Report on Working Party IV meeting on Council Directive 2003/48/EC

Monday 14th November

Introduction

The most active delegations throughout the discussion on savings were BE, DE, EL, ES, FR, IE, IT, MT (on trusts), NL, AT and UK. Some delegations did not intervene at all (CY, LT, LV, SI and SK) or only rarely (DK, EE, LU – only on UCITS, PL, PT, FI and SE). And CZ and HU were not represented.

Among those delegations which were active there was widespread praise of the Commission's paper and agreement that the issues raised should be discussed and agreement sought at EU level.

Section 2 UCITS

General Comments

It was important that any measures taken at EU level to prevent market distortions did not cause further distortions (FR).

It would also be important to consult with Paying Agents who operated under the Directive and to let the Directive work in practice for some time before making changes to it (BE).

This was a complex area and many Member States said that they would prefer to produce a written statement with their final answers.

2.2.1. Primary Funds

Commission services' analysis: income distributed by a non-UCITS and capital gains on shares in a non-UCITS are not within the scope of the Directive.

There was almost unanimous agreement with the Commission's analysis on this point, from the delegations who spoke.

There was also widespread agreement that the exclusion of non-UCITS funds from the scope of the Directive could affect effective taxation and distort the market for investment products.

There was some support for amending the Directive to include certain non-UCITS funds within its scope, particularly if the current situation distorted the market seriously (DE, FR IT).

There were some calls for a more moderate, flexible approach. Some MS were in favour of the Commission producing minimum standards of interpretation so that paying agents could operate in a clear and consistent way across the EU (DE, UK, DK)

It was important that any amendments to the Directive did not create further market distortions (IT).

One Member States said that the Directive was quite clear on the treatment of UCITS and non-UCITS as it stood, and that there was no reason at this stage to change the rules (LU).

Many Member States agreed that there ought to be some time to see how the directive works in practice, before suggesting any amendments. Paying agents should not be made to change their operations so soon after the Directive coming into force. They should be consulted on future changes. (LU, EL, BE, AT, NL, ES, PT)

2.2.2.1. Income distributed by Primary UCITS

During the discussion Patrice Berge-Vincent from DG MARKT explained what UCITS funds were and that they were able to invest up to 40% of their assets in other investment funds and up to 10% of their assets in any single other fund.

There was agreement among the Member States that income distributed by primary UCITS in principle falls within the scope of the Directive, but could partially escape the scope of the Directive to the extent that such income does not derive from interest payments (and to the extent that such income stems from secondary non-UCITS).

Many of the Member States said that the Directive ought to cover such payments so as not to distort the investment fund market (DE, DK, FR, NL, IT).

Many of the Member States suggested that to do so the Directive would need to be amended (an interpretation would be insufficient and would not stand up at the ECJ) to cover these payments (DE, BE, AT, NL, UK).

2.2.2.2. Gains on the sale of shares in Primary UCITS

There was agreement among the Member States that gains on the sale of shares in primary UCITS in principle fall within the scope of the Directive, but only to the extent that the primary UCITS invests more than 40% in debt claims, directly or indirectly through secondary UCITS (or through an entity or a non EC fund).

There was broad agreement that the intention behind the Directive had been to include indirect investments in debt claims through non-UCITS in the 40% computation rule, but the wording of the Directive was not precise enough to put their inclusion beyond doubt (UK, PL). Some Member States' guidelines on the Directive included investments in non UCITS funds in calculations under the 40% rule, some guidelines were ambiguous on this point and some did not.

There was some support for a common interpretation of the Directive to include indirect investments in debt claims through non-UCITS. However, the Dutch translation of the Directive seemed to expressly exclude them.

It was suggested that if income derived directly from non-UCITS was not considered to be interest under the Directive (see section 2.2.1.) then it should also not be included in calculations under the 40% rule.

2.2.3. The 15% rule

Article 6(1) of the Directive gave Member States a clear choice whether or not to implement the 15% rule. There was a wide diversity of practice in this regard by the Member States.

Some had not exercised the option, and some of these agreed that it could be used to allow individual investments to escape the scope of the Directive (IT, NL, EL, FR).

Some had exercised the option in a way that excluded indirect investments in debt claims through non-UCITS from the 15% threshold calculations (UK).

Questions raised by Denmark

The 15% rule

Two strands were identified from these questions; how paying agents could tell if the Member State where the fund is established had opted to implement the 15% rule, and how to determine if particular funds should be included in calculations under the rule (UK).

Some Member States had not implemented the rule (FR, IT, DK) and some had (UK, DE).

Some financial institutions could offer information on whether Member States had implemented the rule (DE). The European Banking Federation had done some work on the subject (UK).

This issue was important for all Member States, not just those which had implemented the 15% rule as all paying agents would need to rely on this information (IT).

Tax Identification Numbers

It was observed that Member States would need to share information on the form of their tax identification numbers so that paying agents could be reasonably certain they had received legitimate identification numbers from recipients of interest payments. There was some confusion between information on this subject provided by OECD and EBF (DK).

Member states shall send the relevant information concerning the structure of their TIN to the Commission services before the end the year. (Such information could be shared on CIRCA.)

Section 3 Treatment of Innovative Financial Products

The Commission asked for first impressions to be given on this subject.

Some Member States felt that it was impossible to include all innovative products because they are innovative and therefore impossible to categorise effectively (BE, FR).

One Member State had decided not to exclude any innovative products automatically. Instead the character of each product would be examined (FR).

One Member State had tried to formulate a rule to include all products that offered a guaranteed yield within the scope of the Directive (DE).

One Member State said that they would wait for a lead from others to decide how to treat innovative products (EL).

Member States shall send the relevant information concerning the treatment of innovative financial products to the Commission services before the end the year

Section 4 Trusts

General Comments

The Commission's paper and presentation of this issue was welcomed. Member States agreed that a range of structures that could present problems for the Savings Directive ought to be examined alongside trusts. It was also important for other Member States to be better informed about trusts (UK).

Three countries (UK, IE, MT) admitted to allowing trust structures under national law. It is likely that Cyprus also does so, though the Cypriot delegation remained silent throughout the meeting.

Most other Member States confirmed that they do not have trusts under their national laws (BE, FR, NL, PL, ES)

Many Member States said that they would prefer to give full answers on trusts in writing (BE, FR, DE, AT, NL, PL, ES, IT).

4.1 and 4.2 Questions on whether trusts should be treated as entities under the Directive.

Many Member States agreed that trusts should be treated as entities under the Directive by paying agents in the absence of evidence that they were not entities (MT, IE, FR, DE, NL, ES).

Some Member States said that they could not give a straight yes or no answer. They would do their best to look at the payment to the trustee and the trustee's position and behaviour, to decide how it should be treated under the Directive (UK, PT, NL).

One Member State allowed trustees to operate on its territory, though trusts could not be established under its own laws. Trustees would often act as paying agents and trusts could not be entities under Article 4 (2) (PT).

All Member States whose laws allowed trust structures, said that those trusts should not be considered to be entities. However, any information on payments to trusts that was reported under the Directive could be checked against the tax returns of trustees (MT, UK, IE).

One Member State who allowed trust structures said that where the payment went to a corporate trustee this would not usually be reportable (UK).

Few Member States commented on these two statements. One Member State expressed reservations about accepting them (EL)

Two Member States said that trusts in their jurisdictions would not be allowed to open bank accounts (UK, MT). In one Member State a bank account was sometimes opened in the name of a trust, for administrative convenience. The trustees would be joint signatories on such an account, and contracts with the trust were not allowed (IE).

4.3.1. Treatment of trusts that are not entities

The Member States accepted the analysis presented by the Commission in its working paper. Briefly the paper concluded that when trustees pass interest income (received from another Member State) directly on to a beneficiary they should disclose the identity of the beneficial owner to the paying agent, so that the payment is appropriately reported under the Directive. Where they pass the income to a beneficiary in another Member State they can be considered to be the paying agent themselves, and would then take responsibility for reporting the payment.

4.3.2. The trustee as the beneficial owner

There was widespread agreement with the Commission's analysis here (FR, DE, IT).

One Member State felt that they should be better informed about trusts before they could propose a solution to the problems raised here (FR).

One Member State that allows trusts said that the character of savings income changes after it is received by a trust. Interest payments were caught, for tax purposes when they were received by the trustee (here at a rate of 35%). Taxation at this point would be relieved to account for any withholding tax on the payments (UK).

One Member State said that it was important to find a solution that reached the beneficial owner. It would be difficult to exchange information on later distributions, particularly because the Directive contained specific deadlines (IT).

4.3.3. Later cross border distributions where trustee and economic operator had been based in the same Member State

There was widespread agreement with the Commission's analysis on this point. Some Member States felt that trusts should be examined as a potential loophole to avoid effective taxation on savings income, and that this could lead to distortions in the investment market. They supported future action to address this (DE, FR).

One Member State repeated that trust income was subject in their jurisdiction to a high level of taxation, which ought to allay Member States' fears of a 'loophole'. It would be difficult to include trusts

within the scope of the Directive because the beneficiaries did not invest or manage the assets and trusts were therefore not an undertaking for collective investment (UK).

Section 5 Treatment of Joint Accounts

Are all account holders considered as beneficial owners?

Most Member States said that their paying agents would report payments to all account holders of a joint account and establish their identity and residential status (MT, UK, FR, IE, ES, AT, NL, BE, SW, FI).Some Member States had not published their guidelines for paying agents. These Member States expected that their guidelines would require each account holder to be identified (IT, EL, FI).

How is the interest payment divided between the account holders?

Some Member States required their paying agents to divide payments equally between account holders (ES, AT, NL, BE, UK).

Some Member States required their paying agents to apportion payments equally between account holders in the absence of any evidence that a different division would be more appropriate (FR, IT, FI)

One Member State required paying agents to attribute the full amount of the payment to each account holder (EL).

One Member State required its paying agents to attribute the full amount of the payment to each account holder in the absence of any evidence that a different division would be more appropriate (IE).

One Member State required its paying agents to apportion each payment to joint account holders depending on their relative shares in the account (SE).

One Member State took a flexible approach to dividing the payment, dividing it equally in the absence of evidence to the contrary, but also allowing paying agents to attribute the whole sum to each account holder where this was appropriate (MT).

Section 6 Treatment of Diplomatic Personnel

For timing reasons only preliminary comments were made on this area, and written comments were requested from each Delegation following the meeting.

Problems of residence for diplomatic staff were not only important in withholding tax countries (BE). Some Member States hadn't addressed this issue in their implementation (MT).

UK said that paying agents should not be asked to go to any greater trouble for diplomatic personnel. This would be burdensome and Article 3 of the Directive specifies that the permanent address should be taken as sufficient evidence of residence. Also the Vienna convention allows for taxation of diplomats in a different country to their commissioning state (UK). UK has the same opinion as Luxemburg on this point.

A majority of Member States considered that diplomats should be considered as resident in the State from which they were sent out. Some Member States insisted that diplomats provide banks with the means to identify their state of fiscal residence (DK). Some Member States always used the state of origin (DE, AT). Some Member States relied on diplomats to establish their residency with documentary evidence (EL).