ACCOUNTANCY EUROPE.

Commissioner Gentiloni
DG TAXUD
European Commission

Submitted electronically

Brussels, 8 August 2023

Subject: Proposal for Directive on Faster and Safer Relief of Excess Withholding Taxes (FASTER)

Dear Commissioner Gentiloni,

Accountancy Europe is pleased to provide you with its comments on the FASTER proposal.

In our May 2019 publication, Simplifying Withholding Tax Procedures, we called for the modernisation of the treatment of Withholding Tax (WHT) across the EU and, consequently, we welcome the FASTER legislative proposal.

We believe that the introduction of an EU-wide legal framework to augment the current incomplete network of double tax treaties has the potential to contribute to the Capital Markets Union project, diversifying financing opportunities in Europe and improving businesses' access to finance - including for SMEs.

Current Member State refund systems are fragmented and predominantly manual. This makes them inefficient and costly and open to abuse – as we have seen with abusive cum-ex and cum-cum schemes. A secure digital solution will provide more timely information and considerably help the fight against aggressive tax planning and fraud involving WHT.

DIGITAL TAX RESIDENCE CERTIFICATE (ETRC)

In our response to the public consultation "*New EU system for the avoidance of double taxation and prevention of tax abuse in the field of withholding taxes*" we supported the development of an electronic tax residence system and increased use of e-ID.

Consequently, we support the proposal to introduce an eTRC that would be accepted as proof of tax residence by all EU tax authorities. We also agree with the suggestion that this could be useful for more than just WHT relief purposes.

We support the proposal that this should be in a common format and that Member States would be obliged to issue the certificate within one working day from the submission of the request. To facilitate the prompt issuance of the eTRC, we propose that the Directive mandates that Member States clearly indicate on the relevant web portal the exact administrative requirements and compliance procedures to be fulfilled by the taxpayer.

To this end, we suggest that the Directive should be explicit on how the eTRC deals with a tie-breaker clause where the taxpayer has dual tax residency. It is possible that this could be dealt with in the implementing acts, but we believe, for improved transparency and predictability, that this should be included in the Directive.

We also support the proposal that the eTRC would be valid for at least the whole calendar year in which the request is made unless the person becomes non-resident for tax purposes in that jurisdiction.

CERTIFIED FINANCIAL INTERMEDIARIES

As stated in Simplifying Withholding Tax Procedures, strong arguments exist for an increased role of financial intermediaries in the system to help tax authorities deal with an increasing number of claims.

Consequently, we welcome the proposal for national, public, registers of Certified Financial Intermediaries (CFI) who would be able to make bulk claims on behalf of their clients. We support the proposal that this should be mandatory for certain large institutions that are integral to the operation of a Member State's financial system and optional for others.

We support the provisions of Article 11 in respect of the due diligence processes that the CFI should conduct to establish the registered owner's entitlement to relief under Article 12 and / or Article 13.

We support the provisions that require the removal of CFIs that 'have repeatedly and intentionally' failed to comply with applicable legislation. This is particularly the case where they fail to take adequate steps to check that the information provided by their client is consistent with their existing knowledge of the client – as we suggested in Simplifying Withholding Tax Procedures.

However, we are concerned that the term 'repeatedly and intentionally' may be interpreted differently by Member States' administrations and their courts, and lead to considerable differences in application across the EU. Harmonisation across the EU of what constitutes 'repeatedly and intentionally' would be beneficial.

Financial intermediaries should not be responsible for incorrect information provided by the client provided that they have a reasonable expectation that the information is correct. Article 16 requires Member States to take appropriate measures against CFIs that **do not comply** with the requirements, deliberately or negligently, and states that they can be held liable for any WHT lost.

However, it would be beneficial to include a provision that CFIs are not responsible for tax losses arising from incorrect information provided by the registered owner where the rules have been complied with and the CFI has taken reasonable steps to ensure that the information is accurate. For example, Article 5c inserted into the 2006 VAT Directive as a result of EU Regulation 2019/2026, in respect of facilitating platforms, expressly states the circumstances when the platform would or would not be liable for mistakes made due to incorrect information being provided by the taxable person.

Without precise and harmonised criteria for removal of CFIs from the register, and without an explicit provision that CFIs will not be held liable for incorrect information provided by the Registered Owner, there is a risk that Financial Intermediaries will opt out of the relief at source mechanism due to concerns about their potential liability even when they have acted in good faith.

Whilst having registered CFIs would undoubtedly make the EU's WHT recovery procedures more efficient, we believe that, ultimately, the systems of relief proposed should be accessible by the registered owners. Consequently, once the processes have been implemented and automated, consideration should be given to extending the systems of relief to the registered owners. This would reduce the costs to the investor and may allow pension funds and other collective investment schemes to make their own claims for relief at source or obtain quick refunds of excess WHT.

This could be introduced based on a Member State's risk analysis – based on, for example, the €1 000 dividend de minimis threshold in Article 9 paragraph 2 and others.

In respect of this de minimis dividend threshold, we wonder how this amount was decided on and whether any impact assessment has been conducted to demonstrate that the threshold would achieve the objective of simplifying procedures for smaller investors whilst still minimising the risk of tax loss for Member States?

SYSTEMS OF RELIEF

We are pleased that the systems of relief encompass both relief at source and quick refunds.

Our preference would be for mandatory relief at source to be the default system of relief, with quick refunds of excess WHT being the fall-back position where relief at source is not possible. The current flexibility offered to Member States does not guarantee that. Indeed, we would argue that there is so much flexibility available to Member States that there is a risk of fragmentation of implementation, thereby increasing the complexity and cost for financial intermediaries. This in turn, could lead to some intermediaries not seeing any financial benefits of becoming CFIs.

The current proposals state that:

1. The obligation to establish a national register for CFIs only applies to Member States that levy a WHT on dividends from publicly traded shares, **and** provide relief of excess WHT (Article 5 paragraph 1).
    - These Member States have the option to use the same register in respect of WHT on publicly traded bonds, if applicable.
2. Member States that do not do not fall under 1. above have the option to establish a national register for WHT if they levy a WHT on interest from publicly traded bonds (Article 5 paragraph 2).
3. Member States that maintain a national register must require that a CFI must request from tax authorities the available reliefs on behalf of the registered owner when:
    - the registered owner has authorised it, and
    - the CFI has verified the registered owner's eligibility (Article 10)
4. Member States may allow CFIs to act on behalf of their registered owners:
    - to request relief at source from WHT (Article 12) and / or
    - to request a quick refund of the excess WHT (Article 13).

It, therefore, appears that Member States that provide no relief for excess WHT do not have to follow any of the provisions in respect of the Systems of Relief. The obligation is then for CFIs on the national registers to apply for the Systems of Relief that are permitted by the relevant Member State. The Member State has the option to permit CFIs to obtain relief at source or quick refund of excess WHT, or both.

This drafting, which effectively passes on to the CFIs a Member State's obligation to provide at least one of the two reliefs, is overly complicated and could lead to fragmentation of the proposed Directive when implemented at a national level and a potential dilution of the effectiveness of both the simplification and anti-abuse measures.

We are also disappointed that the quick refund procedure only relates to 'excess withholding tax' – whilst this is unlikely to be an issue for most registered owners in the EU that pay tax, it will result in an additional burden for registered owners that are not taxpayers (because of low levels of taxable income or because they are tax-exempt entities).

We also find the definition of excess withholding tax to be unclear: "excess withholding tax' means the difference between the amount of withholding tax levied by a Member State on payments to non-resident owners of dividends or interest from securities by applying the general domestic rate and the lower amount of withholding tax applicable by that Member State on the same dividends or interest in line with a double tax treaty or specific national legislation, as the case may be."

Perhaps this definition could be redrafted to reduce the current ambiguity and more clearly reflect what is in the preamble and explanatory memorandum.

We strongly support the Commission's ambition in proposing that under the quick refund system Member States must process a refund request within 25 calendar days. We also support the provision that states that failure to meet this 25-day deadline will result in automatic payment of interest to the registered owner (at a rate equal to the charge for late payment of income tax within that Member State) – we proposed a financial penalty for late refunds in our 2019 paper.

We do have concerns with the drafting of Article 13 paragraph 2. The application for a refund request by a CFI would be in a standard EU format with data fields for all the information required. Presumably, failure to include the necessary information would automatically prevent the submission of the request.

Consequently, we do not understand why it is necessary to state that the 25-day limit runs from the later of the date of the request or 'from the date reporting obligations under this Directive have been met by all certified financial intermediaries'. On one hand, this opens up the possibility of Member States using delaying tactics to delay repayments but there is also no mention of a standard procedure by which tax authorities can 'stop the clock' to raise genuine queries about the repayment claim.

ANTI-ABUSE MEASURES

We support the following anti-abuse measures (Article 10 paragraph 2) whereby Member States must not provide relief under the systems, where:

- The dividend has been paid on a publicly traded share that the registered owner acquired within a period of two days before the ex-dividend date. This could be an effective countermeasure to fight abusive ex-div schemes and is consistent with the Buettner and Kreidel 2020 study we highlighted in our response to the public consultation, which showed it was easy to spot trade value discrepancies around 2 days before the ex-div date on the German Bourse Xetra.

- The dividend payment on the underlying security for which relief is requested is known by the CFI to be linked to a financial arrangement that has not been settled, expired or otherwise terminated at the ex-dividend date.

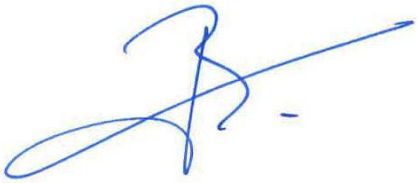
However, so that CFIs can fully comply with the provisions in respect of financial arrangements, we believe that more clarity and explanation should be included in the Directive about the type of financial arrangements that should be reported. We also believe that payments subject to a financial arrangement should not necessarily be completely excluded from faster repayments. Building a reasonable timeline into the system could allow CFIs and tax authorities to ascertain whether a payment subject to a financial arrangement could still be included in the FASTER systems.

DATA PROTECTION AND SECURITY

We agree with the provision in Article 10 paragraph 1(a) that CFIs can only request WHT reliefs on behalf of their registered owners with their explicit authorisation – this was proposed in our 2019 paper.

We also agree with the restricted amount of information that the CFI is required to send to the Member State's tax authority to request WHT relief.

Sincerely,



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