Opinion of the European Economic and Social Committee 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 final – 2003/0239 COD)

(2004/C 110/09)

On 28 October 2003 the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 9 February 2004. The rapporteur was Mr Ravoet.

At its 406th plenary session (meeting of 25 February 2004), the European Economic and Social Committee adopted the following opinion by 114 votes to one with two abstentions.

1. The Commission's strategy on company taxation

1.1 This proposal is one element in the Commission's strategy on company taxation submitted in 2001 (1), in which it identified a certain number of fiscal obstacles to cross-border economic activity in the internal market and announced its short and longer-term plans to remove them.

1.2 The strategy provides for a number of targeted measures on issues such as extending the directives on dividends, interest and royalties and mergers, as well as cross-border loss offset, transfer pricing and double taxation agreements.

1.3 The Commission feels that, in the longer term, companies must be offered the possibility of being taxed on the basis of a consolidated basis of assessment for corporation tax covering all their activities in the European Union, so as to escape the expensive inefficiencies which currently result from the co-existence of 15 (soon to be 25) separate sets of tax rules.

1.4 In its opinion on Direct Company Taxation adopted in 2002 (2), the EESC supported the European Commission's proposals to remove in the short term any form of double taxation or other tax obstacles faced by companies conducting cross-border activities within the internal market.

1.5 As for the longer term, the EESC endorses the aspiration to an internal market without fiscal obstacles, believing that common principles have to be established which would promote an internal market with fair competition. These common principles would also help to achieve the objectives of simplification, competitiveness and job creation.

1.6 The strategy adopted by the European Commission in 2001 was first reviewed in November 2003 (3). The conclusion was that, after two years' work, the Commission's two-tier strategy on company taxation remains the best approach for addressing the problems in the internal market and that the promised measures and initiatives had been carried through. This was confirmed at the European conference on company taxation held in Rome on 5 and 6 December 2003 (4).

2. Targeted short-term measures in the Commission strategy

2.1 One of the short-term objectives set by the European Commission in its October 2001 strategy for company taxation was to adopt proposals intended in particular to update and widen the scope of the Parent-Subsidiary and Merger Directives.

2.2 Another is to adopt and subsequently modernise the draft Interest and Royalties Directive included in the 'tax package', which comprised the code of good conduct, the Savings Directive and the Interest and Royalties Directive.

2.3 The draft directive modernising the Parent-Subsidiary Directive was adopted at the ECOFIN Council on 22 December 2003. The final text of the directive was published in the Official Journal on 13 January 2004 (5).

(1) Commission Communication of 23 October 2001 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

(2) OJ C 241, 7.10.2002

(3) Communication of 24 November 2003, An Internal Market without company tax obstacles - achievements, ongoing initiatives and remaining challenges, COM(2003) 726 final.

(4) See: www.europa.eu.int/comm/taxation_customs/taxation/company_tax/conference_rome.htm

(5) Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 7, 13.1.2004.

2.4 The Interest-Royalties Directive was adopted on 3 June 2003 ([6]) and must be transposed into national law by 1 January 2004. A draft directive to modernise this directive was published by the Commission on 30 December 2003 ([7]). It is intended in particular to incorporate substantial improvements to the scope of the Parent-Subsidiary Directive.

2.5 The draft Merger Directive is thus the last of the three proposals to be adopted by the Council. It is the fruit of an impressive and large-scale consultation exercise which made it possible to identify all the taxation problems associated with cross-border restructuring.

3. **Proposal modernising the directive on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares**

3.1 The directive now in force (90/434/EEC) provides for deferred taxation of capital gains resulting from cross-border company restructuring in the form of mergers, divisions, transfers of assets and exchanges of shares.

3.2 This tax deferral regime ensures the fiscal neutrality of restructuring operations by allowing a temporary exemption: the taxation of capital gains is deferred until subsequent transfer of the assets received. This is why:

— the assets and liabilities of the transferring company are transferred to the receiving company at their tax value;

— the allotment of shares in the receiving company to shareholders in the transferring company may not result in the latter being taxed (otherwise there would be double taxation).

3.3 The directive of 23 July 1990 thus already provides for a solution in certain cases to the cross-border obstacle created by high tax costs linked to business restructurings by guaranteeing that a cross-border operation will not give rise to a higher tax liability than if the operation had been done within the same Member State.

3.4 The proposal modernising the directive replaces a 1993 proposal which was withdrawn by the Commission. It aims to improve the scope of the current directive and the methods for tax deferral whilst safeguarding the financial interests of the Member States. It also complements a tenth draft directive on company law aimed at facilitating mergers between companies in different Member States.

3.5 The key elements of the new proposal for modernising the Merger Directive are as follows:

3.5.1 The proposal is intended to align the Merger Directive with the amendments introduced into the Parent-Subsidiary Directive, namely:

— lowering the minimum holding required to be considered a parent or subsidiary from 25 % to 10 %;

— updating the list of companies to which the directive applies so as to include new types of legal entity, especially certain cooperatives and non-capital based companies, mutual companies, savings banks, funds and associations with commercial activity. The new list includes the European Company and the European Cooperative Society which can be set up as of 2004 and 2006 respectively.

This widening of the scope of the Merger Directive is achieved by adding new legal forms designated by name to the list of entities given in an appendix to the directive. It is basically the same list as that adopted as part of the directive modernising the Parent-Subsidiary Directive and which should be adopted as part of the directive modernising the Interest and Royalties Directive.

3.5.2 The proposal also extends the benefit of the directive (the tax deferral regime) to companies within its scope which are corporate taxpayers in their Member State of residence, but are considered transparent for tax purposes by other Member States.

3.5.2.1 Without modifying the arrangements on transparency, the draft directive stipulates that this other Member State may no longer tax its resident taxpayers having an interest in the company at the time of the transactions covered by the Directive. These taxpayers will only be taxed on the occasion of a later disposal of the assets transferred.

3.5.3 The draft extends the scope to include split-offs, i.e. limited or partial divisions where the transferring company continues to exist. The tax deferral regime will also be applicable to these transactions.

3.5.3.1 A split-off is a transaction whereby, without being wound up, a company transfers part of its assets and liabilities constituting one or more branches of activity to a receiving company. In exchange, the receiving company transfers securities representing its capital to the shareholders of the transferring company.

3.5.4 The draft provides fiscal neutrality for the transfer of the registered office of a European company or a European cooperative society from one Member State to another. It also provides for a tax deferral regime which prevents such a transfer resulting in immediate taxation of capital gains relating to those of its assets becoming connected with the permanent establishment that the company transferring its registered office will now have in the State where it had tax residence. This tax regime will also refer to provisions or reserves constituted by the company before transfer of the registered office, to the possible take-over of losses and to the existence of a permanent establishment in a third Member State.

([6]) Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ L 157, 26.6.2003, p.49.
([7]) COM(2003) 841 final

3.5.4.1 The possibility of transferring the registered office is expressly provided for in the statute of these companies so as to guarantee the right of establishment, a fundamental freedom. It is therefore essential that this freedom should not be impaired by tax provisions.

3.5.5 The draft makes clear that the directive's tax deferral regime may also apply in the case of companies that decide to convert their branches into subsidiaries.

3.5.5.1 The tax deferral provided for in the directive is associated with keeping the assets and liabilities transferred connected with a permanent establishment of the transferring company, which is not the case when a branch of a foreign company is converted into a subsidiary of the same company. In such cases, the assets and liabilities transferred are connected to the receiving company (the new subsidiary). Since conversions of branches into subsidiaries fall within the aims of the directive and pose no threat to Member States' taxing rights (the assets and liabilities remaining under the same tax jurisdiction), it is appropriate to specify that these operations do fall within the scope of the directive.

3.5.6 The draft also extends the benefit of the directive to exchanges of shares where the majority of the voting rights in the acquired company are obtained from shareholders who do not have tax residence in an EU Member State.

3.5.7 Lastly, the draft introduces appropriate rules to prevent double taxation due to different rules for valuing shares and assets in different Member States. This applies to asset transfers and share exchanges.

3.5.7.1 Since the receiving company will subsequently be taxed on the capital gains from the assets transferred, national tax rules for valuing shares received as a result of an asset transfer of share exchange had to be harmonised. It is therefore envisaged that these shares will be ascribed the 'real' value that the assets and liabilities had immediately prior to an asset transfer or the 'real' value which the shares received had at the time of an exchange of shares (one exception being when own shares are held).

4. General comments

4.1 The Merger Directive of 23 July 1990 was designed to guarantee vital tax neutrality for cross-border company restructuring operations while at the same time safeguarding the Member States' financial interests.

4.2 The Committee welcomes the proposals for modernising this Merger Directive drawn up by the European Commission. These proposals make essential and appropriate improvements to the directive of 23 July 1990 and, in principle, do not entail any unfavourable consequences for companies as compared with the present situation. They do not require companies to meet any new fiscal obligation or formality in order to comply.

4.3 The aim of the proposal to modernise the directive is to improve and extend the tax deferral regime for capital gains from restructuring. A broad range of forms of company (including the European company (SE) and the European cooperative society (SCE), as well as the forms of company usually adopted by SMEs) and restructuring operations (such as split-offs and conversion of a branch) are now explicitly covered.

4.4 By extending the regime of tax neutrality to the SE and SCE, including in the case of a transfer of registered office, which is an operation specific to the statute of those two forms of company, the draft directive will contribute to the setting up and management of European-scale companies free of the obstacles associated with the territorially limited tax and company law of the different Member States.

4.5 All these amendments will enable companies – including a larger number of SMEs – to benefit fully from the advantages associated with the single market (through the balanced taxation of national and cross-border activities, which will ensure the neutrality of investment and restructuring decisions). This should improve their competitivity and thus have a positive impact on job creation and the fight against unemployment.

5. Specific comments

5.1 The Committee feels that the clause stipulating that any new form of company introduced by a Member State is automatically to be added to the list of that Member State's forms of company appended to the directive, should be made generally applicable. This would solve any problems arising from a failure to update the list.

5.2 The Committee also considers it essential that the modernisation of the Merger, Parent-Subsidiary and Interest and Royalties Directives be done consistently, both in terms of the scope (for example, the forms of company listed in the appendix to the directives) and the conditions needed to qualify for the proposed tax regime (for example, the holding requirement reduced to 10 % in the directive modernising the Parent-Subsidiary Directive).

5.3 The Committee feels that the extended scope (including other forms of company and other restructuring operations) is incomplete — and therefore unsatisfactory — inasmuch as:

— it does not include all types of taxation involved in restructuring operations (particularly registration charges and transfer taxes);

— the tax deferral regime in the case of transfer of the registered office is limited to SEs and SCEs, whereas the case law established by the Court of Justice in its Centros ruling [8] recognises the right to freedom of establishment and freedom to choose the location of the registered office for all forms of company.

[8] Case no. C 212/97 of 9 March 1999.

5.4 Finally, the Committee insists that the fiscal neutrality of cross-border restructuring operations should be fully guaranteed, particularly as regards the take-over of losses and the immunisation of provisions and reserves.

6. Conclusions

6.1 The Committee wholeheartedly supports the proposals to amend the Merger Directive drawn up by the European Commission. These proposals make essential and appropriate improvements to the directive and will enable companies — including SEs, SCEs and a larger number of SMEs — to benefit fully from the advantages associated with the single market, which should improve their competitivity and thus have a positive impact on job creation and the fight against unemployment.

6.2 However, the Committee urges the Commission to re-examine certain key aspects which remain outstanding. These are referred to in the Committee's specific comments.

Brussels, 25 February 2004

The President

of the European Economic and Social Committee

Roger BRIESCH