Attn Mr Gerassimos Thomas
Director General
DG TAXUD
European Commission
1049 Bruxelles
Belgium

24 June 2022

Dear Mr Thomas,

Subject: PwC response to the European Commission's public consultation 'New EU system for the avoidance of double taxation and prevention of tax abuse in the field of withholding taxes'

PwC International Ltd (PwC), on behalf of the PwC network, welcomes the opportunity to respond to the consultation 'New EU system for the avoidance of double taxation and prevention of tax abuse in the field of withholding taxes', by way of this letter.

The starting point of this initiative is to tackle the burdensome withholding tax (WHT) procedures for cross border investors in the securities market. Indeed, a proper functioning of the Capital Markets Union demands efficient WHT relief procedures. However, the aim of preventing tax abuse is also mentioned in the questionnaire as one of the main goals of the initiative, with some suggestions for more consistent (and in many cases greater) requirements for Member States to apply and share information regarding WHTs.

Currently, Member States apply different scopes and rates to WHTs (constrained largely only by the Parent-Subsidiary Directive, Interest and Royalties Directive and tax treaties). As a result, there is significant inconsistency within the Union in how WHTs are applied. In many Member States, the rules that regulate the refund procedure are also very complex, lengthy and costly.

Simplification and effectiveness

The burden on taxpayers and on tax authorities of applying WHTs effectively within the EU could be limited by applying a simplified EU-wide system. Both relief at source and refund procedures, in line with the recommendations of the OECD, could be enhanced using electronic means without yet exploring the future possibilities of a blockchain solution (which we think is some way from being feasible from a practical perspective and still requiring a robust proof of concept). Our experience with the WHT refund procedures of EU Member States tells us that the underlying data systems and record sharing capabilities of tax administrations would not currently support moves to a significantly digitalised system, not to mention blockchain based tax registries which remain in their early stage of development. Buy-in from a range of stakeholders, including qualified intermediaries and tax administrations would be a prerequisite for any greater automation.

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In considering the need for anti-abuse measures, the sustained outcomes of existing measures, including the need for Member States to have a GAAR in line with ATAD and the Principal Purposes Test following BEPS (including the MLI), would need to be analysed before further anti-abuse measures (which often lead to complications, also for tax administrations) are added. To the extent that some anti-abuse measures are seen as necessary in order to have a fair and effective WHT system, we address those potential needs below.

Beneficial ownership

While clarity over beneficial ownership is to some extent tied in with the need to consider potential avoidance and perceived abuse, the issue has become clouded within the EU following BO cases.[1] These have added complexity to the question of the proper application of withholding taxes and various exemptions and reliefs.

As long as no clear cut, autonomous definition of the concept of beneficial ownership exists in the EU, it would be very difficult to harmonise the EU WHT system effectively and efficiently for the benefit of taxpayers/investors and tax authorities of EU Member States. Preferably, further work on beneficial ownership would be entailed on a global basis. We encourage the European Commission to carefully analyse the concept of beneficial ownership when designing a harmonised WHT system, including any built-in anti abuse measures, which we suggest should not be conflated with beneficial ownership (see below).

The European Commission could, with this initiative, clarify that the main purpose of the concept of beneficial ownership within the EU is to identify a taxpayer to whom income from cross border payments of dividends, interests, or royalties from an EU Member State (source State) is allocated for tax purposes. We would be happy to provide additional thoughts on this if requested.

Built-in anti-abuse

As noted above, the effectiveness of existing anti-avoidance provisions should be factored into the need for measures built-in into an EU-wide system and, to the extent required, they should not rely on the concept of beneficial ownership. Instead, built-in anti-avoidance could be based on the combination of the relief at source (by default) and the refund procedure system, only after delivering a proof by the tax authorities confirming a likely existence of abusive conduit intermediaries or conduit transactions.

A set of predetermined conditions relevant for abusive conduit payments could be included in any new EU WHT legislation. This approach could be supplemented with the enhanced automatic exchange of information in order to allow the tax authorities gathering relevant information concerning abusive practices in WHT and verifying the information provided to the contrary by the taxpayers (especially intermediaries). Real-time reporting of payments to intermediaries and tax authorities will be a prerequisite for this system to function.

[1]The Court of Justice of the European Union (CJEU) issued judgments on 26 February 2019 in T Denmark and Y Denmark vs. the Danish Ministry of Taxation (Joined Cases C-116/16 and C-117/16 – 'the dividend cases') and in N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS vs. the Danish Ministry of Taxation (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16 – 'the interest cases').

Data quality

It is our view that the data currently collected for WHT purposes would not support some technology solutions set out by the Commission. There are several reasons why this is the case. These include:

- inconsistencies in the definition of terms which lead to distinctions in the eligibility of beneficiaries or the qualification of revenues,
- a lack of standardisation on data transmission,
- limited controls on the source of information and accuracy within an information cascade involving multiple layers of beneficiaries, and
- the current practice of manual and paper-based documentation of some relief at source or reclaim applications.

The OECD's TRACE project recognises difficulties with requiring the provision of information only from the intermediary closest to the investor, i.e. the one that can directly ask the investor for the information. However, it also noted that the exposure of other intermediaries to liability for improperly collected and paid WHT could be unfair and go against the reality of cross border investments. TRACE recommends the development of appropriate procedures for WHT settlements by intermediary entities, coordinated across countries and implemented on the basis of a standardised format, including self-declarations by the investor about its beneficial ownership status. There are similarities here with the US system but that is predicated on a different regulatory environment; other countries seem to have found TRACE impracticable and only Finland, so far, is believed to have tried to put it into practice. Accepting the various weaknesses identified, we think a viable adaptation/ alternative is feasible within the EU.

With this letter we kindly invite you to take our observations into consideration during further discussion of WHT procedures within the EU. We stand ready to discuss the issues raised in this letter in more detail, if that would be helpful at any point - please do not hesitate to contact me or one of the individuals set out below.

Yours sincerely,

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