DENMARK

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Laws

- Assessment Law: Ligningsloven; Law 995 of 7 October 2004.
- Corporate Income Tax Law: Selskabsskatteloven; Law 111 of 19 February 2004, most recently amended by Law 485 of 9 June 2004.
- Source Tax Law: Kildeskatteloven; Law 678 of 12 August 2002, most recently amended by Law 468 of 9 June 2004.
- Law on Private Companies: Anpartsselskabsloven; Law 10 of 9 January 2002, most recently amended by Law 226 of 31 March 2004.
- Law on Public Companies: Aktieselskabsloven; Law 1001 of 8 October 2004.
- Law on Collection of Taxes and Levies: Opkrævningsloven; Law of 15 March 2000.

Administrative Guidelines

- Ligningsvejledning 2005-1, Dobbeltbeskatning, Guidelines on double taxation.

Case law

- LSR 1983, 90.
- Tfs 2003, 889.

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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
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
KSL	Source Tax Law, *Kildeskatteloven*
LL	Assessment Law, *Ligningsloven*
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
OKL	Law on Collection of Taxes and Levies, *Opkrævningsloven*
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
Savings Directive	Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments
SEL	The Danish Corporate Income Tax Law, *Selskabsskatteloven*
SL	National Income Tax Law, *Statsskatteloven*

PART I. IMPLEMENTATION OF THE DIRECTIVE

1. INTRODUCTION

1.1. GENERAL INFORMATION ON THE IMPLEMENTATION OF THE DIRECTIVE

The Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (the "Directive") was implemented into domestic law by bill L 119, adopted by the Parliament on 30 March 2004 (Law 221 of 31 March 2004). The implementing provisions retroactively apply from 1 January 2004.

To comply with the Directive, new Danish rules to exempt royalty payments paid by Danish Companies from withholding tax, were introduced in the Corporate Income Tax Law (*Selskabsskatteloven, SEL*), see below. In general, Denmark did not introduce specific national provisions equivalent to the articles laid down under the Directive. However, the Directive was appended to the explanatory memorandum of bill L 119.

Since Denmark did not levy withholding tax on interest payments to foreign entities, no amendments with regard to interest payments to a foreign state were introduced. But when introducing the new Danish rules on withholding tax on royalty payments to comply with the Directive, Denmark did at the same time introduce a rule on withholding tax on interest. The rule is however quite narrow in application and does in essence only apply to interest payments made to group-related lenders resident in a tax haven. Interest payments made to lenders covered by the Directive are explicitly exempted.

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

Articles of the Directive	Relevant sections of national law
Art. 1 (1)	Sec. 2 (1) (d) SEL
Art. 1 (1)	Sec. 2 (1) (g) SEL
Art. 1 (2)	---
Art. 1 (3)	Sec. 6 (a) SEL
Art. 1 (4) - (9)	---
Art.1 (10)	Sec. 2 (1) (g) SEL
Art.1 (11) - (16)	---
Art. 2	---
Art. 3 (a)	---
Art. 3 (b)	Sec. 2 (1) (g) SEL
Art. 3 (c)	Sec. 2 (1) (a) SEL

Articles of the Directive	Relevant sections of national law
Art. 4	---
Art. 5	---

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

Deduction of interest and royalty payments

Royalties and interest (including current commissions) are generally deductible from the company's taxable income (Sec. 6 (a) SL). However, the thin capitalization rules may limit the deductibility of interest and capital losses on debt owed to group-related entities.

Interest is not deductible if, e.g:
- the interest is incurred for the purpose of acquiring receivables (as defined in the Danish Law on Gains and Losses on Debt and Claims) and the interest income is exempt from Danish taxation due to the provisions of a double tax treaty; or
- the interest is incurred for the purpose of acquiring shares in companies, which have a substantial holding of receivables (as defined in the Danish Law on Gains and Losses on Debt and Claims), and the gain on the shares is exempt from Danish taxation due to the provisions of a double tax treaty.

The non-deductibility is extended to loan commission and other financial costs relating to such a loan, including a capital loss on the loan.

Royalties are deductible if at arm's length. Royalties exceeding the arm's length price are not deductible. Any excess is treated as dividend distribution. Under domestic law, withholding tax is levied on dividends paid to resident and non-resident companies, unless exempt under certain rules. The Parent-Subsidiary Directive is applicable to the excessive amount.

Thin capitalization rules

The thin capitalization rules apply to legal entities that are tax resident in Denmark and foreign legal entities that are subject to limited Danish tax liability due to a permanent establishment located in Denmark (Sec. 11 SEL). In the following, both types of entities are referred to as the "Danish debtor".

The thin capitalization restrictions apply to a Danish debtor if the following four conditions are met:
- the Danish debtor has debt to a group-related legal entity ("controlled debt");
- the controlled debt exceeds a threshold of DKK 10 million;
- the Danish debtor's debt-to-equity ratio exceeds 4:1 at the end of the tax year; and
- the Danish debtor cannot prove that similar debt could be contracted with an unrelated party.

b. Tax treatment at the level of the beneficiary company

Interest and royalty payments to a Danish beneficiary company

No withholding tax is imposed on interest and royalty payments to resident companies. Danish companies receiving foreign income from interest and royalty payments are subject to corporate income tax.

Tax treatment of outbound interests and royalties

There is no general withholding tax on interest. However, interest (including deemed interest payments, such as capital losses under a zero coupon note or any return from a profit-sharing loan) accruing from 2 April 2004 and paid to foreign related entities is subject to a 30% withholding tax (*renteskat*) (Sec. 2 (1) (d) SEL). This withholding tax is final (Sec. 2 (2) SEL). The withholding tax is not levied if the related foreign lender is protected under the Directive.

Withholding tax is levied on intra-group interest payments by a Danish company to a controlling foreign company provided the foreign company is a company situated in a tax haven or a state with which Denmark has not concluded a tax treaty.

Denmark has concluded tax treaties with all Member States and accordingly withholding tax will not be levied on interest payments by a Danish company or a permanent establishment of a foreign company in Denmark. Furthermore, interest payments between associated EU companies are protected under the Directive.

As a rule, royalties paid from sources in Denmark to non-resident companies are subject to a 30% withholding tax (*royaltyskat*) levied on the gross amount (Sec. 2 (1) (g) SEL). This withholding tax is final (Sec. 2 (2) SEL).

Royalties paid for rights attributable to a permanent establishment in Denmark are taxed as business income of the permanent establishment at the normal corporate income tax rate. No withholding is made in this case. In other cases, royalties paid from sources in Denmark to non-resident companies are generally subject to a final withholding tax. As a rule, royalties paid from sources in Denmark to non-resident companies are subject to a 30% withholding tax (*royaltyskat*) levied on the gross amount (Sec. 2 (1) (g) SEL). This withholding tax is final (Sec. 2 (2) SEL). Outbound royalty payments falling under the Directive are exempt from tax.

No withholding tax applies if the royalties are paid to a foreign entity or a permanent establishment qualifying under the Directive and the paying company remains associated with the recipient company for an uninterrupted period of 1 year, see 3.1.1 General.

1.2.2. Treaties

Prior to 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 Denmark and the relevant Member State. Denmark has tax treaties with all other EU Member States (see Annex).

a. Interest

Under national law there is no withholding tax on interest paid to residents of treaty states.

b. Royalties

In general, royalty payments are exempt from withholding tax if distributed by a Danish company provided that the state of the owner of the royalty is a state with which Denmark has concluded a tax treaty. If a tax treaty provides for a lower rate, royalty tax shall be withheld at such lower rate. The regular withholding tax rate in the Danish tax treaties on royalty payments is 0% or 10%.

The treaties are generally based on the OECD MC. However, under some treaties the definition of royalties differs significantly.

c. Conclusion

Although the definition of royalties under a tax treaty may differ from that combined in domestic law and in the Directive, some tax treaties concluded by Denmark and some other Member States provide for the exclusive taxation of royalty payments in the state of residence of the recipient. The tax treaties providing for exclusive taxation of royalty income in the state of residence of the recipient, are those concluded with Belgium, Cyprus, Finland, France, Germany, Hungary, Ireland, Luxembourg, Netherlands, Sweden and the United Kingdom.

The practical relevance of the tax treaties with regard to interest and royalty payments arising in Denmark currently is very limited since Denmark, in most cases, does not tax these types of income under its domestic law.

2. SCOPE

2.1. PAYMENTS

2.1.1. Concept of interest

a. Definition

There is no definition of the concept of interest in Danish law. The characteristics of an interest payment are established under case law. The following payments are considered interest payments:

- consideration for a loan made available to a debtor and made periodically to the creditor; and
- the payment, for a given period of time, is computed as a percentage of the amount outstanding at that time.

Interest payments in kind also qualify as interest. The term "interest" is given a uniform meaning for tax purposes of all tax laws.

As mentioned above Denmark did not amend the national provisions with regard to interest payments (see 1.1. General information on the implementation of the Directive).

In a situation where the payments made by a Danish company or a Danish permanent establishment of a foreign company to a related non-resident beneficiary are not at arm's length, the excess payment is treated as a dividend distribution. Dividends may be exempt under the Parent- Subsidiary Directive 2003/48/EC (Parent-Subsidiary Directive).

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2.1.2. Concept of royalties

a. Definition

The Danish concept of royalty includes payments for the use of or the right to use patents, trademarks, patterns, models, drawings, know-how and production processes. It does not include payments for copyright or consideration for artistic works; these sources of income earned by non-residents are therefore only taxable in Denmark if the income is taxable for other reasons, e.g., when the income is attributable to a permanent establishment located in Denmark. Furthermore, no withholding tax applies to royalties for information concerning industrial, commercial or scientific experience. Payments referring to these kinds of payments are treated as business income and fall within the scope of Art. 5 and Art. 7 OECD MC.

The definition of intellectual property rights is narrower than the OECD MC definition. Danish withholding tax on royalties is not levied with respect to copyrights, including, but not limited to, software (see 2.1.2. *b. Classification of revenue from leasing and software* below), manuscripts, music, movies and videos.

As mentioned above (see 1.1. General information on the implementation of the Directive), the Directive was implemented into domestic law by a reference in the implementing provisions. Applying those provisions, the above-mentioned payments are included in the concept of royalties. Accordingly, those payments should be exempt.

b. Classification of revenue from leasing and software

Danish national law does not impose withholding tax on outgoing royalty payments classified as payments from leasing and software. Payments for information concerning industrial, commercial or scientific experience, *see above 2.2.1.a Definition)* are also exempt from withholding tax since they are not included under the Danish concept of royalties.

There are no specific rules on classification of revenue from leasing and software. According to the Guidelines of the Danish tax administration (Ligningsvejledning 2005-1, Dobbeltbeskatning, Guidelines on double taxation), the classification of payments on leasing and software are unclear. Software payments may in some situations be classified as royalty.

Under the guidelines, software is described as a program, or a series of programs containing computer instructions used for the functioning of a computer. The rights to computer software constitute intellectual property. The following three kinds of software payments may be classified as follows:

(i) Payments for the right to use specific parts of the software: royalty payments. Addresses a situation when the beneficial owner transfers part of the rights to use the software to another person.
(ii) Payments for the right to use parts of the software for a specific period of time or within a certain geographic area: business income under Arts. 5 and 7 OECD MC.
(iii) Mixed contracts where the right to use the software is part of a contract may be divided in different parts: it is not clear whether the payments related to the right to use the software will be treated as royalty.

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

Under national tax rules royalties paid to an associated party are deductible if paid at arm's length (Sec. 2 LL). If royalties are paid during more than one calendar year as consideration for the transfer of an asset, a limitation on deductibility applies.

Excessive royalties that conflict the arm's length principle are taxed as a dividend distribution. The Danish concept of dividends (Sec. 16 A (1) LL) is broad. It includes declared dividends and everything allocated to the shareholders is considered a dividend. Apart from declared dividends, dividends subject to withholding tax include constructive dividends.

Dividends paid by resident companies to non-resident companies are, in general, subject to a 28% withholding tax (*udbytteskat*) levied on the gross amount (Sec. 65(1) KSL). The tax is final (Sec. 2 (2) SEL).

Dividends paid to non-resident companies in respect of substantial shareholdings are exempt from dividend withholding tax if (Sec. 2 (1c) (1) SEL):

(i) the non-resident company holds at least 20% of the capital of the resident subsidiary; and
(ii) the parent company has held this holding during a period of at least 1 year (not necessarily corresponding to a tax year or calendar year); and
(iii) Denmark must give up or reduce the taxation of dividends under the Parent-Subsidiary Directive or under a tax treaty with the country in which the recipient of the dividends is resident.

Condition (iii) means that the exemption from dividend withholding tax applies only if the recipient of the dividends is resident in the European Union or in a country with which Denmark has concluded a tax treaty that is in force and the recipient is a company covered by the Directive or the relevant treaty. The reference to the Parent-Subsidiary Directive means that the exemption also applies to dividends paid to foreign fiscally transparent entities covered by the Directive.

If the parent company has not held its shareholding during a period of at least 1 year at the time the dividends are declared, the exemption from withholding tax is nevertheless applicable if the parent company undertakes the obligation to pay the withholding tax in case it later on fails to comply with the holding period requirement.

Denmark does not have any statutory rules on the applicable methods for making transfer-pricing adjustments; in the absence of such rules, it is assumed that the tax authorities generally apply the OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, as updated from time to time. As mentioned above, royalties are deductible if paid at arm's length.

In the court case LSR 1983, 90, a royalty of 6% paid by a Danish resident subsidiary to its non-resident parent company as consideration for the right to use software developed by the parent company was accepted. All subsidiaries of the group paid the same rate of royalties.

2.2. COMPANIES

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

a. Other types of entities

The exemption of withholding tax under the Directive applies to interest and royalties paid by an associated company which is resident in Denmark and which take one of the forms listed in the Annex to the Directive, point (b). The Danish legal entities listed are those that take the form of:

– a public company (*aktieselskab, (A/S)*)
– a private company (*anpartsselskab,(ApS)*)

Furthermore, with regard to non-resident recipient companies the list in the Annex to the Directive is eligible. The national implementing provisions does not explicitly refer to the types of companies listed under the Directive but makes an exemption available provided that the companies are comprised by the Directive. Accordingly, it is most likely that Denmark apply the Directive to non-resident recipient companies listed in the Annex.

b. Hybrid entities

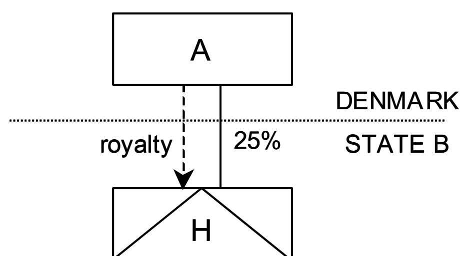
There is no specific guidance with respect to the application of the exemption from withholding tax when royalties are paid to or by hybrid entities. Conclusions on the tax treatment of such payments are drawn on the basis of the general domestic tax provisions. The issue of tax treatment of payments in situations involving hybrid entities is considered based on three hypothetical situations described below:

– a Danish company pays royalties to an associated hybrid entity H located in Member State B;
– a Danish hybrid entity H pays royalties to an associated company in Member State A;
– a Danish company pays royalties to an associated company through a hybrid entity H, the latter two located in Member State A.

In the situations below a hybrid entity means an entity that is treated as transparent either in Denmark or in the other Member State.

<u>Case 1: Payment to a hybrid entity</u>

A Danish company A pays royalties to associated hybrid entity H situated in Member State B. Denmark treats hybrid entity H as a transparent entity.



Under domestic rules withholding tax on royalties are levied on royalty payments by a Danish associated company to foreign hybrid entity, H.

To benefit from the exemption available under the Directive, the national provisions require that (i) the Directive covers the royalty payment; (ii) the recipient and paying company are associated within the meaning of the Directive during a minimum holding period of at least 1 year. It shall be noted that a refund is available if the minimum holding period requirement is subsequently met, see 3.1.2 Relief before the holding period requirement is satisfied.

The Danish implementing rules to the Directive do not specifically address the issue of payments to hybrid entities. To benefit from the exemption available under the Directive, it is required that the receiving EU associated company fulfils the following requirements:

(i) the foreign entity is a company of a Member State listed in the Annex of the Directive and is a resident of that Member State; and
(ii) the foreign entity is subject to one of the taxes as listed in Annex of the Directive; and
(iii) the foreign entity is an associated company (minimum holding period at least 1 year).

Furthermore, in accordance with the Directive the participation in the associated company must be direct.

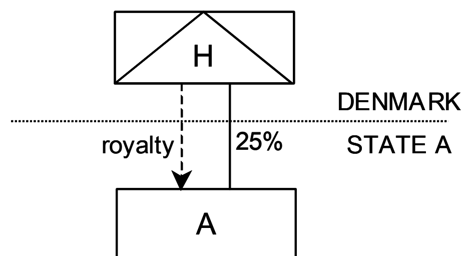
In accordance with the requirements cited above, the benefit of the tax exemption on royalties paid by the Danish associated company will not be granted if company H is not subject to corporate tax on its income. If in this situation, such income is taxed at the level of the members, and not at the level of the hybrid entity, Denmark will look through the hybrid to determine who is the direct recipient of the royalty payment. Provided the recipient is a company subject to corporate tax, the subject to tax requirement will be deemed to be met.

If in this case it is assumed that Member State B treats entity H as a non-transparent taxable entity, while Denmark treats entity H as a transparent entity, a royalty payment from company A in Denmark to entity H in Member State B would be exempt under the provisions of the Directive provided that all the conditions are fulfilled.

Note that in respect of companies listed in the Annex, under certain conditions, e.g., Italian limited liability companies (*societa a responsabilita limitata*) and partnerships limited by shares (*societa in accomandita per azioni*) listed in the Annex to the Directive may opt to be treated as flow-through entities. In these cases, the income of the Italian entity is attributed directly to the members. The income of Czech or Slovak general partnerships (*verejna obchodni spolecnost*) listed in the Annex to the Directive is subject to tax at the level of partners. It is likely that the Danish tax authorities would consider that the direct participation requirement is fulfilled provided that the income of the entity is directly attributed to the members and that the members of the hybrid are companies. In this case, the withholding tax exemption would be granted because the participation is not considered to be indirect and the subject to tax test would be fulfilled.

Case 2: Payment by a hybrid entity

A hybrid entity H in Denmark pays royalties to an associated company A in Member State A.



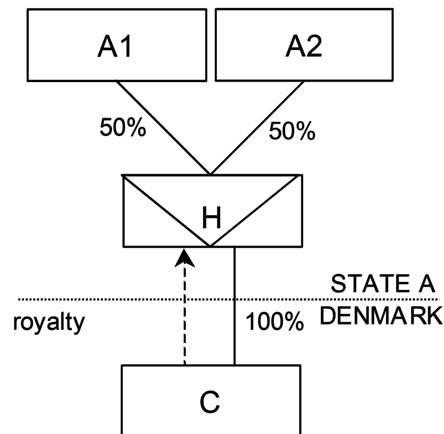
Denmark levies withholding tax on royalty payments made by hybrids located in Denmark to associated EU companies.

The members of the hybrid entity H are subject to tax in Denmark. Provided that the hybrid entity H is included in the list of companies in the Annex of the Directive, the requirements under the Directive are fulfilled. It is most likely that royalty payments by entity H in Denmark would benefit from the tax exemption in Denmark.

Payments by Danish hybrid entities do not benefit from the tax exemption in Denmark if such entities are not listed as eligible companies under the Annex of the Directive (see 2.2.1. *a. Other types of entities*, above).

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 Denmark. Denmark treats hybrid entity H as a transparent entity. Company A1 gives a license to the hybrid entity H and the hybrid entity H gives a license to the company C. Royalties flow from company C to a member A1 through the hybrid entity H.



In the case at hand it is most likely that Denmark will look through the hybrid when determining whether the benefits of the Directive shall be granted. By looking through entity H, company A1 will be treated as the direct and actual recipient of the royalty payment. Accordingly, provided the other requirements are met, it is most likely that an exemption under the Directive will be granted since the direct holding requirement will be met.

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

a. Implementation of the requirement

Sec. 2 (1) (g) SEL generally refers to the Directive by granting exemptions for royalty payments that fulfill the requirements of the Directive. Accordingly, even though no specific national provision equivalent to Art. 3 (a)(ii) was introduced to implement the residence requirement, the implementing provision requires the application of the Directive to determine whether the residence requirement is met. Furthermore, the recipient company of a royalty payment shall be listed in the Annex to the Directive and the associated companies (1 year minimum holding period) must be resident in an EU Member State.

b. Application of the requirement in dual residence cases

In a situation where a dual resident company receives a royalty payment the tax treaty between the States of the dual resident company will apply in order to determine its residency for tax purposes.

If a company that is resident under domestic law is deemed to be resident abroad under a tax treaty, it is treated as a non-resident for purposes of domestic law. This means, for example, that only expenses related to Danish-source income may be deducted in Denmark (Sec. 9(1) SEL).

In general, the residence of a dual resident company is determined by applying the "tie-breaker rule", which is normally included in Art. 4 in the Danish tax treaties. According to this rule, it is the company's effective management that shall be used to determine in which state the company is resident. There is no definition of effective management under domestic law, but guidance can be found in case law. There are only a few cases from lower courts that examine effective management.

As a general rule, the OECD MC is used to interpret the provisions of the Danish tax treaties. According to the Commentary to the OECD MC, it shall be considered where the key management and commercial decisions necessary for the company's substance are made. Furthermore, no definitive rule can be given; all relevant facts and circumstances have to be examined when determining in which Member State the company is resident.

Under certain tax treaties the place of effective management is determined by mutual agreement between the Contracting Parties. Nevertheless, the location of the effective management would be taken into account in accordance with the OECD MC Commentary.

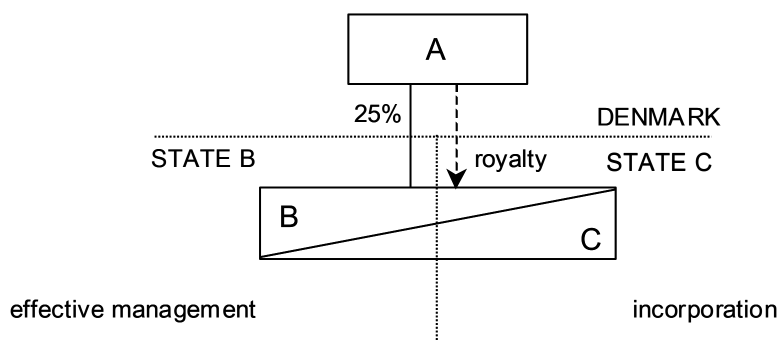
In general under the tax treaties, Art. 4 applies when determining in which state a dual resident company is resident. If the result of the application is that the company is resident in Denmark, a royalty payment received by the resident company will be taxed as business income in Denmark and should be exempt from tax in the other Contracting State. The same method would be used in the reverse situation and consequently Denmark would have to grant the benefit of the Directive.

There is no specific guidance with respect to the application of the exemption from withholding tax when 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 provisions of the SEL. The issue of tax treatment of payments in situations involving dual residency is considered based on three situations described below:

- a Danish company A makes a royalty payment to an associated dual resident company BC incorporated in Member State C but with its effective management in State B;
- a dual resident company BC incorporated in Member State C but with its effective management in Denmark makes an interest or royalty payment to an associated company A resident in Member State A;
- a dual resident company BC incorporated in Denmark 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

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



Danish domestic law, i.e. on the basis of the Directive, requires the receiving EU associated company to meet, inter alia, the following conditions:

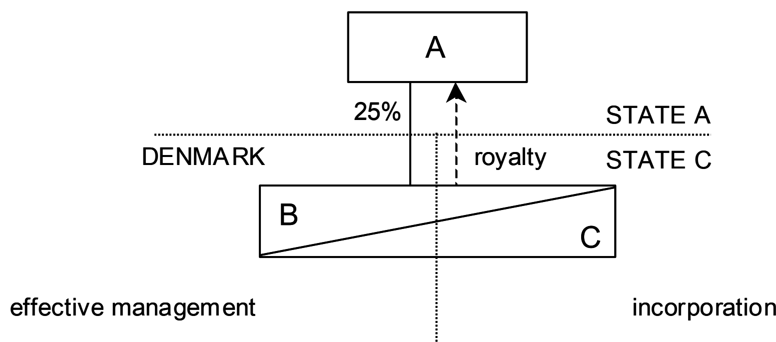
(i) the receiving company has one of the legal forms listed in the Annex to the Directive (i.e. one of the listed form of C); and
(ii) the receiving company is liable to corporate income tax, without being exempt; and
(iii) the receiving company has to be an associated company.

In the case at hand, if it is assumed that Company BC meets requirement (i) cited above: it takes the legal form of a company of Member State C listed in the Annex to the Directive. In respect of condition (ii), generally, the company BC will be subject to B and/or C corporate income tax under the B and/or C domestic tax law and the bilateral treaty. The issue of dual residency of the recipient dual company will be solved under the provisions of the income tax treaty between Member States B and C.

Assuming that the tax treaty between B and C is identical to the 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). In this situation it is most likely that Denmark will grant the withholding tax exemption in respect of the payment made to dual -resident company as a resident of Member State B.

<u>Case 2: Payment by a dual resident with the place of management in Denmark</u>

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



Under domestic law as from the tax year 1995, foreign-incorporated companies and other entities not registered in Denmark, are considered resident in Denmark if their place of management (*ledelsens sæde*) is located in Denmark (Sec. 1(6) SEL).

To determine the location of the place of management, the place of day-to-day management is normally decisive. Thus, if the board of executive directors or the head office is located in Denmark, the entity is resident in Denmark. The residences of shareholders or the place where the shareholders' meetings take place are normally not relevant.

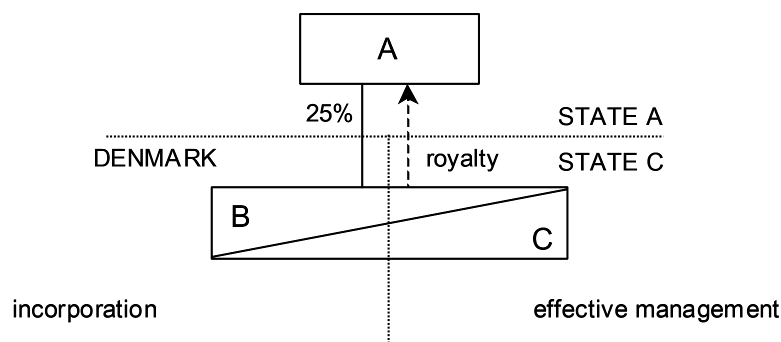
Denmark applies the provisions of the Directive. One could therefore argue that Denmark will apply the Directive to any company having a legal form listed in the Directive and not only to

the Danish legal forms listed therein. However, the tax authorities have not published any guideline on this issue.

The issue will therefore have to be solved by the tax treaty between Denmark and Member State C. Assuming that the tax treaty between Denmark and Member State C follows the OECD MC, the tie-breaker rule under Art. 4 (3) of the tax treaty between Denmark and Member State C will designate Denmark, where the effective management is located, as the country of residence for tax treaty purposes. The royalty payment will therefore be deemed to arise in Denmark, unless the royalty deduction is attributable to a permanent establishment in Member State C under Art. 7 of the tax treaty. In the latter case, the payment will be deemed to arise in Member State C and Denmark will be prevented under Art. 7 of the tax treaty from levying withholding tax on the royalty payments to company A.

If companies A and BC fulfill all conditions under the rules implementing the Directive, Denmark will not be allowed to levy withholding tax on the royalty payment.

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



In accordance with the Directive Denmark grants a tax exemption for royalties paid by a company listed in the Annex to the Directive (see 2.2.1. *a. Other types of entities*). To determine whether or not the Danish company is liable to Danish corporate income tax, it is necessary to determine the residence of company BC for Denmark-State C tax treaty purposes.

Assuming that the tax treaty between Denmark and Member State C follows the OECD MC, the tie-breaker rule under Art. 4 (3) of the tax treaty between Denmark 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 royalty payment will be deemed to arise in Member State C, so that Denmark will be prevented from levying withholding tax on the royalty payment, unless the royalty deduction is attributable to a permanent establishment in Denmark under Art. 7 of the treaty.

Where the royalty payment is attributable to a permanent establishment in Denmark, Denmark will have to apply the withholding tax exemption under the provisions of the Directive in respect of the royalties paid by the Danish permanent establishment to an associated company A in Member State A.

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

Denmark did not introduce a specific provision to implement the requirement that a company is subject to tax. Under domestic law the requirement is transposed by a reference to the

Directive. The implementing provisions generally refer to the Directive by stating that interest and royalty payments falling under the Directive are exempt from withholding tax. The subject-to-tax requirement under the Directive applies.

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

Denmark did not implement a specific provision equivalent to Art. 3 (b) of the Directive. According to Sec. 2 (1) (d) SEL an associated company is a company meeting the requirements of Art. 3 (b) of the Directive. The national provision does not explicitly refer to the article as such but makes an exemption available under the Directive provided that the companies are associated under the Directive. Accordingly, it is most likely that Denmark does not extend the application of the Directive to situations of indirect holdings.

Denmark does not apply a lower ownership threshold than the one in the Directive.

Denmark did not use the option to replace the "holding of capital requirement" with "holding of voting rights". For the purposes of this rule, the term "associated companies" means companies where one company controls at least 25% of the capital of the other company or where a third company has a direct control of at least 25% of the capital of both companies.

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

Denmark did not implement a specific national provision with regard to the beneficial ownership provision. Under domestic law the beneficial ownership requirement is transposed by a reference to the Directive. The implementing provisions generally refer to the Directive by stating that interest and royalty payments falling under the Directive are exempt from withholding tax. Accordingly, Art. 1(4) of the Directive applies.

2.3. PERMANENT ESTABLISHMENTS

2.3.1. Definition (Art. 3(c))

Denmark applies a general concept of permanent establishment. Under the definition of the term "permanent establishment" of domestic law, a non-resident company is taxable if it:

- carries on a business through a fixed place in Denmark;
- participates in a business with a fixed place in Denmark, e.g. through a partnership;
- receives regular payments from a business with a fixed place in Denmark or from the sale of such business in Denmark, provided such payments are not dividends, repayments of loan capital, interest or royalties. This category typically covers profit-related payments made by a business that does not belong to the non-resident company;
- leases out a business with a permanent establishment in Denmark; or
- sells assets attributable to a permanent establishment. This case covers capital gains and losses that are taxable under the general rules on tax treatment of gains and losses.

The concept of permanent establishment is defined in accordance with the concept of permanent establishment under Art. 5 of the OECD MC. This means, inter alia, that a dependent (either legally or economically) agent that regularly exercises its authority to conclude contracts that binds a non-resident company can constitute a permanent establishment for that non-resident company.

Two exceptions exist from the congruity with the OECD concept of permanent establishment, however. First, under domestic law, a building site or construction or installation project constitutes a permanent establishment from the first day of operation.

Second, an agent that carries out passive sales activities in Denmark, such as obtaining orders by phone, telex, telefax, etc., from Danish or foreign customers, never constitutes a permanent establishment. Such an agent may also take care of the production, packing, storage, shipment, invoicing and collection of claims. On the other hand, the agent is not allowed to carry out active sales activities, such as marketing, advising customers and contacting customers in person (e.g. by phone) (Sec. 2 (5) SEL; Sec. 2 (9) KSL). Anti-abuse provisions exist to prevent the splitting of activities.

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

At this stage, we are not aware of any instances where Denmark as, the source state would have 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))

Art. 1 (3) of the Directive in respect to the ‘tax-deductible expense’ requirement has not been implemented as a specific provision under Danish law. As pointed out above the Directive and its requirements have been transposed into Danish law by a reference in the implementing provisions. Accordingly, interest and royalty payments falling within the scope of the Directive are exempt from withholding tax. With regard to the tax-deductible expense requirement it is not clear if the tax administration will require that interest or royalty payments are deductible for tax purposes. In general, under domestic law interest and royalties are deductible.

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

Denmark did not implement a national provision with regard to the beneficial ownership provision. Under domestic law the beneficial ownership requirement is transposed by a reference to the Directive in the implementing provisions. The implementing provisions generally refer to the Directive by stating that royalty payments falling under the Directive are exempt from withholding tax. Accordingly, Art. 1(5) of the Directive is applicable.

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

Denmark did not implement a national provision with regard to permanent establishments in a third country. The implementing provisions generally refer to the Directive by stating that interest and royalty payments falling under the Directive are exempt from withholding tax. Under domestic law, this article is transposed by a reference to the Directive. Accordingly, Art. 1(8) of the Directive is applicable.

3. PROCEDURE

Withholding tax on royalties must be levied if the payer of the royalties is resident or, in case of a permanent establishment, is located in Denmark. As mentioned above (see 1.1 General information on the implementation of the Directive) a final withholding tax of 30% shall be levied on royalty payments to non-resident companies.

The withholding tax on royalties usually falls due by the tenth day of the month following the month in which the royalties were paid (Sec. 66 A KSL; Sec. 2 (2) OKL).

Upon the request of the recipient of a royalty payment, the payer must issue a certificate stating the payment. The recipient must prove its identity for the purpose of the certificate (Sec. 66 A (3) KSL). The certificate can be found at the website of the Danish Minister of Taxation and be downloaded as a pdf document (no. 06.015 Royaltyskat/Attestation af bopael-og skatteforhold, Certification of residence and Tax Status concerning payment of Royalty). The attestation should be handed in to Skattecentre Ballerup. Guidelines on the procedural rules applicable under the Directive are expected in the future.

Generally, most Danish Tax Treaties include an article according to which withholding tax is either reduced partly or waived so that only the Member State of residence of the recipient company is entitled to levy tax. Furthermore, no withholding tax applies if the royalties are paid to a foreign entity qualifying under the Directive and the paying company remains associated with the recipient company for a continuous period of at least 1 year, in which period the payment must take place. For the purposes of this rule, the term "associated companies" means companies where one company controls at least 25% of the capital of the other company or where a third company has a direct control of at least 25% of the capital of both companies.

Denmark did not implement a national provision requiring that the recipient company must submit an attestation with regard to the royalties received. According to the Danish tax administration, an attestation is required. The recipient company must submit an attestation to both the paying agent and the tax authorities having jurisdiction over the non-resident before the actual payment is effected.

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

3.1.1. General

Denmark requires a minimum holding period of one year. It is required that the paying company remains associated with the recipient company for an uninterrupted period of 1 year, in which period the payment must take place. The Danish rule could be interpreted as if an exemption will only be granted if the payment takes place within the 1-year period. However, according to information from the tax administration the provision should be interpreted as follows. It is possible to receive a refund for withholding tax if royalty is paid within the 1-year period and the minimum holding requirement is subsequently met. Furthermore, if the minimum holding period requirement is already met an exemption will be granted (Sec. 2 (1) (d) SEL and Sec. 2 (1) (g) SEL).

In comparison with the implementation of the minimum holding period requirement in the Danish version of the Parent-Subsidiary Directive a deviation exists. The Danish version of the Parent Subsidiary Directive uses a past tense instead of the present tense "maintains" as used under the Directive.

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3.1.2. Relief before the holding period requirement is satisfied

According to the Danish tax administration it is possible to obtain a refund of withholding tax on royalty payments provided the holding requirement is subsequently met. If the minimum holding period is not fulfilled at the time of the royalty payment and tax is withheld at source Denmark will grant relief subsequently under the Directive by way of refund once the minimum holding period is met. The company applying for the refund must complete and file form 06.015, Royaltyskat/Attestation af bopael-og skatteforhold, Certification.

3.1.3. Appeals

Denmark did not implement specific provisions on appeals with regard to the fulfillment of an attestation. The rules on appeals on assessments applicable for corporate taxpayers apply.

An appeal of an assessment made by the tax authorities shall be made directly to the Administrative Tax Court (*Landsskatteretten*). Appeals must be received by the Court within 3 months of the taxpayer's receipt of the assessment. A decision of the Administrative Tax Court may be appealed to a high court (*Østre Landsret* or *Vestre Landsret*) within 3 months after the decision was rendered. Decisions of a high court may be appealed to the Supreme Court (*Højesteret*).

An appeal does not postpone the due date of payment of tax, unless the tax authorities grant permission. Such permission is granted only for the amount of tax that relates to the disputed amount.

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

3.2.1. General

Denmark did not implement any provision equivalent to the attestation requirements as laid down in Art. 1 (11) and (13) of the Directive. According to the Danish tax administration an attestation is required, but it is only necessary to submit an attestation once.

The form to be filed is form no. 06.015, Royaltyskat/Attestation af bopael-og skatteforhold, Certification. The recipient company must include the following information in the attestation: name, address, company number, state of residence and a stamp of the competent authority.

3.2.2. Appeals

See 3.1.3 Appeals, above.

3.2.3. Relief before the holding period requirement is satisfied

See above, 3.1.2 Relief before the holding period requirement is satisfied.

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

3.3.1. General

Denmark does not require a decision on the application of the relief.

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

3.4.1. General

Denmark did not implement Art. 1 (15) and (16) of the Directive. There are no specific rules on procedures or application forms for refunds in a situation when withholding tax is unduly levied.

According to the Danish tax administration, an application form (no. 06.015 Royaltyskat/Attestation af bopael-og skatteforhold, Certification) shall be used to apply for a refund if withholding tax has been unduly levied.

3.4.2. Appeals

See 3.1.3 Appeals, above.

4. FRAUD AND ABUSE (Art. 5)

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

4.1.1. Domestic

Denmark has not made use of the authority in Art. 5 (1) of the Directive to include anti-avoidance rules in domestic law to restrict the exemption from withholding tax.

There are no general anti-avoidance or anti-abuse provisions in Denmark. However, the substance-over-form-principle is applied. The burden of proof lies, as a starting point, with the tax authorities if they seek to disqualify corporate transactions for tax purposes with reference to the substance-over-form principle.

In October 2003, the Danish Supreme Court issued an important decision suggesting that the substance-over-form principle has a narrow scope of application and may only be applied for the purpose of rejecting tax benefits that were created as a result of an actual tax loophole (Tfs 2003, 889).

Under Danish law there are specific anti-avoidance rules such as e.g. anti check-the-box and withholding tax on interest payments to certain related foreign shareholders (see 2.1.1. *a. Definition*).

4.1.2. Agreement-based

Generally, Denmark has not included anti-avoidance provisions in its tax treaties.

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

Denmark did not introduce anti-abuse rules when implementing the Directive.

With regard to the Parent-Subsidiary Directive, Denmark did not make use of the authority to include anti-avoidance rules in its domestic law to restrict the exemption from withholding tax. This applies with respect to both domestic and treaty matters. However, with regard to the Merger Directive tax benefits apply to the consequences of various transactions only if a dispensation is granted.

The Merger Tax Act states that transactions indicated in Art. 11 of the Merger Directive must be approved in advance by the tax authorities. Thus, this applies to cross-border mergers, divisions and transfer of assets, but not to domestic mergers and exchanges of shares. However, as a result of certain abusive practices, the law now requires companies to obtain permission from the tax authorities before they can engage in a tax-free exchange of shares.

The authority to grant permissions for exchanges of shares is delegated to the Regional Customs and Tax Office in the region where the taxpayer is registered.

At present, a number of domestic divisions, transfers of assets and exchanges of shares approved in advance have been published in Danish tax journals. Moreover, the circular to the Merger Tax Act issued on 22 February 1996 outlines the conditions to be fulfilled.

5. SUMMARY

Denmark did not generally implement the provisions of the Directive. The implementation was mainly done by introducing two provisions exempting interest and royalty payments falling under the Directive from withholding tax. There are no Guidelines published by the tax administration.

Objective scope

Denmark did not implement the definitions of interest and royalties income set out in Art. 2 of the Directive. The definitions under the Directive apply. The definition of royalty under national law is narrower than the definition under the Directive. Both interest and royalty payments are subject to the Danish transfer pricing and constructive distributions rules.

Subjective scope

Denmark did not generally implement the provisions laid down in Art. 3 (a) (i) of the Directive. No withholding tax applies if the royalties are paid to a foreign entity qualifying under the Directive and the paying company remains associated with the recipient company for an uninterrupted period of 1 year. For the purposes of this rule, the term "associated companies" means companies where one company controls at least 25% of the voting power of the other company or where a third company has a direct control of at least 25% of the voting power of both companies.

Under Art. 3 (b) of the Directive, a direct shareholding is required. Under domestic rules, the withholding tax on royalties is, as a starting point, levied on royalty payments from or to hybrid entities. Denmark will look through the hybrid to determine who is the direct recipient of the royalty payment. Payments through or to a hybrid entity will most likely benefit from the withholding tax exemption provided that all conditions under the Directive are fulfilled.

Denmark grants a withholding tax exemption only to payments made by Danish eligible companies or by Danish permanent establishments of EU listed companies. In this respect, issues may arise as to whether the withholding tax exemption applies where payments are made by dual resident companies the effective management of which is located in Denmark.

Applying the rules of the Directive Denmark seems to require that the receiving company is subject to corporate tax on the income received (subjective subject-to-tax requirement).

The definitions of “permanent establishment” and “beneficial owner” have not been formally implemented. The concept of permanent establishment is defined in accordance with the concept of permanent establishment under Art. 5 of the OECD MC. Two exceptions exist from the congruity with the OECD concept of permanent establishment, however. First, under domestic law, a building site or construction or installation project constitutes a permanent establishment from the first day of operation. Second, an agent that carries out passive sales activities in Denmark, such as obtaining orders by phone, telex, telefax, etc., from Danish or foreign customers, does not constitute a permanent establishment.

The approach that will be used by the tax administration to define such concepts for the purpose of applying the withholding tax exemption remains uncertain.

Procedure

Denmark did not introduce national provisions with regard to the procedural rules laid down under the Directive. The beneficiary of the payment may benefit from the withholding tax exemption provided that the 1 year uninterrupted holding period and other requirements under the Directive are met. It is possible to obtain a refund of withholding tax on royalty

payments provided the holding requirement is subsequently met. If the minimum holding period is not fulfilled at the time of the royalty payment and tax is withheld at source Denmark will grant relief subsequently under the Directive by way of refund once the minimum holding period is met.

Fraud and abuse

Denmark did not implement specific anti-abuse provisions under the Directive. There are no general anti-avoidance or anti-abuse provisions in Denmark. However, the substance-over-form-principle is applied. The burden of proof lies, as a starting point, with the tax authorities if they seek to disqualify corporate transactions for tax purposes with reference to the substance-over-form principle.

PART II. THE AGREEMENT

There have been to date no legislative or other regulatory measures concerning the ratification or interpretation of the 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”) or its Memorandum of Understanding in Denmark.

Under the Denmark-Switzerland income and capital tax treaty of 23 November 1973 as amended by protocol of 11 March 1977, interest and royalties are exempt from tax in the source state (Arts. 11 and 12 of the treaty). In addition, if the patent royalties, dividends or interest are derived through a permanent establishment which the Swiss company maintains in Denmark, the income is included in the taxable profits of the permanent establishment and is subject to corporate income tax under the standard rules (Arts. 7 (2) and 12 (3)).

The concepts of interest and royalties under Art. 11 and 12 of the Denmark-Switzerland tax treaty are the following:

- the term "interest" means 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;

- the term "royalties" means 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 cinematographic films, patents, trade marks, designs, or models, plans, secret formulae or processes, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial, or scientific experience.

It should be noted that under domestic law there is no withholding tax on interest and that the concept of royalties is narrower than under the Denmark-Switzerland tax treaty. For comparison with domestic definitions of interest and royalties, see 2.1.1. Concept of interest and 2.1.2. Concept of royalties, above.

Under Art. 26 of the tax treaty the following procedural rule applies. If Denmark withholds taxes on interest or royalties at source, then such right to withhold tax shall not be affected by the provisions of the tax treaty. Withholding tax levied at source shall be refunded on application if such taxation is limited by the treaty. The period within which an application for a refund must be made is three years from the end of the calendar year in which the interest or royalties become due. Applications must always include an administrative certificate of the State of which the taxpayer is a resident stating that he is subject to unlimited tax liability in that State. The competent authorities shall communicate with each other as to the details of the procedure, in accordance with Art. 25 of the tax treaty.

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ANNEX

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

EU Member State	Interest	Royalties
Austria	0%	0 / 10% <1>
Belgium	10%	0%
Czech Republic	0%	5%
Cyprus	10%	0%
Estonia	10%	5 / 10% <2>
Finland	0%	0%
France	0%	0%
Germany	0%	0%
Greece	8%	5%
Hungary	0%	0%
Ireland	0%	0%
Italy	10%	0/5% <3>
Latvia	10%	5/10% <4>
Lithuania	10%	5/10% <5>
Luxembourg	0%	0%
Malta	0%	0%
Netherlands	0%	0%
Poland	5%	5%
Portugal	10%	10%
Slovak Republic	0%	5%
Slovenia	5%	5%
Spain	10%	6%
Denmark	0%	0%
United Kingdom	0%	0%

<1> The 10% rate applies if the royalties are paid to an Austrian company owning more than 50% of the capital in the Danish company.
<2> The lower rate applies to equipment rentals.
<3> The lower rate applies to copyrights of literary, artistic or scientific work, except computer software and films, etc.

<4> The lower rate applies to equipment rentals.
<5> The lower rate applies to equipment rentals.