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REPORT

on the 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
(COM(2003) 462 – C5-0427/2003 – 2003/0179(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 5 September 2003 the Council consulted Parliament, pursuant to Article 94 of the EC Treaty, on the proposal for a Council directive on amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (COM(2003) 462 – 2003/0179(CNS)).

At the sitting of 22 September 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 (C5-0427/2003).

The Committee on Economic and Monetary Affairs had appointed Othmar Karas rapporteur at its meeting of 1 September 2003.

The committee considered the Commission proposal and draft report at its meetings of 6 October 2003, 4 November 2003 and 2 December 2003.

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

The following were present for the vote Christa Randzio-Plath (chairwoman), Philippe A.R. Herzog (vice-chairman), John Purvis (vice-chairman), Othmar Karas (rapporteur), Pervenche Berès, Hans Blokland, Armonia Bordes, Hans Udo Bullmann, Harald Ettl (for Helena Torres Marques), Jonathan Evans, Ingo Friedrich, Carles-Alfred Gasòliba i Böhm, Robert Goebbels, Lisbeth Grönfeldt Bergman, Mary Honeyball, Giorgos Katiforis, Alain Lipietz, Astrid Lulling, Hans-Peter Mayer, Simon Francis Murphy (for David W. Martin pursuant to Rule 153(2)), Fernando Pérez Royo, Bernhard Rapkay, Karin Riis-Jørgensen, Olle Schmidt, Peter William Skinner, Charles Tannock (for Generoso Andria), Bruno Trentin and Theresa Villiers.

The opinion of the Committee on Legal Affairs and the Internal Market is attached.

The report was tabled on 5 December 2003.

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a Council directive on amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States
(COM(2003) 462 – C5-0427/2003 – 2003/0179(CNS))

(Consultation procedure)

The European Parliament,

– having regard to the Commission proposal to the Council (COM(2003) 462)[1],

– having regard to Article 94 of the EC Treaty, pursuant to which the Council consulted Parliament (C5-0427/2003),

– having regard to Rule 67 of its Rules of Procedure,

– having regard to the report of the Committee on Economic and Monetary Affairs and the opinion of the Committee on Legal Affairs and the Internal Market (A5-0472/2003),

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 Commission.

Text proposed by the Commission	Amendments by Parliament

Amendment 1
RECITAL 7

(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%.***	(7) ***Most Member States do not apply any domestic threshold at all or a very low threshold for the tax treatment of inter-company dividends, and in*** order to ***bring cross border cases, as covered by*** Directive 90/435/EEC, ***more in line with the treatment of domestic groups***, the

[1] Not yet published in OJ.

	threshold of the shareholding for one company to be considered a parent and the other as its subsidiary should be lowered from 25% to ***5%***.

Justification

Out of the 15 current Member States, 7 of them do not apply any threshold at all for the beneficial tax treatment of dividend payments for domestic situations, and a further three use a relatively low threshold of 5%, whereas 2 Member States apply a 10% threshold, and a further 3 apply a 25% threshold. In order to avoid tax induced distortions of trade, it is desirable to ensure that there is as little difference as possible between doing business in several Member States as opposed in only the home Member State. Although, the ideal solution would be to have no threshold at all, your rapporteur considers that 5% is an acceptable compromise.

Amendment 2
ARTICLE 1, POINT 1
Article 1, paragraph 1 (Directive 90/435/EEC)

"- 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."	"- 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 ***other than the State in which the permanent establishment is situated***."

Justification

Payments from a subsidiary to a permanent establishment (of its parent company) situated in the same State as the subsidiary constitute a transaction subject to domestic law rather than an actual cross-border transaction, and as such should be left out of the directive.

Amendment 3
ARTICLE 1, POINT 2
Article 3, paragraph 1(a) (Directive 90/435/EEC)

"(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; "	"(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 ***5 %*** in the capital of a company of another Member State fulfilling the same conditions; "

Justification

See justification to amendment 1.

Amendment 4
ARTICLE 1, POINT 3, LETTER (A)
Article 4, paragraph 1, indent 2 (Directive 90/435/EEC)

– 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.”	– 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 ***fulfilling the same requirements*** which relates to those profits, up to the limit of the amount of the corresponding tax.”

Justification

This amendment seeks to ensure avoid any ambiguity by including within the directive a clear requirement under which tax deduction entitlements will be granted only to those lower-tier subsidiaries which also meet the requirements laid down for applying the directive to top-tier companies.

Amendment 5
ARTICLE 1, POINT 3, LETTER C
Article 4, paragraph 2 (Directive 90/435/EEC)

“The parent company ***shall be allowed to provide*** evidence ***of*** the real management costs incurred that are to be considered non-deductible.”	“***Where*** the parent company ***provides*** evidence ***that*** the real management costs incurred that are to be considered non-deductible ***are lower than the flat rate amount, the non-deductible amount may not exceed the real costs.”***

Justification

This amendment is necessary to bring the text closer in line with Recital 10. The proposed wording is too open ended as it only stipulates that a company has a right to provide the information, without any corresponding obligation for the administration to take this information into account and adjust the non deductible part accordingly.

Amendment 6
ARTICLE 1, POINT 4
Article 5, paragraph 1 (Directive 90/435/EEC)

"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."	"Profits which a subsidiary distributes to its parent company shall, at least where the latter holds a minimum of ***5%*** of the capital of the subsidiary, be exempt from withholding tax."

Justification

See justification to amendment 1.

Amendment 7
ANNEX
Annex, paragraph za (new)

	(za) cooperatives incorporated under Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) and the Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

Justification

European Co-operatives should also be covered by the proposal.

EXPLANATORY STATEMENT

Background

On 29 July 2003, the European Commission put forward a proposal for a Directive mending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (the Parent-Subsidiary Directive). Its main aim is to avoid the double taxation of companies profits, by ensuring that taxed profits paid as dividends by a subsidiary to its parent company are not taxed twice. Such rules exist in all national tax codes, and the directive was adopted in order to ensure that this same principle also applies where the parent and subsidiary are located in different Member States.

Under the directive, profits distributed by a subsidiary to its parent company shall be exempt from withholding tax, provided that the parent owns at least 25 % of the capital. In addition, the Member State of the parent company shall either exempt such received profits from taxation, or tax such profits while authorising the parent to deduct the related corporation tax paid by the subsidiary.

The Directive only applies to those type of companies listed in the annex to the Directive. Almost as soon as it entered into force in 1992, it was recognised that the list contained in the Directive was too restrictive. The final report from the Committee of Independent Experts on Company Taxation, chaired by Onno Ruding (1992) recommended that the scope of the parent subsidiary directive be extended to cover all enterprises subject to corporate income tax irrespective of their legal form.

This recommendation prompted the Commission to put forward a proposal in 1993 along those lines - ie. rather than seeking to expand the list of named corporate structures to the list, the proposals sought to extend the scope to all entities subject to income tax.

The proposal received the full support of the European Parliament, which adopted only one amendment seeking to further enlarge the scope by making the participation threshold apply not only to direct, but also to indirect holdings (group holdings). The Council, however, debated the proposal at length, but it finally abandoned it in 1997 without having reached an agreement. The disagreement stemmed from differences whereby a certain entity would be regarded as a taxable company in one Member State, whereas other Member States would treat it as transparent - ie. it sees through the corporate structure and taxes the owners directly.

This issue was brought back on the agenda in 2000 when the Council of Ministers (Ecofin at its meeting of 27 November) stated that there was an urgent need to update the list of companies in the Directive. This was also underlined the following year in the comprehensive study on company taxation done for the Commission in 2001, where it was noted that the Directive works well, but that it scope is too narrow, both in terms of the list of eligible companies, and in terms of the size of the minimum holdings.

In addition, there have been a number of developments in the area of company law since 1990, notably the creation of new national legal forms, as well as the adoption of a statue for a European Company (*Societas Europea*)

The Commission Proposal

In addition to a few technical adaptations, the Commission proposal seeks to amend the 1990 Directive in five important areas:

1. The Commission has abandoned the approach behind the 1993 proposal and has instead opted for ***expanding the list of eligible*** companies, to cover a wider range of national companies, as well as the European Company (*Societas Europea* - SE).
2. Following a recommendation from the Company tax study, it is also proposing to ***lower the participation threshold*** from 25% to 10%. This is seen by the company tax study as a less bureaucratic alternative to taking indirect (group) holdings into account.
3. Currently, Member States are allowed to refuse tax deduction of ***management costs*** relating to the holding of subsidiaries. This may done by a flat-rate amount of a maximum 5% of the distributed profits, even if the actual costs are lower. Under the new proposal, companies are allowed to request a lower amount if they can show that the real management costs are lower.
4. To ensure that where the Member State does use the option to tax received profits but allow a deduction of taxes paid (imputation method), that the right for the parent company to deduct taxes paid by the subsidiary applies not only to immediate subsidiaries but also to lower-tier subsidiaries.
5. It introduces a special arrangement where a Member State treats a company, which is subject to corporation tax in its home Member State, as fiscally transparent. A special provision has been added to ensure that these profits are not taxed again when they are distributed.

Critical Appraisal of the Proposal

Your rapporteur welcome this proposal as it seems to correspond closely to what the business community has been calling for for over a decade, and it seems to be a logical step towards the further integration of the single market by reducing (but not removing) a tax obstacle to cross border activities.

At the same time, the rapporteur considers that the Commission could have gone a bit further and he is therefore proposing amendments in three areas:

Lowering the participation threshold to 10%: This was suggested in the 2001 company tax study ((SEC(2001)1681 page 327). It should however be pointed at that the domestic treatment of distributed profits is more beneficial in 11 of the 15 Member States, as the following table shows:

Belgium	5% (Exemption)
Netherlands	5% (Deduction)
Finland	No Minimum Participation (deduction)
Austria	No Minimum Participation (full exemption)
France	10% (exemption)
Greece	No Minimum Participation (exemption)
Ireland	No Minimum Participation (exemption)

Italy	No Minimum Participation (deduction)
Sweden	25% (exemption)
Denmark	25% (exemption)
Germany	No Minimum Participation (deduction)
Spain	5% (deduction)
Luxembourg	10% (exemption)
Portugal	25% (exemption)
United Kingdom	No Minimum Participation (exemption)

If one looks at the aims and objectives of the 1990 Directive, it is worth citing its recital 3 of that Directive which recalls that

> *existing tax provisions which govern the relations between parent companies and subsidiaries of different Member States vary appreciably from one Member State to another and are generally less advantageous that those applicable to parent companies and subsidiaries of the same Member State..... Co-operation between companies of different Member States is thereby disadvantaged in comparison with co-operation between companies of the same Member State.*

Looking at the table above, it is clear that companies in different Member States will still be at a disadvantage compared with national groups. In order to go some way further towards reducing this disadvantageous treatment, your rapporteur is proposing to further lower the threshold to 5%. After all, 7 of 15 Member States have no threshold at all, and a further 3 use 5%.

Management fees: the principle appears to be sound - only deduction for real costs - but the wording should be made more explicit. The problem - in your rapporteur's - eyes is that the current wording only gives a right for the company to provide the information, but it does not in fact oblige the administration to actually adjust the tax accordingly. This seems to leave an unusually large discretion for the tax administration. An amendment is therefore proposed to cap the non deductible part where the real costs are proven to be lower than the flat rate amount. This would be more in line with the wording of the corresponding recital in the proposal.

List of entities covered The regulation on the statue for a European Co-operative Society (SCE) and the accompanying directive on the involvement of employees were adopted on 22 July 2003 - just days before the proposal at hand was published by the Commission. Just as has already been done for the SE, your rapporteur proposes to include the SCE's in the proposed new annex of list of eligible entities.

27 November 2003

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET

for the Committee on Economic and Monetary Affairs

on the 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
(COM(2003) 462 – C5-0427/2003 – 2003/0179(CNS))

Draftsman: Marcelino Oreja Arburúa

PA_Leg

PROCEDURE

The Committee on Legal Affairs and the Internal Market appointed Marcelino Oreja Arburúa draftsman at its meeting of 11 September 2003.

It considered the draft opinion at its meetings of 6 November and 27 November 2003.

At the latter meeting it adopted the following amendments by 28 votes to 0, with 2 abstentions.

The following were present for the vote: Giuseppe Gargani (chairman), Bill Miller (vice-chairman), Marcelino Oreja Arburúa (draftsman), Paolo Bartolozzi, Ward Beysen, Michael Cashman, Willy C.E.H. De Clercq (for Diana Wallis), Bert Doorn, Francesco Fiori, Janelly Fourtou, Marie-Françoise Garaud, Evelyne Gebhardt, Fiorella Ghilardotti, Robert Goebbels, Malcolm Harbour, Stephen Hughes, Wilfried Kuckelkorn, Carlos Lage (for Carlos Candal pursuant to Rule 153(2)), Kurt Lechner, Klaus-Heiner Lehne, Sir Neil MacCormick, Toine Manders, Hans-Peter Mayer (for Lord Inglewood), Arlene McCarthy, Manuel Medina Ortega, Angelika Niebler (for Rainer Wieland), Anne-Marie Schaffner, Peter William Skinner, Hannes Swoboda, Marianne L.P. Thyssen, Ieke van den Burg (for François Zimeray pursuant to Rule 153(2)), Joachim Wuermeling, Matti Wuori (for Uma Maija Aaltonen), Stefano Zappalà and Jürgen Zimmerling (for José María Gil-Robles Gil-Delgado).

AMENDMENTS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission[1]	Amendments by Parliament

Amendment 1
RECITAL 7

(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%.	(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% ***under a gradual and simultaneous timetable providing for a reduction of 5% per year***.

Justification

This reduction is proposed on purely precautionary grounds.

Amendment 2
ARTICLE 1, POINT 1
Article 1, paragraph 1 (Directive 90/435/EEC)

"- 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."	"- 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 ***other than the State in which the permanent establishment is situated***."

Justification

Payments from a subsidiary to a permanent establishment (of its parent company) situated in the same State as the subsidiary constitute a transaction subject to domestic law rather than an actual cross-border transaction, and as such should be left out of the directive.

[1] Not yet published in OJ.

Amendment 3
ARTICLE 1, POINT 2
Article 3, paragraph 1, point (a) (Directive 90/435/EEC)

"(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;"	"(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 ***whose percentage*** holding in the capital of a company of another Member State fulfilling the same conditions ***corresponds to a gradual and simultaneous timetable providing for a reduction of 5% per year***;"

Justification

This reduction is proposed on purely precautionary grounds.

Amendment 4
ARTICLE 1, POINT 3, LETTER (A)
Article 4, paragraph 1 (Directive 90/435/EEC)

"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:	"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	– 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."	– 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 ***fulfilling the same requirements*** which relates to those profits, up to the limit of the amount of the corresponding tax."

Justification

This amendment seeks to ensure avoid any ambiguity by including within the directive a clear requirement under which tax deduction entitlements will be granted only to those lower-tier subsidiaries which also meet the requirements laid down for applying the directive to top-tier companies.

Amendment 5
ARTICLE 1, POINT 4, LETTER (A)
Article 5, paragraph 1 (Directive 90/435/EEC)

"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."	"Profits which a subsidiary distributes to its parent company ***and/or to a permanent establishment thereof*** shall, at least where the latter holds a ***percentage share*** of the capital of the subsidiary ***corresponding to a gradual and simultaneous timetable providing for a reduction of 5% per year***, be exempt from withholding tax."

Justification

The directive should closely reflect the provisions relating to the State in which the parent company or its permanent establishment is situated and explicitly prohibit the levying in the State in which the subsidiary is resident of an exit tax on the dividends paid by the subsidiary to its parent company's permanent establishments.