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Opinion of the European Economic and Social Committee on Proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes

(COM(2023) 324 final — 2023/0187 (CNS))

(C/2024/1580)

Rapporteur: **Benjamin RIZZO**

Referral	Council of the European Union, 28.7.2023
Legal basis	Article 113 of the Treaty on the Functioning of the European Union
Section responsible	Economic and Monetary Union and Economic and Social Cohesion
Adopted in section	15.11.2023
Adopted at plenary	13.12.2023
Plenary session No	583
Outcome of vote (for/against/abstentions)	198/0/2

1. Conclusions and recommendations

1.1. The European Economic and Social Committee (EESC) supports the Commission's objective of avoiding double taxation and complicated procedures for reduced rates to the detriment of investors holding securities in a transnational context. Faster and more efficient procedures will support cross-border investments in the interest of the internal market.

1.2. The EESC appreciates the added value that the Commission proposal could bring in order to support cross-border investments across the EU, especially for retail investors, by achieving substantial procedural simplification. The proposal is hence in line with the objective of establishing a capital markets union and enhancing the overall competitiveness of the internal market.

1.3. The EESC appreciates the Commission's efforts to tackle fraud and tax abuse regarding withholding tax reclaim schemes (Cum/Ex and Cum/Cum fraud), which will lead to a fairer taxation system across the Member States and enhanced collection of tax revenue, as well as encouraging better cooperation between tax authorities.

1.4. The EESC notes that the Commission proposal is in line with the recommendations made by the European Securities and Markets Authority (ESMA) in its *Final report on Cum/Ex, Cum/Cum and withholding tax reclaim schemes*, which urged specific action at EU level in order to fight fraud and abuse.

1.5. The EESC welcomes the introduction of the electronic tax residence certificate (eTRC), a uniform, EU-wide document that will improve the timing of refunds and so benefit transnational investors. The EESC suggests that the eTRC might be used to simplify issues in addition to those already covered in the proposal.

1.6. The EESC underlines that the Commission expects the proposal to deliver significant cost savings compared to the *status quo* and encourages the Commission to periodically verify whether such savings are actually achieved.

1.7. Financial institutions must register with each Member State, and so the Commission expects increased compliance costs in the short term, which should decrease over time leading to substantial advantages in the long run. In this respect, the EESC recommends targeted efforts to keep compliance costs as low as possible in the initial phase of implementation of the new rules.

1.8. The EESC agrees with the Commission's choice to establish a de minimis threshold, whereby investors with dividend payments below a threshold of EUR 1 000 are not asked to provide information about financial arrangements or minimum holding periods. This choice seems to strike a balance between the effectiveness of the new rules for the benefit of the internal market and investors, and the need for simplification by avoiding excessively burdensome duties on small amounts of securities held.

1.9. The EESC encourages Member States to swiftly provide the Commission, during the implementation period, with annual reports on statistics regarding how many excess withholding tax (WHT) reclaims are refunded/relieved both within and after the timeframe in order to ensure that WHT reclaims are gradually refunded/relieved within the ambitious timeframe of no more than 25 days set by the Commission proposal.

1.10. The EESC notes that the potential penalties against financial intermediaries stipulated in Article 17 of the proposal are delegated to Member States. The penalties should be effective and dissuasive, proportionate and reasonable in order to combine swift implementation of the new rules with the need for financial intermediaries to adapt to the new regulatory approach embraced by the Commission.

2. **Commission proposal**

2.1. Holding securities in a cross-border context is currently resulting in double taxation for investors regarding dividends and interest stemming, respectively, from the holdings of equities and bonds. Taxes may indeed be levied, first in the country of the issuer of the securities (source country) by tax withheld from the gross securities income (withholding tax — WHT), and second in the investor's country of residence (residence country), as this income will be taxed.

2.2. To avoid this sort of double taxation, double tax treaties (DTTs) have been implemented to allow for sharing taxing rights between the source and residence countries. Thus, non-resident investors may be entitled to a lower rate of WHT or to an exemption in the source country. Moreover, domestic legislation in some source countries might provide for a reduced tax rate or exemption. This reduced tax or exemption might be applied directly when the dividend/interest is paid (relief at source), or by refunding the excess tax withheld on the basis of a reclaim by the investor (refund procedure).

2.3. However, WHT procedures based on tax treaties or domestic benefits applicable to non-resident investors are often burdensome and lengthy, as they vary considerably across Member States, which have diverse levels of digitalisation and require different documents in each jurisdiction. In addition, WHT procedures risk allowing tax fraud and abuse, triggering revenue losses for Member States, as shown by recent scandals (the Cum/Cum and Cum/Ex cases). Such cases concerned excessive refunds that were obtained without entitlements.

2.4. The described situation actually discourages cross-border investments across the EU, especially for retail investors, due to long and costly procedures which are at odds with the objectives of establishing a capital markets union and with the overall competitiveness of the internal market. Such drawbacks are supplemented by the mentioned risk of fraud and abuse, negatively impacting Member States' tax revenues.

2.5. The impact assessment carried out by the Commission to evaluate possible legislative solutions singled out three viable policy options: i) setting up a common eTRC and common reporting; ii) implementing a relief at source system; iii) implementing a quick refund system within a set timeframe and/or a relief at source. The third option is considered the most effective in terms of effectiveness (speed, simplicity and digitalisation of procedures) and political feasibility.

2.6. The Commission's legislative proposal aims to improve the procedural context, pursuing the double objective of supporting the good functioning of the Capital Market Union by facilitating cross-border investment on one hand, and ensuring fair taxation by reducing tax fraud and abuse on the other. According to Commission estimates, savings for investors triggered by the implementation of the new proposal will amount to approximately EUR 5,17 billion per year.

2.7. The proposal is structured in two main parts (Chapters 2 and 3). Chapter 2 provides for the creation of an EU-wide digital tax residence certificate, while Chapter 3 focuses on the WHT relief procedures. It also includes the procedure to establish National Registers for specific financial intermediaries (Certified Financial Intermediary — CFI), a standardised reporting obligation for such CFI, and the obligation for Member States to set up a relief at source system or a quick refund system or a combination of both.

2.8. The common eTRC is to be introduced by all Member States and will provide a fast and secure administrative process to confirm EU taxpayers' tax residency. According to Article 4, there will be a common content for the eTRC, regardless of the issuing Member State, i.e. the Member State of residence. Furthermore, to bring down the administrative burden it is proposed to provide an eTRC that shall cover a calendar year in case the request is made in an ongoing year for that tax year.

2.9. Member States will be required to issue an eTRC within one day, as long as they have been provided with a specific set of information and provided that no exceptional circumstances occur inducing a delay. In cases where the one-day issuance will not be met, the requested party should be notified by the Member State concerned. To meet the requirement of one-day issuance, a fully automated system to issue the eTRC should be developed by Member States.

2.10. In order to benefit from the WHT relief procedures at the core of the Directive, investors will need to be able to engage with financial intermediaries that are certified to provide those services. There are two grounds for being certified as a CFI and thus accessing the procedures of this Directive: i) on a compulsory basis for large institutions; ii) on a voluntary basis for all other entities.

2.11. Regarding those required to report, reporting obligations are triggered by registration in one of the National Registers. All CFIs included in one or more of the National Registers are subject to reporting to the authority maintaining the register, and where applicable to the withholding tax agent, regardless of their country of residence (EU or outside the EU, or in a Member State with or without an own National Register in place).

2.12. As for the content of the reporting, the Directive lays down a common set of reporting elements (Annex II). Each CFI shall report only on the part of the transaction that is visible for it, meaning from whom it is receiving the dividend/interest and to whom it is paying the dividend/interest. Thus, the recipient of the full reporting, either the source tax administration or a WHT agent designated on its behalf, will have all the necessary information to reconstruct the financial chain of the transaction from the investor to the securities' issuer.

2.13. The information reported to the tax administration will enable it to establish the identity of the final investor and their potential entitlement to the reduced WHT rate. The risk of double refunds is therefore mitigated and the capacity for tax administrations to identify and combat other abusive and fraudulent practices is improved.

2.14. As for how the reporting will work, it will take place via a standardised XML format scheme that will be set out in a Commission implementing act. The automated channel to deliver the information from the economic operators to the corresponding tax administration or WHT agent acting on its behalf will be standardised and laid down in this implementing act.

2.15. The timeline to report the information is 25 days at the latest from the record date. Reporting should take place as soon as possible after the record date, unless a settlement instruction regarding any part of a transaction is pending on the record date, in which case the reporting for that transaction should occur as soon as possible after the settlement.

2.16. The proposal also provides: i) a relief at source system; and ii) a quick refund system. Under a relief at source system, the correct amount of taxes is applied by the WHT agent at the time of the dividend/interest payment (Article 12). Under a quick refund system, the tax is withheld at the higher rate applied in the source country, but the excess tax is then given back within a set timeframe of maximum 25 days from the date of the request or from the date when the required reporting is fulfilled, whichever the latest.

2.17. For the sake of simplification, a de minimis rule has been introduced for reporting obligations and due diligence procedures, whereby investors with dividend payments below a threshold of EUR 1 000 are not asked to provide information about financial arrangements or minimum holding periods.

2.18. In order to ensure that WHT reclaims are refunded/relieved within the specified timeframe (no more than 25 days), Member States will be required to provide the Commission with annual reports on statistics regarding how many excess WHT reclaims were refunded/relieved both within and after the timeframe.

2.19. Finally, according to Article 17 of the proposal, 'Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented'.

3. **General and specific comments**

3.1. The EESC welcomes the Commission proposal's aim to avoid double taxation and excessively complicated procedures for reduced rates to the detriment of investors holding securities in a transnational context. Faster and more efficient WHT procedures will support cross-border investments, avoiding the current drawbacks in the full interest of the capital market union as a key component of the EU single market.

3.2. The EESC also appreciates the Commission's effort to prevent or at least reduce fraud and tax abuse, which will lead to a fairer taxation system across Member States and to increased collection of tax revenues by Member States. The additional revenue could indeed be deployed to foster growth and public services within Member States and to contribute to the twin green and digital transitions, in line with EU objectives.

3.3. The EESC welcomes the introduction of the eTRC, an EU-wide electronic tax residence certificate that will improve the timing of refunds and so benefit investors holding appropriate investments. The EESC suggests that the eTRC might be used to simplify issues in addition to those already covered in the proposal. The information on the eTRC should be available in multiple languages if necessary, thus improving the efficiency of refunds.

3.4. The EESC agrees with the Commission that the persistent risk of fraud or abuse is taking up significant resources for tax authorities, which could be invested to tackle other priorities after a duly digitalised and effective system is implemented to allow quick refunds within a set timeframe, and/or if a relief at source system is put in place from the beginning.

3.5. The EESC shares the Commission's view that a European legislative initiative is better suited than single actions by Member States to address issues related to the taxation of securities held in a transnational context. A level playing field for national and foreign investors and for domestic and non-resident intermediaries alike would be best pursued by an EU directive. National initiatives might indeed cause discrepancies and compliance costs, while a directive based on Article 115 TFUE to approximate national laws affecting the functioning of the single market seems more appropriate for achieving the Commission's objectives.

3.6. The EESC appreciates the Member States' overall support for the Commission's proposal. At the same time, it is worth noting that some Member States where the domestic rate for non-resident investors is lower or the same as the tax treaty rate might not have or need refund procedures. On the other hand, those Member States where the internal withholding tax rate is higher than the applicable tax treaty are certainly more interested in enhancing transparency and standardising procedures.

3.7. In this respect, the Committee observes that the Commission's proposal will benefit EU and non-EU resident investors with diversified portfolios across the entire EU, allowing them access to the reduced rates to which they are entitled when investing across borders, thereby encouraging cross-border investments. It is therefore recommended that the proposal be swiftly approved, in the interest of the single market.

3.8. The EESC notes that the Commission's proposal is in line with previous legislation and, in particular, with the Anti-Tax Avoidance Directive, the Directive on Administrative Cooperation and the Directive to fight against the misuse of shell entities, on which the EESC has published widely supportive opinions. The initiative at hand, dealing with abusive tax practices regarding the WHT procedures not previously covered, is not only consistent with the current legal framework, but also complements it.

3.9. The EESC appreciates the fact that the Commission's proposal responds to the recommendations made by ESMA in the 'Final report on Cum/Ex, Cum/Cum and withholding tax reclaim schemes', which calls for specific action on taxation at EU level to effectively fight fraud and abuse.

3.10. The EESC believes that the consultation carried out by the Commission, in which numerous stakeholders participated (1 682 responses), made the process more transparent and democratic, notwithstanding the highly technical nature of the matter. Member States, investors, financial institutions and tax authorities were duly involved. The entire process underlined a broad consensus on the problems arising from the different WHT procedures across Member States, and on the need for EU action to tackle the fragmented and inefficient situation.

3.11. The EESC underlines that the Commission is expecting significant cost savings from the execution of the proposal compared to the status quo, and encourages the Commission to periodically verify whether such savings are actually achieved when it comes into force. With regard to financial institutions, the Commission is expecting increased compliance costs in the short term, which should decrease over time, leading to substantial advantages in the long run. The EESC recommends targeted efforts to keep compliance costs as low as possible in the initial phase of implementation of the new rules.

3.12. The EESC agrees with the Commission's choice to establish a de minimis threshold which consists of not requesting information about financial arrangements or minimum holding periods to investors with dividend payments below a threshold of EUR 1 000. This choice seems to strike a balance between the effectiveness of the new rules (to the benefit of the internal market and investors) on one hand, and the need to simplify excessively burdensome duties with regard to small amounts of securities held on the other.

3.13. The EESC notes that the potential penalties against financial intermediaries stipulated in Article 17 of the proposal are delegated to Member States. The penalties should be effective and dissuasive, proportionate and reasonable in order to strike a balance between swift implementation of the new system and the need for financial intermediaries to adapt to the new regulatory approach embraced by the Commission.

3.14. The EESC recommends an adequate degree of cooperation among national tax authorities and between national authorities and the European Commission, especially in the first period of implementation, in order to solidly establish the new system in a reasonable time, ensuring that WHT reclaims are refunded/relieved within the specified 25 day period.

3.15. The EESC points out that personal data will be processed for the purposes of verifying that the correct WHT rate is applied to the taxpayer, underlining the need to limit the amount of personal data to be processed and to transmit what is necessary to detect underreporting, non-reporting or tax fraud or abuse, in line with the General Data Protection Regulation requirements and the data minimisation principle, which states that personal data must be 'adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed'.

Brussels, 13 December 2023.

The President
of the European Economic and Social Committee

Oliver RÖPKE