

# EUROPEAN PARLIAMENT

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## **REPORT**

on the 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

(COM(2003) 613 – C5-0506/2003 – 2003/0239(CNS))

Committee on Economic and Monetary Affairs

Rapporteur: Othmar Karas

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases  
covered by Articles 105, 107, 161 and 300 of the EC Treaty and  
Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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## PROCEDURAL PAGE

By letter of 28 October 2003 the Council consulted Parliament, pursuant to Article 94 of the EC Treaty, on the amended proposal for a Council directive on 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 (COM(2003) 613 – 2003/0239(CNS)).

At the sitting of 5 November 2003 the President of Parliament announced that he had referred the proposal to the Committee on Economic and Monetary Affairs as the committee responsible and the Committee on Legal Affairs and the Internal Market for its opinion (C5-0506/2003).

The Committee on Economic and Monetary Affairs appointed Othmar Karas rapporteur at its meeting of 22 October 2003.

The committee considered the Commission proposal and draft report at its meetings of 2 December 2003, 27 January 2004, 17 February 2004 and 24 February 2004.

At the last meeting it adopted the draft legislative resolution unanimously.

The following were present for the vote: John Purvis, (acting chairman), José Manuel García-Margallo y Marfil, (vice-chairman), Philippe A.R. Herzog, (vice-chairman), Jean-Louis Bourlanges for Othmar Karas (rapporteur), Generoso Andria, Pervenche Berès, Hans Blokland, Hans Udo Bullmann, Ieke van den Burg (for David W. Martin), Philip Bushill-Matthews, Martin Callanan (for Brice Hortefeux pursuant to Rule 153(2)), Nirj Deva (for Ioannis Marinos pursuant to Rule 153(2)), Andrew Nicholas Duff (for Carles-Alfred Gasòliba i Böhm pursuant to Rule 153(2)), Harald Ettl (for Christa Randzio-Plath), Jonathan Evans, Göran Färm (for Bernhard Rapkay), Jacqueline Foster (for Ioannis Marinos pursuant to Rule 153(2)), Ingo Friedrich, Robert Goebbels, Lisbeth Grönfeldt Bergman, Malcolm Harbour (for Ioannis Marinos pursuant to Rule 153(2)), Mary Honeyball, Christopher Huhne, Lord Inglewood (for Brice Hortefeux pursuant to Rule 153(2)), Giorgos Katiforis, Christoph Werner Konrad, Klaus-Heiner Lehne (for Ioannis Marinos pursuant to Rule 153(2)), Alain Lipietz, Astrid Lulling, Jules Maaten (for Karin Riis-Jørgensen pursuant to Rule 153(2)), Hans-Peter Mayer, Neil Parish (for Mónica Ridruejo pursuant to Rule 153(2)), Fernando Pérez Royo, Alexander Radwan, Giacomo Santini (for Renato Brunetta pursuant to Rule 153(2)), Manuel António dos Santos (for Helena Torres Marques), Olle Schmidt, Peter William Skinner, Ursula Stenzel (for Mónica Ridruejo pursuant to Rule 153(2)), Charles Tannock (for Piia-Noora Kauppi), Gary Titley (for a member to be nominated), Bruno Trentin, Ian Twinn (for Mónica Ridruejo pursuant to Rule 153(2)) and Theresa Villiers.

The Committee on Legal Affairs and the Internal Market decided on 1 December 2003 not to deliver an opinion.

The report was tabled on 26 February 2004.

## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the 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 (COM(2003) 613 – C5-0506/2003 – 2003/0239(CNS))

### (Consultation procedure)

*The European Parliament,*

- having regard to the Commission proposal to the Council (COM(2003) 613)<sup>1</sup>,
  - having regard to Article 94 of the EC Treaty, pursuant to which the Council consulted Parliament (C5-0506/2003),
  - having regard to Rule 67 of its Rules of Procedure,
  - having regard to the report of the Committee on Economic and Monetary Affairs (A5-0121/2004),
1. Approves the Commission proposal as amended;
  2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty;
  3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
  4. Asks the Council to consult Parliament again if it intends to amend the Commission proposal substantially;
  5. Instructs its President to forward its position to the Council and the Commission.

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Text proposed by the Commission

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Amendments by Parliament

#### Amendment 1

#### ARTICLE 1, POINT 2

#### Article 1, point (b) (Directive 90/434/EEC)

(b) European companies (Societas Europaea or SE), as established in Council Regulation (EC) No 2157/2001, and European Cooperative Societies (SCE), as established in Council Regulation (EC) No

(b) ***Transfer from one Member State to another of the registered office of*** European companies (Societas Europaea or SE), as established in Council Regulation (EC) No 2157/2001, and of European

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<sup>1</sup> Not yet published in OJ.

1435/2003, *transferring their registered office from one Member State to another Member State*

Cooperative Societies (SCE), as established in Council Regulation (EC) No 1435/2003.

*Justification*

*Formal redrafting that clarifies that the scope of the directive insofar as the SE and SCE are concerned, only covers the transfer of their registered office.*

Amendment 2

ARTICLE 1, POINT 6

Article 8, paragraph 11a (new) (Directive 90/434/EEC)

***11a. In order to avoid possible abuses related to the rapid exchange of shares, Member States shall apply an anti-abuse provision aimed at establishing a minimum holding period of 1 year, with the possibility for each Member State to extend it to 2 years.***

*Justification*

*A minimum period of ownership of shares after their exchange is one possible method used to reduce the likelihood of abuse and fraud.*

Amendment 3

ARTICLE 1, POINT 6

Article 8. paragraph 11 b (new) (Directive 90/434/EEC)

***11b. In cases of clear double taxation arising from the transfer of shares, Member States may have the option -after consultation with the Commission- to address the problem using solutions deemed to be alternative and equivalent to the provisions in this Directive.***

*Justification*

*For efficiency and subsidiarity's sake, Member States should retain the option of fighting double taxation through the best means possible, as long as the end results are equal to those which would have obtained using the provisions in the Directive.*

Amendment 4  
ARTICLE 1, POINT 6  
Article 8, paragraph 12 (Directive 90/434/EEC)

12. The fact that a company acquires a holding in the acquired company from shareholders with tax residence outside the Community shall not prevent the granting of the tax relief provided for in this Article.

12. The fact that a company acquires a holding in the acquired company from shareholders with tax residence outside the Community shall not prevent the granting of the tax relief provided for in this Article, ***insofar as the taxing rights of Member States with regards to third countries' shareholders are not significantly infringed.***

*Justification*

*Member States' financial interests, inasmuch as possible, should not be penalized by the provisions of this Directive.*

Amendment 5  
ARTICLE 1, POINT 7  
Article 9, paragraph 2a (new) (Directive 90/434/EEC)

***2a. In order to avoid possible abuses related to the rapid resale of assets, Member States shall apply an anti-abuse provision aimed at establishing a minimum holding period of 1 year, with the possibility for each Member State to extend it to 2 years.***

*Justification*

*A minimum period of ownership of assets after their resale is one possible method used to reduce the likelihood of abuse and fraud.*

Amendment 6  
ARTICLE 1, POINT 7  
Article 9, paragraph 2 b (new) of Directive 90/434/EEC

***2b. In cases of clear double taxation arising from the transfer of assets, Member States may have the option -after***

*consultation with the Commission- to address the problem using solutions deemed to be alternative and equivalent to the provisions in this Directive.*

#### *Justification*

*For efficiency and subsidiarity's sake, Member States should retain the option of fighting double taxation through the best means possible, as long as the end results are equal to those which would have obtained using the provisions in the Directive.*

#### Amendment 7

##### ANNEX

"List of companies referred to in Article 3 (a)

##### Section c

c) companies under German law known as "Aktiengesellschaft", "Kommanditgesellschaft auf Aktien", "Gesellschaft mit beschränkter Haftung", "bergrechtliche Gewerkschaft";

c) companies under German law known as "Aktiengesellschaft", "Kommanditgesellschaft auf Aktien", "Gesellschaft mit beschränkter Haftung", "bergrechtliche Gewerkschaft"; "**Erwerbs- und Wirtschaftsgenossenschaften**";



## **EXPLANATORY STATEMENT**

The inefficiencies encountered in the application of company taxation in the Internal Market are an obstacle to reaping its full benefit. The Commission has presented a proposal aimed at the elimination of these obstacles, in line with the goals of the Lisbon process, which call for increased company cross-border mobility within the Union.

Action is required to address these cross-border tax obstacles, and the European Parliament broadly supports this and any similar measure. In addition, the recently created European Company Statute (SE) and European Cooperative (SCE), are very much related to the applicable tax regime. The SE and SCE should be able to benefit from the whole body of harmonised corporate tax law, and should not be hampered by discriminatory tax rules or by restrictions or distortions arising from the tax provisions of Member States.

### **Why the need for this directive**

Directive 90/434/ECC (the so-called "Merger Directive"), already provides for a solution regarding a common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares, in cases where these involve different Member States. But the Directive needs improvements, and its scope needs to be enlarged.

The total removal of harmful tax obstacles would warrant a common consolidated tax base for the EU-wide activities of companies, but that is not the case at the moment nor for the foreseeable future. In the meantime, this new proposal tries to amend the Merger Directive to reduce instances of international double taxation when industries enter business restructurings in which companies of different Member States are involved. These specifically targeted measures will address the most urgent practical tax problems of internationally active companies until a common tax base is achieved.

### **Main changes proposed by the Directive**

- ❑ The main objective of the proposal is to enlarge the scope of the Merger Directive, which is deemed to be too limited;
- ❑ Included within the scope of the Merger Directive is an operation known as split-off (a limited or partial division where the transferring company, which continues to exist, transfers part of its assets and liabilities constituting one or more branches of activity). The tax deferral regime is applied to the split-off;
- ❑ The list of entities annexed to the Merger Directive is extended, to cover new legal types of companies, such as the Statutes of the European Company Statute (SE) and the European Cooperative (SCE); and give them the same benefits as received by the types of companies already included in the annex,
- ❑ Another type of operation covered will be the conversion of a branch into a subsidiary;

- ❑ The concept of "holding" is changed in order to make it consistent with the definition on the Parent-Subsidiary Directive, where the minimum threshold to be considered as a parent company or as a subsidiary has been lowered from 25 to 10%;
- ❑ There are provisions to prevent double taxation in certain circumstances where there is a transfer of assets and exchanges of shares. Shares must be valued according to their real value at the time of the exchange. The proposed Directive shall cover cases where the majority of the voting rights is acquired by a company resident in a Member State from a shareholder resident in a state which is not a member of the EU;
- ❑ Finally, on the transfer of the registered office of the SE, the Directive clarifies the tax regime that would apply, which should be neutral from the point of view of competition and safeguard the financial interests of the State where the company is resident before transferring its registered office. A specific provision provides that no taxes can be imposed on the shareholders linked to the change of residence of the company.

### **The issue of the safeguard of Member States' financial interests**

Your rapporteur supports the aims and contents of the proposal, but would like to suggest a series of technical amendments geared towards the safeguarding of Member States' financial interests. The key issue for this proposal to gain acceptance in the EU is that it removes cross-border tax obstacles while remaining broadly neutral with regards to the taxing prerogatives of States. In addition, when fighting against double taxation, Member States should retain a certain degree of leeway to come up with the tool that suits them best.