



EUROPEAN CENTRAL BANK
EUROSYSTEM

Advisory Group on Market Infrastructures for Securities and Collateral

The chair

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European Commission – DG-FISMA and DG-TAXUD

Mr. Valère Moutarlier, Director, DG-TAXUD

Mr. Ugo Bassi, Director, DG-FISMA

(sent via email)

Subject: Harmonisation of withholding tax procedures

Dear Mr Moutarlier and Mr Bassi,

I am writing to you in my capacity as chairman of the Eurosystem's Advisory Group on Market Infrastructures for Securities and Collateral (AMI-SeCo). As you are aware the AMI-SeCo and its predecessor the T2S Advisory Group (AG) have been pursuing a harmonisation agenda in the markets covered by T2S to facilitate further progress in European market integration for securities settlement and also more broadly in post trade services.

With this letter, the AMI-SeCo would like:

1. to provide some comments on the recently adopted Code of Conduct on Withholding Tax from a tax procedure perspective while not entering into matters related to tax policy;
2. building on the Code of Conduct, to suggest some promising areas for future work harmonising withholding tax procedures ; and
3. to inform the European Commission that the AMI-SeCo would be willing to provide further support for this work, as is deemed appropriate and relevant.

The AMI-SeCo and its predecessor the AG actively contributed to all Commission initiatives relevant to tax procedures and post trade services. It is worth recalling that the AG fully supported the recommendations made by the T-BAG (Tax Barriers Business Advisory Group) in 2013¹. The AG highlighted the importance of harmonising withholding tax relief procedures for a truly integrated market in Europe in the context of the AG's response to the public consultation by the Commission on Building a Capital Markets Union (CMU) in 2015². There, the AG stressed the negative consequences for the economy of existing non-

¹ http://ec.europa.eu/internal_market/financial-markets/docs/clearing/tbag/130524_tbag-report-2013_en.pdf

² https://www.ecb.europa.eu/paym/t2s/progress/pdf/ag/20150513_ag_response_to_cmu_consultation.pdf

harmonised withholding tax procedures across Member States that hamper cross-border investment, and thus access to finance by businesses and risk diversification by investors in Europe, and therefore against the spirit of the CMU. In 2016³ the AG put forward its own proposals for better withholding tax procedures in the context of corporate actions (market claims) processing. The AG / AMI-SeCo also contributed to and supported the conclusions and recommendations of the European Post Trade Forum (EPTF) made in 2017⁴. More recently the AMI-SeCo summarised its view in this field in its response to the Commission's public consultation on post trade in CMU⁵.

The AMI-SeCo welcomes the Code of Conduct, and believes that it is a valuable and important initiative, both in itself and as a necessary starting point for further progress on withholding tax issues.

The AMI-SeCo and its relevant substructures considered the Code of Conduct and the matters raised in the Public Hearing that had been organised on 30 January 2018 by the European Commission.

The AMI-SeCo notes that the Code of Conduct, while setting out many areas in which operational tax processes can be improved, does not explicitly mention the topic of harmonisation of tax procedures across the EU Member States. The AMI-SeCo highlights that without an explicit commitment to harmonisation or to convergence of tax procedures in the EU, there is the risk that actions taken by Member State tax authorities may have the effect of creating further divergence between national tax procedures, with as consequence that cross-border investment is further discouraged.

The AMI-SeCo believes that it is possible to harmonise procedures relating to the application of withholding tax on income on securities and to the related refund procedures as applicable under the Double Tax Treaties currently in existence.

This is for two important reasons:

1. Compared to other areas of tax in which there is already a significant degree of pan-European harmonisation of procedures – such as, for example, the area of Value-Added Tax –, the area of withholding tax on income on securities is both an area in which significant differences still exist between Member States, and is an area that is conceptually relatively simple and straight-forward. It is an area which has a clearly defined perimeter, within which the information that is necessary to allow for correct tax processing is both secure and auditable. The taxable activity and the relevant taxable entities can be clearly defined. The taxable activity is a distribution of income on a security; the security itself can be clearly identified on the basis of its ISIN; the relevant taxable entities are the holders of the security as of a specific date (the record date) in the books of the last intermediary in the custody chain, namely the end investors. In this context, it would be important that widely held investment funds (e.g. UCITS) are considered as the beneficial owner / end investors in all Member States. End investors can be clearly identified based on their LEI (for legal persons) or their national tax id (for natural persons).

³https://www.ecb.europa.eu/paym/t2s/progress/pdf/ag/20161130_ag_discussion_note_on_harmonisation_of_tax_processing.pdf

⁴https://ec.europa.eu/info/sites/info/files/170515-eptf-report_en.pdf

⁵http://www.ecb.europa.eu/paym/intro/governance/shared/pdf/20171116_ami_seco_response_to_ec_public_consultation_on_post-trade_in_cmu.pdf

2. The process for correctly applying withholding tax on income on securities is necessarily very tightly connected to the process of distributing income on securities. With respect to the process of distributing income on securities, there is already a high degree of harmonisation on a pan-European basis, as European legal requirements and market standards do exist (the implementing act of the Shareholder Rights Directive, the Market Standards for Corporate Actions Processing⁶, and the T2S Corporate Actions Sub Group standards⁷) and there is a very significant degree of compliance with these standards and requirements. More information on this point is available in the 8th Harmonisation Progress Report.⁸ The AMI-SeCo believes that these legal requirements and market standards do provide a strong foundation for a high degree of harmonisation of tax processes. At the same time the AMI-SeCo notes that a lack of harmonisation of tax processes is an important reason why in some cases market participants cannot comply with the market standards.

The AMI-SeCo believes that by building on the Code of Conduct further progress on withholding tax procedural issues can be made – inter alia – through a common, harmonised implementation of the following suggestions:

- Harmonised approach for the identification of taxpayers promoting the use of the LEI and / or relying on eIDAS.
- Efforts towards harmonisation in the process of certification of residence for tax purposes across member states (e.g. via common Certificate of Residence template/standardised documentation requirements, acceptance of electronic certificates across Europe based on standardised communication protocols).
- Following-up on the proposals set out in the paper by the AG in 2016 (referred to above) namely, a consistent application by tax authorities of the record date principle, so that tax processing is based on record positions, and a review of the rationale for the usage of “ex” and “cum” indicators.
- More generally, a set of harmonised principles for tax processing – along the lines and in the spirit of the T-BAG recommendations – that would be compatible with the market standards for corporate actions processing, either in current form of these standards, or in a modified form that takes into account the harmonised principles for tax processing.

In addition, it is important to highlight that the AMI-SeCo has identified the area of withholding tax procedures as one with potential for the use of new technologies that could possibly deliver efficiency gains. Analytical work has been launched on this area by the AMI-SeCo substructure working on fintech innovation. The Commission participates in the work of this group as observer and is actively involved to seek possible synergies with the work on tax procedures brought forward with Member States.

The technological innovations under consideration are

⁶ <https://www.afme.eu/globalassets/downloads/briefing-notes/2017/afme-caiwg-standards-revised-version-2012-updated-2015.pdf>

⁷ <http://www.ecb.europa.eu/paym/t2s/governance/ag/html/subcorpact/index.en.html>

⁸ http://www.ecb.europa.eu/paym/t2s/progress/pdf/ag/ecb.eighth_t2s_harmonisation_progress_report.en.pdf

- e-identity solutions along the lines indicated in the eIDAS regulation;
- the adoption of a shared electronic ledger for the creation, storage and exchange of digitally authenticated Certificates of Residence, in line with the withholding tax code of conduct; and
- the development of smart contracts that might automatically determine the correct amount of taxes to be withheld for each income stream, and individually for each investor receiving those incomes, already at the moment when the income is disbursed.

To conclude, the AMI-SeCo considers that the harmonisation of tax procedures is a high priority and urgent activity in the context of the CMU initiative and of the integration of EU financial markets.

The AMI-SeCo believes that the work initiated by the Commission with the Code of Conduct should be naturally followed by more detailed work, both on the harmonised implementation of the proposed principles/guidelines by all EU member states, and on the suggestions outlined above. The AMI-SeCo would like to strongly encourage the Commission to continue acting as coordinator of future implementation work.

The AMI-SeCo and its members stand ready to provide additional practical support to the Commission and to the EU tax authorities for the definition of next steps in the practical implementation of the Code.

Yours sincerely,



Marc Bayle de Jessé

Chair of AMI-SeCo