EUROPEAN COMMUNITIES
THE COUNCIL

Brussels, 9 July 1990 (12.07)
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RESTREINT

FISC 61

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INTRODUCTORY NOTE

from: General Secretariat of the Council

to : Permanent Representatives Committee (Part 2)(under I)

No. prev. doc.: 7046/90 FISC 56
Nos Cion props: R/95/69 (ECO 16)
R/94/69 (ECO 15) + 7989/85 (FISC 83)
R/2955/76 (FIN 778)

Subject: Tax measures to encourage co-operation between undertakings from different Member States

1. At its meeting on 11 June 1990, the Council:

- agreed on the overall compromise as set out in 7322/89 FISC 92, amended by the text annexed to 7046/90 FISC 56;

- instructed the Permanent Representatives Committee to carry out the legal and linguistic finalization of the texts of the Directive on mergers, of the Directive on parent companies and their subsidiaries and of the Convention on arbitration procedure, with a view to their early adoption.

2. Since the legal and linguistic finalization of the texts has been carried out, the Committee could suggest that the Council:

- adopt, in part "A" of the agenda for its meeting on 23 July 1990 (ECOFIN Council) and in the official languages of the Communities, the two Directives in question, the texts of which are contained in 7585/90 FISC 65 and 7586/90 FISC 66;

- enter in the minutes of that meeting the statements as contained in Annex I hereto;

- order publication of these Directives in the Official Journal of the European Communities.

3. In addition, the Committee could suggest that the Representatives of the Governments of the Member States, meeting within the Council, on the occasion of the meeting of the ECOFIN Council on 23 July 1990:

- decide, in part "A" of the agenda for their Conference, to sign the Convention in question and the Final Act relating to it, as contained in 7587/90 FISC 67;

- enter in the minutes of that Conference the statements set out in Annex II hereto;

- order publication of the Convention and of the Final Act in the Official Journal of the European Communities.

ANNEX I

Draft statements for entry in the Council minutes

I. Directive on mergers

1. Re point (a) of the first indent of Article 2

The Council states that the "accounting par value of a share" means the value which results from the division of a company's paid-up capital by the number of shares issued.

2. Re Article 3

(a) The Council and the Commission are agreed that Netherlands investment companies falling within the terms of Article 28 of the 1969 Corporation Tax Act do not come within the scope of this Directive.

(b) The Council and the Commission are agreed that German investment companies within the meaning of the law on "*Kapitalanlagegesellschaften*" *do not fall within the scope of this* Directive insofar as they are not subject to corporation tax.

3. Re Article 4

The Council and the Commission are agreed that in the case of a merger between international shipping companies or airlines, the Member State of the transferring company shall at the time of the merger be entitled to tax capital gain on the ships or aeroplanes which as a consequence of the merger will be excluded from this State's right of taxation.

4. Re Article 5

The Council and the Commission state that, for the purposes of this Article, the terms "provisions or reserves" include any recoverable tax relief, whether or not described as "provisions or reserves" in national legislation or usage.

5. Re Article 6

The Commission states that, before the end of the fifth year following the date of application of this Directive, it will submit to the Council a report on the application of the provisions of this Article accompanied, if necessary, by a proposal for the amendment of those provisions.

6. Re Article 7

The Council and the Commission state that the Member States may decide that losses sustained by the company receiving the transfer at the time of the cancellation of its holding in the capital of the transferring company shall not be taken into account for tax purposes.

7. Re Article 8

The Council and the Commission agree that the provisions of this Directive shall not prevent the application of national laws the purpose of which is to recover reductions of profits made in previous years.

8. Re Article 9

The Council and the Commission agree that, in the case of the transfer of a branch of activity as defined in Article 2, the receiving company may carry over the provisions and reserves of the transferring company as provided in Articles 5 and 6 only to the extent that such provisions and reserves relate to the branch or branches of activity which have been transferred.

9. Re Article 11(1)

(a) The Council and the Commission agree that a Member State may exercise the option provided for in this Article when, for example, the result of a division is that the company which has been divided is split up among its shareholders, or when a transfer of assets or an exchange of shares is followed by the rapid resale of the securities received. To that end, it may make the application of Articles 4 and 9 subject to prior approval.

(b) The Council and the Commission take note of the statement by the Federal Republic of Germany to the effect that the situation referred to in the second indent of paragraph 1 must be assessed, as regards transfers of assets, only in relation to the representation arrangements of employees who continue to be employed in the company transferring the assets.

(c) The Council and the Commission state that the inclusion of Article 11(1)(b) in this Directive does not prejudge the question of whether any particular arrangements for worker participation are superior to any other arrangements, nor does it prejudge the negotiating position of any Member State in negotiations on any other Community legislation.

10. Re Article 11(2)

The Council and the Commission state that the notion of equivalence in Article 11(2) is a notion of Community legislation and it is not for a Member State to give final interpretation.

II. Directive on parent companies/subsidiaries

1. Re Article 2

(a) The Council and the Commission are agreed that holding companies and investment companies not subject to corporation tax in the countries where they have their seats do not come within the scope of this Directive.

(b) The Council and the Commission are agreed that Netherlands investment companies falling within the terms of Article 28 of the 1969 Corporation Tax Act do not come within the scope of this Directive.

(c) The Council and the Commission are agreed that German investment companies within the meaning of the law on "Kapitalanlagegesellschaften" do not fall within the scope of the Directive insofar as they are not subject to corporation tax.

(d) The Council and the Commission are agreed that companies with fiscal transparency, where Spain is concerned, and Portuguese companies, which are in principle subject to corporation tax but are exempt while their profits are taxed in the hands of their members, are excluded from the scope of this Directive.

2. Re Article 3(2)

The Council and the Commission state that, where two Member States have concluded a double taxation agreement which contains a provision relating to the taxation of dividends, and where that provision provides for the application to the two Member States of a criterion referring to the holding of voting rights within a company, it shall be assumed that an agreement conforming to Article 3(2) has been concluded between those States.

3. Re Article 4(3)

The Council and the Commission are agreed that "any losses resulting from the distribution of the profits of the subsidiary" is to be understood as referring to a case where, following the distribution of profits out of reserves by the subsidiary to the parent company, the value of shares in the subsidiary held by the parent company falls.

4. Re Article 5

(a) The Portuguese Republic undertakes to extend to the other Member States any reduction in the rate of withholding tax which it grants in future to non-member countries.

(b) The Federal Republic of Germany undertakes to extend to the other Member States any reduction in the rate of withholding tax which it grants in future to non-member countries.

5. Re Article 5(4)

The Council and the Commission state that the provisions of Article 5(4) shall not prevent Portugal from levying a withholding tax on estate duties and donations.

6. Re Article 6

The Council and the Commission are agreed that this Article does not prevent Member States from charging withholding tax when profits received by a parent company from its subsidiary are redistribtued.

ANNEX II

Draft statements for entry in the minutes of the Conference at which the Representatives of the Governments of the Member States sign the Convention

1. Re Article 1(2)

The Commission states that at a later date it will submit a report on the application of the Convention in order to enable the Contracting States to give an opinion on whether its application should be extended to the permanent establishments of undertakings of the Contracting States situated in a third State.

2. Re Article 2

The Commission hereby states that, at least six months before the end of the fifth year following the Convention's entry into force, it will submit a report on any problems of double taxation arising out of the exclusion from the scope of the Convention of the Petroleum Revenue Tax levied in the United Kingdom and of similar taxes levied in other Member States, in order to enable the Contracting States to state a position on the advisability of including these taxes in the scope of the Convention.

EUROPEAN COMMUNITIES
THE COUNCIL

Brussels, 16 July 1990 (18.07)
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COR 1
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FISC 61

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CORRIGENDUM TO INTRODUCTORY NOTE

from: General Secretariat of the Council

to : Permanent Representatives Committee (Part 2)(I)

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The first paragraph on page 2 should read:

"7585/90 FISC 65 + COR 1 + COR 2 and 7586/90 FISC 66 + COR 1".