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NOTE

From:	Presidency
To:	Council
Subject:	Council Directive on Faster and Safer Relief of Excess Withholding Taxes - General approach

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.

[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)

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.

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.

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

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.

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. At the meeting of the Committee of Permanent Representatives (Part 2) on 8 May 2024, almost all delegations could support the Presidency compromise text discussed at that meeting. With the objective of addressing the remaining concerns of all delegations, the Presidency tables an updated compromise text, set out in doc. 9786/24.

11. The latest Presidency compromise text aims at striking the right balance between a number of diverging concerns and should provide a good basis for further progress in these negotiations. 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 by delegations of Member States. The Presidency also expects that the key issues set out in part III of this note will be resolved at the meeting of the Council (ECOFIN) on 14 May 2024.

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)

12. A number of Member States requested that the Directive foresees a possibility that Member States can maintaining their current relief at source system. These Member States argued that their national tax relief procedures function efficiently, 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.

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

    i) the market capitalisation ratio (a percentage to the overall market capitalisation of the EU) of the Member State concerned is below a certain threshold (referred to in 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)).

14. 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)). For example, if the threshold is set at 1,5%, Member States with the largest capital markets (combined 95% 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]

15. At the meeting of the Committee of Permanent Representatives (Part 2) on 8 May 2024, one Member State requested that the market capitalisation ratio threshold referred to in Article 2 is raised to 2%. Another Member State continued to maintain its position that the principle of the market capitalisation ratio does not provide sufficient guarantee that this Member State can maintain its current relief at source system but it expressed its willingness to compromise. One Member State indicated that the ratio should remain set at 1%.

[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.

16. In order to resolve this issue, the Presidency suggests that the market capitalisation ratio referred to in Article 2 of the draft Directive is set at 1,5%. Furthermore, the Presidency suggests that the number of consecutive years during which the market capitalisation must exceed the threshold is raised from two to four years and the transposition period is prolonged from three to five years when the market capitalisation ratio is exceeded for four consecutive years. These modifications would result in the similar coverage of the EU capital markets by this Directive which leads to a significant harmonisation of the EU capital market and would still permit Member States to keep their national systems in place in case of a temporary growth of their capital market proportion in the EU. These amendments are reflected in the latest Presidency compromise text set out in doc. ST 9786/24.

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))

17. 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.

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

19. At the meeting of the Committee of Permanent Representatives on 8 May 2024, almost all Member States could in principle support the Presidency compromise text of Article10(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", with certain large regulated and trustworthy collective investment undertakings and certain pension funds being excluded from this provision. Nevertheless, one delegation indicated that it would wish that this threshold is raised to 400.000 EUR.

20. The Presidency believes that raising this threshold or otherwise amending these provisions would reduce the current level of support to the Presidency compromise text. The Presidency suggests that the compromise text set out in doc. ST 9786/24 is accepted by all delegations in the spirit of compromise.

IV. WAY FORWARD

21. The Presidency hopes that the key issues set out in part III of this note will be resolved and all delegations will be in a position to lift any remaining reservations.

22. If the Council reaches a general approach on this basis, in view of the substantial differences between the Commission proposal and the latest Presidency compromise text, a decision to re-consult the European Parliament on the text would have to be taken. Given that the Member States will need time to pass national legislation on transposition of this Directive, that adjustments to the new rules will result in a lot of preparatory work both to national tax authorities and businesses concerned, especially as regards the necessary updates to the infotech systems, and given that businesses and citizens need legal certainty, as the new EU rules will require them to adapt to the new compliance requirements, the European Parliament could be invited to issue its opinion as soon as possible and in any event not later than 31 January 2025.

23. Against this background, the Council is invited to reach a general approach on the text of the draft Directive set out in doc. ST 9786/24.

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)