

CONVENTION

on the elimination of double taxation in connection with the adjustment of profits of associated enterprises

(90/463/EEC)

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,

DESIRING to give effect to Article 220 of that Treaty, by virtue of which they have undertaken to enter into negotiations with one another with a view to securing for the benefit of their nationals the elimination of double taxation,

CONSIDERING the importance attached to the elimination of double taxation in connection with the adjustment of profits of associated enterprises,

HAVE DECIDED to conclude this Convention, and to this end have designated as their Plenipotentiaries:

HIS MAJESTY THE KING OF THE BELGIANS:

Philippe de SCHOUTHEETE de Tervarent,
Ambassador Extraordinary and Plenipotentiary;

HER MAJESTY THE QUEEN OF DENMARK:

Niels Helveg Petersen,
Minister for Economic Affairs;

THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY:

Theo Waigel,
Federal Minister for Finance;
Jürgen Trumpf,
Ambassador Extraordinary and Plenipotentiary;

THE PRESIDENT OF THE HELLENIC REPUBLIC:

Ioannis Palaiokrassas,
Minister for Finance;

HIS MAJESTY THE KING OF SPAIN:

Carlos Solchaga Catalán,
Minister for Economic Affairs and Finance;

THE PRESIDENT OF THE FRENCH REPUBLIC:

Jean Vidal,
Ambassador Extraordinary and Plenipotentiary;

THE PRESIDENT OF IRELAND:

Albert Reynolds,
Minister for Finance;

THE PRESIDENT OF THE ITALIAN REPUBLIC:

Stefano De Luca,
State Secretary for Finance;

HIS ROYAL HIGHNESS THE GRAND DUKE OF LUXEMBOURG:

Jean-Claude Juncker,
Minister for the Budget, Minister for Finance, Minister for Labour;

HER MAJESTY THE QUEEN OF THE NETHERLANDS:

P.C. NIEMAN,
Ambassador Extraordinary and Plenipotentiary;

THE PRESIDENT OF THE PORTUGUESE REPUBLIC:

Miguel BELEZA,
Minister for Finance;

HER MAJESTY THE QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

David H.A. HANNAY KCMG,
Ambassador Extraordinary and Plenipotentiary;

WHO, meeting within the Council and having exchanged their Full Powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

CHAPTER I

SCOPE OF THE CONVENTION

Article 1

1. This Convention shall apply where, for the purposes of taxation, profits which are included in the profits of an enterprise of a Contracting State are also included or are also likely to be included in the profits of an enterprise of another Contracting State on the grounds that the principles set out in Article 4 and applied either directly or in corresponding provisions of the law of the State concerned have not been observed.

2. For the purposes of this Convention, the permanent establishment of an enterprise of a Contracting State situated in another Contracting State shall be deemed to be an enterprise of the State in which it is situated.

3. Paragraph 1 shall also apply where any of the enterprises concerned have made losses rather than profits.

Article 2

1. This Convention shall apply to taxes on income.

2. The existing taxes to which this Convention shall apply are, in particular the following:

(a) in Belgium:

- impôt des personnes physiques/personenbelasting,
- impôt des sociétés/vennootschapsbelasting,
- impôt des personnes morales/rechtspersonenbelasting,
- impôt des non-résidents/belasting der niet-verblijfhouders,
- taxe communale et la taxe d'agglomération additionnelles à l'impôt des personnes physiques/aanvullende gemeentebelasting en agglomeratiebelasting op de personenbelasting;

(b) in Denmark:

- selskabsskat,
- indkomstskat til staten,
- kommunale indkomstskat,
- amtskommunal indkomstskat,
- særlig indkomstskat,
- kirkeskat,
- udbytteskat,
- renteskat,
- royaltyskat,
- frigørelsesafgift;

(c) in the Federal Republic of Germany:

- Einkommensteuer,
- Körperschaftsteuer,
- Gewerbesteuer, in so far as this tax is based on trading profits;

(d) in Greece:

- φόρος εισοδήματος φυσικών προσώπων,
- φόρος εισοδήματος νομικών προσώπων,
- εισφορά υπέρ των επιχειρήσεων ύδρευσης και αποχέτευσης;

(e) in Spain:

- impuesto sobre la renta de las personas físicas,
- impuesto sobre sociedades;

(f) in France:

- impôt sur le revenu,
- impôt sur les sociétés;

(g) in Ireland:

- Income Tax,
- Corporation Tax;

- (h) in Italy:
- imposta sul reddito delle persone fisiche,
 - imposta sul reddito delle persone giuridiche,
 - imposta locale sui redditi;
- (i) in Luxembourg:
- impôt sur le revenu des personnes physiques,
 - impôt sur le revenu des collectivités,
 - impôt commercial, in so far as this tax is based on trading profits;
- (j) in the Netherlands:
- inkomstenbelasting,
 - vennootschapsbelasting;
- (k) in Portugal:
- imposto sobre o rendimento das pessoas singulares,
 - imposto sobre o rendimento das pessoas colectivas,
 - derrama para os municípios sobre o imposto sobre o rendimento das pessoas colectivas;
- (l) in the United Kingdom:
- Income Tax,
 - Corporation Tax.
- in the Federal Republic of Germany:
Der Bundesminister der Finanzen or an authorized representative,
- in Greece:
Ο Υπουργός των Οικονομικών or an authorized representative,
- in Spain:
El Ministro de Economía y Hacienda or an authorized representative,
- in France:
Le Ministre chargé du budget or an authorized representative,
- in Ireland:
The Revenue Commissioners or an authorized representative,
- in Italy:
Il Ministro delle Finanze or an authorized representative,
- in Luxembourg:
Le Ministre des Finances or an authorized representative,
- in the Netherlands:
De Minister van Financiën or an authorized representative,
- in Portugal:
O Ministro das Finanças or an authorized representative,
- in the United Kingdom:
The Commissioners of Inland Revenue or an authorized representative.

3. The Convention shall also apply to any identical or similar taxes which are imposed after the date of signature thereof in addition to, or in place of existing taxes. The competent authorities of the Contracting States shall inform each other of any changes made in the respective domestic laws.

CHAPTER II

GENERAL PROVISIONS

Section I

Definitions

Article 3

1. For the purposes of this Convention: 'competent authority' shall mean:

- in Belgium:
De Minister van Financiën or an authorized representative,
Le Ministre des Finances or an authorized representative,
- in Denmark:
Skatteministeren or an authorized representative,

Section II

Principles applying to the adjustment of profits of associated enterprises and to the attribution of profits to permanent establishments

Article 4

The following principles shall be observed in the application of this Convention:

1. Where:
 - (a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of another Contracting State,

or

2. Any term not defined in this Convention shall, unless the context otherwise requires, have the meaning which it has under the double taxation convention between the States concerned.

- (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of one Contracting State and an enterprise of another Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where an enterprise of a Contracting State carries on business in another Contracting State through a permanent establishment situated therein, there shall be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

Article 5

Where a Contracting State intends to adjust the profits of an enterprise in accordance with the principles set out in Article 4, it shall inform the enterprise of the intended action in due time and give it the opportunity to inform the other enterprise so as to give that other enterprise the opportunity to inform in turn the other Contracting State.

However, the Contracting State providing such information shall not be prevented from making the proposed adjustment.

If after such information has been given the two enterprises and the other Contracting State agree to the adjustment, Articles 6 and 7 shall not apply.

Section 3

Mutual agreement and arbitration procedure

Article 6

1. Where an enterprise considers that, in any case to which this Convention applies, the principles set out in Article 4 have not been observed, it may, irrespective of the remedies provided by the domestic law of the Contracting States concerned, present its case to the competent authority of the Contracting State of which it is an enterprise or in which its permanent establishment is situated. The case must be presented within three years of the first notification of the action which results or is likely to result in double taxation within the meaning of Article 1.

The enterprise shall at the same time notify the competent authority if other Contracting States may be concerned in the case. The competent authority shall then without delay notify the competent authorities of those other Contracting States.

2. If the complaint appears to it to be well-founded and if it is not itself able to arrive at a satisfactory solution, the competent authority shall endeavour to resolve the case by mutual agreement with the competent authority of any other Contracting State concerned, with a view to the elimination of double taxation on the basis of the principles set out in Article 4. Any mutual agreement reached shall be implemented irrespective of any time limits prescribed by the domestic laws of the Contracting States concerned.

Article 7

1. If the competent authorities concerned fail to reach an agreement that eliminates the double taxation referred to in Article 6 within two years of the date on which the case was first submitted to one of the competent authorities in accordance with Article 6 (1), they shall set up an advisory commission charged with delivering its opinion on the elimination of the double taxation in question.

Enterprises may have recourse to the remedies available to them under the domestic law of the Contracting States concerned; however, where the case has so been submitted to a court or tribunal, the term of two years referred to in the first subparagraph shall be computed from the date on which the judgment of the final court of appeal was given.

2. The submission of the case to the advisory commission shall not prevent a Contracting State from initiating or continuing judicial proceedings or proceedings for administrative penalties in relation to the same matters.

3. Where the domestic law of a Contracting State does not permit the competent authorities of that State to derogate from the decisions of their judicial bodies, paragraph 1 shall not apply unless the associated enterprise of that State has allowed the time provided for appeal to expire, or has withdrawn any such appeal before a decision has been delivered. This provision shall not affect the appeal if and in so far as it relates to matters other than those referred to in Article 6.

4. The competent authorities may by mutual agreement and with the agreement of the associated enterprises concerned waive the time limits referred to in paragraph 1.

5. In so far as the provisions of paragraphs 1 to 4 are not applied, the rights of each of the associated enterprises, as laid down in Article 6, shall be unaffected.

Article 8

1. The competent authority of a Contracting State shall not be obliged to initiate the mutual agreement procedure or

to set up the advisory commission referred to in Article 7 where legal or administrative proceedings have resulted in a final ruling that by actions giving rise to an adjustment of transfers of profits under Article 4 one of the enterprises concerned is liable to a serious penalty.

2. Where judicial or administrative proceedings, initiated with a view to a ruling that by actions giving rise to an adjustment of profits under Article 4 one of the enterprises concerned was liable to a serious penalty, are being conducted simultaneously with any of the proceedings referred to in Articles 6 and 7, the competent authorities may stay the latter proceedings until the judicial or administrative proceedings have been concluded.

Article 9

1. The advisory commission referred to in Article 7 (1) shall consist of, in addition to its Chairman:

- two representatives of each competent authority concerned; this number may be reduced to one by agreement between the competent authorities,
- an even number of independent persons of standing to be appointed by mutual agreement from the list of persons referred to in paragraph 4 or, in the absence of agreement, by the drawing of lots by the competent authorities concerned.

2. When the independent persons of standing are appointed an alternate shall be appointed for each of them according to the rules for the appointment of the independent persons in case the independent persons are prevented from carrying out their duties.

3. Where lots are drawn, each of the competent authorities may object to the appointment of any particular independent person of standing in any circumstance agreed in advance between the competent authorities concerned or in one of the following situations:

- where that person belongs to or is working on behalf of one of the tax administrations concerned,
- where that person has, or has had, a large holding in or is or has been an employee of or adviser to one or each of the associated enterprises,
- where that person does not offer a sufficient guarantee of objectivity for the settlement of the case or cases to be decided.

4. The list of independent persons of standing shall consist of all the independent persons nominated by the Contracting States. For this purpose each Contracting State shall nominate five persons and shall inform the Secretary-General of the Council of the European Communities thereof.

Such persons must be nationals of a Contracting State and resident within the territory to which this Convention applies. They must be competent and independent.

The Contracting States may make alterations to the list referred to in the first subparagraph; they shall inform the Secretary-General of the Council of the European Communities thereof without delay.

5. The representatives and independent persons of standing appointed in accordance with paragraph 1 shall elect a Chairman from among those persons of standing on the list referred to in paragraph 4, without prejudice to the right of each competent authority concerned to object to the appointment of the person of standing thus chosen in one of the situations referred to in paragraph 3.

The Chairman must possess the qualifications required for appointment to the highest judicial offices in his country or be a jurisconsult of recognized competence.

6. The members of the advisory commission shall keep secret all matters which they learn as a result of the proceedings. The Contracting States shall adopt appropriate provisions to penalize any breach of secrecy obligations. They shall, without delay inform the Commission of the European Communities of the measures taken. The Commission of the European Communities shall inform the other Contracting States.

7. The Contracting States shall take all necessary steps to ensure that the advisory commission meets without delay once cases are referred to it.

Article 10

1. For the purposes of the procedure referred to in Article 7, the associated enterprises concerned may provide any information, evidence or documents which seem to them likely to be of use to the advisory commission in reaching a decision. The enterprises and the competent authorities of the Contracting States concerned shall give effect to any request made by the advisory commission to provide information, evidence or documents. However, the competent authorities of any such Contracting State shall not be under any obligation:

- (a) to carry out administrative measures at variance with its domestic law or its normal administrative practice;
- (b) to supply information which is not obtainable under its domestic law or in its normal administrative practice; or
- (c) to supply information which would disclose any trade, business, industrial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).

2. Each of the associated enterprises may, at its request, appear or be represented before the advisory commission. If

the advisory commission so requests, each of the associated enterprises shall appear or be represented before it.

Article 11

1. The advisory commission referred to in Article 7 shall deliver its opinion not more than six months from the date on which the matter was referred to it.

The advisory commission must base its opinion on Article 4.

2. The advisory commission shall adopt its opinion by a simple majority of its members. The competent authorities concerned may agree on additional rules of procedure.

3. The costs of the advisory commission procedure, other than those incurred by the associated enterprises, shall be shared equally by the Contracting States concerned.

Article 12

1. The competent authorities party to the procedure referred to in Article 7 shall, acting by common consent on the basis of Article 4, take a decision which will eliminate the double taxation within six months of the date on which the advisory commission delivered its opinion.

The competent authorities may take a decision which deviates from the advisory commission's opinion. If they fail to reach agreement, they shall be obliged to act in accordance with that opinion.

2. The competent authorities may agree to publish the decision referred to in paragraph 1, subject to the consent of the enterprises concerned.

Article 13

The fact that the decisions taken by the Contracting States, concerning the taxation of profits resulting from a transaction between associated enterprises, have become final shall not prevent recourse to the procedures set out in Articles 6 and 7.

Article 14

For the purposes of this Convention, the double taxation of profits shall be regarded as eliminated if either:

(a) the profits are included in the computation of taxable profits in one State only;

or

(b) the tax chargeable on those profits in one State is reduced by an amount equal to the tax chargeable on them in the other.

CHAPTER III

FINAL PROVISIONS

Article 15

Nothing in this Convention shall affect the fulfilment of wider obligations with respect to the elimination of double taxation in the case of an adjustment of profits of associated enterprises resulting either from other conventions to which the Contracting States are or will become parties or from the domestic law of the Contracting States.

Article 16

1. The territorial scope of this Convention shall be that defined in Article 227 (1) of the Treaty establishing the European Economic Community, without prejudice to paragraph 2 of this Article.

2. This Convention shall not apply to:

- the French territories referred to in Annex IV to the Treaty establishing the European Economic Community,
- the Faroe Islands and Greenland.

Article 17

This Convention will be ratified by the Contracting States. The instruments of ratification will be deposited at the office of the Secretary-General of the Council of the European Communities.

Article 18

This Convention shall enter into force on the first day of the third month following that in which the instrument of ratification is deposited by the last signatory State to take that step. The Convention shall apply to proceedings referred to in Article 6 (1) which are initiated after its entry into force.

Article 19

The Secretary-General of the Council of the European Communities shall inform the Contracting States of:

- (a) the deposit of each instrument of ratification;
- (b) the date on which this Convention will enter into force;
- (c) the list of independent persons of standing appointed by the Contracting States and any alterations thereto in accordance with Article 9 (4).

Article 20

This Convention is concluded for a period of five years. Six months before the expiry of that period, the Contracting

States will meet to decide on the extension of this Convention and any other relevant measure.

Article 21

Each Contracting State may, at any time, ask for a revision of this Convention. In that event, a conference to revise the Convention will be convened by the President of the Council of the European Communities.

Article 22

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all 10 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.