AUSTRIA

IBFD

OUTLINE

LIST OF ABBREVIATIONS IV
LIST OF LEGAL REFERENCES V

PART I. IMPLEMENTATION OF THE DIRECTIVE VI

1. INTRODUCTION VI
 1.1. GENERAL INFORMATION ON THE IMPLEMENTATION OF THE DIRECTIVE VI
 1.2. TAX TREATMENT OF INTEREST AND ROYALTY PAYMENTS UNDER GENERAL TAX LAW .. VII
  1.2.1. Domestic rules vii
  1.2.2. Treaties ix
2. SCOPE X
 2.1. PAYMENTS X
  2.1.1. Concept of interest x
  2.1.2. Concept of royalties x
 2.2. COMPANIES XI
  2.2.1. Types of companies benefiting from implementing provisions (Art. 3(a)(i)) xi
  2.2.2. Residence requirement (Art. 3(a)(ii)) xiv
  2.2.3. Subject-to-tax requirement (Art. 3(a)(iii)) xvii
  2.2.4. Associated company (Art. 3(b)) xvii
  2.2.5. Beneficial ownership (Art. 1(4)) xvii
 2.3. PERMANENT ESTABLISHMENTS XIX
  2.3.1. Definition (Art. 3(c)) xix
  2.3.2. Application of source rules (Art. 1(2)) xix
  2.3.3. 'Tax-deductible expense' requirement (Art. 1(3)) xix
  2.3.4. Beneficial ownership (Art. 1(5)) xix
  2.3.5. Permanent establishment in a third country (Art. 1(8)) xix
3. PROCEDURE XXI
 3.1. MINIMUM HOLDING PERIOD (ART. 1(10)) XXI
  3.1.1. General xxi
  3.1.2. Relief before the holding period requirement is satisfied xxi
  3.1.3. Appeals xxi
 3.2. ATTESTATION (ART. 1(11) AND 1(13)) XXI
  3.2.1. General xxi
  3.2.2. Appeals xxii
  3.2.3. Relief before the holding period requirement is satisfied xxii
 3.3. DECISION ON APPLICATION OF THE RELIEF (ART. 1(12)) XXIII
 3.4. APPLICATION FOR REFUND (ART. 1(15) AND 1(16)) XXIII
  3.4.1. General xxiii
  3.4.2. Appeals xxiii
4. FRAUD AND ABUSE (ART. 5) XXIV
 4.1. MEASURES UNDER ART. 5(1) OF THE DIRECTIVE XXIV
  4.1.1. Domestic xxiv
  4.1.2. Agreement-based xxiv
 4.2. MEASURES UNDER ART. 5(2) OF THE DIRECTIVE XXV
 4.3. COMPARISON WITH SIMILAR MEASURES UNDER PARENT-SUBSIDIARY AND MERGER DIRECTIVES XXV
5. SUMMARY XXVI

PART II. THE AGREEMENT XXVII

INTRODUCTION XXVII

1. SCOPE XXVIII

1.1. PAYMENTS XXVIII

1.1.1. Concept of interest xxviii
1.1.2. Concept of royalties xxviii

1.2. COMPANIES XXVIII

1.2.1. Types of companies benefiting from Art. 15(2) of the Agreement xxviii
1.2.2. 'Affiliated' companies xxix
1.2.3. Residence requirement xxix
1.2.4. Subject-to-tax requirement xxix

2. PROCEDURE XXX

3. SUMMARY XXXI

ANNEX XXXII

LIST OF ABBREVIATIONS

Agreement	Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments
AÖF	Amtsblatt der Österreichischen Finanzverwaltung (Official Journal of the Austrian Fiscal Administration)
BGBL	Bundesgesetzblatt (Austrian Federal Gazette)
BAO	Federal Fiscal Code (Bundesabgabenordnung)
Directive	Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payment made between associated companies of different Member States
ECJ	The Court of Justice of the European Communities
EStG	Einkommensteuergesetz (Austrian Income Tax Act)
EStR	Einkommensteuer-Richtlinien (Income Tax Regulations issued by the Austrian Ministry of Finance)
GeS	Zeitschrift für Gesellschaftsrecht (Journal For Commercial Law)
KStG	Körperschaftsteuergesetz (Code of Corporate Income Tax Law)
KStR	Körperschaftsteuer-Richtlinien (Corporate Income Tax Regulation issued by the Austrian Ministry of Finance)
Merger Directive	Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States
OECD	Organization for Economic Cooperation and Development
OECD MC	OECD Model Tax Convention 2003
OECD MC Commentary	OECD Model Tax Convention Commentary
Parent-Subsidiary Directive	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
Rz	Randziffer (recital)
Savings Directive	Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments
SWI	Magazine „Steuer und Wirtschaft International“ (Tax and Business International)
Z	Ziffer (cipher)

IBFD

LIST OF LEGAL REFERENCES

Laws

- Einkommensteuergesetz, BGBI 1988/400 idF BGBI I 2005/104.
- Körperschaftsteuergesetz, BGBI 1988/401 idF BGBI I 2005/93.
- Bundesabgabenordnung, BGBI 1961/194 idF BGBI I 2005/2.

Decrees

- DBA-Entlastungsverordnung, BGBI III 2005/92.

Administrative Guidelines

- Einkommensteuer-Richtlinien 2000, AÖF 2000/232 idF AÖF 2005/110.
- Körperschaftsteuer-Richtlinien 2001, AÖF 2002/70 idF AÖF 2004/119.
- BMF 17.8.2005, EAS 2643; SWI 2005, 459.

Case law

- Austrian Supreme Administrative Court, Decision of 23 October 1984, No. 83/14/0257.
- Austrian Supreme Administrative Court, Decision of 13 September 1998, No. 87/14/0128.

Literature

- *Muszynska*, „Zinsen-/Lizenzen-Richtlinie beschlossen“, SWI 2003, 397.
- *Furherr/Nowotny*, “Umsetzung der Zinsen-/Lizenzen-Richtlinie in § 99a durch das Abgabenänderungsgesetz 2003“, GeS 2004, 190.

PART I. IMPLEMENTATION OF THE DIRECTIVE

1. INTRODUCTION

1.1. GENERAL INFORMATION ON THE IMPLEMENTATION OF THE DIRECTIVE

The Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payment made between associated companies of different Member States (the "Directive") was implemented by an amendment of the Austrian Income Tax Law, whereby a new Section no. 99a was added. Section. 124b Z 89 EStG determines that Section 99a comes into force for payments attributed to the fiscal year 2004. The amendment was published on 19 December 2004 in the Federal Gazette (BGBl I Nr. 124/2003).

The new provision, which closely follows the wording of the Directive, applies to interest and royalties paid as of 1 January 2004. The enacted provisions concern the abolition of the withholding tax on Austrian-source interest and royalty payments made by an Austrian qualifying company to an associated company resident in another EU Member State.

The Austrian tax authorities have not yet published any guidance on the implementing legislation in a Guideline.

The following table shows the relevant provisions of the Austrian law implementing the Directive:

Articles of the Directive	Relevant sections of EStG
Art.1 (1)	Section 99a (1)
Art.1 (2)	---
Art.1 (3)	Section 99a (2)
Art.1 (4)	Section 99a (3)
Art.1 (5)	Section 99a (3) and (4)
Art.1 (6)	---
Art.1 (7)	Section 99a (1)
Art.1 (8)	---
Art.1 (9)	---
Art.1 (10)	---
Art.1 (11)	Section 99a (7)
Art.1 (12)	---
Art.1 (13)	Section 99a (7)
Art.1 (14)	---
Art.1 (15)	Section 99a (8)
Art.1 (16)	Section 99a (8)

IBFD

Articles of the Directive	Relevant sections of EStG
Art.2	Section 99a (1)
Art.3 (a)	Section 99a (5)
Art.3 (b)	Section 99a (6)
Art.3 (c)	Section 99a (1)
Art.4 (1)	Section 99a (9) Z 1
Art. 4 (2)	Section 99a (9)
Art.5	Section 99a (9) Z 2
Art.7	Section 124b Z 89

1.2. TAX TREATMENT OF INTEREST AND ROYALTY PAYMENTS UNDER GENERAL TAX LAW

1.2.1. Domestic rules

a. Tax treatment at the level of the paying company

Royalties and interest are generally deductible in computing the company's income, provided they are incurred for business purposes and the remuneration applied is not excessive. For deduction of excessive payments see *c. Transfer pricing, arm´s length principle and thin capitalization* below.

b. Tax treatment at the level of the beneficiary company

Interest

In general, interest paid by an Austrian debtor to a resident company is not subject to withholding tax. A 25% withholding tax (Kapitalertragsteuer) applies only if the income is derived from qualifying bank deposits or bonds.

Austrian-source interest received by non-resident companies without a permanent establishment in Austria is generally not subject to corporate income tax nor to withholding tax (Section 98 (5) EStG). The foreign company receiving the interest payment must prove that it is not resident in Austria and that the interest income is not attributable to a permanent establishment in Austria. There are, however, certain exceptions.

Interest derived by a non-resident individual or company from loans secured by Austrian-situs immovable property (including ships) or from shares in an Austrian real estate investment fund is subject to income tax by assessment at the standard corporate income tax rate (25%), unless a reduced rate applies under a tax treaty.

Furthermore, non-resident companies are exempt from withholding tax by Section 94 (5) EStG, if

– the interest results from a money deposit with an Austrian bank or from bonds deposited with an Austrian bank; and

– the recipient files a written form with the payer to the effect that the interest is taxable in an Austrian or foreign business.

Royalties

Royalties received by residents from a domestic or foreign source are taxable. On the other hand, royalties paid by non-resident companies are not subject to tax if received by another non-resident company.

Royalties paid to non-residents are subject to corporate income tax (Körperschaftsteuer) by withholding at a rate of 20% (Section 99 (1) No. 3 EStG, Section 100 (1) EStG). However, this tax is reduced or eliminated under most of Austria's tax treaties.

If the royalties are not attributable to an Austrian permanent establishment, the withholding tax constitutes a final taxation (Section 102 (4) EStG). In this case, expenses cannot be deducted (Section 99 (2) EStG). The recipient can also opt for tax assessment, in which case expenses are deductible and the withholding tax is credited against the corporate income tax liability. If royalties are derived by an Austrian permanent establishment, expenses are deductible and the withholding tax is credited against the corporate income tax liability (Section 102 (1) No. 2 EStG).

Procedure

Where income tax is to be withheld at source, the payer normally has to withhold the tax at the time the income becomes available to the payee.

Reduced withholding tax rates under treaties are in some cases not applicable at source. In these cases, the amount paid in excess is refunded by the Austrian tax authorities upon request. This is true if either the treaty itself (i.e. the treaty with Switzerland, Art. 28) or a procedural regulation implementing the tax treaty (i.e. the treaty with Germany, Regulation 426/1996) provides for a withholding obligation. If such a withholding obligation is not provided for, the Austrian tax authorities generally allow the application of the reduced rate at source if the non-resident company presents a certificate of residence to the paying company.

In the case of the refund procedure, application forms issued by the Ministry of Finance (ZS-RD1 in German or ZS-RE1 in English) must be used. These can be obtained from the Ministry's web site (www.bmf.gv.at). Depending on the kind of income, Annex A (for dividends), B (for royalties) or C (for other income) must be enclosed. In addition, the appropriate foreign tax authority must confirm on the application form that the non-resident recipient qualifies as resident for treaty purposes in the year concerned.

c. Transfer pricing, arm's length principle and thin capitalization

Under Austrian tax law, transfer pricing is only to a certain extent governed by special provisions designed to be applicable to transactions with non-resident related parties. However, the transfer pricing rules are supplemented by rules derived from general principles such as hidden profit distributions and hidden contributions. In some cases, the Austrian tax authorities also refer to the general anti-avoidance rule in Section 22 and 23 Federal Fiscal Code in transfer pricing cases.

According to these rules, affiliated companies are required to observe the arm's length principle. The same is true for transactions between head offices and permanent

establishments. Thus, transfer prices of goods and services, interest rates, royalty payments, rentals, etc. must be fixed at an adequate level as if the transaction, etc. had been between unrelated parties.

There are no specific thin capitalization rules in Austria. However, the Supreme Administrative Court (Verwaltungsgerichtshof) has established certain broad and rather liberal guidelines, which are used to determine whether the equity for commercial purposes is adequate for the purpose of taxation (e.g. Decision of 23 October 1984, No. 83/14/0257). If the equity is inadequate, a portion of the indebtedness to shareholders may be regarded as the equivalent of shareholders' equity. Such interest may not be deducted from the taxable income.

In addition, interest paid on loans that are regarded as "disguised capital" will be treated as hidden profit distributions. Such interest may not be deducted in arriving at the taxable income. Furthermore, withholding tax is imposed on the hidden profit distribution.

1.2.2. Treaties

Before the implementation of the Directive, the tax treatment of interest and royalty flows eligible to a withholding tax exemption under the Directive were covered by the tax treaty between Austria and the relevant Member State. Austria has effective tax treaties with all other EU Member States, except Latvia and Lithuania (see Annex).

Most tax treaties concluded between Austria and EU Member States provide for an exemption from the above mentioned withholding tax on interest payments to non-resident companies and for a reduction of the withholding tax on royalties.

According to the Austrian administrative legislation (EStR 2000, Rz 8023 and 8025) royalty payments to non-resident companies can be relieved from withholding tax if:
a) the royalties are exempt from taxation by a treaty;
b) the receiving non-resident company submits a certificate of residence; and
c) the receiving non-resident company submits a written form to the payer stating that it derives its income from an active business, that it employs its own personnel and that it maintains its own business facilities.

2. SCOPE

2.1. PAYMENTS

2.1.1. Concept of interest

a. Definition

The definition of interest provided in Section 99a (1) of the EStG corresponds literally to the definition of interest in Art. 2 (a) of the Directive and also to the definition in Art. 11 OECD MC. Therefore, there are no deviations from the definition of interest given in the Directive. The Austrian national concept of interest is not relevant in this context.

b. Exclusion of hybrid financial arrangements (Art. 4(1) b)-d))

Austria has used an option to exclude payments under financial arrangements listed in Art.4 (1) b) of the Directive. Payments from debt claims which carry a right to participate in the debtor's profits are excluded from the exemption from withholding tax (Section 99a(9)1 of the EStG).

As a consequence, the exemption from withholding tax does not apply to interest paid in respect of profit participation debt claims and, therefore, to payments made under a silent partnership agreement (*echte stille Gesellschaft*). It should, however, be noted that most profit-related interest payments are, with certain exceptions (e.g. silent partnerships), not subject to any withholding tax and, accordingly, non-residents are not taxed on interest paid in respect of profit participation rights (*Genussrechte*) pursuant to Austrian domestic law.

c. Exclusion of interest reclassified as profit distribution or conflicting arm's length (Art. 4(1) a) and Art. 4(2))

Interest, the deduction of which is disallowed, either under the thin capitalization rules or transfer pricing rules (see 1.2.1. *c. Transfer pricing, arm's length principle and thin capitalization* above), is treated as a constructive distribution. The re-characterized interest nevertheless benefits from the dividend participation exemption regime if the beneficiary is a resident parent company or the Austrian permanent establishment of a foreign company covered by an appropriate non-discrimination clause and meeting the other relevant conditions.

Re-characterized income is subject to withholding tax at a rate of 25% or a reduced dividend withholding tax under the tax treaty unless it falls under the exemption granted pursuant to the Parent-Subsidiary Directive.

The wording of the ´special relationship´ clause has been implemented by the Austrian legislator in Section 99a (9) EStG. This provision restricts relief from withholding tax to the amount which corresponds to the arm´s length principle. The definition of related parties is developed on a case-by-case basis and it is not clear what rules on affiliation apply here. Currently, there is no case-law or administrative practice issued yet.

2.1.2. Concept of royalties

a. Definition

According to the Austrian concept (Section 28 EStG) royalties include, in particular:

- the licence of an exclusive or non-exclusive right to use works under copyright or patent within the meaning of the Austrian Federal Copyright Act; and
- the assignment of industrial property rights, of industrial know-how and of licences.

For the purpose of the Directive, Section 99a (1) EStG provides for its own definition of royalties, which transposes literally the definition in Art. 2 (b) of the Directive. Royalties mean 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.

According to the Austrian legislator the definition is based on the one contained in Art. 12 OECD MC and encompasses also rental payments for movable equipment.

b. Classification of revenue from leasing and software

Revenue from leasing and software is included in the definition of royalties by Section 99a (1) EStG. The scope and interpretation of these payments has not been clarified yet.

c. Exclusion of royalties reclassified as profit distribution or conflicting arm's length (Art. 4(1) a) and Art. 4(2))

Royalties paid to related parties in excess of the arm's length remuneration are re-characterized as constructive dividend under the rules previously described (see 2.1.1. *c. Exclusion of interest reclassified as profit distribution or conflicting arm's length* above).

2.2. COMPANIES

2.2.1. Types of companies benefiting from implementing provisions (Art. 3(a)(i))

a. Other types of entities

Austria limits the benefits under the Directive to the entities listed in the Directive. According to Section 99a (5) EStG, the relevant companies must have a legal form listed in the Annex to the Directive, must be resident in an EU Member State and subject to corporate income tax. Concerning the corporate income taxes the Austrian legislator refers to Art. 3 of the Directive.

The listed companies in the Annex are those that take the form of:

- a corporation (*Aktiengesellschaft*, "AG") and
- a limited liability company (*Gesellschaft mit beschränkter Haftung*, "GmbH").

Section 99a (1) EStG uses the term "*Körperschaften*" for paying companies eligible for the exemption. This term encompasses a wider range of companies than those mentioned in the Annex to the Directive. Therefore, in addition to the corporation and the limited liability company, the following entities are covered by the definition:

- Austrian private foundations (*Privatstiftung*),
- co-operatives (*Genossenschaften*);
- mutual insurance companies (*Versicherungsvereine auf Gegenseitigkeit*);
- clubs (*Vereine*);
- foundations, associations and institutions without independent legal existence, and accumulations of property for a specific purpose (*Zweckvermögen*);

– corporations of public law (Körperschaften öffentlichen Rechts).

Foreign legal entities are regarded as „*Körperschaften*“ as well, if their structure is comparable to those of an Austrian company.

b. Hybrid entities

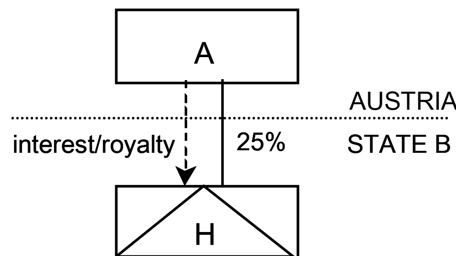
The Austrian commercial and civil law does not cater to the concept of hybrid entity. Any entity is either subject to individual or to corporate income tax without an option to choose between these two systems. Thus only the treatment of interest and royalty payments to foreign hybrid entities may raise the issues of tax treatment.

The issue of tax treatment of payments in situations involving hybrid entities is considered based on three hypothetical situations described below:

- Case 1: an Austrian associated company pays interest and royalties to a hybrid entity H located in Member State B;
- Case 2: an Austrian hybrid entity H pays interest and royalties to an associated company in Member State A;
- Case 3: an Austrian associated company pays interest and royalties to a company through a hybrid entity H, the latter two located in Member State A.

Case 1: Payment to a hybrid entity

An Austrian associated company A pays interest and royalties to a hybrid entity H situated in Member State B. Austria treats hybrid entity H as a transparent entity.



The implementing rules to the Directive do not expressly address this issue. Section 99a (1) and Section 99a (5) EStG require that the receiving EU associated company must fulfil the following requirements:

(i) have its effective management in one of the EU Member States;
(ii) have one of the legal forms listed in the Annex to the Directive; and
(iii) be liable to corporate income tax, also in respect of its income in the Member State where its effective management is located, without being exempt.

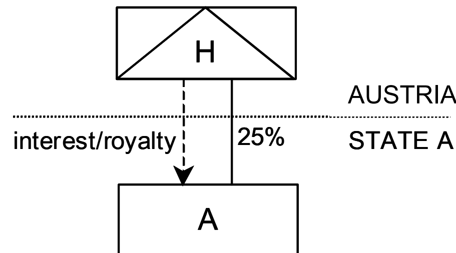
In addition, Section 99a (5) EStG provides that the participation in the associated company must be direct.

In accordance with the requirements cited above, the benefit of the withholding tax exemption on interest and royalty income paid by the Austrian associated company will not be granted if company H is not subject to corporate tax on its income. In this situation, such income is taxed at the level of the members, and not at the level of the hybrid entity. The requirement of being liable to corporate income tax is not met.

For this reason, the withholding tax exemption under the Directive is most likely to be denied in situations where the payment is made to a hybrid entity. Please note that interest in this situation may be exempt under general domestic rules (see 1.2.1. Domestic rules).

Case 2: Payment from a hybrid entity

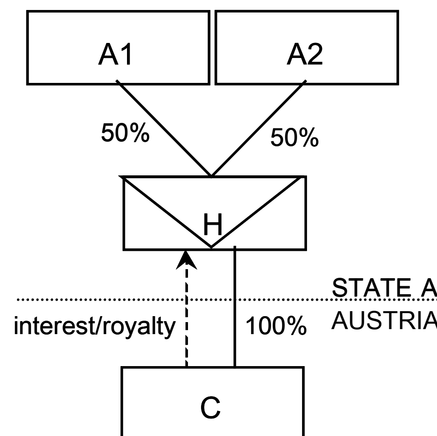
A hybrid entity H in Austria pays interest or royalties to an associated company A in Member State A.



This case is not relevant to Austria as Austrian legislation does not cater to the concept of hybrid entities.

Case 3: Payment through a hybrid entity

Companies A1 and A2 are the members of the hybrid entity H, all located in Member State A. The hybrid entity H holds all the shares in company C, located in Austria. Austria treats the hybrid entity H as a transparent entity. Company A1 grants a loan to the hybrid entity H and the hybrid entity H grants a loan to the company C. Interest flows from the company C to a member A1 through the hybrid entity H.



In the case at hand, there is no direct participation, as the payment is made through a hybrid entity H in State A. The requirement of direct participation excludes the interposition of a partnership or a transparent entity. As a consequence, the withholding tax exemption under

the Directive is most likely to be denied. Please note that interest in this situation may be effectively exempt under general Austrian domestic rules (see 1.2.1. Domestic rules).

2.2.2. Residence requirement (Art. 3(a)(ii))

a. Implementation of the requirement

Under Section 99a (5) EStG, the receiving EU associated company must
- (i) have its effective management in one of the EU Member States; and
- (ii) be liable to corporate income tax, also in respect of its income in the Member State where its effective management is located, without being exempt.

The provision refers to the place of effective management as the factor to determine the residence of the associated company. This reference stems from Austrian domestic legislation and not from the Directive. In addition, the company must be subject to tax without being exempt in the state where its effective management is located.

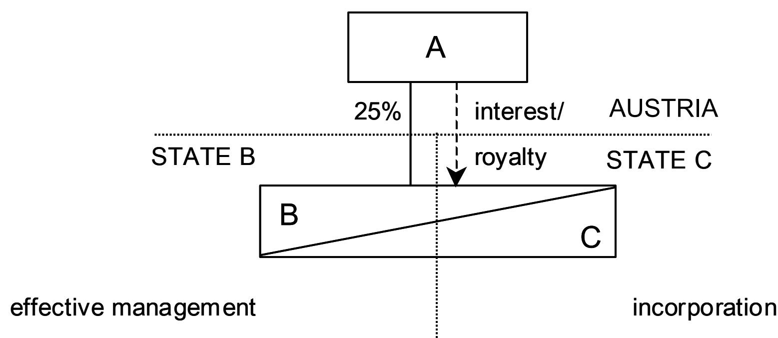
b. Application of the requirement in dual residence cases

There is no specific guidance with respect to application of exemption from withholding tax when interest or royalties are paid to or from dual resident companies. The conclusions on the tax treatment of such payments are drawn on the basis of general implementing provisions of the EStG. The issue of tax treatment of payments in situations involving dual residency is considered based on three situations described below:

- Case 1: an Austrian associated company A makes an interest or royalty payment to a dual resident company BC incorporated in Member State C but with its effective management in State B;
- Case 2: a dual resident company BC incorporated in Member State C but with its effective management in Austria makes an interest or royalty payment to an associated company A resident in Member State A;
- Case 3: a dual resident company BC incorporated in Austria but with its effective management in State C makes an interest or royalty payment to an associated company A located in Member State A.

Case 1: Payment to a dual resident

An Austrian associated company A makes an interest or royalty payment to a dual resident company BC incorporated in Member State C but with its effective management in Member State B.



Austrian law requires the receiving EU associated company to meet, inter alia, the following conditions (Section 99a (1) and Section 99a (5) EStG):

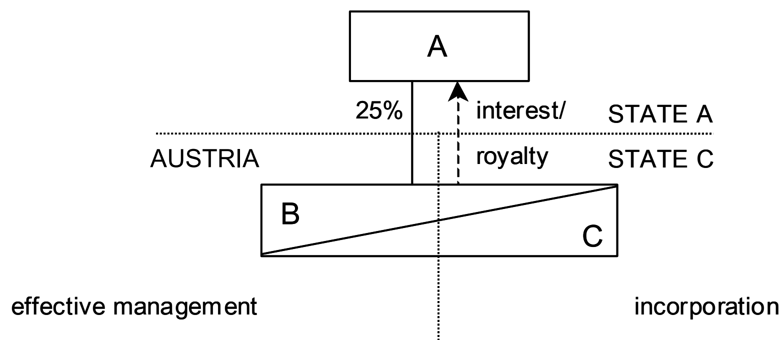
(i) have its effective management in one of the EU Member States;
(ii) have one of the legal forms listed in the Annex to the Directive; and
(iii) be liable to corporate income tax, also in respect of its income in the Member State where its effective management is located, without being exempt.

In the case at hand, Company BC meets requirements (i) and (ii) cited above: it has its effective management in Member State B and takes the legal form of a company of Member State C listed in the Annex to the Directive. In respect of (iii), generally, the company BC will be subject to corporate income tax in Member State B and Member State C under the domestic tax law of Member State B and Member State C, respectively. The issue of dual residence of the recipient dual company will be solved under the provisions of the tax treaty between Member States B and C.

Assuming that the tax treaty between B and C is identical to the OECD MC, the company BC will be considered resident for treaty purposes in Member State B where its effective management is located (Art. 4 (3) of the OECD MC). Consequently, the requirement in (iii) will be met. In this situation, Austria will grant the withholding tax exemption in respect of the payment made to the dual resident company BC. If the company BC is resident in State C, the place of its incorporation, the exemption in Section 99a EStG may be denied, but interest payments may be exempt under domestic rules nonetheless (see 1.2.1 Domestic rules).

Case 2: Payment by a dual resident with the place of management in Austria

A dual resident company BC incorporated in Member State C but with its effective management in Austria makes an interest or royalty payment to an associated company A resident in Member State A.



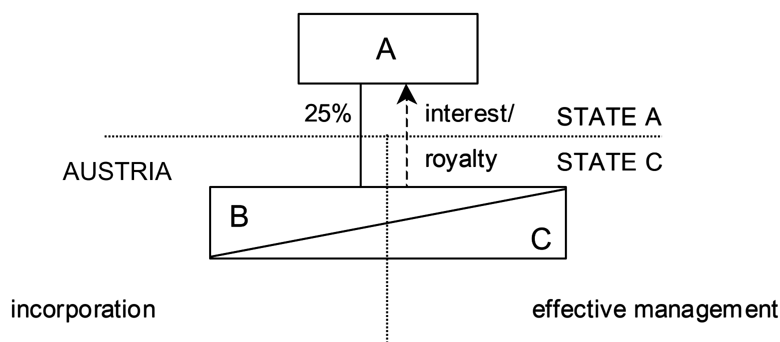
Under the Austrian implementing provisions, Austria restricts the application of the Directive to payments made by either Austrian companies or certain foreign entities which are comparable to an Austrian company (see above 2.2.1. *a. Other types of entities*) which are subject to Austrian corporate income tax and to Austrian permanent establishments of EU listed associated companies (Section 99a (1) EStG). Company BC, while incorporated in State C, is subject to Austrian corporate income tax because the effective management is located in Austria. However, it is not an Austrian company due to its legal form.

Austria applies the Directive to any company having a legal form listed in the Directive and not only to the Austrian legal forms listed therein. The tax administration has not published any guideline on this issue.

Whether Austria is entitled to raise any withholding tax in this case may be solved by tax treaties between Austria and State A and Austria and State C. Assuming that the tax treaty between Austria and Member State C follows the OECD MC, the tie-breaker rule under Art. 4 (3) of the tax treaty between Austria and Member State C will designate Austria, where the effective management is located, as the country of residence for tax treaty purposes. The interest or royalty payment will be deemed to arise in Austria, unless the interest or royalty deduction is attributable to a permanent establishment in Member State C. In any case, Austria will be the source state under tax treaties or domestic law in this situation, the implementing provisions will apply and withholding taxes will be eliminated by Section 99a (1) EStG.

Case 3: Payment by a dual resident with the place of incorporation in Austria

A dual resident company BC incorporated in Austria but with its effective management in State C makes an interest or royalty payment to an associated company A located in Member State A.



Under Section 99a (1) and (5) EStG, Austria grants a withholding tax exemption to interest and royalties paid by certain domestic or foreign companies (see 2.2.1. *a. Other types of entities*), provided that the company is fully liable to Austrian corporate income tax without being exempt. BC is fully liable to Austrian corporate income tax because of its incorporation in Austria. Therefore, relief from Austrian withholding tax is applicable.

To determine whether or not Austria is entitled to levy any withholding tax, it is necessary to determine the situation of company BC for Austria-State C tax treaty purposes in respect of the residence of the Austrian incorporated company.

Assuming that the tax treaty between Austria and Member State C follows the OECD MC, the tie-breaker rule under Art. 4 (3) of the tax treaty between Austria and Member State C will designate Member State C, where the effective management is located, as the country of residence for tax treaty purposes. The interest or royalty payment will be deemed to arise in Member State C, so that Austria will be prevented from applying a withholding tax, unless the interest deduction is attributable to a permanent establishment in Austria under Art. 7 of the treaty.

Where the interest payment is attributable to a permanent establishment in Austria, Austria will have to apply the withholding tax exemption under the Austrian rules implementing the

Directive (Section 99a (1) and Section 99a (5) EStG) in respect of interest and royalties paid by the Austrian permanent establishment to an associated company A in Member State A.

2.2.3. Subject-to-tax requirement (Art. 3(a)(iii))

Austria has transposed the requirement that a company be 'subject to tax' in Section 99a (5) second sentence EStG. This provision literally implements Art. 3 (a) (iii) of the Directive. To our knowledge, there have been no instances in which Austria as a source state refused to accept an assurance by the resident state of the ´beneficial owner´ that the latter is subject to tax in its Member State. Generally, confirmation issued by the tax authorities of the other Member State that the receiving company is subject to corporate tax is necessary (Section 99a (7) Z 1 EStG). Although there is no published guidance or practice yet, it appears that Austria interprets the subject-to-tax requirement as one that the receiving company must be subject to tax (and not the specific income itself).

2.2.4. Associated company (Art. 3(b))

The concept of associated companies follows the wording of the Directive in that a minimum holding of 25% is required in Section 99a (6) EStG. The threshold of 25% must be held directly; Austria does not extend the benefits to situations of indirect holdings.

Austria implemented the ´holding of capital´ requirement only; the ´holding of voting rights´ criterion does not apply. The benefits are not applied to hybrid entities in Austria (see 2.2.1. *b. Hybrid entities* above), there are no difficulties in calculating the threshold for them.

2.2.5. Beneficial ownership (Art. 1(4))

Austria has implemented the beneficial ownership provision of Art.1 (4) of the Directive in Section 99a (3) EStG. According to Section 99a (3) first sentence EStG a company of a Member State shall be treated as the beneficial owner of interest or royalties if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory. The text of the law repeats the wording of Art. 1 (4) of the Directive. The Austrian legislator indicated that the definition of the “beneficiary” shall ensure that relief from withholding tax is only granted if the true recipient of the payments meets the conditions.

Furthermore, Section 99a (3) EStG requires that ´the debt-claim, right or use of information in respect of which interest or royalty payments arise is effectively connected with the receiving enterprise´. Under Art. 1 (5) (a) of the Directive, this requirement is only applicable to permanent establishments. The Austrian law, however, imposes this requirement also with respect to companies. By reason of this additional criterion decreed by the Austrian legislator the implementation of the ´beneficial owner´ could be too narrow as a whole. It has been suggested that in this case Art. 1 (5) (a) of the Directive could take priority over the Austrian law (see *Furherr/Nowotny*, GeS 2004, 190).

The Austrian legislation did not create a link between the definition of the beneficial owner and the subject-to-tax requirement in Art. 3 (a) (iii) of the Directive.

The beneficial-ownership approach is commonly used in Austrian tax treaties. The treaty concept of "beneficial ownership" seems to be in accordance with the Austrian domestic understanding of beneficial ownership. Section 24 of the BAO stipulates that one is seen as beneficial owner if he is entitled on his own behalf to use, to give in charge (pledge) and to sell an asset. In this regard, the Austrian tax authorities have in many cases decided that a mere letter box (or conduit) company is not entitled to claim treaty benefits. Hence, the

ownership attributes might be defined on two different levels: the level of the asset itself and hence the power to make capital or the assets under discussion available to a third party, and secondly to have the respective income under one's own disposal. This interpretation relates to the beneficial ownership approach under national provisions of the BAO. Because the Directive has only applied for a short period of time, there is no administrative practice or case-law yet on the beneficial ownership concept under the Directive set forth in Section 99a (3) EStG.

2.3. PERMANENT ESTABLISHMENTS

2.3.1. Definition (Art. 3(c))

Austria applies a specific concept of permanent establishment for the purposes of the application of benefits under the Directive (Section 99a (1) EStG). Permanent establishment in this context is defined 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. The text of the law merely repeats the definition given in Art. 3 (c) of the Directive.

2.3.2. Application of source rules (Art. 1(2))

Until now, there have been to our knowledge no instances in which Austria has interpreted Art. 3 (c) of the Directive more narrowly than Art. 5 of the OECD MC and as a consequence would have imposed withholding tax on interest or royalty payments from its sources to an associated company in another Member State.

2.3.3. 'Tax-deductible expense' requirement (Art. 1(3))

The ´tax-deductible expense´ requirement in Art. 1 (3) of the Directive has been implemented in Section 99a (2) EStG. We are not aware of any instances where Austria or another Member State has refused to recognise the payment as tax-deductible expense because it considers that the expense is not attributable to the permanent establishment.

2.3.4. Beneficial ownership (Art. 1(5))

According to Section 99a (4) EStG a permanent establishment shall be treated as the beneficial owner of interest or royalties:

"1. if the debt-claim, right or use of information in respect of which interest or royalty payments arise is effectively connected with that permanent establishment; and

2. if the interest or royalty payments represent income in respect of which that permanent establishment is subject in the Member State in which it is situated to one of the taxes mentioned in Article 3(a)(iii) of the Interest and Royalties Directive in its effective version or in the case of Belgium to the 'impôt des non-résidents/belasting der niet-verblijfhouders' or in the case of Spain to the 'Impuesto sobre la Renta de no Residentes' or to a tax which is identical or substantially similar and which is imposed after the date of entry into force of this Directive in addition to, or in place of, those existing taxes."

Evidently, the text of the Austrian implementation repeats the wording of Art. 1 (5) of the Directive translated into German. Because of this literal translation, the interpretation of the terms "effectively connected" and "subject-to-tax" has not been clarified yet and is still quite open.

2.3.5. Permanent establishment in a third country (Art. 1(8))

In Austria, due to Section 99a (1) EStG, the exemption from tax under the Directive does not apply to permanent establishments located in non-EU states. Furthermore, the income derived by the permanent establishment must be subject to corporate income tax or to any equivalent tax in the Member State of the permanent establishment. The requirement that the

business of the receiving enterprise ´is wholly or partly carried on through that permanent establishment' in a third state has not been explicitly implemented into Austrian law.

Article 1 (6) of the Directive stipulates that where a permanent establishment of an EU company is treated as the payer, or as the beneficial owner, of interest or royalties, no other part of the company shall be treated as the payer, or as the beneficial owner, of that interest or those royalties. Art. 1 (8) of the Directive excludes that interest or royalties paid by or to a permanent establishment of an EU company situated in a third state does fall within the scope of the Directive. However, it is noteworthy that neither Art. 1 (6) nor Art. 1 (8) of the Directive has been implemented into Section 99a of the EStG. As - from a legal point of view - a permanent establishment is always part of the (entire) enterprise, some authors tend to argue that in the event that a permanent establishment is to be regarded as beneficial owner of interest and royalties, the entire enterprise always must also be regarded as beneficial owner of the said payments. Nevertheless, one could not come to the conclusion that interest or royalties paid from an Austrian corporate taxpayer to a permanent establishment of an EU company situated in a third state, could fall within the scope of Section 99a of the EStG and hence would be exempted from both Austrian withholding tax because the permanent establishment must be situated in an EU Member State according to Section 99a (4) 2 EStG.

3. PROCEDURE

In order to benefit from the general withholding tax exemption a minimum holding period of one year and the attestation requirement are to be fulfilled under Austrian law. The exemption is generally applied at source. The need to request a refund only exists in cases when the holding period and/or the attestation requirement are not met at the time of payment.

3.1. MINIMUM HOLDING PERIOD (ART. 1(10))

3.1.1. General

Austria requires a minimum holding period of 1 year in Section 99a (6) last sentence EStG. As a consequence, tax at source must be withheld provisionally if the royalties are paid before the expiry of the minimum holding period. A refund may be granted as soon as it has expired. The holding period has the same duration as in the implementation of the same requirement under the Parent-Subsidiary Directive in Section 10 (2) KStG. The deadline for the fulfilment of the minimum holding period is the time of payment.

3.1.2. Relief before the holding period requirement is satisfied

It is not possible to apply the relief under the Directive before the holding period is satisfied. In this case relief is available only through a refund procedure. The receiving company or the receiving permanent establishment can apply for the refund of the withholding tax after the holding period requirement is satisfied (Section 99a (8) EStG). The Austrian legislation is silent about whether according to the wording of the Directive it would also be possible not to apply the relief at all in such cases.

3.1.3. Appeals

If the paying or receiving company is not satisfied with the decision by the fiscal administration that a certain requirement of the Directive is not fulfilled, an appeal may be filed. It should be noted that in respect of this appeal, there are no differences with the normal appeal procedure available to domestic taxpayers.

If the taxpayer does not agree with an assessment issued by the tax office or proposed by a tax auditor, an appeal may be filed with the relevant tax office. To speed up the procedure, the tax office may then issue a decision on its own, rather than submit the appeal to the appellate level (Section 276 BAO).

If the taxpayer is not satisfied with the decision, he may request that the appeal be forwarded to the independent fiscal senate, which – in contrast to the tax offices – is free from instructions of the Federal Ministry of Finance. If the independent fiscal senate decides against the taxpayer, the decision may be appealed to the Austrian Administrative Court, or a constitutional issue may be raised by appealing to the Constitutional Court.

3.2. ATTESTATION (ART. 1(11) AND 1(13))

3.2.1. General

Austria requires an attestation in accordance with Art. 1 (11) and Art. 1 (13) of the Directive. The attestation is a prerequisite for the application of the relief that the paying company already disposes of the attestation at the time of payment. The attestation does not have to be submitted to the Austrian tax authorities but must be kept by the paying company for future tax examinations.

The attestation must include:

- proof of the receiving company's residence for tax purposes and proof that the company is subject to one of the taxes as laid down in Art. 3 of the Directive in the relevant version (again: an ambulatory reference in order to be flexible in the case of possible amendments of the Directive) without being exempt, or to a tax which is identical or substantially similar and which is imposed after the date of entry into force of this Directive in addition to, or in place of, those existing taxes, each certified by the tax authority of the Member State in which the receiving company is resident for tax purposes;

- additional proof of the existence of a permanent establishment and proof that the permanent establishment is subject to tax as laid down under Para. 1, each certified by the tax authority of the Member State in which the receiving company is resident for tax purposes, in the event that a permanent establishment situated in another Member State is beneficial owner of the said interest and royalties; and

- proof issued by the receiving company of minimum shareholding and minimum holding period. Furthermore, the receiving company or the receiving permanent establishment has to attest fulfilment of beneficial ownership as laid down in Section 99a (3) of the EStG and Section 99 (4) of the EStG.

The attestations to be given shall be valid for a period of 2 years (at least 1 year but not more than 3 years, according to Art. 1 (13) of the Directive) from the date of issue.

Furthermore, the requirement of providing legal justification for the payments under the contract (e.g. loan agreement or licensing agreement) to the Austrian authorities as laid down in Art. 1 (13) of the Directive has not been codified by Section 99a of the EStG. However, general provisions of the Austrian tax system provide for a sufficient legal basis for such request if the Austrian tax authorities wish to examine the fulfilment of the conditions as set forth in Section 99a of the EStG. Art. 1 (14) of the Directive, dealing with the recipient's obligation to inform the paying company if the requirements for exemption cease to be fulfilled, has not been implemented.

3.2.2. Appeals

It is possible to appeal any decision of the tax authorities concerning the attestation; the taxpayer has to undertake the same procedure as described in 3.1. Minimum holding period.

3.2.3. Relief before the holding period requirement is satisfied

If the holding period requirement is not fulfilled at the time of payment and tax is deducted at source, it is possible to obtain a refund if the holding period requirement is subsequently satisfied. According to Section 99a (8) EStG, the receiving company or the receiving permanent establishment can apply for a refund within the next five years after the date of payment with the tax office. According to Section 59 BAO, the tax office which is competent for the income tax of the paying company or paying permanent establishment is competent for the refund procedure.

If the holding period requirement is satisfied subsequently, the tax office has to reimburse the withholding tax within one year from the filing of the application. If the reimbursement does not take place within one year, the fiscal authorities must pay interest on the retained sum.

3.3. DECISION ON APPLICATION OF THE RELIEF (ART. 1(12))

Austria does not require a decision of the application of the relief; the attestations mentioned in Art. 1 (11) and Art. 1 (13) of the Directive are sufficient for the relief.

3.4. APPLICATION FOR REFUND (ART. 1(15) AND 1(16))

Austria generally applies the system of exemption at source. The reason for this decision is not quite clear. The Austrian legislator probably wanted to equalize the tax treatment of interest and royalty payments, on the one hand, and dividends, on the other hand.

3.4.1. General

Austria has implemented Art. 1 (15) and Art. 1 (16) dealing with the refund procedure in Section 99a (8) EStG. The refund procedure is only used if at the time of payment:
(a) the minimum holding period requirement is not satisfied; and/or
(b) the attestation is not complete.

The refund procedure is the same described in 3.2.3. Relief before the holding period requirement is satisfied (see above). From the current point of view it is impossible to generally estimate the average time-lapse of time between deduction at source and refund. As stated above, the tax office has to reimburse the withholding tax within one year from the filing of the application, following which date interest becomes payable.

3.4.2. Appeals

The procedure to appeal a decision not granting a refund is the same as described in 3.1.3. Appeals.

In case the tax administration does not answer within the deadline of six months, the taxpayer may bring its case to the independent fiscal senate and then to Supreme Administrative Court.

4. FRAUD AND ABUSE (ART. 5)

4.1. MEASURES UNDER ART. 5(1) OF THE DIRECTIVE

4.1.1. Domestic

Austria has not implemented Art. 5 (1) of the Directive in particular, but there is a general anti-abuse provision under Section 22 of the BAO. This general provision states that tax liability cannot be avoided by an abuse of legal forms or methods offered by civil law (abuse of law). If such an abuse is established, the tax authorities may compute the tax as if such abuse had not occurred. Additionally, Section 23 of the BAO provides that an act or transaction not seriously intended by the parties (sham transaction) but performed only to cover up facts that are relevant for tax purposes will be disregarded and that taxation will be based on the facts the taxpayer sought to conceal.

However, if the tax authorities contend that there is an abuse of law or a sham transaction, they must clearly prove the contention. In such cases the tax authorities must examine taxable events and determine the factual and legal circumstances which are essential for the establishment of tax liability and for the imposition of taxes (Section 115 BAO). They must examine and evaluate tax returns submitted and all data known to them, and must also consider information that is favourable to the taxpayer. Case law shows that in practice it is rather difficult to deliver such proof.

The true meaning of Section 22 BAO is under dispute in Austria. The tax authorities take the view that this provision gives them the power to tax if a structure is:

- not appropriate in relation to the economic results the taxpayer wants to achieve;
- unusual; and
- used by the taxpayer only to minimize the tax burden.

Therefore, in practice a taxpayer may succeed in persuading the tax authorities by arguing that the way he structured the transaction is either not unusual or that he also had other intentions than minimizing the tax burden. In addition, a transaction cannot, under the case-law of the Supreme Administrative Court, be successfully challenged by tax authorities if a tax benefit, which is the main purpose of the transaction, has been provided for in the domestic tax law or any Austrian tax treaty (e.g. tax sparing) (Decision of 13 September 1998, No. 87/14/0128).

However, the Austrian Constitutional Court (Verfassungsgerichtshof) takes the position, and it is the prevailing theory of legal scholars, that attention must be paid to the purpose and the economic background of the law when interpreting the tax rules the taxpayer wants to circumvent. Therefore, Section 22 BAO stresses that the purpose and the economic background of the tax law have to be taken into account when interpreting a tax rule although they do not give a power to levy tax.

4.1.2. Agreement-based

Certain tax treaties concluded between Austria and certain Member States contain anti-abuse provisions. It is not clear whether the tax authorities will apply such anti-abuse provisions for transactions covered by the Directive. This is, however, rather unlikely, as the Austrian transposition of the Directive takes place within the Austrian Income Tax Act which includes its own special anti-abuse provision only for transactions covered by the Directive in Section 99a (9) Z 2 EStG.

4.2. MEASURES UNDER ART. 5(2) OF THE DIRECTIVE

Austria has implemented Art. 5 (1) of the Directive in Section 99a (9) Z 2 EStG; the provision was incorporated literally. In addition to the specific anti-abuse rule in Section 99a (9) Z 2 EStG, it is difficult to foresee from the current point of view which other anti-abuse measures could be used in Austria to deny the relief under Art. 5 (2) of the Directive. There is no advance ruling regime in Austria, and no relevant case-law yet. According to the general case-law, there is an abuse of law if the transaction is fictitious or entered into for tax reasons only.

4.3. COMPARISON WITH SIMILAR MEASURES UNDER PARENT-SUBSIDIARY AND MERGER DIRECTIVES

The anti-avoidance, which the Member States are permitted to implement pursuant to Art. 1 (2) of the Parent-Subsidiary Directive, is implemented in Austria by Section 10 (4) KStG. This provision applies to prevent resident companies from benefiting from the international participation exemption with respect to their foreign-source income which has been subject to low tax. Tax avoidance can, in particular, be assumed if at least two of the following conditions are fulfilled and the third one is closely met (Regulation 57/1995):

- the focus of the foreign subsidiary's business operations is to derive, directly or indirectly, interest income, income from the leasing of assets or the sale of shareholdings (passive income);
- the tax rate or the taxable base in the country in which the subsidiary is resident are not comparable with Austrian taxation. Foreign taxation is not comparable if it is less than 15% of the taxable base determined under Austrian tax law. A foreign average tax burden of less than 15% is not detrimental if it is caused by using special depreciation methods or loss carry-overs; and
- the resident parent company is predominantly directly or indirectly controlled by individuals resident in Austria (the ownership test). As from 2004 the ownership test has been abolished.

In contrast to the detailed implementation of Art. 1 (2) Parent Subsidiary Directive, there are no specific anti-abuse provisions with respect to the Merger Directive under Austrian law.

The anti-avoidance clause under the Parent-Subsidiary Directive is much more detailed and focused on situations where foreign-source income benefited from a low-tax regime, whereas the specific anti-abuse clause under Art. 5 (2) of the Directive is of more general character. It follows that the implementation of the anti-abuse provisions of the Parent Subsidiary, the Merger Directive and the Interest and Royalties Directive is very different in Austrian law.

5. SUMMARY

Austria has generally implemented the provisions of the EC Interest and Royalties Directive (2003/49/EC).

With effect from 1 January 2004, outbound interest and royalty payments are exempt from withholding tax, provided that the beneficial owner of the interest is an associated company of the paying company and is resident in another Member State or such a company's permanent establishment situated in another Member State. Two companies are "associated companies" if:
(a) one of them has a direct minimum holding of 25% in the capital of the other; or
(b) a third EU company has a direct minimum holding of 25% in the capital of the two companies.

The relevant companies must have a legal form listed in the Annex to the Directive and be subject to corporate income taxes listed in the Directive.

A continuous holding period of at least 1 year is required. However, tax at source must be withheld provisionally if the royalties are paid within the holding period of 1 year. A refund may be granted as soon as the holding period has expired.

Tax at source must also be withheld in the case of tax avoidance, abuse of law and royalties exceeding the arm's length amount and for this reason, characterized as constructive dividends. Tax avoidance or abuse of law is not present if the receiving company has submitted a written form to the paying company stating that it derives its income from an active business, that it employs its own personnel and that it maintains its own business facilities. In general, a constructive dividend distribution is assumed if the paying company grants to its shareholders a benefit that it would not have granted to an independent third party when applying the diligence of a prudent businessman.

The Austrian transposition of the Directive is incorporated into the Austrian Income Tax Act . The largest part of the transposition is strictly based on the wording of the Directive, in its German translation. Therefore, the legal terms seem to be open for any interpretation in conformity with the EU law. It is most likely that problems and uncertainties be revealed by the application in the future. It should be noted that no guidance has been issued by the fiscal administration yet nor has it been announced that such guidance would be published in a foreseeable future.

PART II. THE AGREEMENT

INTRODUCTION

There have been no comprehensive measures implementing Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments (the “Agreement”) in Austria. In Austria, the issues of tax treatment of interest and royalty payments covered by the Art. 15 (2) of the Agreement are to be discussed based on the recent ruling issued by the Ministry of Finance (see below) and also taking into consideration the tax treaty between Austria and Switzerland of 30 January 1974.

Under Art. 11 of the Austria-Switzerland tax treaty, interest is exempt at source. This regime complies with the tax regime set forth in Art. 15 (2) of the Agreement.

Royalties, however, are currently subject to a treaty rate of 5% in the state of source, with certain exceptions. According to the recent ruling issued by the Austrian Ministry of Finance (BMF 17.8.2005, EAS 2643; SWI 2005, 459) the relief from withholding tax on royalties under Art. 15 of the Agreement has to be granted to Switzerland by 1 July 2005, in accordance with the Directive. Austria and Switzerland have also initialled a protocol amending the treaty that is expected to take effect on 1 January 2006. The protocol removes the withholding tax on cross-border royalties. The protocol has not been ratified by Austria yet.

Unless further guidance is issued with respect to interest, it may be the case that the tax treaty is effectively applied in practice in situations covered by the Agreement (where interest is not exempt under domestic law). The same may be also true for royalties once the exemption on royalties becomes effective under the amended tax treaty. Therefore, the regime under the tax treaty, being in full compliance with Art. 15 (2) of the Agreement, might be applied in practice (please, see the description of the tax regime of interest and royalties under the tax treaty below).

1. SCOPE

1.1. Payments

1.1.1. Concept of interest

Article 11 (2) Tax Treaty Austria-Switzerland defines the term "interest" as "income from Government bonds, from bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, and debt-claims of every kind, as well as all other income assimilated to income from money lent by the taxation law of the State in which the income arises".

This definition corresponds to a large extent with the definition used in the OECD MC. This definition is not amended by the protocol of 28 April 2005, as interest payments are not subject to withholding tax. The withholding tax on interest has already been eliminated by the amending protocol of 2000 (Official Gazette BGBl III 2001/204).

Article 11 (5) of the treaty provides a ´special relationship´ clause whereby relief from withholding tax is restricted to the amount which corresponds to the arm´s length remuneration.

1.1.2. Concept of royalties

The revision protocol eliminates the withholding tax on royalties and adjusts the term royalties to the definition used in the OECD MC.

Leasing payments are currently characterized as royalties. According to the protocol, such payments shall now be treated as business income.

The Austrian Ministry of Finance has disclosed its opinion on the application of Art. 15 of the Agreement concerning royalty payment in a recent ruling (BMF 17.8.2005, EAS 2643; SWI 2005, 459). The relief from withholding tax on royalties regarding Art. 15 of the Agreement has to be granted to Switzerland by 1 July 2005 according to the Directive. Article 15 has a normative effective with the consequence that Section 99a of the EStG is analogous applicable to royalty payments to Swiss parent companies by 1 July 2005. It is not quite clear whether this ruling is restricted to the legal consequences, or also covers the definitions used in Section 99a EStG.

As provided with respect to interest, Art. 12 (6) of the treaty contains a 'special relationship´ clause regarding royalties under the same conditions (see above).

1.2. Companies

1.2.1. Types of companies benefiting from Art. 15(2) of the Agreement

The tax treaty between Austria and Switzerland does not set out special requirements regarding the type of company. Associations of persons ("*Personengesellschaften*") (commercial partnerships, partnerships, and limited partnerships ("*Offene Handelsgesellschaften*", "*Kollektivgesellschaften*", "*Kommanditgesellschaften*"), which are established under the law of a Contracting State, and which have their seat in that State, may claim tax relief on interest payments from the other State, provided that at least three quarters

IBFD

of the profit of the association benefits persons who are residents of the first-mentioned State (Art. 28 (6) Austria-Switzerland tax treaty).

Article 15 (3) of the Agreement provides that more favourable taxation treatment in double taxation agreements between Switzerland and the Member States shall remain unaffected. The tax treaty does not require a minimum holding or a minimum duration regarding shares as set out in the Directive and in Section 99a EStG. Also in case of required certificates (compared to Sec 99a (7)) the tax treaty is more favourable.

1.2.2. 'Affiliated' companies

The tax treaty between Austria and Switzerland contains no special requirements concerning affiliated companies. Article 15 (3) of the Agreement provides that more favourable taxation treatment in double taxation agreements between Switzerland and the Member States shall remain unaffected. As mentioned, it is not clear if the ruling of the Ministry of Finance (see above) is also applicable to the definitions used in Section 99a EStG.

1.2.3. Residence requirement

The residence requirements are set in Art. 4 of the tax treaty between Austria and Switzerland and follow the OECD MC.

1.2.4. Subject-to-tax requirement

With regard to interest and royalty payments, the tax treaty between Austria and Switzerland does not contain a subject-to-tax requirement.

IBFD

2. PROCEDURE

The tax treaty between Austria and Switzerland applies in principle the exemption method. Interest and royalty payments are relieved at source.

In 2005, the Austrian Ministry of Finance released a relief decree for double tax conventions, which became effective on 1 July 2005 ("DBA-Entlastungsverordnung", Official Gazette BGBl III 2005/92). The ministerial decree allows the direct application of the reduced tax treaty withholding tax rates by the debtor. The non-resident recipient can achieve relief at source and avoid the domestic refund procedure. To obtain relief at source, the non-resident company can provide a certificate of residence by using specific forms (it is a possibility for the company), to show that it is entitled to treaty benefits. If the payments do not exceed the amount of € 10.000 and the recipient is not resident in Austria, a written statement with certain details (section 2 of the decree) can be filed instead of the certificate of residence. The non-resident recipient has to prove that relief at source is justified and in line with the provisions of the decree.

In some situations, the relief at source is not possible (section 5 of the decree). This is the case, for example, where:

- the required documentation is not sufficient;
- the income relates to the secondment of employees to Austria;
- the income is paid to a foreign foundation, trust or an investment fund or a corporation having its place of effective management in a country different from the state of establishment; or
- if investment income (particularly interest) is paid upon maturity or in the course of alienation of securities by a bank acting as custodian or depository for these securities.

According to this decree, it does not affect the application of the agreement between Austria and Switzerland concerning the execution of the tax treaty of 1975 (Official Gazette BGBl 1975/65).

According to Art. 28 (2) of the Austria-Switzerland tax treaty the tax withheld (at source) shall generally be refunded on application if such taxation is limited by the Convention. Instead of a refund, the withholding of tax may, in the case of royalties, be waived on application.

3. SUMMARY

There have been no comprehensive measures implementing the Agreement in Austria. The issues of tax treatment of interest and royalty payments covered by the Art. 15 (2) of the Agreement are partially governed in the recent ruling issued by the Ministry of Finance and by the tax treaty between Austria and Switzerland of 30 January 1974.

Interest payments are exempt in all cases under the tax treaty between Austria and Switzerland. The amending protocol to the tax treaty provides that also royalty payments are relieved from withholding tax. The protocol is expected to take effect on 1 January 2006. In the meanwhile, as from 1 July 2005 and until the protocol becomes effective, royalty payments to Switzerland in situations based on the criteria as set in the Austrian implementing provisions of the Directive (Section 99a EStG) are exempt from tax pursuant to a recent ruling of the Ministry of Finance.

IBFD

ANNEX

Table of the maximum withholding tax rates on interest and royalty payments under the tax treaties between Austria and the EU Member States.

EU Member State	Interest (%) <1>	Royalties (%)
Belgium	15	0/10 <2>
Cyprus	0	0
Czech Republic	0	0/5 <6>
Denmark	0	0/10 <2>
Estonia	10	5/10 <4>
Finland	0	5
France	0	0
Germany	0	0
Hungary	0	0
Ireland	0	0/10 <2>
Italy	10	0/10 <2>
Luxembourg <7>	0	0/10 <2>
Malta	5	0/10 <5>
Netherlands	0	0/10 <2>
Poland	0	0
Portugal	10	5/10 <2>
Slovak Republic	5	0/5 <8>
Slovenia	5	0/10 <9>
Spain	5	5
Sweden	0	0/10 <2>
United Kingdom	0	0/10 <2>

<1> Many treaties provide for an exemption for certain types of interest, e.g. interest paid to the state, local authorities, the central bank, export credit institutions or in relation to sales on credit. Such exemptions are not considered in this column. Interest paid to non-residents is generally not taxable under domestic law; the rates in this column are the maximum rates on interest on loans secured by mortgage.

<2> The 10% rate applies if the recipient company owns more than 50% of the share capital of the paying company.

<3> The rate applies if the recipient company owns at least 10% of the Austrian company's capital or voting power, as the case may be.

<4> The lower rate applies to equipment leasing.
<5> The lower rate applies to copyright royalties, excluding films.
<6> The lower rate applies to copyright royalties, including films.
<7> The treaty does not apply to exempt Luxembourg companies.
<8> The higher rate applies to film royalties.
<9> The 10% rate applies if the Slovenian company holds directly at least 25% of the capital in the Austrian company.