22 March 2004

EUROPEAN COMMISSION PROPOSAL COM (2003) 841 FINAL AMENDING THE INTEREST AND ROYALTY DIRECTIVE 2003/49/EC OF 3 JUNE 2003

UNICE COMMENTS

First of all, UNICE would like to note that it welcomes any proposal that eliminates juridical and economic double taxation on cross border activities within the Internal Market. Elimination of withholding taxes at source is clearly the most effective remedy for avoiding double taxation on interest and royalty payments.

Unfortunately, the practical application of the Directive for businesses operating in various Member States is rather limited. Simply put, the Directive only covers payments between parent companies and their directly held subsidiaries or between sister companies that are held directly by the same parent company.

For organisational, legal and risk management reasons, many internationally operating businesses have centralised their finance function. In large business groups, the company providing the funds and the recipient of the funds would in many cases not qualify as associated companies as defined in the Directive. Similarly, many businesses have centralised the ownership of their intellectual property rights or have intellectual property rights owned by various group companies due simply to acquisitions. Also in these cases it would be unlikely that the owner and user of the intellectual property rights would qualify as associated companies.

It is worth pointing out that the Commission Proposal COM (1998) 67 for the Interest and Royalties Directive contained wording that provided for much wider application in that the proposal considered abolition of withholding taxes between both direct and indirect subsidiaries. However, at its meeting on the 3 June 2003, the Council adopted the text with a much narrower scope.

In order to ensure that the objective of the Directive is fully met, UNICE encourages the Council to revert to the 1998 draft wording and to include both direct and indirect shareholdings within the definition of “associated company” while at the same time lowering the holding from 25% to 10% similar to the revised Parent Subsidiary Directive. The article would thus read as follows:

> “One company is an “associated company” of a second company if, at least,
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> i. the first company has directly or indirectly a minimum holding of 10% in the capital of the second company, or
> ii. the second company has directly or indirectly a minimum holding of 10% in the capital of the first company, or
> iii. a third company has directly or indirectly a minimum holding of 10% both in the capital of the first company, and in the capital of the second company”.

We hope that the Council will take the opportunity to adopt such an amendment simultaneously, while modifying the directive in order to cover a larger range of companies including the *Societas Europea* and the anti-avoidance provisions as per the Commission proposal COM(2003) 841 final.

It is worth noting that few countries, regrettably, have actually incorporated the contents of the Directive that entered into force on 1 January 2004 within their national legislation. Belgium did adopt the Directive but nevertheless kept the possibility of widening the scope of the directive to include indirect participation. UNICE would welcome other Member States following the same approach.

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