

# **Companies of different Member States: taxation of mergers, divisions, transfers of assets, exchanges of shares (amend. Directive 90/434/EC)**

2003/0239(CNS) - 17/10/2003 - Legislative proposal

**PURPOSE** : to amend the Merger Regulation with respect to company taxation on restructuring.  
**PROPOSED ACT** : Council Directive **CONTENT** : Directive 90/434/EEC ('the Merger Directive') already provides for a solution in certain cases to the cross-border obstacle created by high tax costs linked to business restructuring. This proposal aims to improve the scope of the Directive and the methods provided for the deferral of taxation, while at the same time safeguarding the financial interests of the Member States. Industry is still often subject to high tax costs and international double taxation when entering into business restructuring in which companies of different Member States are involved. The Commission's goal is to eliminate these obstacles to the proper functioning of the internal market found in the Member States tax regimes. Eventually, removing the various tax obstacles to cross-border economic activity in the Internal Market would require the introduction of a common consolidated tax base for the EU-wide activities of companies. However, as long as this objective is not yet achieved, specifically targeted measures are needed to address the most pressing practical tax problems of internationally active companies. The following changes are the main ones proposed: - the inclusion within the scope of the Merger Directive of a new type of transaction, known as split-off. The new transaction to be covered is a special type of division. The split-off operation is a limited or partial division since the transferring company continues to exist. It transfers part of its assets and liabilities constituting one or more branches of activity. In exchange, the receiving company issues securities representing its capital. These securities are transferred to the shareholders of the transferring company. There is a definition of the concept of "partial division"; - in the case of the split-off, the tax deferral regime, as provided in Article 4 of the Directive, will apply; - the coverage of the Merger Directive is improved by the extension of the list of entities annexed to the Directive, to cover new named legal types. The Statutes of the SE and of the SCE have been recently adopted, and the benefits of the Merger Directive will be applicable to them. Thus, the annex to the Directive will include the companies that will in future be run under these new legal types. In addition, some of the new entities proposed for inclusion in the list raise a particular technical problem in relation to double taxation. The proposal discusses the following entities; - the Merger Directive will cover the conversion of a branch into a subsidiary; - there are provisions linking the Merger Directive to the Parent-Subsidiary Directive: where the receiving company has a "sufficient holding" according to the conditions of the Parent-Subsidiary Directive, the Merger Directive should allow a similar tax concession to be granted in the case of a merger or division; - the concept of "holding" in the Merger Directive is made consistent with that of the Parent-Subsidiary Directive. In addition, any amendment of this subject in the Merger Directive will be made consistent with the amendments introduced in the Parent-Subsidiary Directive, where the minimum threshold to be considered as a parent company or as a subsidiary is being proposed to be lowered from 25 to 10%; - there are provisions to prevent double taxation in certain circumstances where there is a transfer of assets; - where the acquiring company obtains a holding in another company by paying a fair market price, and this company has to transfer to the shareholders securities representing its capital, a new provision ensures that the acquiring company values the shares received according to their real value at the time of the exchange of shares. This provision will avoid economic double taxation. The proposed Directive shall cover exchange of shares where the majority of the voting rights is acquired by a company resident in a Member State from a shareholder resident in a state which is not a member of the EU. A new title is being added to the Directive to provide for the tax regime that would apply in the case of a transfer of the registered office of the SE and of the SCE. The applicable tax rules will be neutral from the point of view of competition while safeguarding the financial interests of the State where the company is resident before transferring its registered office. Moreover, a specific provision will provide that no taxes can be imposed on the shareholders linked to the change of

residence of the company. This provision gives expression to the EC Treaty obligations concerning the freedom of establishment. Capital gains arising out of the subsequent transfer of the securities may be taxable.