

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

(98/C 123/07)

(Text with EEA relevance)

COM(1998) 67 final — 98/0087(CNS)

(Submitted by the Commission on 6 March 1998)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European 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 Single Market having the characteristics of a domestic market, transactions between companies of different Member States must not be subject to less favourable tax conditions than those applicable to the same transactions carried out between companies of 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 that double taxation is completely eliminated, and their application often entails burdensome administrative formalities and cash-flow problems for the companies concerned;

Whereas it is necessary to ensure that interest and royalty payments are subject to tax once in a Member State;

Whereas the abolition of taxation on interest and royalty payments in the Member State where they arise, whether collected by deduction at source or by assessment, on interest and royalty payments is the most appropriate means of eliminating the aforementioned formalities and problems and of ensuring the equality of tax treatment as between national and cross-border transactions; whereas it is particularly necessary to abolish such taxes in respect of such payments made between associated companies of different Member States as well as between permanent establishments of such companies;

Whereas the arrangements should only apply to the amount of interest or royalties or to the amount of the debt-claim which would have been agreed by the payer and the beneficial owner in the absence of a special relationship;

Whereas Member States should be permitted not to apply the provisions of the Directive if such payments are made to a beneficial owner who, in the Member State where he is situated, is not subject to taxation in respect of those items of income at a level which is normally applicable to interest or royalties received by a company of that Member State;

Whereas it is moreover necessary not to preclude Member States from taking appropriate measures to combat fraud or abuse;

Whereas Greece and Portugal should, for budgetary reasons, be allowed a transitional period in order that they can gradually decrease the taxes, whether collected by deduction at source or by assessment, on interest and royalty payments, until they are able to apply the provisions of Article 1;

Whereas it is necessary for the Commission to report to the Council on the operation of the Directive three years after the date by which it must be transposed, in particular with a view to extending its coverage to other companies or undertakings, to reviewing the application of Article 7, and to reviewing the scope of the definition of interest and royalties in pursuance of the necessary convergence of the provisions dealing with interest and royalties in national legislation and in bilateral double taxation treaties;

Whereas, in keeping with the principle of subsidiarity and the principle of proportionality as set out in Article 3b of the Treaty, the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community; whereas this Directive is confined to the minimum required to achieve those objectives and does not go beyond what is necessary to achieve that purpose,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. A Member State shall exempt interest and royalties from liability to any taxes levied on such income in that Member State, whether collected by deduction at source or by assessment, where such interest or royalties are paid by or on behalf of a company of that Member State, or by a permanent establishment situated in that Member State of a company of another Member State, to an associated company of another Member State or to a permanent establishment situated in another Member State of an associated company of a Member State, where that associated company or that permanent establishment of the associated company is the beneficial owner of those payments.

2. Paragraph 1 shall not apply in situations which do not, in essence, represent cross-border payments. In particular:

- (a) it shall not apply to interest and royalties paid by a company of a Member State, or by a permanent establishment situated in that Member State of a company of another Member State, if the beneficial owner of the interest or royalties is a permanent establishment situated in the first-mentioned Member State and the debt-claim or the right or property in respect of which the interest or royalties are paid is effectively connected with such a permanent establishment;
- (b) it shall not apply to interest and royalties paid by a company of a Member State to a permanent establishment situated in another Member State of an associated company of the first Member State, where the payment of such interest or royalties to the associated company otherwise than to a permanent establishment of it situated outside the first Member State would be subject to a tax collected by deduction at source in that Member State, unless the debt-claim or the right or property in respect of which the interest or royalties are paid is effectively connected with the permanent establishment.

Article 2

1. For the purposes of this Directive:

- (a) 'interest' means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from bonds or debentures, including premiums and prizes attaching to such bonds or debentures. Penalty charges for late payment shall not be regarded as interest;

- (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, scientific work or software, 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. Variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources shall be excluded, as well as payments for the use of, or the right to use, software when ownership is transferred.

2. In addition to the income and payments referred to in paragraph 1, any income or payments which are considered to be interest or royalties, or which would, but for the nature of the payer or the beneficial owner, be considered to be interest or royalties either by virtue of a double taxation convention in force between the Member State where the interest or royalties arise and the Member State of the beneficial owner or, in the absence of a convention, by virtue of the tax legislation of the Member State where the interest or royalties arise, shall be treated as interest or royalties for the purposes of this Directive.

Article 3

1. For the purposes of this Directive:

- (a) 'company of a Member State' means:

- (i) any company formed in accordance with the law of a Member State and having its registered office, central administration or principal place of business within the Community and whose activities present an effective and continuous link with the economy of that Member State; and
- (ii) which according to the tax laws of that Member State is considered to be resident in that Member State and is not, within the meaning of a double taxation convention concluded with a third country, considered to be resident for tax purposes outside the Community; and

- (iii) which moreover, is subject to one of the following taxes without being exempt, or to a tax which is identical or substantially similar and which is imposed after the date of entry into force of this Directive in addition to or in place of those existing taxes:

— impôt des sociétés/vennootschapsbelasting and impôt des non résidents/belasting der niet-verblijfhouders in Belgium,

- selskabsskat in Denmark,
- Körperschaftssteuer in Germany,
- Φόρος εισοδήματος νομικών προσώπων 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,
- vennootschapsbelasting in the Netherlands,
- Körperschaftssteuer in Austria,
- imposto sobre o rendimento da pessoas colectivas in Portugal,
- yhteisöjen tulovero/inkomstskatten för samfund in Finland,
- statlig inkomstskatt in Sweden,
- corporation tax in the United Kingdom;

(b) one company is an 'associated company' of a second company if, at least,

- (i) the first company has directly or indirectly a minimum holding of 25 % in the capital of the second company, or
- (ii) the second company has directly or indirectly a minimum holding of 25 % in the capital of the first company, or
- (iii) a third company has directly or indirectly a minimum holding of 25 % both in the capital of the first company, and in the capital of the second company.

However, Member States shall have the option of:

- applying this Directive in circumstances where the level of the holding concerned is less than 25 %,
- replacing the criterion of a minimum holding in capital with that of a minimum holding of voting rights;

(c) the 'beneficial owner' of payments of interest or royalties is a company of a Member State or a permanent establishment which holds those payments for its own benefit and not as an agent, trustee or nominee for some other person;

(d) 'permanent establishment' means a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on.

A permanent establishment shall be treated as paying interest or royalties in so far as such payments represent a tax-deductible expense for that establishment in the Member State in which it is situated; it shall be treated as the beneficial owner of interest or royalties in so far as such receipts represent income in respect of which it is subject in that Member State to one of the taxes mentioned in paragraph 1(a)(iii).

2. Member States may withdraw the benefit of this Directive from companies of that Member State in circumstances where the conditions set out in paragraph 1(b) have not been maintained for an uninterrupted period of a minimum of two years.

Article 4

By way of derogation from the provisions of Article 2(1)(a) and (2), the Member State where the interest arises may exclude from the application of this Directive payments purporting to be interest such as any of the following:

- (a) income which is treated as a distribution of profits or as a repayment of capital;
- (b) income from debt-claims which carry a right to participate in the payer's profits;
- (c) income from debt-claims which entitle the creditor to exchange his right to interest for a right to participate in the payer's profits;
- (d) income from debt-claims which contain no provision for repayment of the principal amount.

Interest that has been re-characterised as a distribution of profits shall accordingly be subject instead to the provisions of Council Directive 90/435/EEC ⁽¹⁾, where it is paid between companies to which the present Directive applies.

Article 5

Where, by reason of the special relationship between the payer and the beneficial owner of interest or

⁽¹⁾ OJ L 225, 20.8.1990, p. 6.

royalties, or between both of them and some other person, the amount of that income or those payments exceeds the amount which would have been agreed by the payer and the beneficial owner in the absence of such a relationship, the provisions of this Directive shall apply only to the latter amount; and, in the case of interest, where by reason of such a relationship the amount of the debt-claim in respect of which the interest is paid exceeds the amount which would have been agreed by the payer and the beneficial owner in the absence of such a relationship, the provisions of this Directive shall apply only to interest of the latter amount, if any.

Article 6

1. This Directive shall not preclude a Member State from taking appropriate measures to combat fraud or abuse.

2. A Member State may withdraw the benefit of or refuse to apply this Directive in the case of any transaction which has as its principal objective or as one of its principal objectives tax evasion or tax avoidance.

Article 7

1. In addition to the situations covered by Article 6, Member States shall be authorised not to apply the provisions of Article 1 to any payments of interest or royalties made to an associated company of another Member State or to a permanent establishment situated in another Member State of an associated company of a Member State which, in respect of that income and by virtue of a provision made for its benefit or for the benefit of certain companies or permanent establishments or certain activities:

(a) is subject to the tax mentioned in Article 3(1)(a)(iii) at a rate which is lower than the rate of tax which would otherwise normally be applicable to such income received by companies of, or permanent establishments situated in, that other State; or

(b) benefits from a reduction in the tax base which would not otherwise normally be available to companies of, or permanent establishments situated in, that other State.

2. If the circumstances referred to in either of points (a) or (b) of paragraph 1 apply only to a part of the interest or royalties referred to in paragraph 1, Member States shall be authorised not to apply the provisions of this Directive to that part of the interest or royalties.

Article 8

1. Greece and Portugal shall be authorised not to apply the provisions of Article 1 during a transitional period ending five years after the date of entry into force of this Directive. In such a case the rate of tax on payments of interest or royalties made to an associated company of another Member State or to a permanent establishment situated in another Member State of an associated company of a Member State may not exceed 10 % during the first two years and 5 % during the final three years. Before the end of the fifth year, the Council may decide, on a proposal from the Commission, to extend the term of the transitional period provided for in this paragraph.

2. Where a company of a Member State, or a permanent establishment situated in that Member State of a company of a Member State, receives interest or royalties from an associated company of Greece or Portugal, or from a permanent establishment situated in Greece or Portugal of an associated company of a Member State, the first Member State shall allow an amount equal to the tax paid in Greece or Portugal on that income as a deduction from the tax on the income of the company or permanent establishment which received that income in accordance with paragraph 1.

3. The deduction provided for in paragraph 2 need not exceed the lower of:

(a) the tax payable in Greece or Portugal on such income on the basis of paragraph 1; and

(b) that part of the tax on the income of the company or permanent establishment which received the interest or royalties, as computed before the deduction is given, which is attributable to those payments under the domestic law of the Member State of which it is a company or in which the permanent establishment is situated.

Article 9

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 2000. They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, 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 making such reference shall be adopted by Member States.

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. In this communication Member States shall provide a correlation table showing the national provisions which exist or are introduced in respect of each Article of this Directive.

Article 10

Three years after the date referred to in Article 9(1), the Commission shall report to the Council on the operation of this Directive, in particular with a view to extending

its coverage to companies or undertakings other than those covered by this Directive, and to reviewing the application of Article 7.

Article 11

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

Article 12

This Directive is addressed to the Member States.

Proposal for a Council Directive on the extension of Council Directive 97/81/EC of 15 December 1997, on the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, to the United Kingdom of Great Britain and Northern Ireland

(98/C 123/08)

(Text with EEA relevance)

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(Submitted by the Commission on 3 March 1998)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European 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 the Council, acting in accordance with the Agreement on Social Policy annexed to Protocol No 14 on social policy annexed to the EC Treaty, and in particular Article 4(2) thereof, adopted Directive 97/81/EC⁽¹⁾; whereas, as a result, the said

Directive does not apply to the United Kingdom of Great Britain and Northern Ireland;

Whereas the Amsterdam European Council held on 16 and 17 June 1997, noted with approval the agreement of the Intergovernmental Conference to incorporate the Agreement on social policy in the EC Treaty and also noted that a means had to be found to give legal effect to the wish of the United Kingdom to accept the Directives already adopted on the basis of that Agreement and those which may be adopted before the entry into force of the new Treaty;

Whereas at the Council of 24 July 1997, the Council and the Commission agreed to put into effect the conclusions adopted at the Amsterdam European Council; whereas they also agreed to apply the same procedure, *mutatis mutandis*, to future Directives adopted on the basis of the Agreement on Social Policy; whereas this Directive seeks to achieve this aim by extending Directive 97/81/EC to the United Kingdom;

Whereas the fact that Directive 97/81/EC is not applicable in the United Kingdom of Great Britain and

⁽¹⁾ OJ L 14, 20.1.1998, p. 9.