

Email

Mrs Kerstin Malmer
European Commission
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Brussels, 3 July 2008

Subject: *Savings Taxation*

Dear Mrs Malmer,

I am writing to you on behalf of the European Banking Federation (EBF)¹ and, in particular, on behalf of the experts and their alternates we nominated in 2007 in the EC Expert Group on the Taxation of Savings.

In our letter dated 9 May 2007, we set out tentative details of additional issues which we believed the European Commission should take into account as part of its assessment of the operation of the Taxation of Savings Directive.

These issues were subsequently covered, to a greater or lesser extent, in the discussions of the Commission's Expert Group on the Taxation of Savings. The EBF is therefore taking this opportunity to restate its position in the light of these discussions and respectfully requests the Commission to take the following EBF comments into account as part of the overall assessment process.

EBF members would like to emphasize the importance of a level playing field covering the transactions which fall within the scope of the Directive. They share the opinion that the Directive remains unclear as for (i) the definition of 'interest payment' and 'paying agent', (ii) the definition of 'residual entities' and (iii) the formulae that may be used in different member states to determine whether a fund or a particular fund event falls under the Directive.

We enclose herewith our detailed comments.

Yours sincerely,

Roger Kaiser,
Senior Adviser

Enclosure: 1

¹ Set up in 1960, the European Banking Federation is the voice of the European banking sector, with over 30000 billion EUR assets and 2.4 million employees in 31 European countries. The EBF represents the interests of some 5000 a.i.s.b.l. European banks: large and small, wholesale and retail, local and cross-border financial institutions.

NOTE**ADDITIONAL ISSUES FOR CONSIDERATION BY EUROPEAN
COMMISSION**

In its preliminary note dated 9 May 2007, the European Banking Federation (EBF) set out tentative details of additional issues which it believed the European Commission should take into account as part of its assessment of the operation of the Taxation of Savings Directive.

These issues were subsequently covered, to a greater or lesser extent, in the discussions of the Commission's Expert Group on the Taxation of Savings. The EBF is therefore taking this opportunity to restate its position in the light of these discussions and respectfully requests the Commission to take the following EBF comments into account as part of the overall assessment process.

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Art 3(2): Taxpayer Identification Number (TIN) versus date / place of birth

A TIN is currently superior to date and place of birth, and must be reported if it is shown on the passport, ID card or other documentary proof of identity. However, many member states maintain that they do not use a TIN system and the current approach is problematical for paying agents. Consistent with its response to the Commission's Working Document (Q4), the EBF proposes that TIN and date and place of birth be made equally valid as options for paying agents. This would enable paying agents to consistently use date and place of birth details if they wish to do so. If this is not possible, then the EBF believes that, at a minimum, and consistent with views expressed by the Commission during the Expert Group discussions, there should be certainty in terms of which member states look to TINs and which do not.

Art 3(3)(b): Certificates of tax residence

There is a practical inability to secure certificates of tax residence from the "competent authority" of certain third countries. Consistent with its response to Commission's Working Document (Q4), the EBF proposes that other evidence of tax residence as may be agreed by member states should be admissible. During the Expert Group discussions, the Commission indicated that it would be useful to have examples of problem countries of residence and possible alternative evidence. With regard to the former, EBF members report considerable problems securing certificates

a.i.s.b.l.

of tax residence from China and Egypt. With regard to the latter, some EBF members suggest that an employer's certificate or the like be considered as constituting suitable evidence of residence.

(In its note of 9 May, the EBF indicated that there may be a similar issue experienced in relation to certificates under Art 13(1)(b). However, the situation appears to have eased in the intervening period and consistent with its response to Commission's Working Document (Q26), the EBF considers that while the system is considered relatively burdensome, few problems currently arise in this particular area.)

Art 4(1): Passive receipt / payment

The general guiding principle established at Article 4(1) of the Directive is that the paying agent is the last intermediary in the chain. However, in exceptional cases and for certain member states, where there is passive receipt or passive payment, this principle may not apply. At present, there is no common guidance regarding concepts of passive receipt or passive payment. Some member states such as the UK have clarified the "passive" condition in guidance. Others have yet to do so. In the absence of common guidance, a single payment chain that crosses various member states could produce different determinations of where paying agent responsibility lies by the competent authorities in those member states. This could lead to two different parties involved in a single cross border payment chain being deemed to be the paying agent, therefore creating duplicate reporting/withholding under the Directive. Equally it could lead to no party in a single cross border payment chain being deemed to be the paying agent by the relevant member states. During the Expert Group discussions, the Commission indicated that it would welcome further EBF proposals in this regard. Accordingly, the EBF regards the conventions detailed in Appendix 1 – which are based on the current UK guidelines – as a valid approach that can be adopted by the member states concerned.

Art 4(2): Residual entities

Consistent with its response to the Commission's Working Document (Q9-13), the EBF has repeatedly drawn the Commission's attention to the fact that the "equivalent" agreements with the Third Countries are simply restricted to payments to individuals and do not extend to residual entities. Accordingly, EU paying agents find themselves at a significant competitive disadvantage to paying agents in the Third Countries, as well as paying agents outside the EU, Agreement Territories and Third Countries. The EBF remains deeply concerned by the current position and believes that it represents a serious failure on the part of member states and the Commission to ensure a "level playing field" for EU paying agents. The EBF is strongly opposed to any expansion of Art 4(2) without genuine equivalent measures being agreed with the Third Countries. In the continued absence of such equivalent measures the EBF calls for Art 4(2) and its associated provisions within the Directive to be abolished. The EBF is very disappointed that the Commission could provide no commitment to address this continuing disparity during the Expert Group discussions. However, in the interest of

equity, we continue to earnestly press this point on behalf of our members and the wider EU financial services industry.

Paying agents are currently required to secure “official evidence” that an entity falls under sub paragraphs (a), (b) or (c) and is therefore not a residual entity. The current wording of this paragraph means that the entire non-individual client base has to be classified in order that the paying agent can satisfy itself that none of these clients are “residual entities”. This negative evidential standard (i.e. you are a “residual entity” until you can evidence that you’re not) is hugely wasteful in terms of the administrative burden that it places on paying agents; any “residual entities” arising from this process are almost inevitably the result of a lack of “official evidence” rather than true “residual entity” status. Consistent with its response to the Commission’s Working Document (Q10), and in the absence of any abolition of Art 4(2) and associated provisions, the EBF urges the Commission to work with member states to agree a positive list of residual entities, in order that paying agents can limit reporting to entities which are believed to be of a type set out in this list.

Art 6 & 15: Use of external information providers and “home country rule”: determination of securities assets and deemed interest falling under the Directive

Paying agents that are not connected to the issuer of a security (bond or fund) have no practical way of ascertaining whether a bond or fund or a particular fund event (distribution or redemption) falls under the scope of the Directive and if appropriate, the interest element attaching to a fund event. Where member states have issued guidance on this point, it is generally accepted that paying agents can rely on recognised external information providers (e.g. Bloomberg, Fininfo, FTID, Reuters, Telekurs & WM Daten) to classify securities/events for the purpose of the Directive and to determine the interest element attaching to a fund event. Consistent with its response to the Commission’s Working Document (Q20, which was limited to funds), the EBF proposes that this approach be formalised by way of common guidance across all member states.

Furthermore, funds in different member states will likely use slightly different formulae to determine whether the fund or a particular fund event falls under the Directive and if so, the interest element attaching to a fund event. These differences will typically be attributable to variations in accounting or regulatory requirements across the member states. In theory, a paying agent in a different member state to the fund could be obliged to use a different formula to the one used by the fund, resulting in 27 potential calculations of a single event. Practically, only the fund has sufficient information to make the relevant determination /calculation and those member states that have issued guidance on this point have accepted the principle of the "home country rule" for funds. This essentially allows paying agents to defer to the practices adopted by the fund’s country of establishment. Consistent with its response to the Commission’s Working Document (Q24), the EBF proposes that once again this approach be formalised by way of common guidance across all member states and applied to all funds (whether established in member states or otherwise).

Variable implementation of the Directive

The EBF has previously expressed its concerns about the possible unequal implementation of the Directive across member states. The EBF notes and accepts the point made by the Commission in the Expert Group discussions, that there is currently no comitology provision in the Directive and member states may therefore interpret the Directive as they deem appropriate. However, the EBF remains concerned that some member states may nevertheless implement the Directive incorrectly and stands ready to provide the Commission with evidence of any inappropriate implementation practices that it may subsequently become aware of.

Other technical points

Finally, the EBF would like to take this opportunity to highlight some further drafting points that the Commission may wish to address as part of its current review:

- Art 3(2): It is not clear what the paying agent is supposed to do if the beneficial owner simply doesn't possess a passport or ID card. In certain member states ID cards are not compulsory and not all individuals will have a passport.
- Art 3(2): Equally, it is not clear what the paying agent is supposed to do if the beneficial owner's date and place of birth details do not appear on the passport or ID card. Previous EBF research indicates that not all member states include these details on the passport or ID card.
- Art 4(2): In practice, a paying agent acting as economic operator and making payment to a "residual entity" will be unlikely to know the extent to which interest is paid or secured by the residual entity "for the benefit of the beneficial owner". From the perspective of such paying agent, this wording is meaningless, although it may be of application to the "residual entity".

Appendix 1

Proposed Passive Receipt / Payment Conventions

1. The general guiding principle established at Article 4(1) of the Directive is that the paying agent is the last intermediary in the chain paying interest to, or securing interest for, the beneficial owner. However, paying or securing interest for the purpose of the Directive demands significant active responsibility. In exceptional cases and for certain member states, where there is passive receipt or passive payment, the general guiding principle may not apply.
2. In particular, banks, other financial institutions or other businesses which have a role in the payment process are not regarded as making a payment if their role is essentially passive (they act on instructions from others) or auxiliary (they merely provide services to help the paying agent). A bank or similar institution does not therefore make a payment merely by issuing or sending a cheque, or arranging for the electronic transfer of funds on behalf of one of its customers. Equally, a bank or similar institution does not secure a payment merely by clearing a cheque, arranging for the clearing of a cheque, or receiving an electronic transfer of funds on behalf of one of its customers.
3. The following (non-exhaustive) examples are intended to illustrate these exceptional cases.

Paying Agents who make interest payments

Example 1

Factual Summary

A bank has outsourced many of its administrative or back-office functions to an independent contractor. The bank takes full responsibility for everything that the contractor does and the bank's customers are not aware of the contractor's role or of the fact that the staff with whom they communicate are employees of the contractor rather than the bank.

Conclusion

The bank is the paying agent. The outsourcing contractor, even if it is another bank, provides services to the bank but has no responsibility for making interest payments.

Example 2

Factual Summary

A bond issuer has appointed a transfer agent which is responsible for maintaining all the records of the bond holders. The transfer agent also makes interest payments to the bond holders using funds provided by the issuer.

Conclusion

The transfer agent is the paying agent. The issuer has outsourced both essential administrative services and the responsibility for making interest payments.

Example 3

Factual Summary

A bond fund falling under the Directive has appointed a fund administrator in member state A. Amongst the functions performed by the fund administrator is the maintenance of the share/unit holder register of investors in the fund.

The fund has also appointed an agent in member state B. The agent performs various functions on behalf of the fund in member state B, including the receipt of investor subscription and redemption applications for onward delivery to the fund administrator in member state A. The agreement between the fund and the agent also provides that the agent will, when instructed to do so by the fund administrator, effect money transfers representative of fund distributions or redemption payments to share/unit holders (or former share/unit holders) in member state B and potentially other member states. Such money transfers are made in accordance with bank details and other relevant payment information instructed by the fund administrator.

Conclusion

The fund administrator is the paying agent in respect of the fund distributions and redemption payments made through the agent, as it actively initiates these payments. The agent acts passively and simply effects the money transfers based on the direction and information supplied by the fund administrator.

Paying Agents who secure interest payments

Example 4

Factual Summary

A stockbroker holds client securities assets which produce interest (either at the point of interest distribution or when they are sold or redeemed). The assets are registered in the name of a nominee company, which is a subsidiary company of the stockbroker.

The nominee company does not have any real substance. Its sole function is to hold securities on behalf of a third party (being the stockbroker's client), by having those securities registered in its name. The appointed officers of the nominee company are all employees of the stockbroker; the nominee company has no full time staff and all of its essential functions are handled by the stockbroker. Furthermore, the stockbroker's clients have no contractual relationship with the nominee company.

Conclusion

The stockbroker is the paying agent. He has the contractual relationship with the clients (while the nominee company does not), takes responsibility for securing the interest income due to his clients and has full control over the subsidiary company which formally holds the client's property.