

am Main, Lang, 1998); Wunderlich, 'Direkte Steuern und Grundfreiheiten der EU', *EuR* 2007, 7; and references below in §33 N. 161.

I. IMPORTANCE, SCOPE AND SUBJECT MATTER

1. Among the situations regulated by company law, those in which capital flows between shareholders and (limited liability) companies are taxed on the one hand, which have their centre of gravity in the law of financing of the company, i.e. in the context of capital market law.¹ On the other hand, those situations which involve the business of the limited liability company and the profits made are also taxed. These situations fall mainly into two categories: (1) taxation of profits made in current business operation, and (2) the tax treatment of structural changes, and here it is necessary to distinguish between a taxation of the 'profits' made by the structural change itself, mainly because hidden reserves have to be made available, and a taxation of the structure created in the structural change (again current business operation, for instance within a group). In most national tax laws, these are all questions of corporate taxation.

2. In EC/EU law, the area first mentioned (taxation of profits made in current business operations) has long been the subject of extensive harmonisation projects: of the Framework Programme for harmonisation of direct taxation of 1967,² on which the legal measures adopted so far are based, and of the Ruding Report of 1992³ and also – in between – of the unsuccessful harmonisation initiatives on corporate tax systems and on computation of

profits.⁴ However, only as of 2001 – after long years in which the principle of subsidiarity dominated and initiatives were taken only against so-called unfair tax competition –⁵ was there again a more general, thorough concept of harmonisation of corporate taxation, at least with respect to a consolidated basis of taxation (in more detail below §32 para. 22). Only one area (somehow related to structural changes) has been successfully harmonised so far: the tax treatment of payments between affiliated companies in a group of companies which presupposes the creation of such a group. These questions are dealt with in the Parent-Subsidiary Taxation Directive⁶ and – related to it – in what is

⁴ See in more detail below N. 37 and 38. In between different reports and the Internal Market White Paper of 1985 and as well the Guidelines for corporate taxation of 30 April 1990, EC-Doc. SEC(90) 601 final, see on this history Eden, (2000) *British Tax Review*, 624 (628 et seq.); Farmer/Lyal, *EC Tax Law*, 27 et seq., 30 et seq.; Kellersmann/Treich, *Unternehmensbesteuerung*, 87–90; Tsourouflis, *Harmonisierung*, 42–57; Terra/Wattel, *European Tax Law*, 195–208.

⁵ See especially EC Commission, Taxation in the European Union – Report on the development of tax systems, COM(96) 546 final (known as the Monti Report). Similarly, the EU Commission has confirmed that an extensive harmonisation of the tax systems is not intended: COM(2006) 823; Hinnekens, 'The Monti Report: The uphill task of harmonising direct tax systems of EC Member States', (1997) *EC Tax Review*, 31; Osterweil, 'The OECD and the EU – Two Approaches to Harmful Tax Competition', (1999) 3 *EC Tax Journal* 89; Kellersmann/Treich, *Unternehmensbesteuerung*, 89–92; Tsourouflis, *Harmonisierung*, 56; Runge, 'Schädlicher Steuerwettbewerb in der Europäischen Union und in den OECD-Ländern', *Festschrift für Rädler* 1999, 559; and, more demanding, Communication below N. 42.

⁶ 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, OJ 1990 L 225/6; Proposal OJ 1969 C 39/7 = COM(69) 6 final; Opinions OJ 1970 C 51/6 (European Parliament); 1969 C 100/7 (Economic and Social Committee); amended Proposal COM(85) 360 final; then amended by 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, OJ 2004 L 7/41; Proposal of 29 July 2003 for a Council Directive amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ 2004 C 96/11 = COM(2003) 462 final; Opinions OJ 2004 C 32/118 (Economic and Social Committee); further amended by Council Directive 2006/98/EC of 20 November 2006 adapting Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 363/123. For earlier amendment proposals see below N. 25; (broad) comparative law survey on the whole of corporate taxation in: Martinez-Serrano/Patterson, *Taxation in Europe – Recent Developments, European Parliament – Directorate-General for Research, Working Paper, ECON 131 EN*, (01–2003); on this Directive mainly Loyens/Lefebvre/Rädler (eds.), *Parent-Subsidiary Directive*; transposed in Germany in: Gesetz zur Entlastung der Familien und zur Verbesserung der Rahmenbedingungen für Investitionen und Arbeitsplätze (Steueränderungsgesetz 1992 – StÄndG 1992), BGBl. 1992 I, 297; mainly §444 para. 2, 50d EStG, §26 para. 2a KStG (old version), §8b para. 1 KStG; the Directive 2003/123/EC was transposed in Germany in: Gesetz zur Umsetzung von EU-Richtlinien in nationales Steuerrecht und zur Änderung weiterer Vorschriften (Richtlinienumsetzungsgesetz – EURLUmSG), BGBl. 2004, I, 3310; on the German transposition see Häuselmann/Ludemann, 'Besteuerung von verbundenen Unternehmen: Richtlinien-Umsetzungsgesetz und EG-Amtshilfe Anpassungsgesetz', *RIW*

¹ On these questions see above §24, primarily para. 1–4 on the different bases for taxation; for the differences between this area and the second core area of tax law harmonisation discussed in the following see, for instance, Rädler, 'Reasons for Corporate Tax Harmonization', in: IFA (ed.) *Harmonization of Corporate Taxes in the EC*, 91 (94 et seq.); id., 'Einheitlicher europäischer Kapitalmarkt und Besteuerung', *Festschrift für Beusch* 1993, 675 (676); Richter, 'Harmonisierung der Einkommensbesteuerung privater Finanzanlagen in der Europäischen Union', *RIW* 1995, 485 (487).

² Doc. SEC(67) 785 final and 1480 final; on the history see Eden, (2000) *British Tax Review*, 624 (627 et seq.); Farmer/Lyal, *EC Tax Law*, 20 et seq.; Fischer, 'Harmonisierung der Steuergesetzgebung in der EWG', *NJW* 1968, 321 (especially 324); Kellersmann/Treich, *Unternehmensbesteuerung*, 86 et seq.; Tsourouflis, *Harmonisierung*, 33–37; Terra/Wattel, *European Tax Law*, 189 et seq.

³ *Report of the Committee of Independent Experts on Company Taxation*, Luxembourg/Brussels 1992, presented on 18 February 1992; extensively on this report Bovenberg/Cnossen/Vanistendael/Westerburgen (eds.), *Harmonization of Company Taxation in the European Community – Some Comments on the Ruding Committee Report*, (1992); Herzig (ed.), *Harmonisierung*; Knobbe-Keuk, 'The Ruding-Committee Report – an Impressive Vision of European Company Taxation for the Year 2000', *EC Tax Review* 1992, 22; Rädler, *Festschrift für Beusch* 1993, 675 (especially 688–692) (German member of the Committee); references for the host of contributions discussing this report in: Tsourouflis, *Harmonisierung*, 52; see also *How Harmonization of the EC Commission reached the present with reservations* SEC(1000)

known as the **Arbitration Convention**.⁷ Finally, also the Interest and Royalty Payments Directive has to be named (below §32 para. 21).

3. The focus is thus **structural changes**. The main idea is not to additionally burden them merely because they are realised across borders: neither in the structure created (group of companies, see above §32 para. 2) nor, above all, in the structural change itself. Therefore, the second legal measure – typically applying first in the historical sequence – is of the highest importance: the **Merger Tax Directive** (substantially amended in 2005 and replaced in 2009).⁸ This Directive deals with combinations of enterprises across borders (mergers in

⁷ Rechtsformwahl in der EU nach der Änderung der Mutter-Tochter-Richtlinie', *GmbHHR* 2005, 1397. On this Directive see below III.

⁸ Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (and Final Act) of 23.7.1990, OJ 1990 L 225/10 and 17; Proposal (then still Proposal for a Directive) OJ 1976 C 301/4 = COM(76) 611 final; Opinions OJ 1977 C 163/24 (European Parliament); 1978 C 18/27 (Economic and Social Committee). On this connection see below III.

⁹ Today Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ 2009 L 310/34; Opinion OJ 2009 C 100/158 (European Economic and Social Committee); for further developments see Ernst & Young (E&Y), *Survey on the implementation of Council Directive 90/434/EEC*; see formerly: Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE, between Member States, OJ 1990 L 225/1; Proposal OJ 1969 C 39/1 = COM(69) 5 final; Opinions OJ 1970 C 51/12 (European Parliament); 1969 C 100/4 (Economic and Social Committee); then amended by Council Directive 2005/19/EC of 17 February 2005, OJ 2005 L 58/19; Proposal OJ 2004 C 96/21 = COM(2003) 613 final; Opinion OJ 2004 C 110/30 (Economic and Social Committee); transposed in Germany in: Gesetz über steuerliche Begleitmaßnahmen zur Einführung der Europäischen Gesellschaft und zur Änderung weiterer steuerrechtlicher Vorschriften (SEStEG), BGBl. I 2006, 2792 et seqq. The Merger Tax Directive was then amended again by Directive 2006/98/EC of 20 November 2006; see Benecke/Schnitzer, 'Änderungsrichtlinie zur Fusionsrichtlinie: Vermeidung der wirtschaftlichen Doppelbesteuerung und Aufnahme transparenter Gesellschaften – zwei unverfügbare Ziele?', *ISfR* 2005, 606 and 641; Schindler, 'Generalthema II: Die Änderungen der Fusionsbesteuerungsrichtlinie', *ISfR* 2005, 551. For an earlier proposal for amendment see below N. 12; (broad) comparative law survey on the whole of corporate taxation in: Martínez-Serrano/Patterson, *Taxation in Europe – Recent Developments, European Parliament – Directorate-General for Research, Working Paper, ECON 131 EN*, (01-2003); and more specifically on the Directive: Loyens/Lefebvre/Rädler (eds.), *Merger Directive*; Lang (ed.), *Unternehmensbesteuerung*; Saß, DB 1993, 1892; see also the chart in Jacobs, *Internationale Unternehmensbesteuerung*, 170; transposed in Germany in: StändG (see above N. 6), BGBl. 1992 I, 146 (on this part of the law Herzog/Förster, DB 1992, 911 and 959) and Gesetz zur Änderung der Umwandlungssteuerrechts, BGBl. 1994 I, 3267 and Gesetz zur Beibehaltung der Mitbestimmung beim Austausch von Anteilen und der Einbringung von Unternehmensteilen, die Gesellschaften verschiedener Mitgliedsstaaten der europäischen Union betreffen (Mitbestimmungs-Beibehaltungsgesetz – MitBestBeG), BGBl. 1994 I, 2228; mainly §21 para. 1, 23 and 26 para. 2 UmwStG. On this Directive see

the economic sense), and now also with the transfer of the registered office of supranational types of company (SE and SCE), and it further prohibits in principle the taxation of profits (not realised in cash) from such transactions. It does so in order not to burden these transactions (in the case of a cross-border realisation) with prohibitively high tax duties.

4. The two Directives stand alone. Their adoption, after lengthy preparatory work,⁹ came as a surprise.¹⁰ Looking back, one cannot see in them the starting point for a far-reaching harmonisation of corporate taxation, even though the most recent initiatives have already lead to one more adopted measure and may seem more promising again (below §32 para. 21 et seq.). Beyond this, however, consideration must also be given to the influence of the ECJ case law on fundamental freedoms as applied to national tax law, which focuses in part on questions of taxation of cross-border structural change and organisation of enterprises (above §4 para. 36).¹¹

II. MERGERS, (PARTIAL) DIVISIONS, TRANSFER OF (PARTS OF) PRODUCTION UNITS AND EXCHANGE OF SHARES (MERGER TAX DIRECTIVE)

1. Personal Scope of Application (Art. 3)

*5. The Merger Tax Directive (above §32 para. 3) applies to all limited liability companies, covering the PLC, the private limited company, the partnership limited by shares, and similar types (see Art. 3(a) and Annex), i.e. largely to all types of company subject to corporate (and not income) taxation (see Art. 3). However, other types of business organisations, mainly partnerships, can, if they are bearers of rights, meet with the same problems described below – primarily making hidden reserves available – and therefore it had been proposed to extend the personal scope of application, albeit only really to cover all companies subject to corporate taxation.¹² The amendment in 2005,

⁹ The Proposal had been drafted 20 years before, and in between there had been all the steps mentioned above in N. 4. On the history see: Campbell, 'EEC approach on corporate fiscal policy', (1989) 10 *The Company Lawyer*, 186 (186); Kellersmann/Treich, *Unternehmensbesteuerung*, 87-90; Terra/Wattel, *European Tax Law*, 189 et seqq.; Tsourouflis, *Harmonisierung*, 40-49.

¹⁰ Daniëls, in: Wouters/Schneider (eds.), *Current Issues of Cross-Border Establishment of Companies in the European Union*, 91 (91); Knobbe-Keuk, AG 1990, 435 (436); Lutter, *Europäisches Unternehmensrecht*, 796.

¹¹ On indirect harmonisation in European Tax Law via the ECJ see Kingston, (2007) 44 *CMLR* 1321; Lenaerts, *EuR* 2009, 728; Borgsmidt, *ISfR* 2007, 802; Wunderlich, *EuR* 2007, 7.

¹² Proposal of 26 July 1993 for a Directive amending Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, OJ 1993 C 225/3; Opinion of the European Parliament OJ 1994 C 128/89; see Tsourouflis, *Harmonisierung*, 53 et seq.; in this sense mainly

however, added only a few legal entities to the scope of application, in particular supranational types of companies (SE and SCE, see below §33 et seq.). On the other hand, the Directive now provides for so-called 'transparent entities', i.e. companies which, on the basis of an assessment of their specific legal characteristics, are considered fiscally transparent in one of the concerned Member States and which are therefore not accepted as separate tax subjects under that tax regime. Shareholders resident in the Member States in question therefore risk double taxation. Specific provisions (Art. 4(3) and 8(3)) ensure that the benefits of the Directive remain available even in these cases, subject to certain exceptions (Art. 11). The Merger Tax Directive has been amended so often that the EU Commission finally replaced Directive 90/434/EEC by Directive 2009/133/EC (First Recital). The result is, however, mostly the same. The consolidation changed only some minor details of the structure of the text (see Annex III, Synopses), leaving the content basically unchanged.

2. Structural Measures Covered (Art. 1 et seq.)

6. Furthermore, the range of structural changes covered according to Art. 2(a-k) is rather broad. The substantive scope of application comprises **all economically comparable situations** independently of legal construction, as discussed more specifically below.

a) Merger and (Partial) Division in the Narrow Sense

7. The first measures included are merger (Art. 1(a)) and division in the technical sense (Art. 1(b)) – the merger with the characteristics prescribed by the Third (Merger) Directive, i.e. transfer of all assets and liabilities, without winding up the transferring company and compensation in shares, with a cash payment of up to 10%. This covers the merger by acquisition and formation of a new company (on all this above §28 para. 10, 12), but the rules also apply to the transfer of all assets and liabilities to a 100% parent company (functionally equivalent). The division is – again – defined as in the Sixth (Division) Directive, with the elements of transfer of all assets and liabilities without the winding up of the company terminated and with compensation of its shareholders in the form of shares in the acquiring companies, with a cash payment of up to 10%. Henceforth, the Directive also includes partial divisions ("spin-offs"), i.e. transactions transferring only one or more branches of activity to one or more existing or new companies, but leaving at least one branch of activity in the transferring company (Art. 2 lit.c) What really matters, then, is that there is (virtually) no liquid form of payment, but the transfer of an enterprise – or part

of it – in exchange for shares in the acquiring company: the shareholders do not receive cash out of which taxes can be paid.

b) Transfer of (Parts of) Production Units

8. The transfer of individual parts of a company – production units or a part of them – in exchange for shares in the acquiring company is economically equivalent (Art. 1(d)). Although, unlike in cases of merger or division, the transferring company continues to exist, it does not receive cash payments (nor therefore do its shareholders), but 'only' shares in the acquiring company that continues this part of the business. An additional cash payment does not need to be allowed, because the compensation goes entirely to the transferring company and therefore there is no problem of fractions of shares not completely matching in the exchange and requiring a cash top-up. The transferring company – not its shareholders – receives that compensation, which distinguishes the transfer of production units from partial division. A line has also to be drawn between the transfer of (parts of) production units and a **transfer of individual assets**, which, even if compensated by shares in the acquiring company, is considered part of current business operations and does not profit from the tax neutrality described here (mainly no taxation of hidden gains).¹³

c) Exchange of Shares and Takeovers

9. The acquisition of a majority of the voting stock in a company, with compensation of the shareholders who sell in the form of shares in the acquiring company (Art. 1(e)),¹⁴ for instance in a hostile takeover, is also economically equivalent. Again, the selling shareholder does not receive payment in any liquid form, but only his participation is restructured. Again an additional cash payment of up to 10% is irrelevant. Share dealing and takeover, which, from a private law perspective, are arranged in such a fundamentally different way from mergers, but which economically form the second form of a 'merger' in the broad sense, i.e. of external growth (above §25 para. 12–14, §28 para. 2), are thus treated like a merger in the narrow sense under tax law.

¹³ Critical in this respect and pleading for a broad scope of application (whenever compensation is granted in the form of shares in the acquiring company): Dautzenberg, *Unternehmensbesteuerung*, 222; Kellersmann/Treich, *Unternehmensbesteuerung*, 223; on more recent projects of the EC Commission in this respect see also below §32 para. 23.

¹⁴ Applicable independently of whether the shareholder is a company or a natural person or the

then more generally COM(2001) 582 final, 14 and 17 (on all this see below §33 para. 21 et seq.); pleading even for an extension to partnerships Debatin, *BB* 1991, 947 (953). There should

d) Cross-Border Transfer of Seat (Application by Analogy)?

10. Since its recent amendment, the Directive also applies to the transfer of the registered office of supranational types of company (SE and SCE, Art. 10b–10d). Such companies enjoy tax deferral on capital gains where their assets remain connected with a permanent establishment situated in the Member State from which they are moving. The shareholders of such companies are not to be liable for tax on this occasion. The question is whether the regime described can also be extended to other forms of cross-border structural change. This could be considered for a transfer of seat in particular, because the transfer of seat could also be realised by a cross-border merger with a (specially) newly created company abroad, and because the ECJ does not accept obstacles to cross-border trade nor qualify them as justified by mandatory reasons in the general interest if the safeguard is not ‘watertight’, i.e. when it can be circumvented by an equivalent arrangement.¹⁵ In any case, the EU Commission has also given consideration to an extension of the regime to include cross-border transfers of seat.¹⁶ It is not clear how to understand the amendment of 2005 and the new codification in 2009. Does the Commission still think that ECJ case law is sufficient, and therefore no action needs to be taken, or is the amendment, not covering the transfer of seat of national law companies, simply less far-reaching?

3. Overview of the Tax Regime (Art. 4–10)

a) Key Problem and Basic Idea

11. Many national tax laws, in the case of transnational structural change, have regarded the outgoing company as being wound up (at least for tax purposes). Profits resulting from a surplus of the current value over the purchase price or the costs of production (potentially many years ago), i.e. mainly hidden reserves, have been taxed,¹⁷ although the added value is only one on the books and is not

available to the company in cash. This placed a prohibitively heavy burden on the transaction which had to be met out of the company's material assets (in the absence of any cash flow). The basic intention of the Directive is described in Recitals 5, 6 and 7: legitimate tax interests should not have to be foregone by any Member State, but if they could be served in a different way, the most lenient solution had to be chosen. If this is possible, taxation should be delayed because there is no cash flow, i.e. all means remain tied to the investment. Hidden reserves could not have been taxed anyway if the enterprise had continued without any change. Therefore, tax neutrality had to be secured in the sense that the structural change as such should not, in principle, trigger taxation of (fictitious) gains at the level of the company or at the level of the shareholders, but should be instead delayed until the profits were in fact realised, i.e. there really was a cash flow.¹⁸ This is exactly what is guaranteed in Member States in domestic cases.

b) Tax Neutrality at the Level of the Company (Art. 4–7, 9 et seq.)

12. At the level of the company, tax neutrality is a problem only if the ownership in assets or the legal personality of the owner changes and profits from transactions are therefore conceivable. This is the case in mergers and (partial) divisions (Art. 4–7, 10) and in situations where (parts of) production units or registered offices (of an SE or SCE) are transferred (Art. 9¹⁹, 10, 12 and 13), not in the case of mere exchange of shares, takeover, which therefore are only mentioned in Art. 8 (see below §32 para. 15). The following rules therefore apply identically to mergers, (partial) divisions and transfers of production units and registered offices (of an SE or SCE).

13. The main object of reflection is the establishment (Art. 4, 10 and 12). If it is located in the Member State of the transferring company, that State retains competence to levy taxes under the principle of territoriality anyway. Making hidden reserves available (above §32 para. 11) is not needed, not justified and not admitted under the Directive if the (tax) value on the books is maintained by the

United Kingdom Woolridge, *Company Law in the United Kingdom and Europe*, (1991), 8. Comparative law survey on France, Belgium and the Netherlands in Loyens/Lefebvre/Rädler (eds.), *Merger Directive*.

¹⁸ In more detail on this basic idea: Cussons/Robinson, ‘The Mergers Directive’, (1992) *Taxation*, 160 (160); Daniëls, in: Wouters/Schneider (eds.), *Current Issues of Cross-Border Establishment of Companies in the European Union*, 91 (91–93); Kellersmann/Treichl, *Unternehmensbesteuerung*, 223 et seq.; Lutter, *Europäisches Unternehmensrecht*, 807; Schön, ‘Die Europäische Aktiengesellschaft im Steuerrecht’, in: Deutsches Aktieninstitut (above N. 15), 75 (81–83); Terra/Wattel, *European Tax Law*, 536–543; Tsourouffis, *Harmonisierung*, 66.

¹⁹ Art. 9 refers wholesale to Art. 4–6, and Art. 7 is irrelevant if production units are contributed

¹⁵ ECJ case C-212/97 *Centros* [1999] ECR I-1459 (1495 para. 35). For this line of argument see Grundmann, ‘Grenzüberschreitende Sitzverlegung und grenzüberschreitende Fusion’, in: Deutsches Aktieninstitut (ed.), *Die Europa AG – eine Perspektive für deutsche Unternehmen*, (2003) (fasc. 21), 47 (62); similar, partly emphasising an (EC law) equal treatment principle: Eilers/Schmidt, ‘Diskriminierungsverbot gegenüber ausländischen EU-Kapitalgesellschaften nach dem EuGH-Urteil Saint Gobain vom 21.9.1999’, *DStR* 1999, 1977 (1980); Förster/Lange, *RfW* 2002, 585 (586); and the tax law-related case notes on *Centros*: Sörgel, *DB* 1999, 2236 (2237); also Kloster, ‘Societas Europaea und europäische Unternehmenszusammenschlüsse’, *EuZW* 2003, 293 (300); see also the impact assessment by the EU Commission in 2007, SEC(2007) 1707, p. 49 et seq., available at: http://ec.europa.eu/internal_market/company/seat-transfer/index_de.htm.

¹⁶ COM(2001) 582 final, 12 (via better publication of and guidance on ECJ rulings).

¹⁷ For Germany §11 or at any rate §12 KStG; Hügel, ‘Steuerrechtliche Hindernisse bei der internationalen Sitzverlegung’, *ZGR* 1999, 71 (96–105); Merkt, ‘Das Europäische Gesellschaftsrecht

acquiring company (Art. 4).²⁰ The reason is, when profits are later realised, taxation is still possible and at the same amount. Conversely, an establishment in the Member State of the acquiring company was, in principle, already not subject to taxation in the State of the transferring company. Therefore, it seemed acceptable to prescribe that that State now renounced taxation of these assets once and for all (Art. 10).²¹ It may, however, tax (hidden gains etc.) from other assets not clearly located in one country (goodwill or in part also know-how) – although this is not very evident from the text – because these assets are now withdrawn from its tax reach once and for all.²² Participations in the acquiring company may not be re-valued either (Art. 7).

14. This core rule (Art. 4, 10 and 12) is supplemented by two ancillary rules which are about conserving advantageous tax situations for the company: under Art. 5, the acquiring company may continue to keep provisions or reserves for liabilities and charges which were related to the establishment in the Member State of the transferring company – otherwise the taxable profits would increase. According to Art. 6, however, discrimination is prohibited only in the following situation: (only) if domestic law would allow it may the acquiring company, including in the cross-border situation, carry over losses not yet credited (against profits now realised). The same two rules apply to the transfer of the registered office of an SE or an SCE (Art. 13 (1) and (2)).

c) Tax Neutrality at the Level of the Shareholders (Art. 8)

15. There is tax neutrality also at the level of the shareholders. According to Art. 8, **fictitious sales profits may not be taxed** unless the shareholder values the compensation received in the form of shares higher in his tax balance sheets, i.e. they may not be taxed whenever the sales profits realised later are fully available for taxation. The additional cash payment may be taxed (in the part exceeding book value). This rule was necessary and applies only insofar as shareholders transfer (exchange) shares they held, i.e. in cases of merger, division, and also exchange of shares and takeover. Art. 14 therefore only clarifies that, as long as no shares are transferred, the transfer of the registered office of an SE or an SCE does not, in and of itself, give rise to any taxation of the income, profits or capital

²⁰ On this idea see Cussons, (1993) *British Tax Review*, 105 (109 et seq.); Farmer/Lyal, *EC Tax Law*, 286; Herzig/Griemla, *StuW* 2002, 55 (62); Schön (N. 18); Kellersmann/Treisch, *Unternehmensbesteuerung*, 223 et seq.

²¹ In more detail on this situation (comparing this regime with national law or double taxation treaties which would otherwise apply): Herzig/Griemla, *StuW* 2002, 55 (62 et seq.); also Cussons, (1993) *British Tax Review*, 105 (110); Schön (above N. 18); Terra/Wattel, *European Tax Law*, 546 et seq.

²² See for this legal consequence (undisputed): Farmer/Lyal, *EC Tax Law*, 286; Herzig/Griemla,

gains of the shareholder (as long as the relevant shares are not transferred, see Art. 14 (2)).

4. Direct Application (see Art. 15)

*16. Direct application of the Directive is a problem. While the Directive seems indeed to be 'sufficiently precise' within the meaning of the case law of the ECJ and would have to be applied in a vertical relationship (on these conditions see above §5 para. 15), it may not be unconditional as required by the ECJ because any Member State can make reservations under Art. 15.²³ This question was important in cases where Member States had transposed the directive only in part – like Germany – or not at all (see preceding edition of this book). On the other hand, the legislative decision not to provide a private law tool for cross-border mergers was already difficult to maintain after the *Überseering* case, and finally also Germany transposed Directive 2005/19/EC²⁴ – thus rendering the proviso contained in Art. 15 (1) (b) obsolete which could be invoked in countries with employee participation regimes (such as Germany).

III. COMBATING DOUBLE TAXATION IN GROUPS OF COMPANIES (PARENT-SUBSIDIARY TAXATION DIRECTIVE, ARBITRATION CONVENTION, AND INTEREST AND ROYALTY PAYMENTS DIRECTIVE)

1. Scope of Application (Art. 2 et seq.)

*17. The Parent-Subsidiary Taxation Directive (above §32 para. 2) also applies to all limited liability companies, covering the PLC, the private limited liability company, the partnership limited by shares and similar types (see Art. 2 and Annex), i.e. largely to all

²³ On these conditions of direct effect see above §5 para. 15. Nevertheless in favour of applying the Directive directly: Cussons/Robinson, (1992) *Taxation*, 160 (161); Kallmeyer, 'Das neue Umwandlungsgesetz – Verschmelzung, Spaltung und Formwechsel von Handelsgesellschaften', *ZIP* 1994, 1746 (1752); Herzig/Förster, *DB* 1994, 1 (6 note 29); Lutter, 'Umstrukturierung von Unternehmen über die Grenze – Versuch eines Resümees', *ZGR* 1994, 87 (92); contra Voß, in: Dausen (ed.), *Handbuch*, para. J 134; only in very specific cases Krebs, *ZGR* 1992, 346 (352 et seq.).

²⁴ Gesetz über steuerliche Begleitmaßnahmen zur Einführung der Europäischen Gesellschaft und zur Änderung weiterer steuerrechtlicher Vorschriften (SEStEG) BGBl. 2006 I, 2782; see Heckschen, 'Die Reform des Umwandlungssteuerrechts', *DNotZ* 2007, 444; Rödder, 'Das SEStEG – Überblick über die endgültige Fassung und die Änderungen gegenüber dem Regierungsentwurf', *DSR* 2007, 369; Schumacher/Neumann, 'Ausgewählte Zweifelsfragen zur Auf- und Abspalterung von Kapitalgesellschaften und Einbringung von Unternehmensteilen in Kapitalgesellschaften', *DSR* 2008, 325; Kussmaul/Richter/Heyd, 'Ausgewählte Problemfelder der Hinausverschmelzung von Kapitalgesellschaften aus Deutschland', *JSR* 2010, 73; Frotscher, 'Zur Vereinbarkeit der "Betriebsstättenbedingung" bei Sitzverlegung und grenzüberschreitender Umwandlung mit Grundfreiheiten' *JSR* 2006, 65; on the draft see

types of company subject to corporate (and not income) taxation.²⁵ The name 'Parent-Subsidiary Taxation Directive' is misleading insofar as in fact no group in the narrow sense is needed, but instead it suffices if there is a significant participation, which is presumed to exist in the case of holdings of a minimum percentage of the capital, the Member States being entitled to prescribe (unilaterally) that such position had to be maintained for at least two years. While these thresholds used to be set at 25%, the recent amendment lead to a gradual reduction to 10% until 1 January 2009 (Art. 3 (1) (a)).²⁶

2. Overview of the Tax Regime (Art. 4–7)

18. For current business operations, the basic idea in all directives is that the international case should not be discriminated against as compared with the domestic case, but not be privileged either.²⁷ The Parent-Subsidiary Taxation Directive provides for a (partial) solution to the problem of double taxation of the same profit in groups of companies, which would put them at a disadvantage if compared with one unitary structure and typically also if compared with a group whose members are all subject to the same law and thus enjoy a regime of rules well adjusted to one another. Therefore, the Directive had to regulate taxation of profits distributed by the subsidiary to the parent company for the former as well as the latter (Art. 1, now also including distributions via permanent establishments in other Member States). Since its amendment, the Directive also covers the distribution of profits within chains of subsidiaries (distributions of "grandchildren" companies, Art. 4 (1)). It regulates, however,

²⁵ With respect to the scope of application, critics and initiatives for change, everything explained above in §32 para. 5 applied until recently. An extension to all companies subject to corporate taxation had been proposed by: Proposal of 26 July 1993 for a Council Directive amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ 1993 C 225/5; Opinion of the European Parliament OJ 1994 C 128/90. The 2005 amendment of the Directive added in fact numerous legal entities to the scope of application, in particular certain co-operatives, mutual companies, certain non-capital based companies, savings banks, funds and associations with commercial activity (see Art. 2 and Annex). In particular, the new list also includes supranational types of company (SE and SCE, see below §33).

²⁶ Evident in all this is the limitation of harmonisation to (significant) participations which are held for business reasons, although there certainly is an interest in, and an internal market would require, avoiding double taxation also below this threshold. Therefore pleading for a considerable reduction of the threshold: Ruding Report (above N. 3), 203; later also proposed by the EC Commission (preceding N.), COM(2003) 462 final, 5 (in future 10%). That there is a minimum term for the participation is acceptable also from a freedom of establishment point of view, see: Terra/Wattel, *European Tax Law*, 484 et seqq; Dautzenberg, *Unternehmensbesteuerung*, 483 et seq. (however, then retroactive effect); Kellersmann/Treich, *ISfR* 1996, Bell. Heft 2, 13 et seq.; on questions of computation of time limits see ECJ joined cases C-283/94, 291/94 and 292/94 *Denkavit* [1996] ECR I-5063.

²⁷ In this sense also for supranational types of company the references given below in §33 N.

only (all) transfers of profits realised in current business operation, and not also in a winding-up situation (Art. 4, introductory words).²⁸

19. The Directive starts, of course, from the assumption that profits are taxed in the subsidiary because they are realised there (principle of territoriality). There is a prohibition only at a later stage, i.e. when the profits are transferred to the parent company; more precisely, that this outflow of cash from the subsidiary shall not be (additionally) taxed by a tax at source (on the dividends) (Art. 5(1), definition Art. 7(1)).²⁹ The Member State of the parent company should be given the possibility of exempting this company completely from any tax burden besides corporate tax on the profits levied on the subsidiary (by using the exemption method).³⁰ The Directive does not, however, guarantee that the Member State of the parent company actually uses the (more liberal) exemption method, insofar as it contains a compromise. However, it also prohibits the cumulation of corporate taxation in both countries with respect to the parent company: the Member State of the parent company can only choose to either exempt the parent company completely and not levy any tax on the profits realised by the subsidiary (not computing these proceeds as the profits of the parent company at all, the 'exemption method') or at least credit the taxes paid by the subsidiary (Art. 4). In the first case, solely the tax rate in the Member State of the subsidiary applies, in the second (in the result) the higher of the two tax

²⁸ This also covers hidden distribution of profits or profits from reductions of capital: Thömmes/Fuks, *EC Tax Law*, 6.1 para. 11–17; Kellersmann/Treich, *Unternehmensbesteuerung*, 210 et seq.; Sapusek, *Analyse*, 933–935; apparently different the practice in France, see Loyens/Lefebvre/Rädler (eds.), *The Parent-Subsidiary Directive*, 11.

²⁹ On the interpretation of Art. 5(1) by the ECJ see case C-284/06 *Burda* [2008] ECR I-4571 and very recently ECJ case C-338, 339/08 *Ferrero* [2010] ECR I-0000; see also Meißel/Bokeloh, 'Neuere Erkenntnisse für die Anwendung primären und sekundären EU-Rechts aus der Rechtssache Burda?', *DB* 2008, 2160; Rainer, 'Beseitigung der Doppelbesteuerung von Gewinnausschüttungen nach der Mutter-Tochter-Richtlinie', *EuZW* 2009, 329 (333); Sedemund, *EuGH*: §28 para. 4 KStG 1996 – kein Verstoß gegen die Mutter-Tochterrichtlinie, kein Verstoß gegen die Niederlassungsfreiheit', *BB* 2008, 1823 (1830); case note ECJ case C-338, 339/08 by Brill, *GWR* 2010, 360.

³⁰ Kellersmann/Treich, *Unternehmensbesteuerung*, 212; for an EC law (autonomous) interpretation of the term 'tax reduction at source': ECJ case C-375/98 *Epson Europe* [2000] ECR I-4243 (especially 4274–4276 para. 23–27); and also ECJ case C-294/99 *Athinaiki Zythopoiia* [2001] ECR I-6797 (6824–6827 para. 23–33) (higher basis of assessment in the case of distribution than in the case of ploughing-back is unlawful). Comparative law for the treatment of distribution of profits between affiliated companies: Loyens/Lefebvre/Rädler (eds.), *The Parent-Subsidiary Directive*; Grotherr, 'Die unterschiedlichen Konzernbesteuerungssysteme in den Mitgliedstaaten der Europäischen Union – eine steuersystematische Analyse im Hinblick auf Reformüberlegungen beim steuerlichen Organschaftskonzept', *StuW* 1996, 356; Lang (ed.), *Unternehmensbesteuerung*: also table in Jacobs, *Internationale Unternehmensbesteuerung*, 165; short description of the guiding principles in: Müller, in: Gassner/Lang (eds.), *Besteuerung und Bilanzierung international tätiger Unternehmen*, (1998), 285 (294 et seq.); on group tax regimes, see also in the country reports in: Wymeersch (ed.), *Groups of Companies in the EEC – A Survey Report* (1993): 16 et seq. (Belgium), 88–90

rates.³¹ A tax at source can be levied in the Member State of the parent company when the dividend is received (Art. 6) (in anticipation of the corporate tax owed,³² in any case, however, crediting the taxes paid by the subsidiary).

3. Arbitration Convention and Standardisation of Intra-Group Chargeable Prices

*20. The Arbitration Convention deals with the problem that prices paid within a group are checked by fiscal authorities to see whether they are also reasonable according to market standards ('arm's length standard'), but that national laws define this standard differently and tax accordingly. The Convention is aimed at avoiding the situation where, in the case of diverging definition, an amount is taxed in one company, but cannot be deducted by the other. For this purpose, it provides for a consultation and (binding) procedure for decisions between the competent fiscal authorities. It thus helps avoid double taxation in a group of companies, but does not define which one of the two laws applies and even less does it harmonise the definition rules.³³ Practical tax complications faced by multinational affiliated enterprises are significantly reduced because the documentation they must provide to tax authorities on their pricing of cross-border intra-group transactions ("transfer-pricing documentation") is now standardised by a European Code of Conduct.³⁴ This code is based on the work of the EU Joint Transfer Pricing Forum that operates since 2002.³⁵

³¹ Stockmann, 'Should the Exemption Method have Priority over the Credit Method in International Tax Law?', (1995) 48 *BfD* 285; Kellersmann/Treich, *Unternehmensbesteuerung*, 211; also Vogel (ed.), *Freistellung im Internationalen Steuerrecht*, (1996). The problem that only first-tier subsidiaries, not second-tier subsidiaries ('grandchildren'), are caught (see Sapusek, *Analyse*, 936 et seq.), is about to be solved: see COM(2003), 462 final, 5 et seq.

³² Sapusek, *Analyse*, 938; Voß, in: Dausen (ed.), *Handbuch*, para. 141.

³³ In more detail Hinnekens, L., 'The European Tax Arbitration Convention and its legal framework', (1996) *British Tax Review*, 132 and 272; Kellersmann/Treich, *Unternehmensbesteuerung*, 232–238; Krabbe, *ISr* 1996, 5; Lutter, *Europäisches Unternehmensrecht*, 702–704; Sapusek, *Analyse*, 997–1010; Schelpe, 'The Arbitration convention: Its origin, its opportunities and its weaknesses', (1995) *EC Tax Review*, 68; Tsourouflis, *Harmonisierung*, 71–74; for practical problems: De Hosson, 'The slow and lonesome death of the Arbitration Convention', (2003) 31 *Intertax*, 482; Vögeler, 'Das EU-Schiedsübereinkommen', *ISr* 2006, 537. All authors also on the motivation of the Member States when choosing a convention instead of a directive and thus excluding the competence of the ECJ; on the most recent developments see Bödefeld, 'Verständigungs- und Schiedsverfahren nach dem EU-Schiedsabkommen – Theorie und Praxis', *ISr* 2009, 268.

³⁴ Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD), OJ 2006 C 176/1; on this topic see Beiser, 'Verrechnungspreise im Gemeinschaftsrecht', *ISr* 2008, 587.

³⁵ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of business taxation from October 2002 to December 2003 and on a proposal for a Code of Conduct for the effective implementation of the Arbitration

4. Interest and Royalty Payments Directive

*21. The Interest and Royalty Payments Directive³⁶ is aimed at equal treatment: Cross-border groups of companies or company-branch relationships and domestic ones should be treated equally with respect to intra-group or intra-company payments of interests and royalties (see recitals 1 and 2). This is limited, however, to interest (income from any kind of debt, see Art. 2 lit. a) and royalties (any kind of remuneration for the use of certain kinds of copyrights; Art. 2 lit. b) made cross-border between Member States. The exchange with third countries is not covered. The tax is not levied at source, either as withdrawal tax or as normal corporate tax.

IV. RECENT AND PENDING PROJECTS FOR CORPORATE TAXATION, ESPECIALLY WITH RESPECT TO CROSS-BORDER ORGANISATION OF COMPANIES

*22. A number of initiatives dealing with a rather well defined problem have recently been adopted or are pending. Whereas the more general proposals which would have harmonised the system and core components of corporate taxation appear to be obsolete, namely the Proposals for harmonisation of corporate tax systems³⁷ and of the computation of profits,³⁸ the situation is less hopeless in the case of some more narrowly defined

³⁶ Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ 2003 L 157/49; (amended) Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States of 6 March 1998, OJ 1998 C 123/9 = COM(98) 67 final; Opinion OJ C 313/152 (European Economic and Social Committee); on the transposition in Germany: Dörr, 'Praxisfragen zur Umsetzung der Zins- und Lizenzrichtlinie in §50g EStG', *ISr* 2005, 109. An earlier proposal in OJ 1991 C 53/26; see Weber, (2000) *EC Tax Review*, 15; Carl, 'Neue Vorschläge der Kommission zur Unternehmensbesteuerung', *EuZW* 1991, 369; Jacobs, *Internationale Unternehmensbesteuerung*, 179 et seq.; Kellersmann/Treich, *Unternehmensbesteuerung*, 241–248; Lutter, *Europäisches Unternehmensrecht*, 828, Spusek, *Analyse*, 1038–1047, see as well Rach, *Konzernverrechnungspreise*.

³⁷ Proposal for a Directive of the Council concerning the harmonisation of systems of company taxation and of withholding taxes on dividends, OJ 1975 C 253/2; on the key question of bringing into line the taxation of profits of the company and those of the shareholders, and tax rates. Rejected by the European Parliament (because not also harmonising the basis of assessment), OJ 1979 C 140/19, withdrawn officially (though still necessary): SEC(1990) 601 final, 10; on this Proposal Kellersmann/Treich, *Unternehmensbesteuerung*, 258–262; Sapusek, *Analyse*, 237 et seq.; Saß, *DB* 1993, 113; Tsourouflis, *Harmonisierung*, 293 et seq.; also Grotherr, 'Plädoyer für einen neuen Richtlinienvorschlag zur Harmonisierung der Körperschaftsteuersysteme im Europäischen Binnenmarkt', *DSr* 1992, 1388.

³⁸ Preliminary Draft of an EC Directive on the Harmonisation of national tax rules concerning the determination of the taxable profits of enterprises, 1988; not reported officially, but for instance by Zeitler/Tülpner, 'Europäische Steuerharmonisierung und direkte Steuern', *BB Suppl.* 17/1988. On the key question of how to compute profits; rejected by the Member States, who held that the Commission lacked competence: on the preliminary draft see Krüner, 'EC

projects. With the Interest and Royalty Payments Directive, one of these proposals has been realised in the last few years (see §32 para. 21). Moreover, a Proposal is again being discussed concerning the recognition of losses made abroad within a group of companies. Under the Directive, losses suffered by other members of the group could be credited against profits, thus reducing the tax burden, but as the discussion stands today, probably only as between branches and the primary establishment and not between subsidiaries and parent companies, i.e. not really in group relationships.³⁹ The code of conduct of 1 February 1997 (although not binding), which defines the cases of unfair tax competition and in which the Member States commit themselves to reducing the incidence of these cases (including installing a supervisory committee), should also be noted.⁴⁰

Taxable Profits of Enterprises', (1988) *European Taxation*, 319; Anders, 'Vorentwurf der EG-Richtlinie über die Harmonisierung der Gewinnermittlungsrichtlinien', *BB* 1989, 1384; Haase, 'EG-Gewinnermittlungsrichtlinie – Steuerbilanzpolitik nach Belieben?', *DB* 1989, 1205; Kellersmann/Treich, *Unternehmensbesteuerung*, 291–294; Kreile, 'Zum Vorentwurf einer EG-Richtlinie über die Harmonisierung der steuerrechtlichen Gewinnermittlungsrichtlinien', *DB Suppl.* 18/1988; Lutter, *Europäisches Unternehmensrecht*, 833–835 (with further references to older contributions); Sapusek, *Analyse*, 257 et seq.; Saß, *DB* 1993, 113; Tsouroulis, *Harmonisierung*, 327 et seq., especially 342 et seq.

³⁹ (Amended) 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, *OJ* 1991 C 53/30 = COM(90) 595; discussed again more recently, see COM(2001) 582 final, 11 et seq., 14 et seq. and COM(2003) 726 final, 9 et seq. (Commission initiative scheduled for 2004, but then Member States have instead been encouraged to recognise losses made abroad as far as possible); today probably even case law of the ECJ already, see ECJ case C-141/99 *AMID* [2000] ECR I-11619 (11643 et seq. para. 27–33); case note Menhorn, *Steuer & Wirtschaft International* 2001, 62; also ECJ case C-264/96 *ICI* [1998] ECR I-4695 (4720–4724 para. 18–30); ECJ case C-200/98 *X AB and Y AB* [1999] ECR I-8261 (8284–8286 para. 24–30); ECJ joined cases C-397/98 and 410/98 *Metallgesellschaft/Hoechst* [2001] ECR I-1727 (1774–1782 para. 41–76); on this Proposal (and on a proposal – now obsolete – to deal with the parallel question in domestic situations); Meussen, 'The Marks & Spencer case: Reaching the boundaries of the EC Treaty', (2003) *EC Tax Review*, 144 (147 et seq.); Carl, *EuZW* 1991, 369; Grotherr, 'Zur Einführung einer EG-weiten grenzüberschreitenden Verlustberücksichtigung ausländischer Tochtergesellschaften', *RfW* 1994, 1017; Jacobs, *Internationale Unternehmensbesteuerung*, 176–179; Kellersmann/Treich, *Unternehmensbesteuerung*, 282–291; Lutter, *Europäisches Unternehmensrecht*, 816 et seq., 820 et seq.; Sapusek, *Analyse*, 1010–1038; Saß, 'Zum EG-Richtlinien-vorschlag vom 28.11.1990 über den Abzug von Verlusten ausländischer Betriebsstätten und Tochtergesellschaften', *BB* 1991, 1161; id., 'Zur Berücksichtigung der Verluste ausländischer Tochtergesellschaften bei der inländischen Muttergesellschaft in der EU', *BB* 1999, 447; Stockmann, *Verluste*; Rehm/Feyerabend/Nagler, 'Die Renaissance der grenzüberschreitenden Verlustrechnung', *ISfR* 2007, 7; Scheunemann, 'Praktische Anforderungen einer grenzüberschreitenden Verlustberücksichtigung im Konzern in Inbound- und Outboundfällen nach der Entscheidung Mark & Spencer', *ISfR* 2006, 145; also Wagner, 'Kritische Analyse der neuen Regelungen über die Kapitalertragssteuer bei grenzüberschreitenden Ausschüttungen aus Sicht von EuGH und BFH', *Der Konzern* 2008, 332 (334 et seq.).

⁴⁰ *OJ* 1998 C 2/2 Annex 1; on this, for instance, Osterweil, 'The OECD and the EU – Two Approaches to Harmful Tax Competition', (1999) 3 *EC Tax Journal* 89; Schön, 'European Association of Tax Law Professors – Tax Competition in Europe – The National Perspective', *European Taxation* 2002, 490; Kellersmann/Treich, *Unternehmensbesteuerung*, 238–241; see

*23. Today, there is also a more general initiative for corporate tax law. It is based on two Communications from the EU Commission to the Council of 15 June and 23 October 2001 on the priorities of a future corporate tax law arrangement in the Union.⁴¹ With most of the short-term initiatives of this – quite extensive – programme now being adopted (in particular, measures on unfair tax competition, the mentioned Directive on interest/royalties, and the amendment of the Merger Tax and the Parent-Subsidiary Taxation Directives), the European legislator now can concentrate on a Common Consolidated Corporate Tax Base (CCCTB), whereby the group may opt to be taxed on a consolidated basis (on the basis of, but not formally linked to, IFRS), so that all the problems relating to the treatment of losses, intra-group prices and transfer of profits would disappear, and the added revenue would have to be divided between the Member States – very recently cast into a highly promising proposal for a directive.⁴² With a particular focus on small- and medium-sized enterprises (SMEs), the EU Commission moreover explores the concept of 'Home State Taxation'.⁴³ By computing the profit of corporate groups exclusively according to the tax rules applicable to the parent company of the group, this concept would extend the mutual recognition approach also to company taxation and thereby enable SMEs to use only the tax rules with which they are already familiar. Member States, however, still seem rather sceptical. The EU Commission has also furthered the 'good governance' project in tax law – following the decisions taken by the ECJ in the *Cadbury Schweppes plc.* and *Test Claimants in the Thin Capitalisation Group Litigation*.⁴⁴ This project is mainly about transparency, exchange of information between the Member States and a fair framework of tax competition.

⁴¹ COM(2001) 260 final and 582 final; again COM(2003) 462 final, 4 and COM(2007) 223 final; in detail: *European Taxation, Special Issue*, Company Tax Reform in the European Union: Targeted Measures and Comprehensive Proposals, 8/2002; also Göpfarth, *Besteuerung*, 141–170; Kellersmann/Treich, *Unternehmensbesteuerung*, 91–94; Schön (above N. 18), 75 (91–94); Wehrheim/Marquardt, *ISfR* 2003, 14.

⁴² COM (2006) 157 final = *OJ* 2006 C 184/11 and already COM (2005) 532 = *OJ* 2006 C 70/5; supported by the European Parliament (Resolution on taxation of undertakings in the European Union: a common consolidated corporate tax base, 2005/2120(INI), so-called 'Bersani Report') and the Economic and Social Committee, Exploratory opinion ECO/165, 14 February 2006. More in detail: Czakert, 'Der Stand der Arbeiten an einer gemeinsamen konsolidierten Körperschaftsteuer-Bemessungsgrundlage in der Europäischen Union', *ISfR* 2006, 561; Gammie/Giannini/Klemm, *Achieving a Common Consolidated Corporate Tax Base in the EU*, 2006; now proposal for a Directive on a Common consolidated Corporate Tax Base of 16 March 2011, COM (2011) 121 final; first surveys by Munin, (2011) 20 *EC Tax Review* 121; Martinez Arias/Alvarez Garcia/Fernandez Rodriguez, (2011) 20 *EC Tax Review* 41; Weber in: Weber, 941–1028; Förster/Krauss, *ISfR* 2011, 607; Scheffler/Krebs, *DSTR, Separatum* 2011/12.

⁴³ COM (2005) 702 final and already COM (2003) 726 = *OJ* 2004 C 96/30; equally supported by the European Parliament in the 'Bersani Report' (previous note) and the Economic and Social Committee, *OJ* 2006 C 159/58. For a more extensive outline, see Gammie/Lodin, *Home State Taxation*, IBFD 2001.

⁴⁴ In April 2009, the EU Commission published a communication on 'good governance' in tax law: COM(2009) 201 final. The Communication on the application of anti-abuse measures in the area of direct taxation was published in December 2007 (COM[2007] 785 final). The lead cases are ECJ case C-196/04 *Cadbury Schweppes* [2006] ECR I-7665, and case C-524/04 *Test Claimants – Thin Capitalisation* [2007] ECR I-2107; see on this topic also de la Feria, 'Prohibition of abuse of (community) law: the creation of a new general principle of EC law