EC and International Tax Law Series
Volume 16

Taxation of Intellectual Property under Domestic Law, EU Law and Tax Treaties

Guglielmo Maisto / Series Editor

IBFD

Taxation of Intellectual Property under Domestic Law, EU Law and Tax Treaties

Why this book?

Taxation of Intellectual Property under Domestic Law, EU Law and Tax Treaties, comprising the proceedings and working documents of an annual seminar held in Milan in November 2017, is a detailed and comprehensive study on the taxation of intellectual property (IP). It begins with a comparative analysis of the domestic private law aspects of IP and the domestic tax regimes applicable to profits deriving from the utilization of IP. It next examines the taxation of IP under EU law, with a particular emphasis on (i) the EU fundamental freedoms and State aid, and (ii) the open issues in the implementation of the EU Interest and Royalty Directive.The book then moves to selected tax treaty issues. In particular, it analyses (i) the historical background and the policy of article 12 of the OECD Model Convention; (ii) the meaning of "royalties" and overlapping between articles 7, 12 and 13 of the OECD Model Convention; (iii) royalties in the context of the OECD Multilateral Instrument under the limitation on benefits (LOB) provision and the principal purpose test (PPT) clause; and (iv) certain selected issues on cross-border transfers of IP.

Individual country surveys provide an in-depth analysis of the domestic tax regimes and actual tax treaty application and practices by various states, including Australia, Austria, Brazil, Canada, China (People's Rep.), France, Germany, Italy, the Netherlands, Spain, Switzerland, the United Kingdom and the United States.This book presents a unique and detailed insight into the taxation of intellectual property in an international context and is therefore an essential reference source for international tax students, practitioners and academics.

This book is part of the EC and International Tax Law Series.

Title:	Taxation of Intellectual Property under Domestic Law, EU Law and Tax Treaties
Author(s):	Guglielmo Maisto
Date of publication:	June 2018
ISBN:	978-90-8722-465-3 (print/online), 978-90-8722-464-6 (ePub), 978-90-8722-463-9 (PDF)
Type of publication:	Book
Number of pages:	772
Terms:	Shipping fees apply. Shipping information is available on our website
Price (print/online):	EUR 130 / USD 155 (VAT excl.)
Price (eBook: ePub or PDF):	EUR 104 / USD 124 (VAT excl.)

Order information

To order the book, please visit www.ibfd.org/IBFD-Products/shop. You can purchase a copy of the book by means of your credit card, or on the basis of an invoice. Our books encompass a wide variety of topics, and are available in one or more of the following formats:

- IBFD Print books
- IBFD eBooks – downloadable on a variety of electronic devices
- IBFD Online books – accessible online through the IBFD Tax Research Platform

IBFD, Your Portal to Cross-Border Tax Expertise

IBFD Publications BV

Visitors' address:
Rietlandpark 301
1019 DW Amsterdam
The Netherlands

Postal address:
P.O. Box 20237
1000 HE Amsterdam
The Netherlands

Telephone: 31-20-554 0100
Fax: 31-20-622 8658
www.ibfd.org

© 2018 IBFD

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the written prior permission of the publisher. Applications for permission to reproduce all or part of this publication should be directed to: permissions@ibfd.org.

Disclaimer

This publication has been carefully compiled by the IBFD and/or its authors, but no representation is made or warranty given (either express or implied) as to the completeness or accuracy of the information it contains. The IBFD and/or the authors are not liable for the information in this publication or any decision or consequence based on the use of it. The IBFD and/or the authors will not be liable for any direct or consequential damages arising from the use of the information contained in this publication. However, the IBFD will be liable for damages that are the result of an intentional act (*opzet*) or gross negligence (*grove schuld*) on the IBFD's part. In no event shall the IBFD's total liability exceed the price of the ordered product. The information contained in this publication is not intended to be an advice on any particular matter. No subscriber or other reader should act on the basis of any matter contained in this publication without considering appropriate professional advice.

Where photocopying of parts of this publication is permitted under article 16B of the 1912 Copyright Act jo. the Decree of 20 June 1974, Stb. 351, as amended by the Decree of 23 August 1985, Stb. 471, and article 17 of the 1912 Copyright Act, legally due fees must be paid to Stichting Reprorecht (P.O. Box 882, 1180 AW Amstelveen). Where the use of parts of this publication for the purpose of anthologies, readers and other compilations (article 16 of the 1912 Copyright Act) is concerned, one should address the publisher.

ISBN 978-90-8722-465-3 (print)
ISBN 978-90-8722-464-6 (ePub)
ISBN 978-90-8722-463-9 (ePDF)
ISSN 1574-969X
NUR 826

Table of Contents

Part Three
Tax Treaty Issues of Intellectual Property

Sample Content

Chapter 4

Open Issues in the Application of the Interest and Royalty Directive to Royalty Payments

by Paolo Arginelli[1]

4.1. Introduction

Almost 15 years after its approval, Council Directive 2003/49/EC (hereinafter "I&R Directive" or "the Directive")[2] still presents several grey areas, on which this chapter aims at shedding some light.

The following analysis focuses on the application of the I&R Directive to royalty payments, which is the topic of this book. In particular, section 4.2. deals with the interpretation of the definition of royalties included in the Directive, section 4.3. discusses the scope of the subject-to-tax requirement provided for in article 3(a)(iii), section 4.4. examines the proper construction of the beneficial owner clause and how instances of abuse of the Directive may be tackled, section 4.5. analyses certain procedural issues and section 4.6. concludes with some tax policy considerations.

4.2. The definition of royalties

4.2.1. In general

The definition of the term "royalties" provided for in article 2(b) of the Directive is almost the same as the one included in article 12(2) of the 1977 OECD Model, except for the fact that it explicitly mentions "software" as an instance of copyright.[3]

---

1. Professor of European Union Tax Law and Corporate Tax Law, Università Cattolica del Sacro Cuore, Italy; Adjunct Postdoctoral Research Fellow, IBFD; Of Counsel, Maisto e Associati, Milan. The author can be contacted at paolo.arginelli@unicatt.it.

2. 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 (as later amended).

3. In 1992, para. 12 of the Commentary on Article 12 of the OECD Model made clear that the "rights in computer software are a form of intellectual property" and that, back in 1992, "all but one [OECD Member countries] protect[ed] software rights either explicitly or implicitly under copyright law".

Article 2(b) reads as follows:

> [T]he term 'royalties' means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films and software, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; payments for the use of, or the right to use, industrial, commercial or scientific equipment shall be regarded as royalties.

The definition contains several undefined legal jargon ("technical") terms,[4] which themselves are not defined in the Directive, which begs the question how they should be construed for the purpose of applying the Directive. In particular, the interpreter might wonder whether reference to domestic law meaning should be allowed and what relevance, if any, should be attributed to EU law private law instruments dealing with intellectual property (IP) rights and to the OECD Model and its Commentary.

4.2.2. The renvoi to domestic law

With regard to the first question, i.e. whether reference to domestic law meaning should be allowed, the answer should be in the negative.

Indeed, unless it makes an explicit reference to domestic law definitions and meanings, or it may be inferred from its (con)text and objective that such a reference is implicit,[5] secondary EU legislation should be interpreted uniformly and autonomously from the domestic law of the Member States.

4. On the interpretation of legal jargon terms used in tax treaties, *see* P. Arginelli, *Multilingual Tax Treaties: Interpretation, Semantic Analysis and Legal Theory*, sec. 8.5 (IBFD 2015), Online Books IBFD; P. Arginelli, *Riflessioni sull'interpretazione delle convenzioni bilaterali per evitare le doppie imposizioni conformi al Modello OCSE*, Rivista di Diritto Tributario 4, p. 148 et seq. (2016); further references therein.

5. In some cases, the European Court of Justice (ECJ) has recognized the possibility to read an implicit renvoi to the domestic law of EU Member States in the text of the relevant legal instrument. For instance, in a decision concerning the interpretation of art. 5(1) of the *Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters*, after noting that "in the case of an action relating to contractual obligations Article 5(1) allows a plaintiff to bring the matter before the court for the place 'of performance' of the obligation in question", the Court concluded that it was "for the court before which the matter [was] brought to establish under the Convention whether the place of performance is situate within its territorial jurisdiction" and that for such a purpose, the referred court had to "determine in accordance with its own rules of conflict of laws what [was] the law applicable to the legal relationship in question and define in accordance with that law the place of performance of the contractual obligation in question". According to the Court, "in these circumstances the reference in the Convention to

This norm of interpretation descends, as a corollary, from the principle of the autonomy of EU law, which was affirmed by the European Court of Justice (ECJ) already in the landmark *Costa v. Enel* decision.[6] In particular, interpreting EU secondary legislation through a renvoi to the domestic laws of the Member States would entail a significant risk of jeopardizing the attainment of the objectives of that secondary legislation. In the words of the Court, the "integration into the laws of each Member State of provisions which derive from the Community [makes] it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity [i.e. the EU legal system]. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of [the EU legal system]."[7]

The principle of autonomous interpretation was fully developed in later decisions, in particular *CILFIT*,[8] where the Court affirmed that "every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".[9] This rule of interpretation closely resembles the one enshrined in article 31 of the 1969 Vienna Convention on the Law of Treaties,[10] adding thereto that as a general rule, EU law should

---

the place of performance of contractual obligations [could not] be understood otherwise than by reference to the substantive law applicable under the rules of conflict of laws of the court before which the matter [was] brought" (DE: ECJ, 6 Oct. 1976, Case 12/76, *Industrie Tessili Italiana Como v. Dunlop AG*, paras. 13 and 15). For the possibility to read an implicit reference to domestic law in international treaties, *see*, inter alia, A. Cassese, *Il diritto interno nel processo internazionale* p. 202 et seq. (Cedam 1962) and further references therein.

6. IT: ECJ, 15 July 1964, Case 6/64, *Flaminio Costa v. E.N.E.L.*

7. Id.

8. IT: ECJ, 6 Oct. 1982, Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*.

9. Id. p. 20.

10. *Vienna Convention on the Law of Treaties* (23 May 1969), art. 31: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes

be construed dynamically in the light of the evolution of the EU legal order.[11] In this context, the ECJ recognized that as a consequence of the autonomous interpretation of EU law, "legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States".[12]

The bias in favour of the autonomous interpretation of the "royalties" definition is further supported by the analysis of article 115 of the Treaty on the Functioning of the European Union (TFEU), which constitutes the legal basis for the adoption of the I&R Directive by the Council. Article 115 of the TFEU provides that the "Council shall … issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market." The purpose of article 115 is to ensure that even in the field of direct taxation, the Council has the chance to issue directives in order to harmonize the domestic laws of the Member States, in so far as the differences existing among such domestic laws might jeopardize the establishment and the well-functioning of the internal market.[13] There is therefore a causal link between the adopting a directive under article 115 of the TFEU and the existence of discrepancies among the relevant legislations of the EU Member States.

In this respect, interpreting the definition of "royalties" included in the I&R Directive, which does not encompass any express reference to the national legislations of the Member States, by means of a renvoi to such legislations would run against the main objective of the Directive, i.e. harmonizing the domestic laws of the Member States in order to eliminate certain obstacles

---

the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."

11. M.P. Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism,* 1 European J. of Leg. Studies 2, pp. 144-145 (2007); R.A. Wessel, *The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation,* European Const. Law Rev. 5, pp. 141-142 (2009); N. Fennelly, *Legal Interpretation at the European Court of Justice,* 20 Fordham Int'l L.J. 3, p. 655 et seq. (1996); O. Pollicino, *Legal Reasoning of the Court of Justice in the Context of Principle of Equality between Judicial Activism and Self-Restraint*, 5 German Law J. 3, p. 289 (2004).

12. *CILFIT* (283/81), p. 19.

13. B. Terra & P. Wattel, *European Tax Law* p. 22 et seq. (Kluwer 2012); M. Helminen, *Chapter 1: Concepts and Basic Principles of EU Tax Law* in *EU Tax Law – Direct Taxation* pp. 11-12 (IBFD 2017), Online Books IBFD; F. Pocar & M.C. Baruffi, *Commentario breve ai Trattati dell'Unione Europea* Art. 115 (Cedam 2014); J. Malherbe et al., *The impact of the Rulings of the European Court of Justice in the Area of Direct Taxation* 2010, p. 15, available at http://www.europarl.europa.eu/document/activities/cont/201203/20120313ATT40640/20120313ATT40640EN.pdf (last accessed 27 Mar. 2018).

to the establishment and well-functioning of the internal market. Such interpretation, indeed, would preserve – and not reduce – the differences among the domestic legislations of the Member States. Thus, a teleological construction of the Directive, read in conjunction with article 115 of the TFEU, appears to clearly favour the autonomous interpretation of the "royalties" definition.

Finally, it is worth mentioning that the 1998 Proposal presented by the Commission,[14] which constituted the basis for the final text of the Directive, included in article 2(2) a reference to the domestic laws of the Member States in addition to the definition of "royalties" provided for in article 2(1). According to the Commentary attached to the 1998 Proposal, the "Directive applies not only to the payments of … royalties as defined under paragraph 1 but also to all payments regarded by Member States as such".[15] Indeed, article 2(2) of the 1998 Proposal provided that:

> In addition to the income and payments referred to in paragraph 1, any income or payments which are considered to be interest or royalties … either by virtue of a double taxation convention … or, in the absence of a convention, by virtue of the tax legislation of the Member State where the interest or royalties arise, shall be treated as interest or royalties for the purposes of this Directive.

This renvoi to the domestic laws of the Member States was dropped in the final version of the Directive adopted by the Council, which confirms the intention of the EU legislature to adopt an autonomous concept of royalties for the purpose of the Directive and thus an autonomous interpretation of the definition encompassed in article 2(b) thereof.

4.2.3. The relevance of EU private law instruments on IP rights

The first source of interpretation for construing the definition of royalties provided in article 2(b) of the Directive should be the numerous private law instruments dealing with IP rights that form part of the *acquis communautaire*. Such instruments include definitions of the technical terms employed in article 2(b) and shed light on their interpretation by putting them in their context. Moreover, the case law of the competent courts (including the ECJ)

14. COM(1998) 67 final, Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (4 Mar. 1998) [hereinafter the 1998 Proposal].
15. *See* id., p. 6.

interpreting such legal instruments may constitute an additional aid for the construction of the terms used in the definition of royalties.

By way of example, some of the relevant private law instruments that may be referred to in order to interpret the terms used in the definition of royalties provided for in article 2(b) of the I&R Directive are:[16]

- the directive on the harmonisation of certain aspects of copyright and related rights in the information society of 22 May 2001;[17]
- the directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property of 12 December 2006;[18]
- the directive on the resale right for the benefit of the author of an original work of art of 27 September 2001;[19]
- the directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission of 27 September 1993;[20]
- the directive on the legal protection of computer programs of 23 April 2009;[21]
- the directive on the enforcement of intellectual property right of 29 April 2004;[22]
- the directive on the legal protection of databases of 11 March 1996;[23]
- the directive on the term of protection of copyright and certain related rights of 12 December 2006;[24]

16. Some international treaties, which might be relevant for the purpose of interpreting the definition of royalties under the I&R Directive, are still not in force (e.g. the *Beijing Treaty on Audiovisual Performances* adopted on 24 June 2012).
17. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
18. Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.
19. Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.
20. Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.
21. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.
22. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.
23. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
24. Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (as

– the directive on certain permitted uses of orphan works of 25 October 2012;[25]
– the directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market of 26 February 2014;[26]
– the regulation on cross-border portability of online content services in the internal market of 14 June 2017;[27]
– the directive on the protection of undisclosed know-how and business information of 8 June 2016;[28]
– the directive on the approximation of the laws on trade marks of 16 December 2015;[29]
– the regulation on the EU trade mark of 14 June 2017;[30]
– the regulation on the supplementary protection certificate for medicinal products of 6 May 2009;[31]
– the directive on the Community code relating to veterinary medicinal products of 6 November 2001;[32]
– the directive on the Legal Protection of biotechnological inventions of 6 July 1998;[33]
– the regulation on Community Plant Variety Rights of 27 July 1994;[34]

---

amended by Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011).

25. Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

26. Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

27. Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

28. Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

29. Directive (EU) No. 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks.

30. Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark.

31. Regulation (EC) No. 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products.

32. Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products.

33. Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of biotechnological inventions.

34. Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community Plant Variety Rights, as amended by Council Regulation (EC) No. 2506/95 of 25 October 1995.

– the regulation of the Council on supplementary protection certificate for plant protection products of 23 July 1996;[35]
– the directive on the legal protection of designs of 13 October 1998;[36]
– the regulation on Community designs of 12 December 2001;[37]
– the Berne Convention for the Protection of Literary and Artistic Works, as resulting from the Paris Act of 24 July 1971;[38]
– the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;[39]
– the World Trade Organization (WTO) TRIPS Agreement of 15 April 1994;[40]
– the World Intellectual Property Organization (WIPO) Copyright Treaty of 20 December 1996;
– the WIPO Performances and Phonograms Treaty of 20 December 1996; and
– the European Patent Convention of 5 October 1973.[41]

4.2.4. Using the OECD Model Commentary

As previously mentioned, Article 12 of the OECD Model clearly represented the main source of inspiration for the EU legislature when drafting the definition of "royalties" to be included in the Directive. This is confirmed by the Commentary to the 1998 Proposal, where the Commission stated that the "term 'royalties' as used for the purposes of this Directive denotes in general all payments made as consideration made for the use of, or the entitlement to use copyright, work, patents, etc. as included in Article 12 of the 1996 OECD Model Tax Convention".[42] The relevance of the OECD documents for the purpose of the definition of "royalties" was also highlighted by the European Economic and Social Committee, which, in the Opinion issued in connection with the 1998 Proposal, made reference

35. Regulation (EC) No. 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products.
36. Directive No. 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs.
37. Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs.
38. As amended on 28 September 1979.
39. *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (26 Oct. 1961).
40. *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C to the *Marrakesh Agreement Establishing the World Trade Organization*.
41. *Convention on the Grant of European Patents* (European Patent Convention) (5 Oct. 1973).
42. *See* 1998 Proposal, *supra* n. 14, at p. 6.

to the work of the OECD Committee for Fiscal Affairs in order to interpret the definition included in that Proposal.[43]

Although the ECJ is (obviously) not bound by the OECD Commentary when interpreting the I&R Directive, there is case law confirming its willingness to follow non-legally binding instruments, which are not part of the EU legal order, for the purposes of construing EU secondary legislation.

Among non-tax decisions, it is worth recalling the judgment in *Verwertungsgesellschaft Rundfunk* (Case C-641/15),[44] concerning the interpretation of article 8(3) of Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright. More specifically, in such a case the Court had to construe the expression "places accessible to the public against payment of an entrance fee" employed in that directive. The ECJ started its analysis by noting that both Recital 7 of Directive 2006/115/EC and its *travaux préparatoires* gave evidence of the intention of the EU legislature to follow and not to conflict with the 1961 Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.[45] On this basis, the Court

43. *See* the Opinion of the Economic and Social Committee on the Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (98/C 284/09), para. 7.3, where it was stated that "[t]he OECD Fiscal Affairs Committee has clearly stated that no withholding tax should be levied on payments that do not represent royalties but result from agreements on contribution to a group's central expenditure".

44. AT: ECJ, 16 Feb. 2017, Case C-641/15, *Verwertungsgesellschaft Rundfunk GmbH v. Hettegger Hotel Edelweiss GmbH*, ECLI:EU:C:2017:131.

45. *See* id., at paras. 21 and 22, which read as follows: "21. As regards interpreting the concept of 'places accessible to the public against payment of an entrance fee', it is apparent from recital 7 of Directive 2006/115 that it seeks to approximate the legislation of the Member States in such a way as not to conflict, in particular, with the Rome Convention. Accordingly, although that convention does not form part of the legal order of the European Union, concepts appearing in Directive 2006/15 must be interpreted in particular in the light of that convention, in such a way that they are compatible with the equivalent concepts contained in that convention, taking account also of the context in which those concepts are found and the purpose of the relevant provisions of the convention (see, to that effect, judgment of 15 March 2012, SCT, C-135/10, EU:C:2012:140, paragraphs 53 to 56). 22. In the present case, the scope of the right of communication to the public laid down in Article 8(3) of Directive 2006/115 is equivalent to that of the right provided for in Article 13(d) of the Rome Convention, which, in accordance with the wording of Article 8(3), limits it to 'places accessible to the public against payment of an entrance fee' (see, to that effect, judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraphs 94 to 96). The intention of the EU legislature was – as confirmed by the amended proposal for a directive, of 30 April 1992 (COM(92) 159 final, p. 12), which led to the adoption of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61), which was repealed

concluded that although the Rome Convention did not form part of the legal order of the European Union, the concepts appearing in Directive 2006/15 had to be interpreted in the light of the equivalent concepts employed in that convention.[46] Then, in order to interpret the relevant provision of the Rome Convention, it made reference to the Guide to the Rome Convention and to the Phonograms Convention, a non-legally binding document prepared by the WIPO, which provides explanations as to the origin, purpose, nature and scope of the Rome Convention. As a result, the ECJ construed article 8(3) of Directive 2006/115/EC in accordance with the interpretation of the Rome Convention put forward in the aforementioned non-legally binding Guide.[47]

Somehow similarly, in *Internetportal und Marketing* (Case C-569/08),[48] the Court interpreted Commission Regulation (EC) No 874/2004, on the implementation and functions of the .eu Top Level Domain, in light of the non-legally binding 1999 Final Report of the First WIPO Internet Domain Name Process. Also, in this case, the ECJ attributed relevance to the assumed intention of the EU legislature, which was derived from Recital 16 of the Regulation, according to which the Registry of the Domain must take into account the international best practices and, in particular, the relevant WIPO recommendations.[49]

In respect of tax cases,[50] the Advocate General's Opinion in *Scheuten Solar* (Case C-397/09)[51] supported the conclusion that the I&R Directive is concerned solely with international juridical double taxation and not with international economic double taxation, by recalling that the 1998 Proposal "was

---

and codified by Directive 2006/115 – to follow to a large extent the provisions of the Rome Convention introducing minimum protection in order to achieve uniform minimum protection in the European Union and, by modelling Article 6a(3) of the proposed Directive on Article 13(d) of the Rome Convention, to provide for an exclusive right to communicate television broadcasts to the public under the conditions set out in that convention."

46. Id., para. 21.

47. Id., para. 23.

48. AT: ECJ, 3 June 2010, Case C-569/08, *Internetportal und Marketing GmbH v. Richard Schlicht*, 2010 I-04871.

49. Id., para. 38.

50. There are several references to the OECD Model and Commentary in the case law of the ECJ and in the Advocates General's opinions, in addition to those expressly quoted hereafter. *See*, among the most well-known, DE: ECJ, 14 Feb. 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker*, para. 32, ECJ Case Law IBFD; NL: ECJ, 7 Sept. 2006, Case C-470/04, *N v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*, paras. 45-46 and the case law cited therein, ECJ Case Law IBFD; EE: Opinion of Advocate General Jääskinen, 24 Nov. 2011, Case C-39/10, *European Commission v. Republic of Estonia*, para. 77 et seq. and, in particular, n. 35, ECJ Case Law IBFD.

51. DE: Opinion of Advocate General Sharpston, 12 May 2011, Case C-397/09, *Scheuten Solar Technology GmbH v. Finanzamt Gelsenkirchen-Süd*, ECJ Case Law IBFD.

influenced by the OECD Model Tax Convention, the main purpose of which is to set out a means of dealing, on a uniform basis, with the most common problems that arise in the context of international juridical double taxation".[52]

More significantly, in *Berlioz* (Case C-682/15),[53] the Grand Chamber of the ECJ relied on the Commentary on Article 26 of the OECD Model in order to interpret the term "foreseeably relevant" employed in article 1(1) of Directive 2011/16/EU on administrative cooperation in tax matters.[54] The Court recognized that the concept of "foreseeable relevance", as used in the Directive, reflects that used in article 26 of the OECD Model, "both because of the similarity between the concepts used and given the reference to OECD conventions in the explanatory memorandum to the proposal for a Council Directive COM(2009) 29 final of 2 February 2009 on administrative cooperation in the field of taxation, which led to the adoption of Directive 2011/16."[55] Thus, the Court attributed relevance to (i) the similarity between the terms used, (ii) the overlapping of the object and purpose of the instruments and (iii) the intention of the EU legislator, as resulting from the preparatory works of the directive (including the Commission's proposals). On such bases, the ECJ interpreted the term "foreseeable relevance" in accordance with the 2012 Commentary on Article 26 of the OECD Model, which was approved by the OECD Council on 17 July 2012, i.e. almost 1 year and a half after the adoption of Directive 2011/16/EU. In this respect, one may argue that the Court considered the 2012 update to the OECD Commentary as merely clarifying the concept of "foreseeable relevance",[56] which was introduced in the OECD Model back in 2005, and therefore that the 2012 update could be regarded as a relevant aid for the purpose of interpreting the provisions of the earlier directive. Similarly, AG Wathelet based his opinion also on the 2014 OECD Commentary, "by which the EU legislature was itself inspired".[57] According to the Advocate General, the

52. Id., para. 66.
53. LU: ECJ, 16 May 2017, Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes*, ECJ Case Law IBFD.
54. Council Directive 2011/16/EU, of 15 February 2011, on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.
55. *Berlioz* (C-682/15), para. 67.
56. New para. 4.4 *OECD Model: Commentary on Article 26* (2017) provides that the "Commentary was expanded to *develop the interpretation* of the standard of 'foreseeable relevance' and the term 'fishing expeditions' through the addition of: *general clarifications* …, language in respect of the identification of the taxpayer under examination or investigation …, language in respect of requests in relation to a group of taxpayers … and *new examples*… [emphasis added]."
57. LU: Opinion of Advocate General Wathelet, 10 Jan. 2017, Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes***,** para. 102, ECJ Case Law IBFD.

Court "has already held that the Member States are entitled to be guided by an OECD Model Treaty".[58]

Based on the above, it seems reasonable that definition of the term "royalties" provided for in article 2(b) of the I&R Directive should be construed as far as possible in the light of the Commentary on Article 12 of the OECD Model. The reference to the OECD Commentary would be particularly helpful when tackling interpretative issues concerning the tax characterization of the payments received, which are not dealt with in the IP law instruments referred to in the previous section, such as the distinction between letting and alienation,[59] the qualification of payments made for exclusivity[60] and exclusive distribution rights,[61] the application of the definition to payments made under roaming and spectrum license agreements,[62] the distinction between royalties and service fees, as well as between know-how contracts and service contracts,[63] and the characterization of payments made in transactions involving the transfer of computer software.[64]

4.3. The subject-to-tax requirement

4.3.1. A "subjective" or an "objective" requirement?

Under article 3(a)(iii) of the I&R Directive, a "Company of a Member State" is any company which is subject to one of the listed taxes without being exempt. The wording employed is substantially the same as that used in the Parent-Subsidiary Directive,[65] except for fact that the latter also excludes companies having "the possibility of an option".

The requirement of being subject to tax without being exempt has been recently scrutinized by the ECJ in *Wereldhave* (Case C-448/15),[66] where

58. Id., n. 46.
59. Para. 8.2 *OECD Model: Commentary on Article 12* (2017).
60. Id., para. 8.5.
61. Id., para. 10.1.
62. Id., paras. 9.2 and 9.3.
63. Id., paras. 10.2 through 11.6.
64. Id., para. 12 et seq.
65. Council Directive 2011/96/EU, of 30 November 2011, on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.
66. BE: ECJ, 8 Mar. 2017, Case C-448/15, *Belgische Staat v. Wereldhave Belgium Comm. VA and Others*, ECJ Case Law IBFD.

Contributors

Paolo Arginelli is Professor of European Union Tax Law and Corporate Tax Law at the Università Cattolica del Sacro Cuore, Italy and an Adjunct Postdoctoral Research Fellow at IBFD. He is Of Counsel with Maisto e Associati in Milan and can be contacted at paolo.arginelli@unicatt.it.

Celeste M. Black is an Associate Professor at the University of Sydney Law School, University of Sydney, Australia.

Alberto Brazzalotto is an Associate with Maisto e Associati in Milan. He can be contacted at a.brazzalotto@maisto.it.

Patricia A. Brown is the Director of the Graduate Program in Taxation and Graduate Program in Taxation of Cross-Border Investment at the University of Miami School of Law. From 1997 through 2006, Ms Brown was the Deputy International Tax Counsel (Treaty Affairs) at the US Treasury Department, where she was responsible for the coordination of the US tax treaty programme.

Sophie Chatel is the Head of the Tax Treaty Unit at the OECD in Paris. Previously, Sophie worked at Canada's Department of Finance and at the Canada Revenue Agency where she played a key role in the international tax policy work of the Canadian government. Earlier in her career she worked as a tax advisor in the private sector. Sophie holds a law degree from the University of Montreal and a master's degree in taxation from the University of Sherbrooke. She is also a member of the Chartered Professional Accountants of Canada.

Robin Damberger holds an MSc degree from the WU (Vienna University of Economics and Business), where he is currently a Research Associate at the Institute for Austrian and International Tax Law.

Robert J. Danon is Professor of Swiss and International Tax Law at the University of Lausanne, where he heads its Tax Policy Center. He is a founding Partner of the tax firm Danon & Salome, Lausanne, Switzerland and Chairman of the Permanent Scientific Committee of the International Fiscal Association (IFA). He holds a PhD in Tax Law from the University of Geneva and an LLM in International Taxation from the University of Leiden.

Mathieu Daudé is an Avocat and Of Counsel with CMS Francis Lefebvre Avocats in Paris.

David N. de Ruig is an Associate with Fenwick & West LLP in Mountain View, California.

Sjoerd Douma is a Professor at the Amsterdam Centre for Tax Law, University of Amsterdam and a Partner with Lubbers, Boer & Douma.

Anne Fairpo holds an MA (Oxon) degree and is a Barrister at Temple Tax Chambers in London.

Elizabeth Gil García is an Assistant Professor in the Tax Law Department of the University of Alicante, Spain. She holds PhD and LLM degrees and can be contacted at elizabeth@ua.es.

Hans-Peter Gradwohl holds an MSc degree from the WU (Vienna University of Economics and Business), where he is currently a Research Associate at the Institute for Austrian and International Tax Law.

Peter Hongler, Dr. iur., is a Certified Tax Expert and Counsel with Walder Wyss Ltd in Zurich. He is a Lecturer at the University of Zurich and Executive Director of the University's LLM Programme in International Tax Law, and an Adjunct Research Fellow at IBFD, Amsterdam.

Michael D. Knobler is an Associate with Fenwick & West LLP in Mountain View, California.

Na Li is a Lecturer at the East China University of Political Science and Law in Shanghai, China. She can be contacted at na.li@wu.ac.at.

Sean P. McElroy is an Associate with Fenwick & West LLP in Mountain View, California.

Adolfo Martín Jiménez is Professor of Tax Law, Jean Monnet Chair, at the University of Cádiz, Spain.

Leonardo F. de Moraes e Castro is a PhD Candidate in International Taxation at the Universiteit Leiden (Netherlands) and in Economic, Financial and Tax Law at University of São Paulo (Brazil). He holds an LLM in Taxation from Georgetown University Law Center (US) – Graduate Tax Scholarship and Dean's Certificate award and an LLM in Economic,

Financial and Tax Law from the University of São Paulo (Brazil). He is a Professor of International Tax Law in Brazil and an Administrative Judge at the São Paulo State Tax Court. A Tax Partner of Costa e Tavares Paes Advogados in Brazil, he can be contacted at lfcastro@ctpadv.com.br.

Larissa B. Neumann is a Partner with Fenwick & West LLP in Mountain View, California.

Jacques Sasseville is Interregional Adviser in the Capacity Development Unit, FfDO/DESA, at the United Nations, New York. His work focusses primarily on assistance programs and training related to the negotiation, application and interpretation of tax treaties. From 1995 to 2016, he was Head of the Tax Treaty Unit at the OECD in Paris, where he also previously worked from 1990 to 1993, when he was Principal Administrator and subsequently Deputy Head of the Fiscal Affairs Division, as well as with the Federal Government of Canada as Counsel in the Tax Counsel Division (Department of Justice) and as Chief, Tax Treaties (Department of Finance). He has lectured and written extensively on international taxation and is a guest lecturer at the international taxation programs of the University of Leiden (Netherlands) and the Vienna University of Economics and Business Administration (Austria).

Joel Scheuerman is an Associé/avocat en litige fiscal (Partner/Lawyer in tax litigation) with BCF Avocats d'Affaires – BCF Business Law in Montréal.

Livia Schlegel holds an MLaw degree from the University of Zurich and is a Legal Trainee with Walder Wyss Ltd in Zurich.

Florian Schmid is a Trainee Lawyer at an international law firm in Stuttgart and holds a Master of Laws (LLM) degree from Queen Mary University London in international tax law.

Julia Ushakova-Stein is an Associate with Fenwick & West LLP in Mountain View, California.

Matthias Valta, Dr. jur., is Professor for Public Law and Tax Law at the Heinrich Heine University Düsseldorf, Germany.

Zoya Zalmai is a Tax Advisor with PwC Amsterdam (EU Direct Tax Group).

Contact

IBFD Head Office
Rietlandpark 301
1019 DW Amsterdam
P.O. Box 20237
1000 HE Amsterdam
The Netherlands

Tel.: +31-20-554 0100 (GMT+1)
Email: info@ibfd.org
Web: www.ibfd.org

IBFD, Your Portal to Cross-Border Tax Expertise