Council of the European Union

Brussels, 3 May 2024
(OR. en)

9357/24

LIMITE

FISC 92
ECOFIN 514

NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
Subject:	Council Directive on Faster and Safer Relief of Excess Withholding Taxes - Political agreement

I. INTRODUCTION

1. In 2020, in the Action Plan for fair and simple taxation supporting the recovery strategy[1] and in the Action Plan on a Capital Markets Union for people and businesses[2], the European Commission announced its intention for a legislative initiative in the area of withholding tax procedures.

2. On 27 November 2020, the Council of the EU in its Conclusions "On fair and effective taxation in times of recovery, on tax challenges linked to digitalisation and on tax good governance in the EU and beyond" noted the intention of the Commission to put forward an initiative on the introduction of a common, standardised EU-wide system for withholding tax relief.

[1] Communication From The Commission To The European Parliament And The Council An Action Plan For Fair And Simple Taxation Supporting The Recovery Strategy (COM/2020/312 final)

[2] Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions A Capital Markets Union For People And Businesses-New Action Plan (COM/2020/590 final)

3. On 19 June 2023 the Commission issued a proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes ("FASTER")[3]. The key objective of this legislative proposal is twofold: supporting the good functioning of the Capital Markets Union by facilitating cross-border investment, and ensuring fair taxation by preventing tax fraud and abuse in this area.

4. First, this proposal aims at introducing, across the EU, more efficient (and harmonised) procedures concerning cross-border cases of relief from withholding taxes that Member States levy on income from holding publicly traded securities (dividends on equities and interest on bonds). Currently, the procedures that allow non-resident investors to benefit from tax treaty or domestic benefits are often burdensome, costly, and lengthy as they vary considerably across Member States both in terms of documentation to be submitted by the taxpayers to obtain the relief from withholding tax and as regards their level of digitalisation.

5. Second, as an equally important aspect, the proposal aims at adressing the risk of revenue losses for Member States. Withholding tax relief procedures may carry the risk of tax fraud and abuse, as was shown by a series of revelations (for example, the schemes where a lower tax rate is wrongfuly claimed through dividend arbitrage (Cum/Cum) or cases where multiple refund claims are made for the same payout (Cum/Ex)). Tax fraud may happen due to the lack of accurate information at the disposal of tax authorities, as a result of low level of transparency within the financial chain and lack of information on the presence of financial arrangements linked to the underlying security.

[3] Doc. ST 10820/23 + ADD 1-5.

6. In order to achieve these objectives, the new Directive would contain the following main features:

i) **two fast-track procedures** enhancing the current standard withholding tax relief or refund procedures:

- a '**relief at source procedure'** whereby the applicable tax rate is applied at the payment date of dividends or interests;

- a '**quick refund procedure'** whereby initially the withholding tax is deducted at the payment date but the refund of the excess withholding tax is granted within a fast term.

ii) a **common EU digital tax residence certificate** that investors (taxpayers) would be able to use in order to benefit from these fast-track procedures;

iii) a **register and standardised reporting obligations for financial intermediaries. Registration** would ensure that only **certified financial intermediaries** can apply for a relief of withholding tax on behalf of their clients through the fast-track procedures. **Standardised reporting** would harmonise the main compliance requirements in this area across the EU and would equip tax authorities with the essential information to check the eligibility for the relief of withholding tax, to trace the relevant payments and to avoid potential tax abuse or fraud.

7. The opinion of the European Data Protection Supervisor was issued on 8 August 2023.[4] The opinion of the European Economic and Social Committee on this legislative proposal was delivered on 13 December 2023.[5] The opinion of the European Parliament was issued on 28 February 2024.[6]

[4] OJ C, C/2023/897, 13.11.2023; doc. ST 12427/23.
[5] OJ C, C/2024/1580, 5.3.2024; doc. ST 8961/24.
[6] P9_TA(2024)0102.

II. STATE OF PLAY

8. Technical analysis of this legislative proposal and discussions with Member States in the meetings of the Working Party on Tax Questions (WPTQ) revealed that the initial text proposed by the Commission had to be adjusted before it could be submitted to the Council for agreement. Therefore a number of amendments to the Commission's proposal have been made during the terms of the Spanish and Belgian Presidency.

9. As announced at the WPTQ (High Level) meeting on 7 February 2024, the Belgian Presidency has prioritised work on this file with the objective of reaching an agreement in the Council. So far, six meetings of the WPTQ have taken place during the Belgian Presidency term (24 and 25 January, 21 February, 15 March and 16 April and 2 May 2024 (High Level)).

10. Following the meeting of the WPTQ (High Level) on 2 May 2024, where almost all delegations could support the compromise text, the Presidency, in addition to points covered in part III of this note, made a number of further adjustments to the draft Directive:

- transposition deadline set at end of 2028 – amendment of Article 22 and subsequently of Articles 2 and 17a;
- registration procedure of financial groups – addition of Article 7(1bis);
- correction of a cross-reference - Article 11(4);
- aligning the requirements of due diligence of registered owner's eligibility - Article 13a(2).

11. The latest Presidency compromise text, which reflects these amendments, is set out in doc. ST 9356/24. This compromise text aims at striking the right balance between a number of diverging concerns and should provide a good basis to finalise these negotiations. The Presidency is of the view that this updated compromise text should now address the concerns raised by the delegations and that any further modifications of this text may result in the reduction of the existing level of support by delegations of Member States. Therefore,

12. The Presidency is of the view that this updated compromise text should address the concerns raised by the delegations and that any further modifications of this text may result in the reduction of the existing level of support.

13. Against this background and in view of the upcoming meeting of the ECOFIN Council in May 2024, the Presidency also hopes to resolve the last key issues set out in part III of this note.

III. KEY ISSUES

a) Size of the market capitalization ratio - a threshold to apply Chapter III of the Directive (Article 2, paragraphs 2, 4 and 5)

14. One of the principal issues in these negotiations is a request by a number of Member States to keep the possibility of maintaining their current relief at source system. These Member States argue that their national tax relief procedures function efficiently and address the risks of tax fraud and abuse, and are particularly suitable as the stock markets of these Member States are relatively small. However, the legislative proposal by the Commission did not foresee such a possibility.

15. In order to address these two concerns, Article 2 of the Commission's proposal was supplemented with an option for Member States to not apply Chapter III of the Directive under two conditions:

    i) the market capitalisation ratio of that Member State (a percentage to the overall market capitalisation of the EU) is below the threshold of 1% (Article 2, paragraphs 2, 4 and 5); and

    ii) the Member State has a comprehensive relief at source system, as it meets a number of specific criteria (set out in Article 3(22a)).

16. Member States with smaller capital markets often have lower number of requests on withholding tax relief. Therefore the market capitalisation ratio criterion would allow such Member States not to apply Chapter III, as long as their relief at source systems are also "comprehensive" (meet the requirements of Article 3(22a)). If the threshold is 1%, Member States with the largest capital markets (combined 96% of the EU capital markets) would apply Chapter III of this Directive. The table with relevant figures is set out in the annex to this note.[7]

17. At the WPTQ (High Level) meeting on 2 May 2024, whilst almost all Member States could support the Presidency compromise text on this Article with the market capitalisation ratio set at [1]%, one delegation requested that the threshold is raised to 2%. Another delegation continued to maintain its position that the principle of the market capitalisation ratio does not provide sufficient guarantee that this delegation can maintain its current relief at source system indefinitely.

18. The Presidency wants to emphasize that the possibility of the scope-out of Chapter III is well-balanced and takes into account the different interests. Taking this into account, the Presidency calls upon delegations to agree, in the spirit of compromise, on the principle of the market capitalisation ratio.

[7] The methodology for calculating the figures on market capitalisation provides information on market value in euros of all outstanding ordinary shares that are available for trading on MiFID II trading venues. The information is reported by trading venues to the European Securities and Markets Authority under Article 22 of Regulation (EU) No 600/2014. The results of these reports are already used for the periodically published 'MiFID transparency calculations' and would be used, in accordance with the methodology set out in the Regulatory Technical Standards under the "FASTER" Directive, for the purpose of calculating the market capitalisation ratio.

b) *Threshold (gross dividend amount) for an optional exclusion of specific cases from the fast-track procedures (Article 10(2)(f) and Article 3(4c))*

19. While the Directive foresees faster tax relief procedures, Member States should nevertheless maintain the possibility of restricting the use of relief at source or quick refund procedures in cases of elevated risk of tax fraud and abuse. Therefore Article 10(2) contains a list of situations where Member States have a possibility (option) to exclude requests for relief and conduct further checks. In order to take into account the differences in the national legal systems and, in particular, tax risk assessment, such list is not mandatory, and Member States have discretion to choose which cases from this list should be covered by the standard refund procedure.

20. One of such cases is referred to in Article 10(2)(f), which permits Member States to exclude from the fast-track procedures concerning the dividend payments that exceed a specific threshold.

21. At the WPTQ High Level meeting on 02 May 2024, almost all Member States could in principle support the Presidency compromise text of Article 10(2)(f), where this threshold was set at a "gross dividend amount of at least 100.000 EUR per registered owner and per payment date". However, some delegations found this threshold too low, if such threshold were also to be applied to large regulated and trustworthy collective investment undertakings and pension funds. Some delegations have also indicated that deleting Article 10(2)(f) could also be considered, as cases of risks for tax revenues are already covered by other provisions of Article 10(2), so this provision on a threshold can be seen as excessive.

22. In order to address this issue, the Presidency proposes the following amendments that are set out in doc. 9356/24:

a) to amend the text of Article 10(2)(f) so that it does not apply to institutions for occupational retirement provision, statutory pension schemes of a Member State and concerned collective investment undertakings;

b) to include a definition of "institutions for occupational retirement provision" in Article 3(4c).

23. The Presidency calls for support on this new compromise solution.

IV. WAY FORWARD

24. The Presidency hopes that all delegations should be in a position to accept the latest compromise text and lift any remaining reservations, and that the key issues set out in part III of this note will be resolved.

25. Against this background, the Committee of the Permanent Representatives is invited to:

a) confirm its agreement on the compromise text of the draft Directive in doc. ST 9356/24;

b) recommend that the Council, at its forthcoming meeting, reaches a political agreement on the text of the draft Directive, with a view to adopting the Directive, subject to legal-linguistic revision.

ANNEX

	Member State	Market Capitalisation (EUR billion)	% Market Cap.	Harmonisation rate
1	DE	3309,1	32,32%	32,32%
2	FR	2602,9	25,43%	57,75%
3	SE	887,4	8,67%	66,42%
4	NL	760,9	7,43%	73,85%
5	ES	643,9	6,29%	80,14%
6	IT	574,4	5,61%	85,75%
7	IE	290,6	2,84%	88,59%
8	DK	280,1	2,74%	91,33%
9	BE	207,4	2,03%	93,35%
10	FI	169,2	1,65%	95,01%
11	AT	130,7	1,28%	96,28%
12	PL	74	0,72%	97,01%
13	LU	62,1	0,61%	97,61%
14	PT	58,5	0,57%	98,18%
15	GR	55	0,54%	98,72%
16	CZ	29,6	0,29%	99,01%
17	RO	29	0,28%	99,29%
18	HR	17,8	0,17%	99,47%
19	SI	13,5	0,13%	99,60%
20	HU	9,6	0,09%	99,69%
21	CY	8,6	0,08%	99,78%
22	MT	5,4	0,05%	99,83%
23	BG	5,3	0,05%	99,88%
24	LT	4,8	0,05%	99,93%
25	EE	3,7	0,04%	99,96%
26	SK	3	0,03%	99,99%
27	LV	0,6	0,01%	100,00%
	Total	**10237,1**	**100,00%**	

(Unofficial figures of 2022 – source: ESMA)