

DIRECTIVES

COUNCIL DIRECTIVE 2011/96/EU

of 30 November 2011

on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

(recast)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

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

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

Acting in accordance with a special legislative procedure,

Whereas:

(1) Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States ⁽³⁾ has been substantially amended several times ⁽⁴⁾. Since further amendments are to be made, it should be recast in the interests of clarity.

(2) In the light of the judgment of the Court of Justice of 6 May 2008 in Case C-133/06 ⁽⁵⁾, it is considered necessary to redraft the wording of the second subparagraph of Article 4(3) of Directive 90/435/EEC, for the purpose of clarifying that the rules referred to

therein are adopted by the Council acting in accordance with the procedure provided for in the Treaty. It is furthermore appropriate to update the Annexes to that Directive.

(3) The objective of this Directive 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.

(4) The grouping together of companies of different Member States may be necessary in order to create within the Union conditions analogous to those of an internal market and in order thus to ensure the effective functioning of such an internal market. Such operations should not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. It is therefore necessary, with respect to such grouping together of companies of different Member States, to provide for tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the internal market, to increase their productivity and to improve their competitive strength at the international level.

(5) Such grouping together may result in the formation of groups of parent companies and subsidiaries.

(6) Before the entry into force of Directive 90/435/EEC, the tax provisions governing the relations between parent companies and subsidiaries of different Member States varied appreciably from one Member State to another and were generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State. Cooperation between companies of different Member States was thereby disadvantaged in comparison with cooperation between companies of the same Member State. It was necessary to eliminate that disadvantage by the introduction of a common system in order to facilitate the grouping together of companies at Union level.

⁽¹⁾ Opinion delivered on 4 May 2011 (not yet published in the Official Journal).

⁽²⁾ OJ C 107, 6.4.2011, p. 73.

⁽³⁾ OJ L 225, 20.8.1990, p. 6.

⁽⁴⁾ See Annex II, Part A.

⁽⁵⁾ [2008] ECR I-03189.

- (7) Where a parent company by virtue of its association with its subsidiary receives distributed profits, the Member State of the parent company must either refrain from taxing such profits, or tax such profits while authorising the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits.
- (8) It is furthermore necessary, in order to ensure fiscal neutrality, that the profits which a subsidiary distributes to its parent company be exempt from withholding tax.
- (9) 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.
- (10) 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.
- (11) 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 this Directive are met.
- (12) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Part B of Annex II,
- (b) to distributions of profits by companies of that Member State to companies of other Member States of which they are subsidiaries;
- (c) to distributions of profits received by permanent establishments situated in that Member 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;
- (d) to distributions of profits by companies of that Member State to permanent establishments situated in another Member State of companies of the same Member State of which they are subsidiaries.
2. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.

Article 2

For the purposes of this Directive the following definitions shall apply:

- (a) 'company of a Member State' means any company which:
- (i) takes one of the forms listed in Annex I, Part A;
 - (ii) according to the tax laws of a Member State is considered to be resident in that Member State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Union;
 - (iii) moreover, is subject to one of the taxes listed in Annex I, Part B, without the possibility of an option or of being exempt, or to any other tax which may be substituted for any of those taxes;

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. Each Member State shall apply this Directive:
- (a) to distributions of profits received by companies of that Member State which come from their subsidiaries of other Member States;

- (b) '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.

Article 3

1. For the purposes of applying this Directive:
 - (a) the status of parent company shall be attributed:
 - (i) at least to a company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 10 % in the capital of a company of another Member State fulfilling the same conditions;
 - (ii) under the same conditions, to a company of a Member State which has a minimum holding of 10 % in the capital of a company of the same Member State, held in whole or in part by a permanent establishment of the former company situated in another Member State;
 - (b) 'subsidiary' means that company the capital of which includes the holding referred to in point (a).
2. By way of derogation from paragraph 1, Member States shall have the option of:
 - (a) replacing, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights;
 - (b) not applying this Directive to companies of that Member State, which do not maintain for an uninterrupted period of at least 2 years holdings qualifying them as parent companies, or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least 2 years.

Article 4

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 Member State of the parent company and the Member State of its permanent establishment shall, except when the subsidiary is liquidated, either:
 - (a) refrain from taxing such profits; or
 - (b) 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 fall within the definitions laid down in Article 2 and meet the requirements provided for in Article 3, up to the limit of the amount of the corresponding tax due.

2. Nothing in this Directive shall prevent the Member State of the parent company from considering a subsidiary to be fiscally transparent on the basis of that Member 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 Member 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 Member 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 fall within the definitions laid down in Article 2 and meet the requirements provided for in Article 3, up to the limit of the amount of the corresponding tax due.

3. Each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company.

Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5 % of the profits distributed by the subsidiary.

4. Paragraphs 1 and 2 shall apply until the date of effective entry into force of a common system of company taxation.

5. The Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, shall, at the appropriate time, adopt the rules to apply as from the date of effective entry into force of a common system of company taxation.

Article 5

Profits which a subsidiary distributes to its parent company shall be exempt from withholding tax.

Article 6

The Member State of a parent company may not charge withholding tax on the profits which such a company receives from a subsidiary.

Article 7

1. 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.

2. 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 recipients of dividends.

Article 8

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive as from 18 January 2012. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such 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 main provisions of national law which they adopt in the field covered by this Directive together with a correlation table between them and this Directive.

Article 9

Directive 90/435/EEC, as amended by the acts listed in Annex II, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex II, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

Article 10

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

Article 11

This Directive is addressed to the Member States.

Done at Brussels, 30 November 2011.

For the Council

The President

J. VINCENT-ROSTOWSKI

ANNEX I

PART A

List of companies referred to in Article 2(a)(i)

- (a) companies incorporated under Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) ⁽¹⁾ and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees ⁽²⁾ and cooperative societies incorporated under Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) ⁽³⁾ 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 ⁽⁴⁾;
- (b) 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;
- (c) companies under Bulgarian law known as: 'събирателно дружество', 'командитно дружество', 'дружество с ограничена отговорност', 'акционерно дружество', 'командитно дружество с акции', 'неперсонифицирано дружество', 'кооперации', 'кооперативни съюзи', 'държавни предприятия' constituted under Bulgarian law and carrying on commercial activities;
- (d) companies under Czech law known as: 'akciová společnost', 'společnost s ručením omezeným';
- (e) companies under Danish law known as 'aktieselskab' and 'anpartsselskab'. Other companies subject to tax under the Corporation Tax Act, in so far as their taxable income is calculated and taxed in accordance with the general tax legislation rules applicable to 'aktieselskaber';
- (f) 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;
- (g) companies under Estonian law known as: 'täisühing', 'usaldusühing', 'osaühing', 'aktsiaselts', 'tulundusühistu';
- (h) 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;
- (i) 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;
- (j) 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);
- (k) 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;
- (l) 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;

⁽¹⁾ OJ L 294, 10.11.2001, p. 1.

⁽²⁾ OJ L 294, 10.11.2001, p. 22.

⁽³⁾ OJ L 207, 18.8.2003, p. 1.

⁽⁴⁾ OJ L 207, 18.8.2003, p. 25.

- (m) under Cypriot law: 'εταιρείες' as defined in the Income Tax laws;
- (n) companies under Latvian law known as: 'akciju sabiedrība', 'sabiedrība ar ierobežotu atbildību';
- (o) companies incorporated under the law of Lithuania;
- (p) companies under Luxembourgish 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'Etat, 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;
- (q) companies under Hungarian law known as: 'közkereseti társaság', 'betéti társaság', 'közös vállalat', 'korlátolt felelősségű társaság', 'részvénytársaság', 'egyesülés', 'szövetkezet';
- (r) companies under Maltese law known as: 'Kumpaniji ta' Responsabilita' Limitata', 'Soċjetajiet en commandite li l-kapital tagħhom maqsum f'azzjonijiet';
- (s) 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;
- (t) 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;
- (u) companies under Polish law known as: 'spółka akcyjna', 'spółka z ograniczoną odpowiedzialnością';
- (v) commercial companies or civil law companies having a commercial form and cooperatives and public undertakings incorporated in accordance with Portuguese law;
- (w) companies under Romanian law known as: 'societăți pe acțiuni', 'societăți în comandită pe acțiuni', 'societăți cu răspundere limitată';
- (x) companies under Slovenian law known as: 'delniška družba', 'komanditna družba', 'družba z omejeno odgovornostjo';
- (y) companies under Slovak law known as: 'akciová spoločnosť', 'spoločnosť s ručením obmedzeným', 'komanditná spoločnosť';
- (z) companies under Finnish law known as 'osakeyhtiö'/ 'aktiebolag', 'osuuskunta'/ 'andelslag', 'säästöpankki'/ 'sparbank' and 'vakuutusyhtiö'/ 'försäkringsbolag';
- (aa) companies under Swedish law known as 'aktiebolag', 'försäkringsaktiebolag', 'ekonomiska föreningar', 'sparbanker', 'ömsesidiga försäkringsbolag', 'försäkringsföreningar';
- (ab) companies incorporated under the law of the United Kingdom.

PART B

List of taxes referred to in Article 2(a)(iii)

- impôt des sociétés/vennootschapsbelasting in Belgium,
- корпоративен данък in Bulgaria,
- daň z příjmů právnických osob in the Czech Republic,
- selskabsskat in Denmark,

- Körperschaftssteuer in Germany,
 - tulumaks in Estonia,
 - corporation tax in Ireland,
 - φόρος εισοδήματος νομικών προσώπων κερδοσκοπικού χαρακτήρα in Greece,
 - impuesto sobre sociedades in Spain,
 - impôt sur les sociétés in France,
 - imposta sul reddito delle società in Italy,
 - φόρος εισοδήματος in Cyprus,
 - uzņēmumu ienākuma nodoklis in Latvia,
 - pelno mokestis in Lithuania,
 - impôt sur le revenu des collectivités in Luxembourg,
 - társasági adó, osztalékadó in Hungary,
 - taxxa fuq l-income in Malta,
 - vennootschapsbelasting in the Netherlands,
 - Körperschaftssteuer in Austria,
 - podatek dochodowy od osób prawnych in Poland,
 - imposto sobre o rendimento das pessoas colectivas in Portugal,
 - impozit pe profit in Romania,
 - davek od dobička pravnih oseb in Slovenia,
 - daň z príjmov právnických osôb in Slovakia,
 - yhteisöjen tulovero/inkomstskatten för samfund in Finland,
 - statlig inkomstskatt in Sweden,
 - corporation tax in the United Kingdom.
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ANNEX II

PART A

Repealed Directive with list of its successive amendments

(referred to in Article 9)

Council Directive 90/435/EEC
(OJ L 225, 20.8.1990, p. 6).

Point XI.B.I.3 of Annex I to the 1994 Act of Accession
(OJ C 241, 29.8.1994, p. 196).

Council Directive 2003/123/EC
(OJ L 7, 13.1.2004, p. 41).

Point 9.8 of Annex II to the 2003 Act of Accession
(OJ L 236, 23.9.2003, p. 555).

Council Directive 2006/98/EC
(OJ L 363, 20.12.2006, p. 129).

Annex, point 7 only

PART B

List of time limits for transposition into national law

(referred to in Article 9)

Directive	Time limit for transposition
90/435/EEC	31 December 1991
2003/123/EC	1 January 2005
2006/98/EC	1 January 2007

ANNEX III

Correlation Table

Directive 90/435/EEC	This Directive
Article 1(1) first to fourth indents	Article 1(1)(a) to (d)
Article 1(2)	Article 1(2)
Article 2(1) first part of the introductory phrase	Article 2 introductory phrase
Article 2(1) second part of the introductory phrase	Article 2(a), introductory phrase
Article 2(1)(a)	Article 2(a)(i)
Article 2(1)(b)	Article 2(a)(ii)
Article 2(1)(c) introductory phrase of the first subparagraph and second subparagraph	Article 2(a)(iii)
Article 2(1)(c), first subparagraph, first to twenty-seventh indents	Annex I, Part B, first to twenty-seventh indents
Article 2(2)	Article 2(b)
Article 3(1) introductory phrase	Article 3(1), introductory phrase
Article 3(1)(a) first subparagraph, initial words	Article 3(1)(a), introductory phrase
Article 3(1)(a) first subparagraph, final words	Article 3(1)(a)(i)
Article 3(1)(a) second subparagraph	Article 3(1)(a)(ii)
Article 3(1)(a) third subparagraph	—
Article 3(1)(a) fourth subparagraph	—
Article 3(1)(b)	Article 3(1)(b)
Article 3(2) first and second indents	Article 3(2)(a) and (b)
Article 4(1) first and second indents	Article 4(1)(a) and (b)
Article 4(1a)	Article 4(2)
Article 4(2) first sentence	Article 4(3) first subparagraph
Article 4(2) second sentence	Article 4(3) second subparagraph
Article 4(3) first subparagraph	Article 4(4)
Article 4(3) second subparagraph	Article 4(5)
Articles 5, 6 and 7	Articles 5, 6 and 7
Article 8(1)	—
Article 8(2)	Article 8
—	Article 9
—	Article 10
Article 9	Article 11
Annex	Annex I, Part A
—	Annex II
—	Annex III