

European Commission
Directorate-General for Taxation and Customs Union
Unit D2 – Direct Tax Policy and Cooperation
Rue de Spa 3,
B-1049 Brussels

28 April 2011

Dear Sirs:

Re: Consultation on Taxation problems that arise when dividends are distributed across borders to portfolio and individual investors and possible solutions.

Members of each of the International Custody Tax Liaison Group affiliated to the British Bankers' Association (BBA)¹, the Association of Global Custodians (Association)², and the Association for Financial Markets in Europe (AFME)³, have been working together to discuss the European Commission's consultation exercise (Paper) on problems that arise when dividends are distributed across borders.

Members of the aforementioned industry groups (Group) welcome the European Commission's consultation exercise and the opportunity to respond. The Group, in their discussions, identified common areas for comment and as such have decided to submit a joint response.

We recognise that the Paper is part of a wider review of cross-border tax obstacles for EU citizens in the context of the varied tax systems currently adopted across the EU member states. Group members are primarily concerned with the provision of tax services, and in particular services related to the claiming of tax relief on investment income, for cross-border portfolio investors. In this capacity, and mindful of the wider scope of this consultation, our response focuses narrowly on the potential administrative and operational barriers associated with each of the options outlined in the Paper. For the avoidance of doubt we do not think it's appropriate to comment on any of the fiscal policy matters identified in the Paper.

¹ The British Bankers' Association (BBA) is the leading association for the UK banking and financial services sector, speaking for over 200 banking members from 60 countries on the full range of UK and international banking issues. In addition, 40 professional firms are also associated with us. The International Custody Tax Liaison Group (ICTLG) is affiliated to the BBA and is the principal forum for custody tax practitioners operating out of the United Kingdom. ICTLG members include most of the major global custodians (Bank of New York, Brown Brothers Harriman, Citibank, Credit Suisse, Deutsche Bank, HSBC, JPMorgan Chase, Northern Trust, RBC Dexia, State Street Bank & Trust Co. and UBS AG)

² The Association is an informal group of eleven global banking institutions with affiliates and branches in numerous countries that provide global custody services and related securities asset-servicing functions to cross-border institutional investors around the globe. The following Association member banks participate in the Association's Tax Committee: Bank of New York Mellon; Brown Brothers Harriman and Co.; Citibank; Deutsche Bank; HSBC Securities Services; JP Morgan; Northern Trust; RBC Dexia Investor Services; Skandinaviska Enskilda Banken; Standard Chartered Bank; State Street Bank and Trust Company.

³ AFME (Association for Financial Markets in Europe) promotes fair, orderly, and efficient European wholesale capital markets and provides leadership in advancing the interests of all market participants. AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. AFME participates in a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association through the GFMA (Global Financial Markets Association). AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76. For more information please visit the AFME website, www.AFME.eu.

As we understand it, the Paper is concerned with finding solutions for investors resident in EU member states. This will necessitate workable arrangements to distinguish those investors if any option is to operate effectively.

The Group has analysed the Paper in considerable detail; our analysis has identified a number of issues on which we comment in further detail below. In particular however we would highlight the following general substantive matters arising from each of the options suggested:

- The options proposed would result in a two tier system to enable access to relief for EU residents and non-EU residents;
- Options restricted to EU residents may potentially raise discrimination issues for non-EU residents
- There will be additional implications/complications where source member states operate imputation systems or where very detailed information is required in respect of investors ;
- There will be a need to build elaborate systems to enable information to flow through intermediated structures; and
- For certain options, a need to design complex systems to calculate tax relief.

The successful adoption of any option will require the procedural barriers set out in this letter to be resolved while at the same time minimising incremental costs to investors.

We note that the problems encountered by cross-border investors in receiving appropriate tax relief on securities income has been the subject of extensive prior study by the European Commission⁴ and OECD⁵. We believe that the EU and OECD work provides a firm basis for addressing the problems experienced by cross-border investors in this area and the procedural issues to which we allude in this response. We encourage the European Commission to carefully consider the possible synergies between this earlier EU/OECD work and these procedural issues.

On an associated point, we respectfully disagree with the contention made at the foot of page 4/head of page 5 of the Paper that the Commission Recommendation “would not resolve the problems of juridical double taxation not addressed in Double Tax Conventions”. We believe that it is clear that the Commission Recommendation also extends to tax relief available under the domestic law of member states – refer to paragraph 1.1 of the Recommendation.

We further elaborate on each proposed option below.

⁴ The European Commission has issued:

- Fact-Finding Study on Fiscal Compliance Procedures Related to Clearing and Settlement Within the EU - http://ec.europa.eu/internal_market/financial-markets/docs/compliance/ff_study_en.pdf
- Solutions to Fiscal Compliance Barriers Related to Post-Trading Within The EU - http://ec.europa.eu/internal_market/financial-markets/docs/compliance/report_en.pdf
- The Economic Impact of the Commission Recommendation on Withholding Tax Relief Procedures and the FISCO Proposals - http://ec.europa.eu/taxation_customs/resources/documents/common/whats_new/study_fisco.pdf
- The Commission Recommendation on Withholding Tax Relief Procedures - [http://ec.europa.eu/taxation_customs/resources/documents/common/whats_new/c\(2009\)7924_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/whats_new/c(2009)7924_en.pdf)

⁵ The OECD has issued:

- Possible Improvements to Procedures for Tax Relief for Cross-Border Investors - <http://www.oecd.org/dataoecd/34/19/41974569.pdf>
- Possible Improvements to Procedures for Tax Relief for Cross-Border Investors: Implementation Package - <http://www.oecd.org/dataoecd/20/36/44556378.pdf>

Option 1: Abolition of withholding taxes on cross-border dividend payments to portfolio / individual investors

The abolition of withholding on cross border payments would create several practical issues unless it was extended to both EU investors (including residents of the source member state) and non-EU investors. In the absence of such extension, dividend withholding tax may continue to apply to dividend payments made by EU member states to investors resident in the source member state and non-EU member states. As a result it would be necessary to operate two systems for cross-border payments, one that facilitates relief for EU resident investors and one for non-EU residents. A further system may be required for payments to residents of the source member state.

Accordingly, we believe that this option raises the following procedural issues:

- a) Documentation requirements for EU residents to evidence entitlement to relief from the withholding tax on payments from the source state;
- b) Determining how the tax relief will be applied, at source or via a refund claim;
- c) For tax relief applied at source, the obligations to be placed on intermediaries, given that there will be a need to pass sufficient information through intermediated investment structures to enable the correct rate of withholding to be applied (depending on whether the final investor in the chain is a source country resident, other EU resident or non-EU resident). For tax relief provided by means of a refund claim, the development of a further process to facilitate this;
- d) For tax relief applied at source, the post-dividend reporting requirements to be placed on intermediaries in respect of investors benefiting from such relief;
- e) The potential need for an elaborate exchange of information solution between member states;
- f) The need for member states to retain the existing relief systems to enable non-EU residents to obtain any tax relief to which they are entitled under either a tax treaty or domestic law provision.

This option would create a number of procedural challenges (and cost implications) for investors, intermediaries and member states. We believe that these would be minimised by adopting the procedural approaches advanced under the Commission Recommendation and OECD Implementation Package.

Option 2: The residence State grants full credit for the withholding taxes levied in the source State

Notwithstanding certain other operational challenges, we believe this option may require governments to agree a process to validate the final payment of source member state taxation before credit for such taxes can be given in the investor's residence member state. We assume that this may involve the need to produce tax vouchers or the equivalent.

We would highlight that it is not generally possible for the withholding agent in the source country to issue a tax voucher in the name of the investor. This is because there are likely to be one or more intermediaries interposed between the withholding agent and the investor in a typical cross-border payment chain. Thus, any vouchering system would need to be predicated on the basis that the voucher is issued by the final intermediary before the investor in the payment chain. We would note that it is entirely possible that this final intermediary may be located outside the EU, and this may create additional jurisdictional challenges.

Option 3: Net rather than gross taxation in the source Member State

We believe that this option raises similar procedural issues to those detailed at option 1 a) to f). These are further exacerbated by the need to distinguish between the different tax treatments afforded to different types of investor in the source member state, reach agreement as to whether a particular type of cross-border investor is equivalent to a particular type of source member state investor, and consider whether the particular circumstances of the cross-border investor merits a particular tax deduction or credit. In addition, as noted in the Paper, additional claims may still be required to eliminate juridical double taxation.

While we believe that certain procedural aspects may be moderated by adopting the procedural approaches advanced under the Commission Recommendation and OECD Implementation Package, we have considerable doubts as to whether it would be possible and cost effective to build an infrastructure that would enable this option to operate as intended.

Option 4: Application of a general EU-wide reduced rate of withholding tax with information exchange (Neumark solution)

We believe that this option raises similar procedural issues to those detailed at option 1 a) to f). These are further exacerbated by the need to distinguish between cross-border EU investors opting for the reduced rate and cross-border EU investors opting for the higher rate. In addition, it is not clear if the introduction of an EU wide reduced/higher tax rate would supersede existing Double Taxation Conventions or domestic tax relief. If not, then cross-border EU investors may be entitled to reclaim excess initial deductions of reduced/higher rate tax.

We believe that the issues that we have identified may be moderated by adopting the procedural approaches advanced under the Commission Recommendation and OECD Implementation Package.

The group does, however, question the validity of the 'offer' of an increased withholding tax rate in lieu of the provision of information or documentation. Whilst a 'penalty' tax rate may deter many investors from failing to disclose, the concern is that, when defined and stated, this rate provides a clear and legal option for other investors NOT to disclose their beneficial ownership. We believe that such an option may lead to increased tax avoidance and potential tax abuse.

Option 5. Limitation of both source and residence taxation of dividend income

We believe that this option raises similar procedural issues to those detailed at option 1 a) to f). In addition, we believe governments would need to introduce sophisticated systems to handle the complex calculations necessary to determine the tax credit available in the investor's residence state and verify that the appropriate level of taxation in the source state has been applied.

We respectfully disagree with the Paper's assertion that investors would be required to produce residence certificates. Consistent with the procedural approaches proposed under the Commission Recommendation and OECD Implementation Package, we believe that it should be possible for a cross-border investor to complete a self-declaration.

While we believe that certain procedural aspects may be moderated by adopting the procedural approaches advanced under the Commission Recommendation and OECD Implementation Package, we have considerable doubts as to whether it would be possible

and cost effective to build an infrastructure that would enable this option to operate as intended.

Option 6. No WHT in the State of source and no taxation of foreign source dividends in the State of residence

We believe that this option raises similar procedural issues to those detailed at option 1 a) to f) and that such issues may be moderated by adopting the procedural approaches advanced under the Commission Recommendation and OECD Implementation Package.

In addition, it is not clear to us whether this option would also include the removal of taxation on foreign source income derived from non-EU member states. If not, the residence member state would need to operate two systems, for income arising from EU member states and income arising from non-EU member states, respectively.

Further option. Final withholding tax at the same rate as that applicable in the Member State of residence

We believe that this option raises similar procedural issues to those detailed at option 1 a) to f). These are further exacerbated by the need to identify the investor type (including the investor's taxable or non-taxable status) and the investor's total taxable income (i.e. the residence country may have graduated rates of withholding) before the appropriate rate of withholding tax could be determined (where the domestic rate is lower). Given the almost limitless possible permutations, the procedural complexity attached to this option appears virtually irresolvable, although some aspects might be moderated by adopting the procedural approaches advanced under the Commission Recommendation and OECD Implementation Package. This option would require further clarification before we could comment further.

We trust that the Commission will find these comments to be of assistance in helping identify workable solutions to alleviate the problems that arise when dividends are distributed cross border to portfolio and individual investors.

If we can provide any further explanation or assistance in this regard please do not hesitate to contact us.

Yours sincerely,



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IDENTIFICATION OF THE STAKEHOLDER

- Name and address of the respondent, relevant contact details (including email address for contact)

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- If you are registered with the Commission as an "interest representative" your identification number

BBA: 5897733662-75
AFME: 65110063986-76

- Are you a recognised European social partner organisation or a representative of a European (sectoral) social dialogue committee

The BBA is a member of the European Banking Federation, a European social partner organisation

- Field of activity of the respondent. Please specify your field of activity. Please indicate if you are directly affected by any of the measures and if so, which one and to what extent:

The BBA is the trade association for the banking sector based in the UK. The BBA is not directly affected by the proposals but is representing organisations which will be.

If the respondent is an association of stakeholders, how many members do you represent and what is your membership structure?

The BBA has 220 members from 160 countries that hold a banking licence from the UK Financial Services Authority. The BBA is governed through its board of members which meets 6 times a year. The BBA is a not for profit organisation. The International Custody Tax Liaison Group (ICTLG) is affiliated to the BBA and is the principal forum for custody tax practitioners operating out of the United Kingdom. ICTLG members include most of the major global custodians (Bank of New York, Brown Brothers Harriman, Citibank, Credit Suisse, Deutsche Bank, HSBC, JPMorgan Chase, Northern Trust, RBC Dexia, State Street Bank & Trust Co. and UBS AG)

The Association of Global Custodians is an informal group of eleven global banking institutions with affiliates and branches in numerous countries, including in Europe, that provide global custody services and related securities asset-servicing functions to cross-border institutional investors around the globe, including European investment funds. Established in 1996, the Association is a non-partisan advocacy organization that represents members' common interests on regulatory and market structure matters through the issuance of comment letters and white papers and through interaction with legislative and regulatory authorities and financial industry organizations.

AFME (Association for Financial Markets in Europe) promotes fair, orderly, and efficient European wholesale capital markets and provides leadership in advancing the interests of all market participants. AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. AFME participates in a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association through the GFMA (Global Financial Markets Association). AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76. For more information please visit the AFME website, www.AFME.eu.

Do you object to publication of personal data on the grounds that such publication would harm your legitimate interests?

No

- Do you agree to having your response to the consultation published along with other responses?

Yes