

**COUNCIL DIRECTIVE 2003/123/EC
of 22 December 2003**

amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 94 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament ⁽¹⁾,

Having regard to the opinion of the European Economic and Social Committee ⁽²⁾,

Whereas:

- (1) Directive 90/435/EEC ⁽³⁾ introduced common rules in relation to dividend payments and other profit distributions, which are intended to be neutral from the point of view of competition.
- (2) The objective of Directive 90/435/EEC is to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company.
- (3) Experience gained in the implementation of Directive 90/435/EEC has revealed different ways in which that Directive might be improved and the beneficial effects of the common rules as adopted in 1990 extended.
- (4) Article 2 of Directive 90/435/EEC defines the companies falling within its scope. The Annex contains a list of companies to which the Directive applies. Certain forms of companies are not included in the list in the Annex, even though they are resident for tax purposes in a Member State and are subject to corporation tax there. The scope of Directive 90/435/EEC should therefore be extended to other entities which can carry out cross-border activities in the Community and which meet all the conditions laid down in that Directive.

- (5) On 8 October 2001 the Council adopted Regulation (EC) No 2157/2001 on the Statute for a European Company (SE) ⁽⁴⁾ and Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees ⁽⁵⁾. Similarly, on 22 July 2003 the Council adopted Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE) ⁽⁶⁾ and Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees ⁽⁷⁾. Since the SE is a public limited-liability company and since the SCE is a cooperative society, both similar in nature to other forms of company already covered by Directive 90/435/EEC, the SE and the SCE should be added to the list set out in the Annex to Directive 90/435/EEC.
- (6) The new entities to be included in the list are corporate taxpayers in their Member State of residence but some are considered on the basis of their legal characteristics to be transparent for tax purposes by other Member States. Member States treating non-resident corporate taxpayers as fiscally transparent on this basis should grant the appropriate tax relief in respect of revenue which forms part of the tax base of the parent company.
- (7) In order to extend the benefits of Directive 90/435/EEC, the threshold of the shareholding for one company to be considered a parent and the other as its subsidiary should be gradually lowered from 25 % to 10 %.
- (8) The payment of profit distributions to, and their receipt by, a permanent establishment of a parent company should give rise to the same treatment as that applying between a subsidiary and its parent. This should include the situation where a parent company and its subsidiary are in the same Member State and the permanent establishment is in another Member State. On the other hand, it appears that situations where the permanent establishment and the subsidiary are situated in the same Member State, can, without prejudice to the application of the Treaty principles, be dealt with on the basis of national legislation by the Member State concerned.
- (9) In relation to the treatment of permanent establishments Member States may need to determine the conditions and legal instruments in order to protect the national tax revenue and fend off circumvention of national laws, in accordance with the Treaty principles and taking into account internationally accepted tax rules.

⁽¹⁾ Opinion delivered on 16 December 2003 (not yet published in the Official Journal).

⁽²⁾ Opinion delivered on 29 October 2003 (not yet published in the Official Journal).

⁽³⁾ OJ L 225, 20.8.1990, p. 6. Directive as last amended by the 1994 Act of Accession.

⁽⁴⁾ OJ L 294, 10.11.2001, p. 1.

⁽⁵⁾ OJ L 294, 10.11.2001, p. 22.

⁽⁶⁾ OJ L 207, 18.8.2003, p. 1.

⁽⁷⁾ OJ L 207, 18.8.2003, p. 25.

- (10) When corporate groups are organised in chains of companies and profits are distributed through the chain of subsidiaries to the parent company, double taxation should be eliminated either by exemption or tax credit. In the case of tax credit the parent company should be able to deduct any tax paid by any of the subsidiaries in the chain provided that the requirements set out in Directive 90/435/EEC are met.
- (11) The transitional provisions are no longer applicable and should therefore be deleted.
- (12) Directive 90/435/EEC should therefore be amended accordingly,
- of the same Member State, held in whole or in part by a permanent establishment of the former company situated in another Member State;
- from 1 January 2007 the minimum holding percentage shall be 15 %;
- from 1 January 2009 the minimum holding percentage shall be 10 %;
- (b) "subsidiary" shall mean that company the capital of which includes the holding referred to in (a).;

4. Article 4 shall be amended as follows:

- (a) Paragraph 1 shall be replaced by the following:

'1. Where a parent company or its permanent establishment, by virtue of the association of the parent company with its subsidiary, receives distributed profits, the State of the parent company and the State of its permanent establishment shall, except when the subsidiary is liquidated, either:

- refrain from taxing such profits, or
- tax such profits while authorising the parent company and the permanent establishment to deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3, up to the limit of the amount of the corresponding tax due.'

- (b) The following paragraph 1a shall be inserted:

'1 a. Nothing in this Directive shall prevent the State of the parent company from considering a subsidiary to be fiscally transparent on the basis of that State's assessment of the legal characteristics of that subsidiary arising from the law under which it is constituted and therefore from taxing the parent company on its share of the profits of its subsidiary as and when those profits arise. In this case the State of the parent company shall refrain from taxing the distributed profits of the subsidiary.

When assessing the parent company's share of the profits of its subsidiary as they arise the State of the parent company shall either exempt those profits or authorise the parent company to deduct from the amount of tax due that fraction of the corporation tax related to the parent company's share of profits and paid by its subsidiary and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3, up to the limit of the amount of the corresponding tax due.;

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 90/435/EEC is hereby amended as follows:

1. in Article 1(1) the following two indents shall be added:

- to distributions of profits received by permanent establishments situated in that State of companies of other Member States which come from their subsidiaries of a Member State other than that where the permanent establishment is situated,
- to distributions of profits by companies of that State to permanent establishments situated in another Member State of companies of the same Member State of which they are subsidiaries.'

2. in Article 2, the current paragraph shall be numbered '1.' and a new paragraph shall be added as follows:

'2. For the purposes of this Directive the term "permanent establishment" means a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on in so far as the profits of that place of business are subject to tax in the Member State in which it is situated by virtue of the relevant bilateral tax treaty or, in the absence of such a treaty, by virtue of national law.'

3. in Article 3, paragraph 1 shall be replaced by the following:

'For the purposes of applying this Directive:

- (a) the status of parent company shall be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 20 % in the capital of a company of another Member State fulfilling the same conditions;

such status shall also be attributed, under the same conditions, to a company of a Member State which has a minimum holding of 20 % in the capital of a company

- (c) In paragraph 3, the first subparagraph shall be replaced by the following:
'Paragraphs 1 and 1a shall apply until the date of effective entry into force of a common system of company taxation.'
5. Article 5 shall be amended as follows:
- (a) Paragraph 1 shall be replaced by the following:
'Profits which a subsidiary distributes to its parent company shall be exempt from withholding tax.'
- (b) Paragraphs 2, 3 and 4 shall be deleted.;
6. the Annex shall be replaced by the text in the Annex to this Directive.

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2005 at the latest.

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

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive, together with a table showing how the provisions of this Directive correspond to the national provisions adopted.

Article 3

This Directive shall enter into force on the 20th day following the day of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 22 December 2003.

For the Council
The President
A. MATTEOLI

ANNEX

LIST OF COMPANIES REFERRED TO IN ARTICLE 2(1)(A)

- (a) companies under Belgian law known as 'société anonyme'/naamloze vennootschap, 'société en commandite par actions'/commanditaire vennootschap op aandelen, 'société privée à responsabilité limitée'/besloten vennootschap met beperkte aansprakelijkheid, 'société coopérative à responsabilité limitée'/coöperatieve vennootschap met beperkte aansprakelijkheid, 'société coopérative à responsabilité illimitée'/coöperatieve vennootschap met onbeperkte aansprakelijkheid, 'société en nom collectif'/vennootschap onder firma, 'société en commandite simple'/gewone commanditaire vennootschap, public undertakings which have adopted one of the abovementioned legal forms, and other companies constituted under Belgian law subject to Belgian corporate tax;
- (b) companies under Danish law known as 'aktieselskab' and 'anpartsselskab'. Other companies subject to tax under the Corporation Tax Act, insofar as their taxable income is calculated and taxed in accordance with the general tax legislation rules applicable to 'aktieselskaber';
- (c) companies under German law known as 'Aktiengesellschaft', 'Kommanditgesellschaft auf Aktien', 'Gesellschaft mit beschränkter Haftung', 'Versicherungsverein auf Gegenseitigkeit', 'Erwerbs- und Wirtschaftsgenossenschaft', 'Betriebe gewerblicher Art von juristischen Personen des öffentlichen Rechts', and other companies constituted under German law subject to German corporate tax;
- (d) companies under Greek law known as 'ανώνυμη εταιρεία', 'εταιρεία περιορισμένης ευθύνης (Ε.Π.Ε.)' and other companies constituted under Greek law subject to Greek corporate tax;
- (e) companies under Spanish law known as: 'sociedad anónima', 'sociedad comanditaria por acciones', 'sociedad de responsabilidad limitada', public law bodies which operate under private law. Other entities constituted under Spanish law subject to Spanish corporate tax ('Impuesto sobre Sociedades');
- (f) companies under French law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée', 'sociétés par actions simplifiées', 'sociétés d'assurances mutuelles', 'caisses d'épargne et de prévoyance', 'sociétés civiles' which are automatically subject to corporation tax, 'coopératives', 'unions de coopératives', industrial and commercial public establishments and undertakings, and other companies constituted under French law subject to French corporate tax;
- (g) companies incorporated or existing under Irish law, bodies registered under the Industrial and Provident Societies Act, building societies incorporated under the Building Societies Acts and trustee savings banks within the meaning of the Trustee Savings Banks Act, 1989;
- (h) companies under Italian law known as 'società per azioni', 'società in accomandita per azioni', 'società a responsabilità limitata', 'società cooperative', 'società di mutua assicurazione', and private and public entities whose activity is wholly or principally commercial;
- (i) companies under Luxembourg law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée', 'société coopérative', 'société coopérative organisée comme une société anonyme', 'association d'assurances mutuelles', 'association d'épargne-pension', 'entreprise de nature commerciale, industrielle ou minière de l'État, des communes, des syndicats de communes, des établissements publics et des autres personnes morales de droit public', and other companies constituted under Luxembourg law subject to Luxembourg corporate tax;
- (j) companies under Dutch law known as 'naamloze vennootschap', 'besloten vennootschap met beperkte aansprakelijkheid', 'Open commanditaire vennootschap', 'Coöperatie', 'onderlinge waarborgmaatschappij', 'Fonds voor gemene rekening', 'vereniging op coöperatieve grondslag', 'vereniging welke op onderlinge grondslag als verzekeraar of kredietinstelling optreedt', and other companies constituted under Dutch law subject to Dutch corporate tax;
- (k) companies under Austrian law known as 'Aktiengesellschaft', 'Gesellschaft mit beschränkter Haftung', 'Versicherungsvereine auf Gegenseitigkeit', 'Erwerbs- und Wirtschaftsgenossenschaften', 'Betriebe gewerblicher Art von Körperschaften des öffentlichen Rechts', 'Sparkassen', and other companies constituted under Austrian law subject to Austrian corporate tax;
- (l) commercial companies or civil law companies having a commercial form and cooperatives and public undertakings incorporated in accordance with Portuguese law;
- (m) companies under Finnish law known as 'osakeyhtiö/aktiebolag', 'osuuskunta/andelslag', 'säästöpankki/sparbank' and 'vakuutusyhtiö/försäkringsbolag';
- (n) companies under Swedish law known as 'aktiebolag', 'försäkringsaktiebolag', 'ekonomiska föreningar', 'sparbanker', 'ömsesidiga försäkringsbolag';
- (o) companies incorporated under the law of the United Kingdom;
- (p) companies incorporated under Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees and cooperative societies incorporated under Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.