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

13 September 2023

Dear Mr Thomas,

Subject: PwC feedback to the European Commission's Proposal for a Council Directive "Faster and Safer Relief of Excess Withholding Taxes"

PwC International Ltd (PwC), on behalf of the PwC network, is pleased to send our comments and reactions to the recently published Proposal for a Council Directive "Faster and Safer Relief of Excess Withholding Taxes" ("the Directive").

PwC commends the efforts of the European Commission to address investment concerns related to withholding taxes. The Directive as drafted would help to prevent double taxation and mitigate compliance burdens associated with claiming refunds of withholding taxes. This measure would support investment in the Single Market which is needed to underpin the economic performance of all EU Member States. It would further create a reporting regime to prevent against withholding tax schemes such as Cum/Cum and Cum/Ex dividend schemes.

In the short appendix to this letter, we outline some potential solutions to a number of issues that we believe could diminish the benefits of the Directive, and the investor-friendly environment which this Directive seeks to encourage. If not implemented correctly the Directive could add more cost and complexity and therefore make the European Union less, not more, attractive as an investment market.

We would welcome the opportunity to discuss these with you in further detail at your convenience. PwC will continue to strongly support the work of the European Commission on developing sustainable pro-growth tax policies that enhance the business environment in the European Union.

Please reach out to me or Edwin Visser at the addresses below with comments or questions.

PricewaterhouseCoopers International Limited
1 Embankment Place
London WC2N 6RH
T: +44 (0)20 7583 5000 / F: +44 (0)20 7822 4652

Yours sincerely,

William Morris
PwC Global Tax Policy Leader

PwC IL is registered under number 60402754518-05 in the EU Transparency Register

PwC Contacts:

Edwin Visser	edwin.visser@pwc.com

PwC Contributors:

Jacomien van den Hurk	jacomien.van.den.hurk@pwc.com
Philip Greenfield	philip.greenfield@pwc.com
Keetie van der Torren-Jakma	keetie.van.der.torren-jakma@pwc.com
Chloe O' Hara	chloe.ohara@pwc.com
Tom Daffern	thomas.daffern@pwc.com
Blazej Kuzniacki	blazej.kuzniacki@pwc.com
Panagiotis Papapanagiotou	panagiotis.papapanagiotou@pwc.com
Jasper van Schijndel	jasper.van.schijndel@pwc.com
Robert Jan Meindersma	robert.jan.meindersma@pwc.com
Pauline Jonker	pauline.jonker@pwc.com

Appendix

Benefits of the Directive, and mitigating concerns over increased complexity
The current withholding tax reliefs that allow non-resident investors to benefit from a reduced rate of withholding tax via a tax treaty or domestic exemption are indeed burdensome to administer and costly to ensure they apply (noting that they sometimes result in the investor claiming back a refund of tax which may not materialise). Overall the system needs to be addressed and the Directive offers the welcome possibility to enhance the current regime of the withholding tax procedures.

One potential downside of the new rules is that the compliance burden associated with the proposals for Certified Financial Intermediaries ('CFIs')/custodians, as well as the potential risks in falling below regulatory requirements, will be quite heavy. However, we firmly believe these risks can be mitigated, and we make some suggestions below.

First, to set out the issue: From a CFI/custodian perspective, the additional checks and reporting obligations would create an additional layer of responsibility without providing any tangible benefits to this group of service providers (many of whom are also investors into the EU). While it is important that everyone plays a role in combating Cum/Ex, Cum/Cum and similar schemes, it seems that the primary onus of compliance falls on CFIs and custodians.

The custodians' job is made all the more complex as a result of their obligations depending on whether they are the 'closest' custodian to the beneficial owner of the payment. We would not expect that the voluntary aspect of registration for large CFIs would apply in practice as all parts of the custody chain are impacted by the expected data provision (likely all will have to register).

Subsequently, it is expected that the implementation costs contained within the Directive are significantly underestimated and are likely to be multiples of the current estimates of EUR 75.9 million (one off) and EUR 13 million (recurring costs). In addition, due to the very narrow margins within which these custody and tax documentation services are provided it is likely that these costs will be indirectly passed to investors.

Therefore, to at least offset some of these potential problems, we make two suggestions. First we believe that the de minimis amount of €1,000 in Article 9(2) should be revisited on a regular basis (and perhaps increased now) otherwise, due to the systemic nature by which CFIs process reclaims it may not be utilised. Therefore, we recommend insertion of a clause in the Directive allowing the Commission to revisit the quantum of the de minimis threshold after a certain period of time, to determine whether it could be increased.

Additionally, we suggest that a single centralised registration portal would standardise the process and ensure that it is less burdensome; this is particularly true of CFIs who have operations in many EU jurisdictions.

Impact for the regulated investment and pension fund industries

The Directive is primarily focussed on the simplification of administrative processes for retail investors and does not particularly consider more complex investment structures and other types of investors, such as pension funds. This sector is vital for the well-being of many EU citizens who depend upon such pension funds, and below we suggest some ways this might be addressed.

Specifically, the proposal does not address investments through investment funds or pooling vehicles. In practice differences may arise between EU Member States concerning the tax qualification (i.e. tax transparent or tax opaque) of such vehicles (resulting in hybrid mismatches) and which entity would be considered the beneficial owner of the income declared on financial instruments.

Furthermore, the Directive does not provide a harmonised solution for administrative procedures related to exemptions or reductions from withholding tax that follow from domestic legislation in certain EU Member States. In practice, these are often relevant for pension funds as these domestic exemptions typically go beyond the withholding tax rates that are agreed upon in bilateral tax treaties. This is also frequently the case for widely held or collective investment funds.

Therefore, we recommend the Commission take into account the additional administrative processes imposed on pension funds as they will need to provide beneficial ownership statements to CFIs. If these beneficial ownership statements would need to be provided on a per transaction basis, this would result in a considerable administrative burden given the large transaction volumes executed on behalf of pension funds. A practical solution, such as providing a beneficial ownership statement on a per account basis or allowing bulk reclaims could be considered to alleviate such administrative burden.

Finally, we believe this proposal gives the opportunity to effectively take away barriers that hinder investment in the Single Market by introducing an overarching solution. We ask the Commission to investigate a harmonised pension fund exemption from withholding taxes across EU Member States. Such exemption could e.g. be based on existing regulatory frameworks and definitions, such as IORP and EMIR. A generic pension fund exemption from withholding taxes in the internal market would give consideration to the fact that pension funds fulfil a societal function and invest on behalf of the pension beneficiaries. These pension beneficiaries are typically not in a position to recover or credit any withholding taxes incurred in relation to the investment activities of the pension fund. Withholding taxes therefore result in double taxation for pension beneficiaries, for which generally neither relief is available at the level of the pension fund.

Beneficial Ownership concerns and proposed mitigants

While we support the twofold objective of the FASTER proposal, we are concerned it might be difficult to achieve without a precise and EU autonomous definition of beneficial owner (BfO) . Notably, the lack of such definition will continue to complicate the prevention of double taxation: (i) the 'relief at source' and (ii) the 'quick refund'. It will also considerably complicate obligations that FASTER aims to impose on CFI, who is responsible for performing the due diligence requirements, including the identification of the BfO. Accordingly, we advocate a precise EU autonomous legal definition of BfO, which would be relevant for all EU law purposes regarding cross border income taxation. PwC is willing to work with the Commission and other stakeholders on such an approach.

Therefore we suggest a definition that focused on entities that receive income for someone else or on someone else's behalf exclusively, i.e. agents and nominees. Intermediary entities other than agents or nominees would not be negatively affected by that definition of BfO. Entitlements to benefits from EU directives or tax treaties by other entities can still be tested by tax authorities but not via a BfO-test. Instead, they will use GAARs and PPTs and possibly other more specific rules bespoke to prevent improper use of EU directives and tax treaties after the BfO is identified in line with its new, precise and EU autonomous definition[1].

This suggested approach to defining BfO would ensure achieving the twofold purpose of the FASTER proposal (supporting the good functioning of the Capital Markets Union by

[1] *See* more: B. Kuźniacki, *Beneficial Ownership in International Taxation*, Elgar Edward 2022, available here.

facilitating cross-border investment, while also ensuring fair taxation by preventing tax fraud and abuse).

Some additional points:

- The Directive proposes the introduction of a common digital tax residence certificate (“eTRC”). In order to allow for an efficient identification of EU companies, this certificate should include information on the European Unique Identifier (“EUID”).
- The Directive states that reporting on financial arrangements which could be used to shift the economic ownership, that would encompass securities transactions such as repurchase agreements or securities lending, that are entirely legitimate and done in the ordinary course of business should only be required by those certified financial intermediaries that are directly involved in the relevant financial arrangement. Even then, however, this information may be practically very difficult to provide, so we suggest further consideration be given to providing safe harbours for such legitimate transactions, and other potential simplification measures.