

Opinion of the European Economic and Social Committee 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 final — 2003/0179 (CNS))

(2004/C 32/25)

On 5 September 2003 the Council decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned proposal.

In view of the urgent nature of the work, the European Economic and Social Committee decided at its 403rd plenary session of 29 and 30 October 2003 (meeting of 29 October) to appoint Ms Polverini as rapporteur-general and adopted the following opinion unanimously.

1. Background

1.1. Directive 90/435/EEC introduced a body of rules concerning dividend payments and profit distributions, aimed at eliminating, or at least reducing, the legal and economic double or multiple taxation of profits distributed by subsidiaries in the country in which the parent company is established.

1.2. The experience gained in implementing the directive has revealed the need to make some corrections to the original text adopted in 1990.

1.3. Following a study on company taxation in EU Member States, the Commission drew up the present proposal for an amendment, mainly in order to broaden the range of companies which can benefit from the directive.

2. General comments

2.1. In view of the forthcoming enlargement of the Union, the EESC believes that effective removal of tax obstacles requires progressive harmonisation of Member State rules.

2.2. Against a backdrop of market globalisation and spread of new technologies and electronic commerce, it is essential to remove any efficiencies which might prevent EU companies from taking full advantage of the benefits of the internal markets and which would be harmful to competitiveness and well-being, in contrast to the Lisbon objectives.

2.3. The EESC supports the underlying purpose of the proposal to amend the parent-subsidiary directive, which is to

consolidate corporate groups located in several Member States. The same aim could be pursued by eliminating or at least reducing the legal and economic double or multiple taxation of profits distributed by subsidiaries in the country in which the parent company is established.

2.4. The EESC welcomes the proposed broadening of the range of companies covered by the directive to include types of legal person so far excluded from its scope, such as cooperatives, mutual companies, certain non-capital based companies and savings banks.

2.5. In particular, the extension to savings banks and mutual companies of the benefits provided by the parent-subsidiary directive facilitates consolidation of groups within the EU single market, including in the banking and insurance fields.

2.6. However, in some cases to be determined in advance, the possibility should be considered of extending the benefits of the parent-subsidiary directive (restricted to exemption from withholding tax on distributed profits only) regardless of the existence or otherwise of a parent-subsidiary relation.

3. Specific comments

3.1. Article 1 paragraph 1: Permanent establishment

3.1.1. The proposed amendment to Article 1 of the directive helps to make it clear that the Member State where a permanent establishment is situated must grant the benefits of the directive in the event that the permanent establishment receives distributed profits, provided that all the qualifying requirements of the parent-subsidiary directive are met.

3.1.2. The amendment to Article 4(1) of the directive obliges the Member State of a permanent establishment and the State of the parent company receiving distributed profits:

- to refrain from taxing such profits,
or
- in the event that such profits are taxed, to authorise the permanent establishment and 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 tax.

3.1.3. The extension of the parent-subsidiary directive to cover situations where a permanent establishment of a parent company receives distributed profits from a subsidiary requires consideration of the various cases of triangulation which the financial planning of corporate groups may generate.

3.1.4. In this respect, the wording of the proposal allows the benefits of the directive to apply where the parent company and subsidiary are based in different Member States for tax purposes, and the dividends are paid to a permanent establishment situated in another Member State.

3.1.4.1. At the same time, the directive can be applied in the event that the parent company and subsidiary are located in different Member States and the permanent establishment receiving the dividends is located in the same Member State as the subsidiary.

3.1.5. However, the parent-subsidiary directive applies partially in cases where the parent company and subsidiary are located in different Member States and the permanent establishment is located in a non-Community country. The effect of the proposed changes would be for the State of the

subsidiary to exempt outgoing dividends from the withholding tax (cf. Article 5 of the directive), while the jurisdiction in which the permanent establishment is located should not apply the arrangements set out in the directive. Lastly, the State of the parent company, under the new wording of Article 4(1) of the directive, could opt either to exempt such profits from taxation or to deduct from the tax that fraction of the tax due on the profits up to the limit of the amount of the corresponding tax.

3.1.6. Moreover, close attention must be paid to the potential risk of abuse of the directive in cases where a parent company and subsidiary are located in the same Member State while a permanent establishment is located in another Member State; under such circumstances the directive should not apply, since by virtue of Article 3(1) the subsidiary must be resident for tax purposes in different Member State to the parent company.

3.1.6.1. However, detailed examination of this specific situation is necessary regarding the potential infringement of the principle of non-discrimination; the same points apply as in the general comments on these aspects.

3.2. *Article 1 paragraph 2: Broadening of the range of companies benefiting from the directive*

3.2.1. It is proposed that the minimum shareholding requirement (needed in order to qualify for the status of parent company and subsidiary company) be reduced from 25 % to 10 %, in order to widen the range of cases covered by the directive.

3.2.2. The EESC notes with approval that the reduction of the minimum shareholding requirement increases the number of companies which can benefit from the tax advantages under Directive 90/435/EEC, and which were previously unable to meet the minimum 25 % shareholding requirement.

Brussels, 29 October 2003.

*The President
of the European Economic and Social Committee*

Roger BRIESCH