

Proposal for a Council Directive to ensure effective taxation of savings income in the form of interest payments within the Community

(2001/C 270 E/31)

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(Submitted by the Commission on 19 July 2001)

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

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

Whereas:

- (1) Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty⁽¹⁾ has allowed the complete liberalisation of capital movements, including direct investment, taking place in the Community between residents of Member States since 1990; the free movement of capital is now enshrined in Articles 56 to 60 of the Treaty.
- (2) Savings income in the form of interest payments from debt-claims constitutes taxable income for residents of all Member States.
- (3) By virtue of Article 58(1) of the Treaty, Member States have the right to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested, and to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation.
- (4) In accordance with Article 58(3) of the Treaty, the provisions of Member States' national tax law designed to counter abuse or fraud should not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as established by Article 56 of the Treaty.
- (5) In the absence of any co-ordination of national tax systems for taxation of savings income in the form of interest payments, particularly as far as the treatment of interest received by non-residents is concerned, residents of Member States are currently often able to avoid any form of taxation in their Member State of residence on interest they receive in another Member State.
- (6) This scope for tax avoidance is creating distortions in the capital movements between Member States which are incompatible with the internal market.
- (7) In line with the ECOFIN conclusions of 1 December 1997, the Commission adopted on 20 May 1998⁽²⁾ a proposal for a Directive to ensure a minimum of effective taxation of savings income in the form of interest payments within the Community.
- (8) That proposal was the subject of intensive discussions at political and technical level from July 1998 onwards but failed to win the unanimous support of Member States.
- (9) Therefore this Directive builds on the consensus reached at the Santa Maria da Feira European Council of 19 and 20 June 2000 and the subsequent ECOFIN Council of 26 and 27 November 2000.
- (10) The objective of this Directive is to ensure that cross-border savings income in the form of interest payments can be subject to effective taxation in the Member State of residence of the taxpayer in accordance with its national laws.
- (11) The scope of this Directive is limited to interest payments made by a paying agent established in one Member State to beneficial owners who are individuals resident in another Member State.
- (12) Since the objective of this Directive, which is that of the effective taxation of cross-border savings income within the Community, cannot be sufficiently achieved by the Member States, because of the absence of any co-ordination of national systems for the taxation of savings income, and can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article this Directive confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.
- (13) The paying agent is the economic operator who pays interest to, or secures the payment of interest for the immediate benefit of, the beneficial owner; the payment of interest does not include the mere passive receipt of a payment by a bank or financial institution into the beneficial owner's account.
- (14) In defining the notion of interest payment and the paying agent mechanism reference should be made, where appropriate, to Council Directive 85/611/EEC of 20 December 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)⁽³⁾.

⁽¹⁾ OJ L 178, 8.7.1988, p. 5.

⁽²⁾ OJ C 212, 8.7.1998, p. 13.

⁽³⁾ OJ L 375, 31.12.1985, p. 3.

- (15) The scope of this Directive should be limited to taxation of savings income in the form of interest payments on debt-claims, to the exclusion of the issues relating to the taxation of pension and insurance benefits.
- (16) The objective of ensuring effective taxation of interest payments can be achieved thanks to the exchange of information concerning interest payments between Member States.
- (17) Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities in the field of direct and indirect taxation⁽¹⁾ already provides a basis for Member States to exchange information for tax purposes and should as a general rule apply equally to the exchange of information under this Directive.
- (18) The automatic exchange of information between Member States concerning interest payments covered by this Directive constitutes a *conditio sine qua non* for ensuring effective taxation of cross-border interest payments.
- (19) It should therefore be stipulated that Member States which exchange information pursuant to this Directive should not be permitted to rely on the limits to the exchange of information as set out in Article 8 of Directive 77/799/EEC.
- (20) In order to allow them more time to adapt their legislation Belgium, Luxembourg and Austria should not be required to exchange information for the purposes of this Directive during a transitional period of seven years after the entry into force of this Directive, but should receive such information from the other Member States.
- (21) During this transitional period, these three Member States should be required to ensure a minimum of effective taxation of savings income in the form of interest payments by levying a withholding tax.
- (22) Those Member States should transfer the greater part of the revenue of this withholding tax to the Member State of residence of the beneficial owner of the interest.
- (23) Those Member States should provide for a procedure allowing beneficial owners resident in other Member States to avoid the imposition of this withholding tax by authorising their paying agent to report the interest payments or by presenting a certificate issued by the competent authority of their Member State of residence.
- (24) The Member State of residence of the beneficial owner should ensure the elimination of any double taxation of the interest payments which might result from the imposition of this withholding tax in accordance with the procedures laid down in this Directive; it should do so by crediting this withholding tax up to the amount of tax due in its territory on such interest and by reimbursing to the beneficial owner any excess amount of tax withheld.
- (25) In order to avoid market disruption, this Directive should, during the transitional period, not apply to interest payments on existing domestic and international bonds and other negotiable debt securities for which the issuing prospectuses have been certified before 1 March 2001 or which, in the absence of any prospectus, have been issued before that date.
- (26) Provision should be made in order to allow Member States levying withholding tax to exempt paying agents acting on behalf of international organisations issuing debt-claims from the obligation to withhold tax on interest paid on such debt-claims, where such an obligation would be contrary to international agreements concluded by those Member States with respect to such organisations.
- (27) This Directive should not preclude Member States from levying other types of withholding tax than that referred to in this Directive on interest arising in their territories.
- (28) The Commission should report every three years on the operation of this Directive and propose to the Council any amendments that prove necessary in order better to ensure effective taxation of savings income and to remove undesirable distortions of competition.
- (29) This Directive respects the fundamental rights and principles which are recognised, in particular, by the Charter of Fundamental Rights of the European Union,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

INTRODUCTORY PROVISIONS

Article 1

Aim

1. The aim of the Directive is to ensure that savings income in the form of interest payments made in one Member State to beneficial owners who are individuals resident in another Member State can be subject to effective taxation in accordance with the national laws of the latter Member State.

2. Member States shall take the necessary measures to ensure that the tasks necessary for the implementation of this Directive are carried out by paying agents established within their territory, irrespective of the place of establishment of the debtor of the debt-claim producing the interest.

⁽¹⁾ OJ L 336, 27.12.1977, p. 15.

Article 2

Definition of beneficial owner

1. For the purposes of this Directive, 'beneficial owner' means any individual who receives an interest payment or any individual for whose benefit an interest payment is secured, unless he can provide evidence that he has not received it for his own benefit. He shall not be regarded as a beneficial owner where:

- (a) he acts as a paying agent within the meaning of Article 4(1), or
- (b) he acts on behalf of a legal person, an entity which is taxed on its profits under the general arrangements for business taxation, a UCITS within the meaning of Council Directive 85/611/EEC or an entity referred to in Article 4(2) of this Directive and, in the latter case, discloses the name and address of that entity to the economic operator making the interest payment and the latter communicates such information to its Member State of establishment, or
- (c) he acts on behalf of another individual who is the beneficial owner and discloses to the paying agent the identity of that beneficial owner in accordance with Article 3(2).

2. Where a paying agent has information suggesting that the individual who receives an interest payment or for whom an interest payment is secured may not be the beneficial owner, it shall take reasonable steps to establish the identity of the beneficial owner in accordance with Article 3(2). If the paying agent is unable to identify the beneficial owner, it shall treat the individual in question as the beneficial owner.

Article 3

Identity and residence of beneficial owners

1. Each Member State shall, within its territory, adopt and ensure the application of the procedures necessary to allow the paying agent to identify the beneficial owners and their residence for the purposes of this Directive.

Such procedures shall comply with the minimum standards established in paragraphs 2 and 3.

2. In order to establish the identity of the beneficial owner, the following minimum standards shall apply:

- (a) for contractual relations entered into before the date of implementation of the Directive, the paying agent shall establish the identity of the beneficial owner, consisting of his name and address, by using the information at its disposal, in particular pursuant to the regulations in force in its state of establishment and to Council Directive 91/308/EEC⁽¹⁾;

- (b) for contractual relations entered into on or after the date of implementation of the Directive, the paying agent shall establish the identity of the beneficial owner, consisting of name, address and tax or other identification number or, failing such number, the date and place of birth of the beneficial owner.

3. In order to establish the residence of the beneficial owner for the purposes of this Directive, the following minimum standards shall apply:

- (a) for contractual relations entered into before 1 January 2001, the paying agent shall establish the residence of the beneficial owner by using the information at its disposal, in particular pursuant to the regulations in force in its state of establishment and to Directive 91/308/EEC;
- (b) for contractual relations entered into on or after the date of implementation of the Directive, the paying agent shall establish the residence of the beneficial owner according to the following procedure:
 - (i) for individuals holding a passport or similar official document issued by a Member State who declare themselves to be resident in a third country, residence shall be established by means of a residence certificate issued by the competent authority of the third country in which the individual claims to be resident;
 - (ii) in all other cases the residence shall be considered the country where the beneficial owner's permanent address is situated.

- (c) For contractual relations entered into between 1 January 2001 and the date of implementation of the Directive, the paying agent shall check the residence of the beneficial owner according to the procedure laid down for contractual relations entered into on or after the date of implementation of the Directive.

Article 4

Definition of paying agent

1. For the purposes of this Directive, 'paying agent' means any economic operator who pays interest to, or secures the payment of interest for the immediate benefit of, the beneficial owner, whether it be the debtor of the debt-claim which produces the interest or the operator charged by the debtor or the beneficial owner with paying interest or securing the payment of interest.

2. Any entity established in a Member State to which interest is paid or for which interest is secured for the benefit of the beneficial owner shall also be considered a paying agent upon such payment or securing of such payment, provided that it is not:

⁽¹⁾ OJ L 166, 28.6.1991, p. 77.

- (a) a legal person,
- (b) taxed on its profits under the general arrangements for business taxation,
- (c) a UCITS within the meaning of Directive 85/611/EEC.

An economic operator paying interest to, or securing interest for, such an entity established in another Member State which is considered a paying agent under this paragraph shall communicate the name and address of the entity and the total amount of interest paid to, or secured for, the entity to the competent authority of its Member State of establishment, which shall pass this information on to the competent authority of the Member State where the entity is established.

3. The entity referred to in Paragraph 2 shall, however, have the option of being treated for the purposes of this Directive as a UCITS within the meaning of Directive 85/611/EEC. The exercise of such option shall be notified to the Member State of establishment of the entity.

Member States shall lay down the detailed rules for the exercise of this option.

4. Where the economic operator and the entity referred to in Paragraph 2 are established in the same Member State, that Member State shall take the necessary measures to ensure that the entity complies with the provisions of this Directive when it acts as a paying agent.

Article 5

Definition of competent authority

For the purposes of this Directive 'competent authority' means:

- (a) for Member States any of the authorities notified by the Member States to the Commission, and
- (b) for third countries the competent authority for the purposes of bilateral or multilateral tax conventions or, failing that, such other authority as is competent to issue certificates of residence for tax purposes.

Article 6

Definition of interest payment

1. For the purposes of this Directive, 'interest payment' means:

- (a) interest paid, or credited to an account, relating to 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 payments shall not be regarded as interest payments;

- (b) interest accrued or capitalised at the sale, refund or redemption of the debt-claims referred to in (a);

- (c) income deriving from interest payments, either directly or through an entity referred to in Article 4(2), distributed by

- (i) UCITS within the meaning of Directive 85/611/EEC,
- (ii) entities which have exercised the option of Article 4(3), and
- (iii) undertakings for collective investment established outside the territory referred to in Article 7;

- (d) income realised upon the sale, refund or redemption of shares or units in the following undertakings and entities, if they have invested more than 40 % of their assets in debt-claims referred to in (a) or in other shares or units as defined in this sub-paragraph:

- (i) UCITS within the meaning of Directive 85/611/EEC,
- (ii) entities which have exercised the option under Article 4(3),
- (iii) undertakings for collective investment established outside the territory referred to in Article 7.

2. As regards paragraph 1(c), when a paying agent has no information concerning the proportion of the income which derives from interest payments, the total amount of the income shall be considered an interest payment.

3. As regards paragraph 1(d), when a paying agent has no information concerning the percentage of the assets invested in debt-claims or in shares or units as defined in that paragraph, that percentage shall be considered to be above 40 %.

4. When interest as defined in paragraph 1 is paid to or credited to an account held by an entity referred to in Article 4(2), such entity not having exercised the option under Article 4(3), it shall be considered an interest payment by such entity.

5. As regards paragraph 1(b) and (d) Member States shall have the option of requiring paying agents in their territory to annualise the interest over a period of time which may not exceed one year, and treating such annualised interest as an interest payment even if no sale, redemption or refund occurs during that period.

6. By way of derogation from paragraphs 1(c) and (d), Member States shall have the option of excluding from the definition of interest payment any income referred to in those provisions from undertakings or entities established within their territory where the investment in debt-claims referred to in paragraph 1(a) of such entities has not exceeded 15 % of their portfolio.

The exercise of such option by a Member State shall be binding on other Member States.

7. The percentage referred to in paragraph 1(d) and paragraph 3 shall after the end of the transitional period referred to in Article 10 be 15 %.

8. The percentages referred to in paragraph 1(d) and in paragraph 6 are determined by reference to the investment policy as laid down in the fund rules or instruments of incorporation of the undertakings or entities concerned and, failing which, by reference to the actual composition of the assets of the undertakings or entities concerned.

Article 7

Territorial scope

This Directive shall apply to interest paid by a paying agent established within the territory to which the Treaty applies by virtue of Article 299 thereof.

CHAPTER II

EXCHANGE OF INFORMATION

Article 8

Information reporting by the paying agent

1. The minimum amount of information to be reported by the paying agent to the competent authority of its Member State of establishment shall consist of:

- (a) the identity and residence of the beneficial owner established in accordance with Article 3;
- (b) the name and address of the paying agent;
- (c) the account number of the beneficial owner or, where there is none, identification of the debt-claim giving rise to the interest, and
- (d) information concerning the interest payment in accordance with the second paragraph.

2. The paying agent shall report at least the following information concerning the interest payment:

- (a) in the case of an interest payment within the meaning of Article 6(1)(a): the amount of interest paid or credited;
- (b) in the case of an interest payment within the meaning of Article 6(1)(b) or (d): either the amount of interest or income referred to in those paragraphs or the full amount of the sale, redemption or refund;
- (c) in the case of an interest payment within the meaning of Article 6(1)(c): either the amount of income referred to in that paragraph or the full amount of the distribution;
- (d) in the case of an interest payment within the meaning of Article 6(4): the amount of interest attributable to each of

the members of the entity referred to in Article 4(2) who meet the conditions of Articles 1(1) and 2(1);

- (e) where a Member State has exercised the option under Article 6(5): the amount of annualised interest.

Article 9

Automatic exchange of information

1. The competent authority of the Member State of the paying agent shall communicate the information referred to in Article 8 to the competent authority of the Member State of residence of the beneficial owner.

2. The communication of information shall be automatic and shall take place at least once a year, within 6 months following the end of the tax year of the Member State of the paying agent, for all interest payments made during that year.

3. Article 8 of Directive 77/799/EEC ⁽¹⁾ shall not apply to the information to be provided pursuant to this Chapter.

CHAPTER III

TRANSITIONAL PROVISIONS

Article 10

Transitional period

During a transitional period of seven years after the date of entry into force of this Directive and subject to Article 13(1), Belgium, Luxembourg and Austria shall not be required to apply the provisions of Chapter II.

They shall, however, receive information from the other Member States in accordance with Chapter II.

Article 11

Withholding tax

1. During the transitional period referred to in Article 10, Belgium, Luxembourg and Austria shall ensure a minimum of effective taxation of savings income in the form of interest payments by levying a withholding tax at a rate of 15 % during the first three years of the transitional period and 20 % for the remainder of the period.

2. The paying agent shall levy withholding tax as follows:

- (a) in the case of an interest payment within the meaning of Article 6(1)(a): on the amount of interest paid or credited;
- (b) in the case of an interest payment within the meaning of Article 6(1)(b) or (d): on the amount of interest or income referred to in those paragraphs or by a levy of equivalent effect to be borne by the recipient on the full amount of the proceeds of the sale, redemption or refund;

⁽¹⁾ OJ L 336, 27.12.1977, p. 15.

- (c) in the case of an interest payment within the meaning of Article 6(1)(c): on the amount of income referred to in that paragraph;
- (d) in the case of an interest payment within the meaning of Article 6(4): on the amount of interest attributable to each of the members of the entity referred to in Article 4(2) who meet the conditions of Articles 1(1) and 2(1);
- (e) where a Member State has exercised the option under Article 6(5): on the amount of annualised interest.

3. For the purposes of points (a) and (b) of paragraph 2, withholding tax is levied pro rata to the period of holding of the debt-claim by the beneficial owner.

When the paying agent is unable to determine the period of holding on the basis of information in its possession, it shall treat the beneficial owner as having held the debt-claim throughout its period of existence unless he provides evidence of the date of acquisition.

4. The imposition of withholding tax by the Member State of the paying agent shall not preclude the Member State of residence of the beneficial owner from taxing the income in accordance with its domestic law, subject to compliance with the Treaty.

Article 12

Revenue sharing

Member States levying withholding tax in accordance with Article 11 shall retain 25 % of the revenue of such tax and transfer 75 % of the revenue to the Member State of residence of the beneficial owner of the interest. Such transfer shall take place at the latest within a period of 6 months following the end of the tax year of the Member State of the paying agent.

Member States levying withholding tax shall take the necessary measures to ensure the proper functioning of the revenue sharing system.

Article 13

Exceptions to the withholding tax procedure

1. Member States levying withholding tax in accordance with Article 11 shall provide for either of the following procedures in order to ensure that the beneficial owners may request that no tax be withheld:

- (a) a procedure which allows the beneficial owner expressly to authorise the paying agent to report information in accordance with Chapter II, such authorisation being valid for a period of three years and covering all interest paid to the beneficial owner by that paying agent; in such a case, the provisions of Article 9 shall apply;
- (b) a procedure which ensures that withholding tax shall not be levied where the beneficial owner presents to his paying agent a certificate drawn up in his name by the competent authority of his Member State of residence in accordance with paragraph 2.

2. At the request of the beneficial owner, the competent authority of his Member State of residence shall issue a certificate indicating:

- (a) name, address and tax or other identification number or, failing such, date and place of birth of the beneficial owner;
- (b) name and address of the paying agent;
- (c) account number of the beneficial owner or, where there is none, identification of the security.

Such certificate shall be valid for a period of three years provided the information in respect of which it was issued remains unchanged. It shall be issued to any beneficial owner who has requested it, within two months following such request.

Article 14

Elimination of double taxation

1. During the transitional period referred to in Article 10, the Member State of residence of the beneficial owner shall ensure the elimination of any double taxation which might result from the imposition of the withholding tax referred to in Article 11, in accordance with the provisions of paragraphs 2 and 3.

2. If interest received by a beneficial owner has been subject to withholding tax in the Member State of the paying agent, the Member State of residence of the beneficial owner shall grant him a tax credit equal to the amount of the tax withheld up to the amount of tax due on such interest in its territory, in accordance with its national law. Where the amount of tax withheld exceeds the amount of tax due, the Member State of residence shall repay the excess amount of tax withheld to the beneficial owner.

3. If, in addition to the withholding tax referred to in Article 11, interest received by a beneficial owner has been subject to any other type of withholding tax and the Member State of residence grants a tax credit for such withholding tax in accordance with its national law or double taxation conventions, such withholding tax shall be credited before the procedure in paragraph 2 is applied.

Article 15

Negotiable debt securities

1. During the transitional period referred to in Article 10, domestic and international bonds and other negotiable debt securities which have been first issued before 1 March 2001 or for which the original issuing prospectuses have been approved before that date by the competent authorities within the meaning of Council Directive 80/390/EEC⁽¹⁾, or by the responsible authorities in third countries, shall not be considered as debt-claims within the meaning of Article 6(1)(a), provided that no further issues of such negotiable debt securities are made on or after 1 March 2002.

⁽¹⁾ OJ L 100, 17.4.1980, p. 1.

If a further issue is made on or after 1 March 2002 of an aforementioned negotiable debt security issued by a Government or a related entity, the entire issue of such security, consisting of the original issue and any further issue, shall be considered a debt-claim within the meaning of Article 6(1)(a).

If a further issue is made on or after 1 March 2002 of an aforementioned negotiable debt security issued by any other issuer not covered by the previous sentence, such further issue shall be considered a debt-claim within the meaning of Article 6(1)(a).

2. Nothing in this Article shall prevent Member States from taxing the income from the negotiable debt securities referred to in the first paragraph in accordance with their national laws.

Article 16

International organisations

During the transitional period referred to in Article 10, Member States levying the withholding tax referred to in Article 11 shall be free to exempt paying agents acting on behalf of international organisations issuing debt-claims from the obligation to withhold tax on interest paid on such debt-claims, if this obligation would be contrary to international agreements concluded by those Member States with respect to such organisations.

CHAPTER IV

MISCELLANEOUS AND FINAL PROVISIONS

Article 17

Other withholding taxes

This Directive shall not preclude Member States from levying other types of withholding tax than that referred to in Article 11 in accordance with their national laws or double taxation conventions.

Article 18

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2004 at the latest.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall forthwith inform the Commission thereof and communicate to the Commission the main provisions of national law which they adopt in the field covered by this Directive and a correlation table between this Directive and the national provisions adopted.

Article 19

Review

The Commission shall report to the Council every three years on the operation of this Directive. On the basis of these reports, the Commission shall, where appropriate, propose to the Council any amendments to the Directive that prove necessary in order better to ensure effective taxation of savings income and to remove undesirable distortions of competition.

Article 20

Entry into force

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

Article 21

Addressees

This Directive is addressed to the Member States.