

Proposal for a Council Directive amending Directive 2003/48/EC on taxation of savings income in the form of interest payments

Outcome of the meeting of the Council Working Party on Tax Questions on 4 September 2009

Introduction

The President (Ulf Rehnberg) presented the Presidency compromise text (12261/09 FISC 98) on the above proposal, which has been drawn up on the basis of the earlier compromise text (doc. 8346/09 FISC 40). He stressed that the intention of the Presidency was to concentrate the discussion on articles 1, 2, 4 and 6 of the Directive 2003/48/EC. The rest of the articles are not addressed by the Presidency at this stage. Recitals, the rest of the articles and annexes will be addressed at a later stage (+ comitology)

He finally recalled that the SE Presidency intended, as requested by the June ECOFIN Council, to try to reach a balanced political agreement in the autumn of 2009.

Many delegations (**AT, DE, LT, HU, FR, UK, IRL**) expressed general appreciation of the proposal but had not yet have time for internal consultations (scrutiny reservation).

Some delegations expressed remarks about the translations (linguistic problems : **SL, PL, SK**). The President recalled that all linguistic versions would have to be carefully checked and asked for written comments.

GR maintained a general scrutiny reservation on the whole text (concepts too complicated to apply, elections to come in GR)

HU find the text too complicated in general.

Discussion article by article

<u>Article 1 : Aim</u>

The President explained that the change in paragraph 2 aims to clarify that tasks under the Directive shall be carried out not only by paying agents, but also by economic operators, who are not paying agents. The obligations of these economic operators are covered by Articles 2(3) and 4(2). With regard to the introduction of the concept of “place of effective management” in the Directive he explained that it is necessary to clarify that the Member States obligations, where relevant, also apply with respect to the economic operators, who have their place of effective management within their territory. A new paragraph 3 is added, in order to provide definitions of "economic operator" and of "place of effective management"

to be taken into consideration respectively for entities and legal arrangements. These definitions are included in this Article because they can be of use throughout the Directive.

As regards definition of economic operator **IRL** suggested to include an appropriate reference to definitions already provided in Directive 2005/60 (AMLD). The suggestion was taken on board by the Presidency.

NL asked clarification about the definition of those economic operators who are not credit and financial institutions (Does it mean financial specialists?).

GR and **LU** expressed doubts about the practicability of the concept "place of effective management" (administrative costs), as this concept will have to be applied automatically by paying agents. **LU** proposed "place of incorporation" for entities and place of registration for legal arrangements.

LV and **FI** welcomed the Presidency compromise text as regards explanations about the place of effective management **LV** maintained a scrutiny reservation (administrative costs).

UK asked why the words with or without legal personality had been added to point 3, b), expressed the view that entities without legal personality can't exist.

About art. 3, c) (place of effective management of a legal arrangement) some delegations (**HU, LU, CZ**) found the drafting not sufficiently clear ("permanent address of the legal or natural person who primarily manages its assets).

IT had questions about the rules applicable to the fiscal residence of trusts, notably in case the residence of the trustee is not recognised as place of effective management of the trust.

Commission's comments and answers to MS.

All economic operators acting even occasionally in their professional capacity have already obligations under the current Directive. What is proposed by SE Presidency is only a clarification.

About **NL** question it is not possible to limit the definition of economic operators to financial specialists: it means also lawyers, notaries, etc....

About LU comments (administrative burden) generated it is recalled that the economic operator shall establish the legal form, place of establishment or the place of effective management of the entity or legal arrangement by using primarily the information disclosed by any individual acting on behalf of the entity or arrangement (art. 2(3)^o and last subparagraph of Article 4(2))

Moreover, place of incorporation or place of registration for legal arrangements would be too easily used to circumvent the directive (not relevant for taxation purposes).

About UK question, the Commission referred to the present text of the Directive already covering entities without legal personality, which evidently exist.

About paragraph 3, c) a redrafting would indeed be relevant

Proposition (not read by the Commission during the meeting):

(c) a legal arrangement is considered to have its ‘place of effective management’ at the permanent address of the natural person, or where appropriate at the address of the place of effective management of the legal person, who primarily manages its assets while being in a position to be aware of the identity of current or future beneficial owners of the legal arrangement. Where the legal arrangement is considered to have its place of effective management in more than one country or jurisdiction, the place of effective management shall be considered to be at the permanent address of the natural person, or where appropriate at the address of the place of effective management of the legal person, who primarily manages the assets producing interest payments, within the meaning of this Directive, while being in a position to be aware of the identity of current or future beneficial owners of the legal arrangement.”

1. Article 2 : definition of beneficial owner

SWE Presidency presentation

About paragraphs 1 and 2 the President explained that the Presidency suggests to add a new subparagraph (bb) in paragraph 1 to make a clearer distinction of the cases where a person

acts on behalf of an entity or a legal arrangement. Considering several Member States' concerns about the concept of place of effective management it is suggested that when a person acts on behalf of an entity, he or she shall in the first place disclose the address of the place of establishment of the entity. If the place of effective management of an entity, according to the definition in Article 1(3), is in another country or jurisdiction, that address shall also be disclosed. When a person acts on behalf of a legal arrangement the place of effective management is sufficient.

Paragraph 2 is slightly adapted to be put in line with the amended text of paragraph 1.

Commission stressed the link between paragraphs 2 (1) (bb) and 1, 3, c)

Drafting suggestions were made (IRL) and accepted by the Presidency.

Paragraph 3

About paragraph 3 the **President** explained that in order to make the look-through approach more effective, "the place of establishment" has been added. However, if the entity or legal arrangement proves that it is subject to effective taxation, the "look-through approach" shall not apply. Entities and legal arrangements which may be subject to a general scheme of taxation but at a zero rate, are not considered to be subject to effective taxation.

DE thanked the Presidency for the improvement of the text.

UK would like to introduce a grandfathering clause in the provision (1st January 2012).

NL had still some problems with the link with AMLD rules

AT, RU, FR, IRL had questions about the proof of effective taxation (when, how, who decides an appropriate level for a taxation to be considered effective?).

The Commission acknowledged there could be some difficulties to apply the "subject to effective taxation" provision. **GM** explained that the provision was useful to avoid to apply the look-through approach inappropriately, giving the example of a trust established in Italy but having its place of effective management in the Cayman islands: if there is taxation in Italy look-through approach should not apply.

Paragraph 4

On paragraph 4

The President explained that a new paragraph 4 was added, based on the suggestion by one delegation (MT) for Article 4(2). For the sake of consistency and better organisation the

definitions concerning beneficial owners are moved to this new paragraph. When an entity or a legal arrangement shall be considered to be a paying agent upon receipt according to Article 4(2), this provision identifies those individuals who shall be regarded as beneficial owners.

DE presented its **room doc n° 3** with drafting suggestions

According to **DE**, even if the person who has contributed assets to the entity or legal arrangement seems to have no entitlement to the assets any more, it is useful for the tax authorities to know this person's identity. It can be very difficult to judge the question of entitlement and, from **DE** point of view, the tax authorities should be the ones to decide this question and not a paying agent or other economic operator.

It is only in the case where the beneficiaries are entitled to 100% of the income that it would be unnecessary to know the identity of the settlor.

DE presented drafting suggestions modifying paragraph 4, b).

MT explained again the reasoning behind its proposition and acknowledged that the identity of the settlor could be in some cases useful.

FR and **PT** supported **DE** proposition. **UK** has no objection but has remarks about the way things are expressed (will send written contributions).

Commission explained that if **MS** agreed info could be sent to both countries (the one of the settlor when the entity or arrangement receives the payment + at a later stage the country of the individual entitled to receive the income arising from the asset producing the payment).

Art 4, paragraph 2: paying agent on receipt

The President explained the changes made to art 4, 2°

IT could not accept reference to 10 years.

A detailed discussion on the text of this paragraph and the following one was postponed to the next meeting.

ART 6 Definition of interest payment

The **President** asked the Commission to present the changes made in point (**aa**)

DE made reference to room doc 3 (threshold reduced to 75%). **ESP** agreed.
UK, NL : 95 % to be maintained

IRL proposed to suppress "**full link**" of the income + "defined at the issuing date" Redrafting proposed.

LU had problems with the new definition of investment funds in the EU proposed in 6,1) c) (would like a limitation to "**public** collective investment fund")

UK questioned about the word "registered"

Commission answered to **UK** that with Registered + law governing we should cover everything and to **LU** that it was the Commission intention to cover also privately placed investment funds based both inside or outside the EU, but that it is for the Council to decide.

6 (e) Insurances

DE : reference to comments made in room doc number 3.

AT and **LU** found the text would go **beyond the required level playing field**. They stress the importance of covering only those life insurance contracts that can be regarded as equivalent to other instruments covered by the EUSD. **AT** asked to keep the reference to the level of biometric risk put between square brackets.

FR : provision too complex : too difficult to apply and to assess the performances of the contract.

Drafting suggestions were proposed by **IRL** to avoid circumvention through **partial refund** or in case of **assignment** of the contract to a third party. These suggestions were taken on board.

Comm explained difference variable – fixed annuities.