Zeitschrift: Zeitschrift für schweizerisches Recht = Revue de droit suisse = Rivista di diritto svizzero = Revista da dretg svizzer : Halbband II. Referate und Mitteilungen des SJV

Herausgeber: Schweizerischer Juristenverein

Band: 120 (2001)

Artikel: Status and perspectives of harmonisation and co-ordination of company taxation in the European Community

Autor: Maisto, Guglielmo

DOI: https://doi.org/10.5169/seals-895699

Status and perspectives of harmonisation and co-ordination of company taxation in the European Community

PROF. DR. GUGLIELMO MAISTO, AVVOCATO, PIACENZA/MILANO

1. *Introduction*

1.1 The EC Treaty and the institutional framework

The lack of provisions dealing with the harmonisation in the field of company taxation is – no doubt – one of the features of the Treaty of Rome and as such constitutes one important reason of the failure of the EC institutions to achieve reasonable results in this area.

Indeed, the sole provision making express reference to income taxation is Article 293 (*ex* Article 220) of the EC Treaty under which

> „Member States shall, as far as is necessary, enter into negotiations with each other with a view to securing for the benefits of their nationals... the abolition of double taxation within the Community"

Significantly enough, it is a provision addressed to the Member States and not to the EC institutions.

Although scholars have tried to strengthen the importance of this rule, it is accepted that it creates no obligations on the Member States[1, 2].

---

1 Most scholars, in fact, have expressed the view that Article 293 merely requires Member States to enter into negotiations but does not require them to cause such negotiations to be concluded and achieve actual elimination of double taxation and that powers concerning the abolition of double taxation are also attributed to the European Communities [as established by Article 94 (*ex* Article 100) of the EC Treaty]. See M.Lehner, *EC law and the competence to abolish double taxation* in *Tax treaties and EC law*, Kluwer, 1996, 5; E.Kemmeren, *EC law: specific observations* in *The compatibility of anti-abuse provisions in tax treaties with EC law*, Kluwer, 1998, 18; P.Farmer, *EC Tax Law*, Oxford, 1994, 6; L.Hinnekens, *Compatibility of bilateral treaties with European Community law. The rules* in *EC Tax Review*, 1994, 154 (an Italian author dissenting on the point is A.Santamaria, *Diritto Commerciale Comunitario*, Milan, 1995, 10).
The above interpretation has been confirmed by the ECJ in the Gilly case [*Gilly and another vs. Directeur des Services Fiscaux du Bas-Rhin*, Case C-336/96 (1998) ECR 1014]. In such case (§ 15) the Court specified that „*Article 220 is not intended to lay down a legal rule directly applicable as such, but merely defines a number of matters on which the Member States are to enter into negotiations with each other «so far as is necessary». Its second indent merely indicates the abolition of double taxation within the Community as an objective of any such negotiations*".

2 Furthermore, all Member States are bound between themselves by bilateral agreements to avoid double taxation so that the practical relevance of such provision is at present immaterial. In fact in a few instances only are the bilateral relations not yet covered by a convention. These are the relations between Greece and Portugal, Greece and Spain, Greece and Ireland, Portugal and Sweden. In addition, the Denmark-Portugal treaty was terminated on 1 January 1995 and has not been replaced by another treaty. The last bilateral relation between Member States was covered in the year 2000 when the Luxembourg-Portugal treaty, signed on 25 May 1999, entered into force (precisely on 30 December 2000).

In fact, Article 293 merely lays down on the Member States the burden to „*as far as is necessary, enter into negotiations*" and thus requires the Member States to use their best efforts but not to achieve a result. Furthermore, the wording "*as far as is necessary*" seems to suggest that the Member States must undertake actions only to achieve objectives which are not covered by the competence of the EC or, in any case, where the action by the EC would not be sufficient to meet the fixed goals.

For decades attempts have been made to find other treaty provisions in the EC Treaty which could constitute the legal basis for either an exclusive EC competence to issue legislation on company taxation or a mandatory obligation for the EC institutions to harmonise the same.

A first attempt was based on Article 308 (*ex* Article 235) of the EC Treaty which states that

> „If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures"

Recourse to such rule was made in the desire to broaden the EC's competence and to confer to it external powers also with reference to issues which are not expressly covered by the EC Treaty.

Indeed, the ECJ took the view that whenever the Community establishes common rules on a certain subject regarding the relations with Non-Member States, then Member States lose their competence to undertake independently any obligations vis-à-vis such third States.

Some scholars have argued that such principle of acquisition of EC's exclusive competence might apply also to the common rules introduced through the directives approved in the field of company tax[3].

Criticism to this view was however expressed in so far as the company tax directives are governing only the relations between Member States and do not apply to the relations with third States.[4]

All the above attempts to find a basis for mandatory obligation to harmonize or to seek an exclusive EC competence on company taxation have failed and it is now *communis opinio* that action in the field of company

---

3 H.Hamaekers, *Corporate tax policy and competence of the European Community: an EC tax convention with non-member States?* in *European Taxation*, 1990, 358. See also S.van Thiel, *The prohibition of income tax discrimination in the European Union: what does it mean?*, in *European Taxation*, 1994, 303.

4 J.F.Avery Jones, *Flows of capital between the EU and third countries and the consequences of disharmony in European international tax law*, in *EC Tax Review*, 1998, 95.

taxation is governed by the principle of subsidiarity laid down by Article 5 (*ex* Article 3B) of the EC Treaty[5, 6].

In the absence of provisions on company taxation in the EC Treaty, harmonisation may be achieved on the basis of Article 94 (ex Article 100) of the EC Treaty under which

> „the Council shall, acting unanimously on a proposal from the Commission ...issue directives for the approximation of such laws ... of the Member States as directly affect the establishment or functioning of the common market".

The unanimity required to approve the directives remains undoubtedly the unresolved institutional issue which dominates and governs the progress of EC company tax harmonisation.

Attempts to amend the institutional framework and eliminate the unanimity for the taxation initiatives has failed many times and lastly at the recent Nice meeting of the EC Council in December 2000.

However, the Treaty of Nice[7] contains provisions which might change the institutional climate in the field of company taxation. These are the rules amending Article 11 (*ex* Article 5A) of the EC Treaty which no longer contains the possibility for each Member State to veto against a closer (or enhanced) cooperation among other Member States.

Article 2(1) of the Treaty of Nice amended Article 11 of the EC Treaty now reads as follows

> „1. Member States which intend to establish enhanced cooperation between themselves in one of the areas referred to in this Treaty shall address a request to the Commission which may submit a proposal to the Council

---

5 *„The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.*
In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

6 It is debated the extent to which the application of the *„subsidiarity"* principle weakens the action of the EC institutions on a given subject as some scholars have taken the view that it simply represents a different way of achieving the goals of the internal market. On the effects of the subsidiarity principle see S.James, *Can we Harmonise Our views on European Tax Harmonisation?* in *Bulletin for International Fiscal Documentation* 2000, 263.

7 Such Treaty was signed in Nice on 26 February 2001 and was published in the EC Official Gazette no. C 80 of 10 March 2001.

> to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.
> 2. Authorisation to establish enhanced cooperation as referred to in paragraph 1 shall be granted, in compliance with Articles 43 to 45 of the Treaty on European Union, by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament. [...]"

The above modification has therefore eliminated the possibility for a Member State to veto against a closer cooperation among the other Member States on any issue covered by the EC Treaty. Since also the approximation of laws *ex* Article 94 is covered by the EC Treaty, tax harmonisation might fall under the scope of a closer cooperation among some Member States pursuant to Article 11 of the EC Treaty.

1.2 The work of the EC until 1990

The decisive role of the institutional framework is echoed by the remarkably long list of proposals which in the last forty years has been either rejected by the EC Council of Ministers or withdrawn by the same EC Commission in the light of lack of unanimity by Member States[8].

---

8 Among others, the following measures were considered by the Commission but either were rejected/withdrawn or remained dormant until presently:
- a proposal concerning direct taxation (harmonisation of the taxable base for corporation income tax purposes and the tax treatment of profits realised and distributed by corporations) presented by the Commission on 11 February 1966;
- a draft proposal of a Directive concerning the withholding tax treatment applicable to interest from bonds, presented by the Commission on 25 June 1970;
- a proposal of a Regulation concerning the common statute of enterprises acting in the sector of hydrocarbures, presented by the Commission on 29 June 1971;
- a proposal of a Directive concerning the harmonisation of systems of company taxation and of withholding taxes on dividends, presented by the Commission on 1 August 1975;
- a proposal of a Directive concerning the approximation of laws, regulations and administrative provisions on collective investment institutions other than closed institutions presented by the Commission on 29 April 1976;
- a proposal for a Directive concerning the application to collective investment institutions of the Directive concerning the harmonisation of company taxation and of withholding taxes on dividends, presented by the Commission on 24 July 1978;
- a proposal of a Directive concerning the harmonisation of national loss carry-over periods presented by the Commission on 25 June 1985;
- a preliminary draft proposal of a Directive on the harmonisation of rules for the determination of taxable profits of enterprises. presented by the Commission in 1988;
- a proposal to abolish the „*administrative practice*" refusal grounds under the Mutual Assistance Directive, presented by the Commission on 10 February 1989;

Such works ranged from a uniform taxable base of companies to withholding taxes on dividends distributed by companies but also included a draft multilateral convention to avoid double taxation on income and common provisions concerning taxation of collective investment institutions. All such proposals have failed and have either been withdrawn or abandoned by the EC Commission.

This difficulty to achieve harmonisation is reflected in the Communication on tax harmonisation which the EC Commission delivered to the EC Council in 1990 which makes it clear that

> „The Commission has reached the conclusion that Community action should concentrate on the measures essential for completing the internal market"[9].

It is the affirmation of the principle of subsidiarity later expressly laid down in 1992[10] by the above mentioned Article 5 of the EC Treaty which in the field of company taxation puts an end to the EC Commission's proposals which heavily impact on, and interfere with, fundamentals of company taxation in the various Member States.

Article 5 of the EC Treaty lays down three interconnected criteria[11]:

- a proposal to extend the Parent-Subsidiary Directive to all enterprises subject to corporation tax, regardless of their legal form and to provide for a second and further tier credit for underlying foreign tax, presented by the Commission on 26 July 1993;
- a proposal to extend the scope of the Merger Directive to all enterprises subject to corporation tax, regardless of their legal form, presented by the Commission on 26 July 1993.

9 [SEC (90) 601 final]. Communication from the Commission to the Council and to the European Parliament.

10 The so-called principle of subsidiarity was introduced with the new Article 3B (now Article 5) inserted in the EC Treaty by Article G5 of the Treaty of Maastricht. According to some scholars, such principle was already underlying the EC legal system before 1992; in fact the Commission Report on the European Union of 1975 envisaged the introduction of such principle with the purpose to allocate competences between the Member States and the Community on a decentralised basis and the principle was finally adopted by the project of the European Single Act initialised in 1984. However, the principle was formally introduced into the EC Treaty only starting from 1992 and, on this point, the ECJ (of first instance) expressly ruled that „*the principle of subsidiarity did not, before the entry into force of the Treaty on European Union, constitute a general principle of law by reference to which the legality of Community acts should be reviewed*" (Case T-29/92 decided on 21 February 1995 in ECR, 1995, II, 289).

11 With reference to the extent and application of Article 5 of the EC Treaty see P.Craig – G.De Bùrga, *EU Law*, Oxford, 1998, 127; P.Amadei, *Il principio di sussidiarietà nel processo di integrazione comunitaria*, in *Il trattato di Maastricht*, Naples, 1995, 13; A.Jiménez, *Towards corporate tax harmonisation in the European Community: an institutional and procedural analysis*, Kluwer, 1999, 165.

a. the Community can intervene only if its objectives cannot be sufficiently achieved by the Member States [12];
b. the action of the Community has to be required because of the scale or effects of the proposed action[13];
c. if the Community is to take action, this cannot go beyond what is necessary to achieve the objectives of the Treaty [14].

On the application of Article 5, the Commission[15], expressed the opinion that identification of the measures concerning fields where the Community does not have an exclusive competence must be based on the test of „*comparative efficiency*"(this would reflect the principles mentioned under a and b above) Thus the action must be better achievable by the EC rather than by the Member States and must be adequate in its size and effects to what needed by them. In addition, the action must be necessary to achieve the objectives of the Treaty (principle of „*proportionality*").

The above mentioned tests, however, form part of a discretionary judgement by the institutions of the EC[16]. Indeed, it is the EC Treaty itself[17] that acknowledges this by stating that subsidiarity is a „*dynamic concept*"[18].

---

12 First part of Article 5(2).
13 Second part of Article 5(2).
14 Article 5(3).
15 Commission Communication to the Council and the European Parliament, Bull. EC 10-1992, 116 and 1st Report of Commission on Subsidiarity [COM (94) 533].
16 According to most scholars application of the principle of subsidiarity is only effective during the political processes (Temple Lang, *What powers should the European Community have?*, in *European Public Law*, 1995, 97; Dehousse, *Community competences: are there limits to growth?*, in Dehousse, *Europe after Maastricht: an ever closer Union*, Munich, 1994; Emilou, *Subsidiarity: an effective barrier against the enterprises of ambition*, in *European Law Review*, 1992, 383). There are, however, some scholars who believe that subsidiarity may be as well used as a judicial argument (Lanaerts – Ypersele, *Le principe de subsidiarité et son contexte: etude de l'article 3b du Traité CE*, in *Cahiers de droit europeén*, 1994, 10; Jacqué – Weiler, *On the road to European Union. A new judicial architecture: an agenda for the intergovernmental conference*, in *Common market law review*, 1990, 185).
17 See the Protocol on the application of the principle of subsidiarity and proportionality, introduced by the Treaty of Amsterdam.
18 However, the above mentioned Protocol (§ 5) provides for some guidelines on how to identify whether the principle of subsidiarity is respected; the guidelines are as follows:
   – *„the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by the Member States;*
   – *actions by the Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;*

Although establishing what is necessary in the field of company taxation „*to achieve the objectives of the EC Treaty*" may to a certain extent be disputable, it is unlikely that such action includes at present the introduction of an EC company tax or a mandatory EC taxable base for companies[19, 20].

Until the early 1990s, no set of rules had been approved by the EC Council of Ministers in the field of company taxation.

The first piece of EC legislation on the subject matter dates back to 1977 and regarded the administrative assistance between Member States in the field of exchange of information regarding corporate taxes[21].

The adoption of the directive which was limited to co-operation between tax administrations was viewed as the attitude to neglect the interest of companies and businesses and as an implied priority for the protection of the interest of the Member States as opposed to the interest of the taxpayers[22].

– *action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.*"

19 Moreover, it has been argued that with regard to company taxation – which does not fall under the Community's exclusive competence and which, pursuant to Article 94, is subject to the unanimous decision by the Council (*i.e.* by the Member States) – the principle of subsidiarity does not assume a significant relevance. In fact, every decision has to pass under the favourable vote of all Member States which will autonomously verify that the measure under discussion is indeed necessary and cannot be better ruled by them separately. Therefore Article 94 seems sufficient to guard the respect of the principle of subsidiarity as far as company taxation is concerned. See A.Jiménez, *Towards corporate tax harmonisation in the European Community: an institutional and procedural analysis*, Kluwer, 1999, 167.

20 To date the ECJ dealt with the principle of subsidiarity in a few decisions and only incidentally. For instance the Court dealt with subsidiarity in the *Bosman* case [case C-415/93 in ECR 1995, I, 4921] but only stated that the principle of subsidiarity cannot be used by Member States to permit national measures that contrast the principles laid down by the EC Treaty [the Court adopted this argument to counteract the Belgian Government which held that, since the freedom of private associations to adopt sporting rules falls within the Member States' competence, national rules could also limit the rights of individuals (as conferred by the Treaty) in order to ensure such freedom].

21 Council Directive 77/799/EEC of 19 December 1977, OJ L336 of 27 December 1977, 15.

22 In fact, simultaneously with the above mentioned Directive also the Proposed Directive on the elimination of double taxation in connection with the adjustment of transfers of profits between associated enterprises (arbitration procedure) [COM 73 (611) in OJ C 301/1976] was proposed by the EC Commission, but was not finally approved by the Council. See B.Terra – P.J.Wattel, *European Tax Law*, Deventer, 1997, 315; P.L.Kelley, *Transfer price adjustments and double taxation: a sword of Damocles for multinationals*, in *Bulletin for International Fiscal Documentation*, 1984, 448; D.A.van Waardenburg, *Transfer pricing arbitration procedure*, in *European Taxation*, 1978, 144; S.Plasschaert, *Ways and means to improve European and wider international co-*

Yet, such legislative action did not interfere with substantive law and rules on company tax liability of corporate taxable persons.

In order to identify the first EC tax provision dealing with substantive tax law, one needs to wait not earlier than another ten years, namely, 1985 when a provision dealing with the taxation of the profits of an EEIG was included in EC Council Regulation No. 2137/85 of 25 July 1985 governing the creation and functioning of this new EC entity.

Particularly, Article 40 of the said Regulation stated that

> „The profits or losses resulting from the activities of a grouping shall be taxable only in the hands of its members".

The relevance of this provision on corporate harmonisation has so far been extremely negligible because the use of the EEIG to conduct business activities has proven to be very limited and certainly below the desired expectations of the Community drafters.

Part of such failure is to be ascribed to the tax regime tailored by Article 40 which has raised controversial issues in the Member States. In fact, Article 40 lays down the principle of the tax transparency of the EEIG which raises a number of issues both under internal law and under treaty provisions

As scholars[23] have pointed out:

- the participation to an EEIG located in a Member State (EEIG State) by a resident of another Member State (residence State) may be characterised as a permanent establishment of such resident person and may thus give rise to taxation of the EEIG income, in the hands of the participant, in the EEIG State;
- EEIG's income attributed to the participants may, alternatively, maintain its (source State) characterisation or be re-characterised as a specific category of income (such as business income or income from capital);
- in case the EEIG realises income from third (Member) States the applicable double tax treaty may be, alternatively that concluded be-

---

operation against tax evasion and avoidance, with particular reference to transfer pricing within multinational enterprises, in *European Taxation*, 1980, 176.

23 Blouet *et al.*, *The taxation of the European Economic Interest Grouping (EEIG)*" in *European Taxation*, 1991, 2; A.Haeltermann, *International tax aspects of the EEIG*, in *European Economic Interest Groupings*, edited by D.van Gerven and C.Aalders, Kluwer, 1990, 59; T.Lall, *Taxation and the European Economic Interest Grouping* in *British Tax Review*, 1993, 134; Haug-Adrion, *L'imposition du Groupement Europeén d'Interest Economique*, in *Revue de fiscalité europeénne*, 1988, No. 2, 19; B.Terra – P.J.Wattel, *European Tax Law*, Deventer, 1997, 293; J.Goldsworth *Economic Interest Grouping Regulation now in effect*, in *Tax Notes International*, 1989.

tween the third State and the EEIG State or that concluded between the third State and the State of residence of the participant(s)[24];

- the determination of the share of profits of the EEIG which is attributable to each participant may differ in the EEIG State and in the State of residence of the participant, thus possibly giving rise to double taxation issues;
- the possibility to attribute the EEIG's losses to the participants and to offset such losses with other items of income realised by the participants[25].

The results of the work of the EC Commission in the field of company tax may be found in the EC directives which had been approved on 23 July 1990 dealing respectively with:

(i) the common system of taxation of dividends paid by a subsidiary company of a Member State to a parent company of another Member State; and

(ii) cross-border mergers, divisions, transfer of businesses and exchanges of shares.

Yet, on 23 July, 1990, the Member States signed a Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises which is also the result of the efforts made by the EC institutions in the field of company taxation.

---

24 The solution envisaged by the EC legislator was that of having the EEIG completely disregarded for tax treaty purposes, thus adopting the same approach as the recent OECD Report on the Taxation of Partnerships (Paris, 1999). See G.Sass, *Tax aspects of the European Economic Interest Grouping*, in *Tax Planning International*, 1986, No. 1, 3; G.Sass, *Les aspects fiscaux de groupement europeén d'interest économique* in *Revue de fiscalité europeénne*, 1986, No. 4, 43.

25 Assonime, *La politica di armonizzazione fiscale della Comunità Economica Europea,* Rome, 1982, 113; N.Dolfini, *Profili tributari del trattamento del GEIE*, in *Rivista di diritto tributario*, 1992, I, 753; G.Fauceglia, *Il gruppo europeo di interesse economico: profili civilistici e fiscali*, in *Bollettino Tributario*, 1989, 653; A.Lovisolo, *Profili fiscali del GEIE: prime considerazioni* in *Diritto e Pratica Tributaria*, 1989, I, 1170; S.Mayr, *Il GEIE: prime considerazioni sugli aspetti fiscali italiani*, in *Corriere Tributario*, 1991, 2438; A.Novelli, *Aspetti fiscali del gruppo europeo di interesse economico,* in *Diritto e Pratica Tributaria*, 1991, I, 988; M.B.Puoti, *Profili fiscali del gruppo europeo di interesse economico* in *Rassegna Tributaria*, 1992, No. 8, 44.

2. *The parent-subsidiary directive*

2.1 Introduction

Council Directive 435/90 of July 23, 1990 governs the „common system of taxation applicable in the case of parent companies and subsidiaries of different member States".

Particularly, the Directive includes two main principles:

(i) dividends paid by a subsidiary company of a Member State paid to a parent company of the other Member State shall be exempt from any withholding tax in the State of residence of the subsidiary company;

(ii) dividends paid by a subsidiary company of a Member State to a parent company resident of another Member State shall be either exempt in such other State or full credit shall be grated by such State (the State of residence of the parent company) for the underlying company tax paid in the State of residence of the subsidiary (indirect foreign tax credit).

A company of a Member State is an any company which: (i) has one of the forms listed in the Annex to the Directive[26]; (ii) is considered to be a resident of a Member State according to the tax laws of such State and under the terms of a double taxation agreement concluded with a third State is not regarded to be resident for tax purposes outside the Community[27]; (ii) is subject to one of the taxes listed by the Directive (company tax applicable in one of the Member States) „without the possibility of an option of being exempt"[28].

The status of parent company is attributed to any company of a Member State as defined by the Directive, which has a minimum holding of 25 per cent of the capital of a company of another Member State[29]. Member States are granted the option of (i) replacing the condition of the holding in the capital with that of the holding of voting rights[30]; (ii) requiring the parent company to have held the participation in the subsidiary company for an uninterrupted period not to exceed two years either before and or after the dividend distribution[31]; (iii) to introduce anti-abuse provisions[32].

These options reflect the difficulties undertaken by the Member States and by the EC Commission to reach agreement on the principles and the

---

26 Article 2(1)(a) of the Directive.
27 Article 2(1)(b) of the Directive.
28 Article 2(1)(c) of the Directive.
29 Article 3(1)(a) of the Directive.
30 Article 3(2), first indent, of the Directive.
31 Article 3(2), second indent, of the Directive.
32 Article 1(2) of the Directive.

text of the Directive; while options represent the only compromise so far available to the EC Commission and to the Member States to overcome difficulties in the approval of a Directive, they also may undermine or in any event create distortions to the creation of a system of taxation common to the Member States and homogeneously applied for the strength of the internal market.

The principles laid down by the Directive are and represent a minimum common and mandatory requirement. Indeed, some Member States have overcome this minimum requirement and have extended the common regime to entities and or dividend distributions which would not have otherwise fallen under the scope of the Directive.

2.2 The issues

The application of the common system of taxation of dividends for almost ten years has shown a number of distortions and uncertainties as to the interpretation of the EC provisions which suggest legislative action by the EC Commission to amend the Directive.

2.2.1 *The legal form*. The condition of the legal form excludes a fair number of entities from the scope of the Directive and this may affect its ultimate goal of the elimination of double taxation arising from cross-border distribution of dividends. For instance, co-operatives and public saving banks are excluded for most Member States from the list of eligible entities which may be found in the Annex to the Directive. A similar exclusion applies to partnerships notwithstanding the fact that some Member States regard such entities as taxable persons so requiring measures to eliminate international double taxation[33]. The relevance of such entities in certain business sectors has urged an amendment of the Directive which was indeed initiated by the EC Commission which through a proposal of 1993 advocated the repeal of the condition of the legal form set out by Article 2(1)(a) of the Directive[34].

This proposal followed a recommendation made by an *ad hoc* Committee of Experts set up by the EC Commission to prepare a study on the impact of company taxation in the Community[35]. The Committee recommended that „*the scope of the parent/subsidiary Directive be extended to*

33 In Greece, partial taxation of partnership profits was introduced in 1993 while in Italy partnerships which are as a general rule transparent entities may now elect to be taxable persons (Article 9 of Law 22 December 2000, No. 388).

34 See doc. COM (93) 293 of 26 July 1993 in OJ C225 of 20 August 1993.

35 Report of the Committee of Independent Experts on Company Taxation, Brussels, 1992.

cover all enterprises subject to corporate income tax, irrespective of their legal form (Phase I). Subsequently, the Directive should be extended to all other enterprises subject to income tax (Phase II)"[36].

2.2.2. *The „subject to tax" condition*. A company of a Member State must be „subject" to one of the taxes listed by Article 2 of the Directive (*i.e.*, one of the company taxes applied in the Member States). The meaning of „subject to tax" is far from being settled in the Member States.

According to a certain – perhaps more legalistic – interpretation, a company is subject to tax when it is regarded as a taxable person so that the actual payment of the tax becomes immaterial. Some other scholars[37] have argued that the condition set out by Article 2(1)(c) of the Directive requires the company to actually pay the tax on its profits because otherwise the rationale and scope of the Directive would be frustrated and exemption on dividends would be granted even in the absence of a double taxation to be avoided. Furthermore, the amount of tax payable in the Member State should not be negligible.

Such view, however, fails to consider that requiring the payment of the tax does not seem to be a condition contained in Article 2(1)(c) which refers to the company being „subject to tax" and not to the items of income being „subject to tax"; furthermore, under such view, exemptions of certain items of income made available in the State of residence of the subsidiary company would go to the exclusive advantage of the State of residence of the parent company which would subject to tax the dividends paid by the subsidiary company in the other State[38].

Both views have been followed by Member States either in their administrative practice or in drafting the internal law rules implementing the Directive.

For instance, Italy and Spain require the „*company of a Member State*" to be a taxable person only, so that actual payment of company tax in the State of residence is immaterial.

In Italy, this conclusion is well reflected in the internal law provision regarding dividends paid by a foreign subsidiary company to a parent company residing in the territory of the State: such provision states that the subsidiary company must „*be subject in the State of residence without the*

36 Report of the Committee of Independent Experts on Company Taxation, Brussels, 1992, Chapter 10, par. III, p. 203.

37 F.C.De Hosson, *The Parent-Subsidiary Directive* in *Intertax*, 1990, 246.

38 In the event that the State of residence of the parent company applies the indirect tax credit method for the taxation of the dividends.

possibility of an option or an exemption unless limited in time or geographically"[39].

In Spain[40], the dividend exemption provided for the special holding regime of the *Entitades de Tenencia de Valores Extranjeros* (ETVE) is applicable provided that the foreign subsidiary is subject to, and not exempt from (*sujeta y no exenta*), a tax similar to Spanish tax. However, it is not required that the tax is actually paid[41].

As a result of such conclusion a company resident in Portugal and exempt from company tax pursuant to the special rules applied to the companies incorporated in the Madeira Free Zone[42] would be regarded to be a company of a Member State.

Other Member States (e.g. the Netherlands[43] and Sweden[44]) take the opposite view and require the company of a Member State to actually pay a company tax levied in an amount which should not be negligible.

A few Member States support this conclusion on the basis of Article 1(2) of the Directive which permits Member States to introduce provisions to counteract abuses: requiring the company of a Member State to actually pay a not negligible company tax in its State of residence would no longer be a matter of interpretation of the expression „subject to tax" referred to under Article 2(1)(c) of the Directive but rather the application of an anti-abuse provision. This view does, however, seem to conflict with the wording of Article 1(2) of the Directive according to which the

> „Directive shall not preclude the application of domestic or agreement based provisions required for the prevention of fraud or abuse".

Indeed, Article 1(2) refers to „*provisions*" and not to interpretation while the States just mentioned seem rather to rely on an „*anti-abuse interpreta-*

---

39 Article 96*bis*(2)(c) of the Consolidated Income Tax Act (*Testo unico delle imposte sui redditi*).

40 Article 130 of Law December 27, 1995, No. 43 on Corporate Income Tax Law (*Ley del Impuesto sobre Sociedades*).

41 See *Survey of the implementation of the EC corporate tax directives*, International Bureau of Fiscal Documentation, Amsterdam, 1995, 509.

42 Decree Law 500/80 of 20 October, 1980.

43 The Dutch implementation provisions [Article 13g(1)(1) of the 1969 Corporate Income Tax Law (*Wet op vennootschapsbelasting*)] require the subsidiary not to be subject to a preferential tax regime (*bijzonder regime*).

44 The Swedish implementation provisions [Article 7(8) of Law 1994/1859 amending Law 1947/576, National Income Tax Law [(*Lag (1994:1859) om andring I lagen (1947:576) om statlig inkommstskatt*] require the corporate income tax paid by the subsidiary to be „*similar*" to Swedish corporate income tax. Such similarity in practice is assumed to be verified if the foreign tax is not lower than 15 per cent of the taxable income determined according to Swedish rules.

tion" of the Directive, namely the expression „subject to tax" referred to under Article 2(1)(c).

2.2.3 The „*possibility of an option or of being exempt*". The „*company of a Member State*" must be subject to tax „*without the possibility of an option or of being exempt*"[45]. This condition refers to taxable persons which in some Member States may elect to be treated as taxable persons when as a general rule they would be regarded as transparent entities. This is the case of partnerships which in some Member States (e.g. Italy[46] and France[47]) are regarded as transparent but may elect to be taxable as companies and become taxable persons for the purposes of such tax.

In many instances, elections of this type are laid down for legal forms other than those included in the Annex to the Directive. This is the case of the *sociétés en nom collectif* or of the *sociétés en commandite simple* in France. In some Member States such elections are no longer in force: this is the case of the Belgian *sociétés de personnes à responsibilité limitée* (Sprl) which through 1986 could opt for transparency for tax purposes[48].

Consequently, the impact of the condition laid down in Article 2(1)(c) would be relevant only in the event of the approval of the Commission's proposal for the lifting of the legal form's condition.

At present, the condition set out by Article 2(1)(c) of the Directive affects the *sociétés unipersonnelles à responsabilité limitée* in France[49] and the *società in accomandita semplice* in Italy[50].

---

45 Article 2(1)(c) of the Directive.

46 The election for corporate income taxation at the partnership's level was introduced by Article 9(11) of Law 22 December 2000 No. 388. The first election may be exercised in the tax return relating to income realised in year 2000 and is applicable for the following tax period (*i.e.* for partnerships whose tax period coincides with the calendar year, 2001).

47 Pursuant to Article 206(3) and 239 of the General Tax Act (*Code Général des Impots*), *sociétés en nom collectif* (general partnerships) and *sociétés en commandite simple* (limited partnerships) may elect to be either fiscally transparent or non-transparent and thus subject to corporate income tax.

48 See F.De Hosson, *The parent-subsidiary Directive* in *Intertax* 1990, 429.

49 P.Dibout, *La Directive communautaire du 23 juillet 1990 relative au régime fiscal commun applicable aux sociétés mères et filiales d'Etat membres différents* in *Droit fiscal* 1991, 477.

50 These are partnerships which are transparent for company tax purposes but may elect to be subject to company tax according to Article 9 of Law 22 December 2000, No. 388. These entities are however excluded from the Annex to the Directive so that the Member States would not regard these entities as a „subsidiary company" because of the lack of the condition of the legal form (this is not true for Member States which apply the regime laid down by the Directive also to entities other than those listed in the Annex). Notwithstanding the exclusion from the Annex, Italian partnerships which have elected for the liability to company tax may be regarded as „parent company" un-

The rationale of the condition laid down by Article 2(1)(c) is far from being clear. Indeed, the mere existence of an election is not as such relevant for the goals pursued by the Directive which is primarily the elimination of double taxation; what it matters is on whether or not the entity has actually made the election and it is therefore exempt from tax. It is possible that the condition reflects the desire of the Member States to limit their monitoring of the proper application of the parent-subsidiary regime which would have otherwise embraced the control of whether or not the entities made or not an election. There seems to be a clear disproportion between the goals pursued by the Directive on the one hand and the limitation of the monitoring activities by the tax administrations of the Member States on the other hand.

2.2.4 *The definition of withholding tax*. Article 7(1) of the Directive states that

> „The term «withholding tax» as used in this Directive shall not cover an advance payment or prepayment (précompte) of corporation tax to the Member State of the subsidiary which is made in connection with a distribution of profits to its parent company".

Unlike the text laid down by the proposed directive submitted to the Council in 1969, no definition of withholding tax is contained in the Directive. This might fail to create the necessary protection against attempts of the Member States to circumvent the obligation to exempt dividends as laid down by Article 5.

One example of such difficulties may be found in the Portuguese *Imposte sobra as successoes e Doacoes por Avenca* (which is a tax levied *in lieu of* gift and inheritance tax) which is levied on some dividends paid by companies residing in Portugal[51].

The issue was debated before the ECJ[52] after the request of a preliminary ruling by the Portuguese Supreme Administrative Court. In particular the ECJ ruled that the substitute gift tax is similar to an income tax and, being applied as a withholding, is covered by Article 2(1)(c) of the Directive which states that the Directive applies, in addition to the dividend withholding taxes expressly listed, to „*any other tax which may be substi-*

---

der Article 96*bis* TUIR which does not – for parent companies – make reference to the condition laid down by Article 2(1)(a) of the Directive.

51 F.de Sousa de Câmara, *Madeira Free Trade Legislation Amended* in *European Taxation* 1994, 6 and Garcìa Caballero, *Inheritance and Gift Tax* in *European Taxation* 1994, 399.

52 Case *Ministério Público, Fazenda Pública vs. Epson Europe BV* (C-375/98 of 8 June 2000).

tuted for one of the above taxes". Therefore, according to the ECJ, the substitute gift tax has to be treated as a dividend withholding tax and must thus be applied only in compliance with the Directive[53].

Furthermore, it is worth noting that the ECJ confirmed its view that the EC Council minutes of the discussion of the Directive (which expressly clarified that the Directive does not apply to the substitute gift tax) are of no relevance for the interpretation of the Directive[54].

The circumvention of the obligation set forth by Article 5 of the Directive is echoed by the recent surtax[55] introduced in the Netherlands. Under such new legislation, the tax on profits realised by a company – which in the Netherlands is levied at the rate of 35 per cent – is increased by 20 per cent in the event of distribution of such profits as dividends.

Such 20 per cent taxation is a surtax applicable in general in case of dividend distributions to resident individuals (whenever a company distributes „*excessive*" dividends on or after 1 January 2001 through 2005)[56].

The new rules have been introduced in connection with the new tax regime for dividends received by individual resident taxpayers which entered into force as from January 1, 2001. The new rules on excessive distributions are meant to protect the Revenue interest against deferred distributions of dividends which could have been practised to benefit shareholders from the new favourable regime. However, there are a number of cases where the surtax applies also to dividend distributions to corporate shareholders including parent companies of another Member State.

---

53 It was thus established that „*even though the Portoguese Republic may be entitled to maintain that taxation, possibly in combination with corporation tax, it may do so only within the limits temporarily laid down by Article 5(4) of the Directive, namely by levying a withholding tax at a rate not exceeding 15 per cent for 1992 to 1996 and 10 per cent for 1997 to 1999. If such limits were not observed, the Portuguese Republic would enjoy a further derogation not provided for by the Directive*".

54 Consistently with the decision of the ECJ, the Portuguese Supreme Administrative Court on 4 October 2000 ruled that Article 5(4) of the Directive – where it authorises Portugal to levy a 15 per cent or 10 per cent withholding tax – limits to such amounts every kind of tax (also other than corporate income tax) withheld at source on dividends. Therefore the sum of the withholding tax and of the substitute gift tax must not exceed the maximum percentage of withholding tax laid down by Article 5(4) of the Parent-Subsidiary Directive.

55 Article IV (B) of the Law for the introduction of the Income Tax Act 2001 (*Invoeringswet Wet Inkomstenbelasting 2001)* of May 11, 2000

56 Dividends are deemed to be „*excessive*" if their amount exceeds the highest among *(i)* 4 per cent of the value of the shares at the beginning of the calendar year *(ii)* two-thirds of the aggregate profit distribution over 1998, 1999 and 2000 *(iii)* the amount of the obligatory profit distribution for investment institutions (excluding profits of the so-called reinvestment reserve and realisation of the hidden reserves of the company) *(iv)* the commercial profit of the previous year.

In such cases the amount of the surtax is proportionally reduced if the shares of the Dutch company representing at least 5 per cent of the capital have been uninterruptedly held for at least three years. but under certain circumstances the reduction does not eliminate the tax to be applied.

In practice, the new rules achieve the same result of a withholding tax and frustrate the spirit of the Directive.

A similar situation exists in Greece which applies a tax on profits levied at the time of distribution of dividends[57]. The case was referred to the European Court of Justice to the effect that the tax may be regarded as a withholding tax under Article 4 of the Directive thus requiring Greece not to apply it when the dividend is paid to a parent company of another Member State.

2.2.5 Relationship between the Directive and tax treaties. Artlicle 7(2) of the Directive states that

> „This Directive shall not affect the application of domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipient of dividends".

The provision should be viewed as a clarification as to the right to apply the EC provisions regardless of the application of treaty provisions aiming at the elimination or reduction of double taxation.

Implementing legislations of some Member States have relied on a different interpretation of Article 7(2) and have stipulated that the withholding tax exemption laid down by Article 5 does not apply in the event that the parent company of the other Member State is entitled to benefit from treaty provisions granting the refund of dividend tax credits.

In France, for instance, Article 119*ter*(2)(e) of the *Code Général des impots* requires – as a condition for the exemption from withholding tax on dividends paid to an EC parent company resident of another Member State – that the parent company *„is not entitled, by reason of such dividends, according to a tax treaty to the payment by the French Treasury the amount of which, equal to the tax credit or to a fraction of it, be greater than the amount of withholding tax laid down by the treaty provision"*[58].

This provision influenced the Italian legislation implementing the Directive. Indeed, Article 27*bis*(4) of Presidential Decree 29 September,

---

57 Article 106 of Law 2238/1994 (Code of Income Taxation).

58 *„(e) n'avoir pas droit, au titre de ces dividende, en application d'une convention fiscale, à un paiement du Trésor français dont le montant, égal à l'avoir fiscale ou à une fraction de celui – ci, est supérieur là retenue à la source prévue par cette convention"*.

1973, n. 600 (as amended by Article 2 of Legislative Decree 16 March 1993, n. 136) states that „it is saved the application of withholding taxes laid down by treaty provisions granting the refund of sums relating to the dividends"[59].

These internal law rules are clearly contrary to Article 7(2) of the Directive which is meant to save the application of other favourable rules in addition to the exemption laid down by the Directive.

Firstly, Article 5(1) provides for the exemption from withholding tax without any condition [it could have otherwise made reference to the provisions laid down by Article 7(2)].

The sole derogation to the exemption laid down by Article 5(1) is included in the same Article and deals with the transitional period allowed to Portugal, Germany and Greece which could continue to apply the internal law withholding taxes for a transitional period[60].

Secondly, the literal wording of Article 7(2) *saves* the application of (internal law or treaty) provisions („*...does not affect...*") and in no way restricts or excludes the application of either internal or treaty or other provisions of the Directive. Nor it provides for an option between the two regimes.

Provisions creating options or elections between different regimes or giving priority to one regime over another one generally make reference to the criteria which need to be used to select the regime which is to be applied; this is the case for instance of the criteria represented by the more favourable regime (in other terms, Article 7 could have saved the application of „more favourable internal law or treaty provisions...").

The interpretation of Article 7(2) of the Directive is now debated before the judiciary authorities and in one instance[61] it has been submitted to the ECJ[62].

---

59 „*Resta impregiudicata l'applicazione di ritenute alla fonte previste da disposizioni convenzionali che accordano rimborsi di somme afferenti i dividendi distribuiti*".

60 Article 5(2), (3) and (4) of the Directive. In particular, Greece [Article 5(2)] was allowed to levy a withholding tax at a rate not exceeding the rate laid down by the applicable double tax treaty (until when it applied subjected distributed profits to corporate income tax), Germany [Article 5(3)] was allowed to levy a 5 per cent withholding tax (until when it applied a corporate income tax on distributed profits lower than that on undistributed profits for at least 11 per cent and in any case no later than mid-1996) and Portugal [Article 5(4)] was allowed to levy a withholding tax at a 15 per cent rate for the first five years starting from the date of implementation of the Directive and a 10 per cent rate for the following three years (subject to the application of treaty provisions concerning dividend reduced withholding taxes).

61 Appeal to the ECJ by the Special Commissioner of the English Chancery Division on 2 November 2000, Case *IRC vs. Océ Van Grinten NV*.

62 In *International Tax Law Reports*, Aug/Sept 2000, 948.

The case referred to the Court concerned the refund to a Dutch parent company of the advance corporation tax (ACT) paid by the UK subsidiary upon the distribution, as established by the Netherlands-UK double tax treaty.

In particular, the Dutch parent company claimed repayment of the 5 per cent tax abatement of the refund incurred in the UK. Such claim was based on the consideration that withholding taxation on distributions of profits (as the abatement was considered) is precluded by Article 5(1) of the Directive. The Inland Revenue, conversely, contended that the abatement is not a withholding tax on profits and, in any case, is preserved by Article 7(2) of the Directive[63].Similarly, in Italy Provincial and Regional Tax Courts have debated on whether or not the withholding tax exemption laid down by the Directive remains applicable in the event that the treaty concluded by Italy with the State of residence of the recipient grants the refund of the Italian equalisation tax to the shareholder receiving the dividend. The issue is now debated before the Italian Supreme Court[64].

Indeed, Italian tax law as applied until the tax period current on 31 December 1997 (*i.e.* until 31 December 1997, for companies having a tax period equal to the calendar year) stipulated the application of company tax (IRPEG) in the event that exempt profits were distributed to the shareholders[65]. The underlying reason for the application of such (equalisation) company tax had to be found in the circumstance that the resident recipient of the dividend was entitled to a dividend tax credit (to eliminate the economic double taxation) regardless on whether the company had actually paid company tax on such profits.

Treaties concluded by Italy with France and Germany contain provisions which grant to the French and German resident shareholders of Italian companies the dividend tax credit and also the right to the refund of the equalisation tax levied by the Italian State on distributions made to share-

---

63 The Special Commissioner referred the case to the ECJ with regard to the issues of *(i)* whether the abatement is considered a tax on the distributing company's profits *(ii)* whether it is deemed to be a withholding tax for the purposes of the Directive and therefore covered by Article 5(1) [or, alternatively, whether the abatement is safeguarded by Article 7(2).

64 Provincial Tax Court of Turin, Decision No. 76/02/99 deposited on 26 October 1999; Provincial Tax Court of Cuneo, Decision No. 17 deposited on 9 March 2000; Regional Tax Court of Turin, Decision No. 30/31/00 deposited on 7 June 2000.

65 Such rule was contained in Article 105 of the Consolidated Income Tax Act and was substituted by Article 2 of Legislative Decree 18 December 1997, No. 467 which eliminated the mentioned (equalisation) tax.

holders residing in the other State[66]. As a result of the application of the internal law provisions implementing the Directive, the Italian tax authority originally denied the application of the exemption from withholding tax levied on dividends and on the tax credit or equalisation tax refunded to the foreign shareholders. However, subsequently the tax authority took the view[67] that such withholding taxes could not be levied and justified its conclusion on the basis of informal arrangements concluded with the other contracting States. Such arrangement was made possible by the circumstance that the internal laws of both contracting States (respectively Italy and France and Italy and the United Kingdom) contained equalisation taxes and that therefore both States (respectively Italy and France and Italy and the United Kingdom as the case may be) could reciprocally withdraw their right to levy the withholding in the event of the payment of an equalisation tax.

By contrast, with regard to the treaty concluded with the Netherlands providing for the refund of the equalisation tax only, the tax authority took the view that the Directive did not apply and withholding tax could be levied. The reason for such conclusion was based on the circumstance that Dutch internal law did not contain any equalisation tax so that an agreement based on a reciprocal withdrawal of the withholding tax could not be reached with the other contracting State.

2.2.6. *Anti-abuse provisions*. Article 1(2) of the Directive permits the Member States to introduce measures to contrast fraud and abuses.

Various member States have made use of this option either through the insertion of *ad hoc* provisions in the implementing legislation of the Directive or by applying pre-existing general anti-abuse provisions or doctrines.

This part of the implementation of the Directive is totally unexplored by the case law although scholars have correctly pointed out the issues of conformity of many of such rules with the Directive.

Article 1(2) of the Directive does not, indeed, grant Member States an absolute discretion to introduce anti-abuse provisions or doctrines to deny the application of the common regime.

The conditions and limits to the Member States are numerous:

(i) Article 1(2) must be interpreted restrictively because the intent of the Directive is to achieve a uniform application of the common regime set out by the Directive[68] and this creates another element of discrepancy between

66 Article 10 of the Italy-France treaty; Article 10 of the Italy-the Netherlands treaty and Article 10 of the Italy-Germany treaty.

67 Circular 18 August 1994, n. 151/E/14/658.

68 This principle has been affirmed by the ECJ in several cases regarding the value added tax: 21 October 1988 (*Commission of the European Communities* vs. *French Republic*,

Member States; as a result of this principle, Member States could not apply doctrines or practices to deny the application of the common regime because Article 1(2) grants Member States the right to introduce „*provisions*"[69];

(ii) the internal or treaty provisions permitted by Article 1(2) must be necessary to avoid abuses and should not have a general nature[70];

(iii) the internal law or treaty provisions must be proportionate to the goal pursued so that the imposition of measures which are particularly restrictive would be contrary to the Directive[71].

---

case 50/87) in ECR, 1988, 4797; 21 February 1989 (*Commission of the European Communities* vs. *Italian Republic*, case 203/87) in ECR, 1989, 371. In Decision 12 June 1979 (*NV Nederlandse Spoorwegen* vs. *Staatssecretaris van Financien,* case 126/78, in ECR, 1979, 2041) concerning the interpretation of the wording „*as far as possible*" contained in Article 6, No. 2, Annexes A, No. 10 and B, No. 5, of the Second EC Directive (67/228/EEC) the ECJ specified that the „*this provision advising the Member States to avoid «as far as possible" granting exemption to the provision of services compulsorily subject to the common system must be interpreted restrictively in order to safeguard the coherence of the new system and the neutrality in competition which it seeks to establish*". As illustrated in paragraph 4 of the judgment, „*to answer this question the objective of the Directives on turnover taxes should be recalled, together with the fact that they are based on Articles 99 and 100 of the Treaty which are concerned with the harmonisation of the laws of the Member States in the interests of the establishment and functioning of the common market*". See also Decision 15 June 1989 (*Stichting Uitvoering Financiele Acties* vs. *Staatssecretaris van Financien,* case Judgment 348/87, in ECR, 1989, 1737).

69 „*Disposizioni nazionali o convenzionali*" in the Italian language, „*zelstaatlicher oder vertraglicher Bestimmungen*" in the German language, „*domestic or agreement-based provisions*" in the English language, „*disposiciones nacionales o convencionales*" in the Spanish language; „*dispositions nationales ou conventionnelles*" in the French language, „*disposiçoes nacionais ou convencionais*" in the Portoguese language, „*nationale of verdragsrechtlijke voorschriften*" in the Dutch language, „*ethnikon diataxeon e diataxeon diethnon symbaseon*" in the Greek language.

70 The ECJ Judgement 10 April 1984 (*EC Commission of the European Communities* vs. *Kingdom of Belgium*, case 324/82, in ECR, 1984, 1861) reads as follows: „*however, ... the Belgian legislation entails such a complete and general amendment of the basis of assessment that it is impossible to accept that it contains only the derogations needed to avoid the risk of tax evasion or avoidance. in particular, it has not been proved that, in order to attain the aim in view, it is necessary that the taxable amount should be fixed on the basis of the Belgian catalogue price or that the taking into account of any form of price discount or rebate should be excluded in such a comprehensive manner*".

71 Such case may occur with respect to documents demonstrating that the conditions laid down by the Directive and by domestic implementation rules are met. With Judgement 14 July 1988 (*Léa Jeunehomme and Société anonyme d'étude et de gestion immobilière EGI* vs. *Belgian State*, joined cases 123 and 330/87, in ECR, 1988, 4517) with reference to obligations laid down by Belgian legislation for VAT deduction on purchases, the ECJ stated that „*Articles 18 (1) (a) and 22 (3) (a) and (b) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 allow Member States to make the exercise of the right to deduction subject to the holding of an invoice which must contain certain*

The following provisions have been adopted by the Member States:

(a) in Spain, the provisions implementing the Directive (both participation exemption on inbound dividends and withholding tax exemption for outbound dividends) do not apply if the majority of the voting rights of the parent company is directly or indirectly held by persons resident of non-EC States, unless the parent company *(i)* carries out business activities directly connected with the business activity carried out by the subsidiary or *(ii)* has as its corporate purpose the management of the subsidiary with an adequate organisation or *(iii)* demonstrates that it has been incorporated with sound business purposes and not to unduly benefit from the exemption. In addition no exemption is granted when the parent company is resident of a State or territory which is considered to be a tax haven[72];

(b) in France, the withholding tax exemption laid down in accordance with the Directive does not apply if dividends are distributed to a legal person directly or indirectly controlled by one or more residents of non-EC States, unless such legal person demonstrates that the participation does not have the main objective to benefit from the withholding tax exemption[73]; in addition, a general anti-avoidance clause applicable to dividend distributions covers the participation exemption for inbound dividends, by denying the exemption when the subsidiary has been incorporated with no business purpose or merely to transform taxable income into exempt dividends[74];

(c) in Germany, a non-resident company cannot benefit from withholding tax exemption to the extent that it is participated by persons which would not be entitled to such benefit had they directly received the dividends and if the interposition of the non-resident company which does not carry out its own business activity has no sound business purposes for[75];

(d) in the Netherlands, withholding tax exemption is conditioned to the fact that no anti-avoidance clauses laid down by double tax treaty stipulated by the Netherlands with EC Member States apply. Only the

---

particulars which are necessary in order to ensure the levying of value-added tax and permit supervision by the tax authorities. Such particulars must not, by reason of their number or technical nature, render the exercise of the right of deduction practically impossible or excessively difficult" (underlining added).

72 Article 46, Paragraph 1, letter *f)*, of Corporate Income Tax Law (*Ley del Impuesto sobre sociedades*).

73 Article 119*ter* of the General Tax Act (*Code Géneral des Impots*).

74 Article L64 of *Livre des procédures fiscales.*

75 Article 50d) of the Income Tax Law (*Einkommensteuergesetz*).

Netherlands-UK treaty contains such a clause; in fact, according to Article 10(6), the dividend withholding tax reduction is disallowed when a Dutch-resident company distributes income realised before the acquisition of at least 10 per cent of its capital by a UK-resident person which enjoys exemption on inbound dividends (e.g. a pension fund), provided that the acquisition has no sound business purpose and is mainly aimed at benefiting from the treaty[76];

(e) in Austria, when abuse of the Directive is presumed the exemption regime for inbound dividends is substituted by an underlying tax credit regime. Such cases occur, subject to certain exceptions, when the subsidiary mainly realises certain items of passive income or when the subsidiary is subject to a preferential tax regime[77]. The anti-abuse rule does not apply if the Austrian company is controlled by non-resident individuals.

The provision denying the application of the EC regime to dividends paid to a parent which is a resident in another Member State and which is controlled by non-EC resident n2eeds to be examined in the light of the right of establishment.

Indeed, Article 48 (formerly Article 58) of the EC Treaty grants companies formed in accordance with the laws of a Member State same treatment of natural persons who are nationals of Member States. The provision does not make this treatment conditional upon the ownership of capital of the company.

The jurisprudence of the ECJ has however affirmed that anti-abuse provisions enacted by a Member State to prevent fraud and abuses may be compatible with Article 43 (*ex* Article 52) of the EC Treaty[78].

---

76 Article 4a, Letter *e)*, of the Dividend tax Law (*Wet op de dividendbelasting*).

77 Ministerial Decrees issued in accordance with Article 10(3) of the Corporate Income Tax Law (*Korperschaftsteuergesetz*).

78 Judgement of March 9, 1999 (case C 212/97, *Centros Ltd. Vs Erhvervs-og Selskabsstyrelsen*) in ECR 1999, 1484. According to the mentioned decision (and the Court's jurisprudence) *„national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 Kraus v Land Baden-Württemberg [1993] ECR I-1663, § 32, and Case C-55/94 Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, § 37).“* (§ 34). With particular reference to the analysed case, the Court stated that *„the fact that a Member State may not refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office does not preclude that first State from adopting any appropriate measure for preventing or penalising fraud, either in relation to*

The issue therefore remains as to whether the anti-abuse provisions enacted pursuant to Article 1(2) of the Directive meet the criteria of necessity and proportionality developed by the jurisprudence of the ECJ.

As to Article 48 of the Treaty, Article 2(1)(b) of the Directive contemplates the denial of the application of the Directive to a company which is incorporated according to the laws of a Member State in the event that for the purpose of a treaty concluded with a third State such company is resident for tax purposes in such third State.

2.2.7. *Application of the Directive vis-à-vis non-EC States*. The Directive applies exclusively to dividends paid by a company of a Member State to a company which is resident in another Member State.

Dividends paid to companies which are resident in a third State are excluded from the scope of the Directive as well as dividends paid by companies of a third State to a company residing in a Member State.

Many Member States have extended the scope of application of the Directive also to dividends paid by or to companies of a third State. This freedom may also affect the strength of the internal market because non-EC inbound and outbound investments may be directed on the basis of the tax regime applicable to dividends.

For this reason, the Directive should be amended and include a provision dealing with inbound and outbound non-EC dividends.

The extension of the regime laid down by Article 4 of the Directive applies in Austria[79], Belgium[80], Denmark[81], Finland[82], France[83], Luxembourg[84], the Netherlands[85], Spain[86] and Sweden[87].

---

the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of the company, to evade their obligations towards private or public creditors established on the territory of a Member State concerned" (§ 38).

79 Article 10(2), no. 2(a) of the Corporate Income Tax Law of 1988 (*Korperschaftsteuergesetz* 1988).

80 Article 202 of the 1992 Royal Decree of Execution of the Income Tax Act (*Arrete Royal d'execution du Code des impots sur les revenus* 1992).

81 Article 13, Paragraph 1, No. 2 of the Corporate Income Tax Law (*Selskabsskatteloven*).

82 § 6 of the Business Income Tax Law (*Laki elinkeitnotulon verottamisesta*).

83 Article 145 of the General Tax Act (*Code Géneral des Impots*).

84 Article 166, Paragraph 2, No. 2 of the Corporate Income Tax Law (*Loi de l'impot sur le revenu*).

85 Article 10 of the 1969 Corporate Income Tax Law (*Wet op de vennootschapsbelasting* 1969).

86 Article 30*bis* of Law December 27, 1995, No. 43 on Corporate Income Tax Law [Ley del Impuesto sobre sociedades (LIS)].

87 Article 7, Paragraph 8, of Law 1994/1859 amending Law 1947/576, National Income Tax Law [(*Lag (1994:1859) om andring I lagen (1947:576) om statlig inkommstskatt*].

On the contrary, the regime laid down by Article 5 of the Directive (exemption from withholding tax in the State of residence of the subsidiary company) has so far been extended by Denmark only[88] while the United Kingdom and Ireland in general do not apply withholding taxes under internal law.

The reason for this is to be found in the significant loss of revenue for the Member States.

88 The Danish law [Section 65(5) of Source Tax Law (*Kildeskatteloven*)] establishes that no withholding tax applies to dividends paid to non-resident companies provided that *(i)* the non-resident company holds at least 25 per cent of the capital of the resident subsidiary, *(ii)* the participation was held for at least one year and *(iii)* the resident subsidiary takes one of the forms listed in the EC Parent-Subsidiary Directive (*i.e.* „*aktieselskab*" and „*anpartsselskab*").
However, it is worth noting that on 10 November 2000 a draft amendment was presented which intends to introduce a 25 per cent withholding tax to be applied to dividends paid to non-resident companies, unless the receiving company is resident in the European Union or in a State with which Denmark has concluded a double tax treaty. Such amendment is not been approved yet, and, once approved, is expected to become applicable to dividend declared on or after 1 July 2001.

State	Austria	Belgium	Denmark	Finland	France	Germany	Luxembourg	The Netherlands	Spain	Sweden
Reference	Article 10, Paragraph 2, No. 2(a) of 1988 Corporate Income Tax Law (*Korperschaft-steuergesetz 1988*)	Article 202 of Royal Decree of Execution of the Income Tax Act (*Arrete Royal d'execution du Code des impots sur les revenus* 1992)	Article 13, Paragraph 1, No. 2 of Corporate Income Tax Law (*Selskabsskatteloven*)	§ 6 of the Business Income Tax Law (*Laki elinkeitnotulon verottamisesta*)	Article 145 of the General Tax Code (*Code General des Impots*)		Article 166, Paragraph 2, No. 2 of the Corporate Income Tax Law (*Loi de l'impot sur le revenu*)	Article 10 of the 1969 Corporate Income Tax Law (*Wet op de vennootschapsbelasting* 1969)	Article 30*bis* of Law December 27, 1995, No. 43 on Corporate Income Tax Law [*Ley del Impuesto sobre Sociedades* (LIS)]	Article 7, Paragraph 8 of Law 1994/1859 amending Law 1947/576, National Income Tax Law [*Lag (1994:1859) om andring I lagen (1947:576) om statlig inkommstskatt*]
Regime	Exemption	Exemption to the extent of 95 per cent of the dividend	Exemption	Exemption	Exemption to the extent of 95 per cent of the dividend	Exemption to the extent of 95 per cent of the dividend	Exemption	Exemption	Exemption	Exemption
Legal form of the subsidiary	Legal form comparable to the Austrian AG or GmbH	Companies	Companies	Companies	Companies	Companies	Companies	Companies or entities the capital of which is wholly or partially divided into shares	Companies	Legal persons

State	Austria	Belgium	Denmark	Finland	France	Germany	Luxembourg	The Netherlands	Spain	Sweden
Level of taxation in the subsidiary's State of residence of the	Subject to a tax rate or taxable base comparable with Austrian tax	Subject to a corporate income tax comparable with Belgian tax or, for financing companies, to a tax regime not significantly deviating from the general regime applicable in the State of residence	Subject to tax to an extent not substantially lower than Danish tax	The subsidiary must be resident of a State with which Finland has concluded a treaty against double taxation on income effective as of January 1, 1995		The subsidiary must be resident of a State with which Germany has concluded a treaty against double taxation on income	Fully subject to a tax comparable to Luxembourg taxation	Subject to a national tax on profits (whatever the rate) in the State of residence	Subject to a tax comparable to Spanish tax with no possibility of being exempt	Subject to an income tax comparable to Swedish tax (such requirement is deemed to be met if the subsidiary is resident in a State with which Sweden has concluded a treaty against double taxation on income, provided that income mainly derives from sources situated in Sweden or in the subsidiary's State of residence and the subsidiary does not benefit from preferential tax regimes

State	Austria	Belgium	Denmark	Finland	France	Germany	Luxembourg	The Netherlands	Spain	Sweden
Further requirements	1. The focus of the subsidiary's operations is to derive, directly or indirectly, interest income, income from the leasing of assets or the sale of shareholdings		The business activity of the subsidiary must not be of a mainly financial nature					The shares must not be held as an inventory (stock-in-trade)	At least 85 per cent of the profits must have been derived from the performance of business activities in a foreign country other than a tax haven	
	2. Tax rate or taxable base comparable with Austrian tax (see section regarding level of taxation)							The shares must not be held as a mere portfolio investment		
	3. Demonstration of predominant, direct or indirect, participation to the capital of the resident parent, by individuals not resident in Austria									

State	Austria	Belgium	Denmark	Finland	France	Germany	Luxembourg	The Neth-erlands	Spain	Sweden
Percentage of partici-pation	25 per cent of the share capi-tal	5 per cent of the share capital or acquisition cost of at least FB 50 million	25 per cent of the share capital	10 per cent of the voting rights or 25 per cent of the share capital	10 per cent of the share capital or acquisition cost of at least FFr. 150 mil-lion		10 per cent of the share capi-tal or acquisi-tion cost of at least FLux. 50 million	5 per cent of the share capital	5 per cent of the share capital or acquisition cost of at least Euro 6 million	
Minimum holding period	2 years also elapsing after the dividend distribution		1 year also elapsing after the dividend distribution		2 years also elaps-ing after the divi-dend distribu-tion		12 months also elapsing after the dividend distribution		1 year also elapsing after the dividend distribution	

3. *The Merger Directive*

3.1 Introduction

Council Directive 90/434/EEC of July 23, 1990 („the Directive") governs the „common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States".

The Directive applies to four types of transaction involving two or more companies of different Member States:

- mergers;
- divisions;
- transfers of assets;
- exchanges of shares.

The common system provides for a tax neutral treatment of the qualifying transactions. The tax neutral system is twofold: it prevents the Member States from levying taxes at the time of the transaction and grants a tax deferral which does not amount to a permanent tax exemption.

In order to combine the interest 12of the Member States and the tax deferral system, the Directive[342] provides for a combination of two conditions:

- firstly, the assets and liabilities transferred in the reorganisation must be effectively connected with a permanent establishment in a Member State (this condition does not apply in the case of exchanges of shares)[343] and
- secondly, the tax basis of the assets transferred in the hands of the beneficiary remains the same as the one preceding the reorganisation[344]

Under the first condition, if, pursuant to the reorganisation, a Member State loses tax sovereignty over the entity holding the assets transferred, taxation of the capital gains on the assets transferred is deferred only if, and to the extent that, such assets remain attributable to a permanent establishment[345] situated in such Member State.

---

342 Article 4.

343 Article (1), first indent.

344 Article 4(2).

345 The Proposal for a Council Directive on The Common System of Taxation Applicable to Mergers, Divisions and Contributions of Assets Involving Companies of Different Member States, COM(69)5 final, in OJ C 39 of 22 March 1969 („the Proposed Directive"), contained a definition of permanent establishment. The definition was included in the final text of the Directive. Hence, in applying the Directive, each Member State has to make reference to the definition contained in its domestic laws and applicable treaties. This might lead to a different application of the Directive from Member State

In the case of exchanges of shares, the preservation of the tax claims of the Member State of the transferring shareholder is achieved by providing the rollover relief on the new shares in the hands of the transferring shareholders[346]. The method, however, might be less effective than the permanent establishment condition if the shareholder can leave its Member State of residence without being subject to an exit tax.

The Directive applies to transactions involving „companies from two or more Member States". A ‚company from a Member State' is an any company which: (i) has one of the forms listed in the Annex to the Directive[347]; (ii) is considered to a resident of a Member State according to the tax laws of such State and under the terms of a double taxation agreement concluded with a third State is not regarded to be resident for tax purposes outside the EC[348]; (ii) is subject to one of the taxes listed by the Directive (company tax applicable in one of the Member States) „without the possibility of an option or of being exempt"[349].

3.2 The open issues

One of the most interesting aspect of the analysis of the Merger Directive is whether, and to what extent, it has reached its goals, i.e. whether it has indeed removed the obstacles that prevented the implementation in a cross-border scenario of the transactions covered.

3.2.1. *The legal form*. Similarly to the Parent-Subsidiary Directive (see 2.2.1. above), the Directive applies only to „companies from a Member State", i.e. to companies that, amongst other conditions, have one of the legal forms listed under the Directive. The issue is less critical than under the Parent-Subsidiary Directive. In fact, mergers, divisions, transfers of assets and exchanges of shares generally involve medium to large companies which (normally) have one of the legal forms listed in the Directive. However, there might be cases in which corporate entities having a legal form other than the ones covered by the Directive are involved. In this connection, the approval of the proposed amendment to the Directive[350]

---

to Member State (see P.H. SCHONEWILLE, *supra* footnote 354, at 19; IBFD, *Survey on the implementation of the EC corporate tax directives*, 1995, Amsterdam, IBFD Publications, at 45).

346 Article 9 of the Directive.

347 Article 3(a) of the Directive.

348 Article 3(b) of the Directive.

349 Article 3(c) of the Directive.

350 *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*

would be a welcome step towards an enlargement of its scope and increased effectiveness in pursuing its goals[351]. As in the case of the amendment to the Parent-Subsidiary Directive, the proposed amendment stemmed from a recommendation of the Committee of Independent Experts on Company Taxation[352].

3.2.2. *Absence of company law regime.* The Directive regulates only the tax consequences of the transactions which meet its conditions. The legal systems of some Member States, however, do not contemplate some of the transactions covered, particularly of mergers and divisions[353]. Mergers and divisions imply the transfer by a company of all its assets and liabilities to one or more other company, with the transferring company being dissolved without going into liquidation.

Absent a company law regime, the relevant transactions cannot be implemented, thus leaving tax relief provided under the Directive without effect[354].

It is worth noting that, although some Member States have not implemented the Directive due to their lack of corresponding company law rules, the Directive may prevent such Member States from levying taxes on taxable events deriving from mergers and divisions taking place in other Member States. For example, if a person resident of a Member State not allowing for cross-border mergers holds shares in a non-resident company and the latter company is merged into a company of a different

---

exchanges of shares concerning companies of different Member States, COM(93)293 final of 26 July 1993, in OJ No. C 225 of 20 August 1993.

351 The Opinion of the Economic and Social Committee on the proposal for a Council Directive amending Directive 90/434/EEC of 23 July 1990 (in OJ No. C 34 of 2 February 1994) stated that the proposal ensures consistency since the condition of subjection to corporation tax is sufficient in the system of the Directive for the tax deferral system to operate properly. Hence, a limitation of the scope of the Directive based on the legal form is considered an unreasonable restriction to the common system of taxation.

352 See paragraph 4.1(The Ruding Report).

353 The Proposal for a Tenth Council Directive based on Article 54(3) of the Treaty concerning cross-border mergers of public limited companies (COM(84) 727 final, in OJ No. C 23 of 25 February 1985) has never been approved due to the resistance of some Member States. The Commission is expected to table a new proposal. Also the Amended Proposal for a Council Regulation on the Statute of a European Company (COM(91)171 final – SYN 218 (91/C 176/01), in OJ No. C 176/1 of 8 July 1991) contains rules on cross-border mergers.

354 One might wonder whether the entry into force of the Directive regulating the tax aspects of certain transactions creates some obligation on the Member States to adapt they company law legislation to allow such transactions. This seems not to be the case as noted by P.H. SCHONEWILLE, *Some questions on the Parent-Subsidiary Directive and the Merger Directive*, in *Intertax*, 1/1992, at 18, making reference to a memorandum by the Commission.

Member State, the shareholder might receive shares of the company surviving the merger, in exchange for the shares of the non-surviving company. The Directive imposes on the shareholder's Member State the obligation to refrain from taxing the gain on the shares, provided that the shareholder attributes to the shares received a value for tax purposes not higher than the value that the shares exchanged had immediately before the merger. Hence, also Member States that would not allow cross-border mergers may have to apply the Directive to the effects of mergers taking place in other Member States[355].

Thus, the Directive obtains the result under which tax neutrality is granted[356] in one Member State to transactions effected in another Member State even if such transactions have no company law basis in the first State.

However, this result applies solely to the eligible transactions (mergers, divisions, transfer of assets and exchange of shares) which are effected between companies of two different Member States.

The scope of the Directive should therefore be widened to achieve tax neutrality in one Member State of the effects of an eligible transaction effected solely in another Member State. For instance, in the event of a merger between two German companies, the UK shareholder of the German absorbed company is not at present afforded tax neutrality on the shares received in exchange of the shares of the absorbed company as Article 8 of the Directive does not apply.

This example raises the criticism on the crossborder condition laid down by Article 1 of the Directive under which

> „Each Member State shall apply this Directive to mergers, divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved".

---

355 The same would be true in the case of a merger implying the transfer of assets located in such a Member State by a company of a different Member State merging into a company of a third Member State.

356 See the discussions of Seminar F (titled „*Cross-border effects of restructuring, including change of legal form*") held at the IFA 2000 Congress in Munich on 7 September 2000. In particular, the above issue was discussed by C.Staringer (see written presentation „*The impact of EC tax directives on dividends and cross border reorganisations*", not published yet, whereby it was held that one of the Merger Directive's „*fundamental achievements is to oblige Member States to grant tax neutrality by way of tax deferral for certain reorganizations. For some jurisdictions within the EC, this claim for tax deferral might appear self evident, but, as a matter of fact, for others it is not. Therefore, the Merger Directive forced those Member States who used to treat reorganisations as taxable events even under their national lawsz to change their national systems to a tax neutral one*".

Indeed, the crossborder character of the transaction should include situations in which a domestic eligible transaction affects the tax regime of persons residing in another Member State (e.g., a shareholder of a company of another Member State which is a party to a domestic merger or division).

3.2.3. Valuation in the Member State other than the one in which the assets transferred are located. The tax relief provided under the Directive is based on two main principles:

(i) a merger, division or transfer of assets shall not give rise to any taxation of capital gains on the assets transferred that are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company[357]; and

(ii) the allotment of the shares representing the capital of the receiving or acquiring company to a shareholder of the transferred or acquired company in exchange for shares representing the capital of the latter company shall not give rise to taxation in the hands of the shareholders[358].

The Directive imposes the grant of the relief on the Member State of the transferring company and imposes the receiving company to value the assets transferred at the same value as they had in the hands of the transferring company[359]. Nothing is said as to scope of application of the limitation, i.e. whether it affects only the tax regime of the transferred assets in the Member State of the receiving company if such Member State is not the same as the one in which the assets transferred are situated[360].

In principle, issues not specifically regulated under the Directive are subject to the domestic tax law and practice of the Member States involved in the relevant transactions. A simple example is the case of transfers of assets[361]. The Directive provides that the tax basis of the assets transferred is rolled over to the receiving company, which computes any new depreciation and any gains or losses in respect of the assets and liabilities trans-

---

357 Article 4(1) of the Directive.

358 Article 8(1) of the Directive.

359 Article 3(2) reads as follows: „*The Member States shall make the application of paragraph 1 conditional upon the receiving company 's computing 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.*"

360 See J. WHEELER, *What the Merger Directive does not say*, in *European Taxation*, 5/1995, at 142.

361 The example is taken from J. C. WHEELER, *What the Merger Directive does not say*, in *European Taxation*, May 1995, at 142.

ferred according to the rules that would have applied if the transfer had not taken place. The Directive, however, does not specify:

- as to the assets transferred, whether the rule applies for the purposes of applying the taxes of the Member State where the permanent establishment is located only or also of the (different) Member State in which the receiving company is located;
- as to the shares received, whether the tax basis of the assets transferred must be rolled over to the shares received by the transferring company as a consequence of the transaction, and, should this be the case, whether the rule applies for the purposes of applying the taxes (on the subsequent gain on the shares) of the Member State where the permanent establishment is located only or also of the (different) Member State in which the receiving company is located.

For example, if a transferring company resident of Member State A transfers assets situated in Member State B to a receiving company resident of Member State C, it is not clear whether:

- the receiving company must retain the value for tax purposes of the assets transferred only for the purposes of taxation in Member State C (State of the permanent establishment), or
- also for the purposes of taxation in its own Member State of residence (Member State B).

Moreover, it is not clear whether the transferring company must rollover the value of the assets transferred to the shares received for the purposes of determining its taxable basis in member State A or also in member State B.

Different Member States may apply different rules. So, for example, the Member State of the receiving company might impose the adoption of the tax basis of the transferred assets and liabilities that they had in the hands of the transferring company, economic double taxation might arise since:

- the Member State of the permanent establishment might tax the gain on the disposal of the assets;
- the Member State of the receiving company might tax the gain on the disposal of the assets.

Is this in accordance with the Directive? As to the double taxation on the disposal of the assets, it might be argued that the issue in not covered by the Directive but, rather, should be dealt with by the remedies for the avoidance of double taxation (exemption or credit) in the State of the receiving company (and/or in the double tax treaty, if any, between the Member State of the receiving company and the Member State of the Directive. Nevertheless, double taxation might still arise as a consequence of

the roll-over relief. According to reputed scholars[362] the aim of the Directive is not the avoidance of double taxation but the removal of the obstacles represented by the taxation on the transferring company (of the gains arising in a transaction that might generate no cash to pay the tax).

This outcome appears in contrast with the purpose of the Directive, as double taxation cannot be said to foster mergers, divisions and transfers of assets at EC level[363]. Valuations not expressly regulated under the Directive should be made under the domestic laws of the relevant Member States, due regard being had for the purpose of the Directive[364]. If such valuations result in double taxation, the aims of the Directive might be frustrated; hence, valuations that would result in an obstacle to the transactions covered by the Directive should be regarded as contrary to the Directive and, as such, exposed to challenge by the ECJ.

The same holds true as to the valuation of the shares allotted to the transferring company, if the Member State in which the assets are situated is the Member State of residence of the transferring company, double taxation may arise if such State imposes on the transferring company to roll-over the value for tax purposes of the assets transferred to the shares of the receiving company received pursuant to the transfer. This may lead to economic double taxation, since the same gain might be taxed twice, once on the disposal of the shares by the transferring company and once on the disposal of the assets by the receiving company. This double taxation is, as noted above, contrary to the purposes of the Directive.

The same issue may arise in connection with exchanges of shares. the Directive[365] provides the relief in the hands of the exchanging shareholder is conditional upon the shareholder's not attributing to the shares received a value for tax purposes higher than the shares exchanged had before the exchange. Nothing is said as regards the value for tax purposes to be attributed by the acquiring company to the shares of the acquired company. A requirement of the Member State of the acquiring company to retain the value for tax purposes of the shares received as they had in the hands of the transferring shareholder would generate potential double taxation – on

362 O. THÖMMES, *Commentary to the Merger Directive. Chapter 5.2, Commentary on Article 2 of the Merger Directive,* paras. 55 and 56, in *EC Corporate Tax Law*, Amsterdam, IBFD Publications, para. 9.

363 G. SAß, *The new EC tax directives on Mergers and Parent/Subsidiaries*, in *Tax Planning International Revue*, 1991, at 6, considers such double taxation as the „price" for the tax relief under the Directive.

364 J. WHEELER, *supra*, footnote 360, concludes that such valuations should be made at market value.

365 Article 8(3).

the subsequent sale by the transferring shareholder of the shares received and on the sale by the acquiring company of the shares in the acquired company[366].

Another issue concerning exchanges of shares that is not dealt with under the Directive is the valuation of the shares for tax purposes in the Member State in which the acquired company is situated. The exchange by non-residents of shares in resident companies is a taxable event is several Member States. The Directive[367] provides that the allotment of the shares to the shareholder shall not give rise to any taxation of the income, profits or capital gains of that shareholder. The provision makes no reference to the Member State which is compelled to give relief. It may be argued that the general wording imposes also on the Member State of the acquired company to refrain from taxing the possible gain. However, nothing is said as to the value for tax purposes of such shares, such value being the basis to calculate the capital gain or loss realised by the acquiring company at the time of the subsequent disposal of the shares in the acquired company by the acquiring company. If the Member State of the acquired company imposes on the acquiring company the preservation of the value for tax purposes that the shares had in the hands of the exchanging shareholders, double taxation might arise:

- once in the Member State of the shareholder, upon the sale of the shares in the acquiring company; and
- in the State of the acquired company upon the disposal of the shares in the acquired company[368].

Similarly to the transfer of assets it might be argued that this is in contrast with the Directive[369].

---

366 See *supra* footnote 363.

367 Article 8(1).

368 This issue might be more theoretical than practical, since in the presence of a tax treaty between the Member State of the acquiring company and the Member State of the acquired company containing a clause similar to Article 13(4) of the OECD Model Convention, the Member State of the acquired company might be prevented from levying the tax on the capital gain on the disposal, by the acquiring company of the shares in the acquired company. Should this not be the case, an actual risk of double taxation exists. In fact, should the acquiring company be allowed to value for tax purposes in its Member State of residence the shares at their fair market value, the foreign tax credit capacity at the time of disposal of the shares to absorb the tax possible levied in the Member State of the acquiring company might be insufficient. Hence, the tax possibly levied on the capital gain on the sale of the shares by the acquiring company might be a final tax.

369 J. WHEELER, *supra* footnote 360, argues that all the valuations not regulated by the Directive should be such that the hidden gain at the time of the exchange is not taxed in any other way than in the hands of the exchanging shareholders; hence, all the valua-

Unlike the case of the transfer of assets, however, it might be argued that the rollover of the value for tax purposes from the exchanging shareholder to the acquiring company is meant to preserve the fiscal interests of the Member State of the acquired company, similarly to the provision imposing the rollover of the value for tax purposes of the assets forming a permanent establishment in the case of merger, divisions and transfers of assets[370].

3.2.4. The protection of fiscal interests. The relief provided under the Directive applies only to the assets that, after the transaction, remain effectively connected with a permanent establishment in the Member State of the receiving company in the Member State of the transferring company. This condition is provided in order to ensure ultimate taxation of the assets in the Member State of the transferring company at the time of their disposal. In fact, the State in which a permanent establishment is situated normally retains the right to tax the gains on the disposal of the assets forming part of the property of a permanent establishment situated in its territory[371]. In certain circumstances, however, the State where the permanent establishment is situated might loose its taxing rights even if the assets transferred in a qualifying transaction for a permanent establishment in its territory. This is the case of mergers involving companies engaged in the operation of ships or aircraft in international traffic. Under tax treaties[372], income and gains of such companies are taxable only in the State in which the place of effective management of the enterprise is situated. Hence, if a company of a Member State merges with a company of a different Member State and company resulting form the merger is a shipping company or airline engaged in international traffic, the Member State of the transferring company would loose its right to tax the profits and gains of the permanent establishment resulting from the merger and situated in its territory. The question arises of whether in such circumstances the

---

tions other than the one regulated by the Directive (Article 8(2)) should be made at market value.

370 J. WHEELER, *supra* footnote 360, notes that if the rollover is granted also by the Member State of the acquired company thee outcome would be that such Member State would be left with a deferred tax claim against a non-resident shareholder (the exchanging shareholder) holding shares in a non-resident company (the acquiring company), i.e. outside the tax net of the Member State granting relief. to avoid this curious situation, the authors suggests to amend the directive to provide that the Member State of the acquiring company is compelled to give relief only to the exchanging shareholders that are resident of that Member State.

371 The right is normally retained under tax treaties having a capital gains clause similar to Article 13 of the OECD Model Convention.

372 See Article 8 of the OECD Model Convention.

Member State of the transferring company is compelled to grant the tax relief under the Directive.

The conditions in Articles 3 and 4 of the Directive would be met but the requirement of the preservation of the fiscal interest of one of the Member States involved[373] would not. This has led some authors[374] to deny the tax relief when the State of the transferring company looses the right to tax the gains on the assets forming part of the property of a permanent establishment at the time of their disposal.

Under a literal interpretation of the Directive, it may be argued that such a transaction does not meet the test for the relief. In fact, the Directive[375] defines ‚transferred assets and liabilities' as „*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*" (emphasis added). If, after the transaction, the receiving company maintains a permanent establishment in the Member State of the transferring company but such latter State is prevented from taxing the relevant profits due to (for example) treaty provisions, it may be argued that such permanent establishment does not „*play a part in generating the profits or losses taken into account for tax purposes*". The conclusion would disqualify those assets and liabilities from those on which relief should be given under Article 3(1), first sentence.

A different conclusion would be justified from a substantive perspective. The Directive is meant to remove the tax obstacles hindering the transactions covered. It is meant to achieve such goal by differing taxation on the latent gains on the assets involved in the transactions. The deferral, rather than a plain exemption, is meant to allow the member State in which the assets are situated, to preserve its taxing rights on such gains.

On the other hand, the taxation of the subsequent profits of the permanent establishment emerging from the transaction might be prevented by rules (such as Article 8 of a OECD-type treaty) which allocate the taxable profits on ordinary income. This could also be the case, for example, of territorial exemptions or tax reductions that only benefit ordinary profits. The denial of application of the Directive relief also in such cases would be consistent with the wording of Article 3(1) only in cases where:

---

373 Fourth Recital of the Preamble to the Directive. Explanatory Memorandum to the Proposed Directive COM(69)5 final.

374 G. Saß, *supra* footnote 363, at 4; IBFD, *Survey on the implementation of the EC corporate tax directives*, 1995, Amsterdam, IBFD Publications, at 45.

375 Article 4(1).

- the Member State where the assets and liabilities are situated had the right to tax such gains in the case of disposal before the transaction for which relief under the Directive is sought; and
- the right to tax the gains would be lost pursuant to the transaction for which relief under the Directive is sought[376].

3.2.5. *Transfers of assets: incorporation of a branch.* Article 2 of the lists the transactions to which the Directive applies which include the „transfer of assets"[377], effected by a company of a Member State to a company of a different Member State. A special case of transfer of assets is when the assets transferred (branch of activity) and the receiving company are situated in the same Member State, as in the case in which a company intends to covert a branch in another Member State into a local subsidiary. According to some scholars[378], the Directive does not apply to such transactions since it provides for tax relief only on assets located in the Member State of the transferring company. Other authors[379] believe that the transaction is covered by the Directive and tax relief should be granted in the Member State where the assets are located even if the transaction does not result in a permanent establishment in that Member State. The requirement of the existence of a permanent establishment in the Member State where the assets are located is meant to preserve that Member State's taxing rights[380]. However, if the assets are within a legal entity subject to the taxing jurisdiction of the Member State in which they were located before the transaction, it may be argued that the taxing rights are preserved to the same extent as, if not more than, if they were effectively connected with a permanent establishment in that Member State. This argument, read in

---

376 For the sake of completeness is worth noting that Article 13 of the OECD Model Convention prevents the State of source from taxing the gains form the alienation of ships or aircraft operated in international traffic. However, capital gains on the disposal of other assets forming part of the property of a permanent establishment of the enterprise operating the ships or aircraft might still be taxed in the State of source under the said Article 13. Hence, the denial of the Directive relief would be consistent with the requirement to preserve the fiscal interests of the member State where the permanent establishment is situated but would be unjustified as regards the other assets.

377 Defined as *„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"*.

378 See B. LARKING, *The Merger Directive: will it work?*, in *European Taxation*, 12/1990, at 364. The author acknowledges that this might be an unintended result.

379 See O. THOMMES, *supra* footnote 362, paras. 55 and 56. The author acknowledged that, although *„the transaction is covered by the Directive's transfer of assets definition, the Directive is somewhat unclear as regards the applicability of its substantive provisions to this kind of transaction"*.

380 Sixth recital of the Preamble of the Directive.

connection with the Preamble to the Directive, should support the conclusion that the Directive indeed applies to the incorporation of a branch since the transaction should not jeopardise the fiscal interests of the Member State in which the assets transferred are situated. Should transactions be implemented with the purpose of avoiding tax, the Member States whose fiscal interests are jeopardised could protect themselves by recourse to the anti-abuse clause contained in Article 11 of the Directive.

3.2.6. Transfer between two companies belonging to the same Member State of a branch located in another Member State. The wording of Art. 10(1) of the Directive[381], together with the heading of Title IV („Special case of the transfer of a permanent establishment") may lead to speculation that the Directive applies also to the case where a transfer is made between two companies residing in the same Member State of a permanent establishment located in another Member State. Following this approach, if a permanent establishment located in Italy were to be transferred from a company resident in Member State A to a company resident in the same Member State A, Italy shall have to grant the roll-over relief to assets and liabilities pertaining to the Italian permanent establishment.

However, in the author's opinion this view cannot be shared, in that it clearly conflicts with the transnational requirement set forth in Art. 1 of the Directive[382] and with the scope of the Directive itself (*Council Directive of 23.07.1990 on the common system of taxation applicable to mergers, divisions, transfer of assets and exchanges of shares concerning companies of different Member States*).

3.2.7. Share exchanges: existing control participation. Article 2 of the Directive defines the (qualifying) exchange of shares as „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 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 [...]". The wording leaves open the question of whether it covers transactions in which small participations are exchanged that allow the ac-

---

381 See the last sentence of Art. 10(1), that reads as follows: „*The State in which the permanent establishment is situated and the State of the receiving company shall apply the provisions of this Directive to such a transfer as if the former State were the State of the transferring company*".

382 Art. 1 states that: „*Each Member State shall apply this Directive to mergers, divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved*".

quiring company to achieve or consolidate the majority of voting rights[383]. As to the achievement of the majority (e.g. exchange of a 2 per cent participation with an acquiring company already holding a 49 per cent participation), an affirmative conclusion can be drawn directly from the wording of the Directive[384], which includes in the definition all exchanges in which the acquiring company „obtains the majority of the voting rights" in the acquired company. Hence, a transaction which result in a minority (qualified) shareholder obtaining the majority should qualify regardless of the amount of the participation needed to achieve such majority.

The application of the Directive to cases of consolidation of control is less straight forward. A number of Member States[385] have implemented the Directive to cover also such cases. The Directive should apply also to transactions resulting in the consolidation of a majority position. In fact, such transactions may be used in international business practice to achieve the integration of multinational groups that *„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 establishment and effective functioning of the common market"*[386]. It might be argued that the application of the Directive to such transactions might lead to abuse of the relief in transaction in which no such integration is sought but are rather implemented to obtain a tax benefit. However, in order to deny the application of the relief to abusive transactions recourse may be made to the anti abuse provision contained in Article 11 of the Directive. A restriction of the scope of the transaction to achieve the same objective might result in the denial of the relief to transactions that are fully sound from a business perspective, thus frustrating the objectives of the Directive.

3.2.8. *Share exchanges: change in the tax regime of the participation received.* One of the consequences of the Directive is that taxation may be shifted from one shareholding (in the acquired company) to another shareholding (in the acquiring company) in the hands of the same shareholder. This may lead to differences in taxation if, for example, the shareholding in the acquired company qualified for a tax regime and the shareholding in

---

383 E.g. transition from minority (49 per cent) to majority (51 per cent) or consolidation of majority (form 51% onwards). Saß, *supra* at footnote 363, seems to imply that the consolidation of control does not qualify under Article 8 of the Directive. THÖMMES, *supra* at footnote 362, Chapter 5.2, paras. 61 and 67, argues that the consolidation of control should be covered as such conclusion would be more consistent with the intentions of the Directive.

384 Article (1)(d).

385 According to IBFD, *supra* at footnote 345, this is the case, for example, in Germany, Italy and the Nehterlands.

386 First recital of the Preamble to the Directive.

the acquiring company qualified for a different (more or less favourable) regime[387]. This consequence is not covered by the Directive, with the result that the State of the shareholder might loose part of its tax claim (or the shareholder might loose part or all of its tax benefits). It is fair to say that, should the shareholder abuse of the Directive mechanism to obtain a tax saving, its Member State of residence might deny the application of the Directive under the anti-abuse provision (Article 11). In legitimate transactions, however, the mechanism of the Directive might lead to a non-tax-neutral result.

3.2.9. *Anti-abuse provision.* Art. 11(1) of the Merger Directive entitles the Member States to withdraw the Directive's benefits in the case of abuse, „*where it appears that the merger, division, transfer of assets or exchange of shares 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 the rationalisation of activities of the companies participating in the operation may constitute a presumption that the operation has not tax evasion or tax avoidance as one of its principal objectives*".

The purpose of Art. 11 of the Merger Directive is to withdraw the benefits of the Directive on the basis of a case by case examination.

Indeed, in order to determine whether the planned operation has tax evasion or tax avoidance as its principal objective, the competent national authorities cannot confine themselves to applying predetermined general criteria but must adopt a case-by-case approach. Hence, the laying down of a general rule which automatically excludes certain categories of operations from the tax benefits of the Merger Directive, whether or not there is tax evasion or tax avoidance, would go beyond what is necessary to prevent tax abuse and would undermine the objective pursued by the Directive [388].

---

387 In Italy, for example, capital gains on small participations held by individual shareholders are taxed more favourably than capital gains on substantial participations. In the Netherlands, on the other hand, small participations do not qualify for the participation exemption.

388 See, in this respect, para. 44 of the ECJ judgment in the *Leur-Bloem* case (Judgement of 17 July 1997, Case C-28/95, *A. Leur-Bloem v. Inspecteur der Belastingsdienst/Ondernemingen Amsterdam 2,* [1997] ECR I-4161).

This implies that holding period requirements, like the ones set forth in Germany (seven years), in France (five years), or in The Netherlands (three years) are in principle not in line with the Merger Directive[389].

The conclusion would be different if the holding period requirement were waived where it appeared that the taxpayer has valid commercial reasons for the transaction he wants to carry out, or if the taxpayer demonstrates the absence of tax evasion or tax avoidance.

Nonetheless, according to the ECJ, such a waiver should not „ ... be made subject to the mere possibility of the grant of a derogation, at the discretion of the administrative authority"[390], without juridical review.

It is, therefore, legitimate to conclude that the benefits of the Merger Directive cannot be automatically prohibited on predetermined criteria set forth set forth in Member States' legislation. In other words, the Member States cannot escape the obligation to conduct a thorough analysis of each individual case based on all relevant criteria, regardless of whether such criteria have been specifically addressed in the applicable anti-avoidance provisions of their domestic tax law[391].

---

389 The same position (i.e. non-compatibility between the Directive and the holding period requirements set forth by certain Member States for the transferring company or the acquiring company in the case of an exchange of shares) has been held in the Commission Working Paper *„Some Problems of Implementation of Directives 90/434/EEC („Merger Directive") and 90/435/EEC („Parent-Subsidiary Directive"), supra* at footnote 21. More recently, the same view has been taken by the Confederation Fiscale Europeenne, *Opinion statement concerning the implications of the Denkavit-Vitic-Voormeer judgements of the European Court of Justice,* in European Taxation, 1998, 40.

390 See para. 44 of the *Leur-Bloem* judgement. It is worth noting that a discretionary prior approval, with no possibility for an appeal by the taxpayer, has been introduced in France with respect to cross-border mergers. On the infringement of the anti-abuse clause of the Directive by such provision of a preliminary administrative agreement (*agreement préalable*) in French legislation, see P.S. THILL – F. HELLIO, *The merger directive. Practical tax issues – France,* Amsterdam, 1993, at 64; O. NOËL, *France: implementation of the EC merger directive,* in *European taxation*, 1992, at 232; P. DEROUIN – G. LADREIT, *L'incomplète adaptation du régime fiscale des fusions des sociétés et opération assimilées,* in *Droit fiscal*, 1992, at 226.

391 The same conclusion is drawn by O. THÖMMES, *European Court of Justice decides Leur-Bloem: the first case regarding the implementation of the EC Merger Directive,* in *Intertax,* 1997, at 359; D. WEBER, *The first steps of the ECJ concerning an abuse-doctrine in the field of harmonized direct taxes,* in *EC Tax review,* 1997, at 22; D. SCHELPE, *The Denkavit-Vitic-Voormeer case,* in *EC Tax Review,* 1997, at 17; F. HOENJET, *The Leur-Bloem judgment: the jurisdiction of the European Court of Justice and the interpretation of the anti-abuse clause in the Merger Directive,* in *EC Tax Review,* 1997, at 206.

4. The Arbitration Convention

4.1 Introduction

On 23 July 1990 the Member States approved the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (90/436/EEC)[392].

The aim of the Convention is the elimination of double taxation arising from transfer pricing adjustments. If in a certain Member State the local tax authorities make a unilateral upward transfer pricing adjustment to the profits of a local enterprise and the tax authorities of the Member State of the counterpart (being either an associated enterprise[393] or a permanent establishment of the first company) do not make a corresponding downward adjustment, double taxation may arise (in the first case it would be economic double taxation whereas in the second case it would be juridical double taxation)[394].

The Convention provides a three-tier system for the elimination of double taxation arising as aforesaid. When the profits of an enterprise of a Member State are included also in the profits of an enterprise of another Member State[395], one of the enterprises shall inform the competent authorities of its Member State[396]. If the latter are not able to arrive at a satisfactory solution, an endeavour to resolve the case by mutual agreement with the competent authorities of the other Member State(s) involved shall

---

392 In Official Journal L 225 of 20 August 1990. The Convention entered into force on 1 January 1995 pursuant to the deposit by Portugal of the instrument of ratification. The Convention had originally a validity of five years; on 25 May 1999 the Member States signed a protocol (published in Official Journal C 202/01 of 16 July 1999) to extend the Arbitration Convention. The Convention will automatically be extended for additional periods of 5 years, unless a Member State informs the Secretary-General of the Council of the European Union of its objection thereto in writing at least six months before the expiry of any five-year period (new Art. 20 of the Convention).

393 The concept of ‚associated enterprise' is defined in Article 4(1), which is based on Article 9(1) of th OECD Model Convention.

394 Not all such double taxation cases can be dealt with under double tax treaties containing a clause similar to Article 9 of the OECD Model Convention. Firstly, not al Member States have double tax treaties with all other Member States. Secondly, not all double tax treaties in place contain a clause similar to Article 9(2) of the OECD Model Convention. Thirdly, there might be disagreement between the tax authorities involved as to the application of the methods for the determination of the arm's length price.

395 Under Article 1(2), the permanent establishment of an enterprise of a Member Stat situated in another Member State situated in another Member State is deemed to be an enterprise of the Member State in which it is situated.

396 Article 6(1).

be made[397]. If the competent authorities fail to reach an agreement within two years, an advisory commission shall be set up to deliver its advisory opinion[398]. The commission decides based on the information and documentation provided (spontaneously or upon request) by the competent authorities and enterprises involved. The commission is to deliver its opinion within six months from the date on which the matter is referred to it. Pursuant to the opinion, the competent authorities involved shall eliminate double taxation by mutual agreement within six months from the delivery of the opinion. The mutual agreement between the tax authorities may deviate from the opinion, but if no agreement is reached, the competent authorities shall be obliged to act in accordance with the opinion[399].

The main feature of the Convention is that, unlike the Mutual Agreement Procedure provided under double tax treaties – under which the tax authorities of the contracting State have to endeavour to arrive at a solution but are not obliged to reach an agreement on a solution – it provides for a system under which double taxation is to be eliminated. Moreover, the procedure under the Convention is subject to time limits, whereas no time limit is provided for the treaty Mutual Agreement Procedure.

The Convention is undoubtedly a significant step towards the elimination of double taxation. Its system, however, needs to be perfected to fully achieve the intended aims. Although its limited application has so far not allowed a more comprehensive understanding of the issues it raises, some

---

397 Article 6(2).

398 Article 7(1). Under Article 9(1), the advisory commission is to be composed by:
- two representatives of each competent authority concerned;
- an even number of independent persons of standing appointed by mutual agreement (special criteria for the selection of the independent persons apply);
- the chairman.

399 The recourse to arbitration in solving double taxation disputes is not to be found only in the Convention but also in some tax treaties. On the issue see G. LINDENCRONA – N. MATTSON, *Arbitration in taxation*, in *European Taxation*, 1980; G. LINDENCRONA – N. MATTSON, *Ho to resolve international tax disputes? New approaches to an old problem*, in *Intertax*, 5/1990; D.R. TILLINGHAST, *The choice of issues to be submitted to arbitration under income tax conventions*, in *Intertax*, 4/1990; M. ZÜGER, *Mutual agreement and arbitration procedures in a multilateral tax treaty*, in M. LANG ET AL., *Multilateral tax treaties*, Kluwer Law International, 1998. More specifically on the Arbitration Convention see D. SCHELPE, *The Arbitration Convention: its origin, its opportunities and its weaknesses*, in *EC Tax Review*, 2/1995; L. HINNEKENS, *The Tax Arbitration Convention. Its significance for the EC based enterprise, the EC itself, and for Belgian and international tax law*, in *EC tax Review*, 2/1992; L. HINNEKENS, *Different interpretations of the European Tax Arbitration Convention*, in *EC tax Review*, 4/1998. Also Paragraph 48 of the Commentary to Article 25 of the OECD Model Convention makes reference to arbitration for the settlement of tax disputes.

issues have been already pointed out by the scholars[400]. Among such issues, the following appear to be of more immediate impact on the effectiveness of the Convention in pursuing its aims.

4.2 The issues

4.2.1 *The collection of tax pending the procedure*. The Convention contains no provision to prevent the Member States from enforcing their claims pursuant to the proposed adjustments and, eventually, collect the tax. Due to the potential duration of the procedure set forth by the Convention, it may happen that, before the case is settled, the enterprise whose profits have been adjusted has been obliged to pay the tax. In such a case, should the tax collected by a Member State prove to be excessive if compared to the outcome of the arbitration (or mutual agreement procedure), the effect of the Convention could be severely undermined. In fact, in some Member States the procedures for obtaining a refund by the taxpayer may be rather burdensome; in some cases, such as in Italy, the procedure may take several years and may require the recourse to litigation. The damage suffered by the taxpayer in such circumstances is significant and clearly against the aims and spirit of the Convention.
One possible amendment would be to attribute to the starting of the procedure under the Convention the power to hold collection procedures possibly initiated by Member States to enforce their adjustments[401]. Such a solution would protect the taxpayer from the burden of activating burdensome refund procedures.

4.2.2 *Serious penalties*. The Convention imposes no obligation on the competent authorities of the Member States where „legal or administrative proceedings have resulted in a final ruling that by actions giving rise to an adjustment of transfers of profits [...] of the enterprises concerned is liable to serious penalties"[402]. The Member States made unilateral declarations in the Convention as to meaning of ‚serious penalties' under their respective laws. Although the intention is that only major offences should be caught by the provision, the definitions vary significantly. So, for example, in Germany an administrative fine may be a serous penalty, whereas in Italy serious penalties are only criminal penalties; Luxembourg applies the principle of reciprocity whereas Greece set out a definition based on the amounts of the deficiencies. Hence, there is the risk that enterprises of dif-

400 See the authors referred to at footnote 399.
401 Such an amendment has been suggested also by UNICE, *Company taxaion – UNICE suggestions for further harmonisation*, in *Intertax*, 12/1991, at 586.
402 Article 8(1).

ferent Member States may be discriminated as to the access to the Convention, not only on the basis of the Member State in which they are established, but also on the basis of the Member States in which their associated enterprises (or permanent establishments) are situated[403]. In order to avoid such discrimination, the Convention could be amended to provide a definition of ‚serious penalty' applicable to all Member States. Such definition could include ‚criminal penalties' and penalties for ‚fraud' and ‚gross negligence'. It is fair to say that, due to the differences in the domestic legislations of the Member States, the above terms might be interpreted differently, so that complete uniformity could be difficult to achieve[404]. Nevertheless, a common definition could at least reduce the discrepancies now arising form a multitude of definitions.

5. The Ruding Report and the further action of the EC Commission

5.1 The Ruding Report

On 25 October 1990, the Commissioner Mrs. Scrivener gave mandate to a Committee of Independent Experts to evaluate „the importance of taxation for business decisions with respect to the location of investment and the international allocation of profits between enterprises" in order „to determine whether existing differences in corporate taxation and the burden of business taxes among member countries lead to major distortions affecting the functioning of the internal market"[405].

Should such distortions arise, the Committee was mandated to examine all possible remedial measures.

The Committee of Independent experts concluded its works by producing a report („the Ruding Report")[406]. The Report noted that *„the principal differences in the taxation of business income between Member States relate to the nature of the of the corporation tax system, statutory tax rates, the definition of the tax base together with various types of tax relief, withholding taxes on income flows abroad, and the manner in which relief is*

---

403 Article 8(1) seems to imply that if any of the enterprises involved is subject to serious penalties none of the competent authorities involved is under the obligation to initiate the mutual agreement procedure or to set up the advisory commission.

404 The issue of the interpretation affects all terms not defined under the Convention. In this connection see D. SCHELPE, *supra* at footnote 399, at 146 et seq. and L. HINNEKENS, *supra* at footnote 399, at 83 et seq.

405 *Mandate given to Mr. Onno Ruding for the Committee established to examine company taxation in the European Community*, Brussels, 25 October 1990.

406 COMMISSION OF THE EUROPEAN COMMUNITIES, *Report of the Committee of Independent Experts on Company Taxation*, Brussels,. Luxembourg, March 1992.

provided for double taxation with respect to income derived from cross-border activities: There are also major differences between countries in the taxation of unincorporated businesses and net wealth"[407].

The Committee found that the tax systems of the Member States had converged to a certain extent, although wide differences still remained. The Committee reputed unlikely that such differences could be removed through independent action by Member States and that only measures agreed at Community level could remove distortions. The intervention at Community level, however, should have been kept at the minimum necessary to remove discrimination and major distortions, taking into account:

(i) the Member States want to retain flexibility in revenue raising through direct taxes;
(ii) the explicit or implicit linkage between corporate and personal income taxes in Member States;
(iii) the principle of subsidiarity;
(iv) the need of unanimity in tax matters; and
(v) the experience of other federated States, where central intervention on binding harmonization measures had proven to be the exception rather than the rule.

The Committee set forth a series of recommendations to be articulated over three phases: the first, to be completed by the end of 1994; the second to coincide with the second phase of economic and monetary union; the third to coincide with full economic and monetary union. The recommendations were articulated in three areas:

- Elimination of double taxation of cross-border income flows: the recommended measures included: the widening of the scope of the Parent Subsidiary directive to all business taxpays and the reduction of the participation threshold; the establishment of a 30% uniform dividend withholding tax to be waived on payments to EC residents; the establishment of appropriate rules on transfer pricing adjustments; the approval of the proposed directives on interests and royalties and on the compensation of losses (expanded to allow full Community-wide loss compensation within a group of companies; the completion of the double tax treaty network between Member States and the adoption of a common policy on double tax treaties between Member States and third countries;
- Corporation taxes: the recommended measures included: the extension of the domestic imputation systems to cross-border inbound dividend distributions; the study (in phase I) and adoption (in phase III) of the

407 Chapter 10, paragraph II.

most appropriate common corporation tax system; the adoption of a minimum (30%) and maximum (40%) rates; the adoption of minimum standards regarding some aspects of the determination of a number of items concurring to the determination of the tax base (to be agreed by an independent group of technical experts);

- Local taxes: the Committee recommended the replacement of local taxes having a composite basis (levied in France, Germany, Luxembourg and Spain) with an on-profits tax levied on the same basis as the central government corporation tax.

5.2 The reaction to the Report

The three areas of action highlighted in the Report received different reactions at the institutional, business and scientific level[408].

5.2.1 *The institutional reaction. In its reaction to the Report*[409]*, the EC Commission acknowledged that differences between the tax systems of the Member States could indeed affect the location of investments thus distorting competition to the detriment of the allocation of resources within the EC. The EC Commission share the conclusion of the Report that the elimination of double taxation should be the main goal to pursue; such goal, however, in its view should have been pursued taking into account the principle of subsidiarity and the need to consult all interested parties.*
The EC Commission rejected the recommendation for a common approach on tax treaty policy *vis-à-vis* third countries and postponed the consideration of the measures concerning the compensation of losses.
The second set of recommendations (Corporation Taxes) was considered to be too far reaching and inconsistent with the principle of minimum harmonisation, although some measures concerning the determination of taxable profits were considered worth pursuing.

5.2.2 *The European Parliament.* The European Parliament endorsed the conclusions of the EC Commission and pointed out that *„any changes recommended should have regard to the general fiscal environment linked to the establishment of the European Monetary Union, to the budged constraints faced by the Member States, to the implication for other forms of*

---

408 For an analysis of some reputed scholar's reaction to the Report see A.J. MARTÍN JIMÉNEZ, *Towards tax harmonization in the European Community*, Deventer, Kluwer, at 137 et seq.

409 *Commission Communication to the Council and European Parliament indicating the guidelines on company taxation linked to the further development of the internal market*, SEC(92) 1118, 26 June 1992.

taxation of any changes in company tax bases or rates and the wider role of company taxation as an instrument of economic policy."

Also business representatives welcomed the recommendations of the Report as regards the elimination of double taxation, although labelled as over-ambitious an even counterproductive the proposals for a comprehensive harmonisation of corporation taxes under the (at the time) current circumstances[410]. As to the taxation of dividend income, business representatives agreed with the aim to remove distortion derived from the tax treatment of cross-border dividend flows, although reserving the position as to the best method to remove such distortions.

As to the setting of a floor and cap to the statutory corporate tax rate in the Member States, UNICE rejected the former and welcomes the latter, although noting that the setting of statutory rates without intervening on the determination of the taxable base – for which the organisation recommends to concentrate on those elements which have proven to be obstacles to transnational activities – may prove ineffective.

5.3 Further action by the EC Commission

5.3.1. *The emphasis of the EC Commission on the subsidiarity principle.* The position of the EC Commission set the path for future action at Community level for further harmonization. The emphasis put on the principle of subsidiarity and the need to take action in concert with all the Member States and companies was dictated by the lack of success of a full harmonization programme. The EC Commission decided to concentrate on the minimum necessary measures to eliminate distortions generated by lack of harmonisation by promoting measures of convergence of the tax regimes of the Member States.

The differences between the tax systems of the Member States, however, were likely to be increased by the fast approaching of the Economic and Monetary Union. The Member States would have lost control over currency rates and interest rates, historically the main instruments of national economic policy. As a result, the importance of the tax lever as instrument of economic policy increased significantly. This implied, on the one hand, that Member States were far more reluctant to relinquish tax sovereignty in favour of the Community; on the other hand, the use of the

410 *Company Taxation – UNICE suggestions for further harmonisation*, in *Intertax*, 1991/12, at 585; *UNICE position on the recommendations for harmonisation in the area of company taxes as made by the Ruding Committee*, in *Intertax*, 1992/8–9, at 518.

tax lever to attract investments and foster the economy increased, thus widening the already existing differences.

5.3.2 *The tax package.* In 1996 Commissioner Monti revived the issue of taxation at EC level suggesting a global approach (not limited to company taxation) through a paper submitted to the informal meeting of the ECOFIN Council held in Verona in April 1996[411]. The paper was followed by the appointment by the EC Council of a High Level Group[412]. The conclusions of the High Level Group formed the object of a second paper by the EC Commission[413], on which emphasis was put on the need to fight tax avoidance and evasion. In particular, the issues of harmful tax competition for the revenues from internationally-mobile business and the application of state aid rules to tax incentives were raised. The idea for a ‚code of good conduct' to define common standards across a range of areas was also put forward[414]. The Code of Conduct was proposed to the ECOFIN Council together with a proposal for Council Directive on the taxation of savings and a proposal for Council Directive on the taxation of cross-border flows of interest and royalties. The three measures form what is currently referred to as „the Tax Package". The ECOFIN Council of 1 December 1997 approved the Code of Conduct and gave mandate to the Commission to present the proposals for the two directives.

5.3.3 *Harmful tax practices and State aids.* The whole issue of harmful tax practices in general and the Code of Conduct in particular raise the issue of the application of State aid rules[415] to direct tax measures. In 1998, the EC Commission analysed the application of the State aid rules to

411 *Fiscalité dans l'Union Europeenne*, SEC(96) 487 final. of 20 March 1996.

412 Composed of the representatives of the Ministers of Finance of the Member States.

413 *taxation in the European Union: report on the developments of tax systems*, COM(96) 546 final of 22 October 1996.

414 The first version of the Code of Conduct (Business Taxation) appeared in the Communication of the Commission *Towards Tax Co-ordination in the European Union*, COM(97) 495 final of 1 October 1997. It was then refined in a subsequent Communication to the Council and the European Parliament, *A package to tackle harmful tax competition in the European Union*, COM(97) 564 final of 5 November 1997, in which the so called ‚tax package' was restricted to the Code of Conduct and to the proposals for directive on savings and on cross-border payments of interests and royalties.

415 Articles 87–89 of the EU Treaty. In particular, Article 89 provides that „*[s]ave as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.*" Certain exceptions apply.

measures relating to direct business taxation[416] in order to clarify whether a tax measure can be qualified as State aid.

With the exception of the Code of Conduct no further action has been taken by the EC Commission in the field of State aids and company taxation.

6. Home State Taxation

6.1 The concept of Home State Taxation

Since the proposals of the Ruding Committee have not been implemented so far, scholars have suggested different approaches for the harmonisation of company taxation within the European Communities (EC). In particular, the so-called Stockholm Group[417] has recently proposed to implement within the EC the so-called European Home State Taxation (hereinafter „HST") approach.

Under such approach each company incorporated within the European Communities should have a single taxable income determined with reference to all the activities carried on within the Member States admitted to the system by the company and its subsidiaries.

The Stockholm Group suggested that HST: (i) should apply both to companies incorporated under the European Company Statute[418] and under

---

416 *Commission notice on the application of the State aid rules to measures relating to direct business taxation*, in OJ C No 384 of 10 October 1998.

417 Such Group, chaired by SVEN-OLOF LODIN and MALCOLM GAMMIE, issued the paper *The taxation of the European company*, dated February 9, 1999. Such paper addresses four different approaches to achieve harmonisation of company taxation within the European Union (namely, branch basis of taxation, European corporate income tax, the Ruding Committee proposals, and European HST). With reference to the HST approach, see SVEN-OLOF LODIN – MALCOLM GAMMIE, *The Taxation of the European Company*, in *European Taxation*, 1999, 286; MALCOLM GAMMIE, *Taxation issues for the European company*, in *EC Tax Review*, 1998, 159; LORENCE L. BRAVENEC, *Corporate Income Tax Coordination in the 21st Century*, in *European Taxation*, 2000, 450; STEVEN BOND – LUCY CHENNELLS – MICHAEL P. DEVEREUX – MALCOLM GAMMIE – EDWARD TROUP, *Corporate Tax Harmonisation in Europe: A Guide to the Debate*, The Institute for Fiscal Studies, London, 2000, 71.

418 The European Council of Nice has recently approved the Statute of the European Company. The proposal of such statute dates back to 1970 when the Commission submitted to the Council the draft EEC Regulation regarding the Statute of the European Limited by Shares Company (published in the Official Gazette of the European Communities, no. C-124 of 10 October 1970). Such proposal provided for the taxation of the income of the permanent establishments of the European Company only in the State where such permanent establishments are located, being such income exempt in the State of residence (Article 278). Such proposal further provided for the tax neutral-

the corporate laws of each Member State; and (ii) should be elective (*id est* companies should have the right to opt between the conventional tax regime and HST). In case HST is elected, it should apply to all the activities carried on by the company and the subsidiaries that represent a substantial investment for the parent company[419].

6.2 The „Home State"

The HST system implies that the Member States should conform to certain generally accepted criteria as differences in company law or accounting requirements may hinder the calculation of the taxable profits.

As regards the election of the Home State, in order to prevent tax driven choices, the company must prove a *genuine and enduring relationship* with such State. To this end, the election should be made in favour of the State where the real activities are carried on (not, for instance, in the State where the holding company is located). As a consequence, under the HST system the place of effective management should be irrelevant in determining the Home State. Nevertheless, the latter criterion should remain relevant to the application of tax treaties.

It goes without saying that an agreement among Member States which should provide for strict criteria for the admission of the Member States to the system requires a lower degree of control of the relationship of the companies with their Home State.

6.3 The determination of the taxable income

Under the HST system the taxable income should be determined according to the rules laid down by the legislation of the Home State. Since the income of qualified subsidiaries is determined according to the rules pro-

---

ity of the change of residence from a Member State to another Member State (Article 277), the definition of permanent establishment (Article 280), the criterion (based on the place of effective management) for determining the residence of the company (Article 276), and a permanent establishment non-discrimination clause (Article 279). The approval of such draft EEC Regulation would have been a significant step towards tax harmonisation within the EC. The tax provisions included in the subsequent versions of the proposal, dated 1989 and 1991, were limited to the deductibility of the losses of the permanent establishments in the State of residence (Article 133). Such provision was drafted in order to be applicable only to the States that exempt the income produced by the permanent establishments situated abroad. The present draft of the Statute does not contain any tax provision.

419 The investment should be generally deemed substantial if the company holds at least 75 per cent of the ownership. Such threshold may range from 51 to 100 per cent.

vided for by the Home State of the parent company, taxation on a consolidated basis or on a company-by-company basis should occur according to the legislation of such State. In this respect, the companies of the group should be taxed as if they constitute a purely domestic group.

As regards intra-group transactions, transfer pricing provisions should not apply to the extent that the companies are located within Member States admitted to the HST system. In fact, in such a case the shift of income between such companies should not have any influence on the taxable income determined according to the HST system. On the other hand, transactions entered with companies located in third States (*id est* non-Member States and Member States other than those admitted to the regime) are subject to the transfer pricing provisions laid down by the tax laws of the Home State.

With reference to income from third States, as defined above, a problem may arise in case an item of income is paid to a subsidiary belonging to a group which is taxed under the HST system according to the rules laid down by the legislation of another State. In such a case the company receiving the income should be considered as resident of a State for treaty purposes even if its income is determined according to the rules of the Home State. On the point, the Stockholm Group argued that problems may arise in the event that the residence State eliminates double taxation by the exemption method, whilst the Home State adopts the credit method[420]. In order to avoid the above problems it has been suggested that the HST system should apply only with regard to income arising within the EC until tax treaties are modified to accomplish the introduction of the HST system[421].

---

420 The same holds true in the event that the treaty between the residence State and the third State provides that only the source State may tax the income, while the treaty between the Home State and the third State does not limit the taxing powers of the Home State. In such cases, the income should be determined according to the legislation of the Home State having due regard to the treaties concluded by the residence State.

421 SVEN-OLOF LODIN – MALCOLM GAMMIE, *The Taxation of the European Company*, in *European Taxation*, 1999, 294. With regard to the transactions between companies resident of Member States admitted to the system, namely between a French company whose Home State is the United Kingdom and a French company taxed under French rules, such scholars have argued that France and the United Kingdom may agree that the treaty conclude between France and the United Kingdom is applicable. It seems indeed that the treaty should not be relevant as the French company whose Home State is the United Kingdom is a resident of France and is not subject to tax in the United Kingdom.

6.4 The allocation of the taxable income

The taxable income, determined as aforesaid, should be allocated, on the basis of an agreed formula, between the Member States admitted to the system. Each Member State should tax its share of the taxable income at the corporate income tax rate laid down by its legislation[422]. For the purpose of determining the above mentioned formula, the scholars have stated that reference could be made to the legislation of federal States (Germany, Canada and USA) and to the information stemming from the EC VAT system[423].

As regards the allocation of the profits through the formula, it is to be pointed out that the existing tax treaties concluded between Member States that provide that the profits of an enterprise of a contracting State may be taxed in the other contracting State provided that the enterprise has a permanent establishment in the latter State, and to the extent that the profits are attributable to such permanent establishment. Therefore, the existing tax treaties may restrict the taxing powers of the Member States under the HST system. Furthermore, the use of the formula for determining the income attributable to the permanent establishments could be contrary to the treaties that include a provision drafted in accordance with Article 7, paragraph 4, of the OECD Model Convention[424]. Therefore, the implementation of such system requires amendments to the existing tax treaties. Moreover, the allocation of the taxable income to the Member States should be generally subject to transfer pricing legislation.

---

422 An alternative version of the HST approach consists of allocating the tax, not the taxable income, between the Member States. Such approach, which implies the application of the Home State tax rate, could create an incentive to chose as Home State the State having the lowest corporate tax rate. Therefore, its implementation should be accomplished by introducing an agreed band of corporate tax rates. See SVEN-OLOF LODIN – MALCOLM GAMMIE, *The Taxation of the European Company*, in *European Taxation*, 1999, 288; STEVEN BOND – LUCY CHENNELLS – MICHAEL P. DEVEREUX – MALCOLM GAMMIE – EDWARD TROUP, *Corporate Tax Harmonisation in Europe: A Guide to the Debate*, The Institute for Fiscal Studies, London, 2000, 72.

423 SVEN-OLOF LODIN – MALCOLM GAMMIE, *The Taxation of the European Company*, in *European Taxation*, 1999, 293.

424 Such provision of the OECD Model Convention stipulates that: „*Insofar as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article*".

6.5 Pitfalls and drawbacks of the HST system.

The HST system is easier to be implemented than the various proposals set forth by the Ruding Committee and the introduction of a European corporate income tax, which should require an entire corporate income tax system at the level of the European Union. In fact, the HST system allows Member States not to surrender their tax base – even if calculated according to the legislation of the Home State – and to continue to apply their own tax rate and their own rules for determining the taxable income of the companies that elect such State as their Home State. Moreover, the implementation of the HST system should create an incentive for the Member States to approximate their tax systems, and should lead to a greater co-operation between the Tax Authorities of the Member States[425].

On the other hand, it has been correctly pointed out that under the HST system the companies operating in a Member State should determine their income according to different rules, depending on their Home State. Such effect, which may cause unacceptable market distortions[426], could be avoided by applying the approach only with reference to the company and its permanent establishments, not to its subsidiaries[427]. Furthermore, even if the Member States have to satisfy certain criteria in order to be admitted to the system, they may tend to enact a more favourable tax regime for the determination of the taxable income[428]. Such more favourable regime should attract foreign companies to elect such State as Home State and should not reduce the tax levied on resident companies for which such State is not their Home State.

Finally, determining the formula seems to be the most complicated issue of the HST system. Therefore, it may be envisaged to determine the

---

425 SVEN-OLOF LODIN – MALCOLM GAMMIE, *The Taxation of the European Company*, in *European Taxation*, 1999, 289.

426 See S. MICOSSI, *Il coordinamento europeo in materia fiscale: elementi per un sistema comune*, in *Giurisprudenza delle imposte*, 2000, 1381; LORENCE L. BRAVENEC, *Corporate Income Tax Coordination in the 21st Century*, in *European Taxation*, 2000, 454. On the other hand, SVEN-OLOF LODIN – MALCOLM GAMMIE (*The Taxation of the European Company*, in *European Taxation*, 1999, 289) believe that the effect of the fact that the two companies determined their income according to different rules is not material and it is likely to decrease as the tax regimes of the Member States converge.

427 The issue whether HST should be applicable to a single company or on a group basis has been put forward by MALCOLM GAMMIE, *Taxation issues for the European company*, in *EC Tax Review*, 1998, 164. On this point, SVEN-OLOF LODIN – MALCOLM GAMMIE, *The Taxation of the European Company*, in *European Taxation*, 1999, 292, have expressed the view that the HST system should apply to the subsidiaries that represent a substantial investment for the parent company.

428 LORENCE L. BRAVENEC, *Corporate Income Tax Coordination in the 21st Century*, in *European Taxation*, 2000, 454.

specific items of income of the head office, branches and subsidiaries according to the rules of the Home State, without aggregating such items of income and subsequently allocating the total income through the formula.

6.6 The reaction to the proposal

The Panel II of the Working Group on Fiscal Affairs of the UNICE is currently working on a document concerning the HST and the Common Base Taxation approaches. The latter approach differs from the HST one since the taxable income to be allocated between the Member States is determined according to common rules. The UNICE has deemed preferable the Common Base Taxation approach and has expressed the intention of submitting the document to be issued to the EC.

7. Other proposals

Several other proposals for EC harmonisation of company taxation have been developed by scholars and industry associations.
All such proposals reflect, and are influenced by, the underlying vision of the EC institutional problems which still require the unanimity for EC tax legislation.

A first proposed course action is the creation of a „single European company tax" levied by a sovranational body which would also redistribute and allocate the proceeds of the tax among the Member States (on the basis of a macro-economic allocation key)[429].

The European tax would replace all company taxes which are currently levied by the Member States and which would survive and remain applicable limitedly to the profits of companies which conduct their business and realise their profits within the territory of a Member State only.

This feature is also the weakness of the proposal which would thus create distorsions between companies operating domestically and companies operating in various Member States.

Other scholars have further developed some variances such the as the co-existence of the European tax with domestic company taxes which however would not eliminate the above mentioned distorsions.

---

429 M. Tabaksblat, *The case for a single European tax* in *International Tax Review* 1992, 5.

Tax neutrality within each Member State is viewed as a condition for EC harmonisation by other scholars[430]. Particularly, different ways of financing the conduct of business activities (debt versus equity) may lead to different tax results and this ought to be eliminated through the introduction of the dual income tax system through the Member States. This would however maintain discrepancies between various forms of financing the business activities because the dual income tax systems afford a preferential tax regime to the use of equity as opposed to the use of debt.

Less drastic proposals have put forward the creation of a single company tax rate or taxable base. It is difficult to conceive a situation in which the two proposals are pursued separately. Indeed, creation of a single rate would not by itself achieve tax neutrality of investment through the EC because different taxable bases would continue to influence the decision on the location of business activities. This reasoning would equally apply to the harmonisation of the taxable base. Furthermore, in both instances (harmonisation of the rate and harmonisation of the tax base), transfer pricing issues would still require to be governed by tax legislation to avoid the shifting of income among the Member States.

8. Conclusion

Almost all the proposals which have been developed so far, neglect to a large extent the subsidiarity principle which governs the EC action in the field of company taxation.

For this reason, a more puctual and limited action is to be preferred: (a) refinement of the existing EC tax directives; and (b) adoption of a directive on taxation of capital gains realised by companies of different Member States.

The harmonisation should focus on taxation of income arising from cross-border activities and transactions because they undermine the strength of the internal market and because harmonisation in this area is less likely to conflict with the rigidity of fundamentals of company taxation in the internal laws of the Member States.

In this respect, the work done so far (Parent-Subsidiary Directive and Merger Directive) could continue be refined and move towards the harmonisation of capital gains on participations held by a company of a Member State in a company of another Member State. Harmonisation in

430 S.Cnossen, Reform and Harmonisation of company tax systems in the European Union, Rotterdam, 1996.

this area would drastically reduce the distortions which diverging tax regimes have created for the incorporation of holding companies in the various Member States; furthermore, this proposed directive would complete a „European tax regime of companies" which would embrace ordinary income (dividends) and extraordinary income (capital gains on sales and group corporate restructuring).

Finally, Member States have shown a trend to exempt from company tax capital gains on participations (this rule has existed in some Member States for many years and has been recently introduced by Germany) and the Commission's proposal would certainly encourage other Member States to remove their resistance to amend internal law and align with internal laws of other Member States.

The drafting of the proposed directive could follow closely the parent subsidiary directive and apply to:

(i) Source taxation: capital gains arising in a Member State from the sale of a participation held by a company of another Member State in the capital of a company which is a resident of the other State. The rule would preclude taxation to the State of residence of the company whose shares are sold. This provision *mutatis mutandis* would be very similar to the rule contained in the Parent Subsidiary directive which precludes source taxation (exemption from withholding tax);

(ii) Residence taxation: capital gains arising in State of resident of a company of a Member State from the sale of shares held by such company in a company of another Member State; this rule would be similar to the rule addressing taxation of dividends in the State of residence of the parent company (Article 5 of the Parent-Subsidiary Directive).

(iii) Eligible companies. The directive would apply to capital gains realised by a company of a Member State on the sale of shares of a company of another Member State as defined in the parent subsidiary directive (as amended with regard to the eligible legal forms).

(iv) Eligible capital gains. The directive would apply to gains realised on sale of qualified shareholdings, namely subject to the condition that the participation which is held (or sold) represents at least a minimum percentage of the share capital (or voting rights) of the participated company;

(v) Holding period requirement. Member States could elect to include a certain minimum holding period as a condition for the exemption.

(vi) Definition of capital gains. Definition of capital gains would require to address the regime applicable to purchase of own shares which in some States is characterised as a dividend or liquidation proceeds or

income arising from the reduction of the share capital of a company which are also treated differently in the various Member States.

Necessity and possibilities of harmonization of corporate tax law

GUGLIELMO MAISTO

Summary

Introduction

The paper analyses the status of EC harmonisation of company taxation at three different levels:
(i) the legal basis for the harmonisation;
(ii) the work done by the EC institutions on the subject;
(iii) the current trends of harmonisation emerging from the proposals most recently developed by the EC institutions and by scholars;
(iv) conclusive remarks and proposed measures.
One of the main reasons of the very limited results achieved in the harmonisation of company taxation is to be found in the lack, in the EC Treaty, of provisions imposing on the Member States an obligation to harmonise company taxes.

Indeed, the sole provision dealing with income taxation in the EC Treaty is Article 293 (ex Article 220) which requires Member States to negotiate agreements to avoid double taxation. Such provision however does not create obligations to harmonise company taxation but simply to make efforts to conclude tax treaties.

At present, the legal basis for harmonisation of company taxation must be found in the residual provision of Article 94 (ex Article 100) of the EC Treaty which entitles the Council to adopt unanimously directives to harmonise subjects which may be relevant for the internal market.

The unanimity required for the approval of directives in the field of company taxation is indeed the reason for the limited results achieved by the EC Commission.

Efforts to change the institutional framework have failed even recently at the Nice meeting of the EC Council which took place in December 2000. However, the Treaty approved in Nice paved the way for closer co-operation between a limited number of Member States. Formerly, Article 11 (ex Article 5A) of the EC Treaty contained the possibility for some Member States to establish a closer co-operation on certain issues subject to authorisation by the Council by a qualified majority. However, a Mem-

ber State could veto the closer co-operation in which latter case a unanimous vote was required.

Article 2(1) of the Treaty of Nice amended Article 11 of the EC Treaty in so far as the veto is no longer permitted. Closer cooperation in company tax matters between some Member States only may thus play an important role in the years to come.

Despite the lack of special rules in the EC Treaty making company tax harmonisation mandatory, the Commission has, in the last forty years, made several attempts to approximate the laws of the Member States. However, the most ambitious attempts – such as the ones trying to set the grounds for standardised company taxation within the EC – have either been rejected or withdrawn by the same Commission because of the lack of consensus among the Member States.

The most significant progresses have been made in the last ten years.

Particularly, in 1990, the EC Council approved two directives dealing respectively with crossborder taxation of dividends and crossborder taxation of mergers, divisions, transfer of assets and exchanges of shares. Member States have also signed in the same year a multilateral convention regarding the setting up of an arbitration Court to resolve transfer pricing disputes.

The two directives, whose first proposals date back to 1969, represent a significant leap in the direction of harmonisation. Nevertheless, although limited in scope, they have not completely achieved their goals, as a number of issues remain open and may stand in the way of harmonisation.

The Parent – Subsidiary Directive

On 23 July 1990, the Council approved Council Directive 435/90, governing the „common system of taxation applicable in the case of parent companies and subsidiaries of different member States".

Particularly, the Directive includes two main principles:

(i) dividends paid by a subsidiary company of a Member State paid to a parent company of another Member State shall be exempt from any withholding tax in the State of residence of the subsidiary company;

(ii) dividends paid by a subsidiary company of a Member State to a parent company resident of another Member State shall be either exempt in such other State or full credit shall be granted by such Member State (the State of residence of the parent company) for the underlying company tax paid in the State of residence of the subsidiary (indirect foreign tax credit).

The Directive lays down some minimum principles and requirements but has left several options to the Member States; furthermore, some issues have not been specifically addressed by the Directive. Thus, the practical application of the Directive for almost ten years has shown a number of distortions and uncertainties as to the interpretation of the EC provisions, which suggest some amendments.

The issues

The legal form. The Directive applies only to dividends distributed between companies having the legal form laid down in an Annex to the Directive. The condition of the legal form excludes – for some Member States – certain entities such as the cooperatives from the scope of the Directive and this may affect its ultimate goal of the elimination of double taxation arising from cross-border distribution of dividends. The relevance of such entities in certain business sectors (e.g., banking) has urged an amendment of the Directive which was indeed initiated by the EC Commission which proposed in 1993 the repeal of the condition of the legal form set out by Article 2(1)(a) of the Directive.

The subject to tax condition. The Directive applies only to dividends distributed between companies subject to company tax in their State of residence [Article 2(1)(c) of the Directive]. There is no unanimous view as to the meaning of „subject to tax": some Member States have implemented Article 2(1)(c) of the Directive requiring the actual payment of tax whereas other Member States, taking a more legalistic approach, are of the opinion that a company is subject to tax when it is regarded as a taxable person in its State of residence so that the actual payment of the tax becomes immaterial.

The „possibility of an option or of being exempt". The „subject to tax" requirement is met only if the company of a Member State is subject to tax *„without the possibility of an option or of being exempt"*. This condition refers to taxable persons, which in some Member States may elect to be treated as taxable persons when as a general rule they would be regarded as transparent entities. The rationale of the condition laid down by Article 2(1)(c) is far from being clear.

The definition of withholding tax. Some Member States [e.g. the profit tax on excessive distributions recently introduced in the Netherlands or the Greek mechanism for the application of company tax on some un-taxed or low-tax distributed profits which applied until recently and which was referred to the European Court of Justice (ECJ)] apply taxes on profit distri-

butions that achieve the same result of a withholding tax and may frustrate the spirit of the Directive.

Relationship between the Directive and tax treaties. The application of the Directive should not interfere with the operation of treaty based relieves against double taxation on dividends. This, however, is not the case in some Member States, such as Italy and France, in which the Directive relief is granted only as an alternative (rather than in addition) to treaty relieves, thus being in conflict with the Directive.

Anti-abuse provisions. The Directive allows Member States to deny the benefit of the Directive in cases of abuse. Various Member States have made use of this option either through the insertion of *ad hoc* provisions in the implementing legislation of the Directive or by applying pre-existing general anti-abuse provisions or doctrines. This has led, in some circumstances, to restrictions that appear disproportionate to to the stated goal of avoiding abuses and therefore frustrate the spirit of the Directive. Interaction of such measures with the EC Treaty rules on freedom of establishment should also be assessed (it is worth noting that in the *Centros* case in 1999 the ECJ endorsed the compatibility of anti-abuse rules within the context of company law rules hampering the freedom of establishment and that the principles contained in such judgement may also well apply to tax rules).

Application of the Directive vis-à-vis non-EC States. Many Member States have extended the scope of application of the Directive also to dividends paid by or to companies of a third State. This freedom may also affect the strength of the internal market because non-EC inbound and outbound investments may be directed on the basis of the tax regime applicable to dividends. For this reason, the Directive should be amended and include a provision dealing with inbound and outbound non-EC dividends.

The Merger Directive

Council Directive 90/434/EEC of July 23, 1990 governs the „common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States".

The Directive provides for a tax neutral treatment of the qualifying transactions. The tax neutral system is twofold: it prevents the Member States from levying taxes at the time the transaction is effected and does not allow a permanent tax exemption for the taxpayer by granting only a tax deferral.

In order to combine the interest of the Member States and the tax deferral system, the Directive provides for a combination of two conditions:

- firstly, the assets and liabilities transferred in the reorganisation must be effectively connected with a permanent establishment in a Member State (this condition does not apply in the case of exchanges of shares); and
- secondly, the tax basis of the assets transferred in the hands of the beneficiary remains the same as the one preceding the reorganisation.

The issues

The legal form. Similarly to the Parent-Subsidiary Directive, the Merger Directive also applies to transactions involving companies having a certain legal form. The exclusion of some entities constitutes the basis for the proposed amendment to eliminate the requirement of the legal form.

Limited scope of the directive. The Directive is meant to remove the tax obstacles arising from among cross-border mergers and divisions which are defined as transactions effected between companies of two Member States (Article 1). The limited scope of Article 1 prevents tax neutrality to apply to a resident of one Member State as a result of mergers or divisions effected between companies residing in another Member State (e.g., tax regime applicable to a shareholder of a company of another Member State which is absorbed by another company also residing in the second Member State). Indeed, the transaction (e.g., the merger) is not a cross-border merger for the purposes of the Directive but the cross-border effects of the transactions are very significant because of the shareholders in another Member State so that also such transactions should be dealt with by the Directive.

Valuation in the Member State other than the one in which the assets transferred is located. The Directive prescribes the continuity of the value for tax purposes of the assets and liabilities, which are transferred. However, it does not specify on which of the Member States involved such condition is imposed. This has led to implementation legislation not consistent with one another, thus resulting in cases of economic double taxation. In the Directive, it should be better specified that the relief is to be applied consistently by all Member States concerned in order to achieve effective elimination of economic double taxation.

Protection of fiscal interests. The permanent establishment condition in the Directive is not always sufficient to protect the fiscal interests of all Member States involved, such as in the case of transactions involving shipping companies eligible for treaty exemption under treaty provisions following Article 8 of the OECD Model Convention.

Transfers of assets: incorporation of a branch. Not all Member States have implemented the Directive to cover cases in which the assets and liabilities transferred are situated in the same Member State of which the receiving company is a resident, such as in the case of a conversion of a local branch into a subsidiary.

Share exchanges: existing control participation. Not all Member States grant relief to exchanges of shares to transactions in which a small participation is transferred, which allows the acquiring company to reinforce a majority of voting rights. A clarification would be welcome to remove inconsistencies between implementing legislation.

Proposed Harmonisation

Home State taxation. Scholars have suggested different approaches for the harmonisation of company taxation within the EC. In particular, some scholars (the so-called Stockholm Group) have recently proposed to implement within the EC the so-called European Home State Taxation approach. This is by far the most successful and up-to-date proposal put forward by scholars in the last few years and also the business community seems to have paid significant attention to it as one possible avenue towards EC tax harmonisation.

Under such approach each company incorporated within the EC should have a single taxable income determined with reference to all the activities carried on – within the Member States admitted to the system – by the company and its subsidiaries.

The Stockholm Group suggested that Home State system: (i) should apply both to companies incorporated under the European Company Statute and under the corporate law of each Member State; and (ii) should be elective (*id est* companies should have the right to opt between the ordinary internal law tax regime and the Home State system). In case the Home State system is elected, it should apply to all the activities carried on by the company and the subsidiaries that represent a substantial investment for the parent company.

Proposed Directive on taxation of cross-border capital gains. The harmonisation should focus on taxation of income arising from cross-border activities and transactions because they undermine the strength of the internal market and because harmonisation in this area it is less likely to conflict with the rigidity of the fundamentals of company taxation in the internal laws of the Member States.

In this respect, it is the author's view that the work done so far (parent-subsidiary directive and merger directive) should continue and move to-

wards the harmonisation of capital gains on participations held by a company of a Member State in a company of another Member State. Harmonisation in this area would drastically reduce the distortions which diverging tax regimes have created for the incorporation of holding companies in the various Member States; furthermore, this proposed directive would complete a „European tax regime of companies" which would embrace ordinary income (dividends), extraordinary income (capital gains on sales and group corporate restructuring).

Finally, Member States have shown a trend to exempt from corporation tax capital gains on participations (this rule has existed in some Member States for many years and has been recently introduced by Germany) and a Commission's proposal would certainly encourage other Member States to remove their resistance to amend internal law and align with internal laws of other Member States.

Nécessité et possibilités de l'harmonisation du droit d'impôt des entreprises

GUGLIELMO MAISTO

Resumé

Introduction

Le document analyse la situation en matière d'harmonisation de la fiscalité des sociétés dans la CE à trois niveaux différents:
(i) le fondement juridique de l'harmonisation;
(ii) les travaux menés par les institutions de la CE sur le sujet;
(iii) les tendances actuelles de l'harmonisation ressortant des propositions formulées récemment par les institutions de la CE et par les universitaires;
(iv) les remarques de conclusion et les mesures proposées.
L'absence, dans le Traité CE, de dispositions imposant aux Etats membres l'obligation d'harmoniser l'impôt des sociétés est une des principales raisons qui expliquent les résultats très limités obtenus en la matière.

En fait, la seule disposition traitant de l'impôt sur le revenu dans le Traité CE est l'article 293 (ex article 220) qui invite les Etats membres à négocier des accords afin d'éviter la double imposition. Cette disposition n'impose cependant pas d'harmonisation de la fiscalité des sociétés, mais oblige simplement les Etats à s'efforcer de conclure des conventions fiscales.

Actuellement, le fondement juridique de l'harmonisation de la fiscalité des sociétés réside dans la disposition résiduelle de l'article 94 (ancien article 100) du Traité CE qui autorise le Conseil à adopter à l'unanimité des directives visant à harmoniser des sujets qui peuvent être importants pour le marché intérieur.

L'unanimité requise pour l'approbation des directives dans le domaine de la fiscalité des sociétés explique en fait le peu de résultats obtenus par la Commission de la CE.

Les efforts visant à modifier le cadre institutionnel ont échoué, y compris récemment lors de la réunion du Conseil de la CE qui a eu lieu à Nice, en décembre 2000. Et cependant, le Traité approuvé à Nice a ouvert la voie à une coopération plus étroite entre un nombre limité d'Etats membres. Autrefois, l'article 11 (ancien article 5A) du Traité permettait à certains Etats membres d'établir une coopération plus étroite sur certains su-

jets sous réserve de l'autorisation du Conseil à une majorité qualifiée. Néanmoins, un Etat membre pouvait s'opposer à un renforcement de la coopération, dans lequel cas un vote à l'unanimité était requis.

L'article 2(1) du Traité de Nice modifie l'article 11 du Traité dans la mesure où le veto n'est plus permis. Le renforcement de la coopération en matière de fiscalité des sociétés entre certains Etats membres uniquement pourrait donc jouer un rôle important dans les années à venir.

En dépit de l'absence de règles spéciales dans le Traité CE rendant l'harmonisation fiscale des sociétés obligatoire, la Commission a, au cours des quarante dernières années, fait plusieurs tentatives afin de rapprocher les lois des Etats membres. Cependant, les tentatives les plus ambitieuses – telles que celles visant à jeter les bases d'une normalisation de la fiscalité des sociétés dans la CE – ont soit été rejetées, soit retirées par la même Commission en raison du manque de consensus entre les Etats membres.

Les progrès les plus significatifs ont été enregistrés au cours des dix dernières années.

En 1990, en particulier, le Conseil CE a approuvé deux directives traitant respectivement de la fiscalité transfrontalière des dividendes et de la fiscalité transfrontalière des fusions, divisions, transferts d'avoirs et échanges d'actions. Au cours de cette même année, les Etats membres ont également signé une convention multilatérale concernant la création d'une cour d'arbitrage chargée de résoudre les litiges en matière de prix de transfert.

Les deux directives, dont les premières propositions remontent à 1969, représentent un pas important en direction de l'harmonisation. Néanmoins, bien que limitées dans leur portée, elles n'ont pas entièrement atteint leur objectif car un certain nombre de questions restent en suspens et peuvent entraver l'harmonisation.

La directive société mère–filiale

Le 23 juillet 1990, le Conseil a approuvé la directive du Conseil 435/90 régissant le „système commun de fiscalité applicable dans le cas de sociétés mères et de filiales d'Etats membres différents".

La directive inclut en particulier les deux principes suivants:

(i) les dividendes payés par une filiale d'un Etat membre à une société mère d'un autre Etat membre seront exonérés de toute retenue fiscale dans l'Etat de résidence de la filiale;

(ii) les dividendes payés par une filiale d'un Etat membre à une société mère résidente d'un autre Etat membre soit seront exonérés dans cet autre Etat soit un tel Etat membre accordera un dégrèvement total

(l'Etat de résidence de la société mère) pour l'impôt sur les sociétés mères payé dans l'Etat de résidence de la filiale (crédit pour impôt étranger indirect).

La directive expose quelques principes et exigences minimums, mais a laissé plusieurs options aux Etats membres; en outre, certaines questions n'ont pas été abordées de manière spécifique par la directive. Dès lors, l'application pratique de la directive pendant environ dix ans a révélé un certain nombre de distorsions et d'incertitudes quant à l'interprétation des dispositions de la CE, ce qui laisse prévoir certaines modifications.

Les thèmes

La forme juridique. La directive s'applique uniquement aux dividendes distribués entre sociétés ayant la forme juridique exposée dans une annexe à la directive. Les éléments essentiels de la forme juridique excluent – pour certains états membres – certaines entités, telles que les coopératives, du champ d'application de la directive, ce qui peut influer sur l'objectif ultime, à savoir l'élimination de la double taxation résultant de la distribution transfrontalière de dividendes. L'importance de telles entités dans certains secteurs commerciaux (ex: le secteur bancaire) a incité à modifier la directive, ce qui a été fait par la Commission de la CE qui a proposé, en 1993, l'abrogation de la condition relative à la forme juridique exposée par l'article 2(1)(a) de la directive.

La condition „assujetti à l'impôt". La directive s'applique uniquement aux dividendes distribués entre sociétés soumises à l'impôt des sociétés dans leur Etat de résidence [article 2(1)(c) de la directive]. La signification de „assujetti à l'impôt" ne fait pas l'unanimité: certains Etats membres ont mis en application l'article 2(1)(c) de la directive requérant le paiement réel de l'impôt, tandis que d'autres Etats membres, adoptant une approche plus légaliste, estiment qu'une société est assujettie à l'impôt lorsqu'elle est considérée comme une personne imposable dans son Etat de résidence de sorte que la paiement réel de l'impôt devient immatériel.

La „possibilité d'une option ou d'une exonération". La condition „assujetti à l'impôt" n'est satisfaite que si la société d'un Etat membre est assujettie à l'impôt „sans la possibilité d'une option ou d'une exonération". Cette condition fait référence aux personnes imposables qui, dans certains Etats membres, peuvent choisir d'être traitées comme des personnes imposables alors qu'en général elles seraient considérées comme des entités transparentes. La justification de la condition exposée par l'article 2(1)(c) est loin d'être claire.

La définition de la retenue fiscale. Certains Etats membres [par exemple, l'impôt sur les bénéfices prélevé sur les répartitions excessives, récemment introduit aux Pays-Bas ou le mécanisme grec d'application d'un impôt sur les sociétés, prélevé sur certains bénéfices distribués non imposés ou faiblement imposés, qui était en vigueur jusqu'il y a peu et a été porté devant la Cour de Justice des Communautés européennes (CJCE)] appliquent des taxes sur les répartitions de bénéfices qui aboutissent au même résultat qu'une retenue fiscale et peuvent compromettre l'esprit de la directive.

Relations entre la directive et les conventions fiscales. La mise en oeuvre de la directive ne doit pas interférer avec l'application de dégrèvements basés sur les conventions en ce qui concerne la double imposition des dividendes. Tel n'est cependant pas le cas dans certains Etats membres, tels que l'Italie et la France, dans lesquels le dégrèvement prévu par la directive n'est accordé qu'en guise d'alternative (plutôt qu'en sus) aux dégrèvements des conventions, ce qui est donc contraire à la directive.

Dispositions anti-abus. La directive permet aux Etats membres de contester le bénéfice de la directive en cas d'abus. Plusieurs Etats membres ont eu recours à cette possibilité, soit par l'introduction de dispositions ad hoc dans la loi de mise en vigueur de la directive, soit par l'application de dispositions ou de doctrines générales anti-abus préexistantes. Dans certains cas, ces mesures ont abouti à des restrictions qui semblent disproportionnées par rapport à l'objectif déclaré qui consiste à éviter les abus et elles vont donc à l'encontre de l'esprit de la directive. L'interaction de ces mesures avec les règles du Traité CE sur la liberté d'établissement doit également être évaluée (il convient de noter qu'en 1999, dans le cas Centros, la CJCE a avalisé la compatibilité des règles anti-abus dans le contexte des règles de droit des sociétés entravant la liberté d'établissement et que les principes contenus dans un tel jugement pourraient également bien s'appliquer aux règles fiscales).

Application de la directive vis-à-vis d'Etats n'appartenant pas à la CE. De nombreux Etats membres ont également étendu le champ d'application de la directive aux dividendes payés par ou aux sociétés d'un Etat tiers. Cette liberté peut également affecter la vigueur du marché intérieur parce que les investissements non CE entrants et sortants peuvent être orientés sur la base du régime fiscal applicable aux dividendes. C'est la raison pour laquelle la directive devrait être modifiée et inclure une disposition traitant des dividendes non CE entrants et sortants.

La directive sur les fusions

La directive du Conseil 90/434/CEE du 3 juillet 1990 régit le „système commun de taxation applicable aux fusions, divisions, transferts d'avoirs et échanges d'actions concernant des sociétés d'Etats membres différents".

La directive prévoit un traitement fiscal neutre des transactions remplissant les conditions requises. Le système fiscal neutre est double: il empêche les Etats membres de prélever des taxes au moment où la transaction est effectuée et ne permet pas une exonération fiscale permanente pour le contribuable en octroyant uniquement un report d'impôt.

Afin de combiner l'intérêt des Etats membres et le système du report d'impôt, la directive prévoit une combinaison de deux conditions:

- premièrement, l'actif et le passif transférés dans le cadre de la réorganisation doivent être effectivement liés à un établissement permanent dans un Etat membre (cette condition ne s'applique pas dans le cas d'échange d'actions); et
- deuxièmement, l'assiette fiscale de l'actif transféré dans les mains du bénéficiaire reste le même que celui qui précède la réorganisation.

Les thèmes

La forme juridique. A l'instar de la directive société mère–filiale, la directive sur les fusions s'applique également aux transactions impliquant des sociétés ayant une certaine forme juridique. L'exclusion de certaines entités constitue la base de l'amendement proposé qui vise à éliminer la condition de la forme juridique.

Champ d'application limité de la directive. La directive est destinée à éliminer les obstacles fiscaux résultant des fusions et des répartitions transfrontalières qui sont définies comme des transactions effectuées entre des sociétés de deux Etats membres (article 1). Le champ d'application limité de l'article 1 ne permet pas d'appliquer la neutralité fiscale à un résident d'un Etat membre à la suite de fusions ou de divisions effectuées entre des sociétés résidant dans un autre Etat membre (ex: le régime fiscal applicable à un actionnaire d'une société d'un autre Etat membre qui est absorbée par une autre société résidant également dans le deuxième Etat membre). En fait, la transaction (par exemple, la fusion) n'est pas une fusion transfrontalière aux fins de la directive mais les conséquences transfrontalières des transactions sont très importantes en raison des actionnaires d'un autre Etat membre de sorte que de telles transactions devraient être traitées par la directive.

Evaluation dans un autre Etat membre que celui dans lequel l'actif transféré est situé.

La directive prescrit la continuité de la valeur aux fins fiscales de l'actif et du passif qui sont transférés. Cependant, elle ne spécifie pas auquel des Etats membres impliqués une telle condition est imposée. Cette situation a conduit à mettre en œuvre des législations non compatibles les unes avec les autres et a abouti, dans certains cas, à une double imposition économique. La directive devrait mieux spécifier que le dégrèvement doit être appliqué de manière cohérente par tous les Etats membres concernés afin d'aboutir à une élimination effective de la double imposition économique.

Protection des intérêts fiscaux. La condition de l'établissement permanent figurant dans la directive n'est pas toujours suffisante pour protéger les intérêts fiscaux de tous les Etats membres impliqués, comme dans le cas de transactions impliquant des sociétés de transport maritime qui peuvent être dispensées de la convention en vertu des dispositions des conventions conformément à l'article 8 de la Convention modèle de l'OCDE.

Transfert d'actif: constitution d'une filiale. Tous les Etats membres n'ont pas mis la directive en application en vue de couvrir les cas où l'actif et le passif transférés sont situés dans le même Etat membre que celui dont la société réceptrice est résidante, comme dans le cas de la conversion d'une succursale locale en une filiale.

Echanges d'actions: participation existante au contrôle. Tous les Etats membres n'accordent pas un dégrèvement sur les échanges d'actions portant sur des transactions dans lesquelles une petite participation est transférée, ce qui permet à la société acquéreuse de renforcer une majorité des droits de vote. Une clarification serait bienvenue afin de mettre un terme aux incohérences existant entre les lois de mise en vigueur.

L'harmonisation proposée

Imposition dans l'état d'origine. Les universitaires ont proposé plusieurs approches visant à harmoniser l'impôt des sociétés dans la CE. Certains (le Groupe de Stockholm) ont même récemment suggéré d'appliquer dans la CE l'approche de l'imposition européenne dans l'état d'origine. Cette proposition est de loin la plus positive et la plus récente avancée au cours des dernières années par les universitaires et même les milieux d'affaires semblent lui accorder beaucoup d'intérêt, la considérant comme une voie éventuelle vers l'harmonisation fiscale de la CE.

En vertu d'une telle approche, chaque société constituée dans la CE aurait un seul revenu imposable déterminé en fonction de l'ensemble des activités menées – au sein des Etats membres pouvant participer au système – par la société et ses filiales.

Le Groupe de Stockholm propose que le système de l'Etat d'origine: (i) soit appliqué aux sociétés constituées en vertu du Statut de l'entreprise européenne et de la loi sur les sociétés de chaque Etat membre; et (ii) soit facultatif (c'est-à-dire que les sociétés auraient le droit de choisir entre le régime fiscal légal interne ordinaire et le système de l'état d'origine). Si le système de l'état d'origine est choisi, il devrait s'appliquer à toutes les activités menées par la société et les filiales qui représentent un investissement substantiel pour la société mère.

Proposition de directive sur l'imposition des plus-values transfrontalières. L'harmonisation devrait mettre l'accent sur l'imposition des revenus résultant d'activités et de transactions transfrontalières parce qu'elles sapent le dynamisme du marché intérieur et parce que l'harmonisation dans ce domaine est moins susceptible d'être incompatible avec la rigidité des principes de l'imposition des sociétés dans les législations internes des Etats membres.

L'auteur estime à cet égard que les travaux menés à ce jour (directive société mère–filiale et directive sur les fusions) devraient être poursuivis et évoluer vers l'harmonisation des plus-values sur les participations détenues par une société d'un Etat membre dans une société d'un autre Etat membre. Dans ce domaine, l'harmonisation réduirait radicalement les distorsions que des régimes fiscaux divergents ont créées pour la constitution de sociétés holdings dans les divers Etats membres; en outre, la directive proposée complèterait un „Régime fiscal européen de sociétés" qui engloberait les revenus ordinaires (dividendes), les revenus extraordinaires (plus-values sur les ventes et restructuration des sociétés du groupe).

Enfin, les Etats membres ont montré une tendance à exonérer les plus-values sur participations de la taxe sur les sociétés (cette règle existe dans certaines Etats membres depuis de nombreuses années et a récemment été introduite par l'Allemagne) et une proposition de la Commission inciterait certainement d'autres Etats membres à ne plus résister à une modification de leur droit national et à s'aligner sur le droit national d'autres Etats membres.

Notwendigkeit und Möglichkeiten der Angleichung des Unternehmenssteuerrechts

GUGLIELMO MAISTO

Zusammenfassung

Einleitung

In diesem Papier wird der Stand der EG-weiten Harmonisierung der Unternehmensbesteuerung auf drei verschiedenen Ebenen beleuchtet:
(i) gesetzliche Grundlage für die Harmonisierung;
(ii) Arbeit der EG-Institutionen in diesem Bereich;
(iii) gegenwärtige Harmonisierungstrends nach Maßgabe der jüngsten Vorschläge von EG-Institutionen und Sachverständigen;
(iv) Schlussbetrachtung und vorgeschlagene Maßnahmen.
Einer der Hauptgründe für die sehr bescheidenen Ergebnisse bei der Harmonisierung der Unternehmensbesteuerung besteht im Fehlen von Bestimmungen im EG-Vertrag, wonach eine solche Harmonisierung für die einzelnen Mitgliedsstaaten vorgeschrieben wäre.

Tatsächlich ist Art. 293 (vormals Art. 220) die einzige Bestimmung im EG-Vertrag zur Besteuerung von Erträgen; danach sind Mitgliedsstaaten verpflichtet, Abkommen zur Vermeidung einer Doppelbesteuerung zu treffen. Jedoch ergibt sich aus dieser Bestimmung keine Verpflichtung zur Harmonisierung der Unternehmensbesteuerung, denn die Mitgliedsstaaten werden lediglich um Anstrengungen zur Schließung von Steuerabkommen angehalten.

Gegenwärtig ist die gesetzliche Grundlage für die Harmonisierung der Unternehmensbesteuerung in der noch vorhandenen Bestimmung von Art. 94 (vormals Art. 100) des EG-Vertrags zu suchen, derzufolge der Rat zur einstimmigen Verabschiedung solcher Harmonisierungsrichtlinien berechtigt ist, die für den Binnenmarkt von Bedeutung sein können.

Grund für die bescheidenen Ergebnisse der EU-Kommission ist die Einstimmigkeit, die für eine Billigung von Richtlinien im Bereich Unternehmensbesteuerung erforderlich ist.

Bemühungen zur Änderung der institutionellen Rahmengesetzgebung scheiterten jüngst beim EU-Gipfel in Nizza im Dezember 2000. Dennoch wurde durch den in Nizza gebilligten Vertrag der Weg für eine engere Zusammenarbeit zwischen einer begrenzten Zahl von Mitgliedsstaaten frei

gemacht. Früher bestand auf Grund Art. 11 (vormals Art. 5A) des EG-Vertrags für einige Mitgliedsstaaten die Möglichkeit, bei bestimmten Fragen, die der Zustimmung des Rats durch eine qualifizierte Mehrheit bedurften, eine engere Zusammenarbeit einzurichten. Allerdings konnte ein Mitgliedsstaat diese engere Zusammenarbeit durch sein Veto blockieren, wobei erneut ein einstimmiger Beschluss vonnöten war.

Durch Art. 2 (1) des Nizza-Vertrags wurde Art. 11 des EG-Vertrags dahingehend geändert, dass ein Veto nun nicht mehr zugelassen ist. Infolgedessen könnte eine engere Zusammenarbeit im Bereich Unternehmensbesteuerung zwischen einigen Mitgliedsstaaten in den nächsten Jahren eine wichtige Rolle spielen.

Trotz fehlender Sonderbestimmungen im EG-Vertrag für eine obligatorische Harmonisierung der Körperschaftssteuer unternahm die Kommission in den letzten 40 Jahren mehrere Versuche zur Annäherung der Rechtsvorschriften der Mitgliedsstaaten. Doch auch die ehrgeizigsten Bemühungen, wie z. B. der Versuch zur Schaffung der Grundlagen einer einheitlichen Unternehmensbesteuerung in der EG, wurden von derselben Kommission mangels Konsens zwischen den Mitgliedsstaaten entweder verworfen oder zurückgewiesen.

Die bedeutendsten Fortschritte wurden in den letzten zehn Jahren verzeichnet.

So billigte der EG-Rat 1990 zwei Richtlinien, die sich jeweils auf eine grenzüberschreitende Besteuerung von Dividenden sowie auf eine grenzüberschreitende Besteuerung von Fusionen, Spaltungen, Vermögensübertragung und Austausch von Anteilen bezogen. Ebenso unterzeichneten die Mitgliedsstaaten im gleichen Jahr ein multilaterales Abkommen über die Schaffung eines Schiedsgerichts zur Schlichtung von Streitigkeiten bei der Übernahmekursfestsetzung.

Die zwei Richtlinien, deren erste Vorschläge bis auf das Jahr 1969 zurückreichen, stellen einen gewaltigen Sprung auf dem Weg zu einer Harmonisierung dar. Allerdings erreichen die Richtlinien auf Grund ihrer begrenzten Tragweite ihr Ziel nicht ganz, zumal eine ganze Reihe von Fragen offen bleiben und einer Harmonisierung im Wege stehen könnten.

Richtlinie zu Mutter- und Tochtergesellschaften

Am 23. Juli 1990 verabschiedete der Rat die Richtlinie des Rates 435/90 über das „gemeinsame Steuersystem der Mutter- und Tochtergesellschaften verschiedener Mitgliedsstaaten".

Die Richtlinie umfasst insbesondere zwei Hauptprinzipien:

(I) Dividenden, die von der Tochtergesellschaft eines Mitgliedsstaats an eine Muttergesellschaft eines anderen Mitgliedsstaats gezahlt werden, sind im Land des Sitzes der Tochtergesellschaft von der Quellensteuer ausgenommen;
(II) Dividenden, die von der Tochtergesellschaft eines Mitgliedsstaats an eine in einem anderen Mitgliedsstaat ansässige Muttergesellschaft gezahlt werden, sind in diesem anderen Staat entweder von der Steuer befreit oder aber dieser Mitgliedsstaat (der Staat des Sitzes der Muttergesellschaft) erstattet die zu Grunde liegende Körperschaftssteuer, die im Land des Sitzes der Tochtergesellschaft gezahlt wurde, voll (indirekte Steuergutschrift für ausländische Ertragssteuern).

Zwar sind in der Richtlinie einige Grundprinzipien und Mindestanforderungen enthalten, doch haben die Mitgliedsstaaten nach wie vor einige Wahlmöglichkeiten; überdies werden in der Richtlinie einige Aspekte außen vor gelassen. Infolgedessen kam es bei der praktischen Umsetzung der Richtlinie in fast zehn Jahren zu einer Reihe von Verzerrungen und Ungewissheiten in Bezug auf die Deutung der EG-Bestimmungen, die einige Änderungen nahe legen.

Strittige Punkte

Gesetzlicher Status. Die Richtlinie bezieht sich nur auf Dividenden, die zwischen Unternehmen ausgeschüttet werden, die den im Anhang zur Richtlinie aufgelisteten gesetzlichen Status besitzen. Durch die Voraussetzung des gesetzlichen Status fallen manche Organisationen, wie z. B. Genossenschaften, in einigen Mitgliedsstaaten nicht unter den Anwendungsbereich der Richtlinie, wodurch das Endziel einer Beseitigung der Doppelbesteuerung bei einer grenzüberschreitenden Ausschüttung von Dividenden gefährdet werden könnte. Die Wichtigkeit solcher Organisationen in einigen Branchen, wie z. B. auf dem Bankensektor, machte eine Änderung der Richtlinie dringend erforderlich; diese wurde tatsächlich von der EU-Kommission eingeleitet; letztere schlug 1993 die Abschaffung der Voraussetzung des gesetzlichen Status vor, der durch Art. 2 (1) (a) der Richtlinie vorgeschrieben war.

Steuerpflichtigkeit. Die Richtlinie bezieht sich nur auf Dividenden, die zwischen Unternehmen ausgeschüttet werden, die im Land ihres Sitzes der Körperschaftssteuer unterliegen [Art. 2 (1) (c) der Richtlinie]. Hinsichtlich der Bedeutung von "steuerpflichtig" besteht keine einheitliche Meinung; so haben einige Mitgliedsstaaten Art. 2 (1) (c) der Richtlinie, demzufolge die effektive Steuerzahlung zu leisten ist, implementiert. Dagegen sind andere Mitgliedsstaaten mit eher legalistischem Verständnis der Meinung,

dass ein Unternehmen immer dann steuerpflichtig ist, wenn es im Land seines Sitzes als steuerpflichtige Person angesehen wird, sodass die effektive Steuerzahlung rechtsunerheblich wird.

"Möglichkeit einer Option oder einer Freistellung". Die Voraussetzung zur "Steuerpflicht" wird nur dann erfüllt, wenn das Unternehmen eines Mitgliedsstaats steuerpflichtig ist, *"ohne die Möglichkeit einer Option oder einer Freistellung zu besitzen".* Diese Voraussetzung bezieht sich auf steuerpflichtige Personen, die in einigen Mitgliedsstaaten als steuerpflichtige Personen angesehen werden können, wenn sie von vornherein als transparente Organisationen betrachtet werden. Die logische Grundlage für die in Art. 2 (1) (c) dargelegte Voraussetzung ist bei weitem noch nicht geklärt.

Definition der Quellensteuer. Einige Mitgliedsstaaten (wie z. B. die jüngst in den Niederlanden eingeführte Gewinnsteuer für übermäßige Dividenden oder das griechische System für die Erhebung von Körperschaftssteuern auf einige nicht besteuerte oder niedrig besteuerte Gewinne, das bis vor kurzem zur Anwendung kam und sogar den Europäischen Gerichtshof (EuGH) beschäftigte) erheben Steuern auf Gewinnausschüttungen, die dasselbe bewirken wie die Quellensteuer und den Inhalt der Richtlinie damit unterwandern können.

Beziehung zwischen der Richtlinie und Steuerabkommen. Die Anwendung der Richtlinie darf nicht mit Steuerbefreiungen auf Grund Verträgen zur Vermeidung von Doppelbesteuerung von Dividenden in Konflikt geraten. Dies ist jedoch in einigen Mitgliedsstaaten, wie Italien oder Frankreich, nicht der Fall. In diesen Ländern wird die Befreiung durch die Richtlinie nur als Alternative (und nicht als Ergänzung) zu Steuerbefreiungen angesehen, was sich folglich nicht mit der Richtlinie verträgt.

Bestimmungen gegen Missbrauch. Durch die Richtlinie haben Mitgliedsstaaten die Möglichkeit, die Vorteile der Richtlinie bei vorliegendem Missbrauch zu ignorieren. Von dieser Möglichkeit machten bereits verschiedene Mitgliedsstaaten Gebrauch, indem sie den durch die Richtlinie zu implementierenden Gesetzen entweder *Ad-hoc-Bestimmungen* hinzufügten oder bereits vorhandene allgemeine Bestimmungen oder Grundsätze gegen Missbrauch zur Anwendung brachten. In manchen Fällen führte dies zu Einschränkungen, die im Verhältnis zum Ziel der Missbrauchverhinderung unverhältnismäßig erscheinen und infolgedessen den Inhalt der Richtlinie unterwandern. Ebenso sollte die Wechselwirkung solcher Maßnahmen mit den Vorschriften des EG-Vertrags zur Niederlassungsfreiheit untersucht werden (Hierbei sei darauf hingewiesen, dass der EuGH 1999 bei seiner *Centros-Entscheidung* die Verträglichkeit von Bestimmungen gegen Missbrauch bei einem Gesellschaftsrecht, das die Niederlassungs-

freiheit einschränkt, bestätigte; die Grundsätze eines solchen Urteils können sich demnach auch auf Steuerregelungen beziehen).

Anwendung der Richtlinie gegenüber Nicht-EG-Ländern. Viele Mitgliedsstaaten haben den Anwendungsbereich der Richtlinie auch auf Dividenden ausgedehnt, die von oder an Unternehmen aus Drittländern gezahlt wurden. Durch eine solche Freizügigkeit kann der Binnenmarkt geschwächt werden, zumal ein- und ausgehende Nicht-EU-Investitionen nun auf Grundlage der für Dividenden geltenden Besteuerung vorgenommen werden können. Aus diesem Grund sollte die Richtlinie geändert werden und eine Bestimmung in Bezug auf ein- und ausgehende Nicht-EU-Dividenden umfassen.

Die Richtlinie zu Fusionen

Die Richtlinie des Rates 90/434/EEC vom 23. Juli 1990 regelt das "gemeinsame Steuersystem für Fusionen, Spaltungen, die Einbringung von Unternehmensteilen und den Austausch von Anteilen, die Gesellschaften verschiedener Mitgliedstaaten betreffen".

Durch die Richtlinie wird eine steuerneutrale Behandlung der entsprechenden Transaktionen eingeführt. Das steuerneutrale System hat jedoch zwei Komponenten: zum einen hindert es Mitgliedsstaaten an der Erhebung von Steuern zum Zeitpunkt der Transaktion und zum anderen bietet es dem Steuerzahler durch die alleinige Gewährung einer transitorischen Steuerabgrenzung keine permanente Steuerbefreiung.

Zur Versöhnung der Interessen der Mitgliedsstaaten mit dem System einer transitorischen Steuerabgrenzung wird durch die Richtlinie eine Kombination von zwei Voraussetzungen eingeführt:

- zunächst müssen die bei einer Reorganisation übertragenen Vermögenswerte und Verbindlichkeiten tatsächlich mit einer ständigen Niederlassung in einem Mitgliedsstaat verbunden sein (diese Bedingung gilt nicht bei Austausch von Anteilen);
- zweitens bleibt die Steuergrundlage für die dem Empfänger übertragenen Vermögenswerte die gleiche wie vor der Reorganisation.

Strittige Punkte

Gesetzlicher Status. Ähnlich wie die Richtlinie zu Mutter- und Tochtergesellschaften gilt die Richtlinie zu Fusionen auch für Unternehmen mit einem bestimmten gesetzlichen Status. Der Ausschluss einiger Organisationen stellt die Grundlage für die vorgeschlagene Änderung zur Beseitigung der Notwendigkeit des gesetzlichen Status dar.

Begrenzte Tragweite der Richtlinie. Mit der Richtlinie sollen Steuerhindernisse beseitigt werden, die bei grenzüberschreitenden Fusionen und Spaltungen entstehen, die als Transaktionen zwischen Unternehmen aus zwei Mitgliedsstaaten definiert werden (Art. 1). Durch die begrenzte Tragweite von Art. 1 kann Steuerneutralität als Folge von Fusionen oder Aufteilungen zwischen Unternehmen in verschiedenen Mitgliedsstaaten nicht bei einem Bürger eines Mitgliedsstaats angewandt werden (beispielsweise ein Steuersystem, das für den Teilhaber eines in einem anderen Mitgliedsstaat ansässigen Unternehmens gilt, das von einem ebenfalls in diesem Land niedergelassenen Unternehmen übernommen wird). Tatsächlich handelt es sich bei der Transaktion (zum Beispiel die Fusion) nicht um eine grenzüberschreitende Fusion im Sinne der Richtlinie; dennoch sind die grenzüberschreitenden Wirkungen der Transaktion auf Grund der Teilhaber in einem anderen Mitgliedsstaat erheblich – folglich sollte sich die Richtlinie auch auf solche Transaktionen beziehen.

Bewertung in einem Mitgliedsstaat, der nicht mit dem identisch ist, in dem sich die übertragenen Vermögenswerte befinden. Die Richtlinie schreibt die Kontinuität des Steuerwerts von Vermögen und Verbindlichkeiten vor, die übertragen wurden. Allerdings wird in ihr nicht darauf hingewiesen, welchem der beteiligten Mitgliedsstaaten diese Bedingung auferlegt wird. Dies führte zur Verabschiedung unterschiedlicher Rechtsvorschriften und folglich zu Fällen einer wirtschaftlichen Doppelbesteuerung. Die Richtlinie sollte genaue Angaben dazu enthalten, dass die Entlastung in allen beteiligten Mitgliedsstaaten einheitlich durchzuführen ist, damit wirtschaftliche Doppelbesteuerung wirksam vermieden werden kann.

Schutz steuerlicher Interessen. Die Auflage der Richtlinie in Bezug auf ständige Niederlassung reicht zum Schutz der steuerlichen Interessen aller beteiligten Mitgliedsstaaten nicht immer aus, wie z. B. bei Transaktionen von Transportgesellschaften, die gemäß den Vertragsbestimmungen nach Art. 8 des OECD-Musters für ein Abkommen Anrecht auf eine Steuerbefreiung haben.

Vermögensübertragung: Gründung einer Niederlassung. Nicht alle Mitgliedsstaaten haben die Richtlinie implementiert, die Fälle abdeckt, bei denen sich die übertragenen Vermögenswerte und Verbindlichkeiten im selben Mitgliedsstaat befinden wie das begünstigte Unternehmen (dies ist beispielsweise bei der Umwandlung einer lokalen Niederlassung in eine Tochtergesellschaft der Fall).

Austausch von Anteilen: bestehende Kontrolle von Beteiligungen. Nicht alle Mitgliedsstaaten gewähren eine Befreiung für einen Austausch von Anteilen, bei dem auch ein kleiner Anteil transferiert wird, durch den die übernehmende Gesellschaft eine Mehrheit von Stimmrechten erwerben

kann. Hierbei wäre eine Klarstellung zur Beseitigung von Widersprüchen zwischen Rechtsvorschriften zu begrüßen.

Vorgeschlagene Harmonisierung

Heimatstaatbesteuerung. Sachverständige haben verschiedene Ansätze zur Harmonisierung der Unternehmensbesteuerung in der EU vorgeschlagen. Unter anderem empfahlen einige Experten der so genannten Stockholm-Gruppe jüngst die Implementierung des so genannten europäischen Heimstaatbesteuerungsansatzes. Hierbei handelt es sich um den bei weitem erfolgreichsten und modernsten Vorschlag, der von Experten in den letzten Jahren gemacht wurde; auch die Geschäftswelt scheint ihn als möglichen Weg in Richtung einer EU-weiten Steuerharmonisierung zu betrachten.

Bei einem solchen Ansatz sollte jedes in der EU niedergelassene Unternehmen ein einziges steuerpflichtiges Einkommen haben, das im Hinblick auf alle Geschäftsvorgänge des Unternehmens und seiner Tochtergesellschaften in den zum System gehörenden Mitgliedsstaaten bestimmt wird.

Die Stockholm-Gruppe schlug in Bezug auf das Heimatstaatsystem Folgendes vor: (I) es sollte sowohl für Unternehmen mit europäischem Status als auch für Unternehmen nach Maßgabe des Gesellschaftsrechts jedes Mitgliedsstaats gelten und (II) sollte fakultativ sein (d. h. Unternehmen sollten das Recht haben, zwischen dem normalen internen Steuergesetzsystem und dem Heimstaatsystem wählen zu können). Wird das Heimstaatssystem ausgewählt, sollte dieses für sämtliche Geschäftstätigkeiten des Unternehmens und diejenigen Tochtergesellschaften gelten, die für die Muttergesellschaft eine beträchtliche Investition darstellen.

Richtlinienvorschlag zur Besteuerung grenzüberschreitender Kapitalgewinne. Die Harmonisierung sollte sich auf die Besteuerung von Einkommen aus grenzüberschreitenden Geschäften und Transaktionen konzentrieren, zumal diese den Binnenmarkt schwächen und die Harmonisierung in diesem Bereich nicht so sehr mit der Strenge der Grundlagen einer Unternehmensbesteuerung in den einzelstaatlichen Rechtsvorschriften in Konflikt gerät.

In dieser Hinsicht ist der Autor der Auffassung, dass die bisher geleistete Arbeit (Richtlinie zu Mutter- und Tochtergesellschaften sowie die Richtlinie zu Fusionen) fortgesetzt werden und in Richtung einer Harmonisierung von Kapitalgewinnen aus Beteiligungen gehen sollte, die von einem Unternehmen eines Mitgliedsstaats an einem Unternehmen in einem anderen Mitgliedsstaat gehalten werden. Eine Harmonisierung in diesem Bereich würde in großem Maße jene Verzerrungen abbauen, die verschiedene Besteuerungssysteme für die Gründung von Holdinggesellschaften in den verschiedenen Mitgliedsstaaten hervorriefen; außerdem

würde dieser Richtlinienvorschlag ein "europäisches Besteuerungssystem für Unternehmen" ergänzen, das gewöhnliche Erträge (Dividenden) und außergewöhnliche Erträge (Kapitalgewinne aus Verkauf und Konzernumstrukturierung) umfassen würde.

Schließlich macht sich in Mitgliedsstaaten ein Trend zur Steuerbefreiung für Kapitalgewinne aus Beteiligungen bemerkbar (die Regelung bestand in einigen Mitgliedsstaaten mehrere Jahre lang und wurde jüngst in Deutschland eingeführt); ein Kommissionsvorschlag würde andere Mitgliedsstaaten sicherlich ermutigen, ihren Widerstand hinsichtlich der Änderung des Inlandsrechts aufzugeben und dieses an die Rechtsvorschriften anderer Mitgliedsstaaten anzugleichen.