



COMMISSION OF THE EUROPEAN COMMUNITIES

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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**

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

1. The European Council held in Lisbon in March 2000¹ concluded that the European Union had the strategic goal to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth, with more and better jobs and greater social cohesion. This objective was reiterated by the Stockholm European Council of March 2001². The Lisbon Council also called for building up a supportive general framework for economic activity in the EU.
2. In July 1999, the Council of Ministers had given a mandate to the Commission to investigate the impact of tax provisions that constitute obstacles to cross-border economic activities in the internal market and remedies thereto. The context generated by the Lisbon Council strengthens the importance of analysing corporate taxes since taxation of companies can play an important role in achieving the objectives set by the Council. Following this mandate, the Commission services conducted a study on company tax.
3. The conclusions of the company tax study³ resulted in a Commission Communication⁴. There it was examined, among other things, whether the current application of company taxation in the internal market creates inefficiencies and prevents operators from exploiting its full benefits. This would imply a loss of EU welfare, undermine the competitiveness of EU businesses and thus be counter to the Lisbon objectives. The Communication sets out the Commission view of what needs to be and what can be realistically done in the area of company taxation in the EU over the next few years in order to adapt company taxation in the EU to the new economic framework and to achieve a more efficient internal market without internal tax obstacles. For this purpose, a number of concrete initiatives were presented.
4. In addition, the Commission adopted in 2001 a Communication on tax policy for the European Union⁵ where it identified both general objectives and a number of specific priorities in direct and indirect taxation. It referred in particular to corporate tax issues where it highlighted that, at present, re-organisations of companies are often accompanied by cross-border mergers and acquisitions which currently result in a combination of one-off and ongoing tax costs.

¹ Presidency Conclusions of the Lisbon European Council of 23 and 24 March 2000, Press release nr: 100/1/00, 24/3/2000, published on the website of the Council of the European Union (<http://ue.eu.int>).

² Presidency Conclusions of the Stockholm European Council of 23 and 24 March 2001, Press release nr: 100/1/00, 24/3/2001, published on the website of the Council of the European Union (<http://ue.eu.int>).

³ Commission staff working paper "Company taxation in the internal market" SEC(2001) 1681.

⁴ Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, "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.

⁵ Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee "Tax Policy in the European Union", COM (2001) 260 final, OJ C 284 of 10.10.2001.

5. If the Lisbon goals are to be achieved, company cross-border mobility within the Union must be encouraged and obstacles to it eliminated or reduced. This will have social implications, which are dealt with in the framework of other Community policies: the various Directives on worker information and consultation, the on-going initiative on "Anticipating and managing change: a dynamic approach to the social aspects of corporate restructuring" and other initiatives in the employment field.
6. Moreover, the Statute of the European company (*Societas Europaea* - SE) was adopted in 2001⁶. It aims at contributing to the completion of the internal market and the spreading of the improvements that this brings about in the economic and social perspective throughout the Community. To this end, it provides for a legal framework so that structures of production can adapt to the Community dimension and carry out the reorganisation of their business on a Community scale. The success of the SE is very much related to the applicable tax regime. It should be able to benefit from the whole body of harmonised corporate tax law.
7. Similarly, the Statute of the European Cooperative Society (SCE) has been adopted in 2003⁷. The SCE should also be able to benefit from the whole body of harmonised corporate tax law.
8. The Statutes of the SE, Article 8, and of the SCE, Article 7, provide for the possibility of the transfer of their respective registered offices between Member States. This is an expression of the fundamental freedom of establishment. It should not be hampered by discriminatory tax rules or by restrictions or distortions arising from the tax provisions of the Member States which would be in violation of the EC Treaty provisions. Nevertheless, in order to ensure clarity on this point it is appropriate to provide in the Directive for provisions that explicitly refer to this case.
9. In view of the existing cross-border tax obstacles, ensuring the proper functioning of the internal market requires some action. According to Article 94 of the EC Treaty, the Commission has the power to propose to the Council directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.
10. The Directive on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (the Merger Directive)⁸ already provides for a solution in certain cases to the cross-border obstacle created by high tax costs linked to business restructurings. However, it is still possible to improve the scope of the Directive and the methods provided for the deferral of taxation, while at the same time safeguarding the financial interests of the Member States.

⁶ Council Regulation (EC) n° 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294 of 10.11.2001.

⁷ Council Regulation (EC) n° 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 207 of 18.8.2003.

⁸ Council 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, OJ L 225 of 20.8.1990.

11. During 1993 the Commission adopted a proposal amending the Merger Directive⁹. This proposal included two modifications. In the first place, it was designed to enable the Directive to be applied to all enterprises subject to corporation tax, irrespective of their legal form.
12. The second amendment referred to the exemption of capital gains derived from mergers and divisions in certain cases. It may be the case that the company receiving assets in these operations has a holding in the transferring company. As a consequence of the merger or division, the transferring company is dissolved and its shares are cancelled. In this case, the receiving company obtains a capital gain from the difference in value between the shares cancelled and the assets received. According to Article 7 of the Merger Directive, this capital gain is exempted from tax provided that this company had a minimum holding in the transferring company. However, the status of holding was not defined in the same terms as in the Parent-Subsidiary Directive¹⁰. The proposed amendment made the concept of holding in the Merger Directive consistent with that of the Parent-Subsidiary Directive (see also paragraphs 24 and 25 below).
13. The recent company tax study released in 2001 referred to these same problems. In addition, the experience gained after the implementation of the Directive in 1992 has revealed some other shortcomings and the study refers to them in detail and considers possible measures to tackle them.
14. The Commission Communication following the company tax study highlighted the priority of tabling the necessary amendments to the current Directives harmonising corporate tax, following technical consultations with Member States. In the course of 2002, the Commission services have called several meetings of the appropriate Commission working party during which the relevant issues have been discussed with delegations of technical experts from Member States.
15. This proposal for a Directive amends the Merger Directive. It aims at introducing the necessary changes to this Directive to take into account the above-mentioned Conclusions and Communications. Industry is still often subject to high tax costs and international double taxation when entering into business restructurings in which companies of different Member States are involved. The final goal is to eliminate these obstacles to the proper functioning of the internal market found in the Member States tax regimes. Eventually, removing the various tax obstacles to cross-border economic activity in the Internal Market would require the introduction of a common consolidated tax base for the EU-wide activities of companies. However, as long as this objective is not yet achieved, specifically targeted measures are needed to address the most pressing practical tax problems of internationally active companies. Such measures include all those considered absolutely essential in order to improve the existing body of EU company tax law. In particular, this proposal refers to similar matters to those included in the proposal adopted in 1993 and adds other provisions dealing with new issues. In consequence, the previous proposal amending the Merger Directive is being withdrawn.

⁹ 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 (93) 293 final, OJ C 225 of 20.08.1993.

¹⁰ 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, OJ L 225 of 20.8.1990.

16. The first amendment of the Directive relates to the inclusion within its scope of a new type of transaction. It is known as split-off. Article 2 of the Merger Directive, letter (b), refers to divisions. The new transaction to be covered is a special type of division. The so-called split-off operation is a limited or partial division since the transferring company continues to exist. It transfers part of its assets and liabilities constituting one or more branches of activity. In exchange, the receiving company issues securities representing its capital. These securities are transferred to the shareholders of the transferring company. Thus, a new letter (b a) is inserted in Article 2 defining the concept of "partial division".
17. In the case of the split-off, the tax deferral regime, as provided in Article 4 of the Directive, will apply. Thus, there will be a requirement that the assets and liabilities so transferred remain connected with a permanent establishment of the receiving company in the Member State of the transferring company. The Directive will also refer to the tax regime applicable to the shareholders of the transferring company. According to the rules included in Article 8 of the Directive, shareholders are not to be taxed at the time of the transaction but only in respect of the gain arising out of a subsequent transfer of the securities that they received. In addition, the securities received will have attributed to them the same value that the securities exchanged had immediately before the transaction. In the case of the split-off, a similar tax regime will be applicable. The shareholders will not be taxed at the time of the operation. In addition, the value to be attributed to the securities held in the transferring company will be divided between those same securities and the securities representing the capital of the receiving company so acquired.
18. One of the main conclusions of the study on Company Taxation is the too limited scope of the Merger Directive. It applies only to those companies included in the list annexed to its text. The ECOFIN Council of 26-27 November 2000¹¹ had already concluded that the updating of the list was a political priority.
19. This topic was addressed in the proposal adopted in 1993. That proposal aimed at extending the Directive to all enterprises resident and subject to corporation tax in a Member State. However, the asymmetries found in commercial law governing the legal types of entities and the diversity of tax arrangements applicable to them in the Member States creates considerable problems. These difficulties were already brought up during the Council discussions on the previous proposal held during 1996 and 1997. These discussions were suspended without reaching a final conclusion. This subject has been discussed again with the Member States from a technical point of view in the framework of the appropriate Commission working party. As a result, the aim of improving the coverage of the Merger Directive is achieved in this current proposal by proposing the extension of the list of entities annexed to the Directive, to cover new named legal types.

¹¹ Annex to the Presidency Conclusions of the ECOFIN Council of 26 and 27 November 2000, Press release 453 nr: 13861/00, Brussels 26/11/2000, published on the website of the Council of the European Union (<http://ue.eu.int>).

20. As already mentioned, the Statutes of the SE and of the SCE have been recently adopted. Their success requires among other factors that the benefits of the Merger Directive be applicable to them. Thus, the annex to the Directive should include the companies that will in future be run under these new legal types. As a result, the SE and the SCE are among the new entries in the list of entities covered by the Directive.
21. Some of the new entities proposed for inclusion in the list raise a particular technical problem. It could be the case that the Member State where an entity is established treats it for its own tax purposes as a corporate taxpayer whereas another Member State whose resident has an interest in that same entity treats it for its own tax purposes as transparent. The latter State attributes the income of the entity to its resident having an interest in the entity and taxes it accordingly. This Member State should be obliged to extend the benefits of the Directive to that resident with an interest in the entity. Otherwise, double taxation of profits will occur.
22. Similarly, this is the case when shareholders of companies entering into the transactions governed by the Directive are treated for tax purposes as transparent. If those persons and entities having an interest in the shareholder have to bear taxation on the occasion of restructuring transactions they may oppose the idea of the company taking part in a business restructuring. Member States should be obliged to extend the benefits of the Directive to such a resident with an interest in the shareholder. Otherwise, double taxation of profits will occur.
23. A different subject is the uncertainty that exists, in practice, about the application of the Directive to the conversion of branches into subsidiaries. Under Article 4 (1) of the Directive, the deferral of capital gains taxation is possible when the assets and liabilities transferred continue to be effectively connected with a permanent establishment of the acquiring company situated in the Member State of the transferring company. However, this does not occur when a branch of a foreign company is converted into its subsidiary since the assets and liabilities transferred are not effectively connected to a permanent establishment in the Member State of the transferring company, but of the receiving company. In consequence, it has been argued that the Merger Directive does not cover the conversion of a branch into a subsidiary. As these operations fall within the aims of the Directive, it should be clear that it also covers them. There is no risk for Member State's taxing rights since assets and liabilities transferred remain under the same tax jurisdiction.
24. Another important issue concerns Article 7 (2) of the Directive. This provision links this Directive to the Parent-Subsidiary Directive. In mergers and divisions, one of the companies involved receives assets and liabilities. It may occur that this company holds shares in the transferring company that are cancelled as a consequence of the re-organisation. The value of the assets and liabilities received could be higher than the value of the shares cancelled. This difference in value derives from non-distributed profits or hidden capital gains of the transferring company. In its capacity as a shareholder of a transferring company, a receiving company could receive from the latter those reserved profits just as easily in the form of distributed profits. The Parent-Subsidiary Directive may apply when these profits are distributed. Thus, where the receiving company has a "sufficient holding" according to the conditions of the Parent-Subsidiary Directive, the Merger Directive should allow a similar tax concession to be granted in the case of a merger or division. The difference in value mentioned above should not be subject to tax.

25. However, the definition of "sufficient holding" included in Article 7 (2) of the Merger Directive to enjoy the exemption does not correspond to that laid down in Article 3 of the Parent-Subsidiary Directive. The latter Directive provides for relief of double taxation of profits. This tax relief is provided only for those companies fulfilling the conditions set to be considered as parent companies or as subsidiaries. For this purpose, the Parent-Subsidiary Directive requires that a company has a minimum holding of 25% in the capital of the other company. Similarly, the Merger Directive stipulates exemption of the above-mentioned capital gain for parent companies. However, according to its Article 7 (2) a company is deemed to be a parent when its holding in the subsidiary exceeds 25% of the share capital. The criterion of both directives does not coincide. It is therefore necessary to make the concept of "holding" in the Merger Directive consistent with that of the Parent-Subsidiary Directive. In addition, any amendment of this subject in the Merger Directive should be made consistent with the amendments introduced in the Parent-Subsidiary Directive, where the minimum threshold to be considered as a parent company or as a subsidiary is being proposed to be lowered from 25 to 10%.
26. In the case of transfer of assets double taxation may occur. The company that transfers a branch of activity receives, in exchange, securities from the receiving company. The Directive does not provide any rules for the valuation of the securities so acquired. Some national legislations oblige the transferring company to calculate capital gains on the subsequent transfer of the securities received on the basis of the book value that the assets transferred had before the transfer. On the other hand, Article 4 (2) obliges the company receiving the assets to compute any new depreciation and any gains or losses in respect of the assets and liabilities transferred according to their value before the transfer. In these cases, the same value is used twice for tax purposes. Thus, the same capital gain derived from the assets transferred is attributed to two different taxpayers and is taxed twice. The conclusion is that this double taxation problem arises in the Member State of the transferring company. This Member State will tax the income and capital gains derived by the permanent establishment receiving the assets. In addition, it may tax the capital gains derived by the transferring company at the time of a subsequent transfer of the securities received in exchange for the assets transferred. There are no objective reasons that would justify such taxation. In case of tax abuse, however, Article 11 (1) of the Directive allows Member States to refuse the application of its benefits. According to the doctrine of the European Court of Justice¹², under Article 11(1)(a) of the Directive, it is for the Member States, observing the principle of proportionality, to determine the internal procedures necessary to counteract tax abuse. However, the laying down of a general rule automatically excluding certain categories of operations from the tax advantage, whether or not there is actually tax evasion or tax avoidance, would go further than is necessary for preventing such abuse and would undermine the aim pursued by the Directive. Thus, Member States may provide that the securities received by the transferring company are attributed their real value at the time of the transfer of assets. Taxing rights will not be at risk since it is still possible to tax the income or capital gain derived from the assets connected with the permanent establishment that will remain within the same tax jurisdiction.

¹² Judgment of 17 July 1997 in case C-28/95 *Leur-Bloem*. ECR 1997, p. I-4161.

27. Economic double taxation may also distort exchanges of shares. The acquiring company receives securities from the shareholders of the acquired company. These shareholders are not taxed on the capital gain derived from the exchange of the shares in the acquired company for shares in the acquiring company. Article 8 (2) makes this tax benefit conditional upon the shareholders not attributing to the securities received a value for tax purposes higher than the securities exchanged had immediately before the exchange of shares. This capital gain will be taxed on the occasion of a subsequent transfer of the securities so acquired.
28. The Directive does not provide any rules concerning the valuation of the securities received by the acquiring company from these shareholders. Some national legislations oblige the acquiring company to calculate capital gains on the later disposal of the securities received on the basis of the value that these securities had immediately before the exchange of shares. The Member State of the acquiring company will take into account the value of the shares exchanged before the transaction. In these cases, the same value is used twice for tax purposes. Thus, this valuation results in economic double taxation: the same capital gain derived from the shares transferred is attributed to two different taxpayers and is taxed twice.
29. In this particular case, the acquiring company obtains a holding in another company by paying a fair market price. This company has to transfer to the shareholders securities representing its capital. A new paragraph inserted in Article 8 (2) provides that the acquiring company values the shares received according to their real value at the time of the exchange of shares. This provision will avoid economic double taxation. The taxing rights of the Member States will not be put at risk since the shareholders will be taxed on the deferred capital gain. In case of tax abuse, Article 11 (1) of the Directive allows Member States to refuse the application of its benefits (see also paragraph 26 above).
30. On the other hand, it may be the case that the acquiring company holds some of its own shares acquired in the market. It may decide not to increase its capital but to transfer its own shares in exchange. In this particular situation, the acquisition cost of those own shares may be lower than their current market value at the time of the exchange. There is a capital gain and the Member States may want to tax it. If the rules hereby proposed also apply to these cases, taxing rights may be lost permanently. Thus, an exception is required to the proposed valuation rule of the securities received by the acquiring company for these cases: the securities received by the acquiring company shall be attributed the value that the own shares exchanged had immediately before the exchange. In accordance with the aims of the Directive, no taxation on this taxpayer will arise at the time of the exchange.
31. Article 8 is amended to clarify that the Directive covers those exchange of shares 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 European Union.

32. Finally, a new title is being added to the Directive to provide for the tax regime that would apply in the case of a transfer of the registered office of the SE and of the SCE¹³. The applicable tax rules will be neutral from the point of view of competition while safeguarding the financial interests of the State where the company is resident before transferring its registered office. The harmonisation will cover the cases where the transfer of the registered office has as a consequence that the company is no longer a tax resident in that Member State. It will enjoy tax deferral for the capital gains relating to those of its assets becoming connected with the permanent establishment that it will now have in its State of tax residence before the transfer of registered office.
33. The rules already existing in Articles 5, 6 and 10 of the Directive, concerning mergers and divisions, will be extended to this case. Thus, the tax regime applicable to the transfer of the registered office will also refer to provisions or reserves constituted by the company before this operation, to the possible take-over of losses and to the existence of a permanent establishment in a third Member State.
34. In addition, a specific provision will provide that no taxes can be imposed on the shareholders linked to the change of residence of the company. This provision gives expression to the EC Treaty obligations concerning the freedom of establishment. Capital gains arising out of the subsequent transfer of the securities may be taxable.

2. COMMENTARY ON THE ARTICLES OF THE PROPOSAL FOR A DIRECTIVE

Article 1

This Article comprises ten paragraphs amending the Merger Directive.

paragraph (1)

The Merger Directive will include a new title concerning the provisions necessary to grant tax deferral and to safeguard the financial interests of the Member States in cases where a European Company (SE) or a European Cooperative Society (SCE) transfers its registered office from one Member State to another. Accordingly, the title of the Directive is amended so that it also refers to the transfer of the registered office between Member States.

¹³ Article 8 of the SE Statute and Article 7 of the SCE Statute state that the registered office may be transferred to another Member State without it being wound up. According to these statutes, Articles 7 and 6 respectively, their registered offices shall be located within the Community, in the same Member State as their head offices.

paragraph (2)

1. This proposal to amend the Directive includes provisions extending the objectives of the Merger Directive to a transfer of registered office by the SE and by the SCE.
2. Accordingly, Article 1 of the Directive is amended. It includes two indents. The first one refers to the operations that are already covered in the Directive. The second indent now imposes an obligation on Member States to apply its provisions to a transfer of registered office by the SE and by the SCE.

paragraph (3)

1. Article 2 of the Directive is modified in order to include the definition of a new business re-organisation, partial divisions (“split-off”) that will be covered in the future.
2. A partial division or “split-off” is a transaction whereby a company transfers, without being dissolved, part of its assets and liabilities, constituting one or more branches of activity, to a receiving company. In exchange, the latter transfers securities, representing its capital, to the shareholders of the transferring company.
3. Thus, a new paragraph (b a) is added in Article 2 defining the concept of "partial division". Article 4 will be applicable to the transferring company. Further amendments are introduced in Article 8 taking account of the shareholders' tax regime
4. The transfer of registered office by the SE or by the SCE is included within the scope of the Directive. A new letter (j) is added in Article 2 including definitions according to the wording of Article 8 of Statute of the SE and Article 7 of Statute of the SCE.

paragraph (4)

1. This paragraph modifies Article 4 introducing a new text inserted as paragraph (2). This new paragraph refers to the issue raised by companies subject to tax as corporate taxpayers in their Member State of residence which are nevertheless considered as transparent for tax purposes in a different Member State. Due to this circumstance, the benefits of the Directive were in the past not applicable to a number of corporate taxpayers. The aim of the text proposed is to provide for a specific tax regime applicable in these cases. According to it, Member States will defer taxation on the capital gains derived from mergers or divisions by their resident companies that are included in the list. If a different Member State considers the company as transparent for tax purposes, this new paragraph will not allow this Member State to tax its resident taxpayers having an interest in that company at the time of the transactions covered by the Directive. These taxpayers may be taxed on the occasion of a later disposal of the assets transferred.
2. This new paragraph identifies those taxpayers by referring to fiscally transparent companies due to their provisions on civil law relating to the organisation of commercial undertakings. These are the circumstances that Member States use to consider companies as fiscally transparent. The text proposed avoids referring to

companies that are considered as fiscally transparent by a Member State based on the tax regime applicable to them in their State of residence.

3. Paragraphs (2) and (3) are renumbered as paragraphs (3) and (4). Both paragraphs add a reference to the new paragraph (2).
4. Some drafting improvements are also introduced in paragraphs (1) and (3).

paragraph (5)

1. This Article sets the holding requirement of the Merger Directive consistently with that of the Parent-Subsidiary Directive. Thus, the receiving company must hold at least 10% of the shares of the transferring company in order to be exempted from tax on capital gains derived from these shares.
2. The 10% proposed follows the amendment already proposed to the Parent-Subsidiary Directive, reducing the holding requirement from 25% of the share capital to 10%.

paragraph (6)

1. This paragraph amends Article 8.
2. The existing paragraphs of Article 8 together with the new added ones are renumbered. Article 8 comprises now 12 paragraphs.
3. The amendments introduced in the current wording of Article 8 refer to several measures. In the first place, a new paragraph (2) is inserted to deal with the tax regime applicable to the shareholder of the transferring company in the case of a partial division or "split off". These taxpayers will not be taxed on the allotment of securities representing the capital of the receiving company.
4. A new paragraph (3) is included. It may be the case that shareholders of companies (as defined in the Directive) entering into the transactions included within the scope of the Directive are considered as fiscally transparent. The taxpayers having an interest in these shareholders may be taxed when they derive income or capital gains from restructuring operations. The aim of the proposed text is to defer taxation on the taxpayers having an interest in those shareholders. These taxpayers may be taxed on that income on the occasion of a later disposal of the securities received by the shareholders.
5. The new paragraph (5) provides for a valuation rule applicable to the securities received by the shareholders in the case of partial divisions. According to it, the value of the securities held by them in the transferring company is divided between those same securities and the securities representing the capital of the receiving company allotted to them.
6. The new paragraph (10) refers to the value of the shares received by the acquiring company in the case of an exchange of shares. According to this new rule, the acquiring company may attribute to the shares received the real value of the securities issued in exchange. This value corresponds to the real price paid. If Member States are allowed to attribute to the securities received a lower value,

capital gains taxation would be charged on the acquiring company on the occasion of a later disposal of these securities. The capital gain derived from these securities would then be attributed to two different taxpayers: this acquiring company and the shareholders exchanging them. This would lead to double taxation. The rule included in the text proposed avoids double taxation.

7. The new paragraph (11) includes an exception for the valuation rule of the new paragraph (10). It refers to the cases where the acquiring company holds its own shares and, instead of increasing its issued capital, decides to transfer these in exchange to the shareholders of the acquired company. In this circumstance, there is normally a difference between the value of those of its own shares held and their real value at the time of the exchange. Member States may tax this capital gain. Under the principle of neutrality, this capital gain should be taxed at the time of a subsequent transfer of the securities exchanged. For this purpose, the acquiring company will attribute to the securities received the value that the own shares exchanged had immediately before the exchange.
8. A new paragraph (12) is added. It refers to exchange of shares where the majority of the voting rights in the acquired company are received from shareholders which are not tax residents in a Member State of the European Union. The aim pursued with this new provision is to clarify that the Directive covers these transactions. Thus, its benefits are applicable to the taxpayers concerned as currently identified in the Directive.
9. The former paragraph (1) is divided into three different paragraphs numbers (4), (6) and (7). Paragraphs (3) and (4) are renumbered as paragraphs (8) and (9) respectively.
10. The cross references existing in this Article have been modified in order to take into account the new structure of its provisions.

paragraph (7)

1. This paragraph amends Article 9. A new paragraph is introduced and the existing text is renumbered as paragraph (1). In the case of the transfer of assets, there is a capital gain linked to the assets transferred. This capital gain is deferred and will be taxed on the occasion of a later disposal of those assets. The tax will be charged on the permanent establishment acquiring those assets. In addition, Member States may provide that the transferring company is obliged to attribute to the securities received in exchange the value that the assets so transferred had before the transaction. This national rule leads to double taxation.
2. The text proposed includes a rule for valuing the securities received by the transferring company. This company will attribute to them the real value of the assets and liabilities transferred. Consequently, the Member State of the transferring company, at the time of taxing the later disposal of the securities received in consideration for the assets transferred, will have to compute the capital gain arising from this transaction taking account of that value.

paragraph (8)

1. Paragraph (1) of Article 10 is divided into three new subparagraphs and another new one is added in order to cover expressly the conversion of branches into subsidiaries. The tax regime will be the same as already provided for the case of the transfer of a permanent establishment. Consequently, the transfer of assets connected with a permanent establishment to a newly set up company will not give rise to taxation. In addition, paragraph (2) of Article 10 will apply and taxing rights of Member State applying a system of taxing worldwide profits will be safeguarded.
2. Some drafting improvements are introduced to clarify the text of this provision.

paragraph (9)

1. A new title is included in the Directive to provide for a tax regime applicable to the transfer of the registered office. It will be numbered as title IVa.
2. Articles 10a, 10b and 10c are included in the Directive to rule the transfer of the registered office of an SE or of an SCE.
3. Article 10a deals with the tax deferral regime applicable to the SE and to the SCE in the case of a transfer of registered office. A consequence of this operation may be a change in the Member State of tax residence. If this occurs, it may be the case that the Member States tax these companies on the difference between the real value of their assets and liabilities and their value for tax purposes before the transfer. Paragraph (1) makes tax deferral conditional on the assets and liabilities of the company continuing to be effectively connected with a permanent establishment situated in the Member State where the company transferring the registered office was resident before the transfer.
4. Paragraph (2) of Article 10a provides for the rules applicable to the calculation of depreciation, gains or losses in respect of the assets of the company that remain connected with the permanent establishment. It obliges Member States to apply future taxation as though the transfer of the registered office had not taken place.
5. Paragraph (3) of Article 10a refers to the cases where a national legislation provides for special rules applicable to the calculation of depreciation, gains or losses in respect of the assets and liabilities connected with the permanent establishment. Should the company opt for the application of such rules, the provisions of paragraph (1) will not apply.
6. The taxation of the transfer of the registered office is similar to that applicable to mergers and divisions. The new article 10b refers to other provisions of the Directive on mergers and divisions. However, these operations involve a transferring company and a receiving company. Those provisions refer to both companies while the operation envisaged here involves one single company. In order to clarify the position, paragraph (4) states that the company is considered to be both the transferring company and the receiving company.

7. Paragraph (1) of Article 10b provides for the application of Article 5 to the transfer of the registered office. It guarantees that the permanent establishment of the company continues to enjoy the exemption of the provisions or reserves properly constituted by it before the transfer of the registered office.
8. Paragraph (2) of Article 10b refers to the take-over of losses. The permanent establishment may continue to offset those incurred by the company that had not been exhausted for tax purposes. Member States are under the same obligation concerning succession to tax losses as that imposed by their tax law in the case of a domestic business restructuring.
9. Paragraph (3) of Article 10b refers to the case where the company transferring the registered office has a permanent establishment in a third Member State. The principles of Article 10 shall apply and the Member State where the permanent establishment is situated will not raise tax on the transfer of the registered office.
10. If the company had incurred losses in the permanent establishment, those losses had to be set off against other profits of the company. It is possible that the company had not offset its total amount against profits arising from the permanent establishment. Then, the Member State where the company was resident before the transfer may reinstate in its taxable profits such amount of non-recovered losses.
11. It is possible that the Member State of the company applies a system of taxing worldwide profits. Then, that Member State may tax any profits or capital gains linked to the permanent establishment at the time of the transfer of the registered office. This Member State must give relief for the tax that had been paid in the Member State where the permanent establishment is situated if tax deferral had not been provided for.
12. The transfer of the registered office does not change the situation of the shareholders of the company. However, there is a change that might be relevant for tax purposes. They have a holding in a company that changes its tax residence. Thus, the tax regime applicable to income or profits arising from those securities may change.
13. The new Article 10c, paragraph (1), guarantees that the shareholders are not taxed on any income, profits or capital gains when the company transfers its registered office.
14. Paragraph 2 of Article 10c defers taxation until a later disposal of the shares representing the capital of the company.

Paragraph (10)

1. This paragraph refers to the annex of this amending proposal where the annex of Directive 90/434/EEC is amended. Thus, the list of companies to which the Directive applies contained in its annex is replaced by a new one incorporating other types of entities and in particular the European company (SE) and the European Cooperative Society (SCE). This proposal will extend the benefits of the Directive to new legal types of entities, including co-operatives, mutual companies, certain non-capital based companies, saving banks, funds and associations with commercial activity.

2. The SE and the SCE are included under letter (z) of the annex. This new entry does not follow the natural sequence of letters because it is intended to make additional entries in the annex under points (p) to (y) to cover the types of company that exist in the acceding countries.

Article 2

This Article lays down the timetable and the requirements for transposing the Directive into Member States' national laws. Member States are required forthwith to inform the Commission of the transposition of the Directive in their national laws and submit a correlation table between this Directive and the national provisions adopted.

Article 3

This Article refers to the date of entry into force of the amending Directive and to its publication.

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 94 thereof,

Having regard to the proposal from the Commission¹⁴,

Having regard to the opinion of the European Parliament¹⁵,

Having regard to the opinion of the European Economic and Social Committee¹⁶,

Having regard to the opinion of the Committee of the Regions¹⁷,

Whereas:

- (1) Council Directive 90/434/EEC¹⁸ introduced common rules applicable to business restructuring which are neutral from the point of view of competition.
- (2) The objective of Directive 90/434/EEC is that taxation of the income, profits and capital gains from business reorganisations should be deferred and Member States taxing rights safeguarded.
- (3) The experience gained following implementation of Directive 90/434/EEC in January 1992 has demonstrated different ways in which the Directive can be improved and how the beneficial effects of the common rules as adopted in 1990 could be extended.
- (4) On 8 October 2001 the Council adopted Regulation (EC) No 2157/2001 on the Statute for a European Company (SE)¹⁹ and Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees²⁰. Similarly, on 22 July 2003 the Council adopted Regulation (EC) N° 1435/2003 on the Statute for a European Cooperative Society (SCE)²¹ and Directive 2003/72/EC supplementing the

¹⁴ OJ C ..., ..., p. ...

¹⁵ OJ C ..., ..., p. ...

¹⁶ OJ C ..., ..., p. ...

¹⁷ OJ C ..., ..., p. ...

¹⁸ OJ L 225, 20.8.1990, p. 1.

¹⁹ OJ L 294, 10.11.2001, p. 1.

²⁰ OJ L 294, 10.11.2001, p. 22.

²¹ OJ L 207 of 18.8.2003, p.1.

Statute for a European Cooperative Society with regard to the involvement of employees²². One of the most important features of these instruments is that both the SE and the SCE will be able to transfer their respective registered offices between Member States without being dissolved and going into liquidation.

- (5) The transfer of the registered office is a means of exercising freedom of establishment as provided for in Articles 43 and 48 of the Treaty. No assets are transferred and the company and its shareholders do not derive any income, profits or capital gains from it. The company decision to reorganise its business by transferring its registered office should not be hampered by discriminatory tax rules or by restrictions, disadvantages or distortions arising from national tax legislation which is contrary to Community Law.
- (6) The transfer of the registered office necessitates the introduction of a number of new rules which must, however, be neutral from the point of view of competition. Where, upon, the transfer of the registered office, the assets of the SE or of the SCE remain effectively connected with a permanent establishment belonging to it and situated in the Member State in which the SE or the SCE was previously resident, that permanent establishment should enjoy benefits similar to those provided for in Articles 5, 6 and 10 of Directive 90/434/EEC, concerning tax-exempted provisions and reserves, the take-over of losses and taxation of permanent establishments of the SE situated in a third Member State. Moreover, in accordance with the principles of the EC Treaty, the taxation of shareholders on the occasion of the transfer of the registered office should be excluded.
- (7) Directive 90/434/EEC did not refer to a type of division where the company transferring branches of activity is not dissolved. The provisions of Article 4 of that Directive should therefore be extended to cover such cases.
- (8) Article 3 of Directive 90/434/EEC defines the companies falling within its scope and the Annex thereto lists the forms of company to which the Directive applies. However, certain forms of company are not listed in the Annex even though they are resident for tax purposes in a Member State and are subject to corporation tax there. In the light of the experience, this appears to be an unjustifiable lacuna and the scope of the Directive should therefore be extended to cover entities which can carry out cross-border activities in the Community and which meet all the relevant requirements.
- (9) Since the SE is a public limited-liability company and since the SCE is a cooperative society, both similar in nature to other forms of company already covered by Directive 90/434/EEC, the SE and the SCE should be added to the list set out in the Annex to Directive 90/434/EEC.
- (10) The new entities included in the list of the Annex are corporate taxpayers in their Member State of residence but some of them are considered transparent for tax purposes by other Member States. In order for the benefits of Directive 90/434/EEC to be effective, Member States treating non-resident corporate taxpayers as fiscally transparent should apply the benefits of the Directive to them.

²² OJ L 207 of 18.8.2003, p.25.

- (11) Where shareholders of companies entering into the transactions governed by Directive 90/434/EEC are treated for tax purposes as transparent, persons having an interest in the shareholder should not suffer taxation on the occasion of restructuring transactions.
- (12) Some doubts exist as to the application of Directive 90/434/EEC to the conversion of branches into subsidiaries. In these operations, the assets connected to a permanent establishment and constituting a branch of activity, as defined in Article 2 (i) of Directive 90/434/EEC, are transferred to a newly set up company which will be a subsidiary of the transferring company and it should be made clear that being the transfer of assets from a company of a Member State of a permanent establishment located in a different Member State to a company of the latter Member State, this transaction is covered by the Directive.
- (13) The definition of exchange of shares, set out in Article 2 (d) of Directive 90/434/EEC does not impose any special conditions on shareholders who transfer the majority of voting rights in a company to an acquiring company. It should be made clear that the Directive covers cases where both the acquired company and the acquiring company involved in an exchange of shares meet the conditions required in Article 3 of Directive 90/434/EEC but the shareholders transferring their participation to the latter company are resident outside the Community.
- (14) In the case of mergers and divisions, the receiving company may derive gains from the difference in value between the assets and liabilities received and the shares that it may have held in the transferring company that are annulled following these operations. Article (7) of Directive 90/434/EEC provides for the exemption of these capital gains since these profits may be derived just as easily in the form of distributed profits from the transferring company that would have been exempted under 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 States²³. The objectives of both Directive 90/434/EEC and Directive 90/435/EEC coincide with regard to this particular issue but the conditions required are not the same. Directive 90/434/EEC should therefore be amended to assimilate its requirements to those of Directive 90/435/EEC and to take into account the lower shareholding threshold included in the proposal to amend that Directive.
- (15) Under Article 8 (2) of Directive 90/434/EEC, securities received by the shareholders in an exchange of shares are computed for tax purposes by reference to the value, immediately before the exchange, of the securities thus transferred, but there are no provisions as to the value to be attributed by the acquiring company to the securities thus acquired. If, in such cases, Member States attribute to the shares received by the acquiring company the value that they had immediately before the exchange, the same value is attributed to two different taxpayers and the same capital gain is taxed twice. The resulting double taxation should be avoided by allowing the acquiring company to value the securities received by reference to the real value of the securities issued in exchange.

²³ OJ L 225, 20.8.1990, p. 6.

- (16) In such cases, the acquiring company may exchange its own shares representing its capital and there may be a difference between their acquisition cost and their real value at the time of the exchange. Member States should defer taxation on such gains and tax it only on the occasion of a subsequent transfer of the securities received in exchange.
- (17) Under Article 4 (1) of Directive 90/434/EEC, assets acquired in a transfer of assets are computed for tax purposes by reference to their value immediately before the transaction but there are no provisions as to the value to be attributed to the securities received in exchange. If Member States were to attribute to the securities, received in a transfer of assets, the same value that the assets transferred had immediately before the transaction, and taking into account that this is the value attributed to the branch of activity transferred, the result would be that the same value is attributed to two different taxpayers and the same capital gain is taxed twice. The resulting double taxation should be eliminated by providing that the transferring company is to attribute to the securities received the real value of the assets transferred.
- (18) Directive 90/434/EEC should therefore be amended accordingly.

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 90/434/EEC is amended as follows:

- (1) The title is replaced by the following:

"Council Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office between Member States."

- (2) Article 1 is replaced by the following:

"Article 1

Each Member State shall apply this Directive to the following:

- (a) mergers, divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved,
- (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 1435/2003, transferring their registered office from one Member State to another Member State."

(3) Article 2 is amended as follows:

(a) The following paragraph (b a) is added:

(b a) 'partial division' shall mean an operation whereby a company transfers, without being dissolved, one or more branches of activity, to one or more existing or new companies, in exchange for the pro-rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment not exceeding 10 % of the nominal value or, in the absence of a nominal value, of the accounting par value of those securities;

(b) The following paragraph (j) is added:

(j) 'transfer of the registered office' shall mean an operation whereby an SE or an SCE without winding up or creating a new legal person, transfers its registered office from one Member State to another Member State.

(4) Article 4 is replaced by the following:

Article 4

"1. A merger, division or partial division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.

For the purpose of this Article the following definitions shall apply:

(a) value for tax purposes: the value on the basis of which any gain or loss would have been computed for the purposes of tax upon the income, profits or capital gains of the transferring company if such assets or liabilities had been sold at the time of the merger or division but independently of it;

(b) transferred assets and liabilities: those assets and liabilities of the transferring company which, in consequence of the merger or division, are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company and play a part in generating the profits or losses taken into account for tax purposes.

2. Where paragraph 1 applies and where a Member State considers a non-resident transferring company as fiscally transparent on the basis of its provisions under civil law relating to the organisation of commercial undertakings and therefore taxes the shareholders on their share of the profits of the transferring company as and when those profits arise, that State shall not tax any income, profits or capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.

3. Paragraphs 1 and 2 shall apply only if the receiving company computes any new depreciation and any gains or losses in respect of the assets and liabilities transferred according to the rules that would have applied to the transferring company or companies if the merger or division had not taken place.
 4. Where, under the laws of the Member State of the transferring company, the receiving company is entitled to have any new depreciation or any gains or losses in respect of the assets and liabilities transferred computed on a basis different from that set out in paragraph 3, paragraph 1 shall not apply to the assets and liabilities in respect of which that option is exercised."
- (5) In Article 7, paragraph 2 is replaced by the following:
- "2. The Member States may derogate from paragraph 1 where the receiving company has a holding of less than 10% in the capital of the transferring company."
- (6) Article 8 is replaced by the following:

"Article 8

1. On a merger, division or exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.
2. On a partial division, the allotment to a shareholder of the transferring company of securities representing the capital of the receiving company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.
3. Where, on the basis of provisions under civil law relating to the organisation of commercial undertakings, a Member State considers a shareholder as fiscally transparent and therefore taxes those persons having an interest in the shareholders on their share of the profits of the transferring company as and when those profits arise, that State shall not tax those persons on income, profits or capital gains from the allotment of securities representing the capital of the receiving or acquiring company to the shareholder.
4. Paragraphs 1 and 3 shall apply only if the shareholder does not attribute to the securities received a value for tax purposes higher than the value the securities exchanged had immediately before the merger, division or exchange.
5. Paragraph 2 shall apply only if the shareholder does not attribute to the sum of the securities received and those held in the transferring company, a value for tax purposes higher than the value the securities held in the transferring company had immediately before the division.

6. The application of paragraphs 1, 2 and 3 shall not prevent the Member States from taxing the gain arising out of the subsequent transfer of securities received in the same way as the gain arising out of the transfer of securities existing before the acquisition.
7. In this Article the expression 'value for tax purposes' means the value on the basis of which any gain or loss would be computed for the purposes of tax upon the income, profits or capital gains of a shareholder of the company.
8. Where, under the law of the Member State in which he is resident, a shareholder may opt for tax treatment different from that set out in paragraphs 4 and 5, paragraphs 1, 2 and 3 shall not apply to the securities in respect of which such an option is exercised.
9. Paragraphs 1, 2 and 3 shall not prevent a Member State from taking into account when taxing shareholders any cash payment that may be made on the merger, division, partial division or exchange.
10. The acquiring company in an exchange of shares shall attribute to the securities received the real value of the securities issued to the shareholders of the acquired company.
11. When the acquiring company holds its own shares and transfers these in exchange, Member States may derogate from paragraph 10 and compute any income, profits or capital gains, from the subsequent transfer of the securities received, according to the value those transferred shares had immediately before the exchange.
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."

(7) Article 9 is replaced by the following:

"Article 9

1. The provisions of Articles 4, 5 and 6 shall apply to transfers of assets.
2. The securities representing the capital of the receiving company, received in exchange for the transfer of assets by the transferring company, shall have attributed to them the real value that the assets and liabilities transferred had immediately before the transfer of assets."

(8) In Article 10, paragraph 1 is replaced by the following:

- "1. Where the assets transferred in a merger, a division or a transfer of assets include a permanent establishment of the transferring company which is situated in a Member State other than that of the transferring company, the Member State where the permanent establishment is situated shall renounce any right to tax that permanent establishment.

The Member State of the transferring company may reinstate in the taxable

profits of that company such losses of the permanent establishment as may previously have been set off against the taxable profits of the company in that State and which have not been recovered.

The Member State in which the permanent establishment is situated and the Member State of the receiving company shall apply the provisions of this Directive to such a transfer as if the Member State where the permanent establishment is situated were the Member State of the transferring company.

These provisions shall also apply in the case where the permanent establishment is situated in the same Member State as that in which the receiving company is resident."

- (9) The following TITLE IVa is inserted.

"TITLE IVa

Rules applicable to the transfer of the registered office.

Article 10a

1. The transfer of the registered office of an SE or of an SCE shall not give rise to any taxation of income, profits or capital gains derived from those assets and liabilities of the transferring company which, in consequence of the transfer of the registered office, remain effectively connected with a permanent establishment of the SE or of the SCE in the Member State where it was resident before the transfer of its registered office and play a part in generating the profits or losses taken into account for tax purposes.
2. Paragraph 1 shall apply only if the SE or the SCE computes any new depreciation and any gains or losses in respect of those assets and liabilities transferred, as though the transfer of the registered office had not taken place.
3. Where, under the laws of the Member State where the SE or the SCE was resident before the transfer of the registered office, the SE or the SCE is entitled to have any new depreciation or any gains or losses in respect of the assets and liabilities remaining in that Member State computed on a basis different from that set out in paragraph 2, paragraph 1 shall not apply to the assets and liabilities in respect of which that option is exercised.

Article 10b

1. The provisions of Article 5 shall apply in the case of the transfer of the registered office of an SE or of an SCE.
2. Where a Member State allows the receiving company to take over from the transferring company, the losses, which had not yet been exhausted for tax purposes in the case of the operations referred to in Article 1 between companies of that Member State, it shall allow the permanent establishment of the SE or of the SCE, situated within its territory, to take-over the losses of the

SE or of the SCE transferring its registered office which have not been exhausted for tax purposes.

3. The provisions of Article 10 shall apply in the case of the transfer of the registered office of an SE or of an SCE, if that SE or that SCE has a permanent establishment situated in another Member State, notwithstanding that no assets and liabilities are transferred between companies.
4. For the purposes of this Article, the SE or the SCE transferring its registered office shall be deemed to be both the transferring company and the receiving company.

Article 10c

1. The transfer of the registered office of an SE or of an SCE shall not, of itself, give rise to any taxation of the income, profits or capital gains of the shareholders.
2. The application of paragraph 1 shall not prevent the Member States from taxing the gain arising out of the subsequent transfer of the securities representing the capital of the SE or of the SCE that transfers its registered office."

- (10) The annex is replaced by the text in the Annex to this Directive.

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive by 1 January 2005 at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive is addressed to the Member States.

Done at Brussels,

*For the Council
The President*

ANNEX

“ANNEX

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

- a) companies under Belgian law known as "société anonyme"/"naamloze vennootschap", "société en commandite par actions"/"commanditaire vennootschap op aandelen", "société privée à responsabilité limitée"/"besloten vennootschap met beperkte aansprakelijkheid", "société coopérative à responsabilité limitée"/"coöperatieve vennootschap met beperkte aansprakelijkheid", "société coopérative à responsabilité illimitée"/"coöperatieve vennootschap met onbeperkte aansprakelijkheid" and public undertakings which have adopted one of the abovementioned legal forms;
- b) companies under Danish law known as "aktieselskab" and "anpartsselskab". Other companies subject to tax under the Corporation Tax Act, insofar as their taxable income is calculated and taxed in accordance with the general tax legislation rules applicable to "aktieselskaber";
- c) companies under German law known as "Aktiengesellschaft", "Kommanditgesellschaft auf Aktien", "Gesellschaft mit beschränkter Haftung", "bergrechtliche Gewerkschaft";
- d) companies under Greek law known as "ανώνυμη εταιρεία", "εταιρεία περιορισμένης ευθύνης (Ε.Π.Ε.)";
- e) companies under Spanish law known as "sociedad anónima", "sociedad comanditaria por acciones", "sociedad de responsabilidad limitada", and those public law bodies which operate under private law;
- f) companies under French law known as "société anonyme", "société en commandite par actions", "société à responsabilité limitée", "sociétés par actions simplifiées", "sociétés d'assurances mutuelles", "sociétés civiles" which are automatically subject to corporation tax, "coopératives", "unions de coopératives" and public establishments and undertakings;
- g) companies incorporated or existing under Irish laws, bodies registered under the Industrial and Provident Societies Act, building societies incorporated under the Building Societies Acts and trustee savings banks within the meaning of the Trustee Savings Banks Act, 1989;
- h) companies under Italian law known as "società per azioni", "società in accomandita per azioni", "società a responsabilità limitata", "società cooperative", "società per mutua assicurazione", and private and public entities whose activity is wholly or principally commercial;
- i) companies under Luxembourg law known as "société anonyme", "société en commandite par actions", "société à responsabilité limitée", "société coopérative", "société coopérative organisée comme une société anonyme", "association d'assurances mutuelles", "association d'épargne-pension", "entreprise de nature

commerciale, industrielle ou minière de l'Etat, des communes, des syndicats de communes, des établissements publics et des autres personnes morales de droit public";

- j) companies under Dutch law known as "naamloze vennootschap", "besloten vennootschap met beperkte aansprakelijkheid", "Open commanditaire vennootschap", "Coöperatie", "onderlinge waarborgmaatschappij", "Fonds voor gemene rekening", "vereniging op coöperatieve grondslag" and "vereniging welke op onderlinge grondslag als verzekeraar of kredietinstelling optreedt";
- k) companies under Austrian law known as "Aktiengesellschaft", "Gesellschaft mit beschränkter Haftung";
- l) commercial companies or civil law companies having a commercial form as well as other legal persons carrying on commercial or industrial activities, which are incorporated under Portuguese law;
- m) companies under Finnish law known as "osakeyhtiö"/"aktiebolag", "osuuskunta" /"andelslag", "säästöpankki"/"sparbank" and "vakuutusyhtiö"/"försäkringsbolag";
- n) companies under Swedish law known as "aktiebolag", "bankaktiebolag", "försäkringsaktiebolag";
- o) companies incorporated under the law of the United Kingdom;
- z) companies incorporated under Council Regulation (EC) n° 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and the Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees and cooperative societies incorporated under Council Regulation (EC) n° 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."

FINANCIAL STATEMENT

This proposal for a Council Directive has no financial implications for the Community budget.

IMPACT ASSESSMENT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs)

TITLE OF PROPOSAL

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.

DOCUMENT REFERENCE NUMBER

THE PROPOSAL

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

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 (the Directive) aims at harmonising the taxation of business re-structuring operations. It introduces a neutral tax regime from the point of view of competition, in order to allow enterprises to participate in mergers, divisions, transfers of assets or exchanges of shares and so to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level. This is achieved by deferring the taxation of the capital gains relating to the assets transferred on the occasion of the operations described in the Directive. At the same time, requiring that the assets transferred remain under the same tax jurisdiction safeguards the financial interests of the Member States. The harmful effects of a well-known tax obstacle to the internal market are so reduced.

However, due to the current scope of the Directive and its different implementation in Member States, cross-border restructuring operations still give rise to substantial tax charges. The amount of capital gains taxation on sound business restructuring operations forces companies to leave economically sub-optimal structures untouched. These facts reduce the effectiveness of tax harmonisation in this particular area. Industry still encounters important obstacles to cross-border activity, establishment and investment in the internal market. This adversely affects the competitiveness of European companies. In economic terms there is a loss of potential EU welfare.

In addition, the Statute of the European company (*Societas Europaea* or SE) was adopted in 2001 and the Statute of the European Cooperative Society (SCE) was adopted in 2003. According to the preamble of their Regulations, the completion of the internal market and the improvement it brings about in the economic and social situation throughout the Community mean not only that barriers to trade must be removed, but also that the structures of production must be adapted to the Community dimension. For that purpose it is essential that companies whose business is not limited to satisfying purely local needs should be able to plan and

carry out the reorganisation of their business on a Community scale. These Regulations do not include any tax provisions. It is urgent to adopt measures now. It is essential that the benefits of the Directive are applicable to these new legal types. In particular, these companies are able to transfer their registered offices between Member States: it is also very important to guarantee the application of a neutral tax regime to these operations.

This proposal for a Directive contains targeted measures addressing specific problems. It does not seek to apply a global solution to all existing cross-border obstacles. It is designed to overcome these problems by extending the tax deferral regime to a larger number of cases. The proposal is aimed at broadening the scope of harmonisation provided for in the current text of the Directive and improving the methods to secure tax neutrality while safeguarding the financial interests of Member States. All this is achieved in the proposal through the following measures:

- The Directive will be applicable to a larger number of legal persons and entities, including the SE and the SCE.
- A new type of transactions will be covered: a special division known as "split off".
- The shareholding required to enjoy exemption of gains accruing on the cancellation of the holding in the company transferring the assets is set consistently with that of the Directive 90/435/EEC on the common system of taxation applicable to parent and subsidiary companies of different Member States (the Parent-Subsidiary Directive). This requirement is being lowered as well from 25% to 10%, following the amendments proposed to the Parent-Subsidiary Directive.
- It introduces specific provisions concerning the conversion of branches into subsidiaries.
- It clarifies that its benefits apply to exchange of shares where the majority of the voting rights is acquired from shareholders with tax residence outside the European Union.
- It introduces rules to eliminate economic double taxation in the case of exchange of shares.
- It provides for methods to eliminate economic double taxation in the case of transfer of assets
- It deals with the transfer of the registered office of the SE and of the SCE.

THE IMPACT ON BUSINESS

2. Who will be affected by the proposal?

- which sectors of business
- which sizes of business (what is the concentration of small and medium-sized firms)

- are there particular geographical areas of the Community where these businesses are found

The Directive applies to mergers, divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved. Those companies must adopt one of the legal forms mentioned in the list annexed to the Directive. The amending proposal will extend its benefits to new legal types of entities, including the SE, the SCE, co-operatives, mutual companies, certain non-capital based companies, saving banks, funds and associations with commercial activity. The SE is a public limited company of an EC dimension. The SCE is a co-operative of an EC dimension. Co-operatives normally have separate legal personality, which cover the needs of their members by concluding agreements with them. Mutual companies usually bring together persons who pool their common interests in order to receive services in exchange. Funds are assigned capital to meet the purposes for which they are set up. Including these legal forms in the coverage of the Directive will extend its benefits to different forms of organising economic activities.

Although the inclusion in the scope of the Directive of saving banks and mutual companies should have its effects in the banking and insurance sectors, all sectors of business and geographical areas of the Community should benefit equally from the proposal.

The proposal clarifies that the Directive covers exchange of shares where shareholders with tax residence outside the European Union are covered. This should contribute to a wider application of the Directive. Groups of companies which are non-exclusively EC can enter into restructuring operations while their European components will enjoy deferral of taxation on the capital gains accruing. Besides this particular fact, all geographical areas of the Community should benefit equally from the proposal.

3. What will business have to do to comply with the proposal?

No new obligations or tax compliance burdens are imposed on business.

4. What economic effects is the proposal likely to have?

- on employment
- on investment and the creation of new businesses
- on the competitiveness of businesses

The purpose of the proposal is to improve and extend the tax deferral provided for capital gains derived from restructuring operations. A bigger number of entities and business groups will benefit from this tax neutral regime. It is extended to cover "split offs" and is also made clear that the Directive also covers the conversion of branches into subsidiaries and the transactions where resident outside the European Union take part in the sense that they are shareholders in the companies involved. The methods designed for this purpose will also be more effective since economic double taxation linked to transfers of assets and exchange of shares will also be avoided. Ensuring a more uniform application of tax law by extending company tax

harmonisation is also an important step to reduce compliance costs and increase the efficiency of company taxation in the EU.

The benefits of the neutral tax regime as provided in the Directive are extended to the SE and to the SCE. These provisions will contribute to the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law and tax law. This proposal will enable the transfer, in specific circumstances, of the registered office under a tax neutral regime and ensures that the benefits of the SE statute and of the SCE statute are not undermined in this case by a tax obstacle.

All this will play a major role in removing an identified tax obstacle for companies within the EU. By ensuring tax deferral on gains derived from international business re-organisations, the Directive can contribute to balanced taxation of domestic and cross-border activities and improved investment location decisions. International investor's decisions will no longer be influenced by certain current tax obstacles. This will contribute to a reduction of capital costs.

The reduction of disadvantages and distortions arising from variable national tax provisions through a common tax regime consisting of tax deferral will encourage new business initiatives.

The competitiveness of European business will improve by allowing sound business reorganisation at no present tax cost. A more efficient investment decision or restructuring will contribute to business competitiveness in the EU. Also, the waste of resources linked to economic double taxation will be reduced.

The improvement of the business climate should have a positive effect on job creation and the fight against unemployment

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements etc)?

The proposal contains provisions extending the Directive to non-capital based entities. Thus, a larger number of small and medium size enterprises that do not normally adopt the form of a capital based company will be covered.

CONSULTATION

6. List the organisations which have been consulted about the proposal and outline their main views.

The text of this proposal is the result of long consultative processes. On one hand, the initiatives following the previous amending proposal of the Merger Directive, [COM(93) 293 final], were based on the conclusions of the Ruding Committee²⁴ and on the Commission Communication of 26 June 1992 to the Council and to Parliament subsequent to the conclusions of the Ruding Committee²⁵.

²⁴ Report of the Committee of Independent experts on company taxation of March 1992.
²⁵ SEC(92) 1118 final.

In addition, the more far reaching modifications included in the text hereby proposed are the result of the debates between international tax experts, technical delegations from Member States and the Commission services. The company tax study is the main source of ideas for this legislative process. This study was conducted by the Commission services based on discussions with two panels of experts and documentation provided by them. The panels of experts were composed of highly qualified tax professionals from the academic world, including universities and research institutions, and business representatives.

The final step of this process consisted of meetings with the Member States in a Commission chaired working group that examined aspects of the elements taken up in the proposal.

The present proposal is the result of the deliberations of all those experts, the analysis provided for by the Commission services and the evaluation of the reflections and concerns of national tax policy makers.