



THE ASSOCIATION OF
QUALIFIED & AUTHORISED
INTERMEDIARIES

Administrative Offices:
30 Mill Lane, Yateley,
Hampshire United Kingdom
GU46 7TN

September 18th, 2023

**Association of Qualified & Authorised Intermediaries (AQAI) Feedback regarding EU initiative
titled: Proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes 2023/0187
(CNS)**

About our organization

AQAI is an unincorporated, non-profit Association comprising a membership composed of financial institutions actively engaged in tax relief at source processing and compliance. Recently established, the Association seeks to facilitate and stimulate active communication amongst qualified intermediaries, authorised intermediaries, regulators, competent authorities and other industry stakeholders by strengthening international coordination and collaboration across the financial services community. We aim to actively contribute to developing standards and digital solutions that improve the efficiency and promote best practices within the qualified and authorised intermediary community.

The focus of our submission

As we represent authorized intermediaries with extensive experience in managing and complying with international withholding tax regimes we welcome the opportunity to provide feedback and comments on the Commission's proposal for the Directive.

We applaud the Commission's work in this area, many of our members have a long-standing working relationship with the Commission in the area of cross-border withholding tax relief regimes, notably the FISCO and Tax Barriers Business Advisory (T-BAG) groups. We welcome the clear objectives set out in the proposal to simplify and harmonise tax relief procedures and simultaneously providing tax administrations with the necessary tools to address tax fraud and abuse.

Whilst the Proposals objectives are clear, to achieve its intended aims the success of the Directive will depend on achieving as much standardisation and clarity as possible. The proposal appears to center on three core elements, (i) common due diligence, (ii) common reporting, and (iii) the electronic tax-residence certificate (eTRC). Our feedback also focusses on each of these three elements.

We trust our comments and feedback are helpful in considering the final outcomes we understand that the implementing frameworks will be defined by the Commission and assisted by a committee. We welcome the opportunity to work with the Commission and any working group or committee it may establish as it proceeds toward the successful implementation of the proposed Directive.

A Common Due Diligence

Whilst the Directive and pre-ambles provide some guidance regarding the sources of information that ought to be reviewed when conducting due diligence of a registered owner's tax residence, e.g., AML and other comparable information. We would note that with other investor due diligence and reporting regimes¹ have created templates for tax due diligence requirements. We encourage Member States and the Commission to consult with industry to develop a similar approach, specifically it would be useful if CFIs are able to apply investor due diligence by leveraging from existing processes thereby minimising implementation challenges and costs.

¹ OECD Common Reporting Standard (CRS) and US Foreign Account Tax Compliance Act (FATCA) regulations



THE ASSOCIATION OF
QUALIFIED & AUTHORISED
INTERMEDIARIES

Administrative Offices:
30 Mill Lane, Yateley,
Hampshire United Kingdom
GU46 7TN

Any guidance concerning due diligence must recognise the limits to a financial intermediary's visibility of an ultimate investor's activities, it would also be imperative for the Commission to recognise existing financial regulations that may prevent the sharing of information across different business units within one financial organisation.

- **Financial Arrangement** - Whilst the Draft Directive (Article 3 (17)) defines financial arrangement, the definition is very broad and CFIs expected to confirm their awareness of the existence of such arrangements may choose to de-risk themselves and simply not provide services. Implementing guidance will be necessary to provide clear examples of common financial instruments or agreements and whether they fall within scope.

Additionally, Article 11 (d), a CFI is required to determine the possible existence of any financial arrangement that has not been settled, expired, or otherwise terminated as at ex-dividend date based on information that is available to it. It will be necessary to clarify what role, active or otherwise, the CFI of the direct client must undertake to make this determination. For example terms such as "possible existence" and "available information" are subjective it will be crucial to clarify what this means in practice recognising, as we have previously stated, the limits to a financial intermediary's visibility of an ultimate investor's activities.

- **Registered Owner** - It is general market practice for financial intermediaries to commingle the assets of their clients and subsequently register investors' securities in nominee accounts. As a practical matter the nominee account will therefore be recorded as the registered owner of the securities.

Article 11 of the proposed Directive requires CFIs to obtain, from the registered owner, a declaration that it is the beneficial owner of the dividend or interest as defined under the national legislation of the source member state. Furthermore Article 11 (c) requires the CFI to verify the registered owner's entitlement to a specific reduced withholding tax rate in accordance with the double tax treaty (DTA).

This presents a number of practical difficulties outlined below;

- The concept of "beneficial owner" remains unclear. We are not aware of any Member States that have published clear guidance in this regard.
- Whilst the OECD introduced, in the dividends, interest, and royalties' articles of the Model Tax Convention a definition of beneficial owner, this was aimed at clarifying the meaning of the words "paid to", and to deal with simple treaty-shopping situations.
- The OECDs Base Erosion and Profit-Sharing project (BEPS) project, specifically Action 6, takes further measures to tackle treaty abuse by the introduction of one of either a principal purpose test and or a limitation on benefits rule.

As a result of the above, CFIs required to confirm the customer is the beneficial owner and verify the registered owners entitlement to a specific reduced withholding tax rate in accordance with the double tax treaty (DTA) will need to review multiple, and possibly, differing sources of information. For example, source countries' definition of beneficial ownership, the respective DTA, the new and novel income entitlement rules outlined in the Directive and securities registration laws.

It will be critical that the final implementing measures of the Directive clarify the due diligence standards CFIs will be required to follow outlining precisely what 'verifying' entails, aiming to achieve a single standard across all Member States so that CFIs can adopt common principles to deal with, and possibly align customer due diligence to existing tax compliance regimes such as FATCA, CRS and TRACE.



THE ASSOCIATION OF
QUALIFIED & AUTHORISED
INTERMEDIARIES

Administrative Offices:
30 Mill Lane, Yateley,
Hampshire United Kingdom
GU46 7TN

B Common Reporting

The framework for the Directive will require a CFI to register in the national registers of any EU Member State where it wishes to participate in the Relief at Source or Quick Refund system. We acknowledge the need for Member States' tax administrations to have direct oversight of a CFI operating the system and that each Member State will need to receive, from the CFI, the relevant reporting envisaged under the proposal.

However there is a risk that Member States will create differing solutions, including timelines for reporting and the reporting portal mechanisms. This would increase the cost of both implementation and ongoing compliance for CFIs. CFIs are likely already assessing the potential cost-benefit effect of participation.

We believe both implementation and on-going costs for both Member States and CFIs would be greatly reduced by the development of a single reporting portal and standard. This could serve to improve adoption of the system by CFIs thereby maximising the success of the Directive.

Whilst the explanatory memorandum to the Directive helpfully sets out that reporting will take place via a standardized XML format that will be set out in the implementing acts to be adopted by the Commission, we would stress that any divergence from XML in ISO 2022 format would be hugely problematic for industry. Nevertheless we strongly encourage Member States to collaborate with industry to develop harmonized reporting solutions, specifically in terms of timing, data requirements and format.

As drafted, Article 9 paragraph 1 requires CFIs to report relief claimed on an income event within a 20-day period after the record date. Our expectation is that this will likely mean that almost all CFIs will effectively be reporting on a daily basis. This is particularly relevant within the EU where for example a CFI's client base invests widely across the EU with income payments typically overlapping during the busy dividend season.

Whilst we acknowledge the need for the Member States to receive data in a timely manner, near-time daily accurate reporting relies on timely reporting from all actors in the payment chain otherwise Member States will not receive the necessary information to reconstruct the chain of payments and CFIs would be less likely to omit dividend information in error.

We suggest amending this approach and providing a solution that allows for reporting within a pre-defined date, for example within a pre-defined number of days at end of the calendar month (e.g., 20). This would mean that all CFIs along the entire payment chain will send the necessary information at the same time, reducing the need for MS to investigate missing data and enabling Member States to quickly identify and focus on areas of concern.

With respect to reporting, there will need to be clear obligations imposed on Member States for the timely reconciliation of reporting received, this should address the timeliness and process for review and reconciliation of transactions, supporting documentation and/or information and resolving any discrepancies that Member State tax administrations identify with the various intermediaries in the income payment reporting chain. Any requirement to report on an end-owner's period for holding the underlying security must detail the methodology for calculating such holding periods. Recognising high volumes and complex trading activities, the many typologies of trading are well noted and publicised. In the final implementing framework it is critical that Member States provide clear and consistent guidance regarding how to calculate the holding period of a fungible asset. Furthermore, in respect of reporting it is essential that from a CFI liability perspective both MS and the EC recognises the limitations a CFI will have regarding the full scope of an investor's activities, the ultimate investor is the only party that will have the full information concerning the nature of underlying transactions.

As drafted, the traditional record date principle to determine income and therefore tax entitlement is replaced by a modified version of ex-date and any eligibility to tax relief at source or quick refund cannot be granted if the



THE ASSOCIATION OF
QUALIFIED & AUTHORISED
INTERMEDIARIES

Administrative Offices:
30 Mill Lane, Yateley,
Hampshire United Kingdom
GU46 7TN

shares are acquired within a period of two days before the ex-dividend date. This means that for the same client with a total position in the same security, one portion may be relieved of tax at source or quick refund and the other portion must be fully taxed. This not only means a CFI will need to implement and operate a two-tier income collection and tax process the CFI will encounter increased complexity for reporting, including challenges when trying to source new data points for reporting.

(C) Common Digital Certificates of Tax Residency (eTRC)

We welcome the Directive's approach to a fully automated process to issue digital certificates of tax residence (COTR) with common content. The explanatory memorandum references targeted consultations that concluded that in terms of establishing investor residency the same rules apply to deem an investor resident regardless of the country of investment. Currently however there are several Member States that require additional language to appear in the COTR, for example France requires the certificate of tax residency to confirm whether the Treaty claimant is subject to tax in its country of residence. Therefore further analysis may be necessary if the aim of achieving common standards for request and content is to be reached.

We also welcome the approach outlined that will enable requests for an eTRC to be made via on-line portals by taxpayers or their appointed parties.

The Technical requirements outline that the digital tax residence certificate² offer the possibility of both human- and machine-readable format presentations of the digital tax residency certificate with PDF documents or similar other formats which can be used in the automated systems; – be printable; – contain an open text box for inclusion of information under Article 4(g).

We note that the Regulation (EU) No 910/2014 was passed in 2014 however very few countries have adopted the use of digital standards. Given that the Directive proposes that Member States issue an eTRC within one day of request, we cannot assume that all Member States will be ready at the same time. It will thus be critical for both investors and financial intermediaries to be able to quickly identify which countries have adopted/implemented the standard and those that accept the new standard.

Furthermore, a system that allows taxpayers to request tax residence certificates issued in PDF format containing a Secure Verification Code (SVC) that guarantees the integrity of the document, is already a step in the right direction; we believe true digitalisation should go beyond simply providing a PDF version of the original COR.

Lastly, it will also be important for Member States to consider how they achieve efficiencies with non-EU member states in this regard.

D Other Matters for consideration

- **Registration**

Article 6 of the proposed Directive requires large financial institutions, as defined in Article 3(10), and central securities depositories as referred to in Article 3(4) to register in the national register as CFIs. Whilst implied but not explicit the final implementing frameworks should clearly outline that each CFI can independently determine the scope of services it will provide to its customers. This point is crucial to enable CFIs assess liability and risk based.

² shall be issued with an electronic seal in conformity with Regulation (EU) No 910/2014 of the European Parliament and of the Council



THE ASSOCIATION OF
QUALIFIED & AUTHORISED
INTERMEDIARIES

Administrative Offices:
30 Mill Lane, Yateley,
Hampshire United Kingdom
GU46 7TN

- **Compliance and Oversight**

Article 16 refers to a CFI's liabilities for failure to comply with its obligations under Articles 9,10,11,12, and 13. Article 7 makes reference to penalties applicable to infringements of national provisions adopted pursuant to the Directive. However, there is no mention how Member States will be expected to monitor compliance of CFIs. To enable FIs make a balanced decision to determine whether to register as a CFI. It will be necessary to outline, as soon as possible a common approach in this area, including confirming a CFI's liabilities.

E Conclusion

Thank you for the opportunity to provide our views on the Public Consultation. We believe that this initiative will aid in achieving an efficient withholding tax system which in turn will remove current barriers to cross-border investment within the EU.

Should the Commission have any questions regarding the above feedback or wish us to be represented in any of the implementational committees, please contact us.

Sincerely, on behalf of the membership

Ross McGill, Chairman

Cc: Lorraine White, FASTER Committee Chair