

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)

COUNCIL DIRECTIVE 2009/133/EC

of 19 October 2009

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(codified version)

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) Council Directive 90/434/EEC of 23 July 1990 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⁽³⁾ has been substantially amended several times⁽⁴⁾. In the interests of clarity and rationality the said Directive should be codified.
- (2) Mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the effective functioning of such an internal market. Such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. To that end it is necessary, with respect to such operations, to provide for tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the internal market, to increase their productivity and to improve their competitive strength at the international level.
- (3) Tax provisions disadvantage such operations, in comparison with those concerning companies of the same Member State. It is necessary to remove such disadvantages.

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- (4) It is not possible to attain this objective by an extension at Community level of the systems in force in the Member States, since differences between these systems tend to produce distortions. Only a common tax system is able to provide a satisfactory solution in this respect.
- (5) The common tax system ought to avoid the imposition of tax in connection with mergers, divisions, partial divisions, transfers of assets or exchanges of shares, while at the same time safeguarding the financial interests of the Member State of the transferring or acquired company.
- (6) In respect of mergers, divisions or transfers of assets, such operations normally result either in the transformation of the transferring company into a permanent establishment of the company receiving the assets or in the assets becoming connected with a permanent establishment of the latter company.
- (7) The system of deferral of the taxation of the capital gains relating to the assets transferred until their actual disposal, applied to such of those assets as are transferred to that permanent establishment, permits exemption from taxation of the corresponding capital gains, while at the same time ensuring their ultimate taxation by the Member State of the transferring company at the date of their disposal.
- (8) While the companies listed in Annex I, Part A are corporate taxpayers in their Member State of residence, some of them may be considered to be fiscally transparent by other Member States. In order to preserve the effectiveness of this Directive, Member States treating non-resident corporate taxpayers as fiscally transparent should grant the benefits of this Directive to them. However, Member States should have the option not to apply the relevant provisions of this Directive when taxing a direct or indirect shareholder of those taxpayers.
- (9) It is also necessary to define the tax regime applicable to certain provisions, reserves or losses of the transferring company and to solve the tax problems occurring where one of the two companies has a holding in the capital of the other.
- (10) The allotment to the shareholders of the transferring company of securities of the receiving or acquiring company should not in itself give rise to any taxation in the hands of such shareholders.
- (11) The decision of an SE or SCE to reorganise its business by transferring its registered office should not be unduly hampered by discriminatory tax rules or by restrictions, disadvantages or distortions arising from national tax legislation which is contrary to Community Law. The transfer, or an event connected with the transfer, may give rise to some form of taxation in the Member State from which the office is transferred. Where the assets of the SE or of the SCE remain effectively connected with a permanent establishment in the Member State from which the registered office was transferred, that permanent establishment should enjoy benefits similar to those provided for by Articles 4, 5 and 6. Moreover, the taxation of shareholders on the occasion of the transfer of the registered office should be excluded.

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- (12) This Directive 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.
- (13) It is necessary to allow Member States the possibility of refusing to apply this Directive where the merger, division, partial division, transfer of assets, exchange of shares or transfer of the registered office of an SE or SCE has as its objective tax evasion or avoidance or results in a company, whether or not it participates in the operation, no longer fulfilling the conditions required for the representation of employees in company organs.
- (14) One of the aims of this Directive 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 this Directive, Member States should take the necessary measures to achieve this aim.
- (15) This Directive should be 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,

HAS ADOPTED THIS DIRECTIVE:

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- (1) Opinion of 13 January 2009 (not yet published in the Official Journal).
- (2) [OJ C 100, 30.4.2009, p. 153.](#)
- (3) [OJ L 225, 20.8.1990, p. 1.](#)
- (4) See Annex II, Part A.