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**EUROPEAN COMMISSION**  
DIRECTORATE-GENERAL TAXATION AND CUSTOMS UNION  
ANALYSIS AND TAX POLICIES  
**Direct tax legislation**

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Taxud-E2 –

**000701\written answers\summaries  
\20080707 EUSD-EXPERT**

## **EXPERT GROUP ON TAXATION OF SAVINGS**

**Opinions expressed during 2007 in the Expert Group on Taxation of Savings –**

**A summary document**

## **1 EXECUTIVE SUMMARY**

The Expert Group on Taxation of Savings (the EUSD Group) has been set up to assist the Commission services in their review of the functioning of the Savings Directive as provided in Article 18 of the Directive. The Group is comprised of 24 Experts who were appointed on the basis of candidatures submitted by 18 representative Trade Associations at EU level (the full list of the Experts and Trade Associations involved is accessible through the following link:

[http://ec.europa.eu/taxation\\_customs/taxation/personal\\_tax/savings\\_tax/savings\\_directive\\_review/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/personal_tax/savings_tax/savings_directive_review/index_en.htm)).

### **General Remarks**

Although all the Associations involved welcomed the opportunity to assist in the review exercise, some of them expressed their concerns about how Commission Services are managing the process. In particular, these Associations advocated the need to base the review on a thorough impact assessment, conducted over a longer reference period of the operation of the Savings Directive, which should include a cost/benefit analysis at the level of the Member States and of the paying agents. The same Associations also reported difficulties in collecting from their members many of the quantitative elements on which this cost/benefit analysis could be based (refer to the last item of this executive summary). The EUSD Group has only been looking at how the Savings Directive may be amended for the future without proceeding to the efficiency test of both taxation systems contained in the Directive. Many Experts/Associations highlighted the importance of maintaining a level playing field with non-EU countries if any amendments were to be made to the Savings Directive.

### **Answers to the Commission services' Working Document of 14 March 2007**

The Commission services received written replies to the questions raised in the working document from the following Associations (listed by their acronyms): AIMA, AISAM-ACME, CEA, EACB, EAPB, EBF, ECSDA, EFAMA, EFRP, EFSA, ESBG, FEE, ISDA and STEP. Individual written contributions were also received from four Experts (Mr Coveliers, Mr Dardenne, Mr Husson and Mr Marchese) acting in their personal capacity. This Summary Document also includes additional comments resulting from the Summary Minutes of the three meetings held by the Expert Group in 2007.

### ***Question 1***

Many Experts/Associations did not consider it acceptable to make use, for the purposes of the Savings Directive, of the evidence of beneficial ownership for legal entities obtained in the framework of the Anti-Money Laundering Directive (AML). They argued that the purpose of the two Directives is different and that such an alignment would increase the

administrative burden for the paying agents, require major changes to systems and create legal uncertainty, potentially leading to duplicate reporting. Some Experts/ Associations also highlighted that there is a complex problem in relation to the AML proposals, which would lead to tax administrations being provided with incorrect information in terms of the recipients of interest. Some other Experts/Associations, however, were in favour of this proposal, but only in cases where paying agents were already subject to the AMLD. One of these Experts, together with the Trade Association he represents in the EUSD group, suggested that the scope of this measure should be limited to payments to non-EU and non-EEA companies and other legal entities and arrangements.

### ***Question 2***

Whilst maintaining the general reservations expressed in the answers to Question 1, some Experts/Associations considered it sensible and practicable to make the look-through approach suggested in the Working Document conditional on the absence of any evidence to be provided (e.g. before the end of the fiscal year of the interest payment) that the legal entity is subject to yearly taxation on its income (including interest income) in its country of establishment under the local general arrangements for taxation for such kind of legal entities. However, other Experts/Associations indicated that such an additional requirement would make the procedure even more onerous and burdensome and is likely to result in undue reporting or withholding due to the lack of documents confirming yearly taxation status.

### ***Question 3***

A number of Experts/Associations were against introducing amendments in the Savings Directive providing for a reference to concepts of the AMLD for establishing the individual beneficial owners of a discretionary trust or other similar legal arrangement, notably in cases where no evidence is provided within a reasonable time that the income arising to the trust or other similar legal arrangement (including interest income) is taxed on a yearly basis. Their objections were mainly due to the complexity of legal rules applicable to trusts, uncertainty about the application of AMLD (commonly not all beneficiaries of discretionary trusts can be determined until a point immediately before the income is distributed) and the possibly burdensome procedure (yearly tax status). Moreover, they also highlighted that there is a complex problem in relation to the AML proposals, which would lead to tax administrations being provided with incorrect information in terms of the recipients of interest. For trusts and other legal arrangements established in any EU Member State, one of the Trade Associations suggested a different approach, where the trustee would have the obligation either to provide the upstream economic operator with proof that the income is subject to tax, or to act as paying agent on receipt. In the case of accumulation of the income and a later distribution of any amount of money, the nature of such distribution would be deemed to be an income distribution up to the amount of the trust's interest income that has been accumulated in the past.

#### ***Question 4***

In regard to introducing a clarification in the Savings Directive in order to refer systematically to the identity and permanent address resulting from the Customer Due Diligence performed under the requirements of the AMLD, many Experts/Associations agreed that there would be ways to make the present identification procedures more effective. Linking the determination of identity and residence not only to the content of the Identification Document (ID) presented by the customer but also to other reliable information in the possession of the paying agent seemed feasible to them. There was a suggestion to use the 'best information available at a payment date', including information required for AML purposes. Nevertheless, some Associations insisted that any change should only refer to future customer relationships. Some other Experts questioned whether there would be any benefits resulting from the proposal made by the Commission services.

#### ***Question 5***

In connection with the additional requirements set under Article 3 of the Savings Directive for contractual relations established on or after 1 January 2004, an Expert pointed out that information collected by the paying agents according to the AMLD should be sufficient to fulfil the requirements of the Savings Directive. One Association suggested that the burden of determination of fiscal residence has to be put to Member States and customers.

#### ***Question 6***

According to many Experts from the banking sector, the proposed solution for joint accounts seemed to be reasonable, but making its application compulsory could trigger practical problems and additional costs. One of the Trade Associations from the banking sector clearly rejected the idea and did not think common guidelines are necessary.

#### ***Question 7***

Many Experts/Associations replied positively to the question regarding whether it would be acceptable for paying agents to make reference to those official documents proving tax residence of the beneficial owner which are already in their possession, rather than to the address resulting from the ID, for establishing residence for the purposes of the Savings Directive. However, some of them indicated that it cannot be assumed that banks are in a possession of tax certificates from all individuals. Moreover, a number of Associations suggested that common guidance across Member States should accompany any amendment to the Directive.

### ***Question 8***

In relation to the question of whether the paying agent would accept the additional task of systematically requesting official documentary proof of tax residence from certain beneficial owners whose own professional activity or personal status can imply a difference between the State of the permanent address and the State of tax residence, all the Experts/Associations were of the opinion that the paying agents should only take account of those documents proving tax residence which are already available to them.

### ***Question 9***

Some Experts/Associations expressed their opposition to any extension of the scope of Article 4 (2), if equivalent measures were not agreed with third countries. A number of Experts/Associations feared that an extension of Article 4 (2) to all payments made to transparent entities would have a considerable impact on economic operators, encompassing additional administrative burden, since a classification of transparent and non-transparent entities would be difficult. One of the Associations expressed some support for such an extension, but noticed that it would need the establishment of a common definition not only of what is a "transparent entity" but also of the concept of "residence" for the entities concerned, as these definitions can vary within Europe.

### ***Question 10 and 11***

A majority of Experts/Associations would welcome a 'positive' list of the entities concerned to help economic operators apply the 'paying agent on receipt' provision. Nevertheless, many of them stated that they would not accept the amendment proposed in question 9. Some Experts/Associations considered a "negative" list of the categories of entities excluded from the "paying agent on receipt" provisions as an improvement to the present situation, while other Experts/Associations found a negative list neither practical nor manageable.

### ***Question 12***

Experts/Associations from the banking sector thought that combining a look-through approach for beneficial ownership with the residual application of Article 4 (2) would increase the administrative burden in an unreasonable way. Some Associations, even if not explicitly opposing the proposal, indicated that it would add costly complexities to the reporting process.

### ***Question 13***

Apart from one Association which expressed some support for this proposal (see answers to question 3), many Experts/Associations were against the proposal to amend Article 4(2) of the Savings Directive in order to extend the “paying agent on receipt” provisions to interest payments made to those discretionary trusts (or other legal arrangements) whose income (including interest income) is not taxed on a yearly basis in its Member State of establishment. According to them, this solution is not practical, unfairly affects the activity of trusts and would result in new unacceptable administrative requirements for paying agents, given the different legal frameworks across Member States. Most Experts/Associations found that the possible implementation of this proposal would in any case require a positive list detailing the types of arrangements concerned in a legally appropriate form.

### ***Question 14 and 15***

Some Experts/Associations thought that there could be cases where it would be legally and practically feasible to impose an obligation on the head offices established within the EU to report (or to withhold) on interest payments made through non-EU branches, provided that the client has not opened the account directly with a non-EU branch. However, most Associations were convinced that addressing the issue of illegitimate routing of interest payments cannot be achieved by a broad interpretation, since such a solution would not provide the clarity and certainty that paying agents require. One Association suggested that any change in practice should be facilitated by means of common guidance across Member States in consultation with the industry. Other Experts/Associations questioned the legality and practicability of the proposal. They insisted on a level playing field between branches and subsidiaries. Some Experts/Associations feared this proposal would undermine the competitiveness of EU financial institutions.

### ***Question 16***

In the opinion of some Experts/Associations, it cannot be excluded that the omission of innovative financial products causes distortion of competition in the financial markets although there is no direct evidence to support this. One of these Associations suggested a broader definition of interest payment encompassing "*any revenue arising from the investment of capital where the return is fixed ex ante and the substance of the return arising from the transaction is similar to interest income*" and the establishment of a list of the innovative products concerned, to be updated through Comitology procedures. Some other Associations indicated that their members did not report any distortion and were opposed to the "substance over form" approach as not providing legal certainty. They indicated that only financial products that produce income which is fully or partially characterised as interest should fall under the scope of the Savings Directive. An Expert expressed the opinion that structured or derivative financial instruments whereby the economic performance relating to

the underlying assets other than debt claims is exchanged or swapped against interest could be taken into account in the scope of the Savings Directive. Another Expert suggested making reference to representative indexes of return on investment for dealing with products equivalent to debt claims. An Association called for a level playing field with investment funds.

#### ***Question 17***

Some Experts/ Association believed that the current exclusion of life-insurance products leads to distortions, but indicated that there is no data available which allows them to measure this. According to other Associations, competition is not distorted because of the Savings Directive but because of other factors. Competition between life insurance products and other financial products would arise at national level and not at cross-border level and therefore would not be driven by the Savings Directive. Other Experts/Associations expressed some disagreement with this opinion, as non-residents investing abroad can easily have access to insurance products of companies established in the same country of the paying agent of the Savings Directive, so the latter could be a driver for competition even at national level.

#### ***Question 18***

Some Experts/Associations were in favour of introducing an amendment to the Savings Directive in order to include in its scope part or all of the benefits from revocable life-insurance, pension or annuity products when the underlying prevailing investment is directly or indirectly made of interest generating financial products. Other Associations opposed this proposal. In their opinion as the current exclusion has not led to evident distortions in financial markets, the above mentioned products must be maintained outside the scope of the Savings Directive. If the Savings Directive is to be extended, the text should clearly define which contracts would be included (a "grandfather" clause could be considered) and how the payments should be classified, as they are not equivalent to interest payments. Attention should be paid to exclude Second Pillar pension schemes from any amendment to the Savings Directive, as the participants to these schemes do not have any influence in the investment policy of the pension scheme.

#### ***Question 19***

One Association expressed its opposition to an amendment providing for inclusion in the scope of the Savings Directive of interest income obtained through non-UCITS. Some other Experts/Associations considered that the current distinction between interest income obtained through UCITS and non-UCITS is illogical and that competition within the EU between UCITS and non-UCITS may be driven by the Savings Directive, but were not able to provide quantitative evidence. One Association thought that an extension of the "paying agent on receipt" provisions to all transparent entities could be an appropriate solution, if some

conditions are met (establishment of common definitions for "transparency" and "residence", see answers to question 9).

#### ***Question 20***

Some Experts/Associations were in favour of the proposal to detail better the definition of "undertakings for collective investment established outside the territory" [to which the Treaty applies], since a clarification in this respect would help to avoid market distortions or tax evasion. Other Experts/Associations were strictly opposed to any specific definition in the Savings Directive. In their opinion, if the Commission services want nevertheless to refer to a definition then it needs to refer to definitions already included in the UCITS Directive, the Life Assurance Directive or the Markets in Financial Instruments Directive. Other Experts pointed out that a clarification of the definition of undertakings for "collective investment established outside the territory" can be best achieved by means of common guidance across the Member States in consultation with the industry.

#### ***Question 21***

Some Experts/Associations found the definition of collective investment funds or schemes provided by the 2002 OECD Model Agreement an interesting basis for reflection, while others considered it not sufficient and proposed other definitions for the purposes of the Savings Directive. One Association was, however, strictly opposed to any definition of investment fund to be included in the Savings Directive.

#### ***Question 22 and 23***

Experts/Associations who answered this question were not aware of any distortion arising from the annualisation provision contained in the Savings Directive. They saw no reason for annualisation to be compulsory. Furthermore, some of them indicated that the proposed solution could be regarded as discriminatory.

#### ***Question 24***

Some Experts/Associations were in favour of formal recognition of the home country rule in the Savings Directive, while other Experts/Associations believed this issue would be best facilitated by means of common guidance across the Member States in consultation with the industry.

***Question 25***

Concerning the proposal to specify the quarter of the tax year during which the interest payment is made, some Experts/ Associations were convinced that it is not actually necessary and it would be burdensome and costly for paying agents since their reporting systems are not structured to record such information.

***Question 26***

In relation to the certification procedure under Article 13(1) (b) of the Savings Directive, the Experts/ Associations did not report any specific problems.

**Additional points to be discussed by the Experts/Associations**

One Association proposed additional subjects for discussion. These issues were reviewed by the EUSD Group during its last meeting in September and are listed in the Summary Minutes of that meeting.

**Quantitative Questionnaire related to the EUSD**

The Commission Services also asked all the Associations to reply to a Quantitative Questionnaire designed to measure the economic impact of the Savings Directive. Most of the Associations indicated that they are unable to provide statistically firm conclusions based on the feedback received from their members and highlighted problems with gathering the information. Only a few Associations provided some data, but even these replies addressed only a limited number of the questions asked. There was acknowledgement among the Experts/ Associations that the limited data they can provide is not sufficient to measure the impact of the Savings Directive.

**Information about Trade Associations**

Information about Trade Associations represented in the EUSD Group is included in Annex 2.

## 2 INTRODUCTION

The Expert Group on Taxation of Savings (the EUSD Group) has been set up to assist Commission services in their review of the functioning of the Savings Directive as provided in Article 18 of the Directive and to facilitate an initial analysis of the possible impact on the markets of any amendments to the Savings Directive which could be desirable in order to better ensure effective taxation of savings income and to remove distortions to competition. In order to achieve this aim, Commission services have asked the Experts of EUSD Group to provide written replies to the questions raised in the working document of 14 March 2007 on *Review of the operation of the Council Directive 2003/48/EC on taxation of income from savings*.

Commission services received a set of written replies to the questions raised in the working document from the following associations (see in Annex 1 the full name of Associations corresponding to each acronym): AIMA, AISAM-ACME, CEA, EACB, EAPB, EBF, ECSDA, EFAMA, EFSA, ESBG, FEE, ISDA, STEP, as well as from Experts (Mr Coveliers, Mr Dardenne, Mr Husson and Mr Marchese), acting in their personal capacity.

The EFRP contributed to one of the questions of the Working Document in its answer to the Quantitative Questionnaire. Furthermore, the issues raised in the working document were widely commented on during the meetings held on 22 March, 10 May and 13 September 2007. Apart from providing the answers to the 26 questions posed in the Working Document, some Associations also commented on general issues connected to the review process. The EBF proposed other issues to be discussed by the Experts, which were examined during the third meeting.

Moreover, the Commission Services prepared a Quantitative Questionnaire, the replies to which were supposed to constitute a basis for the evaluation of the current functioning of the Savings Directive. All Associations had been requested to answer the Questionnaire, but only some Associations managed to provide contributions by the end of 2007.

The aim of this document is to present as objectively as possible the opinions presented in the course of the review process by the various sectors.

### 3 GENERAL REMARKS

Although the Associations welcomed the opportunity to assist in the review exercise, a number of them, however, expressed their concerns about the way the Commission Services are managing the process. In particular, these Associations advocated the need to base the review on a thorough impact assessment conducted over a longer reference period of the operation of the Savings Directive, which should include a cost/benefit analysis at the level of the Member States and of the paying agents. This impact assessment would help to establish whether there is a level playing field in the operation of the Savings Directive within the EU and should serve as an objective analysis for the improvements that could be envisaged in order to clarify the scope and content of the Savings Directive in line with the Commission's policy on better regulation (EACB, EFAMA, EBF, ESBG, STEP). Nevertheless, the same Associations acknowledged their difficulties in collecting many of the quantitative elements from their members who would provide the basis for this cost/benefit analysis. The same Associations advised carrying out the review process without undue haste. Moreover, in STEP's opinion, it is very likely that, if the approach of the Working Document, insofar as it concerns trusts, was adopted it would not further the objective of ensuring effective taxation of savings, but rather introduce new distortions to competition into the single market. STEP indicated in this respect that any amendments referring to the trusts alone which did not also cover, amongst others, companies, Anstalts, foundations or Stiftungs would result in undesirable and unnecessary distortions to competition.

In his individual contribution, Mr Coveliers expressed scepticism about the need of a cost/benefit analysis based on tax withheld or information exchanged. He also indicated that the main goals of the Savings Directive, i.e. putting an end to the competition between Member States resulting in tax evasion and increasing taxable income from savings in the taxpayer's country of residence, have been substantially achieved.

#### **4 ANSWERS TO THE QUESTIONS RAISED IN THE COMMISSION SERVICES' WORKING DOCUMENT**

The presentation of opinions on questions raised by the Commission Services follows the order of sections in the Working Document. The answers to each question posed in the Working Document are classified in the "yes" or "no" categories on a purely indicative basis and subject to further scrutiny by the Experts.

#### 4.1. ARTICLES 2 AND 3 – BENEFICIAL OWNERSHIP AND IDENTIFICATION RULES

***Q1: For interest payments made to legal entities, located in or outside the EU, would it be possible to refer, when appropriate, to the individual beneficial ownership as established for the purposes of the Third Anti-Money Laundering Directive, for establishing beneficial ownership also for the purposes of the Savings Directive?***

The proposal to make use, when appropriate, of beneficial ownership identified under the rules provided by the AMLD for the purposes of the Savings Directive, was not considered acceptable by many Experts and Associations. It was mainly due to the fact that the purpose of the two Directives is different and that, in the opinion of the Experts, such an alignment would increase the administrative burden for the paying agents and would create legal uncertainty. Some Experts, however, were in favour of this proposal, but only in cases where paying agents were already subject to the AMLD. One of these Experts/Associations indicated that the scope of this counteracting measure should be limited to non-EU and non-EEA companies.

It has to be noted, however, that during the meetings the Commission services clarified that the proposal is addressed only to those paying agents which are already subject to the provisions of the AMLD. Bearing this clarification in mind, a summary of the reactions is given below:

#### **YES: AIMA, AISAM-ACME, FEE**

**AIMA and AISAM-ACME** were in favour of the proposal, but only in cases where paying agents were already required to comply with the AMLD. In cases where paying agents were not subject to the AMLD, the introduction of such a provision could in their opinion represent a significant additional compliance burden. According to AISAM-ACME, even if it is seen as practical and more cost effective to make one and the same test for the AML and for tax purposes, it should, nevertheless, be left up to the Member States to decide whether one or two sets of rules are to be applied.

**FEE (Mr Marchese)** underlined that the counteracting measure should be limited to non EU and non EEA companies beneficially owned by EU individuals, because it would otherwise not be in line with ECJ jurisprudence. FEE also forwarded a proposal for the wording of a new third paragraph to be added to Article 2 of the Saving Directive, stipulating that:

*'In case interest is paid in a Member State:*

*- to any "person", other than an individual and other than a company listed on a regulated market; and*

*- this "person" is not resident for tax purposes in any Member State, and*

*- at least one of its beneficial owners, as defined by the anti-money laundering legislation in force, is resident in another Member State,*

*for the purposes of this Directive the interest will be deemed to be paid directly to the beneficial owners, unless this person provides evidence to the paying agent that:*

- it is subject to yearly income tax in its country of residence without benefiting from general or partial regime of exoneration of interests from the taxable base, or

- the interest payment is subject to tax in any other jurisdiction of establishment of such person or of its shareholders, participants or beneficial owners.

*Such evidence will have to be provided by a certificate issued by the competent tax authority to be filed with the intermediary agent before the end of any calendar year for the interest paid in that calendar year.*

*Evidence of the tax residence of a person in a Member State shall be collected by the paying agent in the framework of the customer due diligence provided for by the anti-money laundering legislation in force.'*

Furthermore, in FEE's opinion, the Savings Directive should also be amended in order to include definitions of 'person' and 'resident of a State', as already provided by the OECD Model, in the following wording:

*'(a) a "person" includes any individual and any entity, incorporated or unincorporated, including any company, partnership, association, foundation, legal arrangement, trust, estate, body of persons;*

*(b) "resident of a State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.'*

#### **NQ: EBF, EACB, EAPB, ESBG, ISDA, STEP**

According to **EBF**, **EAPB** and **ESBG**, the proposal is not acceptable due to the following reasons:

- the look-through approach for legal entities would create unacceptable legal uncertainty;
- the idea of replacing the real account holder, even in limited cases, by a deemed account holder will create confusion and uncertainties about who is the paying agent for the purpose of the Directive;
- it would also have a negative impact on the relationship between paying agents and their customers;
- the approach of Commission Services, based on an alignment of the beneficial owner determination requirements of the Savings Directive with the AMLD, would neither improve the effectiveness of the Savings Directive nor would it reduce the administrative burden for the paying agents. On the contrary, a wider application of the AMLD than for its own purpose would increase the administrative burden on paying agents;
- adapting IT systems would be costly.

In the opinion of **EBF** such a system would even create opportunities for tax evasion.

In the opinion of **ISDA**, each EU country will have its own AML rules which aim to be consistent - but will not always be entirely consistent - with the definitions in the AMLD. Introducing rules which rely on paying agents with the implementation of the general AMLD definitions in the EU Directive will cause the following results: inconsistencies across EU countries on interpretation of the definitions, especially where countries are reluctant to amend local AML rules to adopt EU definitions; and potential encouragement of investors to focus on paying agents in countries which have the narrowest definition of beneficial ownership thereby penalising countries which adopt the broader EU definition.

**EACB**, like EBF, stressed that the purpose of the Savings Directive and the AMLD is different, and that following the Commission Services' proposal would increase the administrative burden for the paying agents.

In **STEP's** opinion, it would be neither wise nor practicable to refer to individual beneficial ownership for the purposes of the AMLD in order to establish beneficial ownership for the purposes of the Savings Directive.

### **OTHER POSITIONS**

**ECSDA** could accept the proposal, but only in cases where paying agents were already required to comply with the AMLD. ECSDA indicated that the AMLD does not fully apply to central securities depositories (hereinafter the CSDs), therefore aligning beneficial owner determination under the Savings Directive with the rules set out in the AMLD would in their opinion create significant administrative and operational burdens for those CSDs which are currently excluded from the scope of the AMLD. In their opinion, that would not necessarily improve the effectiveness of the Savings Directive and could have an adverse effect on the effective clearing and settlement of securities.

***Q2: Would it be wise and practicable to make the above procedure conditional on the absence of any evidence (to be provided e.g. before the end of the fiscal year of the interest payment) that the legal entity is subject to yearly taxation on its income (including interest income) in its country of establishment under the local general arrangements for taxation of such kind of legal entities?***

Some Experts and Associations found the procedure described in the Working Document sensible and practicable, while a number of other Experts and Associations indicated that such an approach would make the procedure onerous and burdensome and is likely to result in undue reporting or withholding because of the lack of documentation confirming the yearly taxation status.

It has to be noted, however, that the Commission Services clarified during the meetings that the tax status should not be checked yearly and that a reference to the general tax status of the entity (taxed on its income on a periodical basis) could be sufficient.

**YES: FEE, AISAM-ACME, EACB**

**FEE (Mr Marchese)** forwarded a complex proposal addressing this issue in its reply to Q1.

In the case of the withholding tax regime, a special provision should be added in order to ensure that the customer maintains enough funds in the account held by the financial intermediary to allow it to be able to withhold and to pay the tax in case such a certificate will not be provided by the year end.

**AISAM-ACME** emphasized that the due diligence must not take place yearly, but only when the contact is initiated or when there is a change of tax status, otherwise it would constitute a compliance burden which is too heavy.

**EACB** indicated that if alignment of the beneficial owner determination rules is demanded, it would then be wise and practicable to make the procedure conditional on the absence of any evidence that the legal entity is subject to yearly taxation on its income (including interest income) in its country of establishment.

**NO: EBF, AIMA, EAPB, ECSDA, ESBG, STEP**

In the opinion of **AIMA**, no condition should be attached to the use of the AMLD (as considered in its answer to Q1). It would also not be practical to define in the Savings Directive the terms 'yearly taxation' and 'income' in a manner which could be consistently applied throughout the Member States. If the requirements are amended, it would place additional burden on paying agents to obtain and retain evidence in respect of legal entities who may be acting as distributors as well as personal holding companies.

To **EBF** it was not clear conceptually why the yearly tax status of the legal entity should be of relevance. If it is introduced, then the issue of timing will have to be addressed, otherwise distortions would be unavoidable. Under the current wording of the Savings Directive, there is no requirement for the legal entities to produce evidence that they are subject to yearly taxation, which is equally valid in the case of the other entities excluded under Article 4 (2) (b).

**ECSDA** pointed out that obtaining confirmation that an entity is subject to yearly taxation on its income under the local general taxation arrangements is not a simple task. Taxation regimes vary in the different EU Member States and different types of entities may be subject to taxation, but not under the "general" arrangements. It would therefore be a very complex assignment for paying agents to verify that the evidence given indeed supports that the entity is subject to yearly taxation under the general arrangements. Verification that the payments are made to legal entities is a feasible task; any verification as to the tax status of the entity puts an important additional burden on the paying agents.

According to **ESBG**, an attempt to establish the tax status of any legal entity would be extremely onerous if at all possible. The circumstances affecting a legal entity may change radically from one year to the next which may defeat the objective. Asking the paying agent to establish the legal entity's tax status on a yearly basis would place a heavy burden on the paying agents. Furthermore, reporting on or withholding tax on payments of interest to a legal entity could result from the lack of documents rather than the legal entity's tax status.

**EAPB** pointed out that paying agent would be obliged to report/withhold, if he does not have any evidence that the legal entity is subject to tax for the year in question. The beneficial owner would not be able to gather information about the tax status of a legal entity, especially on a yearly basis. In their opinion, the proposal touches upon highly sensitive issue of 'fiscal secrecy'.

***Q3: Could the Savings Directive be clarified in order to refer to concepts of the Third Anti-money Laundering Directive for establishing the individual beneficial owners of a discretionary trust or other similar legal arrangement, so as to consider the interest payment as made to those beneficial owners, notably in cases such as the one where no evidence is provided within a reasonable time (e.g. before the end of the fiscal year of the interest payment) that the income arising to the trust or other similar legal arrangement (including interest income) is taxed on a yearly basis?***

Most of the Experts and Associations were against such clarification due to the complexity of tax rules applicable to trusts, uncertainty about the application of the AMLD (commonly not all beneficiaries of discretionary trusts can be determined until a point immediately before the income is distributed) and as the procedure could be burdensome (if tax status of trust to be checked yearly). According to some Experts, the provisions of Article 4 paragraph 2 are more suitable for trusts.

Commission Services explained that the fiscal status of the trust would have to be determined only once, not yearly.

**NO: EBF, AIMA, EACB, ESCDA, EAPB, ESBG, ISDA, STEP**

It was not clear to **EBF** why the tax status of the trust should be of relevance. In their opinion in most cases it is the trustee rather than the trust that is subject to tax. Imposition of a new annual documentation requirement would be severely burdensome to paying agents and would possibly result in reporting or withholding due to documentation deficiencies. They also indicated problems related to the methodology: how a paying agent would report a class of persons; what value would the reporting of a deemed beneficial owner have when this person may never benefit from the relevant interest payment; and the questionable interpretation that the Commission has arrived at in relation to the November 2000 Council conclusions and the application of the Directive to trusts.

According to **AIMA**, given the complexity of trust law and complexities in the taxation rules applicable to trusts, it would not be practical to impose any requirement upon the paying agent to collect, assess and file tax information related to trusts (whether on an annual basis or otherwise). Such an obligation would represent a significant additional burden for the paying agents.

**EACB** stated that the provisions of the AMLD are uncertain in this respect; therefore we should wait and observe which standards will be developed by the Member States in their implementing provisions of the AMLD in order to identify the beneficial owner of a trust. For the purpose of the Savings Directive, it would be helpful to treat every payment to a trust as a payment made to an entity listed in the Art 4 (2). Information should be reported if the entity is established in another Member State.

Also, in the opinion of **EAPB**, it might be easier to treat a payment to a trust as a payment made to an entity corresponding to Article 4 (2).

**ECSDA** referred to its responses provided under Q1 and Q2, and added that trust regulations and taxation of trusts are very complex areas. Putting verification obligations on paying agents with respect to the taxation of trusts would therefore represent an additional burden for such agents.

**ESBG** pointed out that given the inconsistencies that exist across Member States on the legal status of Trusts, seeking to apply any additional policing requirements on paying agents for Discretionary Trusts would appear unwise. In such cases, beneficial ownership is not established and it would not make sense to apply the provisions described in the working document in relation to the AMLD. Furthermore in most cases it is the Trustee rather than the Trust that is subject to tax. Thus even if it were possible to secure evidence of the Trust's tax status, this would result in additional documentary requirements and consequently in an increased administrative burden for the paying agent.

According to **ISDA**, discretionary trusts often do not have specifically named beneficiaries: requiring paying agents to obtain official documentary evidence for all potential beneficiaries would be extremely impractical and overly onerous. Currently domestic AML rules only require detailed information on source of funds within the trust and not detailed information on beneficial owners.

**STEP** pointed out that it is incorrect to regard some living members of a class of beneficiaries as the owners of property in a discretionary trust or in control of anything. The beneficiaries of a discretionary trust have equitable rights, but these do not give them ownership of trust assets or any part of them. No beneficiary owns anything until it is distributed to him or her by the trustees. The suggestion that certain members of a class of discretionary beneficiaries could be deemed to be beneficial owners of interest would appear to compound practical difficulties. Deeming provisions may have a role to play in the taxation of trusts, but they are best introduced by Member States familiar with the concepts of the national legal system. Furthermore, the more divorced from reality a deeming provision is, the more it is likely to present difficulties in operation and the more open it may be to legal challenge. If one were to deem a member of a class of beneficiaries as a beneficial owner, one would be attributing beneficial ownership of property to an individual who had no connection whatever with the

relevant interest payment in the past or the present and, so far as is known at the time of the deeming, in the future. One would also be deeming ownership of property to an individual who is most unlikely to be treated as the owner of it as a matter of national law. Such a deeming provision in the Savings Directive would not, therefore, assist the effective collection of taxation.

#### **OTHER POSITIONS: FEE**

**FEE** stated that a reference to concepts of the Third AMLD for establishing the individual beneficial owners of discretionary trusts and similar arrangements is in principle **not appropriate** due to the extremely different domestic tax treatment of such trusts in the Member States (apart from fixed trusts), but **proposed an alternative solution**, based on a two step approach. If the trust income is subject to tax in any Member State in the name of the trust, then the settlor or any of the beneficiaries and the trustee would provide the paying agent with evidence of such taxation (typically a certificate of the competent tax authority), then the trustee should not have any additional obligation. If such evidence of taxation is not provided, then the trustee could be regarded as “paying agent on receipt” and would have the subsequent obligation of providing information to the tax authority on the payment of interest to any beneficiaries or to withhold the relevant tax, whenever an income will be paid to a beneficiary. In the case of accumulation of the income and a later distribution of any amount of money, the nature of such distribution would be deemed to be an income distribution up to the amount of the trust's interest income that has been accumulated in the past.

***Q4: Should the Savings Directive be amended in order to refer systematically to the identity and permanent address resulting from the Customer Due Diligence performed under the requirements of the Third Anti-money Laundering Directive and its possible future modifications, with the only exception being those cases where there are no such requirements (e.g. transactions not exceeding €15000 carried out in the absence of contractual relations)?***

Many Experts agreed that there would be ways to make the present identification procedures more effective: linking the determination of identity and residence to information in the paying agent's possession seemed feasible. There was a suggestion from ESBG to use the 'best information available at a payment date', including info required for AML purposes. Some Associations (EBF, EAPB) insisted that any such change should only refer to future customer relationships. Some other Experts, however, questioned whether there would be any benefits resulting from this proposal.

#### **YES: AISAM-ACME, EBF, ESBG, EAPB, FEE**

In the opinion of **EBF** the right approach was to link the determination of identity and residence to info in the paying agent's possession, including but not limited to the information

required for AML purposes; however, as existing payees have already been classified according to current requirements, the revision should be of a prospective nature to prevent paying agents suffering an undue administrative burden.

According to **ESBG**, the application of the current text of Article 3 of the Directive led to various practicable problems (for example, that passports do not state the address, or if they do, the address may have changed in the meantime). The use of the suggested identification procedures is welcomed for relatively new customers but presents different issues for customers with long standing contractual relationships. Consideration should be given to a "best information available at a payment date" approach in the absence of an agreed set of approved documentation.

**EAPB** shared the Commission's conclusions and would appreciate an amendment to Article 3, but was not in favour of an extension of obligations for existing payees as it would be an additional burden. AMLD requirements seemed to be disproportionate. An up to date basis was already secured in favour of the norm which makes allowance of the best data basis achievable at the time of opening the account.

**FEE (Mr Marchese)** was in favour of this proposal, because then the paying agent would have to collect all relevant data according to the AMLD; it seemed to him to simplify matters and a better coordination of EC law.

#### **NO: AIMA, EACB, STEP**

**AIMA** questioned whether there would be any benefits resulting from such an amendment.

For **EACB** it would be a disproportionate effort to determine the permanent address of the beneficial owner on an up to date basis. There already exist different situations when the paying agent updates his data: the time of the opening of the account, the time a customer moves, the changing of the name of the customer through a marriage, and the opening of an additional account. These situations offer enough possibilities to determine the current data base. In addition, the beneficial owner is due to inform the paying agent in these cases and additionally the correspondence between the paying agent and the customer usually gives the opportunity to confirm if the address is up to date or if there has been a change of address.

**STEP** reiterated that it would be neither wise nor practicable to refer to individual beneficial ownership for the purposes of the AMLD in order to establish beneficial ownership for the purposes of the Savings Directive.

#### **OTHER ANSWERS: ECSDA**

ECSDA indicated that their members did not report encountering difficulties with the identification rules set out under the Savings Directive therefore, in their opinion, there was no immediate need to align the Savings Directive in this respect with the AMLD.

***Q5: If yes, how could the additional requirements set by Article 3 of the Savings Directive for contractual relations, or single transactions entered on or after 1 January 2004 (supplementing the identity with a reference to the date and place of birth, or to the tax identification number, when available; presumption of residence in the EU of those individuals presenting a passport or official identity card issued by an EU Member State) be maintained and satisfied?***

In the opinion of AISAM-ACME, the burden of determination of fiscal residency needs to be put on Member States and customers, requiring the latter to provide a certificate showing where the natural person and the intermediate legal entity have their fiscal residence and whether they are subject to taxation.

According to EBF, due diligence should be based on the documents presented by a customer and not by requesting him periodically for new documentation. EBF expressed readiness to draft new wording of Article 3 if the Commission Services found it useful. Moreover, the EBF suggested abandoning the overriding requirement to secure a TIN rather than date and place of birth and to allow other satisfactory evidence of residence in a third country than the tax residence certificate.

***Q6: Would you agree that it is desirable to introduce in the Savings Directive (preferably in its Article 2) explicit common rules providing for a proportional attribution of interest payments to all the holders of joint accounts, or other jointly owned assets, according to their actual proportion of beneficial ownerships, or in equal shares in the absence of such information?***

According to the Experts and Associations from the banking sector, the proposed principle seemed to be reasonable, but making its application compulsory could trigger practical problems and additional costs. EBF, EACB, EAPB were not in favour of introducing an explicit rule. However, EBF and EAPB indicated that common guidance would be welcome. ESBG indicated that any decision in the proposed direction would need to be based on a cost/benefit analysis. One of the Trade Associations from the banking sector clearly rejected the idea and did not think common guidelines are necessary. In the opinion of EACB, such a payment should be considered as a payment made to a residual entity under paragraph 2 of Article 4.

**YES: AISAM-ACME, FEE, AIMA**

**FEE** supported the proposal of the introduction of explicit common rules providing for a proportional attribution of interest payments which in their view would clarify the issue, provided that such an amendment would not increase the administrative costs of paying agents.

**AIMA** added that it would reduce uncertainty as to how such an account should be reported.

**NO: EBF, EACB, EAPB**

Although the proposed principle seemed reasonable to **EBF**, the cost v. benefit calculation shall be taken into account. **EBF** would, nevertheless, welcome common guidance in areas where further clarification/ consistency is required.

According to **EACB**, it should be sufficient for the Member States to get information on the payments made on joint accounts or deposits as a payment made to a residual entity on Article 4(2). The Member States receiving this information are able to check if the entity complies with its obligations to determine and report, if necessary, the beneficial owners. It would mean a disproportional administrative burden for the paying agent to split that payment between the holders, especially pro rata according to the actual share belonging to each holder.

In the opinion of **EAPB**, the allocation of interest in proportion to the actual beneficial ownership or in equal shares in the absence of such information could be denoted as reasonable in general, but it may cause huge practical problems. Not all paying agent systems may be able to split a single payment into several constituent parts. There might be obstacles regarding technical capacities. The limitation of this approach is clearly perceptible in the case of multiple account participants. The number of splits a system is able to manage is not corresponding to the number of beneficial owners a group may have.

**RESERVED POSITION: ESBG**

**ESBG**: stressed that, even if such solution could be considered, it may incur a costly upgrade of the paying agents' systems. Any decision should be based on a very careful cost/benefit analysis.

*Q7: Would it be acceptable for paying agents to make reference to those official documentary proofs of tax residence of the beneficial owner which are already in their*

*possession, rather than to his permanent address, for establishing residence for the purposes of the Savings Directive?*

Commission Services received positive answers to this question from many Experts/Associations. However, some of them indicated that it cannot be assumed that banks are in a possession of tax certificates from all individuals. Some Associations suggested that common guidance across Member States should accompany any amendment to the Directive.

**YES: EBF, AISAM-ACME, AIMA, EACB, ECSDA, ESBG, EAPB, FEE**

**AISAM-ACME:** the burden of determination of fiscal residency has to be put on MS and customers requiring the latter to provide a certificate showing where the natural person and the intermediate legal entity have their fiscal residence and whether they are subject to taxation.

**EBF:** it seemed reasonable for paying agents to take into account all information at their disposal, which may include a tax residence certificate. It cannot be assumed that banks are in possession of tax certificates from individuals (cost of claiming treaty relief would in their opinion outweigh the treaty relief due to the individual). EBF highlighted that the FISCO Working Group is currently considering abolishing such certificates; moreover, one service of a large financial institution may not be aware of documentation which is maintained by other services of the same institution. Any change in this area has to be facilitated by means of common guidance across MS in consultation with the industry and should be of a prospective nature. EBF expressed its readiness to draft new wording of Article 3 if the Commission Services found it useful.

For **ECSDA** this solution should be feasible provided different Member States make it clear which documentation may be accepted in this respect.

Although **ESBG** gave a positive answer to this question, they indicated there were no particular problems for diplomats. ESBG also indicated that it cannot be assumed that banks are in a possession of tax certificates from individuals. As in the opinion of EBF, the cost of claiming treaty relief would, in their opinion, outweigh the treaty relief due to the individual.

**EAPB** also pointed out that banks are not normally in possession of tax residence certificates from individuals as the claim of treaty relief for foreign individuals is too costly compared with the amount gathered. Any amendments in this area shall be accompanied by means of common guidance across Member States.

**FEE** stated that the proposal for identifying the tax residence of the client based on documents already in possession of the paying agent would have positive effects.

***Q8: If yes, would paying agents accept the additional task of systematically requesting an official documentary proof of tax residence to all beneficial owners whose own professional activity or personal status, as known by the paying agent and corresponding to an indicative list of possible cases to be joined to the Savings Directive, can imply a difference between the State of the permanent address and the State of tax residence?***

According to most of the Experts/Associations who answered this question, paying agents should only take account of those documentary proofs of tax residence which are already available in order to keep the administrative burden tolerable. ESBG insisted that any possible amendment of this kind should be limited to new customers.

**AISAM-ACME** indicated that the burden of determination of fiscal residency has to be put on Member States and customers, requiring the latter to provide a certificate showing where the natural person and the intermediate legal entity have their fiscal residence and whether they are subject to taxation.

In the opinion of **EACB**, to keep the administrative burden tolerable, the paying agents should only take account of documentary proofs of tax residence which are already available.

According to **AIMA**, systematically requesting an official proof of tax residence would be an arduous process and require the individual or the paying agent to obtain the information directly from the tax authority. They questioned whether Member States' administrations would have resources to issue certificates in a timely manner.

**ESBG** stressed that additional documentary requirements would lead to further administrative burdens for the paying agents. Paying agents should be free to make use of documents that are already available to them. Any additional documentary proof of tax residence should be limited to new customers and not impact on existing relationships.

**EBF** indicated no particular problem with determination of residency of diplomats, civil servants etc. and was resistant to any further documentary requirement. Information in the paying agent's possession should be used to address this matter.

**EAPB** pointed out that there should not be an additional burden for the paying agent to the extent that paying agents are free to make use of documents that are already available to them. They would be resistant to any further documentary requirement as it would increase the paying agent's burden.

In the opinion of **ECSDA**, this would put an additional burden on the paying agents. It would be preferable that the beneficial owners would, at their own initiative, present such documentation in order for the paying agent to take it into consideration and that paying agents would only need to act on this documentation whenever it is provided to them.

**FEE** supported the proposal of the Commission, provided that such an amendment would not increase the administrative costs of paying agents.

#### 4.2. ARTICLE 4: "DEFINITION OF PAYING AGENT"

***Q9: What would be the impact on economic operators making interest payments of an amendment to Article 4(2) of the Savings Directive, according to which all such payments made to a transparent entity (with the only exclusion of UCITS) established in another Member State would have to be submitted to the simplified reporting of the last phrase of Article 4(2), or to withholding tax under Article 11(5) of the same Directive?***

Only **FEE (Mr Marchese)** expressed support for the proposed amendment. However, in their opinion, it should be complemented by a clear and unmistakable definition of transparent entities as well as by a definition of "residence" of the entity, as the notion of "entity established in a Member State" creates uncertainties in its interpretation. The administrative burden and compliance costs both for paying agents and for "paying agents on receipt" have to be kept at a minimum level and the influence of subjective judgments needs to be avoided. Paying agents should be able to identify whether an interest payment is relevant for the purpose of the Savings Directive or not by using a short checklist based on easily certifiable, objective and factual elements.

**EBF** and **EFAMA** stated that they were against any extension of Article 4 (2), if equivalent measures were not agreed with third countries. A number of Experts/ Associations feared that the impact on economic operators would be significant, encompassing the imposition of a significant additional administrative burden, since a classification of transparent and non-transparent entities would be difficult to police.

According to **AIMA** such an amendment to Article 4(2) would increase the level of work required in the application/investment process and the level of reporting, as well as impose costs and additional administrative burdens.

**Mr Dardenne** assessed the impact as very low in case the option of being treated for the purposes of this Directive as UCITS is exercised (i.e. it should be limited to the gathering of certificates issued by the Member States in which these entities would be established), but significant if the option is not exercised (triggering additional costs and an administrative burden).

**EFAMA** opposed such an amendment, since in their opinion it would harm the competitiveness of the EU with third countries.

**EBF** was against any extension of Article 4 (2) if equivalent measures are not agreed with the third countries. Moreover, in the absence of such equivalent measures in relation to third countries, **EBF** proposed that Article 4 (2) should be abolished. The proposed amendment of extension of the Article 4 (2) would trigger a reclassification of payees under the Savings Directive and would create a heavy and costly administrative burden. It would also further increase the unequal treatment of EU paying agents in comparison to those in the third states.

According to **ESBG**, the impact on economic operators would be significant owing to the additional administrative burden. They underline the need to consider that the tax classification of transparent and non-transparent entities across numerous jurisdictions would be extremely difficult to police.

**EAPB** also considered that the impact on economic operators would result in an additional administrative burden.

In **ECSDA's** opinion, the proposal would put an additional workload on such operators with respect to identification of such entities and possible additional reporting and withholding obligations. Moreover, it may have an impact on the admission criteria of CSDs (defined in the answer to Q1) which may as a result become more restrictive and exclude certain members which are currently allowed. Indeed, most CSDs today are not impacted by the Savings Directive and have not put reporting or withholding systems in place. This is either because they do not make any payments or because their members are not reportable entities. Extending the list of reportable entities could potentially mean that such “new” reportable entities can no longer be direct members of the CSD as CSDs may not be prepared or able to make the necessary system changes for reporting or withholding. Considering the cost and complexity of building and implementing a EU savings reporting and withholding system in a CSD environment and considering the very limited number of clients that are “new” reportable entities, the cost may not be economically justifiable. As a result, such “new” reportable entities would therefore be forced to obtain clearing and settlement services (indirectly) through another CSD member. The creation of such an additional intermediary may have a negative impact on efficient clearing and settlement services.

***Q10: Would the establishment of a “positive” list of the categories of transparent entities for which such provisions would apply, help make such an amendment acceptable?***

A majority of Experts/Associations would welcome a positive list to help economic operators needing to apply art 4 (2) due to the legal certainty it would bring. Nevertheless, many of them state that they would not accept the amendment as referred to in question 9.

**YES: AIMA, AISAM-ACME, EACB, Mr Dardenne, FEE, EAPB**

**AIMA** indicated that there are number of questions which need to be addressed in the Savings Directive in order to capture transparent entities including, for example, how the term is defined and is the definition to be considered by reference to the laws/practices in the domicile of the paying agent, the entity or the underlying investor. A consistent methodology would be needed to be applied by all MS, dependent territories etc to provide certainty to the paying agents. Only a “positive” list could work in practice; i.e. a list of entities which, under the law/practice applicable in the territory in which the entity is domiciled, are treated as transparent.

**AISAM-ACME** found it practical to have a positive list accompanied by certification.

According to **EACB**, economic operators need a list and it is not important whether it will be a 'positive' or 'negative' list.

For **Mr Dardenne**, the establishment of a "positive" list would be the only acceptable solution to provide certainty to the paying agents.

**EAPB** found it essential that economic operators receive a list of the kind of entities which should be considered as paying agents on receipt in Article 4 (2) of the Savings Directive. The list needs to be conclusive and non-ambiguous. A clear-cut list can be of a positive or negative character.

**RESERVED POSITION: EBF, ECSDA, EFAMA, ESBG**

**ECSDA** expressed the need for a positive list. The verification of whether an entity is a legal entity is feasible. Verification as to the tax status of entities is a much more difficult task. Tax authorities in the different Member States may also take different approaches as to what should and should not be considered a residual entity. An official list of residual entities would therefore be needed in order to make it workable for paying agents.

**EBF** indicated that the industry has called for a positive list of entities falling under Art 4 (2). The establishment of such a list would assist a reclassification exercise. However, it would not make such an extension of the scope of Article 4 (2) acceptable.

**EFAMA** was against the extension of the concept of the paying upon receipt to all transparent entities, but if such an amendment were to be proposed, a 'positive list' of residual entities would be a useful tool.

In the opinion of **ESBG** having a list – whether positive or negative- could be helpful, however, an amendment of the Savings Directive towards extending the concept of 'paying agent on receipt' as described in question 9 is not acceptable, because it would increase the workload of economic operators and it would require re-classification of entities across the EU.

***Q11: Could the establishment of a “negative” list of the categories of entities certainly excluded from the “paying agent on receipt” provisions be considered a valid alternative to the “positive” list described in question 10, if such “negative” list is coupled with the establishment of a common model of certificate to be issued by the tax administrations in favour of those individual entities which do not belong to the categories included in such “negative list”, but are nevertheless actually taxed on their own income, including interest income, on a yearly basis?***

Some Experts/Associations considered a "negative" list of the categories of entities certainly excluded from the "paying agent on receipt" provisions as an improvement to the present situation, while other Experts/Associations found a negative list neither practical nor manageable.

**YES: Mr Marchese, EACB, EAPB,**

In the opinion of **Mr Marchese** and **EAPB** the negative list may be an alternative.

According to **EACB**, economic operators need a list; it is not important whether it will be a 'positive' or a 'negative' list.

**Reserved position: ESBG**

ESBG indicated that having a list – whether positive or negative– could be helpful. ESBG does however consider that the proposal made would increase the administrative burden on paying agents and furthermore cannot see how it can be implemented in practice.

**NO: AIMA, EFAMA, Mr Dardenne, EBF,**

**AIMA** considered a 'negative' list as neither a practical nor a manageable alternative given the number of countries involved and the number of entities which would be non-transparent.

**EBF** stressed that a 'negative' list would result in further documentation gathering and potentially in reporting/ withholding due to the documentation deficiency and would increase administrative burden for paying agents.

**ECSDA** indicated that in order to make the identification processes as smooth as possible, a positive list should be established. **ECSDA** questioned whether the issuance of certificates can take place in a timely manner.

***Q12: If the “look-through” approach for establishment of beneficial ownership described in §2.1.1 is adopted, would upstream economic operators making interest payments be able to apply the provisions of Article 4(2) of the Directive only to those payments for which an individual beneficial owner cannot be identified at their level?***

Experts/Associations from the banking sector thought that combining a look-through approach with the residual application of Article 4 (2) would increase the administrative burden in an unreasonable way. Some Associations, even if not explicitly opposing the proposal, indicated that would add costly complexities to the reporting process. One Association found the adoption of the look through approach for establishments of beneficial ownership unreasonable as the administrative burden would be unnecessarily extended and called for applying the provisions of Article 4 (2) of the Directive for all payments to an entity listed in this article.

**NO: EBF, EACB, ESBG, EAPB**

**EBF** was against the proposal because paying agents' IT systems would need to be restructured before they could distinguish between the different proposed categories of payees. As well as being administratively burdensome, this exercise would be very costly in terms of the required system reprogramming and the administrative resource to reclassify payees. **EBF** believed that the existing Article 2 methodology works in an optimal manner, as it seems not to create uncertainties about who is the paying agent. Therefore, they did not support a “look-through” approach for the establishment of beneficial ownership.

In **EACB's** opinion, this solution would extend the administrative burden in an unreasonable way. Article 4 (2) should apply for all payments to an entity listed in Article 4 (2).

Like **EACB**, **EAPB** considered it unreasonable to adopt the look through approach for establishments of beneficial ownership as the administrative burden is unnecessarily extended and advocated applying the provisions of Article 4 (2) of the Savings Directive for all payments to an entity listed in this article. **ESBG** was also not in favour of the enhanced 'look through' approach owing to the complexities of investment vehicles currently operating in the

Member States. Restructuring the system in place and reclassification of payees would be a highly burdensome exercise.

**OTHER ANSWERS:** the AIMA and ECSDA believed that this would add costly complexities to the reporting process.

***Q13: What would be the impact for both the upstream economic operators and the professional trustees of possible amendments to Article 4(2) of the Savings Directive aiming at extending the “paying agent on receipt” provisions to the interest payments made to those discretionary trusts (or other legal arrangements) whose income (including interest income) is not taxed on a yearly basis in its Member State of establishment, whenever the Anti-money laundering provisions cannot be used by the upstream economic operator to identify the beneficial owner? Would it be possible to prepare a “negative” list, by Member State of establishment of the trust, of those categories of trusts or similar legal arrangements whose income (including interest income) is always subject to yearly taxation in their Member State of establishment?***

Only FEE expressed full support for the Commission's suggestion (see also its answers to Q3). It stated that a negative list could be very useful for economic operators and professional trustees.

Many other Experts/Associations indicated that this solution is not practical and would result in new unacceptable administrative requirements for paying agents, given the different legal frameworks across Member States. A positive list of the arrangements concerned would in their opinion be necessary. One of the associations considered this question as purely theoretical, as the account is normally held in the name of the trustee.

AIMA, EACB, ECSDA made it clear that in their opinion a 'positive list' of reportable trusts would be the only practical solution.

EACB proposed that it could be possible for paying agents to treat a trust as an entity named in Article 4 (2) if the MS of establishment qualifies the trust as a trust that falls within the scope of the 'paying agent on receipt' provisions.

The proposal was opposed by EBF. In their opinion, imposing a new annual documentation requirement would be severely burdensome to paying agents and would possibly result in reporting or withholding based purely on documentation deficiencies. The negative list of discretionary trusts or similar arrangements that are subject to annual taxation would be rather limited, bordering on non-existent. EBF questioned the practical benefit in reporting such a trust (or applying withholding tax on interest payments made to these trusts) bearing in mind that most Member States do not regard them as entities.

According to ESBG, given the inconsistencies that exist across Member States on the legal status of trusts, seeking to apply any additional policing requirements on paying agents for discretionary trusts would be impractical and result in new unacceptable administrative requirements for paying agents.

For **EAPB** it seemed to be impractical to apply additional policing requirements on paying agents for discretionary trusts because this would lead to new duties. The core of the problem lies in the inconsistency of the legal status of trusts given in the different legal frameworks across Member States.

***Q14: Would it be legally and practically feasible to impose an obligation on the head offices established within the EU to report (or to withhold) on interest payments made through non-EU branches, provided that such head offices have access to the information about the beneficial owner and the interest payment?***

Some Experts/Associations thought that there could be cases where this solution could be feasible, provided that the client has not opened the account directly with the non-EU branch. Other Experts/Associations questioned the legality and practicability of the proposal. They insisted on a level playing field between branches and subsidiaries. Some Experts/Associations feared this solution would undermine the competitiveness of EU financial institutions.

According to **EBF**, it would be practically feasible to require paying agents to treat interest payments as falling under the scope of the Savings Directive, in cases where the paying agent has knowledge that such payments are deliberately routed through branches outside the EU and agreements countries/ territories for the benefit of a beneficial owner falling under the scope of the Directive. It would be not the case when an EU client opens an account directly with a non-EU branch. Finally, the level playing field issued between branches and subsidiaries and between branches of head offices established in the EU and branches of head offices established in third countries should also be considered.

**AIMA** questioned the legality of such an obligation. It would, in their opinion, lead to conflict with privacy laws in non-EU jurisdictions. The decision to use a branch outside the EU may be made by reference to a number of factors, of which tax would only be one, and the Savings Directive would be only one of the tax considerations. It would not be feasible to impose obligations on such operations where the branches may be far removed from the geographical scope of the Directive where the incidence of payments to EU residents would be exceptional.

**ISDA** indicated that each head office would need to undertake legal due diligence to establish whether local laws and regulations permit the sharing of such information. Such a procedure is likely to result in lengthy debates between paying agents and tax authorities on whether the 'head offices have access to the information'. Paying agents with non-EU branches would be at a competitive disadvantage against other EU paying agents which have a non-EU subsidiary acting as a paying agent. Paying agents with non-EU branches could be encouraged to incorporate non-EU branches as subsidiaries. This obligation would also encourage investors to use non-EU financial institutions as paying agents. Loss of business to the EU could be significant and potentially damage the reputation of the EU as a sophisticated, investor friendly region.

**EAPB** agreed that the deliberate routing of interest payments outside the territorial scope of the savings taxation could undermine the underlying principles of the Savings Directive. In such cases, it would be feasible to require paying agents to treat interest payments as falling under the Savings Directive, e.g. when the paying agent has knowledge that payments are deliberately routed through branches outside the EU for the benefit of a beneficial owner falling under the scope of the Directive. However, EAPB had no information that such cases arose in practice. Therefore, EAPB expressed doubts that the suggested obligation is needed. In their opinion, pursuant to bank secrecy rules, it is legally impossible to gather information from non-EU subsidiaries of banks. Consequently, they feared a severe loss of clients due to the uncertainty about privacy matters and thus opposed the suggestion.

**FEE** underlined that it seemed very likely that the reporting or withholding on interest payments through non-EU branches could affect the competitiveness of the EU financial sector and lead to an outflow of capital outside the EU. Taxpayers could open a bank account with a bank resident outside the EU and therefore easily avoid the consequences of the amended Savings Directive and contribute to an outflow of capital outside the EU. EU resident banks could feel encouraged to establish subsidiaries in non-EU countries or to transform their non-EU branches into subsidiaries in order to remain attractive for investors. Such a practice would also contribute to an outflow of capital outside the EU. Furthermore, the differences within Europe and outside the EU in legislation and ethics of banks regarding the provision of data have to be taken into account. As a consequence, the negotiation of equivalent measures with countries outside the scope of the Savings Directive remains essential. FEE also expressed doubts that the suggested obligation on EU head offices is practically and legally feasible.

**ESBG** reported that many of its members do not have branches outside of the country in which they are established and are thus not in a position to answer this question. Others do not have the computer systems to track this information. Furthermore, even if it were possible to treat interest payments as falling under the Savings Directive and the paying agents were aware of such a deliberated routing, it would be legally difficult to get such information from non-EU subsidiaries due to bank secrecy.

In the opinion of **EACB**, it should first be clarified if or under which conditions the head office has access to the information about the beneficial owner and the interest payment made through non-EU branches.

***Q15: Can the above objective be achieved by a common broad interpretation of Article 1(2) of the Savings Directive or should the Directive provide specific rules for cases of EU paying agents deliberately routing interest payments through their non-EU branches?***

Most Associations were convinced that a broad interpretation would not provide the clarity and certainty that paying agents require. Whilst maintaining its reservation on Q 14, one Association suggested that any change in practice should be facilitated by means of common guidance across Member States in consultation with the industry.

**YES (with reservation on Q 14): EBF**

**EBF** stressed that any change in practice of the kind suggested in Q14 should be facilitated by means of common guidance across Member States in consultation with the industry.

**NO: AIMA, EACB, ESBG, EAPB, ECSDA**

**AIMA, EACB, EAPB and ECSDA** underlined that the objective cannot be achieved by a common broad interpretation of the relevant article. Moreover, AIMA and ECSDA indicated that the 'broad interpretation' would not provide the clarity and certainty that paying agents require for establishing or amending necessary systems and procedures to meet their obligations under the Savings Directive.

**ESBG** pointed out that any change in this area would touch upon the wider issue of free movement of capital.

**4.3. ARTICLE 6: "DEFINITION OF INTEREST PAYMENT"**

***Q16: Does the current general exclusion of innovative financial products from the scope of the Savings Directive lead to distortion in financial markets? If so, can experts provide examples or demonstrations? Which kind of structured or derivative financial products could be considered as generating interest payments under a substance over form approach? Would it be desirable to slightly amend the Savings Directive in order to confirm that such an approach applies?***

In the opinion of some Experts/Associations, it cannot be excluded that the current omission of innovative financial products causes distortion of competition in the financial markets although there is no direct evidence to support this. It was likely due to be due to the fact there were no figures available in this respect. Some Associations which are more concerned by this issue indicated that their members did not report any distortion and opposed the "substance over form" approach as it did not provide legal certainty. They indicated that only financial products that produce income which is fully or partially characterised as interest should fall under the scope of the Savings Directive. Others Experts/Associations were of the opinion that structured or derivative financial instruments whereby the economic performance relating to underlying assets other than debt claims is exchanged or swapped against interest could be taken into account in the scope of the Savings Directive. One of them suggested making a reference to representative indexes of return on investment.

***Does the current general exclusion of innovative financial products from the scope of the Savings Directive lead to distortion in financial markets?***

**YES: EFAMA, Mr Dardenne, FEE**

**EFAMA:** it cannot be excluded that the current omission of innovative financial products causes distortions of competition in the financial markets.

**Mr Dardenne** indicated that the Savings Directive may lack neutrality due to such exclusion.

FEE highlighted that it seems very likely that the unequal treatment of interest payments from conventional financial products with earnings from innovative financial products leads to distortions. Therefore, earnings from innovative financial products should in principle be included in the scope of the Savings Taxation Directive by amending the definition of interest payment in Article 6 of the Savings Taxation Directive. As there are various terms used for earnings from innovative financial products, a possible wording for a broader definition of interest payment could be “*any revenue arising from the investment of capital where the return is fixed ex ante and the substance of the return arising from transaction is similar to any interest income.*” Such provision should introduce a “substance over form approach”, that seems to be the only way to address the issue of innovative financial products that are presently a way to escape the Savings Directive. The substance over form approach could be accompanied by a positive list of innovative financial products attached to the Savings Directive. The positive list would have to be maintained and updated, in order to take the changes in the growing market of innovative financial products into account. The pros and cons of using the Comitology procedure in this regard could be considered.

**RESERVED POSITION: EBF, ESBG**

**EBF:** unable to comment as to the extent of distortion, if any, created by innovative products

**ESBG:** no evidence

*If so, can experts provide examples or demonstrations?*

No examples or demonstrations were provided by the Experts/Associations

*Which kind of structured or derivative financial products could be considered as generating interest payments under a substance over form approach?*

**EFAMA:** due to the multitude of such products it is not possible to give an overview or general guidelines as to what kind of products should be considered as generating interest under a substance over form principle.

**Mr. Dardenne:** structured or derivative financial instruments whereby the economic performance relating to underlying assets other than debt claims is exchanged/swapped against interest.

**EBF:** it is necessary to distinguish between financial products that produce income which is fully or partially characterised as interest (which would fall under the scope of the directive) and financial products that do not produce income characterised as interest (which would not fall under the scope of the directive).

**ESBG:** any categorisation for eventual inclusion under the scope of the Directive should be facilitated by means of common guidance across Member States in consultation with the industry.

**FEE:** supports the establishment of a positive list (see above).

**NO:** AIMA, ISDA, EFSA, EAPB

**AIMA** indicated it has no evidence as to whether the general exclusion has led to distortion in the financial markets. It would be not feasible to define either 'innovative financial products' or 'substance over form' in a manner that would ensure clarity and consistency across the EU Member States. Moreover, it would be not wise or practical to place a burden on the paying agents to obtain and analyze information in respect of such instruments. The implementation of the substance over form approach would not be feasible.

**ISDA** underlined that their members have not experienced any such distortions. The market value of such instruments held by individual beneficial owners when compared to the total market value of all such instruments is insignificant and highly unlikely to cause distortions in the financial markets.

**EFSA** indicated that "substance over form" is frequently a subjective matter, and that any uncertainty is likely to drive the trading of the instruments concerned outside the EU.

**EAPB** found no hints that the exclusion of innovative financial products from the scope of the Directive leads to distortions in financial markets.

***Would it be desirable to slightly amend the Savings Directive in order to confirm that such an approach applies?***

**YES:**

**Mr. Dardenne:** Yes, only to the extent that other loopholes can be simultaneously closed. Even if accurate modifications providing for a substance over form approach in respect of the above is introduced into the Savings Directive, its effectiveness could not be guaranteed as long as many other possibilities and opportunities for capital investors not to fall within the scope of the Directive will remain

**NO:** **EBF, ESBG, EAPB** given the nature of such products, substance over form characterization would be better facilitated by means of common guidance across Member States in consultation with the industry.

**ISDA:** strongly resists any attempt to broaden the scope of the EUSD to bring into scope derivatives and structured products, given the potential negative impact on the derivatives market.

**OTHER ANSWERS:** **EACB, Mr Coveliers, Mr Husson**

**EACB:** the Savings Directive only demands information on interest payments. In practice it is not always possible to separate interest payments from payments for derivative contracts.

**Mr Coveliers:** it could be foreseen to submit to the Directive the income in the form of a "lump sum" or "fixed" TIS (or in French: "TIS forfaitaire"). This means that the TIS would be calculated upon a representative index from a securities market, e.g. the Index JPM GBI Global All Maturities Yield or the Index Merrill Lynch Global Broad Bond World.

**Mr Husson:** treating certain derivative products in the same manner as debt claims will result in a number of disadvantages which will outweigh any advantages envisaged by Commission services.

***Q17: Does the current exclusion from the scope of the Savings Directive of all benefits from pensions and insurance contracts lead to distortions in financial markets? To what extent is the competition between UCITS and life-insurance driven by the Savings Directive and not by other economic, commercial, legal, tax, etc. factors? How many individuals, with an account in another Member State, do put their savings in life insurance contracts rather than in UCITS just to avoid the Savings Directive obligations? Which amount of assets under management does this represent in the EU?***

Some Experts (EFAMA, Mr Dardenne) believed that the current exclusion of life-insurance products leads to distortions, but indicated there is no data available to measure to what extent. According to CEA and AISAM-ACME, the competition is not distorted because of the Savings Directive but rather by other more important factors. They stated that competition between life insurance products and other financial products arises at national level and not at cross-border level and therefore is not driven by the Savings Directive.

***Does the current exclusion from the scope of the Savings Directive of all benefits from pensions and insurance contracts lead to distortions in financial markets?***

**YES: EFAMA, Mr Dardenne, FEE**

**EFAMA:** current exclusion of life-insurance products leads to distortions; however, there is no data available to measure to what extent.

**Mr Dardenne:** the Savings Directive might/may lack neutrality due to such exclusion; it might/may probably lead some investors to invest in excluded products.

For **FEE**, it seems to be possible that pension or insurance contracts may serve as substitute for other kinds of investment for individuals who want to avoid the consequences of the Savings Directive. They assumed that there are kinds of pension or insurance products where the name refers to insurance but the aim of the product is related to a purely financial investment

**NO: CEA, AISAM-ACME**

**CEA** concluded from data it provided in reply to the Quantitative Questionnaire that the competition is not distorted because of the Savings Directive but rather by other more important factors. The competition between life insurance products and other financial products arises at national level and not at cross-border level and is therefore not driven by the Savings Directive.

The AISAM-ACME indicated that they do not have quantitative data but their hypothesis was that due to amount of cross-border life insurance sold, this issue is not material and it cannot be concluded that the competition is distorted because of the Savings Directive (other factors are more important).

*To what extent is the competition between UCITS and life-insurance driven by the Savings Directive and not by other economic, commercial, legal, tax, etc. factors?*

In the opinion of CEA the competition between UCITS and life-insurance is driven by real economic, commercial, legal and tax factors and not by the absence of reporting obligations to the tax authorities under the Savings Directive.

According to Mr Dardenne, the extent to which the competition is driven by the Savings Directive should be low.

*How many individuals with an account in another Member State put their savings in life insurance contracts rather than in UCITS just to avoid the Savings Directive obligations?*

Mr Dardenne was convinced that the answers to the Quantitative Questionnaire should contribute to the answer to this question.

*Which amount of assets under management does this represent in the EU?*

Mr Dardenne was convinced that the answers to the Quantitative Questionnaire should contribute to the answer to this question.

**Other contributions: EFRP**

EFRP indicated that for pension funds the difference between the second and the third pillars is very important, because in the second pillar the individual has no choice between all kinds of products, so the possibility of avoiding the scope of the Savings Directive is non existent.

*Q18: Depending on your reply to the different elements of question 17, would it be desirable to amend the Savings Directive in order to include in its scope part or all of the benefits from revocable life-insurance, pension or annuity products when the underlying prevailing investment is directly or indirectly made of interest generating financial products?*

Some Experts/Associations were in favour of introducing an amendment to the Savings Directive in order to include in its scope part or all of the benefits from revocable life-insurance, pension or annuity products when the underlying prevailing investment is directly or indirectly made of interest generating financial products. Other Associations opposed such a proposal. In their opinion, as the current exclusion does not seem to have led to distortions in financial markets, the above mentioned products must be maintained outside the scope of the Savings Directive. If the Savings Directive is to be extended, the text should clearly define

which contracts would be included and how the payments should be classified, as they are not equivalent to interest payments.

**YES: EFAMA, Mr Dardenne, FEE**

**EFAMA:** yes, but **exclusively for UCITS competing life-insurance products**. A level playing field for fund products is needed with regard to products as life-insurance that were created to take advantage of the existing rules in the Savings Directive and which compete with UCITS. This is particularly the case if the scope of the Directive is extended to include funds presently excluded from the scope. Pension products should stay outside the scope of the Directive.

**Mr Dardenne:** yes, but even if such loopholes were closed, the Directive – even when attuned to structured products, derivative financial instruments, pensions and insurance products - will still exhibit signs of serious leakages. In particular, despite the fact that the EU has already reached several agreements with third countries (e.g., Switzerland, the Cayman Islands, etc), no agreements were reached with other important financial centres, such as Hong Kong and Singapore. Investing in these countries will therefore offer the possibility to escape the application of the Savings Directive.

In the opinion of **FEE**, such kind of insurance products should be included in the scope of the Savings Directive in cases where there are no risks to be covered, where the insurer does not undertake any risk and where the calculation of the insurance premium does not include any probability element.

**NO: CEA, AISAM-ACME, AIMA**

**CEA** indicated that as the current exclusion does not lead to distortions in financial markets, the above mentioned products must be maintained outside the scope of the Savings Directive.

**AISAM-ACME** was against such a proposal, but if the Savings Directive is to be extended, the text should clearly define which contracts would be included and how the payments should be classified, as they are not equivalent to interest payments.

**AIMA** indicated that the extension of the scope of the Savings Directive would lead to pension providers requiring information on underlying products in order to meet any obligation imposed on them. The proposal would increase the administrative burden in the pension industry and in turn in the savings/investment industry and lead to an increase in the cost of providing retirement products. The Savings Directive is correct to make a distinction regarding these products.

**Additional contributions:**

**Mr Coveliers:** it could be foreseen to submit to the Directive the income in the form of a “lump sum” or “fixed” TIS (or in French: “TIS forfaitaire”). This means that a TIS will be

calculated, by a representative index from a securities market, e.g. the Index JPM GBI Global All Maturities Yield or the Index Merrill Lynch Global Broad Bond World.

***Q19: If an extension of the “paying agent on receipt” to all transparent entities (see above §3.1 and question 9) turned out not to be feasible, should interest income obtained through non-UCITS established within the EU be included within the scope of Article 6 of the Savings Directive in order to avoid distortions? To what extent is the competition within the EU between UCITS and non-UCITS driven by the Savings Directive and not by other economic, commercial, legal, tax, etc. factors? How many individuals with an account in another Member State put their savings in non-UCITS rather than in UCITS just to avoid EUSD obligations? What percentage of assets under management does this represent in the EU?***

One Association opposed an amendment to include interest income obtained through non-UCITS in the scope of the Savings Directive. Another Association found the current distinction between interest income obtained through UCITS and non-UCITS illogical and advocated a level playing field in this respect. Some Experts/Associations considered that the competition within the EU between UCITS and non-UCITS may be driven by the Savings Directive.

***If an extension of the “paying agent on receipt” to all transparent entities (see above §3.1 and question 9) turned out not to be feasible, should interest income obtained through non-UCITS established within the EU be included within the scope of Article 6 of the Savings Directive in order to avoid distortions?***

**YES: AIMA, Mr Dardenne, FEE**

AIMA indicated that the current distinction between UCITS and non-UCITS is not logical and should be removed, whilst it is unlikely in practice, a non-UCITS fund could be established with an identical investment portfolio to UCITS funds and a comparable geographical distribution but not be within the scope of the Savings Directive. FEE considered it possible that the Savings Directive drives competition within the EU between UCITS and non-UCITS. However, they doubted that an extension of the Savings Taxation Directive to interest income obtained through non-UCITS established within the EU would be easier and more feasible than an extension to transparent entities. Insofar, they referred to their answers to Q 9.

**NO: EFAMA**

EFAMA is opposed to such an amendment. If any, it would have to be balanced by a level playing field including, in the scope, competing life insurance contracts and structured products.

**OTHER OPINIONS: Mr Husson**

**Mr Husson:** it would seem desirable that the future Directive would include non-UCITS and foresees an acceptable deadline of about one year in order that savers who have invested in this type of product can take the necessary measures, adapted to their own situation.

*To what extent is the competition within the EU between UCITS and non-UCITS driven by the Savings Directive and not by other economic, commercial, legal, tax, etc. factors?*

**Mr Dardenne:** the extent might/may be non negligible.

*How many individuals, with an account in another Member State, put their savings in non-UCITS rather than in UCITS just to avoid EUSD obligations?*

**Mr Dardenne:** the answers to the Quantitative Questionnaire should contribute to the answer to this question.

*How much assets under management does this represent in the EU?*

**Mr Dardenne:** the answers to the Quantitative Questionnaire should contribute to the answer to this question.

**Q20:** *Should the definition of “undertakings for collective investment established outside the territory [to which the Treaty applies]” be improved/clarified in the Savings Directive in order to avoid market distortions or tax evasion?*

Some Experts/Associations were in favour of the proposal. In their opinion, the definition should be improved to avoid market distortions or tax evasion, while EFAMA is strictly opposed to any specific definition in the Savings Directive. Nevertheless, in EFAMA's opinion, if the Commission Services want to refer to a definition then the reference has to be made to definitions included in the UCITS Directive, the Life Assurance Directive or the Markets in Financial Instruments Directive. Other Experts pointed out that clarification of the definition of undertakings for 'collective investment established outside the territory' can be best achieved by means of common guidance across the Member States in consultation with the industry.

**YES:** AIMA, Mr Dardenne, Mr Coveliers, FEE

**Mr Dardenne** suggested that the definition should be improved to avoid market distortions or tax evasion.

AIMA indicated that the definition of 'undertakings for collective investment established outside of the territory' should be improved. Lack of clarification has led to uncertainty for product providers, administrators and investors as to whether investment funds are within the scope of the Savings Directive, which leads to administrative and marketing difficulties.

**Mr Coveliers:** in order to safeguard the European Fund Industry, it would indeed be necessary to look for a definition of 'undertakings for collective investment established outside of the territory'

**NO: EFAMA, EBF, ESBG, Mr Husson**

**EFAMA** is strictly opposed to any specific definition of what investments funds are. If the Commission wants to refer to definition it should refer to definitions included in either the Life Assurance Directive or the Markets in Financial Instruments Directive.

**FEE** stated that any legislation should be as clear as possible and therefore in principle welcome suggestions for the improvement and the clarification of the Savings Directive.

**Mr Husson:** the 1985 UCITS definition has to be maintained. It seems to him logical, that in order to guarantee better legal certainty, the same term has a unique definition.

**EBF, ESBG** stated that if it is considered desirable to clarify the definition of 'undertakings for collective investment established outside the territory' then this could be better facilitated by means of common guidance across the Member States in consultation with the industry.

***Q21: What are the views of the Expert Group on the definition of collective investment funds or schemes provided by the 2002 OECD Model Agreement? Do the Experts see any definition which encompasses all different investment funds (irrespective of their legal type, their distribution mode, their clients, their domicile) paying interest to their beneficial owner? Which definition of investment funds, either established inside or outside the EU, would the Experts suggest for the purposes of the Savings Directive?***

The Experts/ Associations who found the OECD definition inadequate, proposed other definitions, which could be used for the purpose of the Savings Directive (Mr Dardenne, AIMA). However, one Association strictly opposed any definition of investment fund to be included in the Savings Directive (EFAMA).

**FEE** supported the use of the definition included in the OECD Model, also for reason of consistency between the Savings Directive and the application of double tax treaties

**Mr Dardenne** indicated that the OECD definition is not sufficient, as it lacks reference to the different criteria that in principle characterizes collective investment funds or an assimilated entity. The definition provided for by the Swiss guidelines appears to be a good starting point as it contains an explicit reference to the different criteria that aim at differentiating collective investment funds from other vehicles (e.g. holdings, etc).

In the opinion of **AIMA**, a definition should be adopted, which provides for more clarity in the Savings Directive itself as to the funds which are and which are not in its scope. The purpose should be to ensure clarity of EU law so that there is no need to refer to local guidelines or interpretations, which lead to inconsistencies. Such a definition should include:

- references to the location of the fund: funds which are domiciled/resident in particular geographical areas (e.g. those territories which are not EU members, associates/dependents or third countries etc) should be outside the scope of the Savings Directive;

- the ability of investors to redeem their investment on a regular basis: a fund should only be 'in scope', if the investors are unable to redeem their holdings from the fund at least once a month; and

- investment diversification: an 'in scope' fund should only be one in which the manager is required to spread the investment risk, for example by limiting the maximum exposure to a single investment.

- any fund which is brought into the scope by its nature or location should then be considered in light of the underlying investment objective. A fund should only be included if its investment object or its actual investment mirror an interest only return. This could be defined as a fund directly or indirectly whose income comes from the periodic payment of interest on capital invested and whose capital price varies only with changes in credit risk or the base rate. Funds which borrow more than say 30 % of their investor capital would also be excluded as not being in economic terms equivalent to an interest bearing deposit. It was important for AIMA members that a fund is not in scope simply because it has a percentage of its investments on deposit.

**EFAMA** is strictly opposed to any specific definition of investment funds.

***Q22: Does the current text of the provision on annualisation in the Savings Directive lead to distortion in financial markets?***

Experts/Associations who answered this question were not aware of any distortion arising from the annualisation provision contained in the Savings Directive. They see no reason for annualisation to be compulsory.

**AIMA** has no evidence of distortion.

**FEE** was not aware of any distortion arising from the annualisation provision contained in the Savings Directive.

**EBF, ESBG:** are not aware of any distortion arising from an annualisation provision contained in the Savings Directive.

**EFAMA:** the provision does not apply in most EU jurisdictions therefore the question of possible distortions is not one which has a major impact on financial markets.

**EAPB:** We have not discovered any distortion in financial markets arising from the annualisation provisions contained within the Directive.

***Q23: Should annualisation be compulsory for those Member States that already apply the same method on interest payments made to their resident customers for domestic tax purposes?***

**EBF, ESBG:** no reason to do this; could be regarded as discriminatory and would not be conducive to removing distortion to competition. Should annualisation become compulsory, there would be enormous technical and administrative implications for EU paying agents.

**EAPB:** As it could be regarded as discriminatory and would not help to remove distortions in competition, we believe that such provisions are inadequate.

**FEE** was not aware of any positive aspects of annualisation to be compulsory.

**AIMA** had no evidence of distortion and did not see any benefit in making annualisation compulsory.

***Q24: How could the current text of Article 6(8) and of the last sub-paragraph of Article 6 (1) be better detailed, in order to convince all Member States to accept the “home country rule”, at least for investment funds established within the EU?***

Some Experts/ Associations were in favour of formal and explicit adoption of the home country rule in the Savings Directive, while other Experts/Associations believed this issue would be best facilitated by means of common guidance across the Member States in consultation with the industry.

**YES: Mr Dardenne, AIMA**

**Mr Dardenne** proposed that the following sentences could be added to Article 6(1) and Article 6(8) respectively of the Savings Directive:

- (i) “To that extent and when appropriate (e.g., indirect investments, via other undertakings for collective investment or entities, in debt claims), Member States shall consider the “home country rule”
- (ii) “When appropriate (e.g., indirect investments, via other undertakings for collective investment or entities, in debt claims), these percentages shall be determined by considering the “home country rule”

**AIMA:** Adoption of the home country rule would reduce uncertainty in the application of the Savings Directive. Article 6 (8) could be detailed to permit a range of acceptable measures, for instance, by reference to investment objectives or the average of assets at the beginning and at the end of the fund's accounting period. With regard to Article 6 (1), the reporting (or final) paying agent should be entitled to rely on information provided by the investment fund and/ or its local administrators, without the need to re-calculate or the ability to challenge that information.

**NO: EBF, ESBG, EAPB**

**EBF:** this issue is to be best facilitated by means of common guidance across the MS in consultation with the industry. The home country rule should be also extended to investment funds established outside the EU in order to provide greater certainty to EU paying agents collecting income and sale proceeds from such funds.

**ESBG, EAPB:** this issue is to be best facilitated by means of common guidance across the Member States in consultation with the industry.

**EFAMA** underlined that although the home country rule is a crucial concept facilitating the operation of the Directive, modification of Art 6 (8) would not change the attitude of Member States.

**4.4. ARTICLE 8: "INFORMATION REPORTING BY THE PAYING AGENT"**

***Q25: Would paying agents find it burdensome to be requested to specify the quarter of the tax year during when the interest payment is made?***

Experts having answered this question were convinced it was not actually necessary and it would be extremely burdensome and costly for paying agents, since their reporting systems are not structured to record such information and this would represent a major system upgrade

**AIMA, EBF, ESBG, ISDA, and EAPB:** it is not actually necessary and it would be extremely burdensome and costly for paying agent; their reporting systems are not structured to record such information and this would represent a major system upgrade.

#### **4.5. ARTICLE 13: "EXCEPTIONS TO THE WITHOLDING TAX PROCEDURE"**

**Q26: Does the procedure of Article 13(1) (b) function effectively? Do paying agents established in Austria, Belgium and Luxembourg face difficulties in obtaining the related fiscal certificates from specific categories of beneficial owners (expatriates, diplomats or personnel of international institutions)? If yes, are there improvements which could be proposed (e.g.: obliging Member States to involve their consulates in the issuing of certificates, provided that their tax authority is made aware of the information contained in the certificate) ?**

The Experts/ Associations did not report problems in this particular area.

**AIMA's** members have not reported any concerns in respect of this procedure.

**EBF, EAPB** and **ESBG** indicated that although the system is considered relatively burdensome, few problems currently arise in this particular area. Moreover, **EAPB** admitted that in the first month of the adoption of the Directive there were difficulties in obtaining fiscal certificates from clients who wished to be exempted from withholding. This was due to the fact that tax administrations were not aware of their new obligations. To **EAPB's** knowledge, these distortions have been of a transitional character.

## **5. ADDITIONAL POINTS ASKED TO BE DISCUSSED BY THE EXPERTS/ ASSOCIATIONS**

Apart from discussing the issues raised in the Working Document, the EBF asked to address other important issues arising from the application of the Savings Directive. The EBF proposed to amend the Savings Directive in order to ensure that date/ place of birth would be equally valid options to TIN, while establishing the identity of the beneficial owner as provided by Article 3 (2). It also indicated problems with securing the certificates residence from certain non-EU countries under Article 3 (3). EBF highlighted the need of the industry to have a positive list of residual entities to eliminate the current requirements regarding 'withhold/report entities unless you have evidence of entity status'. The EBF proposes discussing Articles 6 and 15, with a view to accepting that external information providers may be relied on when classifying assets/events for the purpose of the Savings Directive. In relation to Article 4(1) and 6, it advocated the establishment of common guidance. According to the EBF Article 4 (2) residual entity provisions should be abolished to equalise positions with third Countries like Switzerland. The EBF also raised the point of unequal implementation of the Directive by Member States. All those issues had been discussed during the last meeting of the EUSD Group.

## **6. QUANTITATIVE QUESTIONNAIRE RELATED TO THE EUSD**

A questionnaire on quantitative data for measuring any possible impact of the Savings Directive on financial market had been prepared by the Commission Services and was distributed to the members of the EUSD Group on 22 March 2007 with a request for an answer from their respective Associations. Questions contained in the questionnaire were then discussed with the EBF, ESBG and EFAMA and subsequently slightly revised by the EBF with the consent of Commission Services, to facilitate the associations in gathering all the data required.

There was a broad consensus among the Experts that the quality of answers is very important, because these answers will provide input for the final report to be made under Article 18 by the Commission. It was also agreed that all Associations need not answer every question, but they have to justify when they do not provide an answer.

However, the Associations reported difficulties in obtaining data from their members and many of them replied to Commission Services that they were not able to answer the questions contained in the Questionnaire. Commission Services received answers to the Questionnaire from the CEA (figures concerning their clients who choose life insurance contracts in a cross border context), EFAMA (answers to Q 5 and 6 on cost of implementation) and EFRP (answers to Q 9, but on a qualitative basis only). EAPB commented on the cost incurred by the German banking sector as a whole, due to implementation of the Savings Taxation Directive, making a reference to a report entitled 'Costs of red tape within the credit service

sector' commissioned by the associations of the German banking sector and presented by IW Consult GmbH Cologne.

EBF sent an interim report to Commission Services. However, due to the data included, they indicated that no firm conclusions can be drawn from the report in regard to the functioning of the Savings Directive.

There was a wide consensus among the Experts/ Associations that the limited data available is insufficient to measure the impact of the Savings Directive.

ANNEX 1 List of Experts/Alternates of the EUSD Group and the Trade Associations that they represent

<u>MEMBERS OF THE GROUP</u>	<u>ALTERNATE</u>
<b>Mr Kevin Charlton</b> Alternative Investment Management Association	<b>Mr Neil Oliver</b> Alternative Investment Management Association
<b>Ms Ann-Kristin Marinica</b> Association of European Cooperative and Mutual Insurers	<b>Mr Anders Andersson</b> Association of European Cooperative and Mutual Insurers
<b>Ms Jaana Helena Pedersen</b> Association Internationale des Sociétés d'Assurance Mutuelle	<b>Mr Johan Gefvert</b> Association Internationale des Sociétés d'Assurance Mutuelle
<b>Ms Sylvie Gautherin</b> Comité Européen des Assurances	
<b>Mr Franz Gross</b> <b>Mr Heinz-Jürgen Tischbein</b> European Association of Co-operative Banks	
<b>Mr Christopher Gilbert</b> <b>Mr Klaus Zinkeisen</b> <b>Mr Rüdiger Jung</b> European Banking Federation	<b>Ms Susan Martin</b> <b>Mr Roger Kaiser</b> <b>Ms Annette Schroeder</b> European Banking Federation
<b>Mr Thomas Ihering</b> European Association of Public Banks	
<b>Ms Véronique Witte</b> European Central Securities Depositories Association	<b>Mr Hugues Besson</b> European Central Securities Depositories Association

<p><b>Mr Dirk Coveliers</b></p> <p><b>Ms Annette von Osten</b></p> <p><b>Mr Peter Maier</b></p> <p><b>Mr Jacques Elvinger</b></p> <p>European Fund and Asset Management Association Ltd.</p>	<p><b>Mr Pascal Husson</b></p> <p><b>Ms Deirdre Power</b></p> <p>European Fund and Asset Management Association Ltd.</p>
<p><b>Mr Thomas Terhaar</b></p> <p>European Federation of Building Societies</p>	
<p><b>Mr Leo Bessems</b></p> <p>European Federation for Retirement Provision</p>	<p><b>Ms Chris Verhaegen</b></p> <p>European Federation for Retirement Provision</p>
<p><b>Mr Ian Harrison</b></p> <p>The European Forum of Securities Associations</p>	
<p><b>Mr Manfred Materne</b></p> <p>European Savings Banks Group</p>	<p><b>Mr Steve Hoy</b></p> <p>European Savings Bank Group</p>
<p><b>Mr Vincent Dardenne</b></p> <p>Expert on taxation issues related to Asset Management</p>	
<p><b>Mr Stefano Marchese</b></p> <p>Fédération des Experts Comptables Européens</p>	<p><b>Mr Jean-Marie Cougnon</b></p> <p>Fédération des Experts Comptables Européens</p>
<p><b>Mr Stephen Taylor</b></p> <p>International Capital Market Association</p>	
<p><b>Mr Jatin Patel</b></p> <p>International Swaps and Derivatives Association</p>	
<p><b>Mr Timothy Lyons</b></p> <p>Society of Trust and Estate Practitioners</p>	<p><b>Mr Keith Johnston</b></p> <p>Society of Trust and Estate Practitioners</p>

## **ANNEX II – TRADE ASSOCIATIONS REPRESENTED IN THE EXPERT GROUP ON TAXATION OF SAVINGS**

### **AIMA (Alternative Investment Management Association)**

AIMA is – some 16 years after its establishment - the only global, not-for-profit, professional trade association representing the hedge fund industry. It is also the only such association which represents all practitioners in the alternative investment management industry – whether managers of hedge funds, future funds or currency funds or those providing other specific services such as prime brokerage, administration, legal or accounting, auditing and tax advisory services. Its membership is corporate and now comprises, globally, over 1,100 firms, approximately 60% of which are based in Europe.

### **ACME<sup>1</sup> (Association of European Cooperative and Mutual Insurers)**

ACME was founded in 1978 by ICMIF – the International Cooperative and Mutual Insurers Federation, which has 168 members in 66 countries. ACME's vocation is to represent its members vis-à-vis the European legislator and to promote the cooperative and mutual insurance sector in Europe. Its 57 members in 19 EU member states control over 120 branches, issue 120 million insurance contracts and employ over 140.000 people in Europe.

### **AISAM<sup>1</sup> (Association Internationale des Sociétés d'Assurance Mutuelle)**

AISAM has been promoting mutual insurance and its principles throughout the world since 1964. AISAM has over 130 direct mutual insurance members of all sizes, both life and non-life, and 8 national associations in 22 countries, most of them European. AISAM represents its members vis-à-vis European and international institutions, develops tools to promote the sector and helps its members to develop networks and to exchange information on specific topics. AISAM members directly employ over 180.000 people and insure over 60 million members.

### **CEA (Comité Européen des Assurances)**

CEA is the European insurance and reinsurance federation. CEA's 33 national member associations represent more than 5,000 insurance and reinsurance companies. Insurance makes a major contribution to Europe's economic growth and development. European

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<sup>1</sup> With effect from January 2008, ACME and AISAM have joined to form AMICE, the Association of Mutual Insurers and Insurance Cooperatives in Europe.

insurers generate premium income of €970bn, employ over one million people and invest more than €6,300bn in the economy.

#### **EACB (European Association of Co-operative Banks)**

EACB is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. With 4,500 locally operating banks and 60,000 outlets, co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 130 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 60 million members and 700,000 employees and have a total average market share of about 20%.

#### **EAPB (European Association of Public Banks)**

EAPB represents the interests of 25 public banks, funding agencies and associations of public banks throughout Europe, which together represent some 100 public financial institutions with a combined balance sheet total of about EUR 3,500 billion and with about 190,000 employees, i.e. representing a European market share of approximately 15%.

#### **EBF (European Banking Federation)**

EBF was set up in 1960 and is the voice of the European banking sector. It represents the interests of over 5000 European banks, large and small, from 29 national Banking Associations, with assets of more than EUR 20 000 billion and over 2.3 million employees.

#### **ECSDA (European Central Securities Depositories)**

ECSDA is the European Central Securities Depositories Association, composed of 42 international CSDs situated in the geographical area of Europe. The European Central Securities Depositories Association (ECSDA) was formed in 1997 in Madrid in order to provide a forum for CSDs to exchange views and take forward projects of mutual interest.

#### **EFAMA (European Fund and Asset Management Association)**

EFAMA is the representative association for the European investment management industry. Through its 23 national member associations and over 40 corporate members, EFAMA represents about EUR 15 trillion in assets under management, of which EUR 7.5 trillion is managed by around 46,000 investment funds.

### **EFBS (European Federation of Building Societies)**

The European Federation of Building Societies is an association of credit and other institutions promoting and supporting housing finance.

### **EFRP (European Federation of Retirement Provisions)**

The European Federation for Retirement Provision represents the various national associations of pension funds and similar institutions for pension provision. The EFRP has members in most EU Member States. Its membership largely consists of institutions for occupational (2<sup>nd</sup> pillar) retirement some of them also operating purely individual pension schemes (3<sup>rd</sup> pillar). 73 million EU citizens are covered for their occupational pension plan by EFRP Member Associations. Through its Member Associations the EFRP represents € approximately 3, 6 trillion of assets (2006) managed for future occupational pension payments.

### **EFSA (European Forum of Securities Associations)**

EFSA is a EU confederation established in January 2007 by the French Association of Investment Firms ('AFEI'), the Italian Association of Financial Intermediaries ('ASSOSIM'), the London Investment Banking Association ('LIBA') and the Swedish Securities Dealers Association ('SSDA') to help jointly promote the interests of their members in Europe; the Spanish Asociación de Mercados Financieros ('AMF') joined EFSA in March 2008. EFSA today represents some 320 investment banks and securities dealers, many of whom are active across the EU.

### **ESBG (European Savings Bank Group)**

ESBG is an international banking association that represents one of the largest European retail banking networks, comprising about one third of the retail banking market in Europe, with total assets of € 5,215 billion (1 January 2006). It represents the interests of its members vis-à-vis the EU Institutions and generates, facilitates and manages high quality cross-border banking projects.

### **FEAM (Forum of European Asset Managers)**

FEAM is a lobby group of fifteen Pan-European asset management companies who collectively manage over 5 trillion euros worldwide, of which 1.6 trillion euros is managed in Europe. Members are generally represented in the forum by their Chief Executive Officers.

The objective of FEAM is to realise the benefits of a single market in asset management for both our clients and our firms.

#### **FEE (Fédération des Experts Comptables Européens)**

FEE represents 43 professional institutes of accountants and auditors from 32 European countries, including all of the 27 EU Member States. With a combined membership of more than 500.000 professional accountants, FEE works in the public interest to contribute to a more efficient, transparent, and sustainable European economy.

#### **ICMA (International Capital Market Association)**

ICMA is the self-regulatory organisation and trade association representing the financial institutions active in the international capital markets worldwide. ICMA's members are located in some 50 countries across the globe, including all the world's main financial centres, and currently number over 400 firms in total.

#### **ISDA (International Swaps and Derivatives Association)**

ISDA has over 750 member firms from 52 countries on six continents. These members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the financial market risks inherent in their core economic activities. IASB is involved in work on accounting for financial instruments.

#### **STEP (Society of Trust and Estate Practitioners)**

STEP is a unique professional body providing education, training, representation and networking for its members, who are professionals specialising in the responsible transmission of personal assets. STEP has 14,000 members in 67 branches spanning 55 jurisdictions.