



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10.2.2004  
COM(2004) 75 final

2004/0027 (CNS)

Proposal for a

**COUNCIL DECISION**

**on the conclusion of the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments and the accompanying Memorandum of Understanding**

(presented by the Commission)

## **EXPLANATORY MEMORANDUM**

By its Decision of 16 October 2001, the Council authorised the Commission to negotiate with Switzerland and five other third countries (United States of America, Andorra, Liechtenstein, Monaco and San Marino) appropriate agreements for securing the adoption by these countries of measures equivalent to those to be applied within the Community to ensure effective taxation of savings income in the form of interest payments. The Commission was to conduct these negotiations in close conjunction with the Presidency of the Council and in close and regular consultation with the High-Level Working Party set up by Coreper Decision of 13 June 2001<sup>1</sup> and appointed by the Council as a special committee to assist the Commission in that task.

Following the Decision of 16 October 2001, the Commission wrote to the above third countries asking for negotiations to commence. However, it was only after the ECOFIN Council's approval of a text of the draft Directive on 13 December 2001, that these negotiations could really begin. Despite having adopted its negotiating mandate on taxation of savings income on 30 January 2002, Switzerland initially refused to commence negotiations on this issue until the Council had adopted a series of negotiating mandates in other fields. Following the adoption by the Council of those other mandates on 17 June 2002, formal negotiations with Switzerland on taxation of savings income commenced on 18 June 2002. A large number of meetings at both political and technical level have been held since. In accordance with the Council Decision of 16 October 2001, the Commission conducted these negotiations in close conjunction with the successive Presidencies of the Council. The Commission made regular oral progress reports of these negotiations to the Council and the Parliament and presented a Communication on the negotiations with third countries on taxation of savings income to the ECOFIN Council of 3 December 2002<sup>2</sup>.

At the ECOFIN Council's request, negotiations with Switzerland on taxation of savings income continued in 2003. Between January and May 2003 the Commission presented several working drafts of the Agreement to the Council which were examined by the High-Level Working Party. In the course of negotiations, the Swiss side requested the extension to Switzerland of the regimes provided for in Council Directive 90/435/EEC of 23 July 1990<sup>3</sup> on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States and in 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<sup>4</sup>. The Commission presented the Swiss request to the Council.

On 3 June 2003, the Council stated that the draft Agreement with Switzerland, as submitted by the Commission on 28 May 2003 constituted the final offer for an Agreement between the EU and this country. The draft approved by Council includes the above Swiss request (Article 15 of the draft Agreement). However, in respect of Spain, the draft provides that Article 15 will only apply from the entry into force of a bilateral agreement between Spain and Switzerland on the exchange of information on request in cases of tax fraud or the like with respect to items of income not subject to this Agreement but covered by a bilateral convention or agreement between the two countries.

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<sup>1</sup> OJ C 183, 29.6.2001, p.1

<sup>2</sup> SEC (2002) 1287 final, 27.11.2002

<sup>3</sup> OJ L 225, 20.08.1990, p.6

<sup>4</sup> OJ L 157, 26.06.2003, p.49

In approving the draft Agreement, the Council took the view that the Community does not have exclusive competence to conclude an agreement with Switzerland on the tax treatment of dividends and of interest and royalty payments as mentioned in article 15 of the draft Agreement. Delegations agreed nevertheless, by way of exception and without creating a precedent, that Member States will not exercise their competence in this particular case. The Council and the Commission also declared that the exercise of competence by the Community in respect of article 15 of the Agreement does not affect existing bilateral agreements with other third countries and Member States maintain their competence to conclude bilateral agreements with other third countries on the tax treatment of dividends and of interest and royalty payments between companies.

The Agreement is now being presented to the Council to be concluded. The Agreement is accompanied by an ancillary Memorandum of Understanding (hereinafter MoU) between the Swiss Confederation, the European Community and its Member States, which was also approved in draft form. This MoU *inter alia* commits Switzerland and Member States to enter into bilateral negotiations with a view to including in their respective double taxation conventions provisions on exchange of information on request for cases falling within the concept of "tax fraud or the like" with respect to items of income not subject to the Agreement but covered by their respective conventions, and with a view to defining individual categories of cases falling under "the like" in accordance with the procedure of taxation applied by those countries. In accordance with the ECOFIN Council conclusions of 21 January 2003, the MoU also confirms that, during the transitional period provided for in Council Directive 2003/48/EC of 3 June 2003<sup>5</sup>, the European Community will enter into discussions with other important financial centres with a view to promoting the adoption by those jurisdictions of measures equivalent to those to be applied by the Community. Finally, the MoU provides that the agreed measures will be implemented in good faith and that parties will not act unilaterally to undermine this arrangement without due cause. Should any significant difference between the coverage of Council Directive 2003/48/EC and that of the Agreement be discovered, the Contracting Parties will immediately enter into consultations with a view to ensuring that the equivalent nature of the measures provided for in the Agreement is maintained.

The Commission considers that the text is in accordance with the negotiating directives adopted by the Council on 16 October 2001.

In order to enable the Agreement providing for measures equivalent to those laid down in the Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, and the accompanying Memorandum of Understanding, to be concluded, the Commission proposes that the Council approve the attached proposal for a decision on the conclusion of the Agreement. Article 300 (2) of the Treaty establishing the European Community stipulates that the Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules. As the internal rules in the field covered by this Agreement have been adopted on the basis of Article 94 of the Treaty, the Commission considers that the Council should act unanimously to approve the proposal for a decision. According to the ECOFIN Council conclusions of 21 January 2003, the Council agrees that the Agreement with the Swiss Confederation should be entered into on the basis of unanimity.

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<sup>5</sup> OJ L 157, 26.06.2003, p.38

Proposal for a

## **COUNCIL DECISION**

**on the conclusion of the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments and the accompanying Memorandum of Understanding**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 94 in conjunction with the first subparagraph of Article 300 (2) thereof,

Having regard to the proposal from the Commission<sup>6</sup>,

Having regard to the opinion of the European Parliament<sup>7</sup>,

Whereas:

- (1) On 16 October 2001, the Council authorised the Commission to negotiate with the Swiss Confederation an appropriate agreement for securing the adoption by the Swiss Confederation of measures equivalent to those to be applied within the Community to ensure effective taxation of savings income in the form of interest payments.
- (2) The application of the provisions of Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments depends on the application by the Swiss Confederation of measures equivalent to those contained in this Directive, in accordance with an Agreement entered into by the Swiss Confederation with the European Community.
- (3) In recognition of its co-operation on taxation of savings income, the Community has decided to grant the request of the Swiss Confederation for the inclusion in the Agreement of measures equivalent to the regimes provided for in Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States and in 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.

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<sup>6</sup> OJ C ..., .....2003, p...

<sup>7</sup> OJ C ..., .....2003, p...

- (4) It is necessary to approve the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, and the accompanying Memorandum of Understanding.

HAS DECIDED AS FOLLOWS:

*Article 1*

The Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments and the accompanying Memorandum of Understanding are hereby approved on behalf of the European Community.

The text of the Agreement and the accompanying Memorandum of Understanding is attached to this decision.

*Article 2*

The President of the Council is hereby authorised to designate the persons empowered to sign the Agreement and the accompanying Memorandum of Understanding in order to express the consent of the European Community.

*Article 3*

The President of the Council shall effect the notification provided for in Article 17 (2) of the Agreement on behalf of the European Community<sup>8</sup>.

*Article 4*

This Decision shall be published in the *Official Journal of the European Union*.

Done at Brussels,

*For the Council*  
*The President*

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<sup>8</sup> The date of entry into force of the Agreement will be published in the Official Journal of the European Union by the General Secretariat of the Council.

## **ANNEX**

Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments

Agreement  
between  
the European Community  
and  
the Swiss Confederation

providing for measures equivalent to those laid down in Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments<sup>9</sup>

The European Community, hereinafter referred to as "Community",  
and  
the Swiss Confederation, hereinafter referred to as "Switzerland",  
or as a "Contracting Party" or the "Contracting Parties" as the context may require,  
have agreed to conclude the following Agreement:

*Article 1*

*Retention by Swiss Paying Agents*

1. Interest payments which are made to beneficial owners within the meaning of Article 4 who are residents of a Member State of the European Union, hereinafter referred to as "Member States" or "Member State" as the context may be, by a paying agent established on the territory of Switzerland, shall, subject to paragraph 2 and Article 2 below, be subject to a retention from the amount of the interest payment. The rate of retention shall be 15% during the first three years from the date of application of this Agreement, 20% for the subsequent three years and 35% thereafter.
2. Interest payments made on debt-claims issued by debtors who are residents of Switzerland or pertaining to permanent establishments of non-residents located in Switzerland shall be excluded from the retention. For the purposes of this Agreement, the term "permanent establishment" shall have the meaning that it has under the relevant double taxation convention between Switzerland and the state of residence of the debtor. In the absence of such a convention, the term "permanent establishment" means a fixed place of business through which the business of a debtor is wholly or partly carried on.
3. However, in case Switzerland reduces the rate of its anticipatory tax on Swiss source interest payments to individuals resident in Member States below 35%, it shall levy a retention on such interest payments. The rate of such retention shall be the difference

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<sup>9</sup> Hereafter referred to as the Directive

between the rate of retention provided for in paragraph 1 and the new rate of anticipatory tax. However, it shall not exceed the rate provided for in paragraph 1.

If Switzerland reduces the scope of application of its anticipatory tax law on interest payments to individuals resident in Member States, any interest payments thus excluded from anticipatory tax shall become subject to retention at the rates provided for in paragraph 1

4. Paragraph 2 does not apply to interest paid by Swiss investment funds which at the time of the entry into force of this Agreement or at a later date are exempted from Swiss anticipatory tax on their payments to individuals who are residents of a Member State.
5. Switzerland shall take the necessary measures to ensure that the tasks required for the implementation of this Agreement are carried out by paying agents established within the territory of Switzerland and specifically provide for provisions on procedures and penalties.

## *Article 2*

### *Voluntary disclosure*

1. Switzerland shall provide for a procedure which allows the beneficial owner as defined in Article 4 to avoid the retention specified in Article 1 by expressly authorising his paying agent in Switzerland to report the interest payments to the competent authority of that country. Such authorisation shall cover all interest payments made to the beneficial owner by that paying agent.
2. The minimum amount of information to be reported by the paying agent in case of express authorisation by the beneficial owner shall consist of:
  - a) the identity and residence of the beneficial owner established in accordance with Article 5 of this Agreement;
  - b) the name and address of the paying agent;
  - c) the account number of the beneficial owner or, where there is none, identification of the debt-claim giving rise to the interest, and
  - d) the amount of the interest payment calculated in accordance with Article 3 of this Agreement.
3. The competent authority of Switzerland shall communicate the information referred to in Paragraph 2 to the competent authority of the Member State of residence of the beneficial owner. Such communications shall be automatic and shall take place at least once a year, within 6 months following the end of the tax year in Switzerland, for all interest payments made during that year.
4. Where the beneficial owner opts for this voluntary disclosure procedure or otherwise declares his interest income obtained from a Swiss paying agent to the tax authorities in his Member State of residence, the interest income concerned shall be subject to

taxation in that Member State at the same rates as those applied to similar income arising in that State.

### *Article 3*

#### *Basis of assessment for retention*

1. The paying agent shall withhold the retention in accordance with Article 1 paragraph 1 of this Agreement as follows:
  - a) in the case of an interest payment within the meaning of Article 7 subparagraph 1 (a) of this Agreement: on the gross amount of interest paid or credited;
  - b) in the case of an interest payment within the meaning of Article 7 subparagraph 1 (b) or (d) of this Agreement: on the amount of interest or revenue referred to in those subparagraphs;
  - c) in the case of an interest payment within the meaning of Article 7 subparagraph 1 (c) of this Agreement: on the amount of interest referred to in that subparagraph.
2. For the purposes of subparagraphs 1 (a), (b) and (c), the retention shall be deducted on a pro rata basis for the period during which the beneficial owner holds a debt-claim. If the paying agent is unable to determine the period on the basis of the information made available to him, the paying agent shall consider the beneficial owner to have been in possession of the debt-claim for the entire period of its existence, unless the latter provides evidence of the date of acquisition.
3. Taxes and retentions other than the retention provided for in this agreement on the same payment of interest shall be credited against the amount of the retention calculated in accordance with this article.
4. Paragraphs 1, 2 and 3 are without prejudice to paragraph 2 of Article 1.

### *Article 4*

#### *Definition of beneficial owner*

1. For the purposes of this Agreement “beneficial owner“ shall mean any individual who receives an interest payment or any individual for whom an interest payment is secured, unless such individual can provide evidence that the interest payment was not received or secured for his or her own benefit. An individual is not deemed to be the beneficial owner when he or she:
  - a) acts as a paying agent within the meaning of Article 6 of this Agreement or
  - b) acts on behalf of a legal person, an investment fund or a comparable or equivalent body for common investments in securities or

- c) acts on behalf of another individual who is the beneficial owner and who discloses to the paying agent his or her identity and state of residence.
2. Where a paying agent has information suggesting that the individual who receives an interest payment or for whom an interest payment is secured may not be the beneficial owner, it shall take reasonable steps to establish the identity of the beneficial owner. If the paying agent is unable to identify the beneficial owner, it shall treat the individual in question as the beneficial owner.

## *Article 5*

### *Identity and residence of beneficial owners*

In order to establish the identity and residence of the beneficial owner as defined in Article 4, the paying agent shall keep a record of the name, first name, address and residence details in accordance with the Swiss legal provisions against money laundering. For contractual relations entered into, or transactions carried out in the absence of contractual relations, on or after 1 January 2004, for individuals presenting a passport or official identity card issued by a Member State who declare themselves to be resident in a country other than a Member State or Switzerland, residence shall be established by means of a tax residence certificate issued by the competent authority of the country in which the individual claims to be resident. Failing the presentation of such a certificate, the Member State which issued the passport or other official identity document shall be considered the country of residence..

## *Article 6*

### *Definition of paying agent*

For the purposes of this Agreement, “paying agent” in Switzerland shall mean banks under Swiss banking law, securities dealers under the Federal Law on Stock Exchanges and Security Trading, natural and legal persons resident or established in Switzerland, partnerships and permanent establishments of foreign companies, which even occasionally, accept, hold, invest or transfer assets of third parties or merely pay or secure interest in the course of their business.

## *Article 7*

### *Definition of Interest Payment*

1. For the purposes of this Agreement “interest payment” shall mean:
- a) interest paid, or credited to an account, relating to debt-claims of every kind including interest paid on fiduciary deposits by Swiss paying agents for the benefit of beneficial owners as defined in Article 4, 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, but excluding interest from loans between private individuals not acting in the course of their business. Penalty charges for late payment shall not be regarded as interest payments;

- b) interest accrued or capitalised at the sale, refund or redemption of the debt-claims referred to in (a);
  - c) income deriving from interest payments either directly or through an entity referred to in Article 4, paragraph 2 of the Directive distributed by
    - (i) undertakings for collective investment domiciled in a Member State,
    - (ii) an entity domiciled in a Member State, which exercises the option under Article 4, paragraph 3 of the Directive and informs the paying agent of this fact,
    - (iii) undertakings for collective investment established outside the territory of the Contracting Parties,
    - (iv) Swiss investment funds which at the time of the entry into force of this Agreement or at a later date are exempted from Swiss anticipatory tax on their payments to individuals who are residents of a Member State.
  - d) income realised upon the sale, refund or redemption of shares or units in the following undertakings and entities, if they invest directly or indirectly via other undertakings for collective investment or entities referred to below more than 40% of their assets in debt-claims as referred to in (a):
    - (i) undertakings for collective investment domiciled in a Member State,
    - (ii) entities domiciled in a Member State, which exercise the option under Article 4 paragraph 3 of the Directive and which inform the paying agent of this fact,
    - (iii) undertakings for collective investment established outside the territory of the Contracting Parties.
    - (iv) Swiss investment funds which at the time of the entry into force of this Agreement or at a later date are exempted from Swiss anticipatory tax on their payments to individuals who are residents of a Member State.
2. As regards subparagraph 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.
3. As regards subparagraph 1 (d), when a paying agent has no information concerning the percentage of the assets invested in debt-claims or in shares or units as defined in that subparagraph, that percentage shall be considered to be above 40 %. Where he cannot determine the amount of income realised by the beneficial owner, the income shall be deemed to correspond to the proceeds of the sale, refund or redemption of the shares or units.

4. Income relating to undertakings or entities which have invested up to 15% of their assets in debt claims in the sense of subparagraph 1 (a) shall not be considered an interest payment in accordance with subparagraph 1(c) and (d).
5. The percentage referred to in subparagraph 1 (d) and paragraph 3 shall as from 1 January 2011 be 25 %.
6. The percentages referred to in subparagraph 1 (d) and paragraph 4 shall be determined by reference to the investment policy as laid down in the fund rules or instruments of incorporation of the undertakings or entities concerned and, failing such rules, by reference to the actual composition of the assets of the undertakings or entities concerned.

## *Article 8*

### *Revenue sharing*

1. Switzerland shall keep 25 % of the revenue generated by the retention under this Agreement and transfer 75 % of the revenue to the Member State of residence of the beneficial owner.
2. Such transfers shall take place for each year in one instalment per Member State at the latest within a period of 6 months following the end of the tax year in Switzerland.

## *Article 9*

### *Elimination of double taxation*

1. If interest received by a beneficial owner has been subject to retention by a paying agent in Switzerland, the Member State of residence for tax purposes of the beneficial owner shall grant him a tax credit equal to the amount of the retention. Where this amount exceeds the amount of tax due on the total amount of interest subject to retention in accordance with its national law, the Member State of residence for tax purposes shall repay the excess amount of tax withheld to the beneficial owner.
2. If interest received by a beneficial owner has been subject to taxes and retentions other than as provided for in this Agreement and the Member State of residence for tax purposes grants a tax credit for such taxes and retentions in accordance with its national law or double taxation conventions, such other taxes and retentions shall be credited before the procedure in paragraph 1 is applied. The Member State of residence for tax purposes shall accept certificates issued by Swiss paying agents as proper evidence of the tax or retention on the understanding that the competent authority of the Member State of residence for tax purposes will be able to obtain from the Swiss competent authority verification of the information contained in the certificates issued by Swiss paying agents.

3. The Member State of residence for tax purposes of the beneficial owner may replace the tax credit mechanism referred to in paragraphs 1 and 2 by a refund of the retention referred to in Article 1.

## *Article 10*

### *Exchange of information*

1. The competent authorities of Switzerland and any Member State shall exchange information on conduct constituting tax fraud under the laws of the requested State, or the like for income covered by the Agreement. "The like" includes only offences with the same level of wrongfulness as is the case for tax fraud under the laws of the requested State. In response to a duly justified request, the requested State shall provide information with respect to matters that the requesting State is investigating, or may investigate, on a civil or criminal basis. Without prejudice to the scope of the exchange of information as defined in this paragraph, information shall be exchanged in accordance with the procedures laid down in the double taxation conventions between Switzerland and the Member States and shall be treated as confidential in the manner provided therein.
2. In determining whether information may be provided in response to a request, the requested State shall apply the statute of limitations applicable under the laws of the requesting State instead of the statute of limitations of the requested State.
3. The requested State shall provide information where the requesting State has a reasonable suspicion that the conduct would constitute tax fraud or the like. The requesting State's suspicion of tax fraud or the like may be based on:
  - a) Documents, whether authenticated or not, and including but not limited to business records, books of account, or bank account information;
  - b) Testimonial information from the taxpayer;
  - c) Information obtained from an informant or other third person that has been independently corroborated or otherwise is likely to be credible; or
  - d) Circumstantial evidence.
4. Switzerland shall enter into bilateral negotiations with each of the Member States in order to define individual categories of cases falling under "the like" in accordance with the procedure of taxation applied by those countries.

## *Article 11*

### *Competent Authorities*

For the purposes of this Agreement the competent authorities shall mean those state instances listed in annex 1.

## *Article 12*

### *Consultation*

If any disagreement arises between the competent authority of Switzerland and one or more of the other competent authorities referred to in Article 11 of this Agreement as to the interpretation or application of this Agreement, they shall endeavour to resolve this by mutual agreement. They shall immediately notify the European Commission and the competent authorities of the other Member States of the results of their consultations. In relation to issues of interpretation the European Commission may take part in consultations at the request of any of the competent authorities.

## *Article 13*

### *Review*

1. The Contracting Parties shall consult each other at least every three years or at the request of either Contracting Party with a view to examining and - if deemed necessary by the Contracting Parties – improving the technical functioning of the Agreement and assessing international developments. The consultations shall be held within one month of the request or as soon as possible in urgent cases.
2. On the basis of such an assessment, the Contracting Parties may consult each other in order to examine whether changes to the Agreement are necessary taking into account international developments.
3. As soon as sufficient experience of the full implementation of article 1 (1) of the agreement is available, the Contracting Parties shall consult each other in order to examine whether changes to the Agreement are necessary taking into account international developments.
4. For the purposes of the consultations referred to above each Contracting Party shall inform the other Contracting Party of possible developments which could affect the proper functioning of this Agreement. This shall also include any relevant agreement between one of the Contracting Parties and a third country.

## *Article 14*

### *Relationship to bilateral Double Taxation Conventions*

The provisions of the double taxation conventions between Switzerland and the Member States shall not prevent the levying of the retention for which this Agreement provides.

## Article 15

### *Dividends, interest and royalty payments between companies*

1. Without prejudice to the application of domestic or agreement based provisions for the prevention of fraud or abuse, in Switzerland and in Member States, dividends paid by subsidiary companies to parent companies shall not be subject to taxation in the source state where:
  - the parent company has a direct minimum holding of 25 % of the capital of such a subsidiary for at least two years, and;
  - one company is resident (for tax purposes) in a Member State and the other company is resident (for tax purposes) in Switzerland, and;
  - under any double tax agreements with any third states neither company is resident (for tax purposes) in that third state, and;
  - both companies are subject to corporation tax without being exempted and both adopt the form of a limited company<sup>10</sup>.
2. Without prejudice to the application of domestic or agreement based provisions for the prevention of fraud or abuse, in Switzerland and in Member States, interest and royalty payments made between associated companies or their permanent establishments shall not be subject to taxation in the source state, where:
  - such companies are affiliated by a direct minimum holding of 25 % for at least two years or are both held by a third company which has directly a minimum holding of 25 % both in the capital of the first company, and in the capital of the second company for at least two years, and;
  - where a company is resident (for tax purposes) or a permanent establishment is located in a Member State and the other company is resident (for tax purposes) or other permanent establishment located in Switzerland, and;
  - under any double tax agreements with any third states none of the companies is resident (for tax purposes) in that third state and none of the permanent establishments is located in that third state, and;
  - all companies are subject to corporation tax without being exempted in particular on interest and royalty payments and each adopts the form of a limited company<sup>10</sup>.

However, where the Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States provides for a transitional period as regards a given Member State,

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<sup>10</sup> With regard to Switzerland, the term "limited company" covers:  
société anonyme/Aktiengesellschaft/società anonima;  
société à responsabilité limitée/Gesellschaft mit beschränkter Haftung/società a responsabilità limitata;  
société en commandite par actions/Kommanditaktiengesellschaft/società in accomandita per azioni

that State shall only ensure provision of the above arrangements on interest and royalty payments after the expiry of that period.

3. Existing double taxation agreements between Switzerland and the Member States which provide for a more favourable taxation treatment of dividends, interest and royalty payments at the time of adoption of this Agreement shall remain unaffected.

## *Article 16*

### *Transitional provisions for negotiable debt securities<sup>11</sup>*

1. From the date of application of this Agreement for as long as at least one Member State also applies similar provisions, and until 31 December 2010 at the latest domestic and international bonds and other negotiable debt securities which have been first issued before 1 March 2001 or for which the original issuing prospectuses have been approved before that date by the competent authorities of the issuing state shall not be considered as debt-claims within the meaning of Article 7 paragraph 1 (a) of this Agreement, provided that no further issues of such negotiable debt securities are made on or after 1 March 2002.

However, for as long as at least one Member State also applies similar provisions, the provisions of this article shall continue to apply beyond 31 December 2010 in respect of negotiable debt securities:

- which contain gross-up and early redemption clauses and
- where the paying agent, as defined in article 6, is established in Switzerland and
- that paying agent pays interest directly to, or secures the payment of interest for the immediate benefit of, a beneficial owner resident in a Member State.

If and when all Member States cease to apply similar provisions, the provisions of this article shall continue to apply only in respect of those negotiable securities:

- which contain gross-up and early redemption clauses and
- where the issuer's paying agent is established in Switzerland and
- that paying agent pays interest directly to, or secures the payment of interest for the immediate benefit of, a beneficial owner resident in a Member State.

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 Agreement (listed in Annex 2 to this Agreement), the entire issue of such a security, consisting of the original issue and any further issue shall be considered a debt-claim within the meaning of Article 7 (1) (a).

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<sup>11</sup> As in the Directive, these transitional provisions also apply to negotiable debt securities held through investment funds

If a further issue is made on or after 1 March 2002 of an aforementioned negotiable debt security issued by any other issuer not covered by the previous sentence, such further issue shall be considered a debt-claim within the meaning of Article 7 (1) (a).

2. This Article does not prevent Switzerland and the Member States from continuing to levy a tax on revenues deriving from the aforementioned negotiable debt-claims in paragraph 1 in accordance with their national law.

## *Article 17*

### *Signing, Entry into force and Duration of Validity*

1. This Agreement requires ratification or approval by the Contracting Parties in accordance with their own procedures. The Contracting Parties shall notify each other of the completion of these procedures. The Agreement shall enter into force on the first day of the second month following the last notification.
2. Subject to the fulfilment of their constitutional requirements concerning entering into international agreements and without prejudice to Article 18 Switzerland, and where applicable the Community shall effectively implement and apply this Agreement by 1 January 2005 and notify each other thereof.
3. This Agreement shall remain in force until terminated by a Contracting Party.
4. Either Contracting Party may terminate this Agreement by giving notice to the other. In such a case, the Agreement shall cease to have effect twelve months after the serving of notice.

## *Article 18*

### *Application and Suspension of Application*

1. The application of this Agreement shall be conditional on the adoption and implementation by the dependent or associated territories of the Member States mentioned in the Council decision of Feira of June 19/20, 2000, as well as the United States of America, Andorra, Liechtenstein, Monaco and San Marino, respectively, of measures which conform with or are equivalent to those contained in the Directive or in this Agreement, with the exception of Article 15, and providing for the same dates of implementation.
2. The Contracting Parties shall decide, by common accord, at least six months before the date referred to in Article 17 (2), whether the condition set out in paragraph 1 will be met having regard to the dates of entry into force of the relevant measures in the third countries and dependent or associated territories concerned. If the Contracting Parties do not decide that the condition will be met, they shall, by common accord, adopt a new date for the purposes of Article 17 (2).
3. Notwithstanding paragraphs 1 and 2, Article 15 shall apply in respect of Spain with effect from the entry into force of a bilateral agreement between Spain and

Switzerland on the exchange of information on request in criminal or civil cases of tax fraud, as defined in the laws of the requested State, or the like, with respect to items of income not subject to this Agreement but covered by a convention or an agreement between Spain and Switzerland on the elimination of double taxation on income and capital.

4. The application of this Agreement or parts thereof may be suspended by either Contracting Party with immediate effect through notification to the other should the Directive or part of the Directive cease to be applicable either temporarily or permanently in accordance with European Community law or in the event that a Member State should suspend the application of its implementing legislation.
5. Either Contracting Party may suspend the application of this Agreement through notification to the other in the event that one of the third countries or territories referred to in paragraph 1 should subsequently cease to apply the measures referred to in that paragraph. Suspension of application shall take place no earlier than two months after notification. Application of the Agreement shall resume as soon as the measures are reinstated.

#### *Article 19*

##### *Claims and Final Settlement*

1. Should this Agreement be terminated or its application be suspended either in full or in part, the claims of individuals in accordance with Article 9 shall remain unaffected.
2. Switzerland will, in such case, establish a final account by the end of the applicability of the Agreement and make a final payment to the Member States.

#### *Article 20*

##### *Territorial Scope*

This Agreement applies to Switzerland and to the territory to which the Treaty establishing the European Communities applies.

#### *Article 21*

##### *Annexes*

The Annexes form part of this Agreement. They may be amended by mutual agreement.

Signed at ..... on ..... in duplicate in the Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish languages, each of these languages being equally authentic.

## **Annex 1**

### List of competent authorities

The following are "competent authorities" for the purposes of this Agreement:

- a) in Switzerland, Le Directeur de l'Administration fédérale des contributions/Der Direktor der Eidgenössischen Steuerverwaltung/il direttore dell'Amministrazione federale delle contribuzioni or his proxy or agent,
- b) in the Kingdom of Belgium: De Minister van Financiën/Le Ministre des Finances or an authorised representative
- c) in the Kingdom of Denmark: Skatteministeren or an authorised representative,
- d) in the Federal Republic of Germany: Der Bundesminister der Finanzen or an authorised representative,
- e) in the Hellenic Republic: Ο Υπουργός των Οικονομικών or an authorised representative,
- f) in the Kingdom of Spain: El Ministro de Hacienda or an authorised representative,
- g) in the French Republic: Le Ministre chargé du budget or an authorised representative,
- h) in Ireland: The Revenue Commissioners or their authorised representative,
- i) in the Italian Republic: Il Capo del Dipartimento per le Politiche Fiscali or an authorised representative,
- j) in the Grand Duchy of Luxembourg: Le Ministre des Finances or an authorised representative; however for the purposes of article 10 the competent authority shall be le Procureur Général d'Etat luxembourgeois,
- k) in the Kingdom of the Netherlands: De Minister van Financiën or an authorised representative,
- l) in the Republic of Austria: Der Bundesminister für Finanzen or an authorised representative,
- m) in the Portuguese Republic: O Ministro das Finanças or an authorised representative,
- n) in the Republic of Finland: Valtiovarainministeriö/Finansministeriet or an authorised representative,
- o) in the Kingdom of Sweden: Finansdepartementet or an authorised representative,

- p) in the United Kingdom of Great Britain and Northern Ireland and in the European territories for whose external relations the United Kingdom is responsible: the Commissioners of Inland Revenue or their authorised representative and the competent authority in Gibraltar, which the United Kingdom will designate in accordance with the Agreed Arrangements relating to Gibraltar authorities in the context of EU and EC instruments and related treaties notified to the Member States and institutions of the European Union of 19 April 2000, a copy of which shall be notified to Switzerland by the Secretary General of the Council of the European Union, and which shall apply to this Agreement.

## **Annex 2**

### List of related entities

For the purposes of Article 16 of this Agreement, the following entities will be considered to be a "*related entity acting as a public authority or whose role is recognised by an international treaty*":

#### **ENTITIES WITHIN THE EUROPEAN UNION:**

##### **Belgium**

- Vlaams Gewest (Flemish Region)
- Région wallonne (Walloon Region)
- Région bruxelloise/Brussels Gewest (Brussels Region)
- Communauté française (French Community)
- Vlaamse Gemeenschap (Flemish Community)
- Deutschsprachige Gemeinschaft (German-speaking Community)

##### **Spain**

- Xunta de Galicia (Regional Executive of Galicia)
- Junta de Andalucía (Regional Executive of Andalusia)
- Junta de Extremadura (Regional Executive of Extremadura)
- Junta de Castilla- La Mancha (Regional Executive of Castilla- La Mancha)
- Junta de Castilla- León (Regional Executive of Castilla- León)
- Gobierno Foral de Navarra (Regional Government of Navarra)
- Govern de les Illes Balears (Government of the Balearic Islands)
- Generalitat de Catalunya (Autonomous Government of Catalonia)
- Generalitat de Valencia (Autonomous Government of Valencia)
- Diputación General de Aragón (Regional Council of Aragon)
- Gobierno de las Islas Canarias (Government of the Canary Islands)
- Gobierno de Murcia (Government of Murcia)
- Gobierno de Madrid (Government of Madrid)

- Gobierno de la Comunidad Autónoma del País Vasco/Euzkadi (Government of the Autonomous Community of the Basque Country)
- Diputación Foral de Guipúzcoa (Regional Council of Guipúzcoa)
- Diputación Foral de Vizcaya/Bizkaia (Regional Council of Vizcaya)
- Diputación Foral de Alava (Regional Council of Alava)
- Ayuntamiento de Madrid (City Council of Madrid)
- Ayuntamiento de Barcelona (City Council of Barcelona)
- Cabildo Insular de Gran Canaria (Island Council of Gran Canaria)
- Cabildo Insular de Tenerife (Island Council of Tenerife)
- Instituto de Crédito Oficial (Public Credit Institution)
- Instituto Catalán de Finanzas (Finance Institution of Catalonia)
- Instituto Valenciano de Finanzas (Finance Institution of Valencia)

### **Greece**

- Οργανισμός Τηλεπικοινωνιών Ελλάδος (National Telecommunications Organisation)
- Οργανισμός Σιδηροδρόμων Ελλάδος (National Railways Organisation)
- Δημόσια Επιχείρηση Ηλεκτρισμού (Public Electricity Company)

### **France**

- La Caisse d'amortissement de la dette sociale (CADES) (Social Debt Redemption Fund)
- L'Agence française de développement (AFD) (French Development Agency)
- Réseau Ferré de France (RFF)(French Rail Network)
- Caisse Nationale des Autoroutes (CNA) (National Motorways Fund)
- Assistance publique Hôpitaux de Paris (APHP) (Paris Hospitals Public Assistance)
- Charbonnages de France (CDF) (French Coal Board)
- Entreprise minière et chimique (EMC)(Mining and Chemicals Company)

### **Italy**

- Regions
- Provinces

- Municipalities
- Cassa Depositi e Prestiti (Deposits and Loans Fund)

### **Portugal**

- Região Autónoma da Madeira (Autonomous Region of Madeira)
- Região Autónoma dos Açores (Autonomous Region of Azores)
- Municipalities

### **INTERNATIONAL ENTITIES:**

- European Bank for Reconstruction and Development
- European Investment Bank
- Asian Development Bank
- African Development Bank
- World Bank / IBRD / IMF
- International Finance Corporation
- Inter-American Development Bank
- Council of Europe Social Development Fund
- EURATOM
- European Community
- Corporación Andina de Fomento (CAF) (Andean Development Corporation)
- Eurofima
- European Coal & Steel Community
- Nordic Investment Bank
- Caribbean Development Bank

The provisions of Article 16 are without prejudice to any international obligations that the Contracting Parties may have entered into with respect to the above mentioned international entities.

#### **ENTITIES IN THIRD COUNTRIES :**

The entities that meet the following criteria :

1. The entity is clearly considered to be a public entity according to the national criteria.
2. Such public entity is a non-market producer which administers and finances a group of activities, principally providing non-market goods and services, intended for the benefit of the community and which are effectively controlled by general government.
3. Such public entity is a large and regular issuer of debt.
4. The State concerned is able to guarantee that such public entity will not exercise early redemption in the event of gross-up clauses.

**Memorandum of Understanding**

between

the European Community , the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland,

and

the Swiss Confederation

the European Community, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland,

and

the Swiss Confederation, hereinafter referred to as Switzerland,

have agreed the following Memorandum of Understanding

## **1. INTRODUCTION**

Switzerland and the European Community are entering into an Agreement providing for measures equivalent to those laid down in Council Directive 2003/48/EC of 3 June 2003 on the taxation of savings income in the form of interest payments (hereinafter the Directive). This Memorandum of Understanding complements that Agreement.

## **2. ADMINISTRATIVE ASSISTANCE IN CASES OF TAX FRAUD OR THE LIKE**

As soon as the Agreement is signed, Switzerland and each Member State of the European Union will enter into bilateral negotiations with a view to:

- including in their respective double taxation conventions on income and capital provisions on administrative assistance in the form of exchange of information on request for all criminal or civil cases of tax fraud under the laws of the requested State, or the like with respect to items of income not subject to the Agreement but covered by their respective conventions.
- defining individual categories of cases falling under "the like" in accordance with the procedure of taxation applied by those countries.

## **3. NEGOTIATIONS FOR SECURING EQUIVALENT MEASURES WITH OTHER THIRD COUNTRIES.**

During the transitional period provided for in the Directive, the European Community shall enter into discussions with other important financial centres with a view to promoting the adoption by those jurisdictions of measures equivalent to those to be applied by the Community.

## **4. DECLARATION OF INTENT**

The signatories of this memorandum of understanding declare that they consider the Agreement referred to in point 1 and this memorandum to provide an acceptable and balanced arrangement that can be considered as safeguarding the interests of the parties. They will therefore implement the agreed measures in good faith and will not act unilaterally to undermine this arrangement without due cause.

If any significant difference between the coverage of the Directive as adopted on 3 June 2003 and that of the Agreement should be discovered, in particular with regard to Article 1 (2) and Article 6 of the Agreement, the Contracting Parties will immediately enter into consultations in accordance with Article 13 (1) of the Agreement with a view to ensuring that the equivalent nature of the measures provided for in the Agreement is maintained.

Signed at ..... on ..... in duplicate in the Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish languages, each of these languages being equally authentic.

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