Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States

COUNCIL DIRECTIVE 2005/19/EC

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THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Whereas:

(1) Directive 90/434/EEC[(3)] 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) One of the aims of Directive 90/434/EEC is to eliminate obstacles to the functioning of the internal market, such as double taxation. In so far as this is not fully achieved by the provisions of that Directive, Member States should take the necessary measures to achieve this aim.

(4) 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.

(5) On 8 October 2001 the Council adopted Regulation (EC) No 2157/2001 on the Statute for a European Company (SE)[(4)] and Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees[(5)]. Similarly, on 22 July 2003 the Council adopted Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE)[(6)] and Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees[(7)]. 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.

(6) 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. The transfer of the registered office of an SE or an SCE from one Member State to another may not always lead to the SE or SCE ceasing to be resident in the first Member State. The tax residence of the SE or SCE continues to be determined by national legislation and tax treaties.

(7) The transfer of the registered office of a company, or an event connected with that transfer, that brings about a change in tax residence, may give rise to some form of taxation in the Member State from which the office is transferred. Taxation may also occur in a case where the transfer of the registered office, or an event connected with that transfer, does not lead to a change in tax residence. In order to deal with that eventuality as far as the SE or SCE is concerned, a number of new rules have been introduced into Directive 90/434/EEC. In a case where, following the transfer of the registered office, the assets of the SE or of the SCE remain effectively connected with a permanent establishment belonging to the SE or SCE and situated in the Member State from which the registered office was transferred, that permanent establishment should enjoy benefits similar to those provided for in Articles 4, 5 and 6 of Directive 90/434/EEC. Those articles concern tax-exempted provisions and reserves, and the take-over of losses. Moreover, in accordance with Treaty principles, the taxation of shareholders on the occasion of the transfer of the registered office should be excluded. Having regard to the obligation on Member States under the Treaty to take all necessary measures to abolish double taxation, it is not necessary at this stage to establish common rules governing the tax residence of the SE or SCE.

(8) Directive 90/434/EEC does not deal with losses of a permanent establishment in another Member State recognised in the Member State of residence of an SE or SCE. In particular, where the registered office of an SE or SCE is transferred to another Member State, such transfer does not prevent the former Member State of residence from reinstating losses of the permanent establishment in due time.

(9) Directive 90/434/EEC does not cover a type of division where the company transferring branches of activity is not dissolved. Article 4 of that Directive should therefore be extended to cover such cases.

(10) 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 that 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.

(11) 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.

(12) The other new companies included in the list of the Annex to this Directive are corporate taxpayers in their Member State of residence but some of them are considered fiscally transparent 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. However, given the difference in tax treatment by Member States of these particular corporate taxpayers, Member States should have the option not to apply the relevant provisions in the Directive when taxing a direct or indirect shareholder of those taxpayers.

(13) Where shareholders of companies entering into the transactions governed by Directive 90/434/EEC are treated as fiscally transparent, persons having an interest in the shareholder should not suffer taxation on the occasion of restructuring transactions.

(14) 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 this transaction, 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, is covered by the Directive.

(15) The current definition of ‘exchange of shares’ in Article 2(d) of Directive 90/434/EEC does not state whether the term encompasses further acquisitions beyond that granting a simple majority of voting rights. It is not uncommon for company statutes and voting rules to be drafted in such a way that further acquisitions are needed before the acquirer can obtain complete control over the target company. The definition of ‘exchange of shares’ should therefore be amended to state that that term covers all such further acquisitions.

(16) 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 States[(8)]. 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 that Directive.

(17) Given the extension of Directive 90/434/EEC to include partial divisions and the transfer of a registered office of an SE or an SCE, the scope of the provision regarding the countering of tax avoidance and tax evasion should be amended accordingly.

(18) Directive 90/434/EEC should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

(**1**) Opinion delivered on 10 March 2004 (not yet published in the Official Journal).

(**2**) OJ C 110, 30.4.2004, p. 30.

(**3**) OJ L 225, 20.8.1990, p. 1. Directive as last amended by the 2003 Act of Accession.

(**4**) OJ L 294, 10.11.2001, p. 1. Regulation as amended by Regulation (EC) No 885/2004 (OJ L 168, 1.5.2004, p. 1).

(**5**) OJ L 294, 10.11.2001, p. 22.

(**6**) OJ L 207, 18.8.2003, p. 1. Regulation as amended by Decision of the EEA Joint Committee No 15/2004 (OJ L 116, 22.4.2004, p. 68).

(**7**) OJ L 207, 18.8.2003, p. 25.

(**8**) OJ L 225, 20.8.1990, p. 6. Directive as last amended by Directive 2003/123/EC (OJ L 7, 13.1.2004, p. 41).