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Unilateral Withholding Tax to counteract Base Erosion and Profit Shifting

To impede tax evasion via low-tax regimes we propose a withholding tax on all interest and license fee payments, organised in such way that it can be implemented unilaterally by any individual EU Member State (like Germany). This measure does not require EU unanimity, in contrast to the implementation of the EC tax proposals of June 2015.

The proposed withholding tax (e.g. of 10%) should be levied irrespective of the tax residence of the final beneficiary. In return all withholding taxes paid to foreign tax administrations which have double taxation agreements with Germany should be unconditionally reimbursed to the German payee by the German tax administration.

Such a withholding tax concurs with all EU directives and complements the EC tax proposals. It increases tendentially the tax revenue of those countries introducing the measures as well as the competitiveness of their enterprises and therefore may encourage other EU Member States to take similar actions.

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1. Taxes should be levied where economic activities and value production take place

The aim of the recent OECD action plan on Base Erosion and Profit Shifting (BEPS)[1], to be finalised by the end of 2015, is expressed in these clear words by Secretary General Angel Gurria: "We wanted to avoid double taxation, now we have arrived at double non-taxation. ... We want to have a set of laws and regulations, which ensure: taxes are paid, where values are created und where the economic activities take place."[2]

After all the tax revenue in a modern country serves largely to finance the infrastructure in the widest sense, that is the prerequisite for all economic activities in a country. Up to now, however, the practice in Europe, going back to the 1920ies, is different, so that an increasing part of the value created can leave the source country untaxed towards low-tax regimes (see subsec.1.2 below).

1.1. Different forms of compensation of capital

Economists define the total of the proceeds of economic activities in a country as its "value production". What tax administrations can actually levy taxes on is clearly not this fictitious entity, but the proceeds of individual enterprises, in accordance with the assignment of the different parts of these proceeds. One part is paid as compensation for labour (wages, salaries, fringe benefits, pensions). The other part, compensation of capital, goes to those who provide the different kinds of capital, external capital and equity[3]:

- Compensation of external capital (loans and credits, licenses, patents) is paid as interest, license and patent fees and other royalties.
- Compensation of internal capital (equity) is the remaining profit, part of which may be paid to the owners as dividends.

Whereas taxes on profits follow welldefined rules, similar in all relevant countries, by levying taxes at the enterprise, the taxation of payments of interest and license fees is regulated in a very complicated and timeconsuming way when crossborder payments are concerned. Following Gurria´s above motto they ought in any case be taxed in the source country before they go abroad.

1.2. Traditional rules for the taxation of interest and license fees increasingly serve as loopholes for tax evasion

At present most double taxation agreements concerned with cross-border business provide that only compensation of labour and explicit profits are taxed in the source country, whereas interest and license fee payments are to be taxed at the beneficiary. Here is the loophole[4] that in a global economy allows the so-called tax planning, i.e. systematic tax avoidance: If the receiver resides abroad, the national tax administration as a rule has no way to know or control whether this part of the earnings of the enterprise is taxed abroad at all or possibly taxed only at very low rates.

Increasingly in the last decades offshore financing from banks and other financial institutions has become one of the favorite tax avoidance strategies for multinational enterprises. The part of their earnings paid as interest for credits and going out of the source country to creditors abroad is presently exempt from taxation in the source country at least in most relevant industrial countries. Once abroad the payments, using the channels available for large international enterprises, can easily be transferred to a tax haven; this is Gurria´s double non-taxation.

Payment of license fees is indeed another loophole or rather barndoor, through which multinational enterprises can easily tranfer large parts of their earnings, untaxed in the source country, to tax havens[5]. It is the classic example of BEPS and it is the business principle of famous brands like IKEA and many others.

Thus obviously at present in many countries a considerable share of value production is allowed to go abroad untaxed and remain untaxed also at the final beneficiary. A withholding tax with an adequate tax rate on all interest payments, to domestic and likewise to foreign creditors, will obviously impede this type of evasion.

1.3. OECD and EU action plans are recommendations without binding power

At their 2014 meeting G20 have again emphasized the reform programme that the OECD and the G20 countries have begun to pursue: "Profits should be taxed where economic activities deriving the profits are performed and where value is created."[6] But how can the new policy with respect to taxation of cross-border business, advocated by OECD and now also by G20 and the European Commission, be implemented in national tax law?

The OECD action plan[7] gives a rather complete collection of wellfounded proposals for the respective working groups which have been organized by OECD and thus in the end for proposals for tax legislation in OECD countries (and in all EU member countries). However, neither OECD nor G20 have authority over this legislation, and EU only insofar as its 28 member countries arrive at unanimous decisions[8]. Moreover the actual collection of taxes remains everywhere in the hands of national tax authorities, that are often reluctant to change their traditional practice.

In December 2013 the European Parliament has passed a resolution demanding binding commitments against tax evasion and tax avoidance within the EU[9]. In July 2015 the European Parliament "stresses that tax avoidance by some Multinational Corporations can result in close-to-zero effective tax rates for the profits generated in European jurisdictions, highlighting the fact that such Multinational Corporations, while benefiting from various public goods and services where they operate, do not pay their fair share, thereby contributing to national tax base erosion"[10].

In June 2015 the European Commission has also published an action plan for "Ensuring effective taxation where profits are generated"[11]. Its implementation would need, however, unanimous support of all 28 EU Member States.

At least the EU action plan, the OECD action plan and the G20 resolution show clearly, that attempts to fight tax avoidance and tax evasion are now watched and supported by the relevant international organisations. Now it is up to the parliaments and governments of the Member States to pass the necessary laws.

2. A unilateral withholding tax concurs with EU law

To comply with the OECD action plan on BEPS, the individual countries are admonished to take appropriate measures within their tax regimes which ensure taxation at the site of value creation. The European Parliament "encourages further action at national level to tackle tax avoidance, within the EU and OECD frameworks"[12]. It should be emphasized that taxing all earnings without deduction for interest and license fee payments in and by the source country of these earnings could and should be at the center of any measures against tax avoidance[13].

The relevant EU directive on interest and royalties provides that payments are "subject to tax once in a Member State".[14] The application of the directive can be refused by Member States, if one of the principal motives is, besides tax avoidance or abuse, **tax evasion.**[15]

Many EU countries have themselves developed tax haven status, e.g. by providing some kind of so-called ´interest, patent and license boxes´ with a very low tax or even zero tax rate for the received proceeds[16]. Thus the guarantee for a one-time taxation at an adequate rate can no longer be given. For direct or indirect payments to such boxes the provided applications for general withholding tax exemptions are futile since they can´t be accompanied by a proof that the final beneficiary (and not only the first receiver of the payment) is indeed taxed at an adequate tax rate.

This development only increases the need for the countries damaged by such unfair tax competition to introduce measures against BEPS that can be taken unilaterally.

2.1. What is an adequate tax rate?

Does an effective tax rate in the country of the receiver of slightly above 0% (e.g. 1%) satisfy the directive´s requirements? And if such a low tax rate is not sufficient, what is an adequate tax rate?

- In 2003 when the directive became applicable the minimum nominal corporate tax rate in the EU was 12,5% (Ireland)[17], in 2014 it was 10% (Bulgaria)[18].
- For the future European Common Consolidated Tax Base (CCTB) the European Parliament has proposed the introduction of a minimum tax rate of 7/10 of the EU average corporate tax rate[19], resulting in just over 15%.
- The German law to prevent international fiscal evasion[20] requires corrections in the tax declaration, if the foreign taxation ist less than two thirds of the German tax rate[21], again resulting in a tax rate above 15%.

Résumé: If the tax rate of the final beneficiary is clearly below 10%, an effective taxation within the EU is not ensured and this evidence of tax evasion entitles every Member State to refuse the application of the EU directive.

2.2. Exemption only on request

The directive applies only to payments between associated companies with a direct minimum holding of 25%[22] with an option for every Member State to require "an uninterrupted period of at least two years" for the holding[23]. The directive is not applicable for intermediaries[24].

The EU directive provides for an exemption only on request for every contract:

- For exemption the source state may require for every payment an attestation to substantiate the fulfilment of the directive´s requirements[25] and the legal justification for the payments (e.g. loan agreement or licensing contract)[26].
- The source state may make it a condition for exemption that it has issued a decision currently granting the exemption following the attestation.[27]

- If the paying company or permanent establishment has withheld tax at source to be exempted ... a claim may be made for repayment of that tax at source[28].

Résumé: Withholding taxes can be implemented by an individual EU Member State; in very rare cases withholding taxes have to be repayed.

2.3. Withholding taxes can be implemented unilaterally

An unilateral withholding tax is explicitly allowed with some minor restrictions in the relevant EU directive on interest and royalties. In contrast to a common opinion, taxation at source of all earnings produced by an enterprise, whether declared as profit or transferred to another enterprise, domestic or abroad, as payment for interest or license fees, was and is not generally forbidden by the EU directive on interest and royalty payments. Quite the reverse: As clearly stated in the directive its aim was to prevent double taxation[29], while guaranteeing that all income was indeed taxed once within the EU[30].

In its recent action plan for "A Fair and Efficient Corporate Tax System in the European Union" the European Commission plans to "amend the legislation so that Member States are not required to give beneficial treatment to interest and royalty payments if there is no effective taxation elsewhere in the EU"[31].

Résumé: Withholding taxes on all interest and license fee payments can be implemented unilaterally by individual EU Member States (like Germany) without the need for EU unanimity, which, however, would be required for the implementation of the EC tax proposals of June 2015[32].

3. Imputation of withholding taxes

3.1. Direct or indirect imputation of withholding taxes

Imputation of withholding taxes is implemented according to the following two basic principles:

- Direct tax credit: Foreign withholding taxes can be set off against domestic tax liability; in this case received payment plus tax credit is taxable (standard if a double taxation agreement is applicable).
- Indirect tax credit: Foreign withholding taxes cannot be set off against domestic tax liability; but in this case only received payment is taxable (standard if no double taxation agreement is applicable).

3.2. Presently complicated conditions apply for the imputation of withholding taxes: Example Germany

In practice these principles are applied with many complicated conditions and limitations, as the following examples for Germany show:

- Withholding taxes can be set off only against tax liabilities arising from income from the respective country; this can reduce the effective tax credit considerably.[33]
- Withholding taxes cannot be set off against German trade tax liability; again this can reduce the effective tax credit considerably[34]. The indirect tax credit, however, also applies to the German trade tax. This necessitates complicated and expensive tax planning.
- Losses resulting from withholding tax credits can be carried forward and may be used later for setting off against certain tax liabilities. Again this necessitates complicated and expensive tax planning.

The following example may further illustrate the complicated practice[35]:

- A German company consults a foreign company for 300 €, whereof 100 € are for know-how-transfer. The foreign state may impose a withholding tax of 30% on the total amount, i.e. 90 € (= 30% * 300 €), but the respective double taxation agreement may allow only 10% for know-how-transfer, i.e. 10 € (= 10% * 100 €). The German company receives only 210 €, the foreign company transfers 90 € to the foreign tax administration.
- 60 € withholding tax result from the consulting fee (excluding know-how-transfer) of 200 € where the double taxation agreement does not provide for a withholding tax. Therefore the German company can and has[36] to apply for a refund of 60 € at the foreign tax administration.
- The other 30 € withholding tax result from the know-how-transfer of 100 €, where the double taxation agreement does provide for a withholding tax of 10%, enabling the German company to get tax credit from the German tax administration. For the remaining 20 € the German company can and has to apply for a refund at the foreign tax administration.

4. Proposal: Unilateral withholding tax on all interest and license fee payments

4.1. Implementation of an unilateral withholding tax

(1) Comprehensive withholding tax

To impede one popular method of tax evasion via low-tax regimes we propose a withholding tax on all interest and license fee payments[37], organised in such way that it can be implemented unilaterally by any individual EU Member State (like Germany). This measure does not require EU unanimity, in contrast to the implementation of the EC tax proposals of June 2015.

The proposed withholding tax (e.g. of 10%) should be levied on all interest and license fee payments irrespective of the tax residence of the final beneficiary of these payments.

(2) Reimbursement of foreign withholding taxes by Germany

In return all withholding taxes (up to 10% tax rate) paid to foreign tax administrations which have double taxation agreements with Germany would be unconditionally reimbursed to the German payee by the German tax administration.

(3) Unilateral implementation

When discussing the double taxation agreement it is solely up to the foreign country to decide

- whether it introduces a 10% withholding tax for interest and license fee payments to Germany and
- whether it reimburses payees located in its country for withholding taxes paid in Germany.

Compared with the complex, time-consuming and costly present practice for the imputation of withholding taxes, this rather radical step towards the practice now will eventually make taxation much simpler and more efficient. For the initiation this measure would, however, require those double taxation treaties to be renegotiated which do not allow adequate withholding tax rates.

4.2. Examples

Germany introduces

- a 10%[38] withholding tax for interest and license fee payments, which are deducted in Germany for tax purposes,
- and reimburses all foreign withholding taxes (up to 10% tax rate) to the German payee, but only if the foreign country has a respective double taxation agreement with Germany.

For the evaluation of the effects of the measure one should distinguish the case of payments of interest and that of payments of license fees. In both cases the effects do depend to a large extent on the tax residence of the payer and, respectively, the payee, as will be shown below.

In the following examples the payer may owe the payee 100 €.

(1) Case 1: German payer, foreign payee

Presently, without withholding tax, the payment is exempt from taxation at the payer, because it is assumed to be taxed at the payee. With withholding tax the German payer pays the foreign payee 90 € and the German tax administration 10 €.

Subcase 1a : Reimbursement of the German withholding tax

The foreign tax administration **reimburses** the foreign payee for the German withholding tax of 10 € resulting in a total income of the foreign payee of 100 €.

Subcase 1b : **No** reimbursement of the German withholding tax

The foreign tax administration **does not reimburse** the foreign payee for the German withholding tax of 10 € resulting in a total income of the foreign payee of 90 €.

It now depends on the relative negotiating power of payer and payee whether the foreign payee can compensate his lower income by successfully demanding a **net** payment of 100 € resulting in a price increase from 100 € to 111 € (100 € net plus German withholding tax of 11 €). This price increase decreases the competitiveness of the foreign payee as the German payer will try to find a payee (creditor or licenser) located in a country which reimburses the German withholding tax (e.g. a German supplier). In any case the foreign country will come under pressure to reimburse the German withholding tax.

Example IKEA: IKEA holding gives a license to its local IKEA shops e.g. for a fee of 1 million € per year, which presently goes almost untaxed to IKEA holding (which finally is located in a tax haven). After introducing the proposed measure, the local IKEA shop has to pay 0,1 million € withholding tax to the German tax administration, which decreases its unfair competitive advantage over competing local shops.

(2) Case 2: Foreign payer, German payee

Again at present, without withholding tax, the payment is exempt from taxation at the payer, because traditionally it is supposed to be taxed at the payee. If the foreign country has introduced a withholding tax, the foreign payer pays the German payee 90 € and the foreign tax administration 10 €.

Subcase 2a : Foreign country has a double taxation agreement with Germany

The German tax administration **reimburses** the German payee for the foreign withholding tax of 10 € resulting in a total income of the German payee of 100 €.

Subcase 2b : Foreign country has **no** double taxation agreement with Germany

The German tax administration **does not reimburse** the German payee for the foreign withholding tax of 10 € resulting in a total income of the German payee of 90 €.

Again, it now depends on the relative negotiating power of payer and payee whether the German payee can compensate his lower income by successfully demanding a **net** payment of 100 € resulting in a price increase from 100 € to 111 € (100 € net plus foreign withholding tax of 11 €). This price increase decreases the competitiveness of the German payee (creditor or licenser) who will in the future try to find a payer (i.e. a customer) located in a country which has a double taxation agreement with Germany. In any case the foreign country will come under pressure to negotiate a double taxation agreement with Germany to ensure the reimbursement of the foreign withholding tax to the German payee by the German tax administration.

(3) Case 3: German payer, German payee

Without withholding tax, German payer pays the German payee 100 €.

After the introduction of the proposed withholding tax German payer pays the German payee 90 € and the German tax administration 10 €. The German tax administration **reimburses** the German payee for the German withholding tax of 10 € resulting in a total income of the German payee of 100 €.

4.3. The implementation of withholding taxes requires adjustments of double taxation agreements

(1) Considerably reduced withholding tax rates due to double taxation agreements

Meanwhile many countries have introduced withholding taxes, in particular with respect to interest and license fee payments to related parties.[39] In many cases existing double taxation agreements considerably reduce the withholding tax rate.[40] Within the EU as a rule no withholding taxes are levied, neither for payments between related[41] nor between unrelated parties. Like many other countries Germany has, however, introduced source and withholding taxes to prevent an inadequate use of double taxation agreements[42].

In Germany double taxation agreements with emerging and developing countries do provide withholding taxes: With China a withholding tax rate of 10% for interest and license fee payments was agreed[43] in 2014, with Costa Rica[44] 5%. The double taxation agreements between Germany and industrialized countries as a rule, however, disallow withholding taxes.

The German Finance Ministry is hesitant to support general withholding taxation, because they are afraid of net revenue losses if foreign withholding taxes had to be reimbursed by the German tax administration[45]. Therefore the German principles for negotiating double taxation agreements propose to avoid source taxes for interest and license fee payments.[46] Accordingly German double taxation agreements usually do not provide for withholding taxes and therefore German payers, as a rule, do not have to withhold taxes at source for interest and license fee payments.

(2) Action 15 of the OECD action plan could be used to adjust double taxation agreements

For a (re)introduction of withholding taxes the double taxation agreements would have to be adapted step by step[47]. Action 15 of the OECD action plan provides a multilateral instrument for a consensus to be achieved between the participating countries on a simultaneous change of all respective double taxation agreements.[48]

In a first step Germany would have to change its official position[49] with respect to double taxation agreements (0% withholding tax with industrialized countries up to now). The actual German coalition agreement between CDU and SPD provides activities in this direction: "Double Taxation Agreements should not only prevent double taxation, but also non taxation. We will try to introduce appropriate provisions and in the meantime we will support this policy by aligning German national regulations."[50]

5. Résumé

The proposed withholding tax increases the tax burden only for those who make use of tax havens or low tax regimes. The treasury of a country that enforces such reforms, if necessary unilaterally, will tendentially get increased tax revenue. Germany would have an additional net revenue of more than 4 billion € annually, even if the foreign withholding tax on payments going into Germany would be completely refunded by the German tax administration.

Even if in the beginning the revenue increase would be less, the reform would counteract the trend of ever growing tax avoidance:

- The growing tendency of double non-taxation would be reversed, the advantage of tax avoidance countries would be reduced and tax havens would become less attractive.
- The tax advantage of multinational enterprises over small and medium enterprises and the resulting unfair competition would be reduced.

Without powerful measures an ever growing share of the earnings of big business will no longer be taxed anywhere and countries like Germany will lose more and more revenue in the longer run. Holdings still residing in a normal tax country would be forced to move their head quarters (and the respective high paid jobs) to low tax countries (Netherlands, Luxembourg, Switzerland etc.). All these tendencies can be reversed with the implementation of the measures sketched above.

Once a country like Germany takes the initiative for a withholding tax it becomes easier for other countries to follow and join the struggle against tax avoidance, thereby enabling, step by step, a de facto international harmonisation by an increasing number of countries.

Sources

[BMF 2013]

German principles for negotiating double taxation agreements (Verhandlungsgrundlage für Doppelbesteuerungsabkommen im Bereich der Steuern vom Einkommen und Vermögen. German Ministry of Finance (Bundesministerium der Finanzen), Berlin, 22 August 2013.

http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Allgemeine_Informationen/2013-08-22-Verhandlungsgrundlage-DBA-deutsch.html (29.07.2015)

[BMF 2014]

Double taxation agreement between Germany and China. German Ministry of Finance (Bundesministerium der Finanzen), Berlin, 28 March 2014.

http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/China/2014-03-28-China-Abkommen-DBA-28-Maerz-2014-deutsche-Sprachfassung.pdf?__blob=publicationFile&v=2 (29.07.2015)

[BMF 2014a]

Double taxation agreement between Germany and Costa Rica. German Ministry of Finance (Bundesministerium der Finanzen), Berlin, 13 February 2014.

http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Costa_Rica/2014-11-26-Costa-Rica-Abkommen-DBA.html (21.06.2015)

[BMF 2014b]

Answer of the German Federal Government concerning tax planning using patent boxes. Deutscher Bundestag, Drucksache 18/1238, 18. Wahlperiode, 25.04.2014. Letter of German Ministry of Finance (Bundesministerium der Finanzen), Berlin, 24 April 2014.

http://dip21.bundestag.de/dip21/btd/18/012/1801238.pdf (21.06.2015)

[BMF 2015]

Status of German double taxation agreements as of 1 January 2015. German Ministry of Finance (Bundesministerium der Finanzen), Berlin, 22 January 2015.

http://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2015-01-19-stand-DBA-1-Januar-2015.html (21.06.2015)

[EC 2015]

A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action. Communication from the Commission to the European Parliament and the Council, COM(2015) 302 final, Brussels, 17 June 2015.

http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/fairer_corporate_taxation/com_2015_302_en.pdf (22.06.2015)

[EP 2012]
European Parliament legislative resolution of 19 April 2012 on the proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2011)0121 – C7-0092/2011 – 2011/0058(CNS)).
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0135+0+DOC+PDF+V0//EN (29.07.2015)

[EP 2013]
Resolution on the call for a measurable and tangible commitment against tax evasion and tax avoidance in the EU. European Parliament. 2013/2963(RSP) – 12/12/2013.
http://www.europarl.europa.eu/oeil/popups/summary.do?id=1328953&t=e&l=en (22.06.2015)

[EP 2015]
European Parliament, Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect. Draft report on tax rulings and other measures similar in nature or effect, 2015/2066(INI), 20 July 2015, p. 10.
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-564.938%2b01%2bDOC%2bPDF%2bV0%2f%2fEN (04.08.2015)

[EU 2003]
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. Official Journal L 157, 26/06/2003 P. 0049 – 0054.
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0049:en:HTML (25.07.2015)

[EU 2003a]
Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. Official Journal L 007, 13/01/2004 P. 0041 – 0044.
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0123:en:HTML (25.07.2015)

[EU 2014]
Taxation trends in the European Union. Data for the EU Member States, Iceland and Norway. Eurostat, 2014.
http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2014/report.pdf (24.07.2015)

[Finke/Fuest/Nusser/Spengel 2014]
Finke K, Fuest C, Spengel C, Nusser H: Extending taxation of interest and royalty income at source – an option to limit base erosion and profit shifting? ZEW Discussion Paper, Mannheim, September 2014.
http://ftp.zew.de/pub/zew-docs/dp/dp14073.pdf (21.06.2015)

[G20 2014]
Meeting of Finance Ministers and Central Bank Governors Sydney, 22-23 February 2014. Communiqué 23 February 2014.
https://g20.org/wp-content/uploads/2014/12/Communique-Meeting-of-G20-Finance-Ministers-and-Central-Bank-Governors-Sydney-22-23-February-2014_0.pdf (24.09.2015)

[Jarass 1999]
Jarass L: German Commission for Enterprise Tax Reform, supplement 7: interest taxation, German Federal Ministry of Finance, July 1999.
http://www.jarass.com/home/index.php/DE/steuern/buecher-und-umfangreiche-gutachten/63-bruehler-empfehlungen-zur-reform-der-unternehmensbesteuerung (21.06.2015)

[Jarass/Obermair 2006]
Jarass L, Obermair GM: Enterprise tax reform 2008 – cost benefit anlysis of the reform proposals (in German), MV-Verlag, 2006.
http://www.jarass.com/home/index.php/DE/steuern/buecher-und-umfangreiche-gutachten/58-unternehmenssteuerreform-2008(21.06.2015)

[Jarass/Obermair 2008]
Jarass L, Obermair GM: Tax on earnings before interest and taxes instead of profit – fair, simple and competitive. A conceivable initiative of EU Member States for a common consolidated corporate tax base. EC Tax Review, Kluwer Law International, Amsterdam, vol. 17, June 2008, pp. 111-117.

[Jarass/Obermair 2012]
Jarass L, Obermair GM: Tax measures for sustainable government revenues (Steuermaßnahmen für eine nachhaltige Staatsfinanzierung). MV-Verlag, Münster, 2012.
http://www.jarass.com/home/index.php/DE/steuern/buecher-und-umfangreiche-gutachten/449-steuermassnahmen-zur-nachhaltigen-staatsfinanzierung (29.07.2015)

[Jarass/Obermair 2015]
Jarass L, Obermair GM: Fair and efficient business taxation – International plans for actions and unilaterally realizable measures to counteract base erosion and profit shifting (in German). MV-Verlag, 2015.
http://www.jarass.com/home/index.php/DE/steuern/buecher-und-umfangreiche-gutachten/1237-faire-und-effiziente-unternehmensbesteuerung (22.06.2015)

[Koalitionsvertrag 2013]
Coalition agreement of the German ruling coalition parties CDU/CSU and SPD (Deutschlands Zukunft gestalten. Koalitionsvertrag zwischen CDU, CSU und SPD), Berlin, 14 December 2013.
https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf (29.07.2015)

[OECD 2012]
OECD Model Tax Convention on Income and on Capital. Condensed version OECD, Paris, 15 July 2014.
http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2014_mtc_cond-2014-en#page1 (29.07.2015)

[OECD 2013]
Addressing Base Erosion and Profit Shifting. OECD, Paris, 12 February 2013.
http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#page1 (05.04.2015)

[OECD 2013a]
Action Plan on Base Erosion and Profit Shifting. OECD, Paris, 19 July 2013.
http://www.oecd.org/ctp/BEPSActionPlan.pdf (abgerufen am 05.04.2015)

[OECD 2013b]
Remarks by Angel Gurría, OECD Secretary General, delivered to G20 Finance Ministers and Central Bank Governors. Washington D.C., 19 April 2013.
http://www.oecd.org/unitedstates/taxtransparencyandbepspresentationtog20financeministersandcentralbankgovernors.htm (26.03.2015)

[OECD 2014]
Action 15: A Mandate for the Development of a multilateral instrument on tax treaty measures. OECD/G20 Base Erosion and Profit Shifting Project. OECD, Paris, 2015.
http://www.oecd.org/ctp/beps-action-15-mandate-for-development-of-multilateral-instrument.pdf (25.07.2015)

[Pinkernell 2014]
Pinkernell R: Report of the EU Expert Group on Taxation of the Digital Economy (in German). IStR – Zeitschrift für internationales Steuerrecht, LB, Heft 13/2014, pp. 57-64.
See also EU Expert Group on Taxation of the Digital Economy, 18 May 2014.
http://ec.europa.eu/taxation_customs/taxation/gen_info/good_governance_matters/digital_economy/index_en.htm
http://europa.eu/rapid/press-release_IP-14-604_en.htm (23.06.2015)

[Reimer 2015]
Reimer E: The multilateral convention (BEPS action 15) as instrument for a flexible adjustment of existing double taxation agreements (Das Multilaterale Übereinkommen (BEPS-Maßnahme Nr. 15) als Instrument einer flexiblen Anpassung der bestehenden DBA). IStR – Zeitschrift für internationales Steuerrecht, Heft 01/15, pp. 1-8.

[Spengel/Finke 2013]
Spengel C, Finke K: Interest Allocation – Issues, Evidence, and Reforms. Paper prepared for OECD BEPS Working Group Meeting, Paris, 23 October 2013. ZEW, Mannheim, 16 October 2013.

[Tax Rates 2004]
Tax rates in EU-countries in 2004. Kanzlei Diop & Meier, Berlin, 2014.
http://www.kanzlei-d-m.de/service/steuersaetze-in-anderen-eu-laendern (24.07.2015)

[UN 2011]
United Nations Model Double Taxation Convention between Developed and Developing Countries. Department of Economic & Social Affairs, United Nations, New York, 2011.
http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf (29.07.2015)

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[1] [OECD 2013a], which is based on [OECD 2013].

[2] [OECD 2013b]; translation by the authors.

[3] [Jarass/Obermair 2012, chap. 2.2.1(2), pp. 45].

[4] Incorrect transfer prices are another important loophole: Prices for imports from related enterprices are set higher (and for exports lower) than arm´s length principle prices, thereby decreasing the profit shown in the high-tax country.

[5] See e.g. [Finke/Fuest/Nusser/Spengel 2014].

[6] [G20 2014, par. 9].

[7] [OECD 2013a].

[8] Unanimity in this specific question will hardly be achieved in the European Union because those Member States who benefit from the actual situation cannot be forced to agree to the respective measures.

[9] [EP 2013].

[10] [EP 2015, p. 10].

[11] [EC 2015, p. 8].

[12] [EP 2015, p. 10].

[13] First ideas have been published already in 1999 [Jarass 1999] and again in 2006 [Jarass/Obermair 2006, chapt. 6]; for an English version see [Jarass/Obermair 2008]. The 2008 German enterprise tax reform has been based on these ideas: Conditioned limitation for tax deduction of interest payments (´Zinsschranke´), unconditioned limitation for German trade tax deduction of interest and of license fee payments.

[14] [EU 2003, art. 1 par. 12 and 13].

[15] [EU 2003, art. 5].

[16] In 2014 Belgium, France, Lichtenstein, Luxembourg, Malta, Netherlands, Portugal, Switzerland (Kontan Nidwalden), Spain, Hungary, Uk and Cyprus [BMF 2014b, p. 2].

[17] [Tax Rates 2004]; Luxembourg 22,9%, all other 2003 EU Members States were more or less well above 25%.

[18] [EU 2014, tab. 5, p. 36].

[19] [EP 2012].

[20] Deutsches Außensteuergesetz (AStG).

[21] Par. 2 sec. 2 item 1 AStG: "um mehr als ein Drittel geringer".

[22] [EU 2003, art. 1 par. 7 in connection with art. 3 par. 1b]; note that a minimum holding of 10% holds only for the EU parent subsidiary directive [EU 2003a, art. 1 par. 3a].

[23] [EU 2003, art. 1 par. 10].

[24] [EU 2003, art. 1 par. 4]: " A company of a Member State shall be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary ... for some other person".

[25] [EU 2003, art. 1 par. 11 in connection with art. 1 par. 13].

[26] [EU 2003, art. 1 par. 13, last sentence]: "Member States may request in addition the legal justification for the payments under the contract (e.g. loan agreement or licensing contract)."

[27] [EU 2003, art. 1 par. 12].

[28] [EU 2003, art. 1 par. 12].

[29] [EU 2003, Whereas, (1)]: "... transactions between companies of different Member States should not be subject to less favourable tax conditions than those applicable to the same transactions carried out between companies of the same Member State".

[30] [EU 2003, Whereas, (3)]: "It is necessary to ensure that interest and royalty payments are subject to tax once in a Member State."

[31] [EC 2015, p. 9].

[32] [EC 2015].

[33] Per country limitation, § 68a EStDV (German tax implementing decree).

[34] With 14% on average the German trade tax rate is around the same as the German corporate tax rate of 15%.

[35] See [Pinkernell 2014, p. 76].

[36] In this case Germany neither gives direct nor indirect tax credit.

[37] Including indirect interest (e.g. interest share of leasing expenses) and license fee payments (e.g. license share of intangible assets).

[38] The OECD model tax convention [OECD 2012] provides in art. 11 a possible withholding tax rate of 10% for interest payments.

[39] For an overview for the statutory withholding tax rates for interest payments between related parties see [Spengel/Finke 2013, tab. 3].

[40] The OECD model tax convention [OECD 2012] provides in art. 11 for a possible withholding tax rate of 10% for interest payments, but excludes withholding taxes in art. 12 for license fee payments. The UN model tax convention [UN 2011, art. 11 and 12], however, allows withholding taxes both for interest and for license fee payments, with the tax rates up to bilateral agreements.

[41] With a stake of ≥ 25% [EU 2003].

[42] E.g. § 50d, § 50g, § 50h, § 50i EStG (German income tax law); 15% withholding tax for certain payments to in Germany non-taxable persons (§ 49 Abs. 9, § 50, § 50a EStG); correction of foreign income (§ 1 AStG) and of foreign intermediaries (§§ 7 to 14 AStG), which have an economic effect similar to source taxes.

[43] [BMF 2014, art. 11 interest, art. 12 license fees].

[44] [BMF 2014a, art. 11 sec. 2 interest, and art. 12 sec. 2 license fees].

[45] In contrast we estimate that after the implementation of the proposed withholding tax (i.e. with full reimbursement of foreign withholding taxes by Germany), an annual revenue increase of around 4 billion € would result due to a withholding tax on interest [Jarass/Obermair 2015, p. 109], and around 0,2 billion € due to a withholding tax on license fees [Jarass/Obermair 2015, p. 110], based on [Finke/Fuest/Nusser/Spengel 2014].

[46] [BMF 2013, art. 11 and 12]; similar OECD model tax convention [OECD 2012].

[47] [BMF 2015] shows the status of the German double taxation agreements as of 1 January 2015.

[48] [OECD 2014]; for an implementation in Germany see [Reimer 2015].

[49] German principles for negotiating double taxation agreements (Deutsche Verhandlungsgrundlage für Doppelbesteuerungsabkommen) [BMF 2013].

[50] Translation of the German original: "DBA dienen nicht mehr alleine der Verhinderung von doppelter Besteuerung, sondern auch der Verhinderung doppelter Nichtbesteuerung (sogenannte weiße Einkünfte). Wir werden daher weiterhin entsprechende Klauseln in den DBAs verhandeln und in der Zwischenzeit diese Grundsätze in nationalen Regelungen absichern." [Koalitionsvertrag 2013, p. 65].