NATIONAL TAX POLICY, THE EC DIRECTIVES, AND HYBRID FINANCE

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INTRODUCTION

The right of legislation in the area of taxation is part of the sovereign right of each member state of the European Union, providing that state with autonomy of decision-making as regards its tax policy measures. This autonomy, however, is restricted by EU law in three ways:

1. Member states are bound by the Four Freedoms[1], and in the determination of those freedoms by the jurisdiction of the ECJ. [2]
2. Member states are subject to secondary EU Law in the form of regulations, directives and decisions.[3]
3. Member states are bound by the code of conduct for business taxation.[4]

The focus of this paper rests on the effect of secondary EU Law, in the form of EC directives, on the autonomy of national tax policy in the member states in the area of direct taxation. All EC directives have to be implemented into national law by the member states[5] in compliance with the fundamental provisions of the EC treaty.[6] Up to now, directives have been a major tool used by the Council in bringing the national law of the member states into line with the requirements of a common domestic market within the European Community.[7] Most of these directives contain very detailed provisions in order to achieve their intended goals.[8] Directives in the area of direct taxation, although few in number, are rather detailed and, thus, effectively constrain the member states' autonomy in implementing tax policy. Nevertheless some leeway remains for tax policy in the member states in the course of the implementation of the directives.

It is the aim of this paper to show that there is indeed room for tax policy in the member states, taking the treatment of hybrid cross-border finance between associated companies as an example. We look at this in the context of the Parent-Subsidiary Directive (90/435/ECC) and the Interest and Royalties Directive (2003/49/EC). These directives have been chosen, because they are interrelated, very detailed, and have been implemented by the majority of the member states.

Both directives aim at safeguarding single taxation in case of cross-border, intra-group finance, in order to remove tax obstacles, which would otherwise interfere with the establishment and effective functioning of the common market. The aim of the Parent-Subsidiary Directive in general is to provide for a zero withholding tax on cross-border profit distributions from an EU subsidiary to its EU parent company, and an exemption or an indirect tax credit in respect of the receipt of such profit distributions. The Interest and Royalties Directive aims at providing for a zero withholding tax on cross border interest (and royalty) payments between an EU subsidiary and its EU parent company.

From the standpoint of the taxation of hybrid financial instruments, these are the most relevant directives, as hybrid financial instruments combine elements of debt and equity, by definition.[9] This means that the member states' classification of the relevant instrument as equity or as debt, respectively, for domestic tax purposes, defines the yield as a dividend or as an interest payment. This, in turn, may or may not fall within the scope of application of the Parent-Subsidiary Directive or of the Interest and Royalties Directive. Since these classification issues have immediate consequences for the total amount of income taxes levied by the member states concerned, we regard them as a good example in showing what can still be done by the member states despite the EU directives. We will, therefore, concentrate on the options remaining for policy makers in the member states in the following analysis, and examine the application of the terms *profit distribution, interest,* and *holding in capital* on hybrid instruments in the course of the implementation of the aforementioned directives.

A more detailed analysis of the directives and the legal reasoning can be found in Eberhartinger and Six (2007).

HYBRID FINANCE – THE PROBLEM

The compartmentalization of company finance into equity and debt does not truly capture the enormous diversity of financial instruments available. A wide variety of instruments incorporate elements of both equity and debt.[10] Usually, these financial instruments cannot be clearly attributed to either equity or debt and are, therefore, referred to as "hybrid" instruments or mezzanine finance. The spectrum of hybrid instruments ranges from corporate shares with features typical of loans (such as certain preference shares) to loans with features usually associated with equity investments (such as participation in profit and loss). Such equity-type loans would include *inter alia* jouissance rights, silent partnerships, participation bonds, convertible bonds, warrant bonds, profit participation loans, and preference shares.

The classification of such instruments as equity or debt may or may not be of particular interest from an investor's point of view, as hybrid instruments may be issued for a variety of non-tax reasons.[11] From a fiscal point of view, however, the classification as equity or debt is crucial for two reasons. First of all, the issuer can treat interest on the latter as tax deductible in most cases, and secondly, for the investor the classification determines whether the payments received from the respective instrument are treated as a dividend or as interest.[12]

This classification for tax purposes is the source of important opportunities and risks in the area of international tax management, especially in international groups, where hybrid instruments can be used efficiently as flexible, tailor-made forms of finance. As long as no anti-avoidance rules, such as "Subject-To-Tax" Clauses are applicable, the qualification of the hybrid instrument as debt in the source state and as equity in the state of residence of the parent company could lead to double non-taxation of the profits. In such cases, the payment would then be deductible as interest in the source state and might be exempt as a dividend in the state of residence of the parent company. The opposite case, where the hybrid instrument is treated as equity in the source state and as debt in the state of residence of the parent company, might lead to double taxation, when the payment is subject to withholding tax in the source state and to income tax in the state of residence of the parent company.

EC law does not affect the member state's decision as to how to classify hybrid instruments for tax purposes, as long as the domestic law treatment does not constitute a forbidden discrimination or restriction under the EC Treaty.[13] EC law, however, may affect the tax treatment of the payments on such instruments *via* the directives.

For associated companies within the European Union using hybrid instruments, the definition of the payments received from, or paid on, hybrid instruments as dividends or interest, respectively, is therefore of particular relevance

- in respect of the differential treatment of dividends and interest payments in most national tax laws and double tax treaties, but also
- in respect of the decision whether or not those payments fall under the scope of the Parent-Subsidiary Directive, or the Interest and Royalties Directive, or neither.

Since the focus of our discussion rests on this second point, we will disregard the existence of double tax treaties between member states for the purpose of this article, in order not to overcomplicate the analysis unduly. This limitation is in line with our aim to show options for tax policy despite these directives, since these are not influenced by double tax treaties. It is, therefore, possible to analyze separately the treatment of hybrid finance in the directives and in double tax treaties from a tax policy perspective.[14]

Furthermore, we chose to limit the analysis on the treatment of hybrid finance in the directives to cases where their use does not constitute fraud and abuse in domestic tax law. Therefore, we will not to go into detail on the implications of the general fraud and abuse provisions in Art 1 (2) of the Parent-Subsidiary Directive and Art 5 of the Interest and Royalties Directive for tax policy options in the context of hybrid finance.

HYBRID FINANCE IN THE EU - DIRECTIVES

Hybrid Finance under the Terms of the Parent-Subsidiary Directive

The Parent-Subsidiary Directive (in general) applies to profit distributions to a parent company in one member state by its (associated) subsidiary in another member state. In the context of hybrid finance two questions arise:

> Do payments on hybrid instruments qualify as distributed profits in terms of Art 1 of the Parent-Subsidiary Directive at all, and if so, which instruments would have to be included?
>
> Does participation via hybrid instruments attribute to the holding level required by the Parent-Subsidiary Directive in Art 3 at all and if so, which instruments would have to be included?

In answering these questions one will find out about the discretionary leeway of member states when implementing the directive.

To answer these questions, it is necessary to have a look at the aims of the Parent-Subsidiary Directive, which is essentially the elimination of double taxation in the relationships between parent companies and subsidiaries in context with hybrid finance.

Should the state of residence of the subsidiary (source state) classify a hybrid instrument as equity and, thus, deny a (tax) deduction on the payments on the instrument and levy a withholding tax, double taxation would be the result whenever the state of residence of the parent company (residence state) qualifies the hybrid instrument as equity as well. In this case, the payments would be subject to corporate tax in both countries and to withholding tax in the source state. Since the purpose of the directive is precisely to eliminate such cases of double taxation,[15] the directive has to be applied in these situations.[16] This means that payments on hybrid instruments, which are deemed returns on equity investment and, therefore, as dividends by the source state, would always have to be subject to the benefits of the Parent-Subsidiary Directive. Member states could, therefore, determine which hybrid instruments would benefit from the Parent-Subsidiary Directive *via* their treatment in national tax law.

In this regard, it is interesting to have a look at the origins of the Interest and Royalties Directive:[17]

The last section of Art 4 of the *Proposal* for the Interest and Royalties Directive,[18] which contains an option for member states to exempt certain payments from the benefits of the directive, indicates that this interpretation corresponds to an (at least originally) intended interrelation between the two directives. It reads as follows:

> *Interest that has been re-characterized as a distribution of profits shall accordingly be subject instead to the provisions of Council Directive 90/435/EEC (The Parent-Subsidiary Directive), where it is paid between companies to which the present Directive applies.*

The commentary on the Proposal for the Interest and Royalties Directive stated that such a switch in the applicable directive could arise, if for example the re-characterization as a distribution of profits follows from a tax treaty between two member states or is based on the domestic tax law of the source state.[19]

The proposed text seems to refer primarily to thin capitalization and disguised dividends. As Helminen (2004)[20] correctly states, one could deduce from these text passages that the Commission was of the opinion that income from hybrid instruments should usually qualify as a profit distribution under the Parent-Subsidiary Directive, if treated as a dividend in the source state or if treated as a dividend for tax treaty purposes. The logical consequence of this opinion is that payments on hybrid instruments between companies which fulfil the requirements of both directives[21] are either subject to the Parent-Subsidiary Directive or to the Interest and Royalties Directive, depending on the treatment in the tax law of the source state or in the tax treaties between those countries.[22]

Interestingly though, the reference to the Parent-Subsidiary Directive is not included in the final legal version of the Interest and Royalties Directive. This raises the question whether, in the opinion of the Commission, payments on hybrid instruments that have been excluded from the benefits of the Interest and Royalties Directive on the basis of Art 4(a) as profit distributions, necessarily qualify as profit distributions in the terms of the Parent-Subsidiary Directive; otherwise, they need not fall within the scope of either of these directives.

From our point of view, it seems reasonable to assume that the benefits of the Parent-Subsidiary Directive should always be applicable to payments on hybrid instruments in the national implementation of a member state, if this member state treats such payments as dividends under national tax law. In any case the member state would be hard put to argue why these payments, representing dividends in national tax law, should be exempt from the benefits of the directive.[23] Consequently profit distributions on hybrid instruments, which are qualified as interest in the member state, should not benefit from the Parent-Subsidiary Directive.

Assuming that payments on such hybrid instruments should be treated as profits under the terms of the Parent-Subsidiary Directive, the question arises whether these hybrid instruments should then be included in the determination of the holding level required for the status of a parent company in the terms of the directive. The directive itself contains no definition of the term holding in capital, which gives member states the freedom to define the term in the national implementation of the directive and, therefore, the option to include or exclude certain hybrid instruments. This option however can only go so far, because the payments on the relevant hybrid instrument are treated as profit distributions under the terms of the directive. Therefore, the problem can be narrowed to the question whether hybrid instruments, whose payments qualify as profit distributions under the directive, have to be included in the determination of the minimum holding requirement for the implementation of the directive, or whether the member states enjoy some discretion in the matter. Helminen (1999, p. 267) reasonably argues that, if hybrid debt is treated as equity, it would also have to be taken into account in calculating the fulfilment of the holding requirement between two countries for the purpose of the directive.

If the source state must grant the benefits of the Parent-Subsidiary in cases where hybrid instruments qualify as equity in national tax law, the question arises whether the state of residence of the parent company has to grant these benefits symmetrically, thereby accepting the classification of the source state. If it does not, but treats the hybrid instrument as debt instead, the profits distributed by the subsidiary would be subject to income tax in the state of the recipient. In this case, it would be possible for the residence state to levy income tax on the profits distributed by the subsidiary, even though the source state applies the Parent-Subsidiary Directive. It clearly cannot be required of the parent state to accept the qualification of the source state in any case, but Helminen (1999, p. 269) seems to be correct in arguing that it should at least do so in the following two cases:

1. If, in the opposite situation, the recipient's state of residence itself would have qualified the hybrid instrument as equity.
2. If the recipient's state of residence has to accept a treatment as equity for tax treaty purposes.

Hybrid Finance in the Scope of the Interest and Royalties Directive

The Interest and Royalties Directive contains on the one hand a very wide definition of the term interest (Art 2: … *income from debt-claims of every kind, … whether or not carrying a right to participate in the debtor's profits*), and on the other allows member states to deny the application of the directive in the four cases listed in Art 4 of the directive, thus enabling them to narrow the definition of interest for the purpose of the directive considerably. From the perspective of hybrid finance these four specific cases are of special relevance, since they mainly apply to hybrid instruments. They shall therefore be analyzed separately:

Art 4(a) allows the source state to exempt payments that are treated as a distribution of profits or as a repayment of capital under its domestic law from the benefits of the directive. From the perspective of hybrid finance (e.g., jouissance rights, which are treated as equity in the source state), this provision is especially interesting since the authors' share the view that these payments, if the option is executed and provided the other requirements are met, should fall under the scope of application of the Parent-Subsidiary Directive.[24] As mentioned above, this connection was explicitly stated in the Proposal for the Interest and Royalties Directive in 1998[25] and it is not apparent why this statement was not included in the final version of the directive.

Presuming that any payments that qualify as profit distributions under the tax law of the source state fall under the scope of the Parent-Subsidiary Directive, the question arises as to what happens if the source state does not execute the option in Art 4(a) of the Interest and Royalties Directive and if these payments fall under the scope of both directives. Since both directives prescribe an exemption from any withholding tax on the payments, the effect on the tax burden would be the same, but it nevertheless seems interesting that under these circumstances the same payment might qualify as interest and as profit distribution.

Apart from these considerations, it seems to be the case that, although the provision of Art 4(a) (in the context of the sovereignty to qualify a given instrument as equity or debt) allows the member states to deprive certain hybrid instruments from the benefits of the Interest and Royalties Directive, the effect on tax revenue would be nil, because

these instruments would subsequently fall under the application of the Parent-Subsidiary Directive. In our opinion it can be assumed that this was indeed the intention of the Commission, as the requirements of a common single market are then fulfilled.[26] The question remains why Art 4(a) of the directive gives the member states an option instead of generally exempting such payments from the scope of the directive.

Art 4 (b) allows the exemption of debt claims which carry a right to participate in the debtor's profits.[27] These include participation bonds and profit participation loans as well as forms of jouissance rights and silent partnerships, which are qualified as debt. The source state, therefore, has the option to exclude jouissance rights and silent partnerships from the scope of application of the Interest and Royalties Directive as well as the Parent-Subsidiary Directive by first qualifying them as debt on a national level, thus exempting them from the benefits of the Parent-Subsidiary Directive and then using the option in Art 4 (b) to exempt them from the benefits of the Interest and Royalties Directive.

Art 4 (c) refers to convertible debt instruments, which "entitle the creditor to exchange his right to interest for a right to participate in the debtor's profits." Literally interpreted this wording does not include hybrid instruments, such as convertible bonds and warrant bonds that grant the right of conversion into share capital of the creditor. The question is, if Art 4 (c) is indeed meant to include only interest bearing loans with an option to exchange the entitlement to interest against the entitlement to profit participation, or if the term "a right to participate in the debtor's profits" is used as an equivalent for the term "a right to participate in the debtor's equity" that would include hybrid instruments like convertible bonds or warrant bonds.[28]

Art 4 (d) finally allows the exemption of debt claims that from an economic point of view serve as equity, because they contain no provision of repayment of the principal amount or a provision where the repayment is due more than 50 years after the date of issue.

Art 4 (b), (c), and (d) all apply to cases where the treatment under the domestic tax law of the source state corresponds to the general definition of interest in Art 2 (1) of the directive. This means that member states can decide to exempt payments on certain (hybrid) financial instruments from the benefits of the directive, while still qualifying the same payments as interest in domestic tax law. The reason behind these provisions is hard to see, since they seem to foil the general aim of the Interest and Royalties Directive, which is to eliminate double taxation on interest payments.

Distaso and Russo (2004, p. 150) argue that the intention behind these provisions might be to give member states a tool to eliminate cases of double non-taxation, by excluding instruments that create a tax deduction in the source state, while giving rise to an exemption from taxation of the corresponding income received, because the residence state of the recipient treats the income as profit distributions. If this were indeed the case, the provisions in Art 4 seem to be a rather inadequate instrument since the directive affects not only payments between one pair of member states, but all payments within its scope. Apart from that, Art 4 includes no reference to the treatment of the payments in the residence state of the recipient. It is therefore possible for the source state to exempt payments from the scope of the directive that are treated symmetrically as interest in both states, thereby creating double taxation instead of avoiding double non-taxation, specifically.

The bottom line, nevertheless, is that the directive leaves room for national tax policy measures in the member states to exempt hybrid instruments from the scope of application of the directive altogether, without having to include them in the scope of the Parent Subsidiary Directive.

CONCLUSION

EC Law restricts fiscal sovereignty and, therefore, the possibilities for tax policy on the part of the member states. The goal is to ensure the establishment and effective functioning of the common market by approximating the conditions within the European Union to those of a domestic market.

The directive is a major tool of the Council in bringing the national law of the member states into line with the conditions of such a domestic market. It stands to reason to assume that the more detailed a certain directive is, the less discretionary freedom remains for tax policy in the member states.

This assumption has been tested for the Parent-Subsidiary Directive and the Interest and Royalties Directive as applied to the tax treatment of hybrid finance. These directives were chosen because they are interrelated, very detailed, and have been implemented by most member states. Furthermore, they are of particular importance for national tax policy in direct taxation as they influence attempts to encourage equity finance, and collide with the ambition to safeguard national tax revenue. It is, therefore, of great interest for the member states to know what can still be done in terms of tax policy in spite of these directives.

The leeway for tax policy in the context of the Parent-Subsidiary Directive seems rather limited. Assuming that payments on hybrid instruments are treated as returns on equity by the source state, and therefore as dividends in terms of the directive, such payments must always be subject to the benefits of the Parent-Subsidiary Directive. The only way for member states to circumvent the directive then is *via* a general, national classification of a certain hybrid instrument as debt. But then, however, the hybrid instrument would come under the terms of the Interest and Royalties Directive. This means that no withholding tax could be levied on the payments to those hybrid instruments as long as the source state did not execute any of the options in Art 4 of the Interest and Royalties Directive. For the parent state on the other hand, a classification as debt in terms of the Interest and Royalties Directive, instead of equity in terms of the Parent-Subsidiary Directive, would mean that it was still possible to levy corporation tax on the payments received.

The Interest and Royalties Directive provides considerably more leeway for tax policy. Art 4 of the directive allows member states to deny the application of the directive in four specific cases, which encompass several forms of hybrid finance. This enables the member state to levy withholding tax on certain hybrid instruments despite the directive. While this seems clear cut in the case of Art 4 (b-c), there is some doubt in the case of Art 4 (a) where payments, which the source state chooses to exempt because they are treated as a distribution of profits or as a repayment of capital under its domestic law, should subsequently fall under the scope of application of the Parent-Subsidiary Directive. This would be the case in the circumstances mentioned previously (i.e., where payments on hybrid instruments that are treated as equity in the source state have always to come under the sway of the Parent-Subsidiary Directive). The source state would then not be allowed to levy withholding taxes, irrespective of the national qualification of the hybrid instrument, provided Art 4 (b-c) is not applicable. If, on the other hand, payments on such instruments did not qualify as dividends in terms of the Parent-Subsidiary Directive, Art 4 (a) as well as Art 4 (b-c) provide the source state with an option of levying withholding tax in certain cases of hybrid finance in spite of the directives.

Should the aim of its tax policy in a member state be in opposition to the directives (i.e., if national tax policy were aimed at safeguarding national tax revenue in the area of hybrid finance) -- rather than simplifying its tax procedures for domestic companies or to create incentives for foreign investment -- it seems that a member state to a certain extent could adhere to

- its right to levy withholding tax (as a source state) and
- its right to levy corporation tax (as a parent state),

in spite of the directives. This could be achieved by treating, or classifying, hybrid financial instruments, in general, as debt under national tax law.

Whether this would be a good strategy for Member States to pursue is another matter, but it certainly shows, that the main objective of the two directives – the elimination of double taxation in the area of dividend and interest payments – has not been achieved to a hundred percent so far. Thus it seems that the use of directives, even very detailed ones, as a tool for harmonisation in the area of direct taxation limits options for national tax policy considerably, but does not eliminate them altogether.

Notes

[1] The free movement of goods (Art 23 et seq., ECT), the free movement of capital (Art 56 et seq., ECT), the free movement of services (Art 49 et seq., ECT), and the freedom of establishment (Art 39 et seq., ECT) within the internal market of the EU.

[2] Art. 228, ECT; Cf. Craig and De Búrca (2002, p. 402 et seq.); Callies and Ruffert (2002, p. 1252 et seq.).

[3] Art. 249, ECT; Cf. Craig and De Búrca (2002, p. 112 et seq.); Callies and Ruffert (2002, p. 2171 et seq.).

[4] Resolution of the Council and the Representatives of the Governments of the member states, meeting within

the Council of 1 December 1997 on a code of conduct for business taxation, OJ C 002 , 6 January 1998.

[5] Although directives, as opposed to regulations, do not have to be addressed to all member states, most are addressed to all of them. Cf. Craig and De Búrca (2002, p. 114); Prechal (2005, p. 55) for further evidence.

[6] See e.g. ECJ, 24 September 2003, Case C-168/01, Bosal Holding BV v Staatssecretaris van Financiën, in connection with the implementation of the Parent Subsidiary Directive; Cf. with further references Zanotti (2004, p. 502).

[7] Art. 94 of the EC Treaty gives the Commission the right to propose to the Council directives for the approximation of such laws, regulations or administrative provisions of the member states as directly affect the establishment or functioning of the common market. Cf. Callies and Ruffert (2002, p. 1252 et seq.); Cf. Craig and De Búrca (2003, p. 202, 1170, 1184); and Bieber, Epiney, and Haag (2004, pp. 193 & 305 et seq.)

[8] Cf. Prechal (2005, pp. 14 & 74); Bieber, Epiney, and Haag (2004, p. 193 et seq.)

[9] Cf. Larking (2005, p. 212); Duncan (2000, p. 22 et seq.); and Eberhartinger (2005, p. 121.)

[10] Cf. the list of features of hybrid instruments that can blur the differentiation between equity and debt in Duncan (2000, p. 24 et seq.) and the various hybrid instruments analyzed in the National Reports in the same volume.

[11] For examples for such reasons see Duncan (2000, p. 23).

[12] Eberhartinger (2005, p. 122) with further references; Duncan (2000, p. 27); Helminen (2004, p. 56); Wittendorff, Jens/Banner-Voigt, Erik, Taxation of Hybrid Instruments, *IBFD DFI* 2000, p. 3.

[13] E.g. Helminen (1999, p. 266); Cf. the following examples of ECJ case-law on discrimination cases in connection with dividend or interest payments: ECJ, 7 September 2004, Case C-319/02, Petri Manninen; ECJ, 15 July 2004, Case C-315/02, Anneliese Lenz v Finanzlandesdirektion für Tirol, ECJ, 4 March 2004, Case C-334/02, Commission of the European Communities v. French Republic; ECJ, 24 September 2003, Case C-168/01, Bosal Holding BV v Staatssecretaris van Financiën, ECJ, 12 December 2002, Case C-321/00, Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt.

[14] For a comprehensive survey on the treatment of hybrid instruments in double tax treaties, see Lang (1991).

[15] Cf. the preamble to 2003/123/EC and the preamble to 90/435/EEC; Helminen (1999, p. 266).

[16] See Terra and Wattel (2005, p. 514 et seq.); Helminen (2004, p. 60); and Helminen (1999, p. 266).

[17] Cf. the procedure files of the European Parliament on the Parent-Subsidiary Directive (CNS/1993/1205 and CNS/2003/0179).

[18] COM (1998) 67 final, OJ C 123/9. Cf. Helminen (2004, p. 60).

[19] Commentary on Art. 4 of the Proposal for the Interest and Royalties Directive, COM (1998) 67 final. p. 8.

[20] Helminen (2004, p. 60).

[21] For example the minimum requirements for the holding in capital under both directives would have to be fulfilled, which would be the case anyway, if the parent company held more than 25 percent in the capital of the subsidiary.

[22] This opinion seems to be confirmed by Para. 19 of the Commentary on Art. 11 of the OECD Model Tax Convention 2005 which in the context of thin capitalization cases states that, “it should be noted that the term ‘interest’ as used in Art. 11 does not include items of income which are dealt with under Art. 10.”

[23] Cf. Helminen (2004, p. 60).

[24] Cf. Distaso and Russo (2004, p. 150); Helminen (2004, p. 60).

[25] COM (1998) 67 final, OJ C123/9.

[26] Cf. Para. (1) of the Preamble to the Interest and Royalties Directive and Para. (1) of the Preamble to the Parent-Subsidiary Directive.

[27] Since Art. 4 (b) refers only to participation in the debtor’s profits a literal interpretation would mean that interest payments connected to another entity, e.g. a subsidiary of the debtor, would not be included in the option. Cf. Distaso and Russo (2004, p. 150).

[28] Distaso and Russo (2004, p. 150) plead for a literal interpretation of Art. 4 (b) on the grounds that the provisions in Art. 4 are meant to be exceptions from the general rule of application in Art. 2 (1) and that a broader interpretation of the exceptions in Art. 4 therefore would run the risk of frustrating the Directive.

References

Bieber, Roland, Astrid Epiney, and Marcel Haag. *Die Europäische Union*. 6th ed. Baden-Baden, Germany: Auflage, 2004.

Callies, Christian and Matthias Ruffert, eds. *Kommentar zu EU-Vertrag und EG-Vertrag*, 2nd. ed. Amsterdam: Wolters Kluwer (Luchterhand), 2002.

Craig, Paul and Grainne De Búrca. *EU Law: Text, Cases, and Materials*. 3rd ed. Oxford: Oxford University Press, 2002.

Distaso, Marcello and Raffaele Russo. The EC Interest and Royalties Directive – A Comment. *European Taxation* 44 (2004): 143-154.

Duncan, James. Tax Treatment of Hybrid Financial Instruments in Cross-Border Transactions. General Report. *Cahiers de droit fiscal international,* Volume 85a. The Hague: Kluwer Law International.

Eberhartinger, Eva. Hybride Finanzierungsinstrumente. In Matthias Bischof and Eva Eberhartinger, eds. *Hybride Finanzierungsinstrumente*. Vienna: Linde, 2005.

Eberhartinger, Eva and Martin Six. National Tax Policy, the Directives and Hybrid Finance: Options for Tax Policy in the Context of the Treatment of Hybrid Financial Instruments in the Parent-Subsidiary Directive and the Interest and Royalties Directive. Vienna: Vienna University of Economics and Business Administration. Discussion Paper 16. http://ww2.wu-wien.ac.at/taxlaw/sfb/Working_Papers/workingpaper16.pdf.

Helminen, Marjaana.

The Dividend Concept in International Tax Law: Dividend Payments Between Corporate Entities. The Hague: Springer, 1999.

Classification of Cross-Border Payments on Hybrid Instruments. *Bulletin for International Fiscal Documentation* 58 (2004): 56-61.

Lang, Michael. *Hybride Finanzierungen im Internationalen Steuerrecht* Vienna: Orac, 1991.

Larking, Barry. International Tax Glossary. 5th ed. Amsterdam: International Bureau of Fiscal Documentation, 2005.

Prechal, Sacha. *Directives in EC Law*. 3rd ed. Oxford: Oxford University Press, 2005.

Terra, Ben J. M. and Peter J. Wattel. *European Tax Law*. 4th edition. The Hague: Wolters Kluwer, 2005.

Zanotti, Emiliano. Taxation of Inter-company Dividends in the Presence of a PE: The Impact of the EC Fundamental Freedoms (Part One). *European Taxation* 44 (November 2004): 493-505.