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DIRECTORATE-GENERAL TAXATION AND CUSTOMS

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**SUMMARY RECORD OF THE 8th MEETING OF THE
EXPERT GROUP ON TAXATION OF SAVINGS**

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

Held in Brussels on 17 February 2011

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1. INTRODUCTION

██████████) welcomed ██████████ (European Structured Investment Products Association) and ██████████ (EFAMA) as new experts to the Group. ██████████ (CEA) and ██████████ (EACB) were invited in their capacity as observers to the meeting.

The agenda for the meeting was introduced:

- (i) Draft final report on the start-up and recurrent costs of implementation of the Directive (including a presentation by Deloitte);
- (ii) Status update of the amending Proposal to the Directive;
- (iii) Launching the second review of the Directive as provided by Article 18;
- (iv) Discussion on possible options available for an evaluation of the substitution effect between comparable retail savings products.

██████████ noted that the EU Mediator had received a complaint from an organisation representing European consumers, ALTER-EU, that the Commission's expert groups, including the EUSD group, did not sufficiently take into account the interests of consumers in its selection procedure for the experts to be included in its groups. Finance Watch and Euro Investors had been mentioned by MARKT as possible candidates for membership of the EUSD in their capacity as associations representing consumers in the financial retail sector. The experts were asked if they objected to including a member from a consumer association in the group. None of the experts voiced their objections.

Discussion on FATCA

██████████ noted that member states have agreed that they should have a coordinated approach to the US regarding FATCA. Member States are concerned that it will impose a new set of regulations on market operators in the EU which already have to comply with the requirements of the Directive and the anti-money laundering Directive (AMLD). The Commission and the Presidency are currently preparing a co-ordinated approach. They will have a meeting with their US counterparts early March to look for a way forward and to see whether the existing mechanisms in the EU like the Directive and AMLD can satisfy their requirements. The Commission would be grateful to have contributions from trade associations and market operators on this subject.

■ (AILO): as FATCA related to purely domestic US income matters, it could be debatable whether the scope of the Directive would be sufficient to meet the requirements of FATCA, especially given that the US authorities refused to accept the existing Directive.

■: the feedback from the US treasury was that they were willing to speak with the EU about its concerns and may be willing to make a compromise. It is true that the scope of the existing Directive is unlike FATCA, however, the amending Proposal is more correlated with its provisions. The US have redrafted their interest reporting regulations including provisions of exchange of information with other jurisdictions, therefore this gives the EU a potential way forward for an agreement between the EU and the US.

■: wanted to know if the Mutual Assistance Directive (MAD) was not a more suitable mechanism to use?

■: yes, acknowledged that there was scope for MAD to be put forward as a possible mechanism especially due to the increase of information to be exchanged in the updated MAD.

■ (EBF): unilateral approach of the US should be opposed. Noted that many countries outside the EU are involved in the opposition to FATCA and proposed that EU should collaborate with these countries.

■: believed that the EU can advance on its own initiative and that its bargaining power is stronger than other countries/regions.

■ (AIMA): FATCA covers all types of income therefore would the Directive be adequate for the US purposes? Is it foreseeable that the Directive could be widened in order to take the requirements of FATCA into account?

■: it is unlikely that all EU Member States would be willing to extend the scope of the amending Proposal in order to take into account the specific requirements of FATCA. Naturally the use of the amending Proposal in the negotiations would probably be dependent on an end to the transitional regime for withholding tax purposes. It would be necessary to have exchange of information applying to all countries, in order make the amending Proposal effective as an alternative to FATCA for the Americans.

■ (STEP): wanted to know how the advancement of the Directive squared in with the bilateral discussions between UK/DE and CH.

■ stressed that the negotiations between UK/DE and CH are at an early stage. Possible agreements will also include enhanced exchange of information provisions in addition to withholding tax mechanism. DE and UK have stated that their bilateral negotiations with CH will not affect the amending Proposal.

■ (EFSA): would like to support the comments of EBF. Would like to stress that many investment banks, including EU banks, operate on a global basis and will therefore be affected by regulations coming from the US and the EU. In particular, his members are concerned about the IT amendments necessary to accommodate the requirements of both FATCA and the amending Proposal. If FATCA and the Directive are to operate simultaneously then the same definitions should be used in both scopes otherwise market operators would be exposed to an unnecessary duplication of information requirements.

■ (EBF): regarding the bilateral negotiations between DE/UK and CH, what room for manoeuvre would these Member States have in granting trade benefits to CH in exchange for concessions in the domain of tax?

■: confirmed that access to the EU, including trade benefits like the freedom to provide services in the EU, is an exclusive EU competency and as such Member States cannot use this to procure advantages in their bilateral tax negotiations with third countries like CH.

■ (STEP): wanted to know if the US would be willing to change the legal provisions of FATCA, or would the negotiations be limited to its application.

■: confirmed that it is highly unlikely that the legal provisions of FATCA would be changed, and that any negotiations would primarily relate to the guidelines. The EU is not against the objectives of FATCA per se more its application.

■ (EBF): noted the difference in scope between EUSD and FATCA and wanted to know if the discussions over the next few months on FATCA would affect the amending Proposal and therefore the scope of the review of the Directive.

■: it may well have an impact on the review and the speed of the adoption of the amending Proposal. However, FATCA will go ahead whether Member States like it or not. The Commission needs to look into ways of implementing FATCA through a different method than that proposed by the US.

■: noted that the strength of the EU Member States will be weakened in their negotiations with the US if the amending Proposal has not yet been adopted.

■ (EBF): warned that FATCA demands information from banks which their own domestic legislation would not provide. With regard to its negotiation position with the US, the EU can argue that the provisions of the amending Proposal are more expansive than those of the existing systems in the US like the QI system which, for example, does not require the disclosure of information on the beneficial owner for dividend payments.

■ (AILO): Would like the Commission to raise the issue of grandfathering with FATCA. Often banks have no way of tracking down whether a client is a US citizen unless they have declared to their banks that they are US residents.

■: understands the legal concerns and the difficulties of obtaining this information from clients with which have been established a long time ago. Intends to raise these concerns with the US.

(ii) Administrative burden study

■ presented the methodology of the study. In the main findings, he noted that for obligation 1 of the questionnaire (report data on beneficial owner and savings income to the competent authority), paying agents reported that there was a high percentage of business as usual costs identified with this obligation. For information obligation 2 (communicate information on the paying agent on receipt and the related income), business as usual costs were deemed as low although for the paying agents selected this information obligation did not appear to be applied due to the perceived lack of clarity of the provision.

The difficulty of finding paying agents and finalising the interviews/questionnaires have been identified. Deloitte called on the help of the expert group to complete the study by assisting in the recruitment of paying agents for the study.

■ (EFSA): understood the difficulty in identifying the person responsible for the application of the Directive in an organisation. Furthermore, paying agents found it difficult to separate out costs between the application of the Directive and other activities of the paying agent. Proposed that experts receive an electronic copy of the slides.

■ agreed with the remarks of ■ and will send out the presentation.

■ what about the experience of experts in studies measuring the admin burden of the amending Proposal (AILO and EBF)?

■ (EBF): it is easier to identify prospective costs rather than retrospective costs.

■ (EBF): suggested getting a cost from paying agents at a global level for cost of compliance (number of people working in this activity) then allocating the time out to the individual outputs from this cost centre to arrive at the cost of the obligation.

■ (EBF): acknowledged the difficulty they had a number of years ago in EBF's own study to measure the administration burden of the Directive. The study results were sub-optimal. EBF was willing to find participants for IT/CZ as requested on the slides.

■ (FECIF): had recently conducted an administrative cost study which had shown that 20% of administrative cost for its members were legal/compliance related.

■ could we possibly see it?

■ agreed to send out the study.

■ (EFAMA): asked whether the questionnaire had assessed the costs involved in the asset test of UCITS funds to verify if funds fell into the scope of the Directive?

■ No, did not go into this question in the survey.

■ (EFAMA): suggested that the problems of asset testing should be added into the survey as this is an important cost for paying agents in adhering to the Directive.

■ agreed with ■ The asset test for classification of funds to determine whether they come within the scope of the Directive is an important cost operator. The survey should ideally contain such paying agents who also have to calculate data or the fund information providers who are required to calculate this for the purposes of the Directive for paying agents.

■ (EFAMA): would be willing to provide the names of IE and LU fund issuers who could be willing to participate in the study.

■ noted that the question of costs related to the asset test is included in the survey. However, normally paying agents would not have this information available to them although it is available to the fund issuer.

■ (EFAMA): noted that there can be problems when the fund is located outside the EU to find this information.

■ (ESIPA): at this stage wanted to raise the effectiveness of the study: the German Court of Auditors recently revealed that out of 2.5 information records exchanged over the period 2004-2008, in particular from LU, only 680 resulted in higher tax bills. Sure this situation exists in other Member States. As mentioned earlier, we need to compare the administrative burden with the effectiveness of the Directive.

■ (EBF): BE recently reported similar findings on exchange of information, although the Directive has only been in operation since 2009. Believes these numbers are now available publically.

■ certainly this is one question we will raise with member states in the questionnaire.

■ commented on the finding in the qualitative part of the study when paying agents had reported that there should be a threshold below which paying agents should not have to report the interest income paid. Since stage 1 (establish identity) and stage 2 (determine what part of income is within/outside the scope of EUSD) still have to be done he does not consider that it would make any difference if stage 3 were to be omitted because the amounts came under the threshold.

■ discussions had taken place in Council both for the exchange of information and the withholding tax mechanisms regarding having a minimum threshold. This was rejected by Member States.

■ noted that much of the information for reporting on the Directive has been automated and has high business as usual costs. Information burden on paying agent on receipt article 4 (2) is high.

■ (EBF): the burden and indeed the ability to apply the Directive are related to its clarity therefore the problem of applying the paying agent on receipt article is understandable. Legislation should be capable of being implemented and applied at the level of the paying agent.

■ (STEP): wonders whether we can really ignore the question on the effectiveness of the Directive and the use of the data when we measure the administrative burden and the proportionality of the Directive.

■ noted that market operators questioned in the survey are not best placed to answer this question. We will be following up with Member States about the effective use of the data.

■ (EFSA): agrees with the comments on the survey about small amounts and a minimum threshold. Would like to know if respondents had mentioned a figure for a threshold?

■ no idea what the specific amount would be.

■ (AIMA): regarding FATCA, it requires aggregation of accounts therefore splitting accounts will not be coherent with the requirements of FATCA.

(ii) Status update of the amending proposal to the Savings Taxation Directive

■ reported that the MAD had been agreed upon in Council in December by Member States. As part of the agreement to decouple MAD from the rest of tax cooperation package including the amending Proposal, the Commission was requested to provide an ad-hoc report relating to the implementation of the Directive by Member States. This report is due MID-2011. The report will be based on a questionnaire which has been sent to Member States on 16 February.

An ECOFIN meeting took place on 15 February where the amending Proposal was briefly discussed. Member States had agreed upon the need for an early adoption in order to open up negotiations with third countries. The fact that the world context has changed since the Directive was adopted, including the financial crisis, has put the amending Proposal high on the agenda. However, questions relating to the transitional regime and external conditionality have still to be resolved. The technical issues have been largely resolved. The amending Proposal will be discussed in Council on 18 March, and the HU Presidency has expressed its willingness to move forward with the Proposal during its Presidency.

■ explained that in the working document for the Savings review we had mentioned that the questionnaire would include aspects on the effectiveness of the Directive. However, it has been decided to put these in a second questionnaire to be sent out to Member States later this year.

■ raised the question of internal conditionality and the level playing field. Some Member States do not require exchange of information in their domestic laws, therefore paying agents will be at a disadvantage when they are competing with paying agents that are obliged to exchange information requirements for EU cross-border investors. There is no exchange of information for domestic interest payments in BE yet BE authorities will receive information on records exchanged for their residents under the Directive. Therefore there is no level playing field as far as BE is concerned. This is also true in the DE/FR domestically.

■ our mandate focuses on cross-border cases rather than domestic situations.

■ (EBF): can you have bank secrecy in a cross-border situation but not domestically without looking into it?

■ Noted that according to case law, which is evolving, cross-border situations are not entirely comparable to domestic situations. For example in the NL there was discrimination case brought before the Court regarding a complaint that the tax authorities could claim back taxes from a 12 year period in cross-border situations while this was only a 5 year period in domestic cases. One would expect that the Court judgement was unequivocal about the difference of treatment but in fact its judgement was more nuanced and stated that domestic situations are not always comparable to cross-border situations.

■ (STEP): wanted to know what are the next steps after the agreement in Council on the amending Proposal?

■ the amending Proposal could be carried out in two ways (i) by adopting the Savings Directive in the EU, and then adapting the existing agreements by further negotiations with relevant third countries, or (ii) by adopting the Directive and the Agreements simultaneously. For the existing Directive approach (ii) was used, however, some MS argue that the global context has changed due to changes on information exchange and that it is no longer necessary to wait for agreements with third countries before implementing the Directive in the EU. For some MS the external conditionality is important, and they would prefer that the amending Proposal and the updated Savings agreements are implemented simultaneously. It is unlikely that the text of the amending Proposal being discussed will change even taking into account the ad-hoc report which will later be published.

■ (EFAMA): in relation to the remark about BE, we cannot make a comparison with the situation in LU. In BE, there is exchange of information on all savings accounts, both domestic and foreign.

■ (EBF): in regard to third countries and the level playing field, how easy will it be to negotiate with them given we are just going into the second review of the Directive?

■ Does not imagine that there will be further changes to the text even if new problems are identified.

■ (STEP): in the working document, there were no references to human rights issues. He wanted to know if the Commission foresees an assessment of this issue, given the rights enshrined in the Lisbon Treaty, to see if the Directive is compliant with these rights. Furthermore, we should also look at this issue in regard to our Savings agreements with third countries.

■ currently, it is not possible to say how the issue of data privacy will impact on the Directive or the recently revised MAD with its new obligations regarding exchange of information.

(iii) Launching the second review of the Directive as provided by Article 18

■ As stated in art. 18 of the Directive, the objective of the review is to report on the operation of the Directive and, where appropriate, propose to the Council any amendments that prove necessary in order better to ensure effective taxation of savings income and to remove undesirable distortions of competition. However, since the amending proposal to the Directive is still being discussed in Council, it is not anticipated at this stage that the 2011 review will result in any formal Commission proposal for a further change to the legal text of the Directive.

The scope of the review will cover the following elements:

- (i) Update the elements on coverage of the Directive commented by the Group in the first review and the new developments since the first review affecting its coverage;
- (ii) Assess the effectiveness of the data exchanged under the Directive;
- (iii) Assessment of the implementation of the Directive in the EU based on information from Member States;
- (iv) Economic effects specific to the Directive.

■ noted that the scope of the second review will be broader than the first review. It will also include an assessment of the effectiveness of the Directive and its implementation by MS. This working document for discussion is provisional with the aim of ascertaining your views on what the review should contain. Noted that there will be two reports issued this year on the Savings Directive: one by mid-2011 refers to the ad-hoc questionnaire, and the second report refers to review that will be undertaken this year.

In respect of the remark from ■ human rights do not come within the scope of the review.

■ introduced the section of the working document on measuring the effectiveness of the Directive. This will primarily entail (i) using the statistics supplied by the Member States for withholding tax and exchange of information; and (ii) a questionnaire to be sent out to Member States gauging their experience with Directive and its use.

■ discussed the section on the economic effects of the Directive. Four methods were outlined which could have an impact on the Directive:

(i) Assessing the data sources (BIS etc) used to assess the distortion effects of the Directive in the 2008 review, including the evolution of UCITS coming within the scope of the Directive and those outside;

(ii) supply side substitution study: assessing the substitution effect between comparable retail savings products depending on whether those are within the scope of the Directive or not;

(iii) assessing data gathered in other Commission initiatives (for example the Packaged Retail Products Initiative).

(iv) Geographic distortion: measuring the shift of capital, if any, to jurisdictions outside the Savings agreements network.

■ asked experts for their comments on these sections of the working document:

■ (STEP): in terms of the effectiveness of the Directive, should we not also compare it with different sources of information exchange?

■ do you mean double taxation conventions?

■ (STEP): not only. We would assess other sources of information to see what is significant.

■ for determining the effect of interest income, we should not just look, in the case of BE, the increase in income tax derived from the introduction of exchange of information but also at the deterrent effect in that more people are inclined to declare their income. Naturally, the second effect is more difficult to quantitatively assess.

■ (EBF): Will data exchanged under the Directive be asked at a later stage?

■ (EBF): for effectiveness, we could ask how much capital has been repatriated to the home state as a result of the Directive.

■ if data is obtained from our review including that obtained from member states then this will be included as well in our assessment. However, there is a wider question in how do you separate this from the effects of other measures, for example tax amnesties?

■ (AILO): compare costs of the Directive with the revenue that is raised from its implementation.

■ cost side yes, though acknowledged that it may be difficult to measure the benefits of the Directive as already discussed.

■ (EFSA): difficult to accurately measure the effectiveness of the Directive, and that there is a potential deterrent effect in addition to the repatriation of capital. It may be difficult to measure the number of bank accounts opened by non-residents.

■ (STEP): it could be that evasion is being reduced, but then account should be taken of any impediments to the free movement of capital due to the Directive. An evaluation of the good and bad effects of the Directive is needed.

■ Agreed but evaluating this could prove problematic.

■ (STEP): then why would we assume that a repatriation of capital to the home state is necessarily a positive effect of the Directive by decreasing tax evasion when it may have led to the negative effect of less cross-border savings?

■ Agrees, that it could be difficult to draw firm conclusions. Commercial reasons could also have resulted in retail investors repatriating capital from branch accounts back to the home state.

■ according to statistics paying agents in LU are increasingly exchanging more information records with other MS rather than applying the withholding tax mechanism. Why do you think this is?

■ (EBF): the neighbouring countries, in which most of the beneficial owners of LU paying agents are resident, have introduced measures which encourage their residents to use the exchange of information mechanism. DE and BE have introduced tax amnesties while FR has given greater powers to tax inspectors.

■ introduced the section of the working document on the first Savings Directive review. Regarding the implementation of the Directive, there have been a couple of infringement procedures notably in LU for the reporting on non-domiciled beneficial owners. The questionnaire sent out to the Member States will ascertain how the Directive has been implemented by Member States.

As noted earlier, the amending Proposal contains a number of measures to improve the coverage of the Directive, notably on:

(i) For intermediate structures used to circumvent the Directive, a look-through approach (for entities and legal arrangements outside the Directive and updated Savings agreements' geographical scope) and an enhanced paying agent upon receipt rules (for entities and legal arrangements inside the Directive and updated Savings agreements' geographical scope) was proposed in order to ensure that beneficial owners behind these structures fall under the scope of the Directive;

(ii) Extension of the Article 4 (2) payment on receipt provisions;

(iii) Introducing additional savings products within the scope of the Directive that are comparable to those already covered;

(iv) Equivalent treatment under the Directive of UCITS and non-UCITS.

■ mentioned the difficulty of obtaining data in the first review in order to assess the economic effects of the introduction of the Directive. For example, the BIS data included both corporate and retail deposits. EUROSTAT data did separate household (read retail data), but it did not separate domestic from cross-border investments.

The experts were invited to review their contributions on the TAXUD website, and those of their respective Trade associations, for the Directive and the amending Proposal to see if they are up to date.

Regarding the questionnaire for Member States for the implementation of the Directive, the main sections will be the following:

- the application of the Directive, in particular the enforcement obligations of Member States under art. 1(2);
- the national interpretation of certain terms in the current text;
- the functioning of the Savings agreements with third countries and associated/dependent territories.

■ (EBF): the deposit guarantee scheme does have information on individuals, although does not know if this information is trustworthy.

■ noted that anecdotal information would also be useful for the review purposes and also information practices among member associations.

■ (EBF): depends on the line of business. Large financial institutions have so many divisions and lines of businesses that you would have to analyse them separately in order to assess the impact of the Directive on them. Suggested that an analysis is done on the reports/articles received in the past about delocalisation to third country territories outside the scope of the Directive, like Singapore and Hong Kong.

■ noted that Singapore did not give this data to B.I.S.

■ data in the report will be updated up to and including 2010.

■ (EFAMA): noted some Non-UCITS have elected to become a UCITS fund under the Directive. In terms of the evolution of UCITS and non-UCITS, no clear trend is perceptible and the Directive has had no impact on the evolution between UCITS and non-UCITS, or that funds have relocated outside the EU.

■ possibly we could measure the development of markets affected by the Directive. Ideally we should separate domestic from cross-border investors.

■ (EFAMA): understands the need but is not sure whether EFAMA will be able to provide the data.

■ (AILO): public information is available and we should examine the gaps.

■ (EBF): in assessing data, you should be careful. in LU there has been an enormous increase in new deposit accounts due to the crisis. Investors want to spread out their savings through as many accounts as possible just in case there

is a bank default and investors only receive the minimum amount of their deposit as guaranteed under domestic bank regulations.

(iv) Discussion on possible options available for an evaluation of the substitution effect between comparable retail savings products.

■ noted that the framework contractor was unable to provide reliable data sources for the study which could measure the cross-border retail investments of EU residents of comparable financial products to savings/debt claims covered by Art. 6 of the current Directive. Instead there will be an open call for tender for data on the retail cross-border investments by EU investors in order to have a wide as possible response given the difficulties in identifying data sources.

It may be also be useful to have a pragmatic approach by looking at investment patterns between savings and comparable savings products in EU national markets to see how the Savings Directive ensures a level playing field between similar financial products.

DG MARKT and ECFIN have also been approached to see if they have data sources which could be used for the review.

Experts were asked to check whether all comparable products are included in the scope of the call for tender, and whether the experts knew any data sources which could assist in measuring the substitutability effects.

■ (EFSA): there are studies/consultations performed by consumer associations and market research associations regarding gathering market data and its assessment.

■ (EBF): when is the date for the tender?

■ submit the terms of reference by mid-March.

■ promised to send out the presentation. In particular experts were asked to verify the product scope of the data tender to see that it includes all products that could be comparable to savings products

■ (AILO): raised the point on the presentation regarding the use of UCITS in insurance wrappers in FR. This is done for purely domestic purposes and has nothing to do with avoiding the provisions of the Directive.

■ agrees that the review will make a distinction in its assessment between the affects of such trends on domestic and cross-border investors.

■ May/June.

■ (AILO): if we still have issues with the amending Proposal, can we send in our comments?

■ Yes, would be pleased to receive comments on the document.

Conclusion

■ indicated that a follow-up mail will be sent including the information and assistance requested from the experts in today's meeting. The provisional date of the next group meeting will also be provided.