

Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market

CHAPTER I

GENERAL PROVISIONS

Article 2

Definitions

For the purposes of this Directive, the following definitions apply:

- (1) ‘borrowing costs’ means interest expenses on all forms of debt, other costs economically equivalent to interest and expenses incurred in connection with the raising of finance as defined in national law, including, without being limited to, payments under profit participating loans, imputed interest on instruments such as convertible bonds and zero coupon bonds, amounts under alternative financing arrangements, such as Islamic finance, the finance cost element of finance lease payments, capitalised interest included in the balance sheet value of a related asset, or the amortisation of capitalised interest, amounts measured by reference to a funding return under transfer pricing rules where applicable, notional interest amounts under derivative instruments or hedging arrangements related to an entity's borrowings, certain foreign exchange gains and losses on borrowings and instruments connected with the raising of finance, guarantee fees for financing arrangements, arrangement fees and similar costs related to the borrowing of funds;
- (2) ‘exceeding borrowing costs’ means the amount by which the deductible borrowing costs of a taxpayer exceed taxable interest revenues and other economically equivalent taxable revenues that the taxpayer receives according to national law;
- (3) ‘tax period’ means a tax year, calendar year or any other appropriate period for tax purposes;
- (4) ‘associated enterprise’ means:
 - (a) an entity in which the taxpayer holds directly or indirectly a participation in terms of voting rights or capital ownership of 25 percent or more or is entitled to receive 25 percent or more of the profits of that entity;
 - (b) an individual or entity which holds directly or indirectly a participation in terms of voting rights or capital ownership in a taxpayer of 25 percent or more or is entitled to receive 25 percent or more of the profits of the taxpayer;

If an individual or entity holds directly or indirectly a participation of 25 percent or more in a taxpayer and one or more entities, all the entities concerned, including the taxpayer, shall also be regarded as associated enterprises.

[^{F1}For the purposes of Articles 9 and 9a:

- (a) Where the mismatch outcome arises under points (b), (c), (d), (e) or (g) of the first subparagraph of point (9) of this Article or where an adjustment

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- is required under Article 9(3) or Article 9a, the definition of associated enterprise is modified so that the 25 per cent requirement is replaced by a 50 per cent requirement;
- (b) a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person;
- (c) an associated enterprise also means an entity that is part of the same consolidated group for financial accounting purposes as the taxpayer, an enterprise in which the taxpayer has a significant influence in the management or an enterprise that has a significant influence in the management of the taxpayer.]
- (5) ‘financial undertaking’ means any of the following entities:
- (a) a credit institution or an investment firm as defined in point (1) of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council⁽¹⁾ or an alternative investment fund manager (AIFM) as defined in point (b) of Article 4(1) of Directive 2011/61/EU of the European Parliament and of the Council⁽²⁾ or an undertaking for collective investment in transferable securities (UCITS) management company as defined in point (b) of Article 2(1) of Directive 2009/65/EC of the European Parliament and of the Council⁽³⁾;
- (b) an insurance undertaking as defined in point (1) of Article 13 of Directive 2009/138/EC of the European Parliament and of the Council⁽⁴⁾;
- (c) a reinsurance undertaking as defined in point (4) of Article 13 of Directive 2009/138/EC;
- (d) an institution for occupational retirement provision falling within the scope of Directive 2003/41/EC of the European Parliament and of the Council⁽⁵⁾, unless a Member State has chosen not to apply that Directive in whole or in part to that institution in accordance with Article 5 of that Directive or the delegate of an institution for occupational retirement provision as referred to in Article 19(1) of that Directive;
- (e) pension institutions operating pension schemes which are considered to be social security schemes covered by Regulation (EC) No 883/2004 of the European Parliament and of the Council⁽⁶⁾ and Regulation (EC) No 987/2009 of the European Parliament and of the Council⁽⁷⁾ as well as any legal entity set up for the purpose of investment of such schemes;
- (f) an alternative investment fund (AIF) managed by an AIFM as defined in point (b) of Article 4(1) of Directive 2011/61/EU or an AIF supervised under the applicable national law;
- (g) UCITS in the meaning of Article 1(2) of Directive 2009/65/EC;
- (h) a central counterparty as defined in point (1) of Article 2 of Regulation (EU) No 648/2012 of the European Parliament and of the Council⁽⁸⁾;
- (i) a central securities depository as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council⁽⁹⁾.

- (6) ‘transfer of assets’ means an operation whereby a Member State loses the right to tax the transferred assets, whilst the assets remain under the legal or economic ownership of the same taxpayer;
- (7) ‘transfer of tax residence’ means an operation whereby a taxpayer ceases to be resident for tax purposes in a Member State, whilst acquiring tax residence in another Member State or third country;
- (8) ‘transfer of a business carried on by a permanent establishment’ means an operation whereby a taxpayer ceases to have taxable presence in a Member State whilst acquiring such presence in another Member State or third country without becoming resident for tax purposes in that Member State or third country;
- (9) ^[F1]‘hybrid mismatch’ means a situation involving a taxpayer or, with respect to Article 9(3), an entity where:

- (a) a payment under a financial instrument gives rise to a deduction without inclusion outcome and:
- (i) such payment is not included within a reasonable period of time; and
- (ii) the mismatch outcome is attributable to differences in the characterisation of the instrument or the payment made under it.

For the purposes of the first subparagraph, a payment under a financial instrument shall be treated as included in income within a reasonable period of time where:

- (i) the payment is included by the jurisdiction of the payee in a tax period that commences within 12 months of the end of the payer's tax period; or
- (ii) it is reasonable to expect that the payment will be included by the jurisdiction of the payee in a future tax period and the terms of payment are those that would be expected to be agreed between independent enterprises;
- (b) a payment to a hybrid entity gives rise to a deduction without inclusion and that mismatch outcome is the result of differences in the allocation of payments made to the hybrid entity under the laws of the jurisdiction where the hybrid entity is established or registered and the jurisdiction of any person with a participation in that hybrid entity;
- (c) a payment to an entity with one or more permanent establishments gives rise to a deduction without inclusion and that mismatch outcome is the result of differences in the allocation of payments between the head office and permanent establishment or between two or more permanent establishments of the same entity under the laws of the jurisdictions where the entity operates;
- (d) a payment gives rise to a deduction without inclusion as a result of a payment to a disregarded permanent establishment;
- (e) a payment by a hybrid entity gives rise to a deduction without inclusion and that mismatch is the result of the fact that the payment is disregarded under the laws of the payee jurisdiction;

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- (f) a deemed payment between the head office and permanent establishment or between two or more permanent establishments gives rise to a deduction without inclusion and that mismatch is the result of the fact that the payment is disregarded under the laws of the payee jurisdiction; or
- (g) a double deduction outcome occurs.

For the purposes of this point (9):

- (a) a payment representing the underlying return on a transferred financial instrument shall not give rise to a hybrid mismatch under point (a) of the first subparagraph where the payment is made by a financial trader under an on-market hybrid transfer provided the payer jurisdiction requires the financial trader to include as income all amounts received in relation to the transferred financial instrument;
- (b) a hybrid mismatch shall only arise under points (e), (f) or (g) of the first subparagraph to the extent that the payer jurisdiction allows the deduction to be set off against an amount that is not dual-inclusion income;
- (c) a mismatch outcome shall not be treated as a hybrid mismatch unless it arises between associated enterprises, between a taxpayer and an associated enterprise, between the head office and permanent establishment, between two or more permanent establishments of the same entity or under a structured arrangement.

For the purposes of this point (9) and Articles 9, 9a and 9b:

- (a) ‘mismatch outcome’ means a double deduction or a deduction without inclusion;
- (b) ‘double deduction’ means a deduction of the same payment, expenses or losses in the jurisdiction in which the payment has its source, the expenses are incurred or the losses are suffered (payer jurisdiction) and in another jurisdiction (investor jurisdiction). In the case of a payment by a hybrid entity or permanent establishment the payer jurisdiction is the jurisdiction where the hybrid entity or permanent establishment is established or situated;
- (c) ‘deduction without inclusion’ means the deduction of a payment or deemed payment between the head office and permanent establishment or between two or more permanent establishments in any jurisdiction in which that payment or deemed payment is treated as made (payer jurisdiction) without a corresponding inclusion for tax purposes of that payment or deemed payment in the payee jurisdiction. The payee jurisdiction is any jurisdiction where that payment or deemed payment is received, or is treated as being received under the laws of any other jurisdiction;
- (d) ‘deduction’ means the amount that is treated as deductible from the taxable income under the laws of the payer or investor jurisdiction. The term ‘deductible’ shall be construed accordingly;
- (e) ‘inclusion’ means the amount that is taken into account in the taxable income under the laws of the payee jurisdiction. A payment under a financial instrument shall not be treated as included to the extent that the payment qualifies for any tax relief solely due to the way that payment is characterised

- under the laws of the payee jurisdiction. The term ‘included’ shall be construed accordingly;
- (f) ‘tax relief’ means a tax exemption, reduction in the tax rate or any tax credit or refund (other than a credit for taxes withheld at source);
- (g) ‘dual inclusion income’ means any item of income that is included under the laws of both jurisdictions where the mismatch outcome has arisen;
- (h) ‘person’ means an individual or entity;
- (i) ‘hybrid entity’ means any entity or arrangement that is regarded as a taxable entity under the laws of one jurisdiction and whose income or expenditure is treated as income or expenditure of one or more other persons under the laws of another jurisdiction;
- (j) ‘financial instrument’ means any instrument to the extent that it gives rise to a financing or equity return that is taxed under the rules for taxing debt, equity or derivatives under the laws of either the payee or payer jurisdictions and includes a hybrid transfer;
- (k) ‘financial trader’ is a person or entity engaged in the business of regularly buying and selling financial instruments on its own account for the purposes of making a profit;
- (l) ‘hybrid transfer’ means any arrangement to transfer a financial instrument where the underlying return on the transferred financial instrument is treated for tax purposes as derived simultaneously by more than one of the parties to that arrangement;
- (m) ‘on-market hybrid transfer’ means any hybrid transfer that is entered into by a financial trader in the ordinary course of business, and not as part of a structured arrangement;
- (n) ‘disregarded permanent establishment’ means any arrangement that is treated as giving rise to a permanent establishment under the laws of the head office jurisdiction and is not treated as giving rise to a permanent establishment under the laws of the other jurisdiction;]
- (10) [F2‘consolidated group for financial accounting purposes’ means a group consisting of all entities which are fully included in consolidated financial statements drawn up in accordance with the International Financial Reporting Standards or the national financial reporting system of a Member State;
- (11) ‘structured arrangement’ means an arrangement involving a hybrid mismatch where the mismatch outcome is priced into the terms of the arrangement or an arrangement that has been designed to produce a hybrid mismatch outcome, unless the taxpayer or an associated enterprise could not reasonably have been expected to be aware of the hybrid mismatch and did not share in the value of the tax benefit resulting from the hybrid mismatch.]

Textual Amendments

- F1** Substituted by [Council Directive \(EU\) 2017/952 of 29 May 2017 amending Directive \(EU\) 2016/1164 as regards hybrid mismatches with third countries.](#)

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F2 Inserted by Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.

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- (1) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).
- (2) Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).
- (3) Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).
- (4) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).
- (5) Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ L 235, 23.9.2003, p. 10).
- (6) Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1).
- (7) Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ L 284, 30.10.2009, p. 1).
- (8) Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).
- (9) Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).