

EC: Proposal for a Council Directive on the Common System of Taxation Applicable to Mergers, Divisions and Contributions of Assets Occurring between Companies of Different Member States

*Communication by the Commission to the Council**

The above proposal¹ was laid before the Council as long ago as 1969. Its main purpose is to defer the taxation that would otherwise occur when two companies from different Member States engage in a merger or similar operation. The proposal is of crucial importance to Community industrial policy, since it removes some of the tax obstacles to co-operation across frontiers between enterprises wishing to concentrate or disperse their activities.

The proposal must also be seen in its political context as parallel to the work on the Statute for European Companies² and on the Draft Convention on International Mergers.³ However the proposal could be of immediate practical use for certain forms of cross-frontier co-operation, irrespective of developments in these two other areas.

The importance of the mergers proposal has been recognised by the Council, in its Resolution of 17 December 1973 on Industrial Policy⁴ which identifies the abolition of taxation obstacles to mergers and the early adoption of the Statute for European Companies as essential ingredients of Community industrial policy.

We have now reached the point where nearly all the technical problems have been solved in the course of Council discussions. The adoption of the directive is, however, blocked by political objections on the part of the Netherlands and the Federal Republic of Germany. Both Member States fear that, once the tax obstacles to cross-frontier mergers, etc. are removed, companies engaging in a merger or similar operation will transfer the head of the corporate group outside their respective countries. The inducement for a Dutch company to do so is the more favourable tax treatment of dividends under imputation systems, which grant relief for corporation tax, and in the case of a German company, mergers could be used as a means of avoiding the obligations of worker participation (*Mitbestimmungsgesetz*). It should be pointed out that the fears expressed by the Netherlands and Germany cancel each other out in their bilateral relationships in as much as each Member State envisages mergers taking place in a one way direction towards the other Member State. This contradiction in their positions

* Brussels, 29 April 1980; COM(80) 203 final.

1. OJ No. C 39, 22.3.1969.

2. Amended proposal for a Council regulation on the Statute for European companies, Supplement to EC Bulletin No. 4-1975.

3. Draft Convention on the international merger of sociétés anonymes, Supplement to EC Bulletin No. 13/73.

4. OJ No. C 117, 31.12.1973, paras 3 and 4.

inevitably casts considerable doubt on their validity. It is, moreover, a mistake to assume that decisions regarding mergers will be taken solely for tax reasons or, in the case of Germany, for reasons of social policy. Other considerations generally carry much greater weight, such as the need to obtain sources of finance, to diversify production, to penetrate new markets, and even to meet competition from third countries.

Despite efforts by the Commission to satisfy the two Member States concerned, they have not moved from their respective positions, thus blocking the proposal which the seven other Member States would, with minor reservations, be prepared to approve. The Commission for its part insists that the taxation of mergers and similar operations presents a serious problem requiring urgent attention, since without a settlement there cannot be an effective Community industrial policy.

It is therefore imperative that the mergers proposal should be discussed in the Council, especially when it is borne in mind that the proposal has never during its eleven years of existence, been brought before the Ministers. To facilitate this discussion, the Commission is preparing proposals for safeguarding the interests of any Member State against the risks referred to above and for monitoring the operation of the directive.

We envisage a safeguard article to protect any Member State which finds that, following the introduction of the Directive, mergers or similar operations are taking place unilaterally in other Member States to such an extent as to create serious economic or social problems. Under this article the Member State could apply, stating its reasons, to the Commission for authority to take such measures as are necessary to correct the imbalance. The Commission would decide, within a limited period of time and after consulting the other Member States, whether authorisation should be granted and if so, under what conditions. The Commission's decision refusing authorisation, granting authorisation or attaching conditions to the authorisation, would be subject to review by the Council which, acting by a qualified majority, could substitute its own decision. If authorisation were granted, the decision would have to specify the period for which it was granted. All decisions taken under the safeguard article would be published.

These safeguard provisions would, however, cease to have effect once there were Community rules in force dealing with worker participation and with systems of corporation tax. As regards the latter, the Commission considers that the adoption of the directive concerning the common taxation system for international mergers should lead to renewed efforts to harmonize systems of company taxation. It therefore calls upon the European Parliament which has not yet delivered its final opinion on the proposal for harmonizing company taxation made by the Commission in 1975⁵ as well as on the Council to give priority to the consideration of this matter.

Finally, the operation of the mergers directive will need permanent supervision. It would therefore seem appropriate to add an article requiring the Commission to supervise the application of the Directive, report on its supervision to the Council every two years and make such proposals as seem appropriate.

5. Proposal for a Council directive concerning the harmonization of systems of company taxation and of withholding taxes on dividends, OJ No. C 253, 5.11.1975.