International Lawyer

Volume 26 | Number 1 — Article 11

1992

# European Tax Law

# REGIONAL DEVELOPMENTS

# European Tax Law*

The underlying purpose of the European Community (EC)'s tax harmonization efforts is the creation of a unified market where trade is not diverted, nor competition distorted due to varying tax rates and systems. The most progress made thus far has been in the area of Value-Added Tax (VAT), which has been the subject of several EC Council Directives. Directives have also been issued concerning certain tax-free allowances for individuals and the reduction of capital duties. Most recently, certain long-outstanding directives as to various aspects of corporate taxation, including the tax treatment of mergers, the taxation of dividends, and the arbitration of double taxation disputes have been passed. Certain other proposals such as those regarding the availability of loss carryforwards and carrybacks, loss consolidation, and the taxation of interest and royalties, will probably see some progress in the near term as well.

## I. Indirect Taxation

### A. VAT

The EC Council's First VAT Directive[1] required Member States to replace turnover taxes with a common system of VAT. Since January 1, 1987, all Member States have adopted the VAT system, although further modifications must still be made to bring them in line with the existing EC VAT directives. Subsequent directives and proposed directives on VAT have added details to the uniform VAT system and established procedures for its implementation.

Originally, the Commission made proposals to implement the harmonization of VAT rates, which presently vary between 0 and 36 percent among EC Member

*Prepared by Howard M. Liebman, Partner, Oppenheimer, Wolff & Donnelly, Brussels, Belgium; Chair, European Tax Law Subcommittee, Committee on International Taxation.

1. 1967 J.O. (L 71) 1301.

States. One proposal[2] provided for an approximation of VAT rates into two brackets ranging between 14 and 20 percent for the normal rate and between 4 and 9 percent for the reduced rate (which would be applicable to basic necessities such as transactions relating to food, energy products, pharmaceutical products, and the like). The zero-rating applicable in some Member States for basic necessities such as food or clothing would be abolished.

The two main opponents to this proposal were Denmark and the United Kingdom. Denmark, which together with Ireland applies the highest VAT rates, feared a substantial loss of revenue as a result of the lowering of its rates. On the other hand, the United Kingdom was highly critical of the proposed suppression of its zero-bracket rate for necessities, a measure that would unavoidably affect primarily the least well-off. If the proposals had been enacted as planned, the price of alcohol in the United Kingdom would have fallen as the price of food and clothing would have risen—not a socially preferable result.

In May 1989 the Commission therefore suggested replacing the originally proposed basic bracket (from 14 to 20 percent) with a minimum rate of 15 percent (without a ceiling). The threshold for the reduced rate (4 to 9 percent) was to be maintained, with a zero-rate foreseen for a limited number of products. Germany, however, opposed this proposal, its standard rate being 14 percent. Both the Netherlands and Denmark, on the other hand, supported a threshold higher than 15 percent. As Germany has since increased its VAT rates for budgetary reasons, agreement was finally reached in June 1991 to apply a standard VAT rate of at least 15 percent as from January 1, 1993, with one or two reduced rates allowable (not lower than 5 percent), at the option of each Member State, on certain defined goods and services.

As part of the process of harmonization, the Commission also issued a working document proposing a compensation system or a form of "clearinghouse." Under this approach, intra-Community transactions would generate global input and output figures reported by all VAT-registered businesses. National authorities would then prepare all the computations and submit reports to a central Community clearing system acting as a central account on an intra-State basis.

In further developments, this idea was replaced by a refund mechanism for excess VAT payments calculated on the basis of intra-Community trade statistics. A number of operations would not come under this refund mechanism (inter alia, purchases by public authorities and entities and automobile sales), however, but would instead benefit from a "suspension of VAT."

At the October 5, 1989, session of the EC Finance Council, members of the Council agreed that for a limited, although indeterminate, period beginning January 1, 1993, VAT and excise duties would be collected in the country of final consumption, thereby retaining a destination tax system. This decision was

2. Proposal for a Council Directive Supplementing the Common System of Value Added Tax and Amending Directive 77/388/EEC—Approximation of VAT Rates, 1987 O.J. (C 250) 2.

heavily criticized by, among others, the European Parliament. The Commission alleged it would jeopardize the credibility of the entire single market, and asserted that its own proposal for paying VAT in the country of origin was both simpler and less prone to fraud. Although no date has been set to implement the final system, a review will take place sometime before the end of 1996.

In January 1990, the Commission announced that it would propose concrete measures to ensure the implementation of reinforced cooperation between tax authorities. It also proposed measures on a definitive VAT collection system after the aforesaid transition period.

### B. Capital Duties

The EC Council's First Capital Duty Directive[3] set the standard rate of tax on the contribution of capital at between 1 and 2 percent, with reduced rates for corporate reorganizations. The EC Council's Second Capital Duty Directive[4] reduced the standard rate to a flat 1 percent and set the reduced rate at between 0 and 0.5 percent. EC Council Capital Duty Directive 85/303[5] further reduced the standard rate to between 0 and 1 percent, and eliminated capital duty on corporate reorganizations.

In this context, mention should be made of two decisions recently rendered by the EC Court of Justice, which relate to the payment of capital duty in the context of interest-free loans and the cancellation of intercompany debt, respectively. The Court decided, in both cases, that capital duty may indeed be levied.[6] In the case of an interest-free loan, the duty is due on the amount of interest that would have been paid in an arm's-length transaction. In the case of debt cancellation, duty is apparently due on the amount of debt that is forgiven.

### C. Excise Duties

Excise duties are levied on mineral oils, alcohol, and tobacco. Like the VAT system, both the taxation base and the rates of excise duties vary between Member States. Since 1972, the Commission has sought to harmonize the application and the rates of such duties. However, aside from one proposal relating to the harmonization of the rates of duties on tobacco products, all other proposals have failed to be enacted to date.

The Commission's original proposals for a single excise duty for mineral oils, alcohol, and tobacco, respectively, have been replaced by a proposed system of tax margins or minimum rates, or both. These proposals would require all Mem-

3. Council Directive 69/335, 1969 J.O. (L 249) 25.
4. Council Directive 73/80, 1973 J.O. (L 103) 15.
5. 1985 O.J. (L 156) 23.
6. *See* Europe No. 5426 (n.s.) at 9 (Feb. 7, 1991); Eur. Rep. No. 1650, at II-2 (Feb. 6, 1991).

ber States to bring their duties into line with a new set of minimum rates by January 1, 1993. Member States, however, would be free to apply higher duties. Bracketed rates would be introduced for certain items such as petroleum products. Furthermore, within an unspecified period of time, Member States would be required to align their duties with a target rate, which would take into account not only economic factors,but also health, environmental, transportation, and energy policies. A review procedure would allow for revisions of both the minimum and target rates to take place every two years.

These proposals have received only a cool reception by the Council of Ministers' group of experts, however. Indeed, they were considered to give rise to a number of problems and engender major difficulties in aligning the different rates that presently exist in the different Member States.

The Council of Ministers recently approved the abolition of tax controls at frontiers within the Common Market. Such an abolition will necessitate the introduction of a new (transitional) VAT regime for goods traded cross-border. It remains to be seen to what extent this decision will speed up the Commission's efforts and assist in having its own proposals adopted before January 1, 1993, the date at which all border controls should be removed.

## II. Direct Taxation

### A. General Comments

Efforts to harmonize direct taxation have been much slower to bear fruit and generally less ambitious than those in the indirect tax field. To the extent that much of the "1992 programme" will result in reduced trade barriers and distortions, differences in corporate tax systems are expected subsequently to have heightened significance.

The EC Commission has long studied systems of taxing corporations and their shareholders. The 1963 Neumark Committee recommended a uniform, split-rate corporate tax system similar to Germany's, but with a different, lower tax rate on distributed profits. France has recently implemented such a system, with the lower rate being imposed on undistributed income, but now plans to eliminate it. The 1970 van den Tempel report suggested the classic, unintegrated system (implying double taxation). This system still applies in Luxembourg, the Netherlands, and Spain.

A 1975 draft directive by the Commission[7] proposed a band of corporate tax rates of 45–55 percent (the Commission acknowledges that the range should be lower today, probably 35–45 percent), and a shareholder's tax credit of 45–55 percent of the amount of corporate tax paid (that is, a partial imputation system). The dividend withholding tax would be 25 percent. This proposal was extended

7. Proposal for Council Directive Concerning the Harmonization of Systems of Company Taxation and of Withholding Taxes on Dividends, 1975 O.J. (C 253) 2.

to collective investment institutions.[8] Most Member States now do have some form of shareholder tax credit or imputation system.

In a communication of April 18, 1990, however, the Commission stated that it would not, for the time being, pursue its plan to fix a uniform rate of corporation tax to be applied in all Member States of the Community. Instead, the Commission has decided to develop a new approach to the problem, based on mutual recognition of tax policies and closer coordination between the Member States so as to remove the specter of double taxation. As a first step in this direction, it has finally adopted the so-called package of three directives discussed below in parts II.B.-D. Furthermore, the Commission has submitted two new proposals that are discussed below in parts II.F. and G.

Nonetheless, although it has dropped the idea of a single corporate tax rate or band by 1992, the EC Commission is still concerned about the effects on the single market of disparities in the burden of corporate taxation. To this end, it has established an informal committee of tax experts to look into the effects on the single market of these different rates. The experts have been called upon to examine the following questions:

(1) Do the disparities that exist between corporate taxes and the tax burdens on companies create distortions in investment decisions incompatible with the functioning of a European-wide internal market?

(2) If so, can such distortions be eliminated simply through the interplay of market forces and competition between national tax systems, or are Community measures required?

(3) Should any action at Community level concentrate on one or more elements of company taxation, namely the different corporation tax systems, the differences in tax treatment associated with the legal status of companies, the tax base, or tax rates?

(4) Should any measures envisaged lead to harmonization, approximation, or the straightforward establishment of a framework for national taxation? If measures have to be taken, what would be their effect on Community objectives such as cohesion, environmental protection, and fair treatment for small and medium-sized firms?

While awaiting the results of the experts' deliberations, the EC Commissioner for Taxation, Ms. C. Scrivener, has proposed to extend the tax provisions contained in the draft European Company Law Statute to all companies, including small and medium-sized enterprises, belonging to the same group. Implementation of this proposal would allow parent companies to consider the results of the whole group together and, if need be, offset losses against profits of their subsidiaries or plants established in other Member States.[9]

8. Proposal for a Council Directive on the Application to Collective Investment Institutions of the Council Directive Concerning the Harmonization of Systems of Company Taxation and Withholding Taxes on Dividends, 1978 O.J. (C 184) 8.

9. *See infra* text part II.G.

### B. Mergers

One of the three directives that was finally adopted in 1990, and that is to be implemented by the Member States as from January 1, 1992, is the so-called Merger (Tax) Directive.[10] This directive introduces a common system of taxation applicable to mergers, divisions, and contributions of assets taking place between companies of different Member States. Under this new regime, qualified mergers will no longer attract taxation, and the acquired company will continue to function as a permanent establishment of the acquiring company. Thus, the taxation of capital gains accruing upon corporate mergers across Member State borders will be deferred until the assets transferred in the course of the merger (or the shares received in exchange for those assets) are subsequently disposed of by the acquiring Company. Notwithstanding several safeguard clauses, the directive will probably lead to an even greater acceleration of the already increased level of merger and reorganization transactions observed in the Community over the past several years.

### C. Parents and Subsidiaries

The second recently adopted directive that might generate some interesting tax planning possibilities is the so-called Parent-Subsidiary Tax Directive.[11] This directive is also to be implemented by January 1, 1992.

The directive envisages a common system of taxation applicable in the case of parent companies with subsidiaries in different Member States. Dividends distributed by a company in one Member State to a company holding at least 25 percent of the share capital of such company and located in another Member State will be exempt from withholding taxes in the source country, from all, or nearly all, corporate taxes in the source country, and from all, or nearly all, corporate taxes on the dividend in the recipient country. Member States may, however, at their option, treat up to 5 percent of the dividends received as nondeductible costs, therefore only exempting 95 percent rather than 100 percent of such dividends from tax.

Presently, the tax legislation of the Member States acts not only to discourage companies from setting up subsidiaries across frontiers, but also to distort decisions as to their location. This directive is intended to create a situation whereby a subsidiary's profits are taxed only once so as to render the effect of tax considerations neutral when deciding on the location of an operation.

A number of exceptions exist. Beginning January 1, 1992, when the directive is to come into force, Germany need only reduce its intra-EC dividend with-

10. *See* Council Directive 90/434 of 23 July 1990 on the Common System of Taxation of Mergers, Divisions and Contributions of Assets Taking Place Between Companies from Different Member States, 1990 O.J. (L 255) 1.

11. Council Directive 90/435 of 23 July 1990 on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries in Diffèrent Member States, 1990 O.J. (L 225) 6.

holding tax to 5 percent, abolishing it entirely only four years later (basically by July 1, 1996). Germany argued that the delay was necessary to allow it time to reform its corporate tax system.

Greece and Portugal also have secured exemptions. Since Greece has a dividend-paid tax deduction system, it will maintain its withholding tax on dividends until it introduces a reform package bringing it into alignment with the other Member States. Portugal will enjoy an eight-year transition.

### D. Tax Arbitration Procedures

The last directive adopted as part of the 1990 tax package is Council Convention 90/436 of July 23, 1990, on the Elimination of Double Taxation in Connection with the Adjustment of Transfers of Profits between Associated Enterprises.[12] It should enter into force within three months after ratification by the last Member State.

Proposed in 1976 as a directive, the double taxation proposal was subsequently reissued as a directive and a convention. As finally signed, it takes the form of a multilateral convention providing for a detailed arbitration procedure to be followed in situations where Member States cannot reach mutual agreement regarding the equitable elimination of double taxation arising through an adjustment of profits between companies in two or more Member States (such as following an examination of alleged transfer pricing).

If the fiscal authorities concerned fail to reach an agreement that eliminates double taxation within two years of receiving the file, they must transfer the case to an arbitration commission and agree from the outset to accept its decision. The arbitration commission would consist of an equal number of representatives from the tax authorities concerned and an uneven number of independent persons appointed by mutual agreement. The arbitration commission must render its decision within six months. Unfortunately, the overall delay in reaching a final resolution of tax disputes can still take up to three years.

### E. Mutual Assistance

A 1977 mutual assistance directive established arrangements for exchanges of information in the area of direct taxation, as well as for VAT and other indirect levies.[13] Most matters of mutual assistance have been handled under existing bilateral tax treaties, but the Commission has urged closer cooperation and wishes, therefore, to obtain greater multilateralism in this regard.[14]

A 1989 Commission proposal to amend the mutual assistance directive would require Member States to furnish even more information than their own adminis-

12. 1990 O.J. (L 225) 10.

13. Council Directive 77/799, 1977 O.J. (L 336) 15, *amended by* Council Directive 79/1070, 1979 O.J. (L 331) 8.

14. *See, e.g.*, EC Commission on Community Activity, COM(84)603 final.

trative practices would permit to another Member State when a resident of the latter has transferred "significant funds" to the other state "without declaring the corresponding income."[15] As a result, Luxembourg enacted a formal—as opposed to mere administrative practice—tax/bank secrecy law to avoid any such obligations.

### F. Proposal for Interest/Royalty Withholding

On November 28, 1990, the EC Commission released two further proposed directives that will also have a notable impact on the structuring of all European-wide organizations. The proposals aim at further removing the tax barriers to European-wide, tax-efficient corporate operations. They are intended to be enacted and in force by January 1, 1993.[16]

Under the first new proposal, namely for a Council Directive on a Common System of Taxation Applicable to Interest and Royalty Payments made between Parent Companies and Subsidiaries in Different Member States[17] (the Interest/Royalty Withholding Tax Directive), withholding taxes on interest and royalty payments between parent companies and subsidiaries located in different Member States would be entirely abolished, in the same manner as is provided for dividends in the EC Parent-Subsidiary Tax Directive. In sum, a complete withholding tax exemption would apply to all interest and royalties, provided that a minimum threshold of ownership (25 percent) is maintained between the payor and the recipient. Member States may bilaterally agree to use a voting rights threshold rather than share capital as the testing criterion. And they may also require that a minimum two-year holding period be met by the group in question.

The impact of this proposal on European operations may be quite striking. For example, the ability to generate tax-free royalty streams may warrant a new look at maximizing licensing opportunities, perhaps for new product development or for the right to use trademarks or trade names. This could prove especially interesting for U.S.-based groups in view of the favorable U.S. foreign tax credit position such royalties may help produce if they can be considered as active royalties.

Secondly, the withholding tax exemption on interest might prompt a reexamination of intercompany financing options. Many U.S. groups, in particular, are perhaps not as highly leveraged in Europe as they might be, and this proposal may therefore prove of interest for this reason alone.

If this proposal is eventually adopted, intercompany loans or licensing arrangements, or both, should once again prove even more tax-efficient than dividend flows arising from capital contributions. While both dividends and interest

15. Proposal for a Council Directive Amending Directive 77/799/EEC Concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation and Value Added Tax, 1989 O.J. (C 141) 7.

16. *See generally* Howard M. Liebman, *Full Text: Recent Developments in European Community Taxation,*, 18 Tax Plan. Int'l Rev., Feb. 1991, at 36 (from which the discussion in text part II.F. and G. is taken).

17. 1991 O.J. (C 53) 26.

(or royalties) would be tax-exempt at source, only interest and royalty payments would be deductible (except in unusual circumstances such as under the Greek corporate tax system). Yet this proposal would, in effect, abolish any double taxation on interest or royalty payments between affiliated companies in different Member States, while at the same time maintaining their tax-deductible status.

Article 7 of the proposal allows for an override by Member States' anti-abuse provisions. Further, paragraph 10 of the official Explanatory Memorandum attached thereto specifically includes transfer pricing adjustments in this category of anti-abuse measures that is to remain unaffected by the proposal.

As a final comment, a potential roadblock to efficient tax planning arising from this particular proposal is that the withholding tax exemptions will apply only to payments made to qualified parent companies. Sister or affiliated companies, such as separate licensing or financing entities, would not qualify. Hence, significant restructurings would likely be required by many multinationals in order to take advantage of this proposal, unless its scope is eventually broadened.

## G. Proposal for Loss Consolidation

The second proposed directive (Proposal for a Council Directive Concerning Arrangements for the Taking into Account by Enterprises of the Losses of their Permanent Establishments and Subsidiaries Situated in Other Member States)[18] would enable companies with branches or subsidiaries in another Member State to undertake a form of European-wide tax consolidation, offsetting in their balance sheets any losses incurred by such branches or subsidiaries against the profits made by the parent company. Under current law, the losses of, notably, subsidiaries located in other Member States are usually not consolidated with, and hence deductible from, the parent's profits (with the exception of special regimes available in Denmark and France). This situation would be remedied under this particular proposal, as Member States would have to accord some offset for foreign affiliated losses, using one of two methods.

First as to foreign branch losses, the first method would allow a head office to consolidate the results (combined losses and profits) of all of its foreign establishments in other Member States, crediting any local taxes paid by such establishments. This rule is intended for those countries utilizing the foreign tax credit method in order to eliminate double taxation. According to the second approach (aimed at countries presently using an exemption method of avoiding double taxation), the losses of the foreign branches are to be deducted from the taxable profits of the head office. In future years, any profits derived by such branches would be included in the head office's profits up to the value of the losses previously offset (that is, a branch loss recapture rule, to be applied even if other foreign branch income would be otherwise exempt from tax).

18. 1991 O.J. (C 53) 30.

Subsidiaries could also benefit from this arrangement, except that only the second method of consolidation may be utilized as between EC parents and their subsidiaries, namely, the immediate deduction of the foreign losses with their subsequent recapture. To so qualify , the parent company must hold at least 75 percent of the shares and a majority of the voting rights of such subsidiaries, although individual Member States may choose to apply a lower ownership threshold (but only as to the holdings in capital, not as to voting rights).

Interestingly, the Member States are entitled to extend these arrangements, at their option, to branches and subsidiaries located outside of the Community. On the other hand, consolidation is limited in the sense that only vertical offsets (upward and not downward) are allowed. No horizontal consolidation may be applied, a limitation which may hopefully be eliminated in due course.

## H. Loss Carryforwards and Carrybacks

A proposed Directive[19] would allow the carryback of losses up to the three previous years and their subsequent unlimited carryforward, or a company could elect to apply solely an unlimited loss carryforward.

## I. Proposed Draft Directive on Corporate Income Tax Base

A proposal that was only unofficially published and never actually tabled was a directive that would have harmonized the determination of taxable profits, analogous in its goals (in certain respects) to the Sixth VAT Directive.[20] The proposed directive would have covered corporate income and capital gains taxes and sought to establish common rules for defining the major elements comprising the taxable base in order to render the divergent systems of corporate taxation presently extant within the Community more transparent. Although Member States would retain great latitude in structuring the details of their respective tax systems, no derogations would be permitted in certain areas. For instance, it would no longer be permissible to grant tax incentives via the tax base (for example, accelerated depreciation, investment deductions, and the like).

The proposed directive would set out common depreciation rules, primarily relating to the depreciation base; the choice of straight-line versus the declining-balance method; the deduction of formation, trade name, clientele, or research and development expenses; rules governing reserves and charges and deductions therefor; and the like. Overall, these proposals really only entail the lowest common denominator of rules on which agreement is likely. This proposed

19. Proposal for a Council Directive on the Harmonization of the Laws of the Member States Relating to Tax Arrangements for the Carry-over of Losses of Undertakings, 1984 O.J. (C 253) 5, *amended by* 1985 O.J. (C 170) 3.

20. Council Directive 77/388, 1977 O.J. (L 145) 1. *See generally* John G. Goldsworth, *European Commission Proposal for Directive on the Harmonization of Rules for Determining the Taxable Profits of Undertakings*, 15 Tax Plan. Int'l Rev. Spec. Supp., June 1988, at S-1.

directive may surface again, depending upon the report of the Committee of Tax Experts expected by December 1991.[21]

## J. Proposed Directive for a Common Withholding Tax

In 1989, the Commission released COM(89)60 final, a proposal to establish a uniform withholding tax on interest income, the origins of which lay in Council Directive 88/361,[22] adopted in June 1988, and aimed at securing the free movement of capital in the Community by July 1990. To ensure the free movement of capital, the Commission was required to submit proposals aimed at "eliminating or reducing risks of distortion, tax evasion and tax avoidance linked to the diversity of national systems for the taxation of savings."[23] In response the Commission proposed that a withholding tax of at least 15 percent should be assessed on interest earned from a variety of debt claims. The tax would be payable only by residents of Member States, thereby creating a new tax principle of an EC tax resident.

The withholding tax would not have been levied by a Member State under the following circumstances:

- The recipient of interest is one of its own residents and his or her particulars are automatically notified to the relevant tax authorities;
- the recipient of interest is one of its own residents and is not liable to income on profits tax;
- the recipient of interest is one of its own residents and the interest is not subject to income or profits tax;
- the interest is payable on Eurobonds; or
- the interest is paid to a private individual (this exemption is aimed at encouraging small savers).

The withholding tax paid on interest was to be allowed as a credit against income tax, and it was to be refunded in cases where the payment exceeded the amount of income tax due or if the recipient of the interest was not taxable.

This measure was accompanied by a second proposal amending Council Directive 77/799 on the mutual assistance by the authorities of the Member States in the field of direct taxation (and, as amended, VAT).[24] The latter provided that the tax authorities of one Member State could not refrain from assisting the authorities of another Member State in pursuing a case of tax evasion on the grounds that administrative practices restricted the former's powers of investigation.

The withholding tax proposal originally received strong support from France and those other Member States that feared that the liberalization of capital movements would result in a flight of capital to Member States where more favorable

21. *See supra* text part II.A.
22. 1988 O.J. (L 178) 5.
23. *Id.* at 7.
24. *See supra* text part II.E.

conditions prevailed for savers and investors (that is, states with no withholding tax or a lower rate thereof). On the other hand, Luxembourg and the United Kingdom staunchly opposed the tax, which they claimed was unnecessary and would result in a capital outflow from the Community. After the German Government eliminated its own 10 percent withhold on interest, the proposal was shelved (although officially it remains on the books).

As the proposal must eventually be approved by unanimity, it is unlikely to be adopted in the foreseeable future, especially in its present format. In any case, it would not apply to most large multinationals, which would instead benefit from the interest withholding tax exemption on qualified intercompany debt, both under this proposal and under the Interest/Royalty Withholding Tax Directive, discussed in part II.F. above.

### K. European-wide Business Entities

Business has generally been frustrated in its attempts to establish pan-European companies. Therefore, in addition to efforts at harmonizing existing company law, the Commission has proposed several European legal entities, the first of which became formally available on July 1, 1989.

The European Economic Interest Grouping (EEIG) is based on the French GIE, a form of corporate partnership/joint venture. Specifically, Council Regulation 2137/85[25] allows companies from EC Member States or individuals connected with the EC, that is, persons carrying on industrial or commercial activity within the EC, to form a type of partnership whereby any profits of the grouping will be taxed directly to its participants (a fiscal transparency). Over 80 EEIGs have been established since July 1989. Problems remain, however, with the specific tax rules, which diverge as between the various jurisdictions, especially as the one tax provision, article 42, is not nearly detailed enough to answer all issues.

Since 1970 the Commission has worked on a proposal for a European Company Law Statute, capable of facilitating, among other things, cross-border mergers and structures. The European Company (SE) would be taxable in its country of corporate domicile, and could offset profits with losses from branches in different Member States (vertical offsets, as per article 133 of the August 1989 proposal). The major reason for the present delay in the adoption of this proposal is the absence of clear agreement as to worker participation rights in such a company. In addition, the tax regime to be accorded such an entity is not viewed as sufficient enough incentive to utilize such as structure.

25. 1985 O.J. (L 199) 1.