under which this super deduction is granted are such that only SMEs can benefit from this, while the average SME is, in principle, not covered by the Directive.

According to Article 13, limitations apply to the deduction of interest expenses. These limitations do not apply to financial institutions. An amount equal to the revenues from financial assets is deductible as interest. Above this, EUR 3 million in interest is always deductible or – if this is higher – 30 percent of the EBITDA.

It is unclear how the EBITDA is calculated in this context.

A standalone company can deduct the excess interest expense in full. A company is defined as standalone if it is not part of a consolidated group and does not have any associated enterprises or permanent establishments.

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Companies covered by the Directive are rarely standalone.

THE CALCULATION OF ANNUAL EARNINGS
According to Article 19, stocks and work in progress (hereinafter: WIP) are, in principle, recognised at cost. An exception is made for WIP that is covered by Article 22: the contract to be implemented over a term exceeding 12 months. WIP is then capitalised, including the part of the profit that must be attributed to the completed part of the work. This is effectively in line with the method prescribed in Section 3.29b of the Personal Income Tax Act 2001. Under the Directive, WIP that is completed within 12 months therefore has a lower value than under Section 3.29b of the Personal Income Tax Act 2001.

Stocks and WIP are capitalised to the amount of the directly attributable costs. According to Article 27, taxpayers that also capitalised indirect costs before the effective date of the Directive may also apply this system under the Directive.

The Commission proposes the FIFO, LIFO and weighted average cost methods for the measurement of stocks and work-in-progress.

Financial instruments held for trading must be measured at market value at year-end (21).

The Base stock system collapses.

Financial instruments held for trading must be measured at market value at year-end (21).

The Base stock system collapses.
Unlike what the Supreme Court permitted in its Baksteen judgement, Article 25 of the Directive only provides for the possibility of forming provisions in connection with legally enforceable obligations that exist or are likely to occur. No provision can be formed for likely – but not enforceable – costs that will be incurred. Taxpayers will therefore be considerably worse off in this respect.

The Directive permits the creation of both an individual and a collective loan loss provision, although a special condition applies to the latter. A collective loan loss provision can only be created for receivables representing less than 0.1 percent of the collective loans to be valued. *GKG does not impose this condition.*

Article 26 concerns the effects of hedging. Where there is a hedging relationship, the various financial instruments should, under certain conditions, be subject to a hedge valuation. *The GKG has as the most important condition that there is a high degree of correlation in the movement in value of the various instruments. If that is the case, then hedge valuation is mandatory. The Directive also seems to impose somewhat formal requirements (to the detriment of the tax authorities). The hedging relationship must be formally designated and documented: this is the condition under which companies may use hedge accounting in their financial statements for accounting purposes. Hedge accounting is attractive for accounting purposes; hedge valuation is, in principle, less attractive for tax purposes as it is not possible to make use of the asymmetry of GKG. Nevertheless, hedge accounting is sometimes disregarded because it is administratively cumbersome. In this respect the Directive is more attractive for tax purposes than GKG, at least in terms of financial assets held for trading. Since financial assets held for trading must be recognised at market value, under the Directive it is possible to take any unrealised loss on these assets into account if hedge accounting requirements are not fulfilled.*

Article 29 discusses various types of exits. The Article stipulates when the difference between the market value and the value for tax purposes of assets is included in the tax base of the transferor. *Strangely enough, this Article only covers the impact of the transfer of assets. Strictly speaking, book profits on the transfer of liabilities are therefore not included in the tax base of the transferring State.*

**DEPRECIATION OF FIXED ASSETS (Articles 30 to 40)**

Fixed assets are recorded separately, together with the costs incurred. According to Article 31, the cost does not include any interest expense. *This is in deviation from GKG which, for example, includes the ‘construction interest to be capitalised’ phenomenon.*

In the case of a financial lease, the lessee, as economic owner, deducts the interest component of the lease instalment. In addition, the depreciation charges are for its account. The interest component is, however, not deductible if that component is not included in the tax base at the lessor/legal owner.

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This makes matters difficult because the lessee must be aware of the tax treatment of the lease instalment received by the lessor. This requirement is therefore not imposed in the Netherlands. The interest component of a financial lease is by definition deductible. One could argue that the Commission has made this reservation because the lease transaction that is interpreted as a financial lease at the lessee may be treated as an operational lease (rental) in the country of the lessor. However, that cannot be the reason because, in the case of an operational lease, the lessor must include the entire lease instalment as rental income in its tax base. This is thus more than he has to do in the case of a financial lease: the lessor only includes the interest portion in its tax base.

In paragraph 3, the Commission discusses the situation in which the economic owner is unknown. The lease transaction is then apparently regarded as an operational lease, at least the consequences are then comparable with those of an operational lease.

It would seem better to formulate this provision such that it not only applies if the economic owner is unknown, but also if there is no economic owner because none of the parties concerned has 100% of the economic interest in the lease object.

According to Article 33, immovable property is depreciated on a straight-line basis in two ways. Commercial, office and other buildings, as well as any other type of immovable property in use for the business: depreciation period 40 years. Industrial buildings and structures have a depreciation period of 25 years. Depreciation of land is not permitted.

The Directive classifies the other fixed assets in three categories:
1. other long-life fixed assets (depreciation in 15 years),
2. other medium-life fixed assets (depreciation in 8 years),
3. fixed intangible assets (dealt with separately in the Directive). Patents are depreciated over the period in which these rights offer the holder protection. A depreciation period of 15 years is applied if that period cannot be determined.

New by Dutch standards is a separate depreciation system for not new but used business assets. The principle for these assets is the depreciation period that applies to new business assets. However, if the entrepreneur can demonstrate that the remaining useful life is shorter, then depreciation over that shorter period is permitted (33).

Where depreciation is concerned, the Directive is more finely tuned than the Dutch regime. This has advantages – especially the deviating depreciation for used business assets meets a need – but also disadvantages: we must divide assets into categories and the associated depreciation periods are longer than those in the Netherlands. The major drawback is having to fall back on an outdated regime where land and buildings are separated for accounting purposes, while a straightforward regime is used in the Netherlands that permits depreciation on the basis of the official value (WOZ value) of the whole. The different treatment of immovable property in own use and investment property is also cancelled.
According to Article 34, a business asset is depreciated in the year it was acquired as though the asset had been in use for the full year. No depreciation is deducted in the year of disposal. This provision makes matters simpler and is, in principle, to the benefit of the taxpayer because depreciation commences earlier.

Article 35 of the Directive also includes tax relief that is reminiscent of our reinvestment reserve (hereinafter: RR) and exchange rulings. If the replacement does not take place promptly, the book profit at the end of the second year following the year of disposal is increased by 10 percent and added to the profit. Our RR has less stringent replacement requirements, may continue for a year longer, while the taxpayer has the option of extending the replacement period based on good argumentation. Furthermore, the RR applies to all assets, while the tax relief in the Directive excludes non-wearing or non-aging assets such as land, art, antiques and jewellery. Unlike the RR, the tax relief in the Directive does not include any carrying value requirement, so the write-off on the cost of the replacement asset is not limited. The mandatory 10 percent increase of the release in the absence and timeliness of replacement can possibly be justified by the (in hindsight) erroneously granted deferral of payment of tax on the book profit. Assets with a useful life of less than eight years can be included in an asset pool. This asset pool actually functions as our RR because sale proceeds are deducted from the depreciation base. Exchange results on these assets are therefore not covered by the relatively strict operation of Article 35 CCTB.

A special provision in the Directive (Article 36) governs the depreciation of improvement costs. The general rule is that these costs are depreciated separately over the same number of years in which the improved asset is depreciated. If a machine that is depreciable in eight years is improved after five years, the capitalised improvement is again depreciated in eight years. This is different in the case of rented immovable property, however, as this concerns an economic commodity. The improvement must in principle then be depreciated in the same number of years as the improved immovable property, although the taxpayer entitled to the depreciation may demonstrate that a shorter useful life must be attributed to the improvement. If individual depreciable assets are improved while the investor can demonstrate that the asset will have a shorter useful life than the standard depreciation period, the improvement may be depreciated over the shorter estimated useful life of the asset.

The Directive is undeniably harsh and not very practical, but offers various options for qualifying for a more flexible – and more practical – implementation. The disadvantage of these options is that it is up to the taxpayer to prove that it is eligible for the more flexible depreciation regime. For that matter, it is debatable which depreciation regime applies in the current Dutch regime. For example, increasing the depreciation base by the improvement costs would result in a higher depreciation base, whereby the depreciation period of the original asset is maintained. In increasing the tax base, consideration can also be given to extending the remaining depreciation period.
According to Article 37, assets with a shorter than average useful life are valued together in an asset pool and depreciated at an annual rate of 25 percent. The depreciation base in year 2 is equal to the tax value of the asset pool at the end of year 1, plus the costs of acquisition, construction and improvement in year 2 and less the proceeds from the disposal of assets in year 2.

If the depreciation base in any given year is negative, the value of the asset pool is increased to zero in favour of the result.

*Here we see a depreciation regime based on the carrying amount, which has become obsolete in the Netherlands. There is nothing wrong with it – it leaves as much to be desired as other regimes – with one exception: you never depreciate the amount that you should in total be able to depreciate.*

According to Article 39, exceptional decreases in value of non-wearing assets may be expressed in the tax base.

*What is unusual about this provision is not the fact that it was introduced, but the fact that it is limited to decreases in value of non-wearing assets. When a depreciable asset decreases in value to below the cost after depreciation for the reasons stated above, this decrease in value cannot be expressed with reference to Article 39.*

**LOSSES**

*Article 41 is designed to curtail the trade in loss-making entities. In this sense, the provision is quite similar to our Article 20a. However, there are many differences, one more important than the other. According to the Directive, the provision will take effect as soon as a third party acquires a 75% interest. The Dutch Article 20a sets the bar significantly lower, at 30%. However, Article 20a is not applicable for some changes in interest (acquisition by virtue of inheritance, acquisition by a shareholder who was already a shareholder for a third party, an expansion of the interest that the taxpayer was unaware of). The activities test that the Directive refers to also differs from that of Article 20a. While losses under Article 20a alone cannot be offset if the original activities have decreased to 30%, losses under the Directive can also no longer be offset if a certain amount of activities are added (with 60% of the turnover being derived from the new activities).*

**RULES ON ENTERING AND LEAVING THE CONSOLIDATED TAX BASE REGIME**

The provisions included in Articles 43 to 52 govern the valuation of assets and liabilities on the opening balance sheet at the beginning of the period in which the Directive applies, and on the opening balance sheet of the first year in which they are no longer covered by the Directive.

*These are sympathetic rules which ensure that, in all cases, the regime change is not to the detriment of the taxpayer. They should also avoid double taxation or absence of taxation. However, one must ask whether the chosen administratively cumbersome methods are very practical.*