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COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the document

Proposal for a Council Directive

on Faster and Safer Relief of Excess Withholding Taxes

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{SWD(2023) 217 final}

Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
Article 115 of the Treaty on the Functioning of the European Union (TFEU) constitutes the legal base for legislative initiatives in the field of taxation. Although no explicit reference to direct taxation is made, Article 115 refers to issuing directives for the approximation of national laws as those that directly affect the establishment or functioning of the internal market. It follows that, under Article 115 TFEU, directives are the appropriate legal instrument for the Union in this field. Based on Article 288 TFEU, directives shall be binding as to the result to be achieved upon Member States but leave the choice of form and methods to the national authorities.
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
In the case of direct taxation as far as the proposal relates to the establishment or functioning of the internal market, the Union's competence is shared.
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2¹:
<ul style="list-style-type: none"> - Has there been a wide consultation before proposing the act? - Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?
<p>There has been an extensive consultation process while preparing the current proposal. The stakeholder consultation's strategy consisted of both public and targeted consultations.</p> <ul style="list-style-type: none"> - The Inception Impact Assessment was published on 28 September with one month of consultation period, followed by the public consultation that ran between April and June 2022 leading to 1682 responses. - Targeted consultations were conducted with Member States, one Working Party IV and one High Level Working Party on Taxation (HLWP), bilateral meetings and two meetings at the TADEUS Forum. - Targeted consultations took place as well with the private sector via topic-related calls and onsite sessions to discuss technical elements. - In addition, the Commission has consulted widely and has received input from various other sources during all the stages for the drafting of the proposal. Among others, the Commission has relied on publicly available information such as ESMA, ECB, FISCO Group, Giovannini and OECD reports and on studies done by the JRC and financial market's agents. <p>All of the above-mentioned insights received from stakeholders have been considered and have led to introducing measures in this proposal that strike the balance between the two main objectives, making Withholding Tax procedures more efficient and preventing tax fraud.</p> <p>Furthermore, the Commission prepared an impact assessment and an explanatory memorandum to support this proposal whereby the principle of subsidiarity was duly justified as explained in question 2.2 below.</p>
2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

principle of subsidiarity?

This proposal complies with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). The cross-border nature of the problem at stake requires a common initiative across the internal market.

The source of the current complications lies mainly in the fact that there are currently different systems and different application of these systems across the Union regarding the relief of withholding taxes. Among those Member States that levy withholding taxes on dividend or interest payments, different systems are being applied to provide for relief of double taxation in cross-border situations. The following reclaim systems are being used with different thresholds or different requirements; relief at source system, quick refund system, the standard refund system or a combination thereof.

Keeping an increasingly fragmented framework of withholding tax procedures in the EU would lead to higher compliance costs for investors and financial intermediaries involved. The prevailing cross-border nature of the issue at stake determines the necessity of EU action in order to simplify administrative procedures and reduce compliance costs. Otherwise, the fragmentation of national rules on WHT procedures in the EU would make the effective functioning of reclaim procedures more difficult to achieve for cross-border operations, hindering the proper functioning of the internal market. Therefore, an EU action is required to level the playing field for national and foreign investors and for domestic and non-resident intermediaries alike.

The initiative also aims to respond to the recommendations provided by ESMA which were presented in the 'Final report On Cum/Ex, Cum/Cum and withholding tax reclaim schemes' which concluded that specific action at EU level in the field of taxation should be provided in order to effectively fight abuse.

A legislative approach is therefore in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on the European Union.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

The objectives of the proposed action cannot be sufficiently achieved by the Member States acting alone for the reasons stated below. The necessity for EU action was supported by 94% of respondents during the public consultation.

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

One of the main problems which needs to be addressed is the inefficient withholding tax procedures. Current procedures are cumbersome and costly for investors, financial intermediaries and tax administrations due to a variety of factors, such as:

- Uneven digitalization: the lack of a standardised and digitalised system prevents tax administrations from creating cost efficiencies and automating certain processes. Nowadays a majority of Member States is still fully or partially relying on paper-based WHT refund procedures. This issue was confirmed by most tax administrations during targeted consultations.
- Fragmentated rules across Member States: In particular, there are highly divergent WHT procedures applied in each Member State with more than 450 different forms to be filled in

by investors according to information provided by the industry. In addition, most of these forms are only available in national languages. This results in high administrative and financial compliance costs and in long and heavy processes for both taxpayers and financial intermediaries in charge of providing reclaim services to their clients.

- Lack of transparency in the financial chain: In a cross-border context, chains of financial intermediaries are generally longer than in a domestic scenario, which makes it difficult for issuers to know the identity of the ultimate investor – while they know instead the financial intermediary's identity. Similarly, tax administrations struggle to gather sufficient information on the ultimate investor to be able to properly apply the benefits granted under the DTTs.

In January 2016, the overall cost of WHT refund procedures within the EU was estimated at EUR 8.4 billion per year by the Joint Research Centre (JRC). The estimate has been updated in 2022 amounting to EUR 6.62 billion per year.

The other problem aiming to address under the current initiative is that WHT procedures are prone to risk of abuse. Some Member States have experienced large-scale tax abuse schemes known as 'Cum/Ex' and 'Cum/Cum'.

- 'Cum/Ex' schemes work as fraudulent multiple reclaim schemes when entitled to a single reclaim. Short selling practice around the distribution day creates a confusion between the economic and legal owner of the securities, which enables both parties to claim tax refunds that exceed the amount that was initially withheld by the WHT agent. An estimation made by the journalist network Correctiv, working together with the University of Mannheim, estimated the losses from Cum/Ex at EUR 9.1 billion for the years 2000-2020.
- 'Cum/Cum' schemes are dividend arbitrage patterns aimed to minimise or avoid paying taxes on dividends. Those strategies are often structured in a way that an investor lends or sells its shares to a borrower/buyer domiciled in a country that has a lower dividend tax rate, so as to minimise the taxes paid on such dividend. The borrower/buyer receives the dividend paid out by the issuer of the share and then returns it to the lender/seller, minus the dividend tax and a percentage – or 'cut' – negotiated between the two counterparties. The cost for Member States of Cum/Cum trading has, according to the same sources of Correctiv and University of Mannheim, been estimated at EUR 141 billion for the years 2000-2020.

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty² or significantly damage the interests of other Member States?

National actions would not be sufficient to address the problem in its entirety as the cross-border nature of the problem requires a common action from the EU as a whole. In order to act at EU level the legislative proposal introduces a common digital tax residence certificate, a common reporting standard to tackle the lack of transparency within the financial chain and common streamlined withholding tax procedures to avoid fragmentation across the EU to.

(c) To what extent do Member States have the ability or possibility to enact appropriate measures?

Member States can individually impose domestic measures and indeed lately Member States have had a tendency to impose them unilaterally. As shown in the targeted consultation of Member States, some of them have introduced provisions attempting, in different ways and by different means, to address the problems of withholding tax procedures. For instance, Finland has introduced in 2021 a TRACE-like system for dividend payments from listed companies. It relies on a relief at

² https://europa.eu/european-union/about-eu/eu-in-brief_en

source system as a primary system. Other countries like Germany have approved a tax reform on withholding tax procedures for non-residents that relies on a standard refund procedure with several extensive conditions to be fulfilled in terms of documentation.

(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?

Feedback given by Member States demonstrates that withholding tax collection and relief/refund procedures vary considerably among them. The main differences in such procedures for cross-border withholding tax procedures are:

- Different forms and procedures in place: As explained above each relevant Member State tries to tackle the problems drivers with different procedures. It entails that an investor with a diversified portfolio needs to deal with several forms in different languages depending on which Member States the investments are done.
- Reporting obligations associated with withholding tax collection: in several Member States, domestic reporting obligations must be met in connection with taxable income payments. Differences exist in terms of (i) the content of reporting, (ii) the entity required to comply with the reporting obligations, (iii) the person to whom the reports must be issued to, and (iv) the frequency and format of reporting. In most cases, the information to be reported relates to the gross income, the tax withheld, the net income, and the recipient of the income. Although DAC2 has streamlined the procedures to report information for cross-border passive income, it does not encompass all reporting items needed under withholding tax procedures.
- Documentation requirements for obtaining tax treaty benefits (reduced withholding tax rates): generally beneficial owners must provide evidence to prove that they are entitled to WHT relief/refund under domestic law or DTTs. The type of documentation to be provided differs from one Member State to another. At one end of the spectrum, benefits can be provided on the basis of free-format information about the beneficial owners or on the basis of documentation held by the intermediary under Know Your Customer rules (KYC). At the other end of the spectrum, reduced rate can be granted only on the basis of official forms or certificates stamped by the local authorities of the investor's country of residence or by the local tax authorities of the country of investment.
- Format and covered period of tax residence certificates: tax residence certificates are issued with different content and formats across Member States. In addition, in some countries, new forms must be used for each claim, while in others, certificates remain valid for one year or until they are revoked.
- Time limitations to refund claims: the period within which withholding tax refunds must be claimed varies among Member States and even within the same Member State, depending on the treaty under which the refund is claimed.
- Tax authority arrangements for processing refund claims: in some countries, the processing of all refund claims is centralised in one office of the tax authorities, while in other Member States, refund claims must be filed with the local tax office responsible for the withholding tax agent.
- Due diligence procedures: Although financial intermediaries would already need to check customer information under AML/KYC and DAC2 rules, current reclaim procedures do not adequately leverage these rules as there are divergent customer due diligence procedures in place in the EU for withholding tax procedure purposes.

(e) Is the problem widespread across the EU or limited to a few Member States?

Uneven state of digitalization, fragmentation of rules regarding withholding tax procedures and lack

of transparency within the financial chain are problems widespread across the EU, which hamper non-resident investors access to the reduced rates they are entitled to when investing cross-border and, therefore, discourage cross-border investment. The problems of withholding tax procedures that are inefficient and prone to abuse arise in those Member States where there is a difference between the statutory national rate and the rates provided under tax treaties or lower rates granted to specific taxpayers under domestic legislation. At the moment, 23 Member States levy a withholding tax on dividends and around 15 Member States levy a withholding tax on interest. Furthermore, investors from all EU Member State can face issues once they invest cross-border.

(f) Are Member States overstretched in achieving the objectives of the planned measure?

As the proposed legislation seeks to ensure fair taxation and reinforce the Capital Market Union by setting common rules in the withholding tax procedures field, it is expected that Member States will implement the proposed measures by replacing their current systems by the common ones or adjusting them to be fully compliant with the standards set by the Directive. Therefore, Member States' systems will become more efficient and more secure by re-allocating their resources to the high-risk cases.

(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?

Overall, Member States have expressed support to the initiative.

- Member States support introducing a common EU-wide digital tax residence certificate.

- Regarding the reporting obligation and the common procedures:

(A) there are Member States where the domestic rate for non-resident investors is lower or the same as the tax treaty rate: these Member States therefore might not need and might not have refund procedures. While the impact for these Member States might be limited, some of these Member States have expressed support for European Union action due to their own investor base.

(B) those Member States where internal withholding tax rate is higher than the applicable tax treaty rate: overall, they agree on enhancing transparency and standardizing procedures, stressing the importance of striking a balance between making withholding tax procedures efficient and keeping the control over processes to prevent tax abuses.

2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?

The objectives of the proposal can be better achieved at Union level. The added value of EU action is broadly confirmed in the public consultation where the vast majority of respondents (close to 94 %) stated that the same withholding tax procedures system should be set up throughout the EU.

(a) Are there clear benefits from EU level action?

An action at the level of the EU will bring an added value, compared to individual Member States' initiatives in the field. Firstly, it will ensure a consistent application of the eTRC both for the Member State of the investor and the Member States of the investment. Furthermore, the current reporting obligations could be replaced by the standardized rules set, leading to reductions in compliance costs for any stakeholder involved and enabling Member States to obtain a comprehensive set of information to make a safe and swift decision. Finally, it entails common rules for efficient withholding tax procedures that will benefit investors, financial intermediaries and tax administrations alike as it will avoid a patchwork of refunding requirements, unilaterally

implemented by some or all Member States using different procedures.
(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?
<p>The initiative aims to achieve fair taxation – by ensuring that taxpayers do not pay more than they should and that taxes which are due are paid - and to improve the capital market union.</p> <p>Inefficient withholding tax procedures by using different reporting and procedural requirements imposed by Member States at national level may distort the European financial market and lead to non-well-functioning Capital Market Union.</p> <p>The objective of fighting against tax abuse is better achieved at EU level as it is the only way to gather the information needed to make an accurate decision on refunds and detect potential Cum/Ex and Cum/Cum schemes.</p>
(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?
<p>The measures under the proposal will facilitate cross-border investment. A fully functioning and integrated market for capital with no barriers will allow the EU's economy to grow in a sustainable way and be more competitive. An economically stronger Europe will better serve its citizens and help the EU play a stronger role on the global stage.</p> <p>On the other hand, it will prevent tax abuse. Providing Member States' tax administrations with the proper tools to address the current lack of transparency and would make fraudulent behaviour more difficult. Therefore, this initiative aims to contribute to safeguarding the tax revenues of Member States, making tax systems fairer and ensuring a level playing field among all involved.</p>
(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?
<p>The benefit of EU-level action will outweigh the loss of competence of the Member States. From the tax administrations' perspective, less resources might be required on average to deal with withholding tax reclaim procedures and more resources could therefore be re-allocated to deal with higher risk cases. The main benefit for tax administrations is the availability of the appropriate information to achieve swifter withholding tax procedures and to fight tax abuse. In relation to macro-economic effects, tax revenues would marginally decrease as there will be less cases of foregone tax revenues (as taxpayers will have their excess WHT refunded), but this could be balanced by the prevention of fraud.</p>
(e) Will there be improved legal clarity for those having to implement the legislation?
<p>There will be improved legal clarity as this initiative would digitalise and harmonise key features of withholding tax procedures resulting in a lower administrative burden and hence time and costs savings for tax administrations, investors, financial intermediaries and companies. Making withholding tax procedures more efficient and fighting against fraud are objectives that can be met more effectively and efficiently at EU level.</p>
3. Proportionality: How the EU should act
3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

The envisaged measures do not go beyond ensuring the minimum necessary level of protection for the internal market. The proposal does not therefore prescribe full harmonization but only creates common features that would enhance the Member States' WHT systems and strengthen them against abuse.

The implementation of a digital tax residence certificate benefits investors, financial intermediaries and tax administrations. The current fragmented system with partly paper-based documents is replaced by a completely digital system. It will increase the digitalisation of administrative processes by Member States and achieve efficiency gains, also enabling the intermediaries to improve their processes. This is one step forward to achieve more efficient withholding tax procedures.

The implementation of additional reporting obligations for financial intermediaries imposes additional administrative burden and costs as the reporting of information must be extended to include more granular data. These costs are, nonetheless, outweighed by (i) the standardisation of the reporting obligation in the EU, which will reduce compliance costs for financial intermediaries operating cross-border, and (ii) the positive impact the information received by tax administration has on the improvement of withholding tax procedures in terms of security and effectiveness.

As justified in the Impact Assessment accompanying this proposal, it is compliant with proportionality principle

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

The proposed action is an appropriate way to achieve the intended objectives as it does not go beyond what is needed to make withholding tax procedures more efficient and bring down the risk of tax abuse.

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

By creating common features such as a common tax residence certificate and common reporting and common procedures across the European Union, investors wishing to invest cross-border will no longer be faced with different processes to obtain relief of double taxation in the Member State that levies the withholding tax. These commonalities can only be set at an EU level.

(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?

In order to reach common features and procedures within the EU, the choice of a directive is justified.

Non-legally binding actions were taken in the past but did not resolve the issues. In particular, the most recent soft law measure was the implementation of a Code of Conduct in 2017. Although the implementation of the Code of Conduct helped in raising awareness on the need to simplify withholding tax procedures, it was not in itself sufficient to tackle the existing problems. Therefore, further EU action is needed at legislative level, as neither national measures nor multilateral soft measures have been effective so far.

(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument of approach?)
The scope of the proposal does not set the rate nor the tax base, it limits itself in providing the tools for the Member States to ensure compliance and to streamline procedures.
(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?
<p>For investors, the proposal is not expected to lead to an increase in costs (but actually to costs savings estimated at EUR 5.17 billion annually, thanks to less foregone withholding tax refunds, fewer administrative costs and reduced opportunity costs for investors).</p> <p>Financial intermediaries are estimated to face a one-off increase in costs of EUR 75.9 million (implementing costs) and EUR 13.5 million in recurring costs. For Member States, at the level of the tax administrations, costs will stem from the development of implementing the common digital tax residency certificate and the recurrent costs associated with the new reporting systems to receive information from financial intermediaries.</p> <p>In relation to macro-economic effects, tax revenues would marginally decrease as there will be less cases of foregone tax revenues (as taxpayers will have their excess WHT refunded), but this could be counterbalanced by the prevention of fraud.</p> <p>These costs need to be incurred to achieve the benefits of efficiency and robustness related to withholding tax procedures.</p>
(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?
Not applicable.