COMMISSION OF THE EUROPEAN COMMUNITIES

COM(93) 293 final

Brussels, 26 July 1993

Proposal for a Council Directive

amending Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.

Proposal for a Council Directive

amending Directive 90/435/EEC of 23 July 1990
on the common system of taxation applicable in the case of
parent companies and subsidiaries of different Member States

(presented by the Commission)

Proposal for a Council Directive

amending Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.

EXPLANATORY MEMORANDUM

I. General

1. In its communication of 26 June 1992 to the Council and to Parliament subsequent to the conclusions of the Ruding Committee indicating guidelines on company taxation linked to the further development of the internal market,[1] the Commission stated that it also saw a need to extend the scope of Directive 90/434/EEC ("mergers") in order to ensure greater uniformity for that Directive. The Committee had pointed out in its report[2] that the scope of the "parent companies/subsidiaries" Directive varied from one Member State to another as regards the companies covered. The Committee had therefore recommended that the scope of that Directive be extended to all enterprises subject to corporation tax, whatever their legal form.

   A similar problem exists in the case of the "mergers" Directive.

2. It would not seem to be justified to exclude from the scope of the Directive certain forms of companies which have not been included by some Member States in the list annexed to the Directive but which meet all the other conditions. For example, not all Member States have included cooperatives or public savings banks. The 1992 tax reforms in Greece provided for the partial imposition of corporation tax on partnerships which had previously been subject to personal income tax in the hands of their shareholders.

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1 SEC(92) 1118 final.

2 Report of the Committee of independent experts on company taxation of March 1992.

3. Not all Member States have taken steps to eliminate these differences of treatment when transposing the Directive into national law.

4. The present Directive is designed to ensure greater uniformity for the "mergers" Directive and provides for it to be applied to all enterprises resident in a Member State and subject to corporation tax in a Member State.

5. Article 7(2) of the "mergers" Directive is the only provision which links that Directive to the "parent companies/subsidiaries" Directive. A receiving company could, in its capacity as shareholder of a transferring company, receive from the latter reserved profits or capital gains just as easily in the form of distributed profits as in the form of a transfer at the time of the merger.

   Where the receiving company has a "sufficient" holding according to the conditions of the "parent companies/subsidiaries" Directive to benefit from Article 4 of that Directive, the "mergers" Directive permits the same tax concession to be granted in the case of a merger. However, the option provided for in Article 7(2) of the "mergers" Directive does not correspond to the conditions laid down in Article 3 of the "parent companies/subsidiaries" Directive. The latter Directive requires only a minimum holding of 25%, whereas the "mergers" Directive stipulates that the holding must exceed 25%.

   It is therefore necessary to make the concept of "holding" in the "mergers" Directive consistent with that of "minimum holding" in the "parent companies/subsidiaries" Directive.

6. The object of this proposal is to enable Directive 90/434/EEC to apply to a larger number of firms engaging in cross-border activities within the Community. This measure, responsibility for which is shared with the Member States, will make the scope of this Directive more uniform since, as yet, only Portugal and the United Kingdom have included all forms of companies in the list annexed to the Directive.

   The most effective means of eliminating this discrepancy is to bring in a directive with the general objective of extending the scope of Directive 90/434/EEC in such a way that all firms subject to corporation tax will be more certain than they are at present of being able to benefit from this Directive.

II. Commentary

Article 1

(a) This Article provides for the "mergers" Directive to apply to all enterprises which are resident for tax purposes in a Member State and which are subject to corporation tax in a Member State.

    It has been discovered that not all enterprises subject to corporation tax have been included in the list annexed to the Directive. For example, cooperatives are not mentioned among the companies covered by the Directive in Belgium, Denmark, Germany, Spain, France, Ireland, Luxembourg and the Netherlands. Such companies may nevertheless also engage in cross-border activities.

The 1992 tax reforms in Greece have also had the effect that forms of companies other than those referred to in the list are subject to corporation tax.

Other forms of companies could be created in future in the Community.

There is therefore full justification for deleting the first condition in Article 3 of the Directive.

As a result, all entities which are resident for tax purposes in a Member State and which are subject to corporation tax in a Member State will benefit from this Directive.

(b) The amendment to the last part of point (b) of Article 3 is designed to make this concept consistent with that in the OECD model convention.

Article 2

The aim of the amendment to paragraph 2 of Article 7 of the "mergers" Directive is to make the concept of "holding" consistent with that of "minimum holding" in the "parent companies/subsidiaries" Directive. This latter Directive permits Member States to grant the status of parent company and subsidiary to companies with a holding of less than 25%, whereas Article 7(2) of the "mergers" Directive requires a holding in excess of 25%.

Proposal for a Council Directive
amending Directive 90/434/EEC of 23 July 1990
on the common system of taxation applicable to
mergers, divisions, transfers of assets and exchanges of shares
concerning companies of different Member States

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas Article 3 of Directive 90/434/EEC[1] defines the companies falling within its scope;

Whereas that Article does not list all the forms of enterprises resident in a Member State and subject to corporation tax in a Member State;

Whereas the Directive should apply to all enterprises which can carry out cross-border activities in the Community and which are subject to corporation tax in a Member State;

Whereas it is necessary to make the concept of "holding" in Article 7 of the Directive consistent with that of "minimum holding" in Directive 90/435/EEC,[2];

1 OJ No L 225, 20.8.1990, p. 1.
2 OJ No L 225, 20.8.1990, p. 6.

Whereas the most effective means of making the scope of Directive 90/434/EEC more uniform is to bring in a directive ensuring that the firms concerned will be more certain of being able to benefit from Directive 90/434/EEC;

HAS ADOPTED THIS DIRECTIVE:

Article 1

Article 3 of Directive 90/434/EEC is hereby replaced by the following:

"For the purposes of this Directive, "company of a Member State" shall mean any entity which:

(a) according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;

(b) moreover, is subject to one of the following taxes, without being exempt:

- impôt des sociétés/vennootschapsbelasting in Belgium,
- selskabsskat in Denmark,
- Körperschaftsteuer in the Federal Republic of Germany,
- φόρος εισοδήματος νομικών προσώπων κερδοσκοπικού χαρακτήρα in Greece,
- impuesto sobre sociedades in Spain,
- impôt sur les sociétés in France,
- corporation tax in Ireland,

- imposta sul reddito delle persone giuridiche in Italy,
- impôt sur le revenu des collectivités in Luxembourg,
- vennootschapsbelasting in the Netherlands,
- imposto sobre o rendimento das pessoas colectivas in Portugal,
- corporation tax in the United Kingdom,

or to a tax which is identical or fundamentally similar to one of the above taxes and which is subsequently levied in addition to or in place of that tax."

Article 2

Article 7(2) of Directive 90/434/EEC is hereby replaced by the following:

"2. The Member States may derogate from paragraph 1 where the receiving company's holding in the capital of the transferring company does not confer on it the status of parent company under the national provisions adopted pursuant to Article 3(1)(a) of Directive 90/435/EEC."

Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 1994 and shall forthwith inform the Commission thereof.

When the Member States adopt such provisions, the latter shall contain a reference to this Directive or shall be accompanied by such a reference when they are officially published. The arrangements for such a reference shall be determined by the Member States.

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

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

Impact assessment form

The impact of the proposal on business, with special reference to small and medium-sized enterprises (SMEs)

Title of proposal: Proposal for a Council Directive amending Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.

The proposal: This Directive extends the scope of Directive 90/434/EEC to all enterprises resident in a Member State and subject to corporation tax in a Member State.

Directive 90/434/EEC does not cover all such enterprises. During the course of 1991 (when Member States were in the process of transposing the Directive into national law), the Commission attempted, together with the Member States, to solve this problem. However, not all Member States have included all such enterprises in their legislation transposing the Directive. An amending directive is therefore necessary.

Impact: 1. The initial Directive, which is designed to remove a tax obstacle to the restructuring of Community companies, does not apply to all forms of company.

2. In order to ensure greater uniformity, this proposal for a Directive provides for Directive 90/434/EEC to apply to all enterprises in a Member State that are subject to corporation tax, particularly cooperatives or partnerships opting to be subject to corporation tax.

   In order to benefit from the Directive, enterprises will be required to demonstrate only that they meet the conditions laid down it.

3. This proposal will have a favourable impact on cross-border investment by Community enterprises and on their international competitiveness. It will therefore also have a positive effect on employment.

4. The proposal does not contain measures designed to take account of the specific situation of SMEs.

Consultation: Interested parties have already called on a number of occasions for the scope of Directive 90/434/EEC to be extended.

For example:

- the Savings Banks Group of the European Economic Community;
- the Association of Cooperative Banks of the EC.

Proposal for a Council Directive

amending Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

EXPLANATORY MEMORANDUM

I. General

1. The Ruding Committee stated in its report[1] that the withholding taxes levied on dividends paid by subsidiaries established in one Member State to their parent companies established in another Member State constitute a major obstacle to cross-border capital flows in the Community. Considerable progress was made during 1990 in eliminating such withholding taxes, at least as regards intra-Community income flows. The "parent companies/subsidiaries" Directive adopted by the Council in July 1990, which provides for the abolition of the double taxation of dividends, is currently in force in the Member States.

   However, the scope of that Directive varies from one Member State to another as regards the companies covered. The Committee therefore recommends that the scope of the Directive be extended to all enterprises subject to corporation tax, irrespective of their legal form.

2. In its communication of 26 June 1992 to the Council and to Parliament subsequent to the conclusions of the Ruding Committee indicating guidelines on company taxation linked to the further development of the internal market,[2] the Commission stated that it considers the extension of the scope of the "parent companies/subsidiaries" Directive along the lines suggested by the Committee to be highly desirable as a means of further reducing the double taxation which most penalizes the international activities of companies.

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1 Report of the Committee of independent experts on company taxation of March 1992.

2 SEC(92) 1118 final.

3. It does not seem to be justified to exclude from the Directive's scope certain forms of companies which were not included by some Member States in the list annexed to the Directive but which meet all the other conditions, particularly as they are generally covered by bilateral agreements, especially as regards withholding taxes on dividends. For example, not all the Member States have taken account of cooperatives or public savings banks. The 1992 tax reforms in Greece also provide for the partial imposition of corporation tax on partnerships which were previously subject to personal income tax in the hands of their shareholders.

4. Not all the Member States have taken steps to eliminate this difference of treatment when transposing the Directive into national law.

5. The present Directive is designed to ensure greater uniformity of the "parent companies/subsidiaries" Directive and to enable it to be applied to all enterprises resident in a Member State and subject to corporation tax in a Member State.

6. Article 4(1) of the Directive is intended to prevent profits distributed by a subsidiary to its parent company from being subject to double taxation through the application of either the exemption method or the imputation method. Where the subsidiary in turn owns a subsidiary, the question arises of whether, in the case of the imputation method being applied, the parent company can set the tax deductible in the hands of the subsidiary against the tax paid by the sub-subsidiary or whether it should limit the offsetting to the tax actually due from the subsidiary. If only this latter option is adopted, there is a real danger that double taxation will continue. The Directive's aim of eliminating double taxation would therefore not be achieved.

7. It is, therefore, appropriate to determine the tax to be offset by the parent company in such a way that economic double taxation is totally eliminated.

8. The object of this proposal is to enable Directive 90/435/EEC to apply to a larger number of firms engaging in cross-border activities within the Community. This measure, responsibility for which is shared with the Member States, will make the scope of this Directive more uniform since, as yet, only Portugal and the United Kingdom have included all forms of companies in the list annexed to the Directive.

   The most effective means of eliminating this discrepancy is to bring in a directive with the general objective of extending the scope of Directive 90/435/EEC in such a way that all firms subject to corporation tax will be more certain than they are at present of being able to benefit from this Directive.

II. Commentary

Article 1

(a) The aim of this Article is to apply the "parent companies/subsidiaries" Directive to all enterprises which are resident for tax purposes in a Member State and which are subject to corporation tax in a Member State.

It has been found that not all enterprises subject to corporation tax have been included in the list annexed to the Directive. For example, cooperatives are not mentioned among the companies covered by the Directive in Belgium, Denmark, Germany, Spain, France, Ireland, Luxembourg and the Netherlands. However, such companies can also carry out cross-border activities.

Similar problems exist in the case of public savings banks.

The 1992 tax reforms in Greece have also had the effect that forms of companies other than those included in the list are now subject to corporation tax.

Some Member States permit partnerships which are normally subject to personal income tax in the hands of their shareholders to opt to be subject to corporation tax. It is necessary to enable such partnerships to benefit from the Directive.

Other forms of companies, such as the European Company, could be created in future in the Community.

There is therefore full justification for deleting the first condition in Article 2 of the Directive.

As a result, all entities which are resident for tax purposes in a Member State and which are subject to corporation tax in a Member State will benefit from this Directive.

(b) The amendment to the last part of point (b) in Article 2 is designed to make this concept consistent with that in the OECD model convention.

Article 2

The current wording of the Directive does not provide for those Member States which apply the imputation method for eliminating double taxation to take account of the tax paid downstream of the subsidiary. That company may in turn own a subsidiary which meets the conditions set out in the Directive. Where the first subsidiary receives dividends from its own subsidiary and redistributes them to the parent company, there is a real risk of double taxation continuing if the offsetting by the parent company is limited to the tax actually paid by the subsidiary. This risk exists both when the country of the subsidiary applies the exemption method and where it applies the imputation method and a corporation-tax rate which is below that in the country of the parent company.
If the Directive's aim of abolishing economic double taxation entirely is to be achieved, it is necessary to provide for the parent company to be able also to take account of the tax paid downstream of the subsidiary where all the companies involved meet the conditions laid down in the Directive.

Proposal for a Council Directive
amending Directive 90/435/EEC of 23 July 1990
on the common system of taxation applicable in the case of
parent companies and subsidiaries of different Member States

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas Article 2 of Directive 90/435/EEC[1] defines the companies falling within its scope;

Whereas that Article does not list all the forms of enterprises resident in a Member State and subject to corporation tax in a Member State;

Whereas the Directive should apply to all enterprises which can carry out cross-border activities in the Community and which are subject to corporation tax in a Member State;

Whereas it is necessary to ensure that economic double taxation is completely eliminated where a subsidiary redistributes to its parent company profits derived from its own subsidiary;

1 OJ No L 225, 20.8.1990, p. 6.

Whereas the most effective means of making the scope of Directive 90/435/EEC more uniform is to bring in a directive ensuring that the firms concerned will be more certain of being able to benefit from Directive 90/435/EEC;

HAS ADOPTED THIS DIRECTIVE:

Article 1

Article 2 of Directive 90/435/EEC is hereby replaced by the following:

"For the purposes of this Directive, "company of a Member State" shall mean any entity which:

(a) according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;

(b) moreover, is subject to one of the following taxes, without being exempt:

- impôt des sociétés/vennootschapsbelasting in Belgium,
- selskabsskat in Denmark,
- Körperschaftsteuer in the Federal Republic of Germany,
- φόρος εισοδήματος νομικών προσώπων κερδοσκοπικού χαρακτήρα in Greece,
- impuesto sobre sociedades in Spain,
- impôt sur les sociétés in France,
- corporation tax in Ireland,

- imposta sul reddito delle persone giuridiche in Italy,
- impôt sur le revenu des collectivités in Luxembourg,
- vennootschapsbelasting in the Netherlands,
- imposto sobre o rendimento das pessoas colectivas in Portugal,
- corporation tax in the United Kingdom,

or to a tax which is identical or fundamentally similar to one of the above taxes and which is subsequently levied in addition to or in place of that tax."

Article 2

Article 4 (1) of Directive 90/435/EEC is hereby replaced by the following:

"1. Where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the State of the parent company shall, except when the latter is liquidated, either:

- refrain from taxing such profits, or

- tax such profits while authorizing the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary and any preceding subsidiary which relates to those profits and, if appropriate, the amount of the withholding tax levied by the Member State in which the subsidiary and any preceding subsidiary are resident, pursuant to the derogations provided for in Article 5, up to the limit of the amount of the corresponding domestic tax. Preceding subsidiaries shall be deemed to be all successive companies which are subsidiaries, within the meaning of Article 3, of the company which precedes them."

Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive before 1 January 1994. They shall forthwith inform the Commission thereof.

   When the Member States adopt such provisions, the latter shall contain a reference to this Directive or shall be accompanied by such a reference when they are officially published. The arrangements for such a reference shall be determined by the Member States.

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

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

Impact assessment form

The impact of the proposal on business, with special reference to small and medium-sized enterprises (SMEs)

Title of proposal: Proposal for a Council Directive amending Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

The proposal: This Directive extends the scope of Directive 90/435/EEC to all enterprises resident in a Member State and subject to corporation tax in a Member State.

Directive 90/435/EEC does not cover all such enterprises. During the course of 1991 (when Member States were in the process of transposing the Directive into national law), the Commission attempted, together with the Member States, to solve this problem. However, not all the Member States have included all such enterprises in their legislation transposing the Directive. An amending directive is therefore necessary.

Impact: 1. The initial Directive, which is designed to eliminate the economic double taxation of dividends paid between companies in different Member States, does not apply to all forms of company.

2. In order to ensure greater uniformity, this proposal for a Directive provides for Directive 90/435/EEC to apply to all enterprises in a Member State that are subject to corporation tax, particularly cooperatives or partnerships opting to be subject to corporation tax.

   In order to benefit from the Directive, enterprises will be required to demonstrate only that they meet the conditions laid down in it.

3. The proposal for a Directive is also designed to ensure that the economic double taxation of dividends is completely eliminated where a subsidiary redistributes profits derived from its own subsidiary.

4. This proposal will have a favourable impact on cross-border investment by Community enterprises and on their international competitiveness. It will therefore also have a positive effect on employment.

5. The proposal does not contain measures designed to take account of the specific situation of SMEs.

Consultation: Interested parties have already called on a number of occasions for the scope of Directive 90/435/EEC to be extended.

For example:

- the Savings Banks Group of the European Economic Community;
- the Association of Cooperative Banks of the EC.

25

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