

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

Article 1

Directive 90/434/EEC is hereby amended as follows:

1. the title shall be replaced by the following:
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.;

2. Article 1 shall be replaced by the following:

Article 1

Each Member State shall apply this Directive to the following:

- (a) mergers, divisions, partial divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved,
 - (b) transfers of the registered office from one Member State to another Member State of European companies (*Societas Europaea* or SE), as established in Council Regulation (EC) No 2157/2001 of 8 October 2001, on the statute for a European Company (SE)⁽¹⁾, and European Cooperative Societies (SCE), as established in Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)⁽²⁾;
3. Article 2 shall be amended as follows:

- (a) The following paragraph shall be 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, 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;

- (b) Paragraph (d) shall be replaced as follows:

(d) “exchange of shares” shall mean 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;

- (c) The following paragraph shall be added:

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- (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. the eighth indent of Article 3(c) with respect to Italy shall be replaced as follows:

— imposta sul reddito delle società in Italy,

5. the heading of Title II shall be replaced by the following:

TITLE II Rules applicable to mergers, divisions, partial divisions, and exchanges of shares.

6. Article 4 shall be 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, 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.

- 2 Where paragraph 1 applies and where a Member State considers a non-resident transferring company as fiscally transparent on the basis of that 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 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, division or partial 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.;

7. Article 6 shall be replaced by the following:

Article 6

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

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

8. in Article 7, paragraph 2 shall be replaced by the following:

2. The Member States may derogate from paragraph 1 where the receiving company has a holding of less than 20 % in the capital of the transferring company.

From 1 January 2007 the minimum holding percentage shall be 15 %. From 1 January 2009 the minimum holding percentage shall be 10 %.;

9. Article 8 shall be 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 a Member State considers a shareholder as fiscally transparent on the basis of that 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 shareholders on their share of the profits of the shareholder 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 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 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.

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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.;

10. Article 10 shall be replaced by the following:
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 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.

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.;

11. the following Title shall be inserted:

TITLE IVa

Special case of transparent entities

Article 10a

1 Where a Member State considers a non-resident transferring or acquired company to be fiscally transparent on the basis of that 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 transparent company on its income, profits or capital gains, in the same way and in the same amount as that State would have done if that tax had actually been charged and paid.

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- 3 Where a Member State considers a non-resident receiving or acquiring company to be fiscally transparent on the basis of that 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 paragraphs 1, 2 and 3.
- 4 Where a Member State considers a non-resident receiving company to be fiscally transparent on the basis of that 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.;
12. the following Title shall be inserted.

TITLE IVb

Rules applicable to the transfer of the registered office of an SE or an SCE

Article 10b

- 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 of 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 that Member State, 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 10c

- 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

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first Member State, ceases to be resident in that Member State and becomes resident in another Member State,

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 10d

- 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.

13. In Article 11, paragraph 1 shall be replaced by the following:

1. A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III, IV and IVb where it appears that the merger, division, partial division, transfer of assets, exchange of shares or transfer of the registered office of an SE or an SCE:

- a has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 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.

14. The Annex shall be 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 to comply both with the provisions of this Directive regarding the transfer of the registered office of an SE or of an SCE, and with the entry (a) in the Annex to this Directive by 1 January 2006. Member States shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

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When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive, as regards the provisions other than those referred to in paragraph 1, by 1 January 2007. Member States 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 these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

3 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, 17 February 2005.

For the Council

The President

J.-C. JUNCKER

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- (1) [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](#)).
- (2) [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](#)).