

**Opinion of the European Economic and Social Committee on the 'Proposal for a Council Directive amending Directive 2003/48/EC on taxation of savings income in the form of interest payments'**

**COM(2008) 727 final — 2008/0215 (CNS)**

(2009/C 277/23)

Rapporteur: **Mr BURANI**

On 2 December 2008 the Council decided to consult the European Economic and Social Committee, under Article 94 of the Treaty establishing the European Community, on the

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

(COM(2008) 727 final - 2008/0215 (CNS)).

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 1 April 2009. The rapporteur was Mr BURANI.

At its 453rd plenary session, held on 13 and 14 May 2009 (meeting of 13 May), the European Economic and Social Committee adopted the following opinion by 193 votes to three with eight abstentions.

## **1. Summary and conclusions**

1.1. The Commission's proposal for a Directive is aimed at extending the scope of Directive 2003/48/EC – currently limited to savings interest – to a range of new financial products that also provide benefits but do not fall under the current provisions.

1.2. While the Committee fully endorses the initiative, it has concerns about certain administrative and legal complications thrown up by the new rules. The Commission has acknowledged that the problem exists and has done its best to minimise the burden: while this effort is to be commended, it was constrained by the complexity of the new procedures envisaged and by the difficulties in implementing the relevant provisions.

1.3. An important aspect is the cost, which would be borne not only by the operators, and thus the market in general, but also by the tax administrations, because of both the management element and the need for more accurate and extensive controls. Simplification is not always easy but remains, however, a necessity. The Committee points out, however, that an issue of greater concern than the cost should be the quality of the resulting information: difficult or complicated rules often give rise to poor quality information.

1.4. The Committee would also emphasise the need to avoid a situation where the new rules are to be applied unilaterally by the EU: without agreements with third countries and the *agreement countries* we could see a large-scale shift of operations away from Europe to other areas. At the same time, this would risk greatly distorting competition between Europe and the rest of the world.

The EU should therefore enter into negotiations to agree the simultaneous adoption of similar measures in the main global financial markets.

## **2. Introduction**

2.1. Directive 2003/48/EC established the necessary procedures for the taxation of interest payments on savings held in one Member State made to beneficial owners resident in another Member State. In September 2008 the Commission presented a report to the Council on the impact of the Directive, based on consultations with the Member States' tax administrations, with regard to the first two years of implementation.

2.2. The positive findings of this report encouraged the Commission to press on with refining the original Directive, whilst extending its scope. Thus, new definitions of *beneficial owner* and *paying agent* have been introduced, the Directive has been extended to cover the benefits of a wider range of financial products, and numerous procedural aspects have been revised or amended.

## **3. General comments**

3.1. The Committee notes the considerable effort made by the Commission in drawing up this proposal, which it **fully endorses** in its broad outline. Through Member State and stakeholder consultation new rules have been drawn up to enhance the existing ones, ensuring effective taxation of savings income for the benefit of national tax administrations while, indirectly, correcting distortions in capital movements. There are however some aspects on which the Committee must express certain reservations.

3.2. Overall, the Commission proposal seems to be geared towards a **gradual adaptation of tax legislation to the realities of the financial market** which, before the onset of the current

crisis, witnessed the birth of a range of innovative products, which are difficult to classify and are not covered by the 2003 Directive. Several of these products could enable the tax legislation to be *circumvented* in a perfectly lawful way; it is therefore logical that the new Directive should try to fill this legislative gap, **including in the concept of savings income (interest) certain other income from innovative financial products and certain life insurance products, which, moreover, should be further clarified.** The Committee endorses this approach: it points out, however, that the purpose of this extension is not including general life insurance, pensions and annuities, since they serve a long term clear risk coverage purpose. Moreover, given the variety and sophistication of innovative financial products, it will not always be easy to calculate the amount of declarable income or the taxable base.

3.3. In the introduction, the Commission assures us that in drawing up this proposal for a Directive it has taken into account the **administrative burden** that the amendments would entail for operators, and thus consulted both the national tax administrations and the duly established expert group, in accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty.

3.3.1. The Committee considers, however, that despite these good intentions, the weak point of the proposal is that it in fact **considerably exacerbates the administrative burden** for operators, whilst requiring existing electronic procedures to be modified or completely new ones introduced. Moreover, in some cases, the new rules appear ambiguous or hard to implement. The general impression is that the interests of the national tax administrations – who are obviously in favour of the changes, being the beneficiaries – have prevailed over the fact that **any additional burden on the operator will inevitably end up being shouldered by the consumer**, and more generally by the market. It should also be borne in mind that rules which are hard to implement often result in poor quality information.

3.3.2. With due respect for the proposal's underlying fundamental concepts, the Committee thinks that the only amendments that should be made are those that, without altering the scope of the provisions, would **simplify and lessen the expense of the administrative procedures** involved, providing clarifications where necessary. This is particularly the case with the procedures envisaged for establishing the identity and residence of the investors: the amendments proposed by the Commission entail overly rigid and cumbersome formalities. The Committee thinks that the changes here should be guided by the recent recommendations of FISCO (the Fiscal Compliance Expert Group), an advisory body set up by the Commission itself, which has proposed – in respect of exemption requests – self-declaration of residence by investors, for withholding tax purposes.

3.3.3. In any case, the Directive needs to explicitly establish a principle of fundamental importance: all of the new procedures, provisions and requirements should take effect from the point at which the new Directive enters into force, without retroactive

effect. Electronic procedures have been programmed on the basis of the existing Directive; new formalities with retroactive effect would entail lengthy, complicated modifications.

3.4. The Commission is clearly aware of the complexity of the formalities required of operators, and indeed the Directive is intended to **come into force three years after** its publication date, which seems a reasonable and appropriate timeframe. The experience of the previous Directive is, however, that in certain Member States there have been considerable delays in adopting the necessary legislation, causing administrative problems for operators. The proposal should therefore **require Member States to publish implementing legislation at least two years before the Directive enters into force.**

3.5. The **level playing field** with the *agreement countries*, referred to in the 24th recital of the 2003 Directive, has been only partly achieved, and in any case does not apply to countries that are not signatories to the agreement; the current proposal does not mention the possibility of **extending the scope of the new Directive to third countries.** While not ruling out the possibility of negotiations leading to a new agreement, in the current market crisis it is unlikely that this could be achieved in the short term. The level playing field is not the only thing that would suffer: a **flight of capital** would have much more serious consequences, a concern that is evoked in the above-mentioned recital but not mentioned in the new proposal. The Committee would advise against creating **new disparities** as regards the obligations of paying agents in the Member States and those in other countries, be they *agreement countries*, third countries, or other dependent or associated territories. It takes the same view regarding the announced extension of the Directive to other sources of revenue.

#### 4. Specific comments

4.1. The proposal contains a series of new requirements regarding the documentation to be presented aimed at **identifying the beneficial owners and their residence for tax purposes.** The tax identification number (TIN) <sup>(1)</sup> – for which each country has adopted a different structure – becomes an additional requirement under **Article 3(2)**, alongside indication of the place and date of birth, whereas the current Directive requires only one or the other. Simplification could be achieved by substituting, where possible, the place and date of birth for the TIN; this is information that is sufficient in all Member States to identify residents.

4.1.1. Other cumbersome procedures include the fact that the original **documentation** must be **constantly updated.** The Committee feels that this rule would be almost impossible to enforce, and in any case would constitute a considerable burden. It therefore proposes that the relevant documentation be deemed to have a continuing validity, with due respect for the standard of *best information available.*

<sup>(1)</sup> In French: NIF (Numéro d'Identification Fiscale).

4.1.2. However, it has since been intimated that the provisions on the TIN and updated information are both optional, in that they are to be communicated **only if they are in the possession of the intermediary**. If this were the case, it would negate the fundamental rationale of the objections posed, i.e. the burdensome nature of the procedures.

4.2. The new Article 4(1) extends the concept of beneficial owner, bringing this in line with the concepts established under the anti-money laundering Directive (2005/60/EC) and introduces an investigative requirement (*look-through*) for entities and legal arrangements, as set out in Annex I to the proposal for a Directive. Consequently, a payment made to such entities or legal arrangements is considered to be made to their beneficial owner, in accordance with the provisions of the anti-money laundering Directive.

4.2.1. The Committee highlights the **discrepancies between the objectives pursued by the Directive on the taxation of savings income and the aforementioned anti-money laundering Directive**. While the former requires paying agents to identify taxpayers who are required to declare their savings income in their Member State of residence, the latter requires paying agents to ascertain not only the identity of the legal company or arrangement holding the account, but also the identity of the person who effectively owns, controls or benefits from the company or legal arrangement. Moreover, while the anti-money laundering Directive is applied, with the necessary rigour, *only* to suspect cases, the present proposal would apply to *all* beneficiaries; the difference being that money laundering cases require a level of in-depth investigation that goes far beyond the due diligence of tax legislation. Compliance with the proposed rules would thus not only be difficult, but also costly and somewhat arbitrary.

4.3. Article 4(2) clarifies the nature of **paying agents upon receipt** who under national legislation in their **country of effective management**, are not taxed on their income or on the part of their income attributable to their non-resident members (the categories, which vary from country to country, are listed in Annex III to the proposal for a Directive). **Country of effective management** refers to the country of residence of the person who primarily holds legal title and manages their property and income. Payments received or secured by paying agents upon receipt are deemed to be made or secured for the immediate benefit of the **beneficial owner** to whom the taxable income is legally attributable.

4.3.1. Extending the concept of *paying agent upon receipt*, which is difficult to define in practice on the basis of the existing Directive, could create administrative and systemic problems for the

original operators, despite the effort made to list the various types in Annex III. Moreover, the place of *effective control* could be difficult for the original operator to ascertain. These innovations therefore raise **serious doubts in operational and management terms**. Not only would it add to the administrative burden and responsibilities of paying agents upon receipt, but the tax administrations would also be lumbered with complicated and costly procedures. The beneficiaries concerned have already flagged the problems that would ensue from adoption of the proposed measures, using technical arguments too complex for the uninitiated. The Committee does not feel it ought to take a position on this issue, but calls on the Commission and the legislators to **give serious consideration to the problems raised by the operators**: failure to meet objectives is often down to legislation that underestimates practical difficulties.

4.4. **Article 6** highlights the Commission's efforts to **include within the concept of interest any benefit deriving from an investment**. The long, detailed list of examples is aimed at extending the taxation to income from **innovative financial products**, which represent anomalies or in any case are not covered by the current legislation. The Committee thinks that the Commission has made a worthy effort here to implement the principle of **sharing the burden among taxpayers**, regardless of the form, definition or level of sophistication of their investments. But at the same time, the Committee would stress the need to **safeguard the competitiveness of the EU's financial and insurance markets**. Therefore, an **essential condition to be negotiated** before the new legislation comes into force is that the rules contained in the new Directive will also be applied by the agreement countries and third countries. An imbalance that would penalise Europe is clearly not the best solution.

4.4.1. Several paragraphs of this Article lay down the procedures to be followed by **paying agents**, who are often a different entity from the issuer of the financial instruments or the information provider. The majority of these procedures involve analysis, investigation or assessment, which in certain cases cannot be carried out by paying agents. In the interests of fairness, it should be specified that, once they have proven to have exercised due diligence and acted in good faith, paying agents **should not be liable vis-à-vis tax administrations when the data provided are derived from third-party information** that cannot be verified through normal means of investigation. On the other hand, it should be explicitly specified that liability does lie with intermediaries and direct beneficiaries who provide incorrect, incomplete or false information.

Brussels, 13 May 2009.

The President  
of the European Economic and Social Committee  
Mario SEPI