EPRA
EUROPEAN PUBLIC
REAL ESTATE ASSOCIATION

POSITION PAPER

October 2023

New EU system for the avoidance of double taxation and prevention of tax abuse: Faster and Safer Relief of Excess Withholding Taxes

KEY HIGHLIGHTS AND RECOMMENDATIONS

EPRA views the proposal as a significant step forward for digitalisation and harmonisation of withholding tax processes. Nonetheless, the current proposal will result in a broad range of investors being unable to take advantage of the procedures outlined in the Directive.

- To avoid the exclusion of a wide range of institutional and retail investors in the EU which will lead to further fragmentations and undermine the advantages presented in the proposal, the **Directive shall explicitly establish and guarantee the applicability of double tax treaties** when the procedures outlined in this Directive are put into action.
- Furthermore, we recommend introducing an overarching **transparency principle** for forthcoming costs imposed by certified financial intermediaries (CFIs) to be an integral component of the Directive, with the aim of safeguarding investor interests.

BACKGROUND

The European Public Real Estate Association (EPRA), the voice of Europe's listed real estate companies, views the proposal as a significant step forward for digitalisation and harmonisation of withholding tax processes. Within our industry, these persistent challenges have been brought to our attention numerous times, which is why this proposal has garnered a positive reception.

However, EPRA would like to draw attention to a disparity that, unless rectified within the Directive, will result in the unequal treatment of Real Estate Investment Trusts (REITs) and undermine the Directive's intended goals. The matter we elaborate on in greater detail in this paper pertains to the applicability of double tax treaties (DTTs), which is central to the proposal. It's essential to recognise that it also affects various other investment vehicles, as evidenced by the numerous responses to the Commission's public consultation, hence it is crucial that this matter is addressed effectively.

We are seeking to find adequate support so this Directive does not create further fragmentation and exclude a wide range of investors from the withholding relief procedures laid down in the Directive.

EXPLAINING THE REIT REGIME CONCEPT IN EUROPE

REITs are guardians of our cities' high-quality assets, covering all types of real estate assets, from offices to retail, and increasingly healthcare and retirement facilities. They are also great contributors to GDP and to society as they represent hundreds of thousands of jobs in our continent.

The way in which the REIT concept has developed in Europe over recent years has meant that national structures take into account the differing real estate markets, capital markets, savings markets, and stock markets within the EU Member States, and these have led to differing adaptations of the same basic underlying principle. The REIT concept was developed as a means of encouraging collective retail savings in a secure and transparent manner into

the real estate markets, with benefits for the economy as a whole in terms of corporate outsourcing and investment in all sectors of the capital-intensive property industry.

Currently established in 13 EU Member States, the introduction of REIT legislation by national governments has always been seen as an opportunity to attract new sources of capital into the local real estate market in a more open, more transparent, more liquid, and advantageous form of investment. It is important to highlight that both institutional investors and retail investors have the opportunity to make direct investments in REITs.

The main feature of the REIT concept is their corporate tax-exempt status because earnings have to be mandatorily distributed by the REIT as a dividend in the hands of the shareholders. Taxation occurs only at the shareholder level, eliminating a double layer of taxation. Thus, investment in a REIT has, from a taxation standpoint some comparability with a direct investment in real estate.

This tax transparency or tax-exempt regime[1] applicable to them might give rise to unintended consequences in relation to the benefits of the procedures laid down in the Directive, as explained below.

(1) Applicability of the double tax treaties (DTTs) following the issuance of the residence certificate

In order to benefit from a tax treaty, a taxpayer (i.e. individuals, companies, or groups of persons) must be a “resident” of a contracting state. This initial condition does not lead to concerns, but it does introduce challenges when applying the Directive to REITs, primarily because of the disparity in the definition of "resident" between domestic laws and DTTs. Indeed, in alignment with the OECD model treaty, the status of “resident” hinges on the requirement that the taxpayer is subject to tax in his state of residence, a criterion that is often absent in the domestic definitions of residence in many Member States. In other words, there is often an additional requirement of tax liability to access treaty benefits, distinct from the domestic residence concept. This poses challenges to REITs, especially when considering the tax transparency or tax-exempt regime applicable to them.

For instance, if a foreign investor, who has invested in a French REIT, utilises a financial intermediary to receive their dividends, the financial intermediary will distribute dividends originating from a French REIT which is subject to a tax exemption regime on its real estate tax results. The financial intermediary will apply the reduced tax rate based on the residence certificate it has obtained and the conventional tax rate according to the DTTs. However, tax authorities contend that the residence certificate merely confirms domestic residency but doesn't automatically ensure treaty applicability, as such applicability often hinges on criteria like effective taxation or being subject to tax in many DTTs. This situation presents challenges regarding the Directive’s overall applicability for REITs but presents also enhanced risks for CFIs when they operate under the procedure outlined in Article 12 of this Directive.

Therefore, to ensure a level playing field and prevent further fragmentation, a specific provision that takes into account the transparency or tax-exempt regime of REITs is required. **This provision shall indicate that if a Member State issues a certificate of residence (eTRC) within the framework of the procedures outlined in the Directive, such a certificate shall constitute recognition of the applicability of the benefits conferred by the DTTs, at least the entitlement to the provisions of existing DTTs on withholding tax rates on interest and dividends.** If such inclusion is not present, investors who allocate their funds to REITs and other investment vehicles facing similar exclusions risk being penalised and won’t have the opportunity to benefit from the procedures specified in the Directive.

Cumulatively, to reinforce legal certainty, the Directive shall clearly specify that REITs, and potentially other investment vehicles under transparency or tax-exempt regimes facing similar exclusions, must directly benefit from the procedures outlined in the Directive.

[1] REITs can be under a tax transparency regime or subject to corporate income tax with a *de facto* zero or near zero taxable basis on the real estate results.

Suggested amendment 1

Proposal for a Directive

Article 4 – paragraph 5 –

Text proposed by the Commission	*Amendment*
Member States shall recognise an eTRC issued by another Member State as adequate proof of residence of a taxpayer in that other Member State in accordance with paragraph 3.	Member States shall recognise an eTRC issued by another Member State as adequate proof of residence of a taxpayer in that other Member State in accordance with paragraph 3. **If a Member State issues an eTRC within the framework of withholding relief procedures laid down in this Directive, such eTRC shall constitute and recognise the applicability of the benefits conferred by the double tax treaty or specific national legislation, as the case may be.**

Suggested amendment 2

Proposal for a Directive

Article 2 – paragraph 1 –

Text proposed by the Commission	*Amendment*
(Chapters I and IV shall apply to all Member States. Chapter II shall apply to all Member States with regards to all persons that are resident for tax purposes in their jurisdiction.	(Chapters I and IV shall apply to all Member States. Chapter II shall apply to all Member States with regards to all persons that are resident for tax purposes in their jurisdiction. **Member States may decide to include entities under a specific tax regime to the benefit of the procedures laid down in this Directive.**

(2) Anticipating and mitigating potential fees imposed by CFIs

EPRA also strongly suggests taking measures to reduce fees that could be imposed on investors, as such fees would undermine the core objective of this proposal. As significant costs will incur to CFIs in the short-term to put in place the systems needed to comply with the new Directive and to ensure that CFIs do not impose excessively high fees that would undermine the proposal's objective, one potential approach could involve placing a limit on the fees CFIs can levy on registered owners and investors. Recognising that this particular solution may not be feasible under the current proposal's scope, addressing this matter should be contemplated at the national level in consultation with the national competent authorities.

However, we hold the view that incorporating an overarching transparency principle for forthcoming costs imposed by CFIs shall be an integral component of the Directive, with the aim of safeguarding investor interests.

Suggested amendment 3

Proposal for a Directive

Article 17 (new)

Text proposed by the Commission	*Amendment*
	In order to ensure the effectiveness of the Directive's objectives, Member States shall take appropriate measures aimed at guaranteeing that in instances where certified financial intermediaries charge fees to comply with the procedures laid down in this Directive, such fees must be proportionate and rendered entirely transparent.

We trust that our feedback will aid in fostering productive debates and in reaching an agreement on the Directive proposal. We remain entirely at your disposal to discuss these issues in greater detail. Should you need any other information, we are at your disposal:

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About EPRA

For 20 years, the European Public Real Estate Association (EPRA) has been the voice of Europe's listed real estate companies, investors, and their suppliers. EPRA achieves this through providing better information to investors and stakeholders, active involvement in the public and political debate, promotion of best practices, and the cohesion and strengthening of the industry. With more than 290 members (companies, investors, and their suppliers), EPRA represents over 840 billion EUR of real estate assets (European companies only) and 95% of the market capitalisation of the FTSE EPRA Nareit Europe Index. Find out more about our activities on www.epra.com.

EU Transparency Register no. 09307393718-06