

Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (codified version)

CHAPTER I

GENERAL PROVISIONS

Article 1

Each Member State shall apply this Directive to the following:

- (a) mergers, divisions, partial divisions, transfers of assets and exchanges of shares involving companies from two or more Member States;
- (b) transfers of the registered office from one Member State to another Member State of a European company (Societas Europaea or SE), as established in Council Regulation (EC) No 2157/2001 on the Statute for a European company (SE)⁽¹⁾, and a European Cooperative Society (SCE), as established in Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE)⁽²⁾.

Article 2

For the purposes of this Directive, the following definitions shall apply:

- (a) ‘merger’ means an operation whereby:
 - (i) one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company in exchange for the issue to their shareholders of securities representing the capital of that other company, 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;
 - (ii) two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, in exchange for the issue to their shareholders of securities representing the capital of that new company, 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;
 - (iii) a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities representing its capital;
- (b) ‘division’ means an operation whereby a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to two 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;

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- (c) ‘partial division’ means an operation whereby a company transfers, without being dissolved, one or more branches of activity, to one or more existing or new companies, leaving at least one branch of activity in the transferring company, 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;
- (d) ‘transfer of assets’ means an operation whereby a company transfers without being dissolved all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer;
- (e) ‘exchange of shares’ means an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company, or, holding such a majority, acquires a further holding, in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, in the absence of a nominal value, of the accounting par value of the securities issued in exchange;
- (f) ‘transferring company’ means the company transferring its assets and liabilities or transferring all or one or more branches of its activity;
- (g) ‘receiving company’ means the company receiving the assets and liabilities or all or one or more branches of the activity of the transferring company;
- (h) ‘acquired company’ means the company in which a holding is acquired by another company by means of an exchange of securities;
- (i) ‘acquiring company’ means the company which acquires a holding by means of an exchange of securities;
- (j) ‘branch of activity’ means all the assets and liabilities of a division of a company which from an organisational point of view constitute an independent business, that is to say an entity capable of functioning by its own means;
- (k) ‘transfer of the registered office’ means 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.

Article 3

For the purposes of this Directive, ‘company from a Member State’ shall mean any company which:

- (a) takes one of the forms listed in Annex, I Part A;
- (b) according to the tax laws of a Member State is considered to be resident in that Member State for tax purposes and, under the terms of a double taxation agreement concluded with a third country, is not considered to be resident for tax purposes outside the Community; and
- (c) is subject to one of the taxes listed in Annex I, Part B, without the possibility of an option or of being exempt, or to any other tax which may be substituted for any of those taxes.

CHAPTER II

RULES APPLICABLE TO MERGERS, DIVISIONS, PARTIAL DIVISIONS, TO TRANSFERS OF ASSETS AND EXCHANGES OF SHARES

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.

2 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, division or partial division but independently of it;
- (b) ‘transferred assets and liabilities’ : those assets and liabilities of the transferring company which, in consequence of the merger, division or partial 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.

3 Where paragraph 1 applies and where a Member State considers a non-resident transferring company as fiscally transparent on the basis of that Member State’s assessment of the legal characteristics of that company arising from the law under which it is constituted and therefore taxes the shareholders on their share of the profits of the transferring company as and when those profits arise, that Member 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.

4 Paragraphs 1 and 3 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, division or partial division had not taken place.

5 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 4, paragraph 1 shall not apply to the assets and liabilities in respect of which that option is exercised.

Article 5

The Member States shall take the necessary measures to ensure that, where provisions or reserves properly constituted by the transferring company are partly or wholly exempt from tax and are not derived from permanent establishments abroad, such provisions or reserves may be carried over, with the same tax exemption, by the permanent establishments of the receiving company which are situated in the Member State of the transferring company, the receiving company thereby assuming the rights and obligations of the transferring company.

Article 6

To the extent that, if the operations referred to in Article 1(a) were effected between companies from the Member State of the transferring company, the Member State

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would apply provisions allowing the receiving company to takeover the losses of the transferring company which had not yet been exhausted for tax purposes, it shall extend those provisions to cover the takeover of such losses by the receiving company's permanent establishments situated within its territory.

Article 7

1 Where the receiving company has a holding in the capital of the transferring company, any gains accruing to the receiving company on the cancellation of its holding shall not be liable to any taxation.

2 The Member States may derogate from paragraph 1 where the receiving company has a holding of less than 15 % in the capital of the transferring company.

From 1 January 2009 the minimum holding percentage shall be 10 %.

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 a Member State considers a shareholder as fiscally transparent on the basis of that Member State's assessment of the legal characteristics of that shareholder arising from the law under which it is constituted and therefore taxes those persons having an interest in the shareholder on their share of the profits of the shareholder as and when those profits arise, that Member 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 of shares.

5 Paragraphs 2 and 3 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 partial 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 For the purpose of this Article, 'value for tax purposes' shall mean 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.

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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 of shares.

Article 9

Articles 4, 5 and 6 shall apply to transfers of assets.

CHAPTER III

SPECIAL CASE OF THE TRANSFER OF A PERMANENT ESTABLISHMENT

Article 10

1 Where the assets transferred in a merger, a division, a partial 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 of the transferring company 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 Member 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.

This paragraph 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.

2 By way of derogation from paragraph 1, where the Member State of the transferring company applies a system of taxing worldwide profits, that Member State shall have the right to tax any profits or capital gains of the permanent establishment resulting from the merger, division, partial division or transfer of assets, on condition that it gives relief for the tax that, but for the provisions of this Directive, would have been charged on those profits or capital gains in the Member State in which that permanent establishment is situated, in the same way and in the same amount as it would have done if that tax had actually been charged and paid.

CHAPTER IV

SPECIAL CASE OF TRANSPARENT ENTITIES

Article 11

1 Where a Member State considers a non-resident transferring or acquired company to be fiscally transparent on the basis of that Member State's assessment of the legal characteristics of that company arising from the law under which it is constituted, it shall have the right not to apply the provisions of this Directive when taxing a direct or indirect shareholder of that company in respect of the income, profits or capital gains of that company.

2 A Member State exercising the right referred to in paragraph 1 shall give relief for the tax which, but for the provisions of this Directive, would have been charged on the fiscally

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transparent company on its income, profits or capital gains, in the same way and in the same amount as that Member State would have done if that tax had actually been charged and paid.

3 Where a Member State considers a non-resident receiving or acquiring company to be fiscally transparent on the basis of that Member State's assessment of the legal characteristics of that company arising from the law under which it is constituted, it shall have the right not to apply Article 8(1), (2) and (3).

4 Where a Member State considers a non-resident receiving company to be fiscally transparent on the basis of that Member State's assessment of the legal characteristics of that company arising from the law under which it is constituted, that Member State may apply to any direct or indirect shareholders the same treatment for tax purposes as it would if the receiving company were resident in that Member State.

CHAPTER V

RULES APPLICABLE TO THE TRANSFER OF THE REGISTERED OFFICE OF AN SE OR AN SCE

Article 12

- 1 Where:
- a an SE or an SCE transfers its registered office from one Member State to another Member State; or
 - b in connection with the transfer of its registered office from one Member State to another Member State, an SE or an SCE, which is resident in the first Member State, ceases to be resident in that Member State and becomes resident in another Member State;

that transfer of registered office or the cessation of residence shall not give rise to any taxation of capital gains, calculated in accordance with Article 4(1), in the Member State from which the registered office has been transferred, derived from those assets and liabilities of the SE or SCE which, in consequence, remain effectively connected with a permanent establishment of the SE or of the SCE in the Member State from which the registered office has been transferred 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 the assets and liabilities that remain effectively connected with that permanent establishment, as though the transfer of the registered office had not taken place or the SE or the SCE had not so ceased to be tax resident.

3 Where, under the laws of the Member State from which the registered office was transferred, 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 13

- 1 Where:
- a an SE or an SCE transfers its registered office from one Member State to another Member State; or
 - b in connection with the transfer of its registered office from one Member State to another Member State, an SE or an SCE, which is resident in the first Member State, ceases to be resident in that Member State and becomes resident in another Member State;

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the Member States shall take the necessary measures to ensure that, where provisions or reserves properly constituted by the SE or the SCE before the transfer of the registered office are partly or wholly exempt from tax and are not derived from permanent establishments abroad, such provisions or reserves may be carried over, with the same tax exemption, by a permanent establishment of the SE or the SCE which is situated within the territory of the Member State from which the registered office was transferred.

2 To the extent that a company transferring its registered office within the territory of a Member State would be allowed to carry forward or carry back losses which had not been exhausted for tax purposes, that Member State shall allow the permanent establishment, situated within its territory, of the SE or of the SCE transferring its registered office, to take over those losses of the SE or SCE which have not been exhausted for tax purposes, provided that the loss carry forward or carry back would have been available in comparable circumstances to a company which continued to have its registered office or which continued to be tax resident in that Member State.

Article 14

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.

CHAPTER VI

FINAL PROVISIONS

Article 15

1 A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Articles 4 to 14 where it appears that one of the operations referred to in Article 1:

- a has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that the operation is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives;
- b results in a company, whether participating in the operation or not, no longer fulfilling the necessary conditions for the representation of employees on company organs according to the arrangements which were in force prior to that operation.

2 Paragraph 1(b) shall apply as long as and to the extent that no Community law provisions containing equivalent rules on representation of employees on company organs are applicable to the companies covered by this Directive.

Article 16

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

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Article 17

Directive 90/434/EEC, as amended by the acts listed in Annex II, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex II, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

Article 18

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 19

This Directive is addressed to the Member States.

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- (1) [OJ L 294, 10.11.2001, p. 1.](#)
- (2) [OJ L 207, 18.8.2003, p. 1.](#)