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SUMMARY RECORD OF THE 2nd MEETING OF THE EXPERT GROUP ON TAXATION OF SAVINGS

*Review of the operation of the Council Directive 2003/48/EC on
taxation of income from savings*

Held in Brussels on 10 May 2007

B-1049 Brussels / Belgium. Room: MO59 6/75.

Telephone: central (32-2) 299.11.11; direct line (32-2) 295.48.11. Fax: (32-2) 299.80.52.

E-Mail: taxud-e2@ec.europa.eu.

1. INTRODUCTION

The second meeting of the Commission Expert Working Group on Taxation of Savings (hereinafter the 'EUSD Expert Group', where 'EUSD' is the commonly used acronym for "European Union Savings Directive") was attended by the appointed experts representing banking, accountants, asset management, insurance, investment funds and professional trustees and was chaired by Mr Michel Aujean, Director for Analysis and Tax Policies at the Directorate General Taxation and Customs Union of the Commission. The Chair welcomed all the experts, thanked them for the written contributions received and said that there was no intention to go through the content of the contributions during the meeting, since some of the contributions had only arrived this morning. The same model of discussion was adopted as during the first meeting of the EUSD Expert Group.

2. TREATMENT OF CONTRIBUTIONS

The treatment of received contributions was discussed. It was agreed that all the contributions will be systematically sent to all other members of the group. Subsequently, the second point linked to the contributions – a website issue – was discussed. The Chair announced that the website will be accessible to all contributors. He highlighted difficulties encountered with receiving permission to mention the names of experts and/or their respective Trade Associations for publication on the website. It was concluded that only contributions qualified as final by the authors will be placed on the web site.

3. SUMMARY MINUTES

The Chair highlighted problems encountered during verification of the summary minutes with the experts. The Chair stressed that there is no intention of the Commission to have summary minutes formally agreed upon. What the Commission tried to do was to accommodate the experts' comments but without seeking a formal approval. It was announced by the Chair that the revised summary minutes of the meeting of 22 March would be sent out the day after this meeting, for which the Commission services will be exclusively responsible. This system would be carried on in the future and dissenting views could possibly be reflected within footnotes. Some experts highlighted that there is an added value of having the summary minutes approved by the experts as it would be something the Commission could refer to in future and it is important that experts can give their comments.

4. DEADLINES

The Chair referred to written positions received from some associations which were expressing concerns at the deadlines for providing both the answers to the questions raised in the working document and to the quantitative questionnaire. He indicated that keeping to the schedule is very important, because after discussions with the experts the Commission will still have a lot of work to do in preparing a report and possible amendments, which under the Directive are due in 2008. At the same time the Chair expressed his understanding for the obstacles the Trade associations might have in reacting and in producing the necessary information. He announced that the meeting initially scheduled for July 3rd would be

postponed to September. The new deadline for both the replies to the questions raised in the working document, as well as to the quantitative questionnaire would be set for July 1st.

All experts who took the floor during the meeting indicated how difficult and time consuming the process of collecting and processing information for the purpose of answering the quantitative questionnaire would be. Some experts expressed their astonishment for not requesting the authorities of the Member States to answer at least some of the questions raised in the quantitative questionnaire. They also claim that the deadline of July 1st seems to be unrealistic to them, notably for the answers to the quantitative questionnaire. Moreover the experts claimed that it would be worth considering slightly redrafting the questionnaire in order to make it answerable in a more meaningful way. It was agreed that the Commission together with the EBF will have a discussion to see whether it would be possible to redraft the questions to make replying to them easier and whether it would reflect the type of information the Commission needs to find out.

At the same time the Chair made it clear that it would not accept a situation where the Commission is blamed by the experts or their Trade Association for not having included in the report an objective assessment of the situation, if it happens that the experts themselves claim they are not able to provide the necessary data to enable the Commission to prepare such an assessment. The Chair highlighted the importance of an evaluation of the situation and asked the experts to make their best endeavours to provide the answers to the questions starting from question 5 by the 1st of July; he proposed that for the first 4 questions the experts would send in their replies before the meeting planned in September. The Chair also indicated that he was hesitant to postpone the whole exercise because it would not necessarily produce a better result. He informed the experts that part of the questions had or will also be addressed to the Member States' tax administrations.

5. DISCUSSION OF THE WORKING DOCUMENT

5.1. Issues relating to identity and residence

The Commission services presented in detail the issues discussed in Section 2.2. of the working document (questions 6 to 8). In particular, the questions were raised about how to deal with joint accounts and other cases of shared beneficial ownership, how to deal with the cases where it is clear to the paying agent that the permanent address does not correctly correspond with the beneficial owner's residence for tax purposes (diplomats, expatriates and staff of public international institutions) and how to deal with the change of residence of beneficial owner during a tax year.

5.1.1 Dealing with joint accounts

A majority of the experts were in favour of applying the attribution of the interest payment to all holders (beneficial owners) of the joint accounts or deposits (the split-up). The experience of Member States which apply withholding taxes, either for the purpose of the EUSD or under internal laws was recalled and there were different ideas expressed on how to deal with this issue from a practical point of view. The question of whether to presume a proportional attribution unless otherwise requested by the holders or whether to ask them to provide the paying agents with the accurate information on the percentage share beneficially owned by each holder seemed to be a matter of presentation rather than of substance.

Only a few experts indicated that the joint accounts have to be treated as so called residual entities under Article 4 (2) of the EUSD, arguing that the application of the split-up creates practical difficulties in cases of changing composition of the group or percentage of the ownership during the information period.

5.1.2 Dealing with the cases where the permanent address does not correctly correspond with the residence for tax purposes

While some experts remarked that it would not be possible to obtain information from their customers about their profession, it was indicated that it would be reasonable that paying agents take into consideration all the information they have at their disposal to establish where the beneficial owner has their actual tax residence. It was stated that the documentation may include a tax certificate issued by the tax administration in context of bilateral tax treaties if it is already in possession of the paying agent. However, it would be less burdensome to rely on self certification combined with an official obligation for the customer to keep the paying agent informed of any changes. Some experts stated that they are against asking for any additional information in this respect.

5.1.3 Dealing with the change of tax residence during the year

It was proposed that the experts will express their views on this issue through their written contributions.

5.2. Issues relating to definition of paying agents

The Commission services presented in detail the issues discussed in the Section 3.1. of the working document (questions 9 to 15) which touched upon three main issues in relation to the definition of paying agents under the EUSD: transparent entities, trusts and deliberate routing through branches established outside the territorial scope of the EUSD.

5.2.1 Transparent entities

The Commission services clarified that their preference would be rather for using the look through approach based on the AML evidence if considered feasible. The residual entity approach would be reserved for the cases of transparent entities, where it has not been possible to identify the beneficial owner under the anti-money laundering provisions.

The experts highlighted technical difficulties that may arise from the fact that there are different definitions of fiscal transparency in Member States. In the opinion of some of them, it would be advisable to have a common definition of what is a fiscally transparent entity. Many experts believed that the application of the residual entity mechanism as provided by Article 4(2) of the EUSD to all payments made to all fiscally transparent entities, with the only exclusion of UCITS (or UCITS-like under Article 4 (3)), would increase the work of the economic operators; they added that the establishment of a positive list of the entities concerned would be a precondition.

5.2.2 Trusts

An expert from the trust industry indicated that any extension of the Directive (in particular, but not only, of its 'paying agent on receipt' provisions) to arrangements described in general terms as "discretionary trusts" or "trusts" would not be a solution, due to the vague legal meaning of these terms in an international context.

According to this expert, it would instead be necessary to adopt a more detailed definition of the kinds of arrangements which are in the scope of the EUSD.

The experts from the trust industry expressed concern that any provisions referring only to trusts would be likely to introduce distortions of competition with other equivalent structures.

These experts were invited by the Commission services to provide their help in exploring alternative ways to address the issue of trusts and equivalent structures, for the sake of ensuring a level playing field for payments received by individuals directly or through these arrangements and structures, although no specific commitments were suggested.

5.2.3 Abusive routing of interest payments

Some experts suggested that routing of interest payments through non-EU branches on the initiative of beneficial owners can actually happen with the aim of circumventing the Savings Directive. During the discussion it was stressed that, if any provision in this area is to be adopted, it should be limited to evident cases of real abuse. However, experts believed that putting reporting obligations on the head office would be not a feasible solution; access by tax authorities to information possessed by branches through their head offices is already being legally challenged in some Member States. In addition, bank secrecy provisions in some non-EU countries would stop branches from revealing information referring to a specific client. One expert indicated that a possible solution might be to identify the location of the business relationship on the basis of the AMLD. The Commission services suggested that it would be useful to have a sort of anti-abuse provision introduced in the EUSD so that information on the opening of customer relationships through branches outside the EU would be provided to the tax authority and in such a case the MS of the beneficial owner's residence could apply its own anti-avoidance provisions.

Some experts expressed general concerns that the kind of provisions suggested by question 14 of the Commission services' working document may undermine the competitiveness of EU financial institutions and could be easily avoided by these institutions by incorporating their non-EU branches in the form of legally independent subsidiaries.

5.3. Issues relating to the definition of interests payment

In relation to the definition of interest payment, as discussed in the Section 4 of the working document (questions 16 to 21 and question 24), the Commission services raised issues related to the treatment of certain derivatives and structured products under the substance over form principle, to the treatment of income and benefits from other "risk free" capital investments (like life-insurance, pensions or annuity contracts), and finally issues related to the collective investment schemes and to the application of the "home country rule".

As a general comment to the current exclusion of certain products, some experts indicated that it does not necessarily cause distortions in financial markets but only a lack of neutrality among products based on tax reasons.

5.3.1 Derivatives and substance over form principle

Some experts highlighted that often the Member States' tax laws do not classify derivatives as interest income and therefore many financial institutions have not set up technology systems to capture this information or apply the withholding tax, so broadening the scope of the EUSD by accepting the substance over form approach would constitute an additional administrative burden for the paying agents. Moreover, classifying the derivatives as an interest payment may, in view of some of them, cause legal problems and lead to distortions. These experts stated that there has not been a rush for derivative products in order to avoid the EUSD. While some experts advised applying the substance over form approach rather than being very specific, many advised developing a definition of those kinds of products which produce interest income.

5.3.2 "Risk free" capital investments

Some experts had noted the phenomenon of packaging interest products into insurance products after the implementation of the EUSD; however others stated that they were not of the opinion that the exclusion of insurance products from the scope of the EUSD leads to financial distortions. Some experts advised that, in case the Commission services would like to cover income from 'risk free' insurance products by the EUSD, they would then need a proper definition in order to include only products presenting no real actuarial risk and to exclude genuine insurance products.

The Chair underlined that there is a concern about some instruments or a segment of the insurance market which are effectively used to avoid paying taxes and this limited area will have to be looked at more closely.

5.3.3 Treatment of UCITS, non- UCITS, UCI

Some experts considered that the present exclusion of non-UCITS from the scope has not lead to obvious distortions. Many experts agreed that the definition of undertakings for collective investment established outside the territory to which the Treaty applies (UCI) should be improved in the EUSD in order to encompass all investment funds irrespective of their legal form and the regulation applicable, in order to bring certainty to the paying agent on what is in and what is out of the scope of the EUSD. Some experts indicated that using the definition provided by the Swiss guidelines or by the OECD Model will still keep half of the funds out of the scope of the EUSD.

Furthermore, some experts called for recognising a procedure enabling paying agents to rely on data provided by the data vendors.

5.3.4 Application of the "home country rule"

Some experts indicated that the application of the home country rule is crucial. It is already applied by the paying agents despite the fact it is not provided for in the EUSD. In their view it is not practically feasible for the paying agents to follow the rules of their own country for funds established abroad.

6. Final remarks

The Chair indicated that for all the other questions raised in the working document an oral debate is not needed; the experts were invited to submit their answers to these questions in writing. He indicated that at this point in time the Commission services have not drawn any conclusions. The Chair asked the experts to prepare final written contributions to the working document in order to enable the Commission services to put them on the web page. He invited the experts to propose any other issues which might be worth being examined by the EUSD Expert Group during the third meeting. He also informed the group that the Commission services will have a discussion with the EBF on the quantitative questionnaire and that everyone is invited to participate in it. The Chair thanked the experts and closed the meeting.