



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.12.2003
COM(2003) 841 final

2003/0331 (CNS)

Proposal for a

COUNCIL DIRECTIVE

amending Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

1. At its meeting on 3 June 2003, the “Economic and Financial Affairs” Council adopted the so-called “Tax Package” one part of which was Council Directive 2003/49/EEC¹ on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (hereinafter “the Directive”).
2. Given the date of adoption, and the fact that the Directive is based on a Commission proposal from 1998², the Directive has not been technically adapted to the accession of new Member States. It is foreseen that the technical adaptations of the scope that this will call for (the establishment of lists of taxes and companies covered for each of the acceding States), will be made under the procedure laid down in Article 57 of the Act of Accession. These technical adaptations are therefore not dealt with in this proposal.
3. The “Statements for entry in the minutes of the Council”, when the Directive was adopted, contained the following passage: “The Council and the Commission agree that the benefits of the Interest and Royalty Directive should not accrue to companies that are exempt from tax on income covered by this Directive. The Council invites the Commission to propose any necessary amendments to this Directive in due time.” The Commission already provides in the Directive that “it is necessary to ensure that interest and royalty payments are subject to tax once in a Member State”³ and “it is moreover necessary not to preclude Member States from taking appropriate measures to combat fraud or abuse”⁴. The Commission shares the view of the Council that there should be no loopholes in the provisions of the Directive allowing for circumvention of taxation of interest and royalty payments. This new proposal is the Commission's response to the invitation of the Council.
4. In addition, following its Communication on tax policy for the European Union⁵ and its Communication on the restrictions imposed by direct taxation to cross-border economic activities in the Internal Market and remedies thereto⁶, the Commission has presented two proposals⁷ for the amendment of Council Directives in the area of direct taxation, one in relation to Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and

¹ OJ L 157, 26.6.2003, p. 49

² COM(1998) 67 final – 98/0087(CNS), OJ C 123 p 9

³ Recital 3 of the Directive

⁴ Recital 6 of the Directive

⁵ Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee “Tax Policy in the European Union”, COM (2001) 260 final.

⁶ Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, “Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities”, COM (2001) 582 final.

⁷ Proposal 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, COM(2003)462 final and Proposal for a Council Directive amending Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, COM (2003) 613 final

subsidiaries of different Member States (hereinafter "the Parent-Subsidiary Directive")⁸ and the other in relation to Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (hereinafter "the Merger Directive")⁹. Part of the amendments - aimed at extending the scope of the two Directives – consists of proposing to amend the list of entities annexed to the Directives, to cover other legal forms of companies not so far covered by those Directives. The Commission considers it appropriate, in order to avoid disparities or confusion, to follow the same approach in relation to the Interest and Royalty Directive. Therefore, it proposes that the list of companies annexed to the Interest and Royalty Directive be aligned on the list proposed for the Parent-Subsidiary Directive.

5. Furthermore, the Statute of the European Company (*Societas Europaea* - SE)¹⁰ will enter into force on 8 October 2004. The SE will give companies operating in more than one Member State the option of being established as a single company under Community law and so able to operate throughout the EU with one set of company law rules and a unified management and reporting system. While there are no provisions in the Statute of the European Company directed specifically at taxation, nevertheless, the instrument does require the SE to be subject to "the provisions of Member States' law which would apply to a public-limited company formed in accordance with the law of the Member State in which the SE has its registered office"¹¹. Such public-limited companies in the 15 Member States, which are listed in the annex to the SE Statute, are also included in the list of companies annexed to the Interest and Royalty Directive. So, in practice the SE already enjoys the benefits of the Interest and Royalty Directive because the Member State where it has its registered office is obliged to grant the same benefits as apply to the respective national type of public-limited company. However, both for the purposes of clarification and to underpin the importance that the Commission attaches to it, the Commission proposes that the SE be specifically mentioned in the list of companies annexed to the Interest and Royalty Directive¹².
6. Finally, the Statute for a European Cooperative Society (*Societas Cooperativa Europaea* – SCE)¹³ was adopted on 22 July 2003. From 2006 onwards, this new legal form will be available to enable co-operative businesses better to exploit cross-border opportunities and to help boost Europe's competitiveness. In the absence of specific

⁸ 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 L 225, 20.8.1990, p 6.

⁹ Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, OJ L 225, 20.8.1990, p 1.

¹⁰ Council Regulation (EC) n° 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) and the Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294 of 10.11.2001.

¹¹ Article 9 1. (c) II of the Council Regulation (EC) n° 2157/2001 of 8 October 2001

¹² The same approach is followed in the proposals to amend the Parent-Subsidiary Directive (90/434/EEC) and the Merger Directive 90/435/EEC, where the European Company is explicitly included in the list of companies covered by the Directives.

¹³ Council Regulation (EC) n° 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) and the Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 207 of 18.8.2003, p. 1.

provisions on taxation¹⁴ for the SCE, the normal tax laws of Member States and of the Community apply. The Commission considers it essential to support this new type of company and to provide the framework to allow businesses to make the best use of this legal form in practice. The SCE will receive the same treatment as cooperatives in the Member State of their registered office and therefore, indirectly, the benefits of the Interest and Royalty Directive provided for those national types of cooperatives already covered by the Directive. While some national types of cooperatives are already included in the list of companies annexed to the Interest and Royalty Directive, it is proposed to include more such cooperatives in the new annex to the Directive. In these circumstances the Commission proposes to include the SCE Statute, also, in the list of companies. Although the inclusion is seen more as a signal, as in the case of the SE, underlining the importance that the Commission assigns to the SCE, and to avoid any uncertainty or doubt, this measure ensures that the SCE will enjoy the full benefits of the Interest and Royalty Directive from 2006 onwards.

2. COMMENTARY ON THE ARTICLES OF THE PROPOSAL FOR A DIRECTIVE

Article 1

This Article comprises two paragraphs amending the Interest and Royalty Directive.

Paragraph (1)

The aim of this paragraph is to amend the existing Article 1 Paragraph 1. It makes clear that Member States have to grant the benefits of the Directive only where the interest or royalty payment concerned is not exempt from corporate taxation in the hands of the beneficial owner. In particular this addresses the situation of a company paying corporate tax but benefiting from a special national tax scheme exempting foreign interest or royalty payments received. The Source State would not be obliged to exempt from withholding tax under the Directive in such cases.

Paragraph (2)

1. The list of companies, to which the Directive applies, as contained in the annex, is replaced by a new one incorporating other types of entities and in particular, the European Company and the European Cooperative Society. This proposal will extend the benefits of the Directive to new legal forms of entities, including co-operatives, mutual companies, certain non-capital based companies, saving banks, funds and associations with commercial activity, and in this respect will align the list in the Interest and Royalty Directive with that in the proposed amendment to the Parent-Subsidiary Directive.
2. The European Company and the SCE are included under letter (z) of the annex. This new entry does not follow the natural sequence of letters, because it is intended to make additional entries in the annex under points (p) to (y) so as to cater for the inclusion of certain types of company that exist in the acceding States under the procedure laid down in Article 57 of the Act of Accession (on the adoption of

¹⁴ Recital 16 of the SCE Statute

measures necessary to adapt Community measures in order to take account of accession).

Article 2

This Article lays down the timetable and the requirements for transposing the Directive into the national law of the Member States. Member States are required, forthwith, to inform the Commission of the transposition of the Directive into their national laws and to submit a correlation table between this Directive and the national provisions adopted.

Proposal for a

COUNCIL DIRECTIVE

amending Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 94 thereof,

Having regard to the proposal from the Commission¹⁵,

Having regard to the opinion of the European Parliament¹⁶,

Having regard to the opinion of the European Economic and Social Committee¹⁷,

Whereas:

- (1) Directive 2003/49/EC does not contain any explicit requirement that the beneficial owner of an interest or royalty payment be effectively subject to tax in relation to that payment. To ensure that the objectives of that Directive are met, it is necessary to introduce such a requirement in order to exclude from the benefits of Directive 2003/49/EC any case where the interest or royalty payment received is not subject to tax.
- (2) Certain forms of companies are not included in the list in the Annex to Directive 2003/49/EC, even though they are resident for tax purposes in a Member State and are subject to corporation tax there.
- (3) The European company or *Societas Europaea* (SE), as established in Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)¹⁸ and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees,¹⁹ is a public limited-liability company of similar nature to other legal types of companies already covered by Directive 2003/49/EC. For clarification purposes, the SE should be added to the list in the Annex to Directive 2003/49/EC.

¹⁵ OJ C , , p. .

¹⁶ OJ C , , p. .

¹⁷ OJ C , , p. .

¹⁸ OJ L 294 of 10.11.2001, p.1.

¹⁹ OJ L 294 of 10.11.2001, p. 22.

- (4) The European Cooperative Society (SCE), as established in Council Regulation (EC) No 1435/2003 of 22 July 2003 on the European Cooperative Society (SCE)²⁰ and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees,²¹ is a cooperative society similar in nature to other legal types of cooperatives proposed to be included in the scope of Directive 2003/49/EC. Accordingly, the SCE should be added to the list in the Annex to Directive 2003/49/EC. In the interest of clarity that Annex should be replaced.
- (5) Directive 2003/49/EC should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE :

Article 1

Directive 2003/49/EC is amended as follows:

- (1) In Article 1 paragraph 1 is replaced by the following:
- “1. Interest or royalty payments arising in a Member State shall be exempt from any taxes imposed on those payments in that State, whether by deduction at source or by assessment, provided that the beneficial owner of the interest or royalties is a company of another Member State or a permanent establishment situated in another Member State of a company of a Member State and is effectively subject to tax on the interest or royalty payments in that other Member State.”
- (2) The Annex is replaced by the text in the Annex to this Directive.

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2004 at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.
- When Member States adopt such provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

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

²⁰ OJ L 207 of 18.8.2003, p. 1.

²¹ OJ L 207 of 18.8.2003, p. 25.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

*For the Council
The President*

ANNEX

“ANNEX

List of companies referred to in Article 3 (a)

- 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" "société coopérative à responsabilité limitée"/"coöperatieve vennootschap met beperkte aansprakelijkheid", "société coopérative à responsabilité illimitée"/"coöperatieve vennootschap met onbeperkte aansprakelijkheid", and public undertakings which have adopted one of the abovementioned legal forms;
- b) companies under Danish law known as "aktieselskab" and "anpartsselskab". Other companies subject to tax under the Corporation Tax Act, insofar as their taxable income is calculated and taxed in accordance with the general tax legislation rules applicable to "aktieselskaber";
- c) companies under German law known as "Aktiengesellschaft", "Kommanditgesellschaft auf Aktien", "Gesellschaft mit beschränkter Haftung", "bergrechtliche Gewerkschaft", "Versicherungsvereine auf Gegenseitigkeit", "Erwerbs- und Wirtschaftsgenossenschaften", "Betriebe gewerblicher Art von juristischen Personen des öffentlichen Rechts";
- d) companies under Greek law known as "ανώνυμη εταιρεία", "εταιρεία περιορισμένης ευθύνης (Ε.Π.Ε.)";
- 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", "sociétés par actions simplifiées", "sociétés d'assurances mutuelles", "caisses d'épargne et de prévoyance", "sociétés civiles" which are automatically subject to corporation tax, "coopératives", "unions de coopératives" and industrial and commercial public establishments and undertakings;
- g) companies incorporated or existing under Irish laws, bodies registered under the Industrial and Provident Societies Act, building societies incorporated under the Building Societies Acts and trustee savings banks within the meaning of the Trustee Savings Banks Act, 1989;
- h) companies under Italian law known as "società per azioni", "società in accomandita per azioni", "società a responsabilità limitata", "società cooperative", "società per mutua assicurazione", and private and public entities whose activity is wholly or principally commercial;

- i) companies under Luxembourg law known as "société anonyme", "société en commandite par actions", "société à responsabilité limitée", "société coopérative", "société coopérative organisée comme une société anonyme", "association d'assurances mutuelles", "association d'épargne-pension", "entreprise de nature commerciale, industrielle ou minière de l'Etat, des communes, des syndicats de communes, des établissements publics et des autres personnes morales de droit public";
- j) companies under Dutch law known as "naamloze vennootschap", "besloten vennootschap met beperkte aansprakelijkheid", "open commanditaire vennootschap", "coöperatie", "onderlinge waarborgmaatschappij", "fonds voor gemene rekening", "vereniging op coöperatieve grondslag" and "vereniging welke op onderlinge grondslag als verzekeraar of kredietinstelling optreedt";
- k) companies under Austrian law known as "Aktiengesellschaft", "Gesellschaft mit beschränkter Haftung", "Versicherungsvereine auf Gegenseitigkeit", "Erwerbs- und Wirtschaftsgenossenschaften", "Betriebe gewerblicher Art von Körperschaften des öffentlichen Rechts", "Sparkassen";
- l) commercial companies or civil law companies having a commercial form and cooperatives and public undertakings incorporated in accordance with Portuguese law;
- m) companies under Finnish law known as "osakeyhtiö/aktiebolag", "osuuskunta /andelslag", "säästöpankki/sparbank" and "vakuutusyhtiö/försäkringsbolag";
- n) companies under Swedish law known as "aktiebolag", "ekonomiska föreningar", "sparbanker", "ömsesidiga försäkringsbolag";
- o) companies incorporated under the law of the United Kingdom;
- z) companies incorporated under Council Regulation (EC) n° 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and the Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees or cooperative societies set up under Council Regulation (EC) n° 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) and the Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees."

FINANCIAL STATEMENT

This proposal for a Council Directive has no financial implications for the Community budget.

IMPACT ASSESSMENT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs)

TITLE OF PROPOSAL

Proposal for a Council Directive amending 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

DOCUMENT REFERENCE NUMBER

THE PROPOSAL

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

This proposal updates and improves an already existing 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). The three changes included in the proposal contribute to the objectives of the above-mentioned Directive especially in reiterating the principle that the benefits of the Directive shall only be granted when the interest and royalty payments are taxed once in a Member States and by expanding the scope of the Directive to types of company not yet covered and by clarifying the application of the Directive to the European Company and the European Cooperative Society.

THE IMPACT ON BUSINESS

2. Who will be affected by the proposal?
 - which sectors of business
 - which sizes of business (what is the concentration of small and medium-sized firms)
 - are there particular geographical areas of the Community where these businesses are found

Compared to the current situation determined by the 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, the proposal shall extend the benefits of the Directive to the types of companies added to the annex of the Directive. The proposal does not affect particular sectors or sizes of business nor does it affect particular geographical areas.

3. What will business have to do to comply with the proposal?

No new obligations or tax compliance burdens are imposed on business.

4. What economic effects is the proposal likely to have?

- on employment
- on investment and the creation of new businesses
- on the competitiveness of businesses

The proposal improves the functioning of the Council Directive 2003/49/EC of 3 June 2003. This will reinforce positive effects on cross-border investment, the competitiveness of companies and employment from underlying Directive.

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements etc)?

As the first recital of the Directive, when adopted in June 2003, makes clear, it only applies to payments of interest or royalties by a company to an associated company established in another Member State, where the latter is subject to corporation tax. While the majority of small and medium enterprises are not organised as companies that are subjected to corporation tax in their Member State, those that are will be able to benefit from the proposed extension of the scope of the Directive.

CONSULTATION

6. List the organisations which have been consulted about the proposal and outline their main views.

Due to the technical nature of the proposal for an amendment of a recent adopted Directive it was not considered useful to consult again the organisations, which commented on the original Directive. These organisations in their response to their consultation on the previous proposal already advocated the broadest possible scope. However there were discussions between technical representatives of Member States' tax administrations and the Commission services.

The proposals in respect of the SE and the SCE respond partly to the views expressed by the representatives of business and industry during the consultations on those two types of company.