

Proposal 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

COM(90) 571 final

(Submitted by the Commission on 6 December 1990)

(91/C 53/02)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

HAS ADOPTED THIS DIRECTIVE:

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas, in a common market having the characteristics of a domestic market, transactions between companies in different Member States must not be subject to less favourable tax conditions than those applicable to the same transactions carried out between companies in the same Member State;

Whereas this requirement is not currently met as regards interest and royalty payments; whereas national tax laws coupled, where applicable, with bilateral agreements do not ensure complete elimination of double taxation, and whereas their application entails administrative formalities and cash-position problems for the companies concerned;

Whereas abolition of all withholding taxes on interest and royalty payments is the most appropriate means of eliminating such formalities and problems and of ensuring equality of tax treatment as between national and transnational transactions; whereas it is necessary, initially, to abolish withholding tax in respect of such payments of special importance made between parent companies and subsidiaries; whereas the arrangements should not apply under certain conditions where the payment is made to a permanent establishment of the recipient company located in the Member State of the debtor; whereas Greece and Portugal should, for budgetary reasons, be authorized to retain a withholding tax temporarily;

Whereas it is necessary to ensure that interest and royalty payments are actually taxed; whereas it is therefore necessary to permit Member States to take the appropriate measures to combat fraud or abuse,

Article 1

Member States shall exempt from any withholding tax interest and royalty payments made between parent companies and subsidiaries in different Member States.

Article 2

For the purposes of this Directive:

- (a) 'interest' means income from debt-claims of every kind, whether or not carrying a right to participate in the debtor's profits, including premiums and prizes attaching to bonds or debentures;
- (b) 'royalties' means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.

Article 3

For the purposes of this Directive, 'company of a Member State' means any company which:

- (a) takes one of the forms listed in the Annex hereto;
- (b) according to the tax laws of a Member State, is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;
- (c) is subject to one of the following taxes, without the possibility of an option or of being exempt in respect of the income covered by this Directive:
 - impôt des sociétés/vennootschapsbelasting in Belgium,
 - selskabsskat in Denmark,
 - Körperschaftsteuer in the Federal Republic of Germany,
 - φόρος εισοδήματος νομικών προσώπων κερδοσκοπικού χαρακτήρα in Greece,

- impuesto sobre sociedades in Spain,
- impôt sur les sociétés in France,
- corporation tax in Ireland,
- imposta sul reddito delle persone giuridiche in Italy,
- impôt sur le revenu des collectivités in Luxembourg,
- vennotschapsbelasting in the Netherlands,
- imposto sobre o rendimento das pessoas colectivas in Portugal,
- corporation tax in the United Kingdom,

or to any other tax which may be substituted for any of the above taxes.

Article 4

1. For the purposes of this Directive:

- (a) the status of parent company shall be attributed at least to any company in a Member State which fulfils the conditions set out in Article 3 and has a minimum holding of 25 % in the capital of a company in another Member State fulfilling the same conditions;
- (b) 'subsidiary' means that company the capital of which includes the holding referred to in (a).

2. By way of derogation from paragraph 1, Member States shall have the option of:

- replacing, by means of bilateral agreement, the criterion of a capital holding by that of a holding of voting rights,
- not applying this Directive to companies in their countries which do not retain, for an uninterrupted period of at least two years, holdings qualifying them as parent companies, or to those companies in their countries in which a company in another Member State does not retain such a holding for an uninterrupted period of at least two years.

Article 5

Notwithstanding Article 1, Greece and Portugal may levy a withholding tax on interest and royalty payments made by subsidiaries to parent companies in other Member States until a date not later than the end of the seventh year following the date of application of this Directive.

Subject to the existing bilateral agreements concluded between Greece or Portugal and a Member State, the rate of this withholding tax may not exceed 10 % during the first five years and 5 % during the last two years of that period.

Before the end of the seventh year, the Council shall decide unanimously, on a proposal from the Commission, on a possible extension of the provisions of this Article.

Article 6

The provisions of this Directive shall apply to interest and royalty payments made to a permanent establishment of the recipient company located in the Member State of the debtor company only if that Member State does not apply withholding tax to payments of the kind made between resident parent companies and subsidiaries.

Article 7

This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.

Article 8

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1993.

They shall immediately inform the Commission thereof.

When Member States adopt these measures, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall ensure that the texts of the main provisions of national law which they adopt in the field covered by this Directive are communicated to the Commission.

Article 9

This Directive is addressed to the Member States.

ANNEX

List of forms of companies referred to in Article 3

- (a) companies under Belgian law known as 'société anonyme'/'naamloze vennootschap', 'société en commandite par actions'/'commanditaire vennootschap op aandelen', 'société privée à responsabilité limitée'/'besloten vennootschap met beperkte aansprakelijkheid' and those public-law bodies that operate under private law;
- (b) companies under Danish law known as: 'aktieselskab', 'anpartsselskab';
- (c) companies under German law known as: 'Aktiengesellschaft', 'Kommanditgesellschaft auf Aktien', 'Gesellschaft mit beschränkter Haftung', 'bergrechtliche Gewerkschaft';
- (d) companies under Greek law known as: 'ανώνυμη εταιρεία';
- (e) companies under Spanish law known as: 'sociedad anónima', 'sociedad comanditaria por acciones', 'sociedad de responsabilidad limitada' and those public-law bodies which operate under private law;
- (f) companies under French law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée' and industrial and commercial public establishments and undertakings;
- (g) the companies in Irish law known as 'companies incorporated under Irish law', 'registered building societies', and 'registered industrial and provident societies';
- (h) companies under Italian law known as 'società per azioni', 'società in accomandita per azioni', 'società a responsabilità limitata', and public and private entities carrying on industrial and commercial activities;
- (i) companies under Luxembourg law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée';
- (j) companies under Dutch law known as: 'naamloze vennootschap', 'besloten vennootschap met beperkte aansprakelijkheid';
- (k) commercial companies or civil-law companies having a commercial form, cooperatives and public undertakings incorporated in accordance with Portuguese law;
- (l) companies incorporated under the law of the United Kingdom.

Withholding tax rates on royalties ⁽¹⁾

Situation on 1 July 1990

(in percent)

Residence State of the debtor \ Residence State of the beneficiary	Belgium	Denmark	Spain	France	Greece	Ireland	Italy	Luxembourg	Netherlands	Portugal	Germany	United Kingdom
Country without tax treaty	10	30	25	33 ¹ / ₃	25	30	21	12	0	15	25	25
Belgium	—	0	5	0	5	0	5	0	0	5	0	0
Denmark	0	—	6	0	25 ⁽²⁾	0	5	0	0	10	0	0
Spain	5	6	—	6	25 ⁽²⁾	30 ⁽²⁾	4	10	0	5	5	10
France	0	0	6	—	5	0	0	0	0	5	0	0
Greece	5	30 ⁽²⁾	25 ⁽²⁾	5	—	30 ⁽²⁾	0	12 ⁽²⁾	0	15 ⁽²⁾	0	0
Ireland	0	0	25 ⁽²⁾	0	25 ⁽²⁾	—	0	0	0	15 ⁽²⁾	0	0
Italy	5	5	8	0	0	0	—	10	0	12	0	8
Luxembourg	0	0	10	0	25 ⁽²⁾	0	10	—	0	15 ⁽²⁾	5	5
Netherlands	0	0	6	0	7	0	0	0	—	15 ⁽²⁾	0	0
Portugal	5	10	5	5	25 ⁽²⁾	30 ⁽²⁾	12	12 ⁽²⁾	0 ⁽²⁾	—	10	5
Germany	0	0	5	0	0	0	0	5	0	10	—	0
United Kingdom	0	0	10	0	0	0	0	5	0	5	0	—

⁽¹⁾ The possible value added tax applied is not included in these rates.⁽²⁾ No tax treaty.

Withholding tax rates on ordinary interest payments by a non-resident subsidiary to its parent company

Situation on 1 July 1990

(in percent)

Residence State of the debtor \ Residence State of the beneficiary	Belgium	Denmark	Spain	France	Greece ⁽¹⁾	Ireland	Italy	Luxembourg	Netherlands	Portugal	Germany	United Kingdom
Country without tax treaty	10	0	25	0	46	30	30	0	0	20	0	25
Belgium	—	0	15	0	15	15	15	0	0	15	0	15
Denmark	10	—	10	0	46 ⁽²⁾	0	15	0	0	15	0	0
Spain	10	0	—	0	46 ⁽²⁾	30 ⁽²⁾	12	0	0	15	0	12
France	10	0	10	—	10	0	15	0	0	12	0	0
Greece	10	0 ⁽²⁾	25 ⁽²⁾	0	—	30 ⁽²⁾	10	0 ⁽²⁾	0	20 ⁽²⁾	0	0
Ireland	10	0	25 ⁽²⁾	0	46 ⁽²⁾	—	10	0	0	20 ⁽²⁾	0	0
Italy	10	0	12	0	10	10	—	0	0	15	0	10
Luxembourg	10	0	10	0	46 ⁽²⁾	0	10	—	0	20 ⁽²⁾	0	0
Netherlands	0	0	10	0	10	0	15	0	—	20 ⁽²⁾	0	0
Portugal	10	0	15	0	46 ⁽²⁾	30 ⁽²⁾	15	0 ⁽²⁾	0 ⁽²⁾	—	0	10
Germany	10	0	10	0	10	0	0	0	0	15	—	0
United Kingdom	10	0	12	0	0	0	15	0	0	10	0	—

⁽¹⁾ Moreover, 2,4 % stamp duty withheld from interest other than interest on bonds and bank deposits.⁽²⁾ No tax treaty.