



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 14 September 2009**

**13297/09**

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**Interinstitutional File:  
2008/0206 (CNS)**

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**CODIF 106  
FISC 114**

**NOTE**

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from:	General Secretariat of the Council
to:	Working party on Codification of Legislation
N°. Cion prop.:	COM(2008) 691 final
Subject:	Proposal for a Council directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (codified version) - Opinion of the Consultative Working Party of Legal Services

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Delegations will find attached the opinion of the Consultative Working Party of Legal Services regarding the above mentioned subject.

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GROUPE CONSULTATIF  
DES SERVICES JURIDIQUES

Brussels, 31-08-2009

## OPINION

FOR THE ATTENTION OF THE EUROPEAN PARLIAMENT  
THE COUNCIL  
THE COMMISSION

**Proposal for a Council directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States  
COM(2008) 691 final of 6.11.2008 – 2008/0206 (CNS)**

Having regard to the Interinstitutional Agreement of 20 December 1994 on an accelerated working method for official codification of legislative texts, and in particular to point 4 thereof, the Consultative Working Party, consisting of the respective legal services of the European Parliament, the Council and the Commission, met on 12 and 25 November 2008 for the purpose of examining the aforementioned proposal submitted by the Commission.

At those meetings<sup>1</sup>, an examination of the proposal for a Council directive codifying 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 resulted in the Consultative Working Party's establishing, by common accord, that in Article 4(3) the initial wording "*In applying paragraphs 1 and 2*" should be removed, and that in Article 4(4) the initial wording "*Paragraphs 1, 2 and 3*" should be adapted so as to read "*Paragraphs 1 and 2*".

As far as Article 4(5) is concerned, the issue was raised of whether that provision would establish a "secondary legal basis". The discussions continued during the months following those meetings with a view to clarifying the matter.

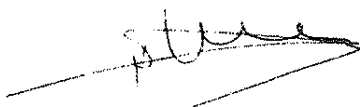
Article 4(5) reads as follows: "*The Council shall at the appropriate time adopt the rules to apply after the entry into force of a common system of company taxation*".

The Legal Service of the Commission is of the view that the said provision would do no more than reminding the legislator that at a certain point in time a certain mechanism should be reviewed, since that mechanism would no longer be appropriate when acting in the context of


<sup>1</sup> The Consultative Working Party had at its disposal 22 language versions of the proposal and worked on the basis of the English version, being the master-copy language version of the text under discussion.

a harmonised environment. In the light thereof, the Legal Service of the Commission considers that the said provision would not establish a secondary legal basis.


The Legal Services of the European Parliament and of the Council share the view of the Commission Legal Service that it was not the intention of the legislator to create a secondary legal basis enabling the Council to legislate by simple majority and without any Commission proposal in an area covered by Article 94 EC, which provides that the Council shall act by unanimity and on a proposal of the Commission. This is why, for the avoidance of any doubt in this respect and for the sake of legal certainty, the Legal Services of the European Parliament and of the Council are of the opinion that Article 4(5) should be clarified to specify that *"the Council, acting in accordance with the procedure foreseen by the Treaty, shall at the appropriate time adopt the rules ..."*. It is true that such an addition would imply a change of the text which appears not to be purely formal and could be regarded as going beyond straightforward codification. The same would apply if the Commission were to conclude that Article 4(5) should be deleted altogether because it has become obsolete or has no normative value. In either case, for the sake of legal certainty, point 8<sup>2</sup> of the Interinstitutional Agreement of 20 December 1994 - Accelerated working method for official codification of legislative texts - should therefore be applied, in the light of the Joint declaration on the said point<sup>3</sup>.



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J.-C. PIRIS  
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L. ROMERO REQUENA  
~~C. F. DURAND~~  
Director General

<sup>2</sup> "Should it prove necessary during the legislative process to go beyond straightforward codification and make substantive changes, it will be the Commission's responsibility to submit any proposal(s), where appropriate".

<sup>3</sup> "The European Parliament, the Council and the Commission note that if it should appear necessary to go beyond straightforward codification and make substantive changes, the Commission will be able to choose, case by case, whether to recast its proposal or whether to submit a separate proposal for amendment, leaving its codification proposal on the table, and then, once the substantive change has been adopted, incorporate it into the proposal for codification".