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VIA E-MAIL

Marc Clercx
Director, TAXUD.D.2 (Direct Tax Policy & Cooperation)

Re: Follow-Up to 28 September Meeting and Survey on Withholding Tax Procedures

Dear Marc,

The Association of Global Custodians ("AGC")[1] Tax Committee very much welcomes the European Commission's initiative to improve withholding tax procedures with a harmonized process. We have appreciated the opportunity to have representatives of our Committee participate, along with other industry stakeholders, in discussions with you regarding the proposals. The AGC is submitting this letter as a follow-up to the latest meeting on 28 September and in response to the additional information provided in the survey issued on 12 October.

As previously shared, our preferred option is the introduction of a common system of relief at source with a simplified and streamlined withholding tax refund procedure, but we support the work of the European Commission to bring improvements to the existing processes. In reviewing the survey that was shared, we would stress that whichever policy option is adopted, it should cater to both European Union (EU) and non-EU resident investors, retail and institutional alike, as well as non-EU last intermediaries and EU investors that use a non-EU

[1] The Association is an informal group of 12 member banks that provide securities safekeeping and asset servicing functions to cross-border institutional investors worldwide, including investment funds. In providing global custody services, AGC members routinely seek appropriate withholding tax relief on behalf of custody clients by processing millions of such claims in the aggregate each year, affecting substantial amounts of cross-border portfolio investment flows in and out of countries worldwide.

intermediary. This broad applicability is essential for ensuring the Capital Markets Union objective to enhance cross-border investment, by enabling all stakeholders to participate in an equitable manner. This letter, in addition to the letter issued by the informal business group, seeks to provide suggestions for enhancing the current policy proposals to address our member banks' concerns.

Digital/electronic certificates of residence (eCoR)

The proposal to make the certificate of tax residence digital or electronic is a positive development as it will reduce the need to wait for paper documents to be issued by Member State tax administrations. This has been demonstrated already by the adoption of this format by at least two Member States (Ireland and Spain). We would emphasize that harmonized content of the eCoR and agreement to accept such documents by all Member States, as well as by jurisdictions outside of the EU, and timely implementation is critical for its success.

The preference of AGC Members is for the introduction of a verifiable investor self-declaration (ISD) to take the place of a CoR (electronic or not). Under the quick refund policy option proposed, an eCoR may be considered sufficient documentation, alongside income information reported by the financial intermediary closest to the investor, for the application of tax relief to certain investors (for example retail investors). However, it is likely additional documentation with information relevant to the application of a double taxation treaty or domestic rate, for example beneficial ownership, is required from investors. The introduction of an ISD would also ensure that non-EU investors, many of whom may not be able to obtain an eCoR, are not excluded from the process.

An ISD can be a single document, harmonized for use by all investors in EU securities, verified by a regulated financial institution closest to the beneficiary, with the benefit of removing the sometimes lengthy delays for obtaining CoRs or other tax relief specific documents from tax administrations or regulatory bodies. The introduction of an ISD would require clear guidance on what information must be verified (limiting this to information that is available to the verifying party) and the due diligence procedure expected to be followed, as well as the means to confirm verification has taken place to the next intermediary in the chain. If additional information (for example transaction reporting for certain investors) is required by tax administrations, this should be provided by way of standardized reporting.

Reporting

The objective to provide transparency in the custody chain is an important one and the benefit that the Finnish delegation noted of receiving this information through the TRACE reporting was clear. However, whether reporting should be to the financial intermediary national tax authority or to the source country tax authority will depend on the meaning of the EC proposal.

One view would be to suggest that any reporting destined for the source country tax authority is submitted directly and not to the jurisdiction of the financial intermediary to avoid reporting becoming bottlenecked, but also importantly, for the information of investors who are not

resident in the financial intermediary's jurisdiction not to be passed to the financial intermediary's tax authority. If the approach was a financial intermediary reporting any information destined to the source country to its home country tax authority for onward transmission, a source country could face difficulties in promptly confirming compliance by the former.

If reporting to the tax authority in the jurisdiction of the financial intermediary will not affect the refunds under the quick refund process, (i.e., delays at the national tax authority will not affect the refund) it may be worth exploring. However, if the intention now or in the future is to enable non-EU last intermediaries to participate in the quick refund system and report, then it is advisable to consider enabling reporting directly to the source country tax authority.

The quick refund proposal does not indicate how a financial intermediary may be expected to provide information to the withholding agent. We would recommend that at the time of the quick refund, pooled information is submitted by the financial intermediary closest to the end investor through the chain of custody to the withholding tax agent, and that the "securities transaction data" as described in the survey is submitted to the tax authority. This enables the withholding agent to receive information on the withholding tax to apply, whilst ensuring the tax authority is in receipt of the more detailed, confidential payment information (similar to the reporting process in Finland). The source country tax authority may then exchange information with the relevant tax authorities of the investors' countries of tax residence.

It should also be noted that reporting under any of the policy options should follow a standardized format and schema across all markets to ensure efficiencies in terms of cost and procedures.

Spot checks/Spot audits

It was mentioned during the meeting of September 28, that in the quick refund procedure it may allow for the possibility of the tax authority to step in to stop a payment and audit it. We would need to understand how the Commission envisages this type of spot audit to operate, its duration, the documentation expected to be provided and by when, and lastly how these audits impact the liability of the financial intermediary. In our view, periodic reporting by the financial intermediary and standard audits that follow a defined cycle provide the same level of assurance and certainty to the tax administration, as well as to investors and intermediaries processing tax relief.

Due diligence and liability

As described in Section 3 of the survey, under both proposals the financial intermediary closest to the end investor would collect and verify information on the income payment and beneficiary. Financial intermediaries, such as global custodians, should only be liable for any tax loss resulting from inaccurate or incomplete due diligence. We rely on reconciled information stored in systems to ensure the correctness of a tax relief application. As such, we are dependent on the quality of information provided by end or intermediary clients. If there is a misrepresentation or unknown inaccuracy in such information and such misrepresentation or

inaccuracy is no fault of the financial intermediary (i.e., to the extent its systems and control environment have performed to the standard expected) then it should not be the party held responsible.

We would also note that from previous experience, global custodians should only be required to use static data collected in their ordinary business operations as a global custodian. If a custodian is treated as knowing or having reason to know that information received is unreliable because an affiliated/related entity is part of or party to an arrangement affecting the reliability of the information, this assumes a level of knowledge that is highly unlikely to exist in practice.

As noted above, where the financial intermediary is responsible and liable to collect and verify information on the income payment and the beneficiary, clear guidance must be provided on the required due diligence procedures. Financial intermediaries such as global custodians are not able to make tax technical determinations on behalf of their clients and, in particular with respect to intermediary clients, we do not receive information during onboarding AML/KYC process for the underlying investors for whom assets will be held. Further to the provision of clear due diligence procedures, there should be clear guidance on how liability is assigned with example scenarios (as included in the Finnish procedures).

We would reiterate the importance of including non-EU intermediaries to enable both non-EU investors and EU investors who may be contracted with a non-EU intermediary to benefit from the system. This ensures that the party who holds the relevant information and is in a position to verify the information, is the party to be held accountable and to answer questions should the tax authority require this. This may be achieved through a single, public register of intermediaries or contracts (preferably with a standardized template or format) between a Member State tax administration and the non-EU financial intermediary. It results in appropriate liability placed with the relevant party responsible for the due diligence process.

Common definitions

Whilst implementing a quick refund process is certainly welcome for markets where only tax refund exists today, we would note that building a common pan-European relief process without first creating common definitions creates significant risk for the project. As such, the Commission may wish to consider some measures to minimise the risk and provide certainty to investors and those who file claims on their behalf:

- Clarification of the treatment of market claims and whether they are treated as indemnities or taxable dividends
- A common basis across all markets to establish the date that entitlement to tax relief arises

Future developments

Whilst the proposals under consideration are a positive step forward towards tackling the barriers to cross border portfolio investment and tax abuse, we believe there is a lot more to do to move towards a common, efficient and effective withholding tax system for all stakeholders.

The current proposal may act as a common framework upon which stakeholders can continue discussions and address some longstanding issues. For example, features to consider for future iterations of the project include guidance on beneficial ownership, treatment of collective investment vehicles, harmonized security holding periods where they exist (such as those in Germany, Belgium and Finland today), and efficiencies and harmonization in the tax reclaim process (common reclaim forms, standardization of supporting documentation requirements), providing tax relief and compliance in the most effective manner.

The AGC Tax Committee greatly appreciates the opportunity to provide feedback on this important initiative and would be happy to meet with you to discuss our feedback or to provide any additional information that you may need.

Sincerely yours on behalf of the Association,

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