FEE SURVEY ON THE INTEREST AND ROYALTIES DIRECTIVE AND ITS IMPLEMENTATION

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CONTENTS

INTRODUCTION

The objective of this paper is to identify the most significant issues related to the Directive on Interest and Royalties and its implementation in the European Member States. FEE analysed the interaction of the Directive with other rules and regulations existing at national and international level.

The paper is based on a survey examining taxation rules of interest and royalties in EU Member States. Information has been gathered on the general implementation of the Directive and more specifically on the options taken by Member States in this respect, the scope and procedure, the definitions adopted and their interaction with domestic anti-avoidance provisions.

After an introduction to the technical background of the topic, an analysis of the EU Directive and its implementation in EU Members States, based on the results of the survey, follows. FEE identified some issues related to the interpretation of the Directive in Member States and more specifically to its interaction with European Court of Justice case law, domestic thin capitalisation rules, the Parent Subsidiary Directive[1] and to some extent with the OECD Model Convention with respect to taxes on income and capital[2]. In the Annex two matrices summarising the results of the survey are provided.

1 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

2 Updated on July 15th, 2005

1. THE DIRECTIVE AND ITS IMPLEMENTATION

1.1 The contents of Directive 2003/49/EC on Interest and Royalties

The Directive 2003/49/EC on a 'Common system of taxation applicable to interest and royalties payments made between associated companies of different Member States' was approved on June 3rd, 2003[3]. The general aim of the Directive is to ensure that double taxation of interest and royalties' payments is eliminated: in a Single Market, 'transactions between companies of different Member States should not be subject to less favourable tax conditions than those applicable to the same transactions carried out between companies of the same State'[4].

The Directive includes 11 Articles, the contents of which can be summarised as follows:

- *Scope and procedure: Art. 1*

Interest and 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 (PE) situated in another Member State of a company of a Member State[5].

The condition for exemption is that the payer of interest and/or royalties is an associated company or a Permanent Establishment of an associated company of the company treated as beneficial owner.

The source State[6] may require that fulfilment of the exemption requirements (laid down in Articles 1 and 3) be substantiated by an *attestation*. The contents of the attestation are prescribed by Article 1 paragraph 13.

If the requirements for exemption cease to be fulfilled, the receiving company or Permanent Establishment shall immediately inform the paying company or PE and, if the source State so requires, the competent authority of that State.

If the paying company or PE has withheld tax at source which can be exempted under this Article, a claim may be made for refund of that tax at source. The application for repayment must be submitted within the period, provided for by domestic legislation, which shall last for at least two years from the date when the interest or royalties are paid. The source State shall repay the excess tax withheld at source within one year following due receipt of the application and such supporting information as it may reasonably ask for.

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3 However, the Directive 2003/49/EC was amended in 2004 by Council Directive 2004/66/EC dated April 26th, 2004 by reason of the accession of the 10 new Member States to the EU.

4 Recital, point (1), Directive 2003/49/EC on a 'Common system of taxation applicable to interest and royalties payments made between associated companies of different Member States'

5 The definition of beneficial owner is provided for by Art. 1, paragraphs 4 and 5.

6 Art 1 paragraph 2 of the Directive defines as 'source State' the Member State of the debtor (a company of a Member State or a PE located in a Member State). For this purpose, a PE is treated as a payer of interest or royalties provided that its payments are tax- deductible expenses in the Member State in which it is situated.

- *Definitions of Interests and Royalties: Art. 2*

The Directive defines *interest* as '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 securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; penalty charges for late payment shall not be regarded as interest'.

Royalties are defined by the Directive as '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 and software, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; payments for the use of, or the right to use, industrial, commercial or scientific equipment shall be regarded as royalties'.

- *Definitions of Company, Associated Company and Permanent Establishment: Art. 3*

The term *company* according to the Directive means any company which:

- Takes one of the legal forms listed in the Annex of the Directive;
- Is resident for tax purposes in a Member State and it is not considered to be resident for tax purposes in a country outside the EU according to a double taxation convention; *and*
- Is subject to one of the income taxes listed in the Directive.

A company is an *associated company* of a second company if, at least:

- The first company has a direct minimum holding of 25% in the capital of the second company, or
- The second company has a direct minimum holding of 25% in the capital of the first company, or
- A third company has a direct minimum holding of 25% both in the capital of the first company and in the capital of the second company.

Holdings must involve only companies resident in Community territory. However, Member States shall have the option of replacing the criterion of a minimum holding in the capital with that of a minimum holding of voting rights.

The term *Permanent Establishment (*PE) is defined by the Directive as 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."

- *Exclusions and Transfer Pricing: Art. 4*

The source State shall not be obliged to ensure the benefits of the Directive in the following cases:

a) Payments which are treated as a distribution of profits or as a repayment of capital under the law of the source State;
b) Payments from debt-claims which carry a right to participate in the debtor's profits;
c) Payments from debt-claims which entitle the creditor to exchange his right to interest for a right to participate in the debtor's profits;
d) Payments from debt-claims which contain no provision for repayment of the principal amount or where the repayment is due more than 50 years after the date of issue.

Where the amount of interest or royalties exceeds the 'at arm's length' amount determined according to Transfer Pricing rules, the provision of the Directive applies only to the at arm's length amount.

- *Fraud and Abuse: Art. 5*

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

In the case of transactions for which the principal motive or one of the principal motives is *tax evasion, tax avoidance or abuse* Member States may withdraw the benefits of the Directive or refuse to apply the Directive. Such anti-abuse provision will have to be interpreted in the framework of the European Court of Justice case law on tax avoidance or abuse.

- *Transitional periods: Art. 6 and the amendment Directives*

For budgetary reasons Article 6 provides transitional periods for the implementation of the Directive in relation to both interest and royalties for Greece and Portugal and for royalties only for Spain.

Owing to the EU enlargement process, the types of companies existing in the 10 'new' Member States[7] have been added [8] into the scope of the Directive and transitional periods (ranging from 2 to 8 years) have been allowed for 5 Member States resulting in their not applying the provisions of the Directive immediately from the date of their accession[9]. Namely Czech Republic and Slovakia are granted transitional periods for royalties payments only, while Latvia, Lithuania and Poland are authorised to apply transitional periods for both interests and royalties.

- *Implementation: Art. 7*

Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by January 1st, 2004. They had to inform the Commission thereof.

On December 2003 a new proposal amending Directive 2003/49/EC was tabled by the Commission with the two following aims:

- To extend the scope of the Directive to include, among others, the European Company (Societas Europeae, SE) and the European Cooperative Society (Societas Cooperativa, SCE), so as to be aligned to the 'new' amended Parent Subsidiary Directive of 2003;
- To ensure that Member States grant the benefits of the Directive to relevant companies of a Member State *only when the beneficial owner is effectively subject to tax.* In particular this addresses the situation of a company which, while subjected to corporate tax, also benefits 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.

As of March 2007 this proposal has not yet been adopted by the Council.

7 Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.
8 Via Directive 2004/66/EC of 26 April 2004.
9 Via Directive 2004/76/EC of 29 April 2004.

1.2 Results of the survey

The questionnaire was sent in 2006 to the 27 EU Member States; answers were received from all of them. Here follows a summary of the answers received which provides a broad picture on the status of the implementation of the Directive. This summary is a basis for the identification of the issues arising in the interpretation of the Directive, which are identified in chapter 3.

Question 1
When did the directive enter into force under your Member State's implementing legislation? The deadline set by the directive was 1 January 2004.

Results of the Survey

As allowed by the Directive for budgetary reasons, Greece and Portugal implemented it in 2005 for both interests and royalties, while Spain implemented it in 2004 for interest and in 2005 for royalties. In the rest of the 'old' 15 Member States' (except for Italy which implemented it in 2005) the Directive entered into force in 2004.

As far as the 12 'new' Member States are concerned, Cyprus, Malta, Estonia, Hungary and Slovenia implemented the Directive upon their accession to the EU, i.e. 1 May 2004. The Czech Republic, Latvia, Lithuania, Poland and Slovakia chose to benefit from the transitional rules of Directive 76/2004 allowing them to implement the Directive on Interest and Royalties after 2004. Romania was allowed to implement the Directive by 2010 as it entered the EU in January 2007.

Question 2
If the Directive was implemented after 2004, will it have retrospective effects from that date? If so, how is repayment obtained?

Results of the Survey

In the countries where the Directive was or will be implemented after 2004 it will not have any retrospective effects, except in Italy where it is retroactive till 2004 as it was implemented too late (2005).

Question 3
Please provide the legislative reference (together with URL, where applicable) for your Member State's implementing legislation.

Results of the Survey

The legislative references of the surveyed countries are stated below:

Austria: BGBl. I Nr. 124/2003 124. Bundesgesetz: Abgabenänderungsgesetz 2003 – AbgÄG 2003 (NR: GP XXII RV 238 AB 296 S. 38. BR: 6890 AB 6907 S. 703.) [CELEX-Nr.: 20031219

Belgium: The references of the three legal instruments implementing the directive into Belgian law are:
- Royal Decree of 22 December 2003, Moniteur belge 31.12.2003, Ed. 2, p. 62326;
- Law of 4 July 2004, Moniteur belge 7.09.2004, p. 65330;
- Royal Decree of 13 August 2004, Moniteur belge 7.09.2004, p. 65331.

The most important instrument is the RD of 22.12.2003. A law was necessary to solve the problem of the "zero bonds". This was made by the law of 4.7.2004 and the RD of 13.8.2004.
The link to the site of the Moniteur belge is hereunder:
http://www.moniteur.be/index_fr.htm
Please type in the box "date" the date in the form YYYY-MM-DD, then click on "Autre sommaire". The instruments are published under the heading "Service Public Fédéral Finances".

Cyprus: Regarding interest: The Income Tax Law, Law 118(I) 2002 and The Special Contribution for the Defence of the Republic Law, Law 117(I)2002.
Regarding royalties: The Income Tax Law, Law 195(I) 2004. URL: www.mof.gov.cy/ird (Please note that the website is only in Greek language)

Czech Republic: Act No 586/1992 on Taxes on Income
(http://www.zakonycr.cz/seznamy/5861992Sb.html) - Czech language only

Denmark: Selskabsskattelovens § 2, stk. 1, litra g

Estonia: http://www.legaltext.ee/

Finland: The legislative reference: Laki rajoitetusti verovelvollisen tulon ja varallisuuden verottamisesta annetun lain muuttamisesta (1282/2003), http://www.finlex.fi/fi/laki/alkup/2003/20031282

France: Finance Act n° 2003-1302 of December 30, 2003; Official Journal (Journal Officiel) of December 31, 2003.

Germany: Sec. 50g German Income Tax Act.

Greece: Articles 14-16 of law 3312/16.2.2005

Hungary: Act LXXXI of 1996 on Corporate Tax and Dividend Tax; Section 7, subsection (1) k), s); Section 7, subsections (14), (16)

Ireland: Chapter 6 of Part 8 of the Taxes Consolidation Act 1997

Italy:
Decreto Legislativo 143/2005.
http://www.giustizia.it/cassazione/leggi/dlgs143_05.html

Latvia: The Directive 2004/76/EK that makes changes to 2003/49/EK on transitional period.

Lithuania:
The Lithuanian Law on Income Taxes can be wiewed on: www.lrs.lt

Luxembourg: Law of July 9, 2004 was published in the Mémorial, Recueil de Législation A, no. 129 of July 19, 2004. www.legilux.lu

Malta: Legal Notice 267 of 2004.

Netherlands: The Tax Act Proposal dates from September 2003 (Tweede Kamer, vergaderjaar 2002-2003, 29 034, nr. 1-2). The Final Law was published in Stb 2003/529.

Poland: Law dated April 20, 2004 on the Amendment of the Law on Personal Income Tax, the Law on Corporate Income Tax and Certain Other Laws (Journal of Laws No. 93, item 894, as amended) [Ustawa z dnia 20 kwietnia 2004 r. o zmianie ustawy o podatku dochodowym od osób fizycznych, ustawy o podatku dochodowym od osób prawnych oraz niektórych innych ustaw (Dziennik Ustaw Nr 93, poz. 894, ze zmianami)] and for the Directive Amending the Interest-Royalties Directive (2003/76/WE) - the Law dated November 18, 2004 on the Amendment of the Law on Corporate Income Tax and Certain Other Laws (Journal of Laws No. 254, item 2533) [Ustawa z dnia 18 listopada 2004 r. o zmianie ustawy o podatku dochodowym od osób prawnych oraz niektórych innych ustaw (Dziennik Ustaw Nr 254, poz. 2533].

Portugal: Decreto-Lei n.º 34/2005, of 17th February 2005.

Slovak Republic: The Slovak income tax Act No. 595/2003 Coll. as amended stipulates the rules of the Directive in its provisions in Section 13, subsection 2, letters g) – interest and i) – royalties.

Slovenia: Act on Income Tax of Legal Person
http://www.dz-rs.si/si/aktualno/spremljanje_zakonodaje/sprejeti_zakoni/sprejeti_zakoni.html

Spain: Law 62/2.003 of 30 December 2.003, of fiscal, administrative and social provisions. (B.O.E. of 31 December 2.003), and Royal Decree Law 5/2.004 of 5 March 2.004, which approved the revised text of the Non-Resident Income Tax Law. (B.O.E. 12 March 2.004).

Sweden: Regarding royalties: SFS 2004:614 (it can be found on www.notisum.se under its main legislation SFS 1999:1229). Regarding interests, the existing Swedish rules regarding interests were deemed to be sufficient and did not lead to any new legislation.

UK: Finance Act 2004 (s. 106(1)(a), (2), (3).) The detail is also in Regulations which were introduced by statutory instrument found at SI 2004/2662

Question 4
In what circumstances is a payment of royalties or interest made by a Permanent Establishment (PE) to an associated company regarded as a tax-deductible expense under your domestic law in order to qualify for favourable treatment under the directive? (Article 1(3))

Results of the Survey

The circumstances differ across Member States. In most countries (19 Member States) a payment of interest and royalties made by a Permanent Establishment (PE) is considered tax deductible if it is connected to the business of the PE. Some Member States require the payment to be done at "Arm's Length" conditions in order to be deductible, while some 'new' Member States do not prescribe any specific criteria for deductibility.

Question 5
In implementing the directive, has your Member State taken advantage of the option contained in Article 1 (10) <u>not</u> to apply the Directive when the payer/recipient of the interest/royalties have not been associated for an uninterrupted period of two years?

Results of the Survey

Only 8 of the surveyed countries have taken advantage of that option not to exempt interest and royalties payments from Withholding Taxes in case the requirement ex Art. 3 have not been met for an uninterrupted period of at least two years.

Question 6
Does your Member State require an attestation before it will permit the application of the exemption?

- ***If so, for how long does the attestation remain valid?***
- ***What form does the attestation take?***
- ***Does your Member State require legal documentation, justifying payment of interest or royalties?***

Where tax has been paid, what is the deadline under your domestic law for reclaiming the tax (Article 1 .15)?

- ***If there is a delay of more than one year - from the date of receipt of the application and requisite documentation - before the refunding of the tax, what rate of interest is payable under your domestic law to the taxpayer?***

Results of the Survey

14 of the surveyed countries require an attestation or a certificate valid for a period ranging from 1 to 3 years in order to permit the application of the exemption from tax. In most countries such attestation has the contents prescribed by the Directive in Art. 3.

The deadline for reclaiming the withholding tax ranges from 2 to 6 years. The interest rate accorded by tax authorities in case of delay in repayment varies significantly across the surveyed countries, from 5% to 15%. Interests are either equal to the national legal interest rate, or calculated upon the bank discount rate or the market rate.

Question 7
Has your Member State chosen to define "associated" status by reference also to voting rights as well as shareholding?

Results of the Survey

11 out of the surveyed countries chose to include voting rights as criteria to define associated companies, while the others did not.

Question 8

8 A.
In implementing the directive, has your Member State adopted the same wide definition of
- ***Interest (see Article 2 (a))***
- ***Royalties (see Article 2 (b))***

8 B.
In implementing the directive has your Member State extending its scope to include any third countries (e.g., EEA members etc)

8 C.
In implementing the directive has your Member State sought to ensure that such transfer payments are not discriminated against when made in a purely domestic context.

Results of the Survey

11 of the surveyed countries adopted the same definition of interests of the Directive; the countries which did not adopt the same definition of the Directive however have a definition which is quite similar to the one of the Directive.

15 of the surveyed countries adopted the Directive definition of royalties.

In the majority of the countries the scope of the Directive has not been extended to include third countries. Only 3 Member States included third countries.

11 of the surveyed countries have sought to ensure that transfer payments are not discriminated against when made in a purely domestic context.

Question 9
Are the following payments excluded from the definition of interest under your domestic law?
- ***Debt-claims carrying a right to participate in the debtor's profits***
- ***Debt-claims where the right to interest can be converted into a right to participate in profits***
- ***Debt-claims with no entitlement to repayment of principal (or entitlement only after 50 years or more)***

Results of the Survey

Debt-claims carrying a right to participate in the debtor's profits are excluded in 11 of the surveyed countries.

Debt-claims where the right to interest can be converted into a right to participate in profits are excluded in 10 of the surveyed countries.

Debt-claims with no entitlement to repayment of principal (or entitlement only after 50 years or more) are excluded in 9 of the surveyed countries.

Question 10, 11, 12 and 13 (analysed jointly)
- Under what circumstances - under your domestic law - can a payment of interest be treated as a distribution of profits or a repayment of capital?

- Are there any objective criteria that determine when a payment of interest/royalties to an associated company is considered excessive (Please specify)?

- Please outline the domestic anti-abuse provisions that may restrict the application of the directive.

- In relation to anti-avoidance provisions, please comment on potential problems with the exemption conferred by this directive and domestic thin capitalisation provisions post the ECJ Lankorst decision (C-324/00).

Results of the Survey

In the majority of the surveyed countries national thin capitalisation rules determine whether a payment of interest is treated as a distribution of profits or repayment of capital. The problem is that thin capitalisation rules vary significantly across the EU. However, in most of the surveyed countries such rules prescribe debt/equity ratios according to which if debt exceeds certain limits then interests are not deductible. In addition, in several countries a payment can be treated as dividends distribution if the interest rate is not at Arm's Length, i.e. if interest rate is higher than the market rate.

In some countries thin capitalisation rules are also accompanied by transfer pricing rules.

Question 14
A) Does your Member State propose to introduce further anti-avoidance provisions in relation to the interest and royalty directive?
B) Were such anti-avoidance provisions introduced into domestic legislation at the time that the original directive was implemented?
C) Specifically, has your domestic legislation introduced a requirement that any interest and royalties should be subject to effective taxation in the Member State of receipt?

Results of the Survey

No country but Poland does foresee to introduce anti-avoidance provisions in relation to the Interests and Royalties Directive.

Only 3 countries introduced anti-avoidance provisions before or at the time of the Directive implementation.

2 countries have introduced a specific requirement that any interest and royalties should be subject to effective taxation in the Member State of receipt.

Question 15

A) Has your Member State introduced specific amending legislation extending the scope of the exemption to include the European Statutory Company and the European Cooperative Society?

B) Has your Member State introduced a list of companies to which the interest and royalties directive applies?

- ***i) Has/will this list be (en) aligned with the list for the revised Parent/Subsidiary directive?***
- ***ii) Is this list capable of future amendment by simplified administrative procedure, as opposed to the full legislative process?***

Results of the Survey

Only 5 countries have introduced specific amending legislation extending the scope of the exemption to include the European Statutory Company and the European Cooperative Society. 12 of the surveyed countries have introduced a list of companies to which the interest and royalties directive applies, but only 6 of those countries have it aligned with the list for the revised Parent/Subsidiary Directive. In 5 countries the list is capable of future amendment by simplified administrative procedure, as opposed to the full legislative process.

2. THE ISSUES RELATED TO THE DIRECTIVE

According to the results of the survey there does not appear to be any significant divergence from the text of the Directive in the implementation of the Directive by Member States.

However, there appear to be potential conflicts of the Directive provisions with:

- The European Court of Justice case-law;
- The OECD Model Convention on income and capital taxes;
- Domestic thin capitalisation rules;
- The Parent-Subsidiary Directive.

Such interaction can create significant problems in the implementation of the Directive in Member States and namely issues related to:

1. Permanent Establishment,
2. Interests,
3. Royalties.

2.1 Permanent Establishment

Permanent Establishment: definition and entitlement to the benefits of the Directive

The Directive places PEs at a different level than companies, as they are treated differently under both the definitions of payer and beneficial owner.

The Directive defines a Permanent Establishment (PE) as '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' (Art. 3,c).

Concerning the payer, the Directive specifies in Article 1 (3) that in order to benefit from an exemption, PE's payments must be tax- deductible expenses for the PE in the Member State in which it is situated. It is important to note that the Directive does not have any provision in this respect for companies, and therefore the treatment of PEs and companies is different.

It can be observed that interest and royalties' payments cannot be tax deductible in a number of cases, the most frequent of which are:

a) The capital producing interests or the use of the asset for which royalties are paid are not linked to the PE and therefore interests and royalties are not deductible;
b) The capital producing interests or the use of the asset for which royalties are paid are linked to the PE but interests or royalties are not deductible under domestic laws (e.g. the tax authorities may object the lack of business purpose or interest may be linked to exempt assets and income, like participations and dividends);
c) Interests are re-qualified as dividends according to domestic thin capitalisation rules;
d) Interests and royalties are partly adjusted according to Transfer Pricing rules.

In case a) the capital or the use of the asset is attributed to the head office of the company or to another PE, with the consequence that the head office or the other PE will deduct the cost for tax purposes and will, *all other things equal*, benefit of the provision of the Directive. Hence, the condition of tax deductibility is justified as a criterion for the allocation of interest and royalties between a company's head office and its PEs.

In case b) the condition of tax deductibility puts PEs at disadvantage: not only will PEs suffer from non-deductibility but also their payments will not be protected under the provisions of the Directive, entailing possible withholding taxes which would not have been due in the case of payments made by subsidiaries. The difference between companies and PEs does not seem to justify the different treatment operated by the Directive in this respect.

Cases c) and d) will be dealt with in the point related to interests of paragraph 3.2.

Concerning the beneficial owner, the Directive treats PEs and companies differently insofar as it requires that interests and royalties are taxable income for PE but does not require it for companies.

While, on the one hand, according to Art 1 (5) of the Directive a PE can be considered a beneficial owner if:

- Interests and royalties are connected with the PE business;
- Interests and royalties are a taxable income of a PE;

On the other hand, a company is considered a beneficial owner ex Art 1 (4) if:

- It receives interests and royalties per its own benefit;
- It is not acting as intermediary agent, trustee or authorised signatory.

Like in the above mentioned case a), when the capital producing interests or the use of the asset for which royalties are paid are not linked to the PE and therefore interests and royalties are not deductible, the connection and taxation criteria provided for in order to qualify a PE as a beneficial owner are justified as a criterion for the allocation of interest and royalties. If interest and royalties cannot be allocated and taxed at PE level, they will be allocated to the head office or other PEs, which will be then qualified as beneficial owner for the purpose of the Directive.

Permanent Establishment: Interaction with ECJ rulings

European Court of Justice decisions need to be taken into account in the interpretation of the Directive definition and treatment of a PE.

According to ECJ rulings, PEs should enjoy the same tax treatment as resident companies or subsidiaries. In this respect specific reference can be made to the following cases:

- C- 253/03 CLT –UFA S.A. in which it was stated that there are no substantial differences between subsidiaries and PEs;
- C250/95 Singer, in which the Court identified a justification for a different treatment of a PE in the field of accounting requirements for deduction of losses;

- C- 307-97 Saint Gobain, in which the Court stated that according to Articles 53 and 48 of the Treaty, PEs have to enjoy the same tax conditions as those applicable to resident companies or subsidiaries[10].

On the other hand, as mentioned above, when interpreting literally the Directive (Articles 1.3 and 1.5), it appears that PEs and companies are treated differently insofar as it is required that interests and royalties are taxable income for PE but this is not required for companies. The different tax treatment of a PE would not be in line with the ECJ case law insofar PEs are put at disadvantage without any justification. Therefore, in order to avoid double taxation, FEE recommends interpreting such provisions of the Directive more restrictively in order to allow the exemption also in the case when the non-deduction of interest and royalties at PE level exists together with a non-deduction at head office or at other PEs level.

An additional issue relates to the case of PEs in a Member State of non-EU companies. From the payer perspective, the Directive provides that only payments of interest and royalties made by PEs located in a Member State of companies of another Member State benefit from its provisions. Hence, payments made by EU PEs of non-EU companies to other EU companies are out of the scope of the Directive. Symmetrically, from the recipient perspective, a PE located in a Member State but not belonging to a EU company does not benefit from the Directive.

In this regards, such provisions are in contrast with the aims of the Directive, i.e. to avoid double taxation on interest and royalties within a group located in the internal market. Indeed, if a non EU company establishes its activity in the EU by incorporating a EU company, then the Directive will apply, while if such a non EU company operates in the EU market through a PE in a Member State, then the Directive does not apply. Such discrimination between companies and PEs located in EU, even if both do not belong to EU companies, appears in contrast with the ratio of the Directive itself and with the ECJ case law.

Permanent Establishment: Interaction with the OECD model

Article 5 of the OECD Model Convention on taxation of Income and Capital[11] defines a Permanent Establishment as 'a fixed place of business through which the business of an enterprise is wholly or partly carried on', which includes especially:

a) A place of management;
b) A branch;
c) An office;
d) A factory;
e) A workshop, and
f) A mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

A building site or construction or installation project constitutes a PE only if it lasts more than twelve months'.

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[10] The case relates to a French company having a PE in Germany through which it holds significant portions of shares in two German companies and one US company. The German tax authorities refused to grant the PE the same tax rights enjoyed by German resident companies and referred the case to the ECJ. The ECJ decision was taken in the framework of bilateral double tax treaties between Germany and third countries. The ECJ judged the refusal of the German tax authorities to constitute an infringement of the principles of the EC Treaty as PEs, subsidiaries and parent companies should have the same tax rights.

[11] OECD Model Convention on Income and Capital, 2005

However, the term Permanent Establishment shall be deemed not to include:

a) The use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
b) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
c) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
d) The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
e) The maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
f) The maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

Where a person is 'acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a PE in that State in respect of any activities which that person undertakes for the enterprise (unless the activities of such person, if exercised through a fixed place of business, would not make the latter a PE under the provisions of the article).

'An enterprise shall not be deemed to have a PE in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business'.

'The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a PE or otherwise), shall not of itself constitute either company a PE of the other'.

The Directive defines the term PE in Article 3 c) as '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'. Such definition is in line with Article 5, paragraph 1 of the OECD model convention, although it does not explicitly include the other paragraphs of Article 5. The question is whether such definition provided by the Directive could be interpreted as to implicitly include paragraphs 2 to 7 of Article 5 of the OECD model.

Under the Directive a PE can be treated:

- As a payer insofar as its payments of interest and royalties represent tax-deductible expenses;
- As a beneficial owner insofar interest and royalties are taxed in the Member State in which it is situated.

There is a need to interpret the Directive and the applicable bilateral conventions (which generally follow the OECD model convention) consistently. Issues could arise when a fixed place of business is considered as a PE by the applicable convention but not according to the Directive, or vice versa. Therefore, when interpreting the Directive definition of PE, one should implicitly consider the more comprehensive lists of positive examples and exceptions to define a PE provided by the applicable convention and, when relevant for the interpretation, the OECD Commentary.

The 'dependent agent' included in the definition of PE in Article 5 paragraph 5 of the OECD model may be included as well when interpreting the Directive definition. The Directive may not be interpreted literally excluding the existence of a PE when it is deemed to exist according to a convention, because such literal interpretation could cause the denial of the benefits of the Directive to a PE existing solely of a dependent agent.

An additional argument in favour of the thesis of an interpretation of the Directive consistent with the OECD model is provided by the new Article 2 paragraph 2 of the amended *Parent Subsidiary Directive*[12]. This article defines a PE using the same wording of Article 5 paragraph 1 of the OECD model, like Article 3 (c) of the Interest and Royalties Directive does as well. However, the amended Parent Subsidiary Directive is more exhaustive as it also specifies that a PE exists 'insofar as the profits of that place of business are subject to tax in the Member State in which it is situated by virtue of the relevant bilateral tax treaty or, in the absence of such treaty, by virtue of national law'.

2.2 Interest

Interests: definition

The definition of interests provided by the Directive is quite similar to the one of the OECD model.

The Directive defines *interest* as '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 securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; penalty charges for late payment shall not be regarded as interest'.

Article 11 of the OECD model Convention defines interest as '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 government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest'.

The Directive definition differs from the one provided by the OECD only insofar as it does not include income from government securities. This however does not represent an issue as generally government securities are out of the scope of the Directive.

Interest: Interaction with the OECD model convention

According to Article 11 of the OECD Model Convention, interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. 'However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10% of the gross amount of the interest. The competent authorities of the Contracting States shall settle the mode of application of this limitation by mutual agreement'.

[12] 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.

This provision shall not apply 'if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises through a PE situated therein and the debt-claim in respect of which the interest is paid is effectively connected with such Permanent Establishment. In such case the provisions of Article 7 shall apply.

Interest shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a PE in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such PE, then such interest shall be deemed to arise in the State in which the PE is situated.

Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention'.

It can be observed that, provided the situation corresponds with the description of the scope in Article 1 of the Directive, the Directive is applicable irrespectively of whether the recipient is a PE or not. The Directive approach differs from the OECD one to the extent that the use of PEs as recipients allows avoiding any domestic withholding tax levied in the source State. 'The inclusion of PEs among those persons who may benefit of EC law could well be interpreted as the reply of the Council to the Saint-Gobain case C-307/97' [13].

Interests: Interaction with Anti- avoidance provisions

In case of a special relationship between the payer and the beneficial owner, Article 4 (1) of the Interest and Royalties Directive allows Member States to apply withholding taxes to the amounts of interest and royalties in excess to what would have been agreed if there was no such relationship. Most Member States use transfer- pricing rules or thin capitalisation rules to apply withholding taxes to the excess amounts of interests and royalties.

According to Article 5 of the Directive, Member States are entitled not to apply the Directive 'in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse'. As a consequence, thin capitalisation rules and other domestic provisions to prevent tax evasion, tax avoidance or abuse can be used to refuse to exempt interest from withholding taxes.

It appears[14] that all Member States apply anti-abuse provisions (thin capitalisation and transfer pricing rules) to take advantage of the possibility to deny the exemption of withholding tax under Article 5 of the Directive; in some countries specific measures have been introduced. Anti-avoidance provisions are determined at national level and vary significantly across the EU. In most of Member States such rules determine whether a payment of interest is treated as a distribution of profits or repayment of capital and prescribe debt/equity ratios according to which if debt exceeds certain limits then interests are not deductible. In several countries a payment can be treated as dividends distribution if the interest rate is not at arm's length, i.e. as stated by the OECD model convention, if the conditions of

[13] EC Tax Review 2004/3, p. 140, K Eicker and F. Aramini

[14] Survey on the implementation of the EC Interest and Royalties Directive, IBFD, 2006

commercial and financial relations are not determined by market price. In some countries thin capitalisation rules are also accompanied by transfer pricing rules.

The question to consider is whether domestic anti-avoidance rules are to some extent consistent with the Directive. In order to find an appropriate answer, the interpretations of the ECJ have to be taken into consideration.

ECJ judgement of 17 July 1997 on Leur-Bloem case (C-28/95) applies the Merger Directive and does not provide a severe interpretation of tax avoidance. The case relates to Ms Leur-Bloem, sole shareholder of two Dutch companies, planning to acquire all the shares in a third company by means of exchanging shares in the first two companies. Under Dutch law, in the case of mergers by exchange of shares, there is exclusion from taxation of gains arising on major shareholdings and the possibility to offset any losses within the tax entity thus created. However, a Dutch tax inspector refused this right to Ms Leur- Bloem, taking the view that there was no merger by exchange of shares and contending that the operation was not carried out for commercial purpose, but only to obtain fiscal advantages. Ms Leur-Bloem appealed against that decision to the Dutch Court, which referred the case to the ECJ.

In the judgement on this case,[15] the ECJ first pointed out that it has jurisdiction also where the situation in question is not governed directly by Community law, but the national legislature, in transposing the provision of a directive into domestic law, has chosen to apply the same treatment to purely internal situations. According to the judgement, Article 11 of Directive 90/434 (the so-called old 'Merger Directive') is to be interpreted as meaning that Member States can refuse to apply the benefits granted by the Directive where the planned operation is not carried for valid commercial reasons, i.e. for the sole attainment of a purely fiscal advantage. However, there should not be an automatic exclusion of certain operations from tax advantage without ascertaining whether or not there actually is tax evasion or avoidance, as this would undermine the aim pursued by the Merger Directive.

According to another ECJ judgement of 2004 on case Lenz (C-315/02) tax avoidance is not a justification to limit the freedoms of the Rome Treaty. The case relates to Ms Lenz, fully taxable in Austria, who declared to the Austrian tax authorities dividends received from limited companies in Germany. The Austrian tax authorities charged such dividends to ordinary revenue and did not grant the reduced rate taxation applied for revenue from capital of Austrian origin. The question was referred to the ECJ by the Austrian Court.

According to the ECJ final judgement in this case 'refusal to grant the recipients of revenue from capital originating in another Member State the tax advantages granted to recipients of revenue from capital of Austrian origin cannot be justified by the fact that revenue from companies established in another Member State is subject to low taxation in that State'[16].

To summarise, it appears that according ECJ rulings Member States can refuse to apply the benefits granted by the Directive in case of operation carried for the sole attainment of a purely fiscal advantage with no valid commercial reasons. However, there should not be an automatic exclusion of certain operations from tax advantage without ascertaining whether or not there actually is tax evasion or avoidance.

[15] ECJ Judgement of 17 July 1997 on case Leur-Bloem C- 28/ 95
[16] ECJ Judgement of 15 July 2004 on case Lenz C-315/02

Interests: Interactions with the Parent Subsidiary Directive

The 'old' 1990[17] Parent Subsidiary Directive was created with the purpose to eliminate tax obstacles in groups operating in the EU by preventing double taxation on distribution of dividends between companies of the same group located in different Member States. The 'new' 2003[18] Parent Subsidiary Directive amended the 1990 Directive by relaxing the conditions for exempting dividends from withholding taxes and introduced elimination of double taxation for subsidiaries of subsidiary companies.

According to the amended Parent Subsidiary Directive, in the case of a parent company or its PE receiving profits from subsidiaries located in a different Member State, the Member State of the parent company and of the PE should:

- Not tax the profits; *or*
- Tax these profits and allow the parent company and the PE to deduct the part of corporation tax related to those profits and paid by the subsidiary and any lower-tier subsidiary.

In addition, Article 5 of the Parent Subsidiary Directive requires that profits distributed by a subsidiary to its parent company are exempt from withholding tax[19].

It is important to note that, in case of re-characterisation of interests as dividends according to domestic anti-avoidance provisions, even though no withholding tax can be applied according to the Parent- Subsidiary Directive, double taxation could still occur if:

- The Member State of the payer does not allow deduction of interests paid in the calculation of taxable income, as it classifies the payment as dividend distribution; *and*
- The Member State of the beneficial owner still taxes the amount received as interest, as it does not automatically recognise thin capitalisation rules of the Member State of the payer and does not classify such amount as dividends.

The *ratio legis* of the Parent Subsidiary Directive, which is to avoid double taxation of distributions of income at the level of the parent company, would therefore be jeopardised in this case. The similar aim of the Interest and Royalty Directive, to assure that double taxation is eliminated, is also not achieved.

In order to avoid double taxation, an appropriate solution should be identified. For example, it might be foreseen by the Directive that a classification as dividends distribution for tax purpose in the Member State of the payer is automatically accepted as such in the Member State of the recipient.

Both the Parent-Subsidiary Directive (Article 1.2) and the Interest and Royalties Directive (Article 5.1) foresee the application of either domestic or agreement-based provisions for the prevention of fraud or abuse. More specifically, the Amending Directive of 2003 to the Parent Subsidiary Directive mentions that 'in relation to the treatment of PEs Member States may need to determine the conditions

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[17] 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.

[18] 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.

[19] While in the 'old' Parent Subsidiary Directive the exemption of dividends from withholding tax was granted under the condition of a percentage of shareholding not less than 25%, in the amended Directive such threshold has been reduced to 20 % up to May 2007, to 15 % from June 2007 and to 10% from 1 January 2009.

and legal instruments in order to protect the national tax revenue and fend off circumvention of national laws, in accordance with the Treaty principles and taking into account internationally accepted tax rules (Recital 9)'. The Interest & Royalty Directive is more exhaustive, insofar as it provides that "Member States may, in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse, withdraw the benefits of the Directive in case of fraud or abuse (Article 11).

Following the ECJ judgement on Halifax case C-255/02, related to arrangement exclusively designed to avoid tax, it is clear that the term abuse still has to be defined by the domestic courts in the relevant Member States. This is causing uncertainty as Member States can have different interpretations of abuse. On the other hand, in other cases such as Cadbury Schweppes C-196/04, the Court has been more precise on defining abuse.

2.3 Royalties

Royalties are defined by the Directive as '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 and software, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; payments for the use of, or the right to use, industrial, commercial or scientific equipment shall be regarded as royalties'.

Article 12 of the OECD Model Convention defines royalties as '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 information concerning industrial, commercial or scientific experience'.

Article 7 of the OECD specifies that royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State should be taxable only in that other State. This shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a PE situated therein and the right or property in respect of which the royalties are paid is effectively connected with such PE. In such case the profits of the enterprise may be taxed in the other State but only the part which is attributable to that PE.

The Directive definition of royalties in Article 2 (b) differs from the one of the OECD where it includes also software and payments for the use of, or the right to use, industrial, commercial or scientific equipment. As a consequence, according to the Directive definition, also leasing rents can be considered as royalties, while the OECD includes leasing in company income. However, this is only a formal difference, as in substance those leasing rents are not taxed according to Article 7 of the OECD convention and are exempt under the Interest and Royalties Directive.

3. EXECUTIVE SUMMARY

According to the results of the survey there does not appear to be any significant divergence from the text of the Directive in the implementation of the Directive by Member States.

However, there can be potential conflicts of the Directive provisions with:

- The European Court of Justice case-law;
- The OECD Model Convention on income and capital taxes;
- Domestic thin capitalisation rules;
- The Parent-Subsidiary Directive.

The main issues arising when interpreting the Directive relate to:

1) Permanent Establishment (PE)

The interpretation of the general definition of PEs provided for by the Directive should take into account also the definitions provided by the bilateral tax Treaties (which usually follow the OECD model convention) and the applicable domestic laws.

The definition of PE provided by the Directive is not as comprehensive as the one provided by the OECD model convention. FEE recommends that the Directive definition is interpreted as implicitly including the lists of positive and negative examples provided by the OECD, in order to avoid that a fixed place of business is considered as a PE by the applicable convention but not according to the Directive, or vice versa.

In addition, the Directive limits the scope of application of its benefits to the cases where interest and royalties are not deductible from the taxable profit of the PE. FEE recommends interpreting this scope limitation strictly so as to include only the case where interest and royalties expenses are not attributable to the PE. In FEE's view, other cases of non-deductibility due to thin capitalisation rules or other domestic provisions should not prevent the application of the benefits of the Directive.

With regards to PEs located in a Member State of non-EU companies, they are excluded from the scope of the Directive both in case they are payer or payee of interests and royalties, while EU subsidiaries of non EU parent companies benefit from the provisions of the Directive. Such discrimination between PEs and EU subsidiaries of non-EU (parent) companies seems to be in contrast with the aims of the Directive (to avoid double taxation of payments of interests and royalties within a group in the internal market) and with the ECJ case law on the non discrimination. In this case, an extensive interpretation of the Directive, based on ECJ case law, could solve the unreasonable limit provided for by the literal interpretation of the Directive.

2) Interests

In case of re-characterisation of interests as dividends according to domestic anti-avoidance provisions, the Interest and Royalties Directive would not apply. FEE observes that in that case double taxation could still occur, even though no withholding tax can be applied owing to the Parent-Subsidiary Directive, if:

- The Member State of the payer does not allow deduction of interests paid in the calculation of taxable income, as it classifies the payment as dividend distribution; *and*

- The Member State of the beneficial owner still taxes the amount received as interest, as it does not automatically recognise thin capitalisation rules of the Member State of the payer and does not classify such amount as dividends.

In order to avoid double taxation FEE suggests that a classification of a payment of interests as dividends distribution for tax purpose in the Member State of the payee is automatically accepted as such in the Member State where such payments are received.

3) Anti-avoidance provisions

According to the Directive, Member States can refuse to apply the benefits granted by it in case of transactions carried on for the sole attainment of a purely fiscal advantage with no valid commercial reasons. However, there should not be an automatic exclusion of certain transactions from the tax advantages provided for by the Directive without ascertaining whether or not there actually is tax evasion or avoidance.

Indeed, according to the ECJ interpretation tax avoidance is not a justification to limit the freedoms of the Rome Treaty or the provisions of community law. Hence it can be observed that the anti avoidance rules application has to be more restrictive than the literal interpretation of the Interest and Royalty Directive would suggest. FEE therefore recommends that the interpretation of Article 5 of the Directive is consistent with the developing ECJ case law.

In addition FEE observes that the ECJ has not provided clear guidance on the definition of abusive anti- avoidance provisions. FEE therefore recommends the European Commission provide a Recommendation or guidelines on a European definition of abusive anti avoidance provisions. This is in FEE's view preferable to the 'wait and see approach', i.e. waiting for further clarification to be provided for by future ECJ decisions.

ANNEX: MATRIXES SUMMARISING THE ANSWERS TO THE QUESTIONNAIRE

The countries to which the questionnaire has been sent to are the 25 EU Member States in 2006. Answers were received from all the countries. The matrixes below summarise the main answers by country.

Matrix A

***Countries**:* Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Denmark, Estonia, Spain, Finland, France, Greece, Hungary and Ireland

Questions:	AU	BE	BG	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HU	IR
1. When did the directive enter into force under your Member State's implementing legislation? The deadline set by the directive was 1 January 2004.	04	04	N/A	04	i 04 R11	04	04	04	i 04 R05	04	04	05	04	04
2. If the Directive was implemented after 2004, will it have retrospective effects from that date? If so, how is repayment obtained?	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N	N/A	N/A	N/A	N/A	N/A	N/A
4. In what circumstances is a payment of royalties or interest made by a PE to	con.	con.	N/A	con.	con.	con.	con.	N/A[20]	N/A	N/A	AL	con.	con.	con.

[20] In Estonia residents do not pay income tax and consequently deductibility of costs does not apply. Only some specific items are taxable (fringe benefits, etc.). This has been allowed by the EC till 2008.

Questions:	AU	BE	BG	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HU	IR
an associated company regarded as a tax-deductible expense under your domestic law in order to qualify for favourable treatment under the directive? (Article 1(3))														
5. In implementing the directive, has your Member State taken advantage of the option (Article 1 (10)) not to apply the Directive when the payer/recipient of the interest/royalties have not been associated for an uninterrupted period of three years?	Y, 1y	N	N/A	N	Y, 2y	N	Y	N	N	N/A	Y,2y	N	N	N
6. Does your Member State require an attestation before it will permit the application of the exemption?	Y	Y	N/A	N	Y	Y	N	N	Y	Y	Y	N/A	Y	N
• If so, for how long does the attestation remain valid?	2y	not specifie d	N/A	N/A	1y	3y	N/A	N/A	1y	N/A	N/A	N/A	all	N/A
• What form does the attestation take? Does it			N/A	N/A			N/A	N/A		N/A		N/A		N/A

Questions:	AU	BE	BG	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HU	IR
require:														
- Proof of the receiving company's residence/confirmation of the existence of a P/E by the tax authorities in the other Member State?	Y	Y	N/A	N/A	Y	Y	N/A	N/A	Y	N/A	N	N/A	Y	N/A
- Confirmation a) of the beneficial ownership of the receiving company or b) that the income is effectively connected to the P/E and subject to taxation	Y	N	N/A	N/A	Y	Y	N/A	N/A	Y	N/A	Y	N/A	N	N/A
- In the case of a receiving company, that it has been subject to tax (Article 3 (a) (iii))	Y	N	N/A	N/A	Y	Y	N/A	N/A	Y	N/A	Y	N/A	Y	N/A
- Proof that the minimum shareholding requirements have been met (Article 3 (b))	Y	Y	N/A	N/A	Y	Y	N/A	N/A	Y	N/A	Y	N/A	Y	N/A
- Proof that any shareholding has been held for the requisite minimum period	Y	Y	N/A	N/A	Y	N	N/A	N/A	Y	N/A	Y	N/A	N	N/A

Questions:	AU	BE	BG	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HU	IR
• Does your Member State require legal documentation, justifying payment of interest or royalties?	N	N	N/A	Y	Y	N	Y	N	N	N	N	N/A	N	N/A
• Where tax has been paid, what is the deadline under your domestic law for reclaiming the tax (must be more than 2 years Article 1 (15))	5y	3y	N/A	6y	3y	4y	N	3y	4y	5y	2/3y; 1/2y[21]	N/A	5y	N/A
• If there is a delay of more than one year - from the date of receipt of the application and requisite documentation - before the refunding of the tax, what rate of interest is payable under your domestic law to the taxpayer?	Di +2%	N	N/A	9%	[22]	5%	N/A	0.06% per day	5%	5%	legal	N/A	N	N/A
7. Has your Member State chosen to define "associated" status also by reference to voting rights as well as	N	N	N/A	N	Y	N	N	N	Y	N	N	N	Y	Y

[21] 2 to 3 years if tax claimed by the payer company
1 to 2 years if tax claimed by the receiving company

[22] 140% of bank rate

Questions:	AU	BE	BG	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HU	IR
shareholding?														
8. A. In implementing the directive, has your Member State adopted the same wide definition of: - interest (see Article 2 (a)) - royalties (see Article 2 (b))	Y	N	N/A	N	i:N R:Y	N	N	Y	N	Y	Y	Y	i:N R:Y	Y
B. In implementing the directive has your Member State extended its scope to include any third countries (e.g. EEA members etc)	N	N	N/A	N	N	N	N	N	N	N	N	N	Y	Y
C. In implementing the directive has your Member State sought to ensure that such transfer payments are not discriminated against when made in a purely domestic context?	N/A	N/A	N/A	Y	Y	N	Y	N	Y	N	N	N	Y	Y
9. Are the following payments excluded from the definition of interest under your domestic law?														

Questions:	AU	BE	BG	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HU	IR
- Debt-claims carrying a right to participate in the debtor's profits	N	N	N/A	N	Y	Y	Y	N	N	N	Y	Y	Y	Y
- Debt-claims where the right to interest can be converted into a right to participate in profits	N	N	N/A	N	Y	N	Y	N	N	N	Y	Y	Y	Y
- Debt-claims with no entitlement to repayment of principal (or entitlement only after 50 years or more)	N	Y	N/A	N	N	N	N	N	N	N	Y	Y	Y	Y
10. Under what circumstances - under your domestic law - can a payment of interest be treated as a distribution of profits or a repayment of capital?	If not AL	Thin cap	N/A	If not AL	If not AL	If not AL	If not AL	N/A	thin cap	If not AL	If not AL	N/A	If not AL	If not AL
11. Are there any objective criteria that determine when a payment of interest/royalties to an associated company are considered excessive (Please specify)	If not AL	If not AL	N/A	N	If not AL, thin cap.	Tfr price	thin cap	N	N	If not AL	If not AL	N/A	If not AL	N
12. Please outline the domestic anti-abuse	Thin cap	If no econ.	N/A	N	N/A	If no econ.	N/A	If no econ.	AL	If no econ.	If no econ.	N/A	AL	If no econ.

Questions:	AU	BE	BG	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HU	IR
provisions that may restrict the application of the directive.		Reas.				Reas.		Reas.		Reas.	Reas.			Reas.
13. In relation to anti-avoidance provisions, please comment on potential problems with the exemption conferred by this directive and domestic thin capitalisation provisions post the Lankorst decision (ECJ).	No thin cap	N	N/A	N/A	If not AL	Thin cap	N/A	N/A	If not AL	N/A	Thin cap	N/A	N/A	N/A
Amending Directive 2003/49/EC			N/A											
14. A) Does your Member State propose to introduce further anti-avoidance provisions in relation to the interest and royalty directive?	N	N	N/A	N	N	N	N	N	N	N	N	N	N/A	N
B) Were such anti-avoidance provisions introduced into domestic legislation at the time that the original directive was implemented?	N	N	N/A	N	N	Y	N	N	N	N	N	N	Y	N
C) Specifically, has your domestic legislation introduced a requirement	N	N	N/A	N	N	N	N	N	N	N	Y	N	N	N

Questions:	AU	BE	BG	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HU	IR
that any interest and royalties should be subject to effective taxation in the Member State of receipt?														
15. A) Has your Member State introduced specific amending legislation extending the scope of the exemption to include the European Statutory Company and the European Cooperative Society?	Y	N	N/A	N	Y	N	Y	N	Y	Y	N	N	N	N
B) Has your Member State introduced a list of companies to which the interest and royalties directive applies?	Y	N	N/A	Y	Y	Y	N	N	Y	N	Y	N	Y	Y
i) Has/will this list be (en) aligned with the list for the revised Parent/Subsidiary directive?	Y	N/A	N/A	Y	Y	Y	N/A	N/A	Y	N/A	N	N/A	N	N
ii) Is this list capable of future amendment by simplified administrative procedure, as opposed to the full legislative process?	Y	N/A	N/A	N	Y	N	N/A	N/A	N	N/A	N	N/A	N	N

Legend:

- **AU**: Austria; **BE**: Belgium; **BG**: Bulgaria; **CY**: Cyprus; **CZ**: Czech Republic; **DE**: Germany; **DK**: Denmark; **EE**: Estonia; **ES**: Spain; **FI**: Finland; **FR**: France; **GR**: Greece; **HU**: Hungary; **IR**: Ireland

- Years: 04= 2004; 05= 2005; 13= 2013
- Y: Yes
- N: No
- i: Interests
- R: Royalties
- con.: deductible if connected with the PE, if incurred in relation to the debt, if connected to the PE business, if to generate income
- AL: if payments in accordance with the Arm's Length's principle
- If no econ Reas: transaction done with no economic reason, and only for tax reasons
- Di: Discount interest rate

Matrix B

Countries: Italy, Luxembourg, Lithuania, Latvia, Malta, The Netherlands, Poland, Portugal, Slovenia, Slovak Republic, Sweden and the United Kingdom

Questions:	IT	LU	LT	LV	MA	NL	PL	PT	RO	SI	SK	SW	UK
1. When did the directive enter into force under your Member State's implementing legislation? The deadline set by the directive was 1 January 2004.	05	04	05	13	04	04	13	05	10	04	I 05 R 06	04	04
2. If the Directive was implemented after 2004, will it have retrospective effects from that date? If so, how is repayment obtained?	Y	N/A	N	N/A	N/A	N/A	N	N/A	N/A	N/A	N	N/A	N/A
4. In what circumstances is a payment of royalties or interest made by a PE to an associated company regarded as a tax-deductible expense under your domestic law in order to qualify for favourable treatment under the directive? (Article 1(3))	con.	con.	con.	If WH deducted	Con.	AL	con.	con.	N/A	all	all	con.	con.
5. In implementing the directive, has your Member State taken advantage of the option (Article 1 (10)) not to apply the Directive when the payer/recipient of the interest/royalties have not been associated for an uninterrupted period of three years?	N	N	Y	N/A	N	N/A	Y, 2y	Y, 2y	N/A	N	Y, 2y	N	N

Questions:	IT	LU	LT	LV	MA	NL	PL	PT	RO	SI	SK	SW	UK
6. Does your Member State require an attestation before it will permit the application of the exemption?	Y	N	Y	N/A	N	N/A	Y	Y	N/A	Y	N	N	Y
• If so, for how long does the attestation remain valid?	1y	N/A	N/A	N/A	N/A	N/A	N/A	2y	N/A	1y	N/A	N/A	[c)]
• What form does the attestation take? Does it require:													
- Proof of the receiving company's residence/confirmation of the existence of a P/E by the tax authorities in the other Member State?	Y	N/A	N/A	N/A	N/A	N/A	Y	Y	N/A	Y	N/A	N/A	Y
- Confirmation a) of the beneficial ownership of the receiving company or b) that the income is effectively connected to the P/E and subject to taxation	Y	N/A	N/A	N/A	N/A	N/A	N	Y	N/A	Y	N/A	N/A	Y
- In the case of a receiving company, that it has been subject to tax (Article 3 (a) (iii))	Y	N/A	N/A	N/A	N/A	N/A	N	Y	N/A	Y	N/A	N/A	Y
- Proof that the minimum shareholding requirements have been met (Article 3 (b))	Y	N/A	N/A	N/A	N/A	N/A	N	Y	N/A		N/A	N/A	N

[23] For the length of the obligation

Questions:	IT	LU	LT	LV	MA	NL	PL	PT	RO	SI	SK	SW	UK
- Proof that any shareholding has been held for the requisite minimum period	Y	N/A	N/A	N/A	N/A	N/A	N	Y	N/A		N/A	N/A	N
• Does your Member State require legal documentation, justifying payment of interest or royalties?	N	N	Y	N	N	Y	Y	Y	N/A	Y	N	N	Y
• Where tax has been paid, what is the deadline under your domestic law for reclaiming the tax (must be more than 2 years Article 1 (15))	4y	2y	5y	2y	N/A	N/A	No claim	2y	N/A	N/A	5y	10Y	6Y
• If there is a delay of more than one year - from the date of receipt of the application and requisite documentation - before the refunding of the tax, what rate of interest is payable under your domestic law to the taxpayer?	Li	N/A	3%	N/A	N/A	5%	N/A	7%	N/A	15%	>30 days 14.25% p.a.	9 %	AL
7. Has your Member State chosen to define "associated" status also by reference to voting rights as well as shareholding?	Y	Y	Y	Y	N	Y	Y but thin cap	N	N	N	N	N	Y
8. A. In implementing the directive, has your Member State adopted the same wide definition of: - interest (see Article 2 (a)) - royalties (see Article 2 (b))	Y	N	i:N R:Y	N/A	Y	N/A	N	Y	Y	Y	N	N	Y

Questions:	IT	LU	LT	LV	MA	NL	PL	PT	RO	SI	SK	SW	UK
B. In implementing the directive has your Member State extended its scope to include any third countries (e.g. EEA members etc)	N	Y	N	N	N	N/A	N	N	N/A	N	N	N	N
C. In implementing the directive has your Member State sought to ensure that such transfer payments are not discriminated against when made in a purely domestic context?	N	N/A	N/A	N/A	N	N/A	Y	Y	N/A	Y	Y	N	Y
9. Are the following payments excluded from the definition of interest under your domestic law? - Debt-claims carrying a right to participate in the debtor's profits	Y	C by C	N/A	N	N	N/A	N[24]	N	N	Y	Y	N	Y
- Debt-claims where the right to interest can be converted into a right to participate in profits	Y	C by C	N/A	N	N	N/A	N	N	N	Y	Y	N	Y
- Debt-claims with no entitlement to repayment of principal (or entitlement only after 50 years or more)	Y	C by C	N/A	N	N	N/A	N	N	N/A	Y	Y	N	Y
10. Under what circumstances - under your domestic law - can a payment of interest be treated as a	Thin cap	If not AL	N/A	N/A	N/A	Thin cap	Thin cap	N	N	Thin cap	all	If not AL	-thin cap -tfr

[24] Excluded in common practice even though not by law

Questions:	IT	LU	LT	LV	MA	NL	PL	PT	RO	SI	SK	SW	UK
distribution of profits or a repayment of capital?													price
11. Are there any objective criteria that determine when a payment of interest/royalties to an associated company are considered excessive (Please specify)	ratios	N	If not AL	Tfr price + thin cap	N	ratios	If not AL i	ratios	N	N	N	N	If not AL
12. Please outline the domestic anti-abuse provisions that may restrict the application of the directive.	If no econ. Reas.	If not AL	N/A	N/A	N	If not AL ratios	ratios	If not AL	N/A	N/A	N/A	If no econ. Reas.	If no econ. Reas.
13. In relation to anti-avoidance provisions, please comment on potential problems with the exemption conferred by this directive and domestic thin capitalisation provisions post the Lankorst decision (ECJ).	N	N/A	N/A	N/A	N/A	Thin cap	N	N	N/A	N/A	N	N/A	N
Amending Directive 2003/49/EC													
14. A) Does your Member State propose to introduce further anti-avoidance provisions in relation to the interest and royalty directive?	N	N	N/A	N/A	N	N/A	Y	N	N/A	N/A	N	N	N
B) Were such anti-avoidance provisions introduced into domestic legislation at the time that the original directive was implemented?	N	N	N/A	N/A	N	N/A	N	N/A	N/A	N	N/A	N	Y

Questions:	IT	LU	LT	LV	MA	NL	PL	PT	RO	SI	SK	SW	UK
C) Specifically, has your domestic legislation introduced a requirement that any interest and royalties should be subject to effective taxation in the Member State of receipt?	Y[25]	N	N	N	N	N/A	N	N	N/A	N	N	N	N
15. A) Has your Member State introduced specific amending legislation extending the scope of the exemption to include the European Statutory Company and the European Cooperative Society?	N	N	N	N/A	N	N/A	N	N	N/A	N	N	N	N
B) Has your Member State introduced a list of companies to which the interest and royalties directive applies?	Y	N	N	N	N	N	Y	N	N/A	N	N	Y	Y
i) Has/will this list be (en) aligned with the list for the revised Parent/Subsidiary directive?	N	N/A	N/A	N/A	N/A	N/A	N	N/A	N/A	N/A	N/A	N/A	Y
ii) Is this list capable of future amendment by simplified administrative procedure, as opposed to the full legislative process?	Y	N/A	N/A	N/A	N/A	N/A	N	N/A	N/A	N/A	N/A	Y	Y

[25] Payments made to PE are not exempt

Legend:

- **IT**: Italy; **LU**: Luxembourg; **LT**: Lithuania; **LV**: Latvia; **MA**: Malta; **NL**: Netherlands; **PL**: Poland, **PT**: Portugal; **SI**: Slovenia; **SK**: Slovak Republic; **SW**: Sweden; **UK**: United Kingdom

- Years: 04 = 2004; 05 = 2005; 10 = 2010; 13 = 2013
- Y: Yes
- N: No
- i: Interests
- R: Royalties
- con.: deductible if connected with the PE, if incurred in relation to the debt, if connected to the PE business, if to generate income
- AL: in accordance with the Arms Length's principle
- L i: Legal interest rate
- all: Always
- C by C: to be analysed case by case
- Ratios: ratios between debt and equity determined by thin capitalisation rules
- Thin Cap: domestic thin capitalisation rules