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Mr Stephen QUEST, Director-General
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Dear Mr Guersent and Mr Quest,

Subject: EBF comments on the EU Code of Conduct on Withholding Tax Procedures

The European Banking Federation (EBF), which is the voice of European banks, commends the Commission on its efforts specifically for having brought together a small number of EU Member States to discuss the long outstanding issue of withholding tax (WHT) relief/refund procedures which resulted in the publication of The Code of Conduct on Withholding Tax (The Code) in December 2017.

The EBF attended with interest the 30 January public hearing on withholding tax as hosted by the Commission which aimed to discuss the best practices proposed in the Code.

The EBF has continually highlighted to the EU Institutions, the OECD and governments worldwide that persistent barriers to WHT relief/refund procedures are a major deterrent to cross-border investment.

The EBF however believes that much more needs to be done. We would observe that for any changes to be successful they must be both balanced and workable and relieve the cost and complexity for all actors in the process. This means investors, tax authorities and operators of tax relief/refund procedures must be able to implement any recommendations in a streamlined and harmonised manner.

In the EBF's view, the Code has not addressed the following areas:

1) The need for harmonisation and standardisation
2) The international developments
3) The wider digital agenda
4) The specific issues presented by pension funds and regulated investment funds
5) The need for a broader industry engagement
6) Follow-up, monitoring and defining key element to measure compliance.

You will find enclosed detailed comments on each of these 6 topics.

The EBF stands ready to work with the Commission and governments to help overcome the many practical barriers that its members and their clients face and hope that together we can truly implement solutions that bring about simplification and procedural harmonisation.

We are at your disposal to discuss these comments in further details.

Yours faithfully,

Wim MIJS
Chief Executive Officer

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DETAILED COMMENTS

1. HARMONISATION

As also emphasised by the Eurosystem's Advisory Group on Market Infrastructures and Collateral (AMI-SeCo) in their comments on the Code, the latter does not deal with the need to implement solutions in a harmonised, standardised way.

We believe that the lack of harmonisation brings the following problems:

- ***Technology*** – Absent standard technology solutions, the costs associated with the need to build, design, test and maintain multiple systems will mean costs for all actors in the process will rise.

- ***Tax Forms Information & Data*** – The lack of identification of standard relevant tax data required to be transmitted in administration of the relief process suggests that opportunities to simplify the data collection, transmission and review process in a truly digitised way cannot be fully appreciated. For example, we have identified that tax relief forms have certain core similarities with at least 15 questions repetitive in nature but all conveying the same facts regarding the investor and the tax relief sought. We urge the Commission to encourage further dialogue with member state tax authorities to define a standardised documentation to support a common tax claim process. We would be happy to further discuss and share with you our analysis in this area.

2. INTERNATIONAL DEVELOPMENTS

Well-advanced solutions that have been discussed in many fora are possibly being overlooked by the Code, particularly the work of the OECD and its Tax Relief and Compliance Enhancement (TRACE) project which aims to propose a global model. The earlier and to some extent parallel work of the Commission with its Tax Barriers Advisory Group should also be referred to.

We recognise that the Code of conduct guidelines are non-binding on any Member States. However we are concerned that the Code has overlooked the fact that some governments are already exploring solutions and proposing processes based on the TRACE Implementation Package.

There is in our view a need to improve clarity and to raise awareness and understanding about TRACE both in the industry and in the public sector. We encourage the Commission to work closely with the OECD notably to help ensure a proper implementation of TRACE and similar solutions in those jurisdictions that are early adopters. Provided that TRACE remains an optional system for Financial Institutions, it may provide a starting point for a welcome level-playing field.

The EBF has always considered that synergies and consistency with other information exchange systems, such as the Common Reporting Standard (CRS), should be exploited and/or ensured.

3. The Digital Agenda

Signatures

We encourage the Commission to work with governments to implement digital solution in line with the work it has already undertaken with the **eIDAS** (electronic Identification, Authentication and trust Services) Directive that applied from 1 July 2016. As the Commission will know eIDAS establishes an EU wide legal framework for electronic signatures and a range of newly defined trust services. We note that the Eurosystem's AMI-SeCo and the ECB's FinTech Task Force are making the same recommendations.

A move by tax authorities toward acceptance of 'electronic or digital signatures' would not only remove or eliminate much of the paper-based administration inherent in the current relief procedures but absent a solution it would seem that the ability for investors to complete digital reclaim filing on line will never be achieved.

Forms

As mentioned above tax forms share common data attributes in terms of the information requested from the investor. The Code does not appear to contemplate real solutions to help investors and intermediaries transmit to tax authorities this necessary data in a digitised and harmonised manner. The seamless transmission of data, in a manner that tax authorities can consume would clearly improve processing timelines, increase governance and importantly enable tax authorities focus their efforts on real areas of concern. We urge the Commission to engage with industry in this area to identify scalable solutions that are in line with the wider digital landscape.

Solutions must be interoperable, standardised, global and available to all parties, and possibly based on machine readable forms.

4. Specific Issues presented by pension funds and regulated investment funds

The Code hasn't addressed issues to enable investors seek clarity, and thereby certainty, as to entitlement to withholding tax relief. Take for example pension funds and regulated funds, such as the Undertakings for The Collective Investment of Transferable Securities (UCITS) funds.

Qualification for treaties

Because they are often not subject to tax, and therefore not considered as residents for treaty purposes, pension funds and collective investment vehicles (CIVs) generally do not qualify for treaties. Therefore, they are suffering high withholding taxes in source countries (15 to 30%). Some countries accept to provide treaty benefits provided the fund disclose its investors. However, in most cases, this information is not available, either because the fund manager does not keep a nominative register or/and because of confidentiality. We consider that widely held CIVs such as UCITS funds should be considered as tax residents and therefore qualify for treaties. For example, Spain grants a 1% withholding tax (instead of 19%) to UCITS funds based on a certificate signed by the Financial Authority of the country where the UCITS fund has been set up.

Pension Funds

Unlike the tax treatment of the pension fund in its home country, where the pension fund may be exempt from taxation, the fund may not have automatic exemption in the investment country and would need to submit a retrospective claim to obtain such relief. The procedures presented to pension funds for the collection of tax relief to which they are legitimately entitled are often cumbersome and resource intensive and some smaller schemes do not have the capacity or resources to pursue relief claims.

With pension funds focussing on performance and the ability to meet future funding requirements any tax leakage can have a significant impact.

Collective Investment Vehicles (CIVs)

Most countries within the OECD have a tax system that should in principle treat equally all direct investments and investments through so called Collective Investment Vehicles (which are funds that are widely held, hold a diversified portfolio of securities and are subject to investor protection regulation in the country in which they are established). However this objective is in practice often only fulfilled when the CIV, its investors and its investment are all located in the same country. This is the case partly due to complicated withholding tax refund procedures.

In general the rules of the Double Tax Agreements are only applicable for "persons" who are "residents" in one of the Contracting States. For investment funds this is not so obvious. It is often unclear whether their legal structure qualifies them as "persons" and whether they are "residents" of the Contracting State. Some source countries require investment funds to provide detailed information about their investor base in order to get access to treaty benefits. UCITS and other widely held cross-border investment funds are often held by or through distributors and the information about the end-investors is only directly available for these distributors.

UCITS represent a low risk of being used for treaty shopping purposes. First, they are open-ended vehicles, i.e. an unlimited number of investors can subscribe and redeem their fund units freely and on a daily basis. This limits the capacity of a single investor to control the vehicle for treaty shopping purposes. Second, they must fulfil risk spreading requirements, i.e. cannot be used to hold a certain position in order to benefit from a specific treaty relief on investments. Due to the generally rather small number of shares invested in these, UCITS should normally not be able to exert any influence on the companies in which they invest. In addition, investors in those UCITS are also not able to influence any treaty shopping politics of those CIUs. A general treaty entitlement for UCITS would serve the goals of neutrality between direct investments and indirect investments as the risk of double taxation between the source State and the investor's State of residence would decrease.

EU citizens are actively encouraged by their governments to seek alternative means to fund long term savings and retirement needs; one area this can be accomplished is by the use of CIVs. As with pension funds, a CIV must often submit retrospective claims to obtain such relief. CIVs that forego any withholding tax relief can also have a significant impact on the returns for the underlying CIV investor (unit holder) and by association this can impact the investment objective.

In conclusion for both pension funds and CIVs there is the loss of return and also the loss of re-investment of the tax amounts (opportunity cost).

One possible solution would be the creation and maintenance of a tax register that would list recognised funds across Europe. Similar to existing registers for legal entity identification we would suggest that a centralised register could be utilised by all participants in the relief process to identify and apply more streamline tax relief procedures to cross border income received by such funds.

Such a register could also provide with clear guidance, specifically one that includes a definition of 'an entitled pension fund' and entitled CIV. This would bring tax certainty, simplification and would form a building block toward a relief at source solution.

5. Industry engagement

It is understood and accepted that domestic tax policy should be a matter for governments, and the EBF does not seek to contend this. However, we are concerned that solutions that aim to address administrative issues regarding cross border investment, and therefore non-domestic entities, do not address the specific legal concerns of those non-domestic parties. We believe that engaging with the wider financial services sector and the investment community will bring about more workable procedures. Indeed, there is evidence that such an approach does and can work, for example when developing the CRS, governments chose to work with the industry resulting in workable procedures and interoperable technology solutions.

Governments should also consider other ongoing regulatory objectives that, in some instances, share the same end goals to increase transparency, create efficiency and further the ambition to achieve a true Capital Markets Union (CMU), for example:

- European Central Banks work on securities settlement harmonisation (T2S) with post trade issues highlighted as areas requiring ongoing work.
- Governments should examine the Legal Entity Identifier (LEI) system which was developed by the G20 in response to the inability of financial institutions to identify organisations uniquely so that their financial transactions in different national jurisdictions can be fully tracked. The LEI system is a good example of the use of

central registers to enable every legal entity or structure that is a party to a relevant financial transaction to be identified in any jurisdiction. The Commission and governments should consider the creation and maintenance of a tax register that could help achieve simplification of tax relief procedures. Including for example pension funds, UCITs and Alternative Investment Funds (AIFs) which all could be recorded in such a tax register.
- Finally, the previously mentioned eIDAS Directive could provide tax administrations with a framework for inclusion of digital signature solutions into existing procedures, thereby ultimately reducing reliance on physical documents.

Work in the abovementioned areas is consultative and collectively explores the use of standardised technology solutions. We believe this sharing of best practice can benefit governments and investors alike.

6. How will success be measured? What does success mean?

Recommendation 9 of the Code refers to follow-up and monitoring. We believe this to be the most important Recommendation. However, how this will be achieved is unclear as there is no mention of what will be monitored and what success will look like. We are also concerned that each government may measure success differently, as no common terms of reference have been defined.

We believe that it is important for the Commission to develop and manage a peer review framework for laws and regulations passed in individual jurisdictions to ensure governments are advancing solutions in this important area. Equally we would welcome any framework to include domestic and non-domestic financial institutions to demonstrate compliance with domestic and international tax rules to further evidence how financial institutions could helpfully contribute to the success of the longer term aim to achieve full efficiency, with relief at source, as outlined in Recommendation 8 of the Code.