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SUMMARY RECORD OF THE 5th MEETING OF THE EXPERT GROUP ON TAXATION OF SAVINGS

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

Held in Brussels on 3 March 2009

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1. INTRODUCTION

The fifth meeting of the Commission Expert Working Group on Taxation of Savings (hereinafter the 'Group') was attended by the appointed experts representing banking, accountants, asset management, insurance, investment funds and professional trustees. The meeting was chaired by Mr Philip Kermode, Director of Analyses and Tax Policies in Directorate General Taxation and Customs Union of the Commission. The Chair explained that the mandate of the Group has been extended until December 31, 2010. The extended mandate will include the following items which will be discussed in today's meeting:

(i) Possible suggestions for ensuring that both the Proposal, when adopted by the Council, and the domestic implementing rules will be faithful to the Commission's aim to limit the administrative burden on market operators;

ii) Assisting the Commission in the task of establishing the collection of appropriate statistics from market operators, with a view to allowing a more accurate cost benefit analysis at the occasion of the next review of the directive in 2011;

iii) Any other business.

The Chair explained that the work of the Group will be discussed in the various meeting to be held in the Council on the subject of the Commission Proposal for amending Council Directive 2003/48/EC on taxation of savings income in the form of interest payments ('Proposal'). The amendments contained in the Proposal will be discussed today in order to gauge the reaction of members of the Group.

The Chair noted that the meeting will also include a discussion of the comments provided by the Comité Europeén des Assurances (CEA) and the European Banking Federation (EBF).

2. PRESENTATION OF THE AMENDING PROPOSAL

The Group by Commission services was informed that the Council unanimously called on the Commission to continue with more precise drafting of the Proposal and requested the Czech Presidency to report back to the Council by 9 June with its conclusions. As the legal base for the Proposal is Article 94 of the Treaty (Internal Market), it is necessary to consult the European Parliament (meeting due on 23 March in Strasbourg). The possible adoption of the Proposal by Parliament is foreseen in April. Additionally, the European Social and Economic Committee should also be consulted.

The Commission services explained that they would go through the comparative table that was distributed in advance of the meeting. The table highlighted the differences per article between the current Directive and the Proposal. The following amendments were highlighted:

Beneficial Owner (B.O.): EU paying agents are to make use of the information already available to them under the provisions of the Anti-Money Laundering Directive ('AMLD') regarding the identity of the beneficial owner (look-through approach for individuals resident in the EU) for certain types of entities and arrangements (Annex I) established in jurisdictions outside the EU.

Paying Agent inside the EU: a clearer definition of 'paying agent on receipt' in order that structures (including trusts, transparent entities…) know when they should apply the provisions of the Directive. These structures are listed in Annex III on the basis that they are not taxed on their income under the general rules for taxation applicable in the Member State in which the entity or arrangement is established.

Definition of interest payments: extending the scope of the Directive to include (i) securities which are equivalent to debt claims, because virtually all (95%) of the capital invested is protected, and because the conditions on return on capital are defined at the issuing date; (ii) life insurance contracts whose performance is strictly linked to income from debt claims or equivalent income when they provide for very low 'biometric' (mortality or disability) risk coverage (lower than 5%) in relation to the capital insured.

The following were proposed in order to ensure a level playing field for **Investment funds**: (i) replace the reference to Directive 85/611/EEC with a reference to the registration of the undertaking/investment fund or scheme in accordance with the rules of any Member State; (ii) application of the same rules not only to all UCITS, but also to all non-UCITS (independently of their legal form); (iii) income from all non-EU investment funds is also covered.

The Commission also proposes the following amendments to improve the efficiency and to provide legal certainty:

- The identification of beneficial owners and the establishment of their residence (incl. Annex II);
- Refinement to the definition of paying agent upon distribution Art 4(1);
- Procedural elements of the definition of interest payments (home country rule to facilitate the activity of paying agents (art 6));
- Information reporting by paying agents (e.g. additional information on the features of payments to joint accounts);
- Facilitate the access of beneficial owners to the exceptions to the withholding tax procedure (art 13), while ensuring that their Member State of residence is correctly informed.

The Chair noted that the amending proposal needed to take into account the differing views of Member States regarding the scope and the application of the Directive.

An expert representing **EFSA (**the European Forum of Securities Associations) was concerned about the practicalities of the Proposal and not whether the Proposal had gone too far. It is important to determine what works and what does not work and to take into account the costs related to these amendments. is pleased to see that the Czech Presidency is currently reviewing the provisions which effectively grandfather innovative financial instruments and life insurance contracts issued or subscribed after 1 December 2008. The industry needs more time than this and such a cut-off date should ideally coincide with the start of a new calendar year. It should in any case be clearly signalled to the market in

advance. The expert agreed with the comments of EBF that the Proposal as it now stands could lead to an emigration of clients and businesses outside the EU. It could actually lead to an increase in fraud and evasion if the provisions of the Proposal are not accepted in agreements with third countries/tax havens. The political pressure so far has been put on EU operators rather than on non-EU operators.

An expert representing **EBF** stated that without specific provisions, there could be a divergence between EU Member States and the 15 dependent and associated territories if differences arise between the Directive and the relevant Agreements. Ideally, we should give an acceptable period for the implementation of the Proposal and learn lessons from the implementation of the first Savings Directive – there should be at least two years lead time for market operators and guidance should be provided for paying agents.

An expert representing **STEP** (Society of Trust and Estate Practitioners) shared both the practical and conceptual concerns of the previous speakers. The expert was concerned that the definition contained in Article 2 of the Proposal 'the name and the permanent address of the person who primarily holds legal title and primarily manages its property and income' is not clear as often these criteria cannot be attributed to one person. Are obligations imposed on economic operators based on documents provided to them or when they know? Knowledge is a higher requirement than evidence in the form of documents. The expert considered that 'reasonable belief' is a better term to use. There is still no definition of a trust or a similar arrangement in the Proposal. The definition of a trust can differ from one jurisdiction to another. Finally, if there is a definition then how will this be translated into the languages of the other Member States? The expert noted that the Anti-Money Laundering Directive (AMLD) has not yet been implemented in many Member States. The 25% criteria[1] for identifying the beneficial owner (B.O.) did not mean anything and has no meaning in trust law. That is because the B.O. can change from one year to the next depending on what type of income is involved.

The Chair indicated that the aim of the Proposal is to use information from the AMLD – it will not have an influence on how the Savings Directive is applied. The aim is to have information on the beneficial owner not the trustee.

An expert from **EBF** stated that it had already been noted by them in the first meeting of this expert group that, under article 18 of the Savings Directive, an evaluation of the effectiveness should be made between the withholding tax and the exchange of information regimes. By suppressing the tax certificate option in article 13, the Commission is opening up the discussion on the merit of the withholding tax system.

The Chair stressed that it is not in the remit of the Group to answer questions of a political nature, i.e. the choice between a withholding tax system and an exchange of information system.

[1] Article 3 (6) (b) in the case of legal entities, such as foundations, and legal arrangements, such as trusts, which administer and distribute funds: (i) where the beneficiaries have already been determined, the natural person (s) who is the beneficiary of 25% or more of the property of a legal arrangement or entity; (ii) where the individuals that benefit from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; (iii) the natural person(s) who exercises control over 25£% or more of the property of a legal arrangement or entity;

The Chair noted that the annexes would need constant updating and would therefore like to ascertain the views of the experts on the use of a comitology?

The expert from **EFSA** noted that from past experience it could be problematic for Member States to accept a comitology. In a meeting in December 2008 with contacts from the City Group, many of them objected to having a comitology for the Savings Directive. We should make clear that it is very limited and confined to narrow areas in order to convince Member States of its benefit.

The expert from **FEE** (Fédération des Experts Comptables Européens) noted that although there are a number of inconsistencies in Annex I, fully supported the annexes to the Directive especially since some jurisdictions may introduce new types of vehicles in order to circumvent the Directive. The Association will follow up with the Commission to ensure that Annex III is comprehensive. When the Proposal refers to 'taxed on its profits' it is important to define what we mean by taxed: taxed according to a domestic tax law or according to the OECD MTC. will follow up with the direct tax working party of FEE for their comments on the Proposal.

The Chair noted that the committee structure on comitology does not decide this autonomously but with the approval of the Commission. It could be difficult for Member States to accept a comitology process for updating Annex III as it only requires qualified majority voting rather than unanimity of Member States as is required in the field of taxation. Being able to update the annexes is necessary to be able to have more flexibility and ensure the effectiveness of the Directive.

An expert from **STEP** acknowledged the need for comitology, however, it not only updates but also supplements the list of paying agents on receipt contained in Annex III. These are wide ranging powers and go beyond merely keeping the Annex up to date.

An expert from **EBF** queried the French translation of the Proposal where only the term 'mise à jour' is used in connection with Annex III. In French, this simply means an update rather than an addition to the list of paying agents on receipt.

The expert from **EFSA** is concerned that qualified majority voting could lead to the detriment of the competitive position of market operators in the EU compared to third countries. If it is just a matter of 'efficacy' then this would be acceptable.

An expert from **STEP** raised the problem of unfair competition with competitors outside the EU – for example, tax havens like Delaware in the United States. considers that the Commission should discuss the application of the Savings Directive with such jurisdictions. would like to know the opinion of the Council on these matters? The expert noted that there are more companies registered in Delaware than in the Cayman Islands. Putting in place an exchange of information mechanism with the British Virgin Islands or Delaware will be futile as they do not officially collect data for commercial reasons. There has to be information available in the first place before information on exchange can be effective.

The Chair noted that the exchange of information (bilateral agreements) will decide how far we can go. It is in the off-shore jurisdictions where there is a real risk rather than just a perceived risk. The G20 meeting of 2 April should provide guidance on the developments on anti-abuse matters in the field of taxation.

The Chair wanted to address some of the practical points raised by the experts:

(i) Grandfathering: - at this point, it is too early to conclude on this issue;

(ii) For third countries, there are on going discussions with off-shore jurisdictions like Singapore, Macao and Hong Kong. The EU is currently in talks with Norway concerning the Directive and its application;

(iii) Regarding the 13 dependent territories which are required to apply the Directive, it is not envisaged that there will be any obstacles to implementing the provisions of the Proposal to the agreements already in place. There should be further progress in these discussions as a result of the G20 meeting;

(iv) In the EU, the Mutual Assistance Directive will affect bank secrecy throughout the EU;

(v) In regard to widening the scope of the Directive to include new products (life insurance/investment products), he wanted to know how this could be done in a different way to that contained in the Proposal. The aim of the Proposal is to capture products that are in direct competition to products already in the scope of the current Directive. We would be interested to see comments from the insurance industry as to how this can be achieved which are different to those contained in the Proposal;

(vi) With regard to giving market operators enough time to prepare for the implementation of the Proposal, he wanted to underline that it is a cross-border Directive and as such it should be implemented simultaneously across Member States. In addition, any amendments will entail fewer changes than implementing the Directive for the first time;

(vii) With regard to the comment of the expert from STEP, any contribution would be welcome as the Proposal has to be transposed into national legislations. If we are too precise then this could lead to difficulties in the transposition therefore we need to get the balance right. Ideally we would have preferred to review the Mutual Assistance Directive at the same time as the Savings Directive. He welcomed the remarks of EFAMA regarding the level playing field.

An expert representing AMICE (the Association of Mutual Insurers and Insurance Cooperatives in Europe) emphasised the need for guidance and a reasonable time in which market operators can implement the new amendments – a legislation time period of 5 years is ideal. There is a concern about the doubling up of reporting obligations. Furthermore, the expert agreed with the contribution from CEA that there should be a level playing field between life insurance products and other financial instruments; insurers have to guarantee capital and have capital backing for their assets which are not required in the case of investment funds. The expert also indicated that the costs and benefits of the Proposal should be more clearly taken into account. Finally, any definition of life insurance included in the Proposal should not include voluntary pension insurance contributions.

An expert representing CEA did not consider that the exchange of information on insurance products in the Proposal had taken into account the existing national legislations of Member States. It therefore risks imposing a double administrative burden on insurance operators. The provisions of the Mutual Assistance Directive can also be used for these purposes. There should not be two different definitions for life insurance – one a legal definition and the other

for tax purposes. Furthermore, the taxation of life insurance varies considerably between Member States therefore it could be problematic to include the product in a tax directive. As already stated by the expert from AMICE, there are material differences between insurance products and investment funds and as such insurance products should not be included in the scope of the Directive.

An expert from **AILO** (the Association of Life Offices) was against extending the scope of the Directive to include insurance products and claims that the Proposal would fail any cost/benefit analysis. Their association had done a survey which indicates that the costs outweigh any potential benefit to Member States in terms of tax revenue. According to their analyses, this insurance income would not be taxable in many Member States; there would be a huge amount of insurance income to be reported but no tax to be paid on it. The tax treatment of life insurance varies considerably between Member States. The Proposal would therefore not be an appropriate instrument to ensure the effective taxation of insurance benefits.

The expert explained that currently the life insurance industry has to comply with national legislation for reporting requirements and considers that there is no material benefit of extending the coverage to the Savings Directive for information exchange purposes. Often life insurance market operators do not know the identity of the beneficial owner and cannot trace the unnamed beneficial owner. In the case of life insurance for trusts, the policy owner is not often known by the paying agent. Finally, the Mutual Assistance Directive can provide all the information that Member States may require about the beneficial owners of life insurance.

In regard to a level playing field, the expert stated that the insurance industry does not make interest payments and insurance operators have to meet solvency and underwriting obligations regarding underlying assets and accounting requirements. Solvency obligations are applied to the insurance industry but not to the investment fund industry. Unlike investment funds, in life insurance contracts there is no link between the benefits and the underlying assets.

In regard to KYC requirements – how does the paying agents know if the information should be updated?

The expert promised to provide a matrix which describes the status of life insurance polices in the EU and comments from his Trade association on the Proposal.

An expert from **AMICE** considered that most insurance products will fall outside the scope of the Proposal but acknowledged that there are life insurance products currently on the market which are not genuine life insurance. considered that the 5% is too high as a threshold for triggering an insurance product to fall within the scope of the Proposal. The expert envisaged that this definition would include most unit linked insurance contracts. There could be problems in determining what constitutes an interest payment and whether this would be taxable during the life of the contact or at the end of the contract.

An expert from **AIMA** (the Alternative Investment Management Association) claimed that many life insurance products could be qualified as savings or equivalent products; it is better to define what kinds of product are in and what products are outside the scope of the Directive due to their characteristics rather than to which product sector they belong. considered that the objection that insurance products are taxed differently between Member States is irrelevant. The aim of the Directive is to provide exchange of information.

An expert from **EFAMA** (the European Fund and Asset Management Association Ltd.) welcomed the level playing field as currently there is competition between investment funds and the certain life insurance products. The expert would prefer some terms to be better defined, for example 'Biometric risk'. There should be the same application date to the new investment funds and life insurance products which will be included within the scope of the Directive.

The Chair wanted to address some of the points raised by the experts:

(i) In regard to Article 6 (*'fully linked to interest or income of the kinds referred to in points (a), (aa), (b), (c) and (d)'*), the Commission services indicated that some Member States prefer replacing it with 'mainly' – the word 'fully' is considered by some to be too formal although changing to mainly would widen the scope of the Directive to cover many more insurance products than is currently envisaged. We require a balance.

(ii) In regard to the point of the expert from AILO that the life insurance operator may not know the identity of the beneficial owner, as with trusts it is only the paying agent with the direct relationship with the beneficial owner that has the burden of making the reporting requirements under the Directive.

(iii) In regard to the statistics provided by CEA, the Commission services underlined the importance that the Proposal should not include transactions that are already covered under national reporting requirements. For example, if a policy holder changes its residence, does the insurance operator have reporting requirements to the new state of residence of the policy holder?

The expert from **CEA** stated that the figures provided by CEA were global and applied to the whole industry including policy holders in another Member State.

The Commission services (DG MARKT) pointed out that under the Life Insurance Directive, an operator is deemed as being cross-border if it has operations in another Member State. It will be obliged to fulfil reporting requirements to that Member State. However, cross-border transactions do not include a consumer going from one Member State to another and buying the product there. The latter would not be defined as a cross-border transaction under the Life Insurance Directive and would therefore not be reported to the Member State of the policy holder.

The expert from **STEP** noted that under the Life Insurance Directive, cross-border is where the operator is going. The Savings Directive relates to tax residence even where there is no cross-border involvement by the bank or the operator.

The expert from **AILO** confirmed that the Life Insurance Directive only applies to insurance operators who cross-border. Some Member States, like Spain, require insurance operators to report information on policy holders that are non resident. Nevertheless, the expert considered that applying the Directive to non-residents, as with the Savings Directive, would be prohibitive and would lead to massive duplication. ▒ will follow up with his members to see what the situation is in Member States.

The expert from **EFAMA** considered that it was important to raise the concern in the meeting. The expert believed that it is unlikely that there will be an exchange of information reported to national authorities when a life insurance operator makes a payment to a foreign resident. stated that if a Belgian resident acquired life insurance in Luxemburg then there would be no obligation to report this transaction to the Belgian authorities.

The expert from **CEA** replied that in general there should be exchange of information regarding such transactions but cannot give a specific reply in the case of Belgium and Luxemburg. CEA is reviewing the definition of insurance products given in the Proposal and intends to come up with a definition from the viewpoint of the market. It is time consuming to do this which is why we have not yet come up with an alternative solution.

An expert from **EFAMA** explained that to be equitable, insurance products as described should be included in the proposal and the same rules should be applied to them as with investment products. The expert is concerned that maintaining the word 'fully' would mean that many life insurance products that are equivalent to savings products would be outside the scope of the Directive.

The Chair stated that the Commission services are aware of the problem of red tape. The tax implication is irrelevant – it is the exchange of information that is relevant not if the income is taxed.

The expert from **AILO** is concerned about the definition of life insurance used in the Proposal and whether there are inconsistencies between this definition and definitions for life insurance contained in other pieces of EU legislation i.e. the Life Insurance Directive. was also concerned that the Proposal would affect life insurance contracts issued after December 1, 2008 where the information needed to adhere to the Proposal in its current from will not be available. The expert wanted to know whether the Commission has discovered any cases of abuse by life insurance operators?

The Commission services replied that they have no information available on this. However, he considered that it is important to look prospectively and prevent this type of abuse arising.

An expert from **EFAMA** did not see the relevance of applying grandfathering to insurance contracts as they are not grossed-up and have no early redemption clause (as in the case of bonds in the Directive). also would like to know if the grandfathering clause would apply to non-UCITS.

An expert from **AMICE** suggested that insurance products that are abusive should not be defined as 'life insurance products'. Under national legislations, there are quite clear definitions of what is and is not life insurance. A clear definition should be included in the Proposal (under FI legislation pension insurance contributions are categorised as life insurance).

An expert from **CEA** noted it is forbidden for an insurer to sell products other than insurance. Life insurance is defined at a national level. It is not appropriate to include a definition of life insurance in a tax directive.

The expert from **AMICE** wanted to know as far as a life insurance definition is concerned, if we should have one definition for this Directive or should we think of a definition for a wider application.

The Chair agreed to raise this issue in the Council.

The expert from **STEP** wanted to know if it was the function of this group to convey its opinions to the Council, or just to help the Commission with its Proposal? Is it possible that the Council could participate in the meetings of the Group, and not just as observers?

The Chair noted that institutionally, the Council is not obliged to take into account the deliberations of the Group as it is an informal one. However, it is important that the views of market operators are expressed, especially in regard to the administrative burden. When there is blockage in the discussion between Member States then the Presidency and the Commission will take the initiative.

3. APPROPRIATE STATISTICS

The Commission services cited difficulties during the original mandate of the Group of gathering data to use in the review process. It would have been preferable to have collected data on a more comprehensive basis to use in the impact assessment of the Proposal.

There were no clear results from the first questionnaire issued in 2007 with regard to the cost of implementing the Savings Directive. Furthermore, the data collected was not representative of all market operators. He suggested that it may be more appropriate to narrow down the questionnaire by including only questions 5 and 6 which relate to the costs of running the system (fixed and variable costs).

It may be important to break down costs per beneficial owner and per product and the incremental costs of adapting systems to meet the requirements of the Proposal. What incremental costs arise from the implementing the look-through approach? What effect does the number of intermediaries have on the costs? What modifications to the questions are needed in order for your members to respond to the questionnaire?

An expert from **AMICE** noted that it would be necessary to provide IT specialists with detailed specifications in order to assess the costs of setting up a system or upgrading an existing one. Furthermore, there are other costs that are even more difficult to quantify like audit costs or inspections from the tax authorities.

The expert from **EFSA** agreed with the comment of the expert from AMICE. The assessment should take into account both prospective and retrospective changes. regrets that the members of his association were unable to give much feedback to the first questionnaire. suggests that market research specialists may be able to get more accurate data.

An expert from **EBF** agreed and noted that it is very difficult to get answers from their members. It may be more useful to obtain estimates from specialists. A second expert from **EBF** noted that EBF will set up a specific working group for better regulation which looked at the issue of impact assessment. confirmed that it was difficult for members to provide an adequate assessment of costs on which to base an impact assessment.

The expert from **EFSA** noted that it may not be that important to get a precise estimate of costs – a rough estimate could be sufficient to give you all the information you need in order to see the magnitude of incremental costs.

The expert from **EFAMA** noted that this depends on the information technology changes and the technology platform that a market operator has. This in itself may not be sufficient to extrapolate costs to a whole industry.

An expert from **CEA** noted that any questionnaire should focus on what is possible: questions should be kept to a minimum; the assessment of costs should be prospective rather than retrospective.

The Chair suggested that it is up for the members of the Group to decide the form and the contents of the survey. He suggests that it would be useful for both market operators and Member States to have data to assess for any subsequent review of the Directive.

The expert from **ISDA** (International Swaps and Derivatives Association) highlighted that some new operators will now be included within the scope of the Directive like certain investment funds and trusts. These operators will most likely not have the technology platforms to be able to capture this data from scratch.

An expert from **STEP** noted that they are willing to send the questionnaire off to their members.

The expert from **AILO** considered that a survey is a good idea to ensure a comprehensive impact assessment. association has already performed a cost-benefit analysis and found that the costs are much higher than the benefits. The mandate of the Group stipulates that a cost/benefit analyses is performed before any legislation is amended.

The Chair noted that for the amending proposal, the Commission Services carried out an impact assessment, but the assessment was incomplete due to the lack of suitable data therefore estimations were provided. The Commission performs an impact assessment on proposed legislation in order to improve the coherence of the decision making process in the Commission and in the Council. However, not every proposal is required to undergo an impact assessment. We need data to defend the Proposal in front of the impact assessment board. It is in the interests of market operators that they provide data in order for the assessment of the Proposal to be comprehensive.

An expert from **STEP** noted that the trust industry is diverse – many of the members of STEP are carrying on business in a very small way – it would be quite difficult to give you an idea of costs because the trust industry is not standardised.

The expert from **EFSA** noted that they would be able to get at least some members to respond if another questionnaire or study was launched.

An expert from **EBF** noted that the Information technology costs can be found out but human resource costs should also be involved in the data collection process in order to work out what additional costs are involved in the Savings Directive from time sheets.

4. CONCLUSIONS

The Chair encouraged the experts to provide written contributions on the Proposal. The experts were reminded that the next ECOFIN meeting takes place on June 9 and their contributions could be used for discussion purposes in the Council.

The Chair indicated that Commission services will come up with a detailed and structured agenda for the next meeting of the Group. We will also inform them about the Council discussions on the Mutual Assistance Directive. We should ask the SE presidency if they would like to participate as an observer in the meeting. We will also see whether we can launch a study on the compliance costs of implementing the Directive. He asked the members of the group for their comments in writing so that they can be put on the website.

A provisional date for the next meeting will be confirmed at a later stage.