COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.07.2003
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2003/0179 (CNS)

C5-0427-03

Proposal for a

COUNCIL DIRECTIVE

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

(presented by the Commission)

EN

EXPLANATORY MEMORANDUM

1. INTRODUCTION

1. The European Council held in Lisbon in March 2000[1] concluded that the European Union had the strategic goal to become the most competitive and dynamic knowledge-based economy in the world. This objective was reiterated by the Stockholm European Council of March 2001[2]. The Lisbon Council also called for building up a supportive general framework for economic activity in the EU.

2. In July 1999, the Council of Ministers had given a mandate to the Commission to investigate the impact of tax provisions that constitute obstacles to cross-border economic activities in the internal market and remedies thereto. The context generated by the Lisbon Council strengthens the importance of analysing corporate taxes since taxation of companies can play an important role in achieving the objectives set by the Council. Following this mandate, the Commission services conducted a study on company tax.

3. The conclusions of the company tax study[3] resulted in a Commission Communication[4]. There it was examined, among other things, whether the current application of company taxation in the internal market creates inefficiencies and prevents operators from exploiting its full benefits. This would imply a loss of EU welfare, undermine the competitiveness of EU businesses and thus be contrary to the Lisbon objectives. The Communication sets out the Commission view of what needs to be and what can be realistically done in the area of company taxation in the EU over the next few years in order to adapt company taxation in the EU to the new economic framework and to achieve a more efficient internal market without internal tax obstacles. For this purpose, a number of concrete initiatives were presented.

4. In addition, the Commission adopted in 2001 a Communication on tax policy for the European Union[5] where it identified both general objectives and a number of specific priorities in direct and indirect taxation. It referred in particular to corporate tax issues where it highlighted that, at present, cross-border activities of companies give rise to numerous cases of double taxation hampering legitimate business activities

5. Moreover, the Statute of the European company (*Societas Europaea* - SE) was adopted in 2001[6]. It aims at contributing to the completion of the internal market and

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1 Presidency Conclusions of the Lisbon European Council of 23 and 24 March 2000, Press release nr: 100/1/00, 24/3/2000, published on the website of the Council of the European Union (http://ue.eu.int).

2 Presidency Conclusions of the Stockholm European Council of 23 and 24 March 2001, Press release nr: 100/1/01, 24/3/2001, published on the website of the Council of the European Union (http://ue.eu.int).

3 Commission staff working paper "Company taxation in the internal market" SEC (2001) 1681.

4 Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, "Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities", COM (2001) 582 final.

5 Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee "Tax Policy in the European Union", COM (2001) 260 final.

6 Council Regulation (EC) n° 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) and the Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294 of 10.11.2001.

the spreading of the improvements that this brings about in the economic and social perspective throughout the Community. To this end, it provides for a legal framework so that structures of production can adapt to the Community dimension and carry out the reorganisation of their business on a Community scale. The success of the SE is very much related to the applicable tax regime. It should be able to benefit from the whole body of harmonised corporate tax law.

6. In view of the existing cross-border tax obstacles, ensuring the correct functioning of the internal market requires some action. According to Article 94 of the EC Treaty, the Commission has the power to propose to the Council directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.

7. The Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (the Parent-Subsidiary Directive)[7] already provides for a solution to a cross-border obstacle arising from double taxation of profits. However, it is possible to improve the scope of the Directive and the methods provided for the elimination of double taxation.

8. During 1993 the Commission adopted a proposal amending the Parent-Subsidiary Directive[8]. This proposal included two modifications. The first amendment was designed to enable the Directive to be applied to all enterprises subject to corporation tax, irrespective of their legal form. The second amendment referred to the imputation method. It provided for parent companies to be able to take account of the tax paid by the subsidiary and any other lower-tier subsidiary where all the companies involved met the conditions laid down in the Directive.

9. The company tax study released in 2001 referred to these same issues. In addition, the experience gained after the implementation of the Directive in 1992 has revealed some other shortcomings and the study refers to them in detail and considers possible measures to tackle them.

10. The Commission Communication following the corporate tax study highlighted the priority of tabling the necessary amendments to the current Directives harmonising corporate tax, following technical consultations with Member States. In the course of 2002, the Commission services have called several meetings of the appropriate Commission working party during which the relevant issues have been discussed with delegations of technical experts from Member States.

11. This proposal for a Directive amends the Parent-Subsidiary Directive. It aims at introducing the necessary changes to this Directive to take into account the above-mentioned Conclusions and Communications. The final goal is to eliminate obstacles to the proper functioning of the internal market found in the tax regimes applicable to parent companies and subsidiaries of different Member States. Eventually, removing the various tax obstacles to cross-border economic activity in the Internal Market would require the introduction of a common consolidated tax base for the EU-wide

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7 Council 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, OJ L 225 of 20.8.1990.

8 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, COM (93) 293 final, OJ C 225 of 20.08.1993.

activities of companies. However, as long as this objective is not achieved, specifically targeted measures are needed to address the most pressing practical tax problems of internationally active companies. Such measures include all those considered absolutely essential in order to improve the existing body of EU company tax law. In particular, this proposal deals with matters treated in the proposal adopted in 1993. It also has other provisions dealing with new issues. In consequence, the previous proposal amending the Parent-Subsidiary Directive is being withdrawn.

12. One of the main concerns is the limited scope of the Parent-Subsidiary Directive. It applies only to those companies included in the list annexed to the directive. The ECOFIN Council of 26-27 November 2000[9] had already concluded that the updating of the list was a political priority. The Commission study on company taxation shows the need to extend and improve the Parent-Subsidiary Directive so as to cover a wider range of companies.

13. This topic was addressed in the proposal adopted in 1993. That proposal aimed at extending the Directive to all enterprises resident and subject to corporation tax in a Member State. However, the asymmetries found in commercial law governing the legal types of entities and the diversity of tax arrangements applicable to them in the Member States creates considerable problems. These difficulties were already brought up during the Council discussions on the proposal held during 1996 and 1997. These discussions were suspended without reaching a final conclusion. This subject has been discussed again with the Member States from a technical point of view in the framework of the appropriate Commission working party. As a result, the aim of improving the coverage of the Parent-Subsidiary Directive is achieved in this current proposal by proposing the extension of the list of entities annexed to the Directive, to cover new named legal types.

14. As already mentioned, the statute of the SE has been recently adopted. The Directives' scope should include the companies which will in future operate under this new legal form. Thus, the SE is among the new entries proposed for inclusion in the list of entities covered by the Directive.

15. Some of the new entities proposed for inclusion in the list raise a particular technical problem. It could be the case that the Member State where an entity is established treats it for its own tax purposes as a corporate taxpayer whereas another Member State whose resident has an interest in that same entity treats it for its own tax purposes as transparent (i.e. it looks through the "corporate" structure). The latter State attributes the income of the entity to its resident having an interest in the entity and taxes it accordingly. This Member State should be obliged to extend the benefits of the Directive to that resident with an interest in the entity.

16. One of the basic elements of the Parent-Subsidiary Directive is the exemption of withholding tax charged on distributed profits. According to the Commission Communication following the company tax study, the Directive could be improved here by extending its benefits to a wider range of cases. This could be achieved by reducing the conditions required in order to qualify as a parent company and as a

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9 Annex to the Presidency Conclusions of the ECOFIN Council of 26 and 27 November 2000, Press release 453 nr: 13861/00, Brussels 26/11/2000, published in the website of the Council of the European Union (http://ue.eu.int).

subsidiary company. It is proposed to lower the minimum holding threshold requirement from 25% to 10%.

17. The second main element of the Directive is the application of methods to eliminate double taxation of the parent company. A subsidiary company is taxed on its income. Its parent company may be taxed as well on its share of those profits when the subsidiary distributes them. In order to relieve double taxation, Article 4 (1) of the Directive obliges the Member State of the parent company to exempt distributed profits from the subsidiary or to authorise the parent company to deduct that fraction of the corporation tax paid by the subsidiary which relates to those profits. Member States may choose between one of these methods to eliminate double taxation. When the second method is chosen, the deduction is not extended to corporation tax paid by any lower-tier subsidiary of the subsidiary from which the profits are derived. In consequence, there is still a possibility that double taxation occurs. The Directive's aim of eliminating double taxation is therefore not fully achieved.

18. 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. The method now proposed is similar to that included in the proposal made in 1993.

19. The Parent-Subsidiary Directive does not deal explicitly with the situation where profits distributed are received by a permanent establishment in respect of shares effectively connected with it. The coverage of these situations is among the aims of the Directive. In addition, the European Court of Justice jurisprudence states that permanent establishments may not be discriminated against in relation to subsidiary companies when both are subject to a similar tax regime[10]. It is appropriate to clarify the text of the Directive concerning this issue.

20. The current wording of Article 4 (2) of the Directive permits Member States to exclude from tax deduction charges incurred by parent companies relating to their holdings in the subsidiaries. In the case of management costs, Member States may estimate the amount at a flat rate not exceeding 5% of the profits distributed. As a consequence, the parent company cannot deduct costs up to 5% of the profits distributed by the subsidiary while the real costs linked to the shareholding may be lower. In such a case, this company is effectively prevented from deducting other costs which would in the normal course of events be deductible.

21. This negative effect could be overcome by allowing the parent company to show that its actual expenses relating to the holding are lower. The non-deductible charges would then be limited to the real costs associated with the shares.

22. The transitional provisions authorising Greece, Germany and Portugal to charge withholding taxes on dividends are no longer effective. Being superfluous, this proposal will delete the corresponding texts included in paragraphs (2), (3) and (4) of Article 5 of the Parent-Subsidiary Directive.

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[10] Judgment of the Court of 28 January 1986, case C-270/83, *Commission vs. France*, ECR 1986, p. 273, and Judgment of the Court of 21 September 1999, case C-307/97, *Compagnie de Saint-Gobain v. Finanzamt Aachen-Innenstadt*, ECR 1999, p. I-6161.

2. COMMENTARY ON THE ARTICLES OF THE PROPOSAL FOR A DIRECTIVE

Article 1

This Article comprises five paragraphs amending the Parent-Subsidiary Directive.

paragraph (1)

The aim of this paragraph is to amend Article 1 of the Parent-Subsidiary Directive. It makes clear that the Member State where a permanent establishment is situated must grant the benefits of the Directive when this permanent establishment receives distributed profits. Among other situations, the change proposed will ensure that the Directive covers the case where the parent company and its subsidiary are tax residents in the same Member State and the dividend payment is received by a permanent establishment of the parent company situated in a different Member State.

paragraph (2)

Article 3.1 point (a) of the Parent-Subsidiary Directive is amended in order to reduce from 25% to 10% the shareholding requirements needed to qualify for the status of parent company and subsidiary company, thus increasing the number of companies that will be able to benefit from the relief provided for in the Directive.

paragraph (3)

1. Point (a) amends the wording of Article 4 of the Parent-Subsidiary Directive in order to include several measures. In the first place, paragraph 1 is modified to include the obligation of the Member State where a permanent establishment is situated to refrain from taxing distributed profits received by it from subsidiaries of the company of which it is a permanent establishment or to allow deduction of the tax paid by the subsidiary which relates to the profits distributed to the permanent establishment.

2. In addition, this same point (a) amends paragraph 1 of this same Article 4 in order to improve double taxation relief. The issue arises when the imputation method is applied. According to the text of the Parent-Subsidiary Directive, parent companies may be taxed on the profits received from their subsidiary and, in that case, they deduct from their tax on such profits the taxes already paid by the subsidiary on those same profits before distribution. This deduction has a limit: the tax owed by the parent company in respect of the profits received. However, the current draft of the Directive does not refer to those cases where there is a chain of companies. In such cases, the parent company may receive profits that have been distributed through the different tiers of the group of companies. These profits would have been subject to tax in the hands of the successive subsidiaries. Article 4.1 refers only to the deduction of the tax paid by the immediate subsidiary but does not refer to the taxes paid further downstream in the chain of companies. It is now proposed to allow deduction not only of the tax paid by the immediate subsidiary but also the tax paid by any other lower-tier subsidiary in relation to the profits distributed. This proposal maintains the current limit: the parent company can deduct taxes paid by its lower-

tier subsidiaries subject to the specified limitation of the tax due on the profits received.

3. It also deletes the reference to the transitional provisions, included in paragraph 1 of Article 4 of the Parent-Subsidiary Directive, as those provisions are no longer applicable (see below n° 2 of the comments made to paragraph (5)).

4. Point (b) includes a new paragraph 1a in Article 4 of the Parent-Subsidiary Directive, due to the proposed changes to the Directive concerning the extension of the scope of the Directive. This new paragraph is needed to take account of matters arising as a result of including some of the new entries in the list. Some of these new entities are subject to corporation tax in their Member State of residence but, for tax purposes, are considered transparent in a different Member State. The latter Member States levy tax on their own resident taxpayers that have an interest in such entities. The aim of the text proposed is to provide for a specific tax regime applicable in these cases. These Member States will not be prevented from maintaining this taxation approach in the circumstances specified in the Directive. However, at the time when they come to tax their resident taxpayers with an interest in such entities, they will be obliged to allow them to deduct the taxes paid by those entities in their Member State of residence and those paid by its lower-tier subsidiaries. In addition, these same Member States must exempt from taxation the dividends paid by the companies they treat as transparent to the companies having an interest in them. As a requirement, the companies and the persons having an interest in them must fulfil the conditions set in the Directive in order to be considered as parent companies or as subsidiaries.

5. This new paragraph identifies those taxpayers by referring to companies which are fiscally transparent by reason of the applicable provisions relating to the organisation of commercial undertakings. These are the criteria that Member States use when deciding whether to treat a non-resident company as fiscally transparent. The text proposed avoids any reference to companies that are considered as fiscally transparent by a Member State based on the tax regime applicable to them in their State of residence. Hence, this provision does not deal with the issues raised by controlled foreign company legislation

6. Point (c) introduces a new sentence in paragraph 2 of Article 4 of the Parent-Subsidiary Directive. Its former text authorised Member States to deny the tax deduction of management costs relating to the holding in subsidiaries from the tax base of the parent company. These costs could according to the Directive be fixed at a flat rate not exceeding 5%. The proposed text will permit parent companies to prove, to the extent that they are lower than 5%, the actual management costs incurred in order to reduce the amount of non-deductible costs

7. Point (d) adds a reference to the new paragraph 1a of this Article 4 since it deals with similar issues as paragraph 1.

paragraph (4)

1. Point (a) amends Article 5 of the Parent-Subsidiary Directive in order to include the new shareholding requirements provided for in Article 3.

2. Point (b) deletes the transitional provisions in favour of the Hellenic Republic, the Federal Republic of Germany and the Portuguese Republic, as they are no longer applicable.

paragraph (5)

1. The list of companies, to which the Parent-Subsidiary Directive applies, contained in its annex, is replaced by a new one incorporating other types of entities and in particular the European company. This proposal will extend the benefits of the Directive to new legal types of entities, including co-operatives, mutual companies, certain non-capital based companies, saving banks, funds and associations with commercial activity. The new list has been drawn up following intensive discussions with the Member States

2. The European company is included under letter (z) of the annex. This new entry does not follow the natural sequence of letters because it is intended to make additional entries in the annex under points (p) to (y) to cover the types of company that exist in the accession countries.

Article 2

This Article lays down the timetable and the requirements for transposing the Directive into Member States' national laws. Member States are required forthwith to inform the Commission of the transposition of the Directive in their national laws and submit a correlation table between this Directive and the national provisions adopted.

Article 3

This Article refers to the date of entry into force of the amending Directive and to its publication.

2003/0179 (CNS)

Proposal for a

COUNCIL DIRECTIVE

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 94 thereof,

Having regard to the proposal from the Commission[1],

Having regard to the opinion of the European Parliament[2],

Having regard to the opinion of the European Economic and Social Committee[3],

Having regard to the opinion of the Committee of the Regions[4],

Whereas:

(1) Council Directive 90/435/EEC of 23 July 1990 on the common systems of taxation applicable in the case of parent companies and subsidiaries of different Member States[5] introduced common rules in relation to dividend payments and other profit distributions, which are intended to be neutral from the point of view of competition.

(2) The objective of Directive 90/435/EEC is to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company.

(3) Experience gained in the implementation of Directive 90/435/EEC has revealed different ways in which that Directive might be improved and the beneficial effects of the common rules as adopted in 1990 extended.

(4) Article 2 of Directive 90/435/EEC defines the companies falling within its scope. The Annex contains a list of companies to which the Directive applies. Certain forms of companies are not included in the list in the Annex, even though they are resident for tax purposes in a Member State and are subject to corporation tax there. The scope of

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1 OJ C , , p. .
2 OJ C , , p. .
3 OJ C , , p. .
4 OJ C , , p. .
5 OJ L 225, 20.8.1990, p. 6, Directive as last amended by the Treaty of Accession for Austria, Finland and Sweden.

Directive 90/435/EEC should therefore be extended to other entities which can carry out cross-border activities in the Community and which meet all the conditions laid down in that Directive.

(5) Since the European company as established in Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)[6] and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees[7] is a public limited-liability company of similar nature to other legal types of companies already covered by Directive 90/435/EEC the SE should be added to the list in the Annex to Directive 90/435/EEC.

(6) The new entities to be included in the list are corporate taxpayers in their Member State of residence but some are considered transparent for tax purposes by other Member States. Member States treating non-resident corporate taxpayers as fiscally transparent should apply the benefits of Directive 90/435/EEC to them. In addition, those Member States should not tax those same profits a second time when they are distributed from the subsidiaries to their parent companies.

(7) In order to extend the benefits of Directive 90/435/EEC, the threshold of the shareholding for one company to be considered a parent and the other as its subsidiary should be lowered from 25% to 10%.

(8) Directive 90/435/EEC does not expressly deal with the situation where shares are held through a permanent establishment of the parent company. It should be made clear that the Member State where the permanent establishment is situated is required to apply the provisions of that Directive in such circumstances.

(9) It is normal practice for corporate groups to be organised in chains of companies and profits to be distributed through the chain of subsidiaries to the parent company. Double taxation should be eliminated in such cases. Therefore, the parent company should be able to deduct any tax paid by any of the subsidiaries in the chain provided that the requirements set out in Directive 90/435/EEC are met.

(10) Directive 90/435/EEC allows Member States to fix the amount of non-deductible management costs from the taxable profits of the parent company as a flat rate not exceeding 5% of the profits distributed by the subsidiary. In some circumstances, that flat rate might not correspond to the real management costs incurred, meaning that other expenses could not be deducted. As an alternative to the flat-rate amount of 5%, parent companies should be allowed to prove the actual costs incurred in relation to the holding which Member States may consider non tax-deductible.

(11) The transitional provisions in Article 5 are no longer applicable and should therefore be deleted.

(12) Directive 90/435/EEC should therefore be amended accordingly,

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6 OJ L 294 of 10.11.2001, p. 1.
7 OJ L 294 of 10.11.2001, p. 22.

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 90/435/EEC is amended as follows:

1. In Article 1(1) the following indent is added:

   "- to distributions of profits received by permanent establishments situated in that State of companies of other Member States which come from their subsidiaries of a Member State. "

2. In Article 3 (1) point a is replaced by the following:

   "(a) the status of parent company shall be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 10 % in the capital of a company of another Member State fulfilling the same conditions; "

3. Article 4 is amended as follows:

   (a) Paragraph 1 is replaced by the following:

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

   – refrain from taxing such profits, or

   – tax such profits while authorising the parent company and the permanent establishment to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary and any lower-tier subsidiary which relates to those profits, up to the limit of the amount of the corresponding tax. "

   (b) The following paragraph 1a is inserted:

   "1a. Where the State of the parent company considers a subsidiary to be fiscally transparent on the basis of applicable law relating to the organisation of commercial undertakings and therefore taxes the parent company on its share of the profits of its subsidiary as and when those profits arise, the State of the parent company shall refrain from taxing the distributed profits of the subsidiary;

   When taxing the parent company's share of the profits of its subsidiary as they arise the State of the parent company shall authorise the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary and any lower-tier subsidiary which relates to those profits up to the limit of the amount of the corresponding domestic tax."

(c) In paragraph 2 the following sentence is added

"The parent company shall be allowed to provide evidence of the real management costs incurred that are to be considered non-deductible."

(d) In paragraph 3 the first subparagraph is replaced by the following:

"Paragraphs 1 and 1a shall apply until the date of effective entry into force of a common system of company taxation."

4. Article 5 is amended as follows:

(a) Paragraph 1 is replaced by the following:

"Profits which a subsidiary distributes to its parent company shall, at least where the latter holds a minimum of 10% of the capital of the subsidiary, be exempt from withholding tax."

(b) Paragraphs 2, 3 and 4 are deleted.

5. The Annex is replaced by the text in the Annex to this Directive.

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2004 at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

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

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

Article 3

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

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

ANNEX

"ANNEX

List of companies referred to in Article 2 (a)

a) companies under Belgian law known as "société anonyme"/"naamloze vennootschap", "société en commandite par actions"/"commanditaire vennootschap op aandelen", "société privée à responsabilité limitée"/"besloten vennootschap met beperkte aansprakelijkheid" "société coopérative à responsabilité limitée"/"coöperatieve vennootschap met beperkte aansprakelijkheid", "société coopérative à responsabilité illimitée"/"coöperatieve vennootschap met onbeperkte aansprakelijkheid", and public undertakings which have adopted one of the abovementioned legal forms;

b) companies under Danish law known as "aktieselskab" and "anpartsselskab". Other companies subject to tax under the Corporation Tax Act, insofar as their taxable income is calculated and taxed in accordance with the general tax legislation rules applicable to "aktieselskaber";

c) companies under German law known as "Aktiengesellschaft", "Kommanditgesellschaft auf Aktien", "Gesellschaft mit beschränkter Haftung", "bergrechtliche Gewerkschaft", "Versicherungsvereine auf Gegenseitigkeit", "Erwerbs- und Wirtschaftsgenossenschaften", "Betriebe gewerblicher Art von juristischen Personen des öffentlichen Rechts", insofar as these bodies may, under German Law, assume the functions of parent company or subsidiary;

d) companies under Greek law known as "ανώνυμη εταιρεία", "εταιρεία περιωρισμένης ευθύνης (Ε.Π.Ε.)";

e) companies under Spanish law known as: "sociedad anónima", "sociedad comanditaria por acciones", "sociedad de responsabilidad limitada", and those public law bodies which operate under private law;

f) companies under French law known as "société anonyme", "société en commandite par actions", "société à responsabilité limitée", "sociétés par actions simplifiées", "sociétés d'assurances mutuelles", "caisses d'épargne et de prévoyance", "sociétés civiles" which are automatically subject to corporation tax, "coopératives", "unions de coopératives" and industrial and commercial public establishments and undertakings;

g) companies incorporated or existing under Irish laws, bodies registered under the Industrial and Provident Societies Act, building societies incorporated under the Building Societies Acts and trustee savings banks within the meaning of the Trustee Savings Banks Act, 1989;

h) companies under Italian law known as "società per azioni", "società in accomandita per azioni", "società a responsibilità limitata", "società cooperative", "società per mutua assicurazione", and private and public entities whose activity is wholly or principally commercial;

i) companies under Luxembourg law known as "société anonyme", "société en commandite par actions", "société à responsabilité limitée", "société coopérative", "société coopérative organisée comme une société anonyme", "association d'assurances mutuelles", "association d'épargne-pension", "entreprise de nature commerciale, industrielle ou minière de l'Etat, des communes, des syndicats de communes, des établissements publics et des autres personnes morales de droit public";

j) companies under Dutch law known as "naamloze vennnootschap", "besloten vennootschap met beperkte aansprakelijkheid", "Open commanditaire vennootschap", "Coöperatie", "onderlinge waarborgmaatschappij", "Fonds voor gemene rekening", "vereniging op coöperatieve grondslag" and "vereniging welke op onderlinge grondslag als verzekeraar of kredietinstelling optreedt";

k) companies under Austrian law known as "Aktiengesellschaft", "Gesellschaft mit beschränkter Haftung", "Versicherungsvereine auf Gegenseitigkeit", "Erwerbs- und Wirtschaftsgenossenschaften", "Betriebe gewerblicher Art von Körperschaften des öffentlichen Rechts", "Sparkassen";

l) commercial companies or civil law companies having a commercial form and cooperatives and public undertakings incorporated in accordance with Portuguese law;

m) companies under Finnish law known as "osakeyhtiö/aktiebolag", "osuuskunta /andelslag","säästöpankki/sparbank"and "vakuutusyhtiö/försäkringsbolag";

n) companies under Swedish law known as "aktiebolag", "ekonomiska föreningar", "sparbanker", "ömsesidiga försäkringsbolag";

o) companies incorporated under the law of the United Kingdom;

z) companies incorporated under Council Regulation (EC) n° 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and the Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees."

FINANCIAL STATEMENT

This proposal for a Council Directive has no financial implications for the Community budget.

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 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

DOCUMENT REFERENCE NUMBER

THE PROPOSAL

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

   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 Directive) aims at harmonising tax rules governing the relations between parent companies and subsidiaries of different Member States. It introduces a neutral tax regime from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level. This is achieved by eliminating double taxation of profits obtained by subsidiaries of a Member State that are distributed to their parent companies of a different Member State. The harmful effects of a well-known tax obstacle to the internal market are so reduced.

   However, due to the current narrow scope of the Directive, its implementation in Member States is very different and not all types of entities are covered. Its benefits as currently provided do not avoid double taxation in all circumstances. These facts reduce its effectiveness and result in international double taxation of profits. This situation leads to obstacles to cross-border activity, establishment and investment in the internal market. It adversely affects the competitiveness of European companies. In economic terms there is a loss of potential EU welfare.

   In addition, the Statute of the European company (*Societas Europaea* - SE) was adopted in 2001. According to the preamble of its Regulation, the completion of the internal market and the improvement it brings about in the economic and social situation throughout the Community mean not only that barriers to trade must be removed, but also that the structures of production must be adapted to the Community dimension. For that purpose it is essential that companies whose business is not limited to satisfying purely local needs should be able to plan and carry out the reorganisation of their business on a Community scale. The Regulation on the SE does not include any tax provisions. It is urgent to adopt measures now. It is essential that the benefits of the Directive are applicable to this new legal type.

This proposal for a Directive contains targeted measures towards specific problems. It does not seek to apply a global solution to all existing cross-border obstacles. It is designed to eliminate double taxation in a larger number of cases. It aims at broadening the scope of harmonisation provided for in the current text of the Directive and improving the methods to avoid double taxation. All this is achieved in the proposal through the following measures:

– The Directive will be applicable to a larger number of legal persons and entities, including the SE.

– The Directive will apply to profits distributions received through a permanent establishment of the parent company.

– The shareholding requirements to qualify as a parent company or as a subsidiary company are reduced.

– When the imputation method to prevent economic double taxation applies, the parent company shall deduct from the tax on the distributed profits which it receives from its direct subsidiary that fraction of the tax paid not only by this direct subsidiary but also by successive subsidiaries downstream of the direct subsidiary.

– Parent companies will be allowed to prove the actual management costs incurred relating to the holding which are non-deductible from the tax base.

– In addition, the transitional provisions allowing withholding taxes on profits distributed from Greece, Germany and Portugal are deleted since they are no longer effective.

THE IMPACT ON BUSINESS

2. Who will be affected by the proposal?

– which sectors of business

– which sizes of business (what is the concentration of small and medium-sized firms)

– are there particular geographical areas of the Community where these businesses are found

The Directive applies to profits distributed cross-border from subsidiary companies of a Member State to parent companies of a different Member State. Those companies must adopt one of the legal forms mentioned in the list annexed to the Directive. The amending proposal will extend its benefits to new legal types of entities, including the SE, co-operatives, mutual companies, certain non-capital based companies, saving banks, funds and associations with commercial activity. The SE is a public limited company of an EC dimension. Co-operatives normally have separate legal personality which cover the needs of their members by concluding agreements with them. Mutual companies usually bring together persons who pool their common interests in order to receive services in exchange. Funds are assigned capital to meet the purposes for which they are set up. Including these legal forms in the coverage of the Directive will extend its benefits to different forms of organising economic activities.

Although the inclusion in the scope of the Directive of saving banks and mutual companies should have its effects in the banking and insurance sectors, all sectors of business and geographical areas of the Community should benefit equally from the proposal. The reduction of the shareholding requirements to qualify as a parent company or as a subsidiary company should extend the benefits of this neutral tax regime to a broader scope of relevant holdings.

3. What will business have to do to comply with the proposal?

No new obligations or tax compliance burdens are imposed on business. When taxpayers apply the new rules concerning non-deductible management expenses, evidence should be obtained and kept.

4. What economic effects is the proposal likely to have?

– on employment

– on investment and the creation of new businesses

– on the competitiveness of businesses

The purpose of the proposal is to improve and extend the tax regime aiming at avoiding double taxation of profits. Such double taxation has negative and discouraging effects on business and investment. It is also unfair. A bigger number of entities and business groups will benefit from a reduction of excessive tax charges. The methods designed for this purpose will also be more effective. Ensuring a more uniform application of EU tax law is also an important step to reduce compliance costs and increase the efficiency of company taxation in the EU.

The benefits of the elimination of double taxation as provided in the Directive are extended to the SE. These provisions will contribute to the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law and tax law.

All this will play a major role in removing an identified tax obstacle for group of companies within the UE. By ensuring a more efficient taxation of cross-border business profits, the Directive can contribute to balanced taxation of domestic and cross-border activities and improved investment location decisions. International investor's decisions will no longer be influenced neither by certain current tax obstacles nor undermined by excessive taxation. The profit after tax of investment will tend to increase and will contribute to a capital cost reduction. In addition, the reduction of cases where withholding tax is charged will also lower international tax compliance costs for taxpayers.

Lower tax costs and the expectation of a larger profit after tax would have a positive effect on investment.

The competitiveness of European business will improve by reducing the circumstances under which international double taxation may occur. Also, the waste of resources linked to economic double taxation will be reduced.

The improvement of the business climate should have a positive effect on job creation and the fight against unemployment.

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements etc)?

The proposal contains provisions extending the Directive to non-capital based entities. Thus, a larger number of small and medium size enterprises that do not normally adopt the form of a capital based company will be covered.

CONSULTATION

6. List the organisations which have been consulted about the proposal and outline their main views.

The text of this proposal is the result of long consultative processes. On one hand, the initiatives following the previous amending proposal of the Merger Directive, COM (93) 293 final, were based on the conclusions of the Ruding Committee[1] and on the Commission Communication of 26 June 1992 to the Council and to Parliament subsequent to the conclusions of the Ruding Committee[2].

In addition, the more far reaching modifications included in the text hereby proposed are the result of the debates between international tax experts, technical delegations from Member States and the Commission services. The company tax study is the main source of ideas for this legislative process. This study was conducted by the Commission services based on discussions with two panels of experts and documentation provided by them. The panels of experts were composed of highly qualified tax professionals from the academic world, including universities and research institutions, and business representatives.

The final step of this process consisted of meetings with the Member States in a Commission chaired working group that examined technical aspects of the elements taken up in the proposal.

The present proposal is the result of the deliberations of all those experts, the analysis provided for by the Commission services and the evaluation of the reflections and concerns of national tax policy makers.

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

2 SEC(92)1118 final.