EUROPEAN PARLIAMENT

1999 *2004*

Session document

FINAL
A5-0061/2002

26 February 2002

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REPORT

on the proposal for a Council directive to ensue effective taxation of savings income in the form of interest payments within the Community
(COM(2001) 400 – C5-0402/2001 – 2001/0164(CNS))

Committee on Economic and Monetary Affairs

Rapporteur: Fernando Pérez Royo

Symbols for procedures

*	Consultation procedure *majority of the votes cast*
**I	Cooperation procedure (first reading) *majority of the votes cast*
**II	Cooperation procedure (second reading) *majority of the votes cast, to approve the common position* *majority of Parliament's component Members, to reject or amend the common position*
***	Assent procedure *majority of Parliament's component Members except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty*
***I	Codecision procedure (first reading) *majority of the votes cast*
***II	Codecision procedure (second reading) *majority of the votes cast, to approve the common position* *majority of Parliament's component Members, to reject or amend the common position*
***III	Codecision procedure (third reading) *majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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PROCEDURAL PAGE

By letter of 30 August 2001 the Council consulted Parliament, pursuant to Article 94 of the EC Treaty on the proposal for a Council directive on to ensue effective taxation of savings income in the form of interest payments within the Community (COM(2001) 400 – 2001/0164(CNS)).

At the sitting of 3 September 2001 the President of Parliament announced that she had referred this proposal to the Committee on Economic and Monetary Affairs as the committee responsible and the Committee on Legal Affairs and the Internal Market and the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs for their opinions (C5-0402/2001).

The Committee on Economic and Monetary Affairs had appointed Fernando Pérez Royo rapporteur at its meeting of 11 September 2001.

It considered the Commission proposal and the draft report at its meetings of 5 November 2001, 6 November 2001, 3 December 2001, 8 January 2002, 23 January 2002 and 20 February 2002.

By letter of 11 September 2001 the Committee on Legal Affairs and the Internal Market notified the Committee on Economic and Monetary Affairs that it had decided to deliver an opinion on the proposal's legal basis under Rule 63(3).

At the latter/last meeting it adopted the draft legislative resolution by 34 votes to 3, with 3 abstentions.

The following were present for the vote: Christa Randzio-Plath, chairman; José Manuel García-Margallo y Marfil, Philippe A.R. Herzog, John Purvis, vice-chairmen; Fernando Pérez Royo, rapporteur; Generoso Andria, Luis Berenguer Fuster (for a full member to be nominated), Pervenche Berès, Roberto Felice Bigliardo, Renato Brunetta, Hans Udo Bullmann, Marco Cappato (for Charles de Gaulle, pursuant to Rule 153(2)), Benedetto Della Vedova, Jonathan Evans, Ingo Friedrich, Carles-Alfred Gasòliba i Böhm, Robert Goebbels, Lisbeth Grönfeldt Bergman, Mary Honeyball, Christopher Huhne, Othmar Karas, Piia-Noora Kauppi, Christoph Werner Konrad, Werner Langen (for Alexander Radwan), Alain Lipietz, Astrid Lulling, Thomas Mann (for Brice Hortefeux), Ioannis Marinos, Helmuth Markov (for Armonia Bordes), David W. Martin, Hans-Peter Mayer, Miquel Mayol i Raynal, Bernhard Rapkay, Olle Schmidt, Peter William Skinner, Charles Tannock (for Alejandro Agag Longo), Helena Torres Marques, Bruno Trentin, Ieke van den Burg (for Giorgos Katiforis), Theresa Villiers.

The opinion of the Committee on Legal Affairs and the Internal Market as well as the opinion of the Committee on Legal Affairs and the Internal Market on the legal basis are attached; the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs decided on 13 September 2001 not to deliver an opinion.

The report was tabled on 26 February 2002.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

LEGISLATIVE PROPOSAL

Proposal for a Council directive on to ensue effective taxation of savings income in the form of interest payments within the Community (COM(2001) 400 – C5-0402/2001 – 2001/0164(CNS))

The proposal is amended as follows:

Text proposed by the Commission[1]	Amendments by Parliament
Amendment 1 Title	
Council Directive to ensure ***effective taxation of savings income in the form of interest payments within the Community***	Council Directive to ensure ***an effective taxation of interest payments made by paying agents resident in one Member State to beneficial owners who are natural persons resident in another Member State***.
Justification	
The title of the Commission's proposal for a directive is not in line with the agreement reached at the Ecofin Council of 26 and 27 November 2000.	
Amendment 2 Recital 10	
10. The objective of this Directive is to ensure that cross-border savings income in the form of interest payments can be subject to effective taxation in the Member State of residence of the taxpayer in accordance with its national laws.	10. The objective of this Directive is to ensure that cross-border savings income in the form of interest payments can be subject to ***an*** effective taxation in the Member State of residence of the taxpayer in accordance with its national laws.
Justification	
See Justification to Amendment 21.	
Amendment 3 Recital 11b (new)	

[1] OJ C not yet published.

	11b. Save where otherwise provided, profits, dividends and other income generally not considered as interest under the national laws of the Member States shall not be covered by this directive.

Justification

This amendment is necessary to guarantee a minimum of legal certainty.

Amendment 4
Article 1, paragraph 1

1. The aim of the directive is to ensure ***that savings income in the form of interest payments made in one Member State to beneficial owners who are individuals resident in another Member State can be subject to effective taxation in accordance with the national laws of the latter Member State.***	1. The aim of the objective is to ensure ***an effective taxation of interest payments made by paying agents resident in a Member State to beneficial owners who are natural persons resident in another Member State***.

Justification

The Commission's text is not in line with the agreement reached at the Ecofin Council of 26 and 27 November 2000.

Amendment 5
Article 1, paragraph 2

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

Justification

Clarification is needed in the interests of legal rigour.

Amendment 6
Article 3, paragraph 2 (b)

For contractual relations entered into ***on or after*** the date of implementation of the Directive, the paying agent shall establish the identity of the beneficial owner, consisting of name, address ***and tax or other identification number or, failing such number, the date and place of birth of the beneficial owner***.	For contractual relations entered into ***before*** the date of implementation of the Directive, the paying agent shall establish the identity of the beneficial owner, consisting ***solely*** of name ***and*** address ***until such time as the contractual relation is activated. It shall then be brought into line with the registration rules introduced after the directive.***

Justification

Although, on the one hand, the directive should not be burdened with excessive administrative requirements, on the other consideration must be given to safeguarding the transparency which is a key element in combating money laundering.

Amendment 7
Article 6, paragraph 1(a)

(a) interest paid, or credited to an account, relating to debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; penalty charges for late payments shall not be regarded as interest payments;	(a) interest paid, or credited to an account, relating to debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; penalty charges for late payments shall not be regarded as interest payments***, nor shall issue premiums, provided they do not have the effect of increasing the annual yield rate of the debt claim to a level more than 75 basis points higher than the nominal rate*** ;

Justification

When a bond is issued slightly below par because interest rates have increased between the date on which the nominal rate was fixed and the date of issue, it would be logical not to treat the issue premium as interest. Otherwise, if the bond is disposed of, the paying agent would have to calculate the pro-rata of the low issue premium with reference to the period for which the bond was held and, for example, make a deduction at source from this amount.

In view of the complexity of this operation and the blatant disparity between the administrative burden this would involve and the amount of taxation at stake, it is proposed that the above addition be made to subparagraph (a).

Amendment 8
Article 6, paragraph 1 (d)

(d) ***income realised*** upon the sale, refund or redemption of shares or units in the following undertakings and entities, if they have invested more than 40% of their assets in debt-claims referred to in (a***) or in other shares or units as defined in this sub-paragraph***:	(d) ***to the extent that they derive from interest payments as defined in subparagraphs (a) and (b), profits realised*** upon the sale, refund or redemption of shares or units in the following undertakings and entities, if they have invested more than 40% of their assets in debt-claims referred to in (a) or in other shares or units as defined in this sub-paragraph:
(i) UCITS within the meaning of Directive 85/611/EEC,	(i) UCITS within the meaning of Directive 85/611/EEC,
(ii) entities which have exercised the option under Article 4 (3),	(ii) entities which have exercised the option under Article 4 (3),
(iii) undertakings for collective investment established outside the territory referred to in Article 7.	(iii) undertakings for collective investment established outside the territory referred to in Article 7.

Justification

Although the conclusions of the Ecofin Council of 26 and 27 November 2000 stipulate that 'the scope of the directive will include (...) income distributed by investment funds and capitalised interest from capitalisation funds, as far as, in the two latter cases, such income or interest is attached to debt securities', the application of this principle has been omitted in the wording used in subparagraph (d), which consequently needs to be amended.

Furthermore, the words 'income realised upon the sale, refund or redemption of shares or units' are likely to cause confusion, since the impression is given, for example, that the deduction at source would apply to the full selling price, which would clearly not be the case. In order to avoid all ambiguity, the term 'profit' should be used.

Finally, it is necessary to abide by the conclusions of the Ecofin Council of November 2000, which stipulated that account should be taken only of 'rate products' for determining whether the 40% threshold has been exceeded. The words 'or in other shares or units as defined in this subparagraph' should therefore be deleted.

Amendment 9
Article 6, paragraph 2

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

Justification

This amendment is a consequence of the amendment to Article 6 (1) (d).

Amendment 10
Article 7

This Directive shall apply to interest paid by a paying agent established within the territory to which the Treaty applies by virtue of Article 299 thereof.	This Directive shall apply to interest paid by a paying agent established within the territory to which the Treaty applies by virtue of Article 299 thereof. ***Member States shall ensure that this Directive also applies to interest paid by paying agents established in their associated or dependant territories.***

Justification

It is important to ensure that the Member States concerned continuously ensure that their dependent territories respect the provisions of the Directive.

Amendment 11
Article 7a (new)

	The Community shall enter into negotiations with its main third-country commercial parties in order to ensure that equivalent measures to those foreseen in the present Directive are also applied for income from savings covered by this directive which is paid to individuals

	established or resident in a Member State by paying agents established in such third countries.
	The Commission shall regularly, or at least every three months, inform the Parliament of the progress in these negotiations.

Justification

These negotiations should be conducted within the framework of the Directive. It is inappropriate to treat these as a separate process outside the scope of this Directive where it has been clearly stated that the entry into force of the Directive is dependent on the outcome of these. The mechanism foreseen by the Council should thus be integrated in the Directive, in particular to ensure appropriate parliamentary involvement and scrutiny. This amendment, together with amendment 18, contain the same guarantees that the rules will only apply once agreements had been reached as to the Ecofin conclusions.

Amendment 12
Article 9, paragraph 3

3. Article 8 of Directive 77/799/EEC shall not apply to the information to be provided pursuant to this Chapter.	3. ***The provisions of Directive 77/799/EEC shall apply to the exchange of information provided for in this directive, provided that the provisions of this directive do not derogate therefrom. However,*** Article 8 of Directive 77/799/EEC shall not apply to the information to be provided pursuant to this Chapter.

Justification

This amendment is more in line with the spirit of the agreements reached in Feira and at the Ecofin Council of 26 and 27 November 2000.

Amendment 13
Chapter III

Chapter III : ***Transitional provisions***	Chapter III : ***Withholding tax system***

Justification

The amended text is more in line with the spirit of the agreements reached at the Feira European Council in June 2000 and at the Ecofin Council of 26 and 27 November 2000.

Amendment 14
Article 10, paragraph 1

During a transitional period of seven years after the date of entry into force of this Directive and subject to Article 13 (1), Belgium, Luxembourg and Austria shall not be required to apply the provisions of Chapter II.	During a transitional period of seven years after the date of entry into force of this Directive and subject to Article 13 (1), Belgium, Luxembourg and Austria shall not be required to apply the provisions of Chapter II. ***At the end of the transitional period, the three countries concerned shall fully participate in the automatic exchange of information described in Chapter II.***

Justification

It should be stressed that the move from the transitional system of withholding tax to the automatic information exchange for the three countries concerned should be automatic, not requiring any further decision and not allowing for any possible extension of the transitional period.

Amendment 15
Article 10

During a transitional period of seven years after the date ***of entry into force of this Directive*** and subject to Article 13 (1), Belgium, Luxembourg and Austria shall not be required to apply the provisions of Chapter II.	During a transitional period of seven years after the ***date specified in Article 18, paragraph 1,*** and subject to Article 13 (1), Belgium, Luxembourg and Austria shall not be required to apply the provisions of Chapter II.

They shall, however, receive information from the other Member States in accordance with Chapter II.	They shall, however, receive information from the other Member States in accordance with Chapter II.
	During the transitional period, the aim of this directive shall be to an effective taxation of savings income in the form of interest payments made in a Member State to beneficial owners who are natural persons resident for tax purposes in another Member State.

Justification

This amendment is more in line with the spirit of the agreements reached in Feira and at the Ecofin Council of 26 and 27 November 2000.

Amendment 16
Article 11, Chapter

Withholding tax	Withholding tax ***system***

Justification

The amendment is designed to clarify the fact that two different systems are in force during the transitional period.

Amendment 17
Article 11

1. During the transitional period ***referred to in Article 10***, Belgium, Luxembourg and Austria ***shall ensure a minimum of effective taxation of savings income in the form of interest payments by levying*** a withholding tax at a rate of 15% during the first three years of the transitional	During the transitional period, Belgium, Luxembourg and Austria***, in accordance with the objective of the directive as laid down in Article 1(1), shall introduce*** a withholding tax at a rate of 15% during the first three years of the transitional period and 20% for the remainder of the period.

period and 20% for the remainder of the period.

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

(a) in the case of an interest payment within the meaning of Article 6 (1) (a): on the amount of interest paid or credited;

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

(c) in the case of an interest payment within the meaning of Article 6 (1) (c): on the amount of income referred to in that paragraph;

(d) in the case of an interest payment within the meaning of Article 6 (4): on the amount of interest attributable to each of the members of the entity referred to in Article 4 (2) who meet the conditions of Articles 1 (1) and 2 (1);

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

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

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

4. The imposition of withholding tax by the Member State of the paying agent shall not preclude the Member State of residence of the beneficial owner from taxing the income

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

(a) in the case of an interest payment within the meaning of Article 6 (1) (a): on the amount of interest paid or credited;

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

(c) in the case of an interest payment within the meaning of Article 6 (1) (c): on the amount of income referred to in that paragraph;

(d) in the case of an interest payment within the meaning of Article 6 (4): on the amount of interest attributable to each of the members of the entity referred to in Article 4 (2) who meet the conditions of Articles 1 (1) and 2 (1);

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

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

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

4. The imposition of withholding tax by the Member State of the paying agent shall not preclude the Member State of residence of

in accordance with its domestic law, subject to compliance with the Treaty.	the beneficial owner from taxing the income in accordance with its domestic law, subject to compliance with the Treaty.
	5. During the transitional period, the Member States levying a withholding tax may stipulate that an economic operator who pays interest to, or secures the payment of interest for an entity referred to in Article 4(2) established in another Member State, shall be considered to be the paying agent and shall levy the withholding tax on this interest, unless the entity has formally agreed that its name and address, and the total amount of interest paid to it or secured for it may be reported pursuant to the last subparagraph of Article 4(2).

Justification

Self-explanatory.

Amendment 18
Article 12

Member States levying withholding tax in accordance with Article 11 shall retain 25% of the revenue of such tax and ***transfer*** 75% of the revenue to the Member State of residence of the beneficial owner of the interest.	1. Member States levying withholding tax in accordance with Article ***11(1)*** shall retain 25% of the revenue of such tax and ***pay*** 75% of the revenue to the Member State of residence of the beneficial owner of the interest.
	2. Member States levying withholding tax in accordance with Article 11(5) shall retain 25% of the revenue and pay 75% to the other Member States in the same proportion as the payments made pursuant to paragraph 1 of this article.
Such transfer shall take place at the latest within a period of 6 months following the end of the tax year of the Member State of the paying agent.	3. Such ***payments*** shall take place at the latest within a period of 6 months following the end of the tax year of the Member State of the paying agent ***in the case of paragraph 1, or of the economic operator, in the case of paragraph 2***.
Member States levying withholding tax shall take the necessary measures to ensure the	***4.*** Member States levying withholding tax shall take the necessary measures to

proper functioning of the revenue sharing system.	ensure the proper functioning of the revenue sharing system.

Justification

This amendment derives from the amendment to Article 11.

Amendment 19
Article 14, paragraph 3(a) (new)

	3(a) In order to eliminate any double taxation, the paying agent of a UCITS within the meaning of Directive 85/611/EC or any entity which has used the option provided for in Article 4(3) may, when determining the withholding tax to be levied pursuant to Article 11(2), take into account any withholding tax already levied by other Member States or third countries.

Justification

The principle adopted by the Ecofin Council that 'it is the responsibility of the State in which the recipient of interest is resident to take the necessary measures to eliminate cases of double taxation' also applies in cases where the interest is paid indirectly through an investment fund. To take account of this, with the proviso that strict compliance with this principle could lead to practical problems difficult to overcome, provision should be made for a new paragraph 4 in keeping with the spirit of the Ecofin agreement.

Amendment 20
Article 15, paragraph 1, second subparagraph

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

Justification

Greater clarity.

Amendment 21
Article 18.1

Member States shall ***bring into force*** the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2004 ***at the latest.***	Member States shall ***adopt and publish*** the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2004. ***They shall apply the provisions from a date that will be determined by a separate act of council, taking into account the outcome of the negotiations foreseen in Article 7a of this Directive, and after having consulted the European Parliament.***
When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.	When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Justification

This is necessary to ensure that Parliament is fully involved in the process. In addition it would also allow for a more rapid implementation and application of these rules. It may take considerable time before the negotiations are completed and it would thus appear useful for Member States to already start implementing the Directive now, and then the decision as form when to apply these rules could be taken quickly.

Amendment 22
Article 19

The Commission shall report to the Council every three years on the operation of this Directive. On the basis of these reports, the Commission shall, where appropriate, propose to the Council any amendments to the Directive that prove	The Commission shall report to the Council ***and the European Parliament*** every three years on the operation of this Directive. On the basis of these reports, the Commission shall, where appropriate, propose to the Council any amendments to

necessary in order better to ensure effective taxation of savings income and to remove undesirable distortions of competition.	the Directive that prove necessary in order better to ensure effective taxation of savings income and to remove undesirable distortions of competition.

Justification

Parliament should also receive this report.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the proposal for a Council directive on to ensue effective taxation of savings income in the form of interest payments within the Community (COM(2001) 400 – C5-0402/2001 – 2001/0164(CNS))

(Consultation procedure)

The European Parliament,

– having regard to the Commission proposal to the Council (COM(2001) 400[1]),

– having been consulted by the Council pursuant to Article 94 of the EC-Treaty (C5-0402/2001),

– having regard to the opinion of the Committee on Legal Affairs and the Internal Market on the proposed legal basis,

– having regard to Rule 67 of its Rules of Procedure,

– having regard to the report of the Committee on Economic and Monetary Affairs and the opinion of the Committee on Legal Affairs and the Internal Market (A5-0061/2002),

1. Approves the Commission proposal as amended;

2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty;

3. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;

4. Calls for the conciliation procedure to be initiated should the Council intend to depart from the text approved by Parliament;

5. Asks to be consulted again if the Council intends to amend the Commission proposal substantially;

6. Instructs its President to forward its position to the Council and Commission.

[1] OJ C not yet published.

EXPLANATORY STATEMENT

Background

Parliament has recently received from the Commission the third attempt to introduce a minimum effective taxation of savings income. The first, the 1989 proposal aiming at introducing a common withholding tax (COM(89)60) was later withdrawn in favour of the 1998 proposal which sought to create a co-existence model allowing Member States to chose whether to levy a withholding tax or to exchange of information on income received (COM(98)295). This approach failed, too. Instead, the Ecofin (on a mandate from the European Council in *Feira*) came up with a political compromise which had but eliminated the withholding tax aspect.

Now, the focus is firmly on exchange of information - only three Member States (Austria Belgium and Luxembourg) will levy a withholding tax, and they are only allowed to do so for a transitional period. After that, all Member States shall exchange information on savings income earned by non-residents. Any tax shall be levied in the country of residence. The Commission produced a new proposal along the very detailed lines agreed by Ecofin, and at the same time withdrew the 1998 proposal.

Legal Basis

Just as its predecessor, the current proposal is based on Article 94 of the Treaty which means simple consultation of Parliament, and unanimity in Council. The question has been raised whether Article 95 would not have been more appropriate as the proposal in a sense no longer is of a fiscal nature as it mostly concerns exchange of information. The Legal Service of Parliament, as well as its Committee on Legal Affairs, have however both concluded that Article 94 most likely is the correct legal basis in this case as there are a significant number of fiscal aspects in the transitional provisions.

One could argue that it would be possible to split this legal instrument in two: a Parliament and Council Directive on the exchange of information, and a Council Decision exempting the three countries from the application of that Directive for a period of seven years during which time they would have to apply a withholding tax. The first act could then be adopted under Article 95, and the second under article 94. However, given the practical and political difficulties associated with doing this, your rapporteur proposes that the Committee follows the advice of the Legal Affairs Committee and accepts the Legal Basis chosen by the Commission.

Third Country Relations

Although the previous proposal called for negotiations with third countries to extend the EU system to them (Article 11), this has now become a *sine qua non* for the entry into force of the Directive. The European Council, in the Conclusions from the Feira Summit stated unequivocally that:

> *Once sufficient reassurances with regard to the application of the same measures in dependent or associated territories and of equivalent measures in the named countries have been obtained, and on the basis of a report, the Council will decide on the adoption and implementation of the Directive no*

later than 31 December 2002, and do so by unanimity.

Even so, there is no mention of this in the new proposal. The Commission has in talks with the rapporteur stated that it does not want to make an direct link with the third country issue in the proposal, and that, in any event, it would be illogical to do so as the negotiations would have been concluded, and the results thereof assessed (and approved, presumably) before the Directive would be on the Statue Books; a mention of the third countries would thus be redundant. This, however, raises two concerns for your rapporteur. First, what happens if one or more third countries (and/or associated territories) go back on their commitments and decide to not impose or to scrap the mechanism and/or withholding tax agreed?

Second, and more importantly, where does this leave the European Parliament? Maybe Parliament, too, should wait and deliver its opinion after the negotiations have been terminated to ensure that these live up to the expectations of Parliament? It would seem unfair to expect Parliament to vote on something where the Council has already said in advance that it will make the approval subject to certain conditions. How then can Parliament fulfil its role in the democratic system if it is supposed to deliver an opinion on something it does not know what it is?

Scope - Persons Covered

Although there are arguably some practical difficulties in levying a withholding tax on legal persons, this does not apply to the exchange of information. The distinction that the new proposal draws between natural and legal persons seems quite artificial in the context of exchange of information. Wealthy individuals could easily circumvent the proposal by placing their personal assets in a trust or by forming a company and it would therefore seem logical to include legal persons in the scope. This may also in a sense reduce the administrative burden on banks and other as this would remove the selective aspect of the reporting requirement.

Your rapporteur therefore proposes that information should be exchanged for all non-resident whether they are natural or legal persons. This would in your rapporteur's view have two main advantages; first, it would remove the possibility to avoid the rules by placing one's savings in a company or trust, and, as outlined above, make life somewhat easier for paying agents. Although the number of cases to be reported would rise, it would most likely be easier to identify them.

Although the rapporteur personally supports this view, it was not the majority position in the Economic and Monetary Affairs Committee, and in the respect of the political balance achieved in the vote of the report, he will not submit any amendments to the Plenary.

Scope - Products Covered

As for the products covered, your rapporteur would primarily like to raise the issue of the inclusion of UCITS. The new proposal significantly lowers the threshold for them being considered as interest payments. Under the terms of the 1998 proposal, they were to be considered as interest income if they were made up of at least 50% interest bearing instruments. This limit has now been lowered to 15%.

Your rapporteur thinks that it would be more useful to include all UCITS, but only to the extent that the income is to be considered as deriving from debt claims. Thus for example if a fund is made up of 30% bonds, and 70% equities, only 30% of the sale price should be considered as interest as that is the share that is directly derived from debt claims. The other 70% derives from products that fall outside fall outside of the scope in general, and should therefore not be included in this context either.

Conclusion

Your rapporteur welcomes this new proposal as he considers it an important step forward in the process of ensuring an equitable tax treatment of savings in Europe. Although it no longer seeks to impose a minimum taxation, it gives, through an automatic exchange of information, Member States the possibility and the right to tax at least the EU-wide income of the residents according to its domestic tax rules, and at its own tax rates. By abolishing the banking secrecy for fiscal purposes, it will mean a major step forward in the fight against harmful tax competition. It will also contribute towards improving the functioning of the single market by removing artificial incentives to the flow of capital in the EU and beyond.

It should however be noted that the 1998 proposal would have been an easier solution to implement internationally as certain countries refuse to share information, but are perfectly willing to levy a withholding tax. Given the very strong positions of both certain EU Member States, and some third countries, it remains to be seen what the result of those negotiations will be.

The Commission should undertake to inform the relevant Committee regularly, or at least every three months on the progress of those negotiations. The Council should also reconsult Parliament should it decide to either change the text substantially, or, more crucially, decide on a third country framework that is not fully in line with the Conclusions from Feira. The international dimension, while not being included in the Commission's Draft, does form an integral part of the Directive and Parliament must thus ensure that its prerogatives are not being undermined.

19 February 2002

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET

for the Committee on Economic and Monetary Affairs

on the proposal for a Council directive to ensure effective taxation of savings income in the form of interest payments within the Community
(COM(2001) 400 – C5-0402/2001 – 01/0164(CNS))

Draftsman: Paolo Bartolozzi

PROCEDURE

The Committee on Legal Affairs and the Internal Market appointed Paolo Bartolozzi draftsman at its meeting of 11 December 2001.

It considered the draft opinion at its meetings of 7 January, 24 January and 19 February 2002.

At last meeting it adopted the following amendments unanimously with 2 abstentions.

The following were present for the vote: Giuseppe Gargani, chairman; Willi Rothley, vice-chairman; Ioannis Koukiadis, vice-chairman; Bill Miller, vice-chairman; Paolo Bartolozzi, draftsman; Michel J.M. Dary (for François Zimeray, pursuant to Rule 153(2)), Francesco Fiori (for Mónica Ridruejo, pursuant to Rule 153(2)), Luis Berenguer Fuster, Ward Beysen, Isabelle Caullery, Brian Crowley, Willy C.E.H. De Clercq, Bert Doorn, Nicole Fontaine, Janelly Fourtou, Marie-Françoise Garaud, Evelyne Gebhardt, Fiorella Ghilardotti, José María Gil-Robles Gil-Delgado, Malcolm Harbour, Heidi Anneli Hautala, Othmar Karas, Kurt Lechner, Klaus-Heiner Lehne, Neil MacCormick, Helmuth Markov (for Alain Krivine, pursuant to Rule 153(2)), Manuel Medina Ortega, Angelika Niebler, Elena Ornella Paciotti, Marianne L.P. Thyssen, Rijk van Dam, Michiel van Hulten, Theresa Villiers, Diana Wallis and Stefano Zappalà

SHORT JUSTIFICATION

In recent years the European Union institutions have focussed their attention on the fiscal implications of the introduction and development of the single market, particularly as regards problems relating to the protection of tax bases and the prevention of fraud and cross-border tax evasion.

Three areas were identified where coordinated action was deemed necessary, namely the business taxation, tax on savings income and the levying of withholding tax on cross-border payments of interest and royalties between undertakings.

These three areas are therefore the main elements of what is now commonly known as the 'tax package', which the Community institutions have undertaken to implement on a uniform basis by the end of 2002.

The main element of the package is the *proposal for a directive* under consideration, which is designed to ensure a minimum of effective taxation of savings income in the form of interest payments within the Community. This concerns interest payments within the Community made to natural persons resident for tax purposes in a Member State other than that in which the interest payments are made.

Under the directive, each Member State will be required to forward to the other Member States information on interest payments made within its territory to individual savers resident in another Member State. However, during a transitional period of seven years, instead of exchanging information, Belgium, Luxembourg and Austria may levy a withholding tax at a rate of 15% during the first three years and 20% for the remainder of the transitional period. The proposal concerns interest deriving from savings of all kinds, including securities (although existing securities are covered by a transitional regime).

The proposed directive has a broad sphere of application including interest from cash deposits, corporate and government bonds and debentures, and similar negotiable debt securities. The definition of interest also extends to accrued or capitalised interest.

Lastly, it also applies to interest realised from indirect investments through collective investment undertakings.

The legal basis proposed by the Commission is Article 94 of the Treaty.

At its meeting of 11 October 2001, the Committee on Legal Affairs and the Internal Market endorsed the legal basis chosen by the Commission.

The current proposal replaces the one submitted by the Commission in 1998, which gave Member States the option of choosing between exchange of information and the application of a withholding tax.

It is based on the agreements reached by the Heads of State at the European Council in Santa Maria di Feira in June 2000 and reflects the conclusions of the ECOFIN Council in Brussels of 26/27 November 2000.

The ECOFIN Council is examining the Commission proposal. The Council has reached agreement on amending a very important aspect of the proposal, namely abolishing the retroactive nature of the rules determining the place of residence of those subject to the directive. Specifically, it has been decided to remove the provision contained in Article 3, under which residence would have had to be determined according to the new rules laid down by the directive, in the case of relations with clients established between 1 January 2001 and the date of implementation of the directive.

The directive is due to be published and *enter into force* at the beginning of 2003, whereas the *deadline* established for Member States to introduce the rules, regulations and administrative provisions necessary is 1 January 2004 at the latest. In this connection, a further technical problem remains to be resolved. The intermediaries concerned should be allowed to adjust their internal procedures more gradually. The deadline for the Member States to transpose the directive should therefore be extended by at least one year, to 1 January 2005.

AMENDMENTS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to include the following amendments in its report:

Text proposed by the Commission[1]	Amendments by Parliament

Amendment 1
Article 3, paragraph 3(a)

3. In order to establish the residence of the beneficial owner for the purposes of this Directive, the following minimum standards shall apply:	3. In order to establish the residence of the beneficial owner for the purposes of this Directive, the following minimum standards shall apply:
(a) for contractual relations entered into before ***1 January 2001***, the paying agent shall establish the residence of the beneficial owner by using the information at its disposal, in particular pursuant to the regulations in force in its state of establishment and to Directive 91/308/EEC;	(a) for contractual relations entered into before ***the date of implementation of the directive*** the paying agent shall establish the residence of the beneficial owner by using the information at its disposal, in particular pursuant to the regulations in force in its state of establishment and to Directive 91/308/EEC;

Justification

The proposal for a directive makes the rules establishing the residence of the beneficial owner to some extent retroactive and extends the new rules to relations with clients established between 1 January 2001 and the date of implementation of the directive. The aim is to abolish the retroactive application of the rules (grey period) as this would place a major burden on paying agents, who would have to update their client registers covering relations established over an extremely long period of time (2001 - 2003).

Amendment 2
Article 3, paragraph 3(b)

Not applicable to the English version

[1] OJ C 270E, 25.9.2001, p. 259

Justification

Amendment 3
Article 18, paragraph 1

Transposition	**Transposition**
1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January ***2004*** at the latest.	1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January ***2005*** at the latest.
When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.	When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Justification

Provision should be made for a longer transposition period to enable the intermediaries concerned to adapt their internal procedures gradually.

Amendment 4
Article 20, new paragraph

	Nevertheless, the entry into force of this Directive shall also be subject to the agreement to be reached between the European Union and a number of third countries and independent territories on the equal treatment of taxation of savings income.

Justification

It is important, before the Directive enters into force, that a prior agreement should be reached on the duty of notification and taxation with a number of important third countries (e.g. Switzerland, Andorra, Monaco) and the 'independent territories' (e.g. the Channel Islands – Jersey and Guernsey – and the Isle of Man) in order to arrive at equal treatment in this area and to exclude large-scale tax evasion or avoidance. The Council has in fact also expressed a similar opinion.

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET ON THE PROPOSAL'S LEGAL BASIS

Subject: Legal basis of the proposal for a Council directive to ensure effective taxation of savings income in the form of interest payments within the Community COM(2001) 400 - C5-0402/2001 - 2001/0164(CNS))

Dear Madam President,

On September 3, 2001, the Committee on Legal Affairs and Internal Market decided on its own initiative to take up the question concerning the legal basis of the proposal.

The Committee on Legal Affairs and the Internal Market examined this question at its meeting of 10-11 October 2001 in the presence of the Legal Service.

The members of the Committee on Legal Affairs and Internal Market examined, in particular, the issue of whether Articles 93 and 94 EC on the one hand or Article 95 EC on the other are the correct legal basis for the adoption of this proposal.

It is clear from settled case law of the ECJ that the choice of the legal basis does not depend on the discretion of the Community legislature but must be based on objective elements which are amenable to judicial control, including, in particular, the aim and the content of the measure as they appear from its actual wording[1].

As regards its aim, according to Article 1, the proposal aims at ensuring effective taxation of savings income in the form of interest payments to beneficial owners who are individuals resident in another Member State.

This aim is confirmed by indent 10 which declares that "the objective of this Directive is to ensure that *cross-border savings income in the form of interest payments can be subject to effective taxation in the Member State of residence of the taxpayer* in accordance with its national laws" (emphasis added). Indent 12 further mentions that "*the objective of this Directive, which is that of the effective taxation of cross-border savings income within the Community,* cannot be sufficiently achieved by the Member States, because of the absence of any co-ordination of national systems for the taxation of savings income*"*(emphasis added).

It seems therefore that the proposal's aim is to guarantee that taxation of savings income occurs.

The objective of ensuring effective taxation of interest payments can be achieved through exchanges of information between Member States concerning interest payments.

Thus indent 18 states that "the automatic exchange of information between Member States concerning interest payments covered by this Directive constitutes a *conditio sine qua non* for ensuring effective taxation of cross-border interest payments*"*.

Certain Member States (Belgium, Luxembourg and Austria) benefit from a seven-year

[1] See, *inter alia*, ECJ, case C-42/97, *Parliament v Council*, para. 36.

accomodation with their national legal systems - including bank secrecy rules - "in order to allow them more time to adapt their national legislation″ (indent 20).

During this so-called transitional period, they are ″required to ensure a minimum of effective taxation of savings income in the form of interest payments by levying a withholding tax″ (indent 21) and to "transfer the greater part of the revenue of this withholding tax to the Member State of residence of the beneficial owner of the interest″ (indent 22).

Therefore, this transitional period seems to have been provided for in recognition of the major changes these Member States need to make to their current systems, including their banking secrecy rules.

As concerns its content, the proposal sets up schemes for approximation of legislation which are different between two sets of Member States:

a) For twelve Member States, there is exchange of information in order to ensure effective taxation of savings income. This requirement to exchange information between competent authorities seems to concern rules that do not touch the heart of the tax system, i.e. the substantive tax rules.

b) For three Member States, during a period of seven years only, another type of framework is provided for, including withholding tax and a revenue sharing system. This system requires considerable adaptation of the national tax laws of these Member States, in particular amending banking secrecy rules. It also implies adapting national legislation so as to levy a withholding tax and to create a revenue sharing system.

A similar legal change as concerns the revenue sharing system will have to occur in the remaining twelve Member States (which are excluded from this transitional period) in order to enable them to receive the revenue transfer from the three Member States. Therefore, this special framework will require a considerable change in all 15 national tax systems.

Having the above in mind, it is to be highlighted that:

i) It is settled case law that where a measure pursues more than one objective, its principal objective is decisive for determining the correct legal basis. Therefore, one needs to consider whether the proposal in question relates principally to a particular field of action, having only incidental effects on other policies, or whether both aspects are equally essential.

ii) According to settled case-law, if the first hypothesis is correct, recourse to a single legal basis is sufficient[1]; if the second is correct, it is insufficient[2] and the institution is required to adopt the measure on the basis of both of the provisions from which its competence derives[3].

iii) However, no such dual basis is possible where the procedures laid down for each legal basis are incompatible with each other[4]. Therefore, this hypothesis is to be discarded in the present case.

iv) In the present case, there is a unique situation whereby the proposal has a single aim -

[1] Case C-70/88 *Parliament* v *Council* [1991] ECR I-4529, paragraph 17, and Case C-271/94 *Parliament* v *Council* [1996] ECR I-1689, paragraphs 32 and 33.
[2] Case 242/87 *Commission* v *Council* [1989] ECR 1425, paragraphs 33 to 37, and Case C-360/93 *Parliament* v *Council* [1996] ECR I-1195, paragraph 30.
[3] Case 165/87 *Commission* v *Council* [1988] ECR 5545, paragraphs 6 to 13.
[4] Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraphs 17 to 21.

effective taxation of savings income - but a dual content, since it creates two different frameworks, one of exchange of informations for twelve Member States and another applicable to three Member States.

It is not possible to state that the second framework is accessory or ancillary to the first one just because it applies to three Member States only, via the application of a quantitative criterion of 12 vs. 3 Member States.

In other words, the objective elements of the Commission's proposal do not lead to conclude that the adequate legal basis is article 95 EC.

v) The present proposal has to be distinguished from Directive 2001/44 modifying the directive on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties[1]. The original Commission proposal had opted for Article 95. However, the Council adopted the Directive on the basis of Articles 93 and 94 EC. The Committee on Legal Affairs and Internal Market recently recommended to the EP President to bring proceedings in the ECJ for annulment of that directive on the ground that it was adopted on the wrong legal basis.

The distinction results from the fact that Directive 2001/44 contains provisions relating to exchange of information only, whose purpose is to facilitate the elimination of frontiers without affecting the substance of Member States' own tax rules.

In the present case, the measures contained in the accommodating period for three Member States require considerable modification of their national tax rules and impinge on the tax sovereignty not only of the three Member States involved, but also of the remaining twelve.

vi) The situation mentioned under iv) is not covered by previous case law on legal basis, which deals with measures which have a principal aim and content, in comparison to an incidental or ancillary aim and content of a measure.

Taking into consideration that the proposal has a single aim - albeit with a dual content -, a single solution has to be identified.

At its meeting of 11 October 2001, the Committee on Legal Affairs and the Internal Market therefore decided by 7 votes in favour and 3 against that Article 94 EC is the adequate legal basis of the Commission's proposal[2].

Yours sincerely,

(s.) Ana Palacio Vallelersundi

[1] Official Journal L 175 , 28/06/2001, p. 17.

[2] Were present: Ana Palacio Vallelersundi (president), Ward Beysen (vice-président), Neil MacCormick (rapporteur), Paolo Bartolozzi, Klaus-Heiner Lehne, Manuel Medina Ortega, Fernando Pérez Royo, Gary Titley, Joachim Wuermeling.