# Financial Services User Group's (FSUG)

# response

# on Taxation problems that arise when dividends are distributed across borders to portfolio and individual investors and possible solutions

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**FSUG response on**
**Taxation problems that arise when dividends are distributed across borders to portfolio and individual investors and possible solutions**

The Financial Services User Group (FSUG) believes that double taxation of dividends represents an increasingly greater and more important impediment to the accomplishment of the Single Market and therefore highly welcomes this consultation on possible solutions for taxation problems that arise when dividends are distributed across border. The consultation is the logical consequence of the Commission's recent initiatives to remove double taxation and discriminatory situations, in particular through its upcoming initiative planned for 2012, its Communication COM(2010)769 on removing cross-border tax obstacles for EU citizens and its Recommendation 2009/784/EC on withholding tax relief procedure.

Juridical and economic double taxation of cross-border dividends continues to be a reality for EU individuals. Such situations are unfair and increasingly detrimental to individual investors not only of themselves but also in a context of more frequent cross-border corporate mergers.

**FSUG believes that Option 1 (Abolition of withholding taxes on cross-border dividend payments to portfolio/individual investors) is the simplest, fairest and most efficient approach to remove the double taxation of cross-border dividends received by individual investors. We believe that this should be coupled with an improved information exchange framework across Member States to avoid tax evasion.**

We regret however that this consultation is limited to dividend income, as there is also widespread discrimination of EU private investors regarding other types of cross-border investment income. We also regret that individual investors and savers are not more closely consulted and involved throughout the policy-making process and included in expert groups on taxation of savings and investments as they represent major stakeholder interests.

- The abolition of withholding tax on cross-border dividend payments to portfolio/individual investors would require a new EU tax directive (unless coordinated action to abolish withholding taxes is taken spontaneously by the Member States – but this is an unlikely event). Traditionally, this could require several years to be achieved and it may work as the medium/long term solution. However, in the shorter term, the Commission may take a preliminary step consisting of a recommendation to the Member States. According to Cerioni, this would mean to incorporate, in bilateral double tax conventions, an arbitration clause pursuant to Article 25 of the OECD model or to interpret existing bilateral tax conventions as allowing such an arbitration procedure: in fact, if the bilateral double tax conventions at stake in the ECJ Kerkhaert-Morres and Damseux rulings had already contained an arbitration clause binding the contracting states to achieve the result of eliminating juridical double taxation, it could be argued, in light of the ECJ reasoning in those rulings, that the ECJ conclusion would have been different.[1]

Therefore, following Cerioni's possible suggestion, the following step would be needed:

- First step in the short term: recommendation to Member States to interpret double tax conventions as allowing an arbitration procedure (as contemplated under Article 25 of the OECD model) or to expressly incorporate arbitration into existing double tax conventions, whose results should be binding on Member States, and which would already serve to eliminate juridical double taxation.

[1] L.Cerioni, *Double Taxation and the Internal Market: Reflections on the ECJ's Decisions in Block and Damseaux and the Potential Implications, in Bulletin for International Taxation*, IBFD, 2009, Vol. 63, n. 11, pp. 543-556.

– Second step, which would be still necessary as the resort to an arbitration procedure would be lengthy and expensive, the abolition of withholding tax through a new directive, which is the option already recommended.

## I GENERAL IDENTIFICATION

Name: Financial Services User Group (FSUG)

## II PROBLEMS ENCOUNTERED

### 1) Which problems, if any, have you encountered due to the EU cross-border levying and refunding of withholding taxes on dividends?

☒ **Double taxation**
☒ **Discrimination (please provide details):**

To illustrate this point, FSUG would like to present a case study based on the situation of a Belgian individual investor holding shares in a French company.

Under Belgian law, a dividend received by a resident individual is subject to withholding tax at a rate of 25 %. If tax has been withheld at source, the taxpayer does not need to declare the dividend on his tax return, so the withholding tax is the final tax. Only if tax has not been withheld at source the taxpayer has to declare the dividend and pay income tax at a rate of 25 %.

The same rule applies to inbound dividends. However, the foreign company paying out the dividend usually must withhold tax at source as well, even if the withholding is mitigated under the relevant tax treaty. For instance, a French company must withhold a 25-percent withholding tax at source.

The fiscal regime applicable to French dividends is specified in the France-Belgium double tax convention (DTC) signed in 1964 and amended in 1971 (and still contains references to tax mechanisms that have been abolished since then, e.g. the French *avoir fiscal*).

Under this convention, dividends paid by a French company are taxable in Belgium if received by a Belgian resident. In addition, the convention provides that the dividends can (and they are indeed) be taxed in France at a withholding tax rate limited to 15 % (instead of the 25 % applicable to French residents).

This means that a Belgian individual investor in French shares is taxed twice, once at source in France and once on the remainder in Belgium, and usually has to proactively file a tax reclaim to the French Tax Authorities to benefit from the reduced withholding tax rate of 15 %.

Please note that such situations can also arise whereby originally domestic shareholders may end up being foreign shareholders of a company by way of cross-border mergers such as in the case of the takeover of a Belgium company by a French one (see the acquisition of Petrofina by Total[2] or of the Belgian Tractebel[3] by the French Suez in 2005). Belgian

[2] French oil group Total bought Belgium's PetroFina in December 1998 by way of a share swap. Under the agreement, PetroFina shareholders received 9 shares in the new company for every 2 PetroFina shares. In 2000, Total increased its share in Petrofina to 98 % to finally hold 100 % of Petrofina in 2002.

[3] For a long time a majority stake in Electrabel was held by the French company Suez. In 2005, Suez increased its stake to 96.7 % and a squeeze-out of the remaining shareholders was completed on

shareholders in Petrofina and Tractebel suddenly realised that their dividends were taxed at a much higher rate!

The following quantified example illustrates the situation of a Belgian individual being invested in Suez-Tractebel and the tax impact of that situation depending on the home country of the company (Tractebel used to be a Belgian company before the acquisition by Suez, then became French).

| | As a Belgian company (eg Tractebel) | As a French company (eg. Suez) |
|---|---|---|
| Based on "normal" procedure (once dividend is paid) | **Belgium-Source Dividend** | **French-Source Dividend With tax reclaim as per DTT*** |
| **Gross Dividend 2006** | 17,80 € | 17,80 € |
| **French Withholding tax on dividend (25% before tax reclaim)** | | -4,45 €<br>13,35 € |
| **Amount subject to Belgian withholding tax** | 17,80 € | 13,35 € |
| **Belgian dividend tax (25%)** | -4,45 € | -3,34 €<br>10,01 € |
| **French dividend tax reclaim according to Belgo-French DTT (10%)** | | 1,78 € |
| **Net dividend after tax** | 13,35 € | 11,79 € |

** DTT stands for Double Taxation Treaty (in this case between France and Belgium).*

Based on European Court of Justice (ECJ)'s case Law, Member States must not treat dividends that are issued to a foreign shareholder (outbound dividends) less favourably than dividends that are paid out to a domestic shareholder. In the same fashion, dividends obtained from a foreign company (inbound dividends) must not, in principle, be treated less favourably than dividends received from a domestic company. However, the ECJ cannot commit the Member States to avoid double taxation meaning that the Member States can continue to conclude double-taxation conventions in which the power to levy taxes is shared between the two Member States[4].

The ECJ's Kerkhaert-Morres ruling in 2006 confirmed that the existence of double taxation is completely legal under Community law. The Member States continue to have sovereign power to decide on the distribution of fiscal rights, including double taxation, regardless of whether it is in their national law (Kerkhaert-Morres) or in their double-taxation conventions (see also Damseaux case in 2009).

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10 July 2007, when the company was de-listed from the stock exchange. Following Suez's 2008 merger with Gaz de France, Electrabel is now a subsidiary of GDF Suez.

4 See 2004, when the Ghent Court of First Instance (Belgium) referred a question to the Court of Justice for a preliminary ruling with a view to establishing whether Belgian legislation conflicted with the free movement of capital because it subjected both domestic dividends and foreign dividends to a single withholding tax and allowed no offsetting of the withholding tax applied in the other Member State. The Court of Justice came to the conclusion that this did not breach the principle of free movement of capital. Since Belgium treats both domestic and foreign dividends in the same way, the Court ruled that Belgium had not breached the Treaty establishing the European Community.

For Belgian investors, the fact that France and Belgium exercise their fiscal sovereignty in parallel is that Belgian individual investors end up paying much more tax on French dividends than on Belgian dividends.

Finally, albeit more focused on corporations, the Ruding Report[5] (1992) already stated that "the manner in which Member States currently provide relief for the double taxation of corporate profits distributed to individual shareholders in the form of dividends constitutes a source of discrimination against cross-border investment flows". The absence of a neutral tax system leads to a misallocation of resources that are somewhat detrimental to the Single Market and the EU's competitiveness.

**2) What was the source of the problem?**

- ☒ **Denial of credit for foreign withholding tax**
- ☒ **Higher taxation of foreign dividends than in purely domestic situations**
- ☒ **Difficulties in obtaining a refund of foreign withholding taxes – the procedures were (please specify): too complex, costly, time-consuming**

The application of withholding tax refund procedures typically depends on the source country (of the dividend). In certain cases the refund is done directly at source when a reduced withholding tax rate is applied. In other cases, the refund is only possible *a posteriori*, meaning in that case that the investor has to proactively file a request for a refund.

The 'upfront' refund option enables the investor to benefit directly from a reduced rate, thus (partially) removing a lengthy – and costly – reclaim process. However, this system is only applied by a minority of European countries (in addition to – notably – the United States). In addition, the procedure still involves that the investor proves its identity and state of residence. This is typically done through the investor's bank(s). Generally, such a service is not free but involves charges for the investor. In addition, not all banks offer this type of service.

The *a posteriori* refund option is mostly the rule across European countries. In this case, the full withholding tax rate is applied at source (e.g. 25 %) and the investor has to file a tax claim to apply for a refund of parts of the withholding tax (e.g. 10 % if – as provided for in the OECD Model Double Tax Convention – the convention prescribes that a 15-percent withholding tax rate applies). We believe that the current environment creates a situation of double taxation resulting in many cases in pure discrimination against shareholders. Not only are situations of double taxation not acceptable from our point of view but also when reduced withholding tax rates apply via double taxation conventions, these suffer from very big handicaps in their implementation:

- Procedures too complex (numerous forms and stakeholders);
- Procedures too costly (e.g. bank charges);
- Lengthy refund process (more than 10 years).

**Procedures too complex**

First of all the individual investor needs to become active himself if he wants to avoid that he is de facto double-taxed on dividends and from the investors point of view the different preconditions for the assertion of claims within Member States already makes the procedure too complex:

[5] *Report of the Committee of Independent Experts on Company Taxation* (Ruding Report), March 1992, pp. 207-208.

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For individual investors different forms for the refund of cross-border withholding tax exist in each country. This means that investors cannot rely on a standardised format but have to get used to the various forms even for very small amounts of withholding tax. Some countries, e.g. Spain, do not even provide forms in English, which means that the investor furthermore has to translate the refund form to enable him to initiate the refund procedure.

The deadlines for the assertion of claims for a refund of withholding tax differ from Member State to Member State (e.g. Portugal 2 years, Italy 4 years) which makes a monitoring for the investors even more complicated.

The addressees for the refund also differ, sometimes even within one Member State: e.g. in Spain, investors in large companies (for example Telefónica) have to submit the form to the Spanish Central Tax Agency while investors in smaller Spanish companies have to send the form to the respective companies' Tax Office. Austrian forms do not even include information on where to send the refund reclaim.

The different Member States require different documentation for the refunding procedure. For example Spanish tax authorities require investors to hold an account in Spain and to provide them with a Spanish tax number (NIE). For private investors this produces a significant hurdle which leads to a de facto double taxation.

All this contradicts the EU Commission's statement that “it is undesirable in the EU Internal Market that a taxpayer is disadvantaged solely by reason of cross-border investment activity”.

**Procedures too costly:** In France, for example, the relevant tax authorities only accept claims for refunds if they are processed to them via the banking chain. German banks, however, according to an inquiry of the German magazine 'Börse Online' (10 February 2011) charge up to EUR 145 per dividend payment (ING-Diba) or EUR 23.80 per security for which a refund is requested (Commerzbank, comdirect). Especially private investors are therefore factually excluded from enforcing their claims at least in such cases where the refund amount is equal to or lower than the banking fees.

**Lengthy refund process:** The aforementioned difficulties investors face when applying for refunding of withholding tax force investors to dedicate a huge effort into the various refunding forms.

Specifically in Italy, the payment of the refund amounts takes several years. We have knowledge that the refund of German investors took more than 10 years!

In case of investors that have grouped in a legal entity (e.g. an investment club) to invest in shares, Italian tax authorities require the management board members to apply for a personal tax number to get Italian withholding tax refunded. Furthermore, the tax authorities request among others a copy of the management board members identity card and a copy of the list of authorised signatures of the applicants.

DSW, the German investor association, has received more than 100 enquiries to support its members in accelerating the refunding procedure with the Italian tax authority. They started negotiations with SOLVIT by asking whether they will be able to assist German investors. SOLVIT finally did, for a few German investors and reached a prompt payment by the Italian tax authority. Unfortunately, at some time SOLVIT stopped its support and declared itself 'non-competent'.

## FSUG response on Taxation problems that arise when dividends are distributed across borders to portfolio and individual investors and possible solutions

We believe that the current situation, investors face creates significant practical hurdles to cross-border movement of capital and individual pan-European share ownership as well as discrimination between larger individual portfolios and smaller ones (based on the costs of recoup).

### III ADDITIONAL COSTS

**1) Have you suffered any additional costs due to the cross-border investment in dividends?**

Yes, see below for details.

**2) What is the amount of these additional costs?**

According to the German magazine Börse Online (as of 10 February 2010) the following banks charge the following fees for withholding tax reclaims:

| | |
|---|---|
| DAB Bank: | EUR 10 per claim plus 'charges from abroad' |
| Comdirect/Commerzbank: | EUR 23.80 per security on the claim form |
| Cortal Consors: | EUR 19.95 per security on the claim form plus up to EUR 35 third party fees |
| ING-Diba: | EUR 50 for a proof of the claim form (including attestation) EUR 145 for forwarding the claim form to the tax authority |

Third party fees, i.e. mainly fees of the intermediaries and depositary banks in the Source State amount to up to EUR 100 per claim.

The following table provides indicative tax refund bank charges for a Belgian individual investor:

| Withholding tax refund charges | |
|---|---|
| Dexia | 6,05 % of the amount to recup with a minimum fixed charge of 60.5 euros |
| Fortis Banque | 60.50 euros and the dividend must reach a minimum threshold (between 500 and 1750 euros, depending on the source country) |
| ING | 5 % of the amount to recup with a minimum of 60.50 euros and the dividend must be comprised between 1000 and 1750 euros, depending on the source country |
| KBC - CBC | 60 euros |
| Keytrade Bank | 5,08 % of the amount to recup with a minimum 30.25 euros |

Note: these fees do not include potential fees associated with foreign correspondent banks.

Source: www.test-achats.be

**3) Have these additional costs dissuaded you from investing cross-border?**

See above comments (Question 2). It's clear that the extra tax burden created by double taxation situations is a disincentive to investments in other Member States and therefore represents an obstacle to the smooth operation of the Internal Market.

**4) Which was the Member State of source of the dividend (please indicate for each separate case in which you have suffered additional costs)?**

See above.

**5) Which is/was your Member State of residence?**

FSUG represents an adequate geographical coverage within the Union.

## IV POSSIBLE SOLUTIONS

**1) Which (combination) of the above outlined solutions do you consider most appropriate to tackle any taxation problems that arise when dividends are paid across border to individual investors or to companies that are portfolio investors? Why do you prefer that option?**

Within the Member States the same investor investing in cross border companies is often enough imposed with comparable taxes in two states in respect of the same income. Fairness dictates that any income received by a single person should only be taxed once. By the currently pursued parallel exercise of fiscal sovereignty of two Member States (see Annex for examples) especially private, small investors are faced with a de facto double taxation. The ECJ in its Kerckaert-Morres decision ruled that it is up to the Member States to take the measures necessary to prevent such situations by following international tax practice in the allocation of tax rights. However, from our experience and as the above described problems show we argue that this objective is not pursued by all Member States which remain virtually unconstraint in how they tax corporate profits on the investor level. Juridical double taxation of dividends still is reality in the EU, at least for private investors and for companies that cannot rely on the Parent-Subsidiary Directive.

Juridical double taxation leads to inefficient distortions of investment flows and decisions. The existence of several thousand bilateral Tax Treaties which all aim at eliminating or at least reducing a juridical double taxation bear witness to the consensus that juridical double taxation should be avoided.

The issue of juridical and economical double taxation is not new, although its impact has increased during recent years as cross border participations in companies are becoming more and more frequent in the EU because of the progressive market harmonisation. Therefore investors/taxpayers need clear and accurate rules governing these operations, in order to avoid double taxation.

**FSUG therefore believes that Option 1 (Abolition of withholding taxes on cross-border dividend payments to portfolio/individual investors) is the simplest, fairest and most efficient approach to remove the double taxation issue at individual investors' level. We however believe that this should be coupled with an improved information exchange framework across Member States to avoid tax evasion.**

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Rationale:

a) From our point of view the approach in Option 1 would overall not lead to a loss of taxable income for the Member States and rather should facilitate the allocation of profits to the Member States afterwards via an apportionment formula.

b) Discrimination and juridical double taxation will not only be reduced by this opinion but eliminated.

c) As regards the mentioned costs related to the introduction of automatic exchange of information, i.e. standardised forms, formats and channels of communication, we point to the Savings Tax Directive which already provides for a system of information exchange whereby the source state submits to the state of residence the appropriate data regarding the beneficiary's identity and the interest payment. This is intended to enable the Residence State to tax foreign interest income of its residents effectively. The Source State levies no withholding tax whatsoever.

d) Article 293 of the Treaty establishing the European Community did stipulate that Member States shall so far as it is necessary "enter into negotiations with each other with a view to securing for the benefit of their nationals … the abolition of double taxation within the Community". This article has not been reproduced in the Treaty of Lisbon. However the general provisions of Article 4(3) TEU prescribe that the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure that could jeopardise the attainment of the Union's objectives.

e) Despite this, Member States – intending to exercise their fiscal sovereignty – have not considered it necessary to proactively conduct negotiations with each other to abolish juridical double taxation. Double taxation conventions often cater for a reduced withholding tax rate in the source country but do not remove the double taxation issue as we evidenced through the Belgium-France example. Juridical double taxation of dividends is a reality across the EU for individual investors (and companies) that cannot resort to the Parent-Subsidiary Directive[6].

COMMENT: Once more, based on Cerioni, the fact that double taxation conventions do not (always) remove the double taxation issues can hold true to the extent that double taxation conventions do not incorporate an arbitration clause pursuant to Article 25 of the OECD model and are not interpreted as allowing such an arbitration procedure.[7]

f) Cross-border activities are increasing on all fronts. European firms are more and more operating on a cross-border/transnational basis as the European markets are getting harmonised and companies compete for growth and acquire other firms. Individual investors will be increasingly faced with double taxation issues in absence of harmonised framework based on secondary EU Law. As evidenced by the growth of EU citizens enquiries mentioned in COM(2010)769, tax complaints account for 3-4 % of the total annual complaints and are bound to grow if no further progress is made.

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6 Council Directive 90/435/EEC, 23.7.1990.

7 L.Cerioni, *Double Taxation and the Internal Market: Reflections on the ECJ's Decisions in Block and Damseaux and the Potential Implications, in Bulletin for International Taxation*, IBFD, 2009, Vol. 63, n. 11, pp. 543-556.

g) The European Court of Justice (ECJ) has been a pioneer in the fair treatment of domestic and cross-border dividends; however, the limitations of the case law of the Court of Justice are becoming increasingly obvious. The ECJ – as the Kerckaert-Morres decision has proven – can only take action if a Member State is treating cross-border dividends less beneficially than domestic dividends but is powerless if the double taxation is simply the result of two Member States exercising, without discrimination, their respective fiscal power.

h) Exchange of (tax) information is progressing[8].

Further, we believe that the most appropriate way to harmonise the taxation of dividends for individual investors in the Member States may be by way of secondary EU legislation (eg. Directive) given the limitations of the ECJ's Case Law. A report by the European Parliament[9] also favours EU secondary Law as the best approach: "As the Commission has shown in recent communications, better coordination could improve both the Member States' and the taxpayers' situations. Coordination can be achieved either by coordinated unilateral or bilateral measures (double taxation conventions) taken by Member States, by multilateral instruments of international law (multilateral tax convention) or by secondary legislation based on Article 94 EC486. Several authors have proposed a multilateral EC convention, but such proposals have never received much attention from the Member States[10]. However, an instrument of secondary legislation would better fit into the institutional framework of the Internal Market."

The Savings Directive provides an interesting framework of reference to show that such an option is possible. Until the 1980s, interests were subject to double taxation: specifically withholding tax in the Source State and tax in the beneficiary's Residence State. The Savings Directive provides for a system of information exchange whereby the Source State submits to the Residence State the appropriate data regarding the beneficiary's identity and the interest payment. This is intended to enable the Residence State to tax the foreign interest income of its residents effectively. The Source State levies no withholding tax at all.

**2) Would you prefer a completely different solution and if so what solution do you suggest?**

No, the abolition of the withholding tax regime (Option 1) is the option we support. It is the simplest, fairest and less complex to operate one. The Savings Directive can be a benchmark for the implementation of such an option (see exchange of information).

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8 See for instance the recent communication by ECOFIN (press release 6554/11) announcing a new Directive to replace the 'Mutual Assistance' Directive (Council Directive 77/799/EEC of 19 December 1977, as amended by Directive 2004/56/EC) and aiming at ensuring that the OECD standard for the exchange of information on request is implemented in the EU. See also Directive on recovery of tax claims (Council Directive 2008/55/EC of 26 May 2008) establishing a regime whereby one Member State may request assistance from another in the recovery of claims relating to taxes, duties and levies and the Savings Taxation Directive (Council Directive 2003/48/EC of 3 June 2003) enabling tax administrations to exchange information automatically, although it applies only to the interest income from savings of individuals and three Member States have been authorised to apply a withholding tax on a transitional basis.

9 European Parliament's Committee on Economic and Monetary Affairs, The impact of the rulings of the European Court of Justice in the area of direct taxation, IP/A/ECON/ST/2007-27, pp 79-81.

10 Pistone, P., *An EU Model Tax Convention*, EC Tax Rev., 2002, p. 129; Pistone, P, *The impact of Community Law on Tax Treaties : issues and solutions*, Kluwer Law International, 2002, p. 235 seq; Lang, M. and Schuch, J., *Europe on its way to a multilateral tax treaty*, EC Tax Rev., 2000, p. 39; Lang, M. (ed.), *Multilateral Tax Treaties*, Kluwer Law International, 1998.

**3) What, if anything, else do you think could be done at EU level to overcome any difficulties that exist in the area of cross-border withholding taxes on dividends paid to individual and portfolio investors?**

Notwithstanding the removal of the withholding tax as stated in Option 1, we believe that more progress should be made in terms of information exchange across EU Member States in order to facilitate acceptance of this option by Member States.

We also believe that the Commission should develop some sort of harmonisation framework to spread the practice whereby the reduced withholding tax rate from the source country (as stated in the Double Taxation Convention) would be retained directly at source thus avoiding the complex tax reclaim procedure.

Should this not be feasible, at a minimum, standardisation of tax reporting forms and processes for non-resident individual investors should be sought in order to facilitate the tax reclaim processes. We also believe in this case that some sort of framework should be established to enable access to a cheaper tax reclaim service by banks and financial intermediaries.

It is also worth mentioning that a number of countries like e.g. the United States, Canada and Japan rely on the tax payer's declaration of residence which is confirmed by the deposit bank to which the dividend payments flow. For example, a German investor in a US corporation from the beginning is only charged a reduced withholding tax rate of 15 % instead of being charged the full US tax rate of 30 % when he receives dividends in his German bank account only because the deposit bank provides the IRS with the "Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding" (W-8 BEN form). However, such a procedure should only be considered as 'second-best' solution.

**4) Are you aware of any statistics or legal or economic studies which could further contribute to the analysis of the costs and benefits of implementing any of the above solutions?**

According to a report of the GOAL Group[11] which specialises in withholding tax reclamation, EUR 8.5 billion was wasted by investors in 2005 because withholding tax on dividends and income has not been properly reclaimed. This represents around a quarter of withheld tax on foreign securities. GOAL Group in its report has further estimated that the global market for withholding tax reclamation services by custodian banks is worth EUR 698 million.

In order to monitor precisely the increase in individual enquiries related to double taxation issues, we would suggest that the various relevant EU agencies (for instance Your Europe Advice, SOLVIT and the Europe Direct Contact Centres) start collating more granular data specifically about this type of enquiries.

**5) Do you have any other comment or thoughts to share as regards cross-border taxation of dividends paid to portfolio and individual investors?**

As stated previously, FSUG very much welcomes the Commission's initiative to investigate ways to remove double taxation situations for individual investors. We however want to insist on the fact that it is of utmost importance to expand such an initiative to all other cross border investment income across the European Union. Indeed, unfair and discriminatory taxation of investment income for EU citizens goes way beyond share dividend income only, and the situation is getting worse. For example, France recently issued a new law to tax all non-

[11] See http://www.goalgroup.com/news-and-pr/2006/05/01/the-dividend-dilemma.

French residents on their French domiciled life insurance contracts income with a withholding tax of up to 45 % with no possibility of claiming any tax credit.[12]

In addition, there is a clear discrimination between the way EU transnational corporations can avoid double taxation on dividends today through the Parent-Subsidiary Directive or the ability for most EU-based pension funds to avoid paying withholding taxes on dividends through specific provisions in the relevant double taxation treaties and the way individual investors are exposed today to double taxation of dividends.

The Commission's Europe 2020 roadmap states that "a stronger, deeper, extended single market is vital for growth and job creation. However, current trends show signs of integration fatigue and disenchantment regarding the single market … Every day businesses and citizens are faced with the reality that bottlenecks to cross-border activity remain despite the legal existence of the single market." We believe that with such concrete harmonisation measures, the Commission would send very strong signals to individual investors, savers and shareholders that the Single Market is indeed moving forward.

[12] French Law 2009-1674 of 30 December 2009, became Article 125 O-A II bis of the French Code général des Impôts. For example a Belgian resident will pay no tax on income from a unit-linked insurance contract if the insurer is Belgian domiciled, but up to 45 % tax from the French State if the insurer is French domiciled.

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**ANNEX 1: Example Spain source dividends for German investors**

In mid-2010, German deposit banks changed their handling with regard to Spanish withholding taxes on dividends. The reason was that the German Ministry of Taxes (Bundeszentralamt für Steuern) had discovered that dividends an investor receives from Spanish companies are exempted from withholding taxes up to an amount of EUR 1 500 p.a. and per investor. German deposit banks therefore have amended all dividend statements and since 2010 no longer deduct Spanish withholding tax on dividends from the German withholding tax on capital income as they used to do before. The reason behind this procedure is that – from the German tax authorities point of view – German shareholders are able to get their withholding tax for an amount of up to EUR 1 500 fully refunded in Spain (above this amount a refunding of 4 % is possible). To prevent investors from getting a 'double refund', the possibility to set-off the tax paid in Spain against the German withholding tax has been abolished. The problem is that – as mentioned before – shareholders have to request a Spanish tax number and have to open an account in Spain to get a refund of the dividends. These preconditions factually prevent private investors to request a refund in Spain. But despite these severe obstacles, investors cannot get a refund from the German tax authorities, as a proof of the non-enforcement of their claim in Spain is rather impossible.

## ANNEX 2: Double taxation rates of foreign sourced dividends for Belgian residents

The following table provides a synopsis of withholding tax rates and the type of option applied (reduced rate applied at source or *a posteriori*) for Belgium and the country of residence and a select list of source countries.

| WITHHOLDING TAX ON DIVIDENDS | | | | |
|---|---|---|---|---|
| Country | Withholding tax rate in "source country" | Reduced withholding tax rate in "source country" based on double taxation convention with Belgium | Total double withholding tax impact in Belgium | Total double withholding tax impact in Belgium with reduced withholding tax rate in "source country" |
| Belgium | - | - | 25** | 15** |
| Luxembourg | 20 | 15 | 40 | 36,25 |
| Netherlands | 25 | 15 | 43,75 | 36,25 |
| Germany | 21,1 | 15 | 40,83 | 36 |
| France | 25 | 15 | 43,75 | 36,25 |
| United-Kingdom | 0 | - | 25 | 25 |
| Ireland | 0 | - | 25 | 25 |
| Italy* | 27 | 15 | 45,25 | 36,25 |
| Spain* | 15 | - | 36,25 | 36,25 |
| Portugal* | 20 | 15 | 40 | 36,25 |
| Greece | 0 | - | 25 | 25 |
| Austria | 25 | 15 | 43,75 | 36,25 |
| Denmark | 28 | 15 | 46 | 36,25 |
| Sweden* | 30 | 15 | 47,50 | 36,25 |
| Finland* | 28 | 15 | 46 | 36,25 |
| Switzerland | 35 | 15 | 51,25 | 36,25 |
| Norway | 25 | 15 | 43,75 | 36,25 |
| United-States* | 30 | 15 | 47,50 | 36,25 |
| Canada* | 25 | 15 | 43,75 | 36,25 |
| Australia* | 30 | 15 | 47,50 | 36,25 |
| Japan | 10 | - | 32,50 | 32,50 |

Source: http://www.test-achats.be/invest/double-imposition-s35030.htm

*In %. * Countries for which the simplified procedure is applicable (ie. a reduced withholding tax rate can be applied directly at source).*

## ANNEX 3: Case example French source dividends for Belgian investors

To elaborate on the case of France and Belgium stated above in Question II.1, the double taxation convention has catered for two types of refund procedures to reduce the level of double taxation:

- The simplified procedure which must be completed before the actual payment of the dividend and reduces the withholding tax rate applied upfront by France on the gross dividend (15 % instead of 25 %). To this end, investors have to fill in the form 5000FR (in French) proving their quality of Belgian resident and confirmed by the local tax administration.
- The normal procedure when the dividend has already been paid and enabling the investor to recoup *a posteriori* a certain percentage of the withholding tax paid upfront in the source country (10 % based on the France-Belgium convention, i.e. a reduced rate of 15 % instead of 25 %). Two forms (5000FR and 5001FR) have to be filled in that case. The refund procedure can take a maximum of two years and typically takes between a year and a year and a half.

Charges and procedures differ based on the way shares are held. The example of a Belgian shareholder of Suez:

- Nominative shares: for those, the company 'CACEIS Corporate Trust' ensures the management and payment of dividends.

  a) Simplified procedure: the original form 5000FR (proving fiscal residence in Belgium) has to be sent at the latest 10 working days before the payment of the dividend to Caceis in France. Caceis does not charge for the service, however, the investor's Belgian bank may charge to help with the form (see below sample charges).

  b) Normal procedure: both forms 5000FR and 5001FR have to be sent to Caceis after having been signed by the Belgian fiscal authorities and the bank that paid out the dividend. Caceis will charge EUR 80 by form.

- Shares held on a securities account at a Belgian Bank: it is the bank that will manage the relationship with Caceis Corporate Trust. The forms have to be passed onto the bank after having received the sign-off by the Belgian fiscal authorities proving effective fiscal residence in Belgium. The bank typically charges for the service and frequently, banks impose minimum dividend thresholds to offer the service.

## ANNEX 4

Another interesting example of the kind of situations that double-taxation issues generate can be found with companies which have designed complex systems to avoid double taxation of dividends, primarily for their individual investors. See for instance Fortis which had implemented a complex system of dual stock exchange listings coupled with 'twin shares'[13]:

"It is unfavourable for a Belgian investor to receive Dutch-source dividends and conversely. When a Dutch and a Belgian banks merged into 'Fortis', they devised a sophisticated system, which obviously only worked for Belgian and Dutch investors and showed its limitations: “The Twinned Share Principle of Fortis is truly unique. It implies that a single unit represents a share in two legal entities, each with a different nationality. Shareholders have voting rights in both parent companies and may choose to receive a wholly Belgian-sourced or a wholly Dutch-sourced dividend, http://www.fortis.com/governance/media/pdf/fortis_governance_statement_UK.pdf, p. 13. The Belgian-French bank Dexia had a similar system, but abandoned it.”

[13] European Parliament's Committee on Economic and Monetary Affairs, The impact of the rulings of the European Court of Justice in the area of direct taxation, IP/A/ECON/ST/2007-27, pp. 177-178, http://www.uclouvain.be/cps/ucl/doc/centre-jrenauld/documents/WP_4_Study_Impact_of_ECJ_Rulings_Direct_Taxation.pdf.