

Le Directeur Général délégué

Paris, le 2 mars 2009

Monsieur,

La Fédération Bancaire Française (FBF), organisme professionnel regroupant l'ensemble des établissements de crédit en France, est heureuse de l'opportunité qui lui est offerte de présenter ses commentaires dans le cadre de la consultation sponsorisée par l'Organisation de Coopération et de Développement Economiques (OCDE), sur les projets de rapports du « Groupe Consultatif Informel » relatifs à l'imposition des véhicules d'investissement collectif et les procédures d'octroi des avantages conventionnels pour les investisseurs transfrontaliers.

Les documents du Groupe Consultatif Informel « The Granting of Benefits with respect to the Income of Collective Investment Vehicles » et « Possible Improvements to Procedures for Tax Relief for Cross-Border Investors », publiés sur votre site internet, font l'objet d'un certain nombre d'observations de notre part que vous trouverez dans la note ci-jointe, établie en anglais pour votre convenance.

Nous restons à votre entière disposition pour tout renseignement complémentaire dont vous auriez besoin.

Je vous prie d'agréer, Monsieur, l'expression de mes sentiments distingués.



Pierre de Lauzun

Monsieur Jeffrey Owens
Directeur du Centre de Politique et d'Administration Fiscale
Organisation de Coopération et de Développement Economiques (OCDE)
Annexe Ingres 159
2 rue André-Pascal
75016 Paris

1. PRELIMINARY COMMENTS

We hereafter refer to the Informal Consultative Group as the "ICG".

The comments expressed hereafter are largely those of French banks acting as custodians in the CIV Industry.

1.1 Role of custodians in the CIV Industry

As a preliminary remark as regards the structure of the CIV Industry, we would like to insist on the role of custodians which is usually to hold the securities of the CIVs managed by the CIV Manager. Generally speaking, three parties are involved: the CIV itself, the CIV Manager and the Custodian (usually a bank). Custodians may also undertake other responsibilities as shareholder recordkeeping responsibilities.

As the securities of the CIVs are deposited with them, custodians are very often the ones involved in presenting claims of investors for treaty benefits to the tax authorities, rather than the CIV Manager himself. Depending on the circumstances, they may act as the representatives of the investors, or may only pass the claims over to the tax authorities without representing the investors. As a result of this situation, custodians are often those who face impediments with respect of tax claims.

As the representative of French banks, the FBF suggests that some developments are added in this respect to the report on "The Granting of Benefits with respect to the Income of Collective Investment Vehicles" in order to clarify the role of custodians, which is in our view not detailed sufficiently. This additional language could be added in Part III of the report "Structure of the CIV Industry", paragraphs 10 to 19.

1.2 Scope of the ICG reports

Another preliminary remark the FBF would like to make relates to the scope of the two reports of the ICG. Although these reports mainly pertain to the granting of benefits to investors through CIVs, certain issues may have more general impacts on the currently in force or future procedures for the granting of benefits to investors, should they invest through a CIV or not.

In particular, the issues examined by the ICG are very similar to those addressed at the EU level by the FISCO Experts' Group (« EU Clearing and Settlement Fiscal Compliance Experts' Group) which was created in March 2005 to work on the removal of fiscal compliance barriers to post-trading activities (« Giovannini Barriers »). A number of recommendations of this group are very similar to those of the ICG.

Any modification of the rules pertaining to the granting of benefits for "direct investors" or for investors "through a CIV" would most probably influence each another. It would indeed be surprising that two different set of rules co-exist whereas the objective of tax relief would be the same at the end of the day.

Therefore, the FBF considers that the work carried on by the ICG must not be disconnected from that of the FISCO Group. Should multiple procedures co-exist depending on the status of the investor, it is the FBF's opinion that banks will not be willing to deal with them (or at least not with all of them) because of increased complexity and costs.

It is thus crucial that converging recommendations / best practices are reached at the level of the ICG and the EU so as to ensure a certain degree of harmonization for the market operators with respect to tax relief procedures in general.

2. COMMENTS RELATING TO THE REPORT "THE GRANTING OF BENEFITS WITH RESPECT TO THE INCOME OF COLLECTIVE INVESTMENT VEHICLES"

Our comments on this report relate mainly to the ICG's proposals in the draft commentary changes (part VI: Draft Commentary changes to reflect recommendations of the ICG).

2.1 Application of the Model Convention to CIVs – preferred scenario

We note in paragraph 29 that a large majority of the ICG concluded that a widely held CIV that meets the "person" and "resident" requirements for claiming treaty benefits should also be treated as the beneficial owner of the income it receives, so long as the managers of the CIV have discretionary powers to manage the assets on behalf of the holders of interests in the CIV. We also note in paragraph 32 that there was a general agreement that where a CIV cannot claim benefits on its own behalf, there should be some way for the investors to claim benefits (with strong reservations however on whether residents of third countries would be entitled to treaty benefits).

In this respect, the FBF clearly favors the approach under which the granting of treaty benefits to CIVs should be taken into account in bilateral treaties and under which the CIV itself would be treated as a "resident of a Contracting State" and "beneficial owner", rather than adopting a look-through approach: This would be much more in line with the practical considerations and the business constraints that custodian face than any other approach. Indeed, a case-by-case basis management is not a realistic approach in the CIV field as custodians may be dealing with hundreds or thousands of investors. Therefore, taking into account the CIV itself makes things more practicable for custodians.

Contracting States should have a flexible approach as to the "residence" and "beneficial owner" tests and allow the granting of treaty benefits in an extensive way (of course, this has to be done through bilateral negotiations and both Contracting States should have ambitious aims).

As the scenario where the CIV is granted treaty benefits without consideration of its investors is unlikely to happen often, the FBF thinks the most acceptable and practicable approach would be the one where the CIV would be entitled to treaty benefits with respect to all of its income if a certain threshold of treaty-eligible investors is met. As an alternative, it would also be acceptable to us to have an approach where the CIV would be entitled to treaty benefits on a portion of its income, according to the percentage of treaty-eligible investors in the CIV. The first of these two approaches is however the most practicable one considering the structure of the banking industry.

Finally, in situations where a CIV cannot claim treaty benefits, treaties should contain specific provisions so as to allow relief directly to investors. However, in this type of case, the FBF considers that custodians should clearly be allowed to act on behalf of these investors, through simple and practicable procedures. If such simple and practicable procedures are not set forth, it is expected that the currently existing obstacles will remain for investors.

2.2 Draft Commentary Changes to Reflect Recommendations of the ICG (paragraphs 50 and following of the report)

2.2.1. Guidance needed as to which entities can be considered as CIVs: amendments to points 6.13, 6.14 and 6.15

Custodians often find it difficult to clearly identify which entities can be considered as CIVs entitled to treaty benefits (or CIVs whose investors are entitled to treaty benefits). They sometimes have to carry out very technical legal and tax analyses in order to classify certain entities as being a CIV or "something else", especially when foreign entities are involved.

As a consequence, certain relief claims are simply not presented when the custodian does not know that the entity which received a payment is in fact a CIV, or when the custodian wrongly considers that it is not the case. Conversely, certain claims are rejected for example when the tax authorities do not agree with the custodian on whether an entity is a CIV entitled to treaty benefits (or a CIV whose investors are entitled to treaty benefits).

In practice, these difficulties constitute a major obstacle for custodians in helping CIV investors to present tax claims because of the significant lack of legal uncertainty in this area.

It would therefore be very helpful for custodians if States clarified the status of entities entitled to treaty benefits (or of entities whose investors are entitled to treaty benefits). This could be done directly in the treaties by inserting clauses (detailing which types of entities are concerned), through exchanges of notes, or even through decisions of the competent authorities or administrative guidelines published by both States involved.

In order to address this very important issue, additional developments should in our view be added to the report on "The Granting of Benefits with respect to the Income of Collective Investment Vehicles", presumably at points 6.13, 6.14 and 6.15.

2.2.2. Granting treaty benefits to residents of third countries (points 6.18 to 6.24)

We note that two approaches are proposed:

- Treaty benefits may be granted to third-country residents: Point 6.18 proposes a provision where a CIV may be treated as resident and beneficial owner, but only to the extent that "equivalent beneficiaries" are the owners of the beneficial interests in the CIV. Equivalent beneficiaries are defined as residents of third states which have concluded a tax treaty with information exchange clauses with the country of source, who would be entitled to treaty benefits under such tax treaty to a rate of tax at least as low as the rate claimed under the tax treaty considered. Point 6.20 indicates that many investors would be treated as "equivalent beneficiaries" as rates in treaties are nearly always 10-15%.
- Treaty benefits are not granted to third-country residents: Certain States do not favor the first approach and would only accept to grant treaty benefits to investors who are residents of the same country than the CIV.

With respect to these two approaches, **the FBF generally agrees that third-country residents should benefit from treaty relief (provided they are covered by a tax treaty between the source country and their country of residence). However, dealing with multiple residency ownership implies more complex processes for banks. Therefore, it is crucial that simple procedures are set forth if it decided that treaty benefits are granted to third-country investors, especially to maintain a cost-effective system. In particular, it would be very burdensome to require banks to obtain and to deal with documentation**

requirements on an investor-specific basis: banks should be allowed to rely on information provided by other financial institutions as suggested in point 6.27. without having to maintain any documentation.

Simple procedures are also necessary for the application of treaty rates: dealing with multiple rates for third-country residents, including exemption cases as described in point 6.24 may not be very effective insofar that banks will have to "look-through" the CIVs and determine on a case-by-case basis whether certain investors may enjoy a 0% rate. Having to apply multiple rates would also be very burdensome and costly for banks in general since it is impossible to implement automatic processes in this area, given the way custodians structure their accounts (per tax rate). In other words, dealing with different tax rates for third-country investors would imply manual treatments when handling the payment processes. To make things simple and practicable, we think it would therefore be advisable that third-country residents should be allowed treaty benefits only if they enjoy the same rate as the residents of the CIV's country.

Finally, it is also important that banks do not have the responsibility of determining the tax treaty eligibility of the investors or the applicable tax rates (including exemption cases) of third-country investors.

As a conclusion on this issue, the FBF believes that simple procedures and processes are necessary when granting treaty benefits to third-country residents, if not, it is likely that the impediments/operational constraints will outweigh any benefits in this area and banks will not be keen on developing systems to grant treaty benefits for such investors.

2.2.3. Ownership threshold (points 6.23 to 6.27)

As regards the ownership threshold discussed at point 6.23, it is also important that its calculation is made simple: **The FBF considers that a reasonable approach would be to have an annual calculation:** It is indeed not sure that more frequent calculations would provide with more accurate results, while the work load would be significantly higher. It is the FBF's opinion that the suggestion at point 6.27 of quarterly calculations with an average of each period is totally burdensome.

In addition, we think that the ownership threshold should be considered before the paying date. A after-the-fact approach would be very complicated because it would necessarily imply a number of corrections given the fact that the payment would have been made on the basis of a necessarily inaccurate percentage. **The FBF therefore thinks the most practical solution is to take into account the ownership threshold at the closing date of the year preceding that of the payment** (e.g. 31 December of preceding year in many cases).

3. COMMENTS RELATING TO THE REPORT "POSSIBLE IMPROVEMENTS TO PROCEDURES FOR TAX RELIEF FOR CROSS-BORDER INVESTORS"

In this report, the ICG discusses the procedural problems faced by portfolio investors in claiming treaty benefits and makes a number of recommendations on "best practices" regarding procedures for making and granting claims for treaty benefits for intermediated structures. The FBF hereafter comments these "best practices" as laid out in part VI of the report (paragraph 125 and following).

3.1 Relief at source (paragraphs 127 - 128)

Banks clearly favor the alternative of the relief at-source procedure, when the income is paid. The re-imburement procedure should only be used as a second resort (as an exceptional procedure), when treaty benefits have not been granted upon payment of the income.

We also support the idea of a « *quick refund procedure* ». However, it should be designed in light of what currently exists in France: French paying agents are authorized to make offsets under their own responsibility (via their own declarations) without having to go through a specific procedure with the tax authorities (no prior notification or authorization needed). This offers very much appreciated flexibility for banks in France. In our view, this would be the preferred method as a quick refund procedure rather than a procedure where a prior notification / authorization / claim with the tax authorities is needed. Intermediaries would be allowed to set off any withholding tax refunds in relation to current or previous time periods on subsequent withholding tax payments to the source country, therefore paying the net tax to this source country.

Finally, if « *quick refund procedures* » imply that paying agents will act under their own responsibility, **the FBF then thinks that documentation supporting such claims should consist of residency certificates and tax reclaim forms (which include details of the income payment for which a tax refund is claimed), duly stamped by the tax authorities of the investor's country of residence.** These documents would be passed on by the paying agents of a chain up to the paying agent which assumes the withholding responsibility. There is indeed a need for certainty here. Conversely, if paying agents can simply rely on information provided by other intermediaries, then there would be no need to rely on such residency certificates.

In this respect, it is crucial that the ICG (and later OECD) clarifies in detail what would be the responsibilities of paying agents in such procedures. It is indeed very uneasy for banks to apply concepts such as "good faith", "having reason to know that", etc. if these concepts are not clearly defined, explained and illustrated. Our view is that there should be a "chain of responsibility" where any intermediary that has relied on information received from another intermediary with whom it has a contractual relationship should be able to turn against the latter in case of errors or failures, and so on. This is necessary because there is usually no direct relationship between the custodian and the intermediary responsible for paying the withholding tax to the source country.

Finally, the FBF notes that the report does not address « Reporting » requirements. Comments should be inserted to explain which type of Reporting should be made, the conditions under which it should be done and who will receive it. In this respect, one should make sure that intermediaries have identical obligations, to ensure a level-paying field.

3.2 Pooled claims for Benefits (paragraphs 129 - 130)

The FBF is clearly in favor of a system which would clearly facilitate the passing on of information, as compared with the current burdensome system where all residency certificates for each investor are passed on (in paper format all the most). This system would also help solve confidentiality issues and preservation of banking secrecy induced by transmission of such information, while it would clearly help increasing efficiency. It would allow banks granting treaty benefits on an automatic basis, allowing economies of scales.

3.3 Improved Information Reporting and Automatic Exchange of Information (paragraphs 131 - 132)

The ICG favors the use of TINs and automatic exchange of information. In this respect, the FBF notes that TIN formats are very different from one country to another – and some countries such as France do not have any TINs – therefore **it is often very burdensome for banks to check them**. Guidance is needed in this area.

3.4 Authorization of Intermediaries (paragraph 133 - 134) and Standard of care (paragraphs 135 - 136)

The FBF agrees that the authorization of intermediaries could be implemented by way of contract, but only if these contracts are standardized and if there is true harmonization across countries as regards the rules and guidance that will be provided for banks. Competition issues may arise if such harmonization is lacking.

A crucial point regarding both the questions of authorization of intermediaries and standard of care is that the issue of responsibility of paying agents is properly addressed. For example, it is very uneasy for banks to apply concepts such as “good faith”, “having reason to know that”, “reliance on information” from third parties, etc. if these concepts are not clearly defined, explained and illustrated. Another example is that banks should no longer have any role or responsibility in determining the entitlement of investors to treaty benefits, in particular if investors will self-declare their tax status (this is currently a major obstacle for presenting certain claims).

If the issue of responsibilities of banks is not properly addressed, the FBF thinks it would be a major obstacle to improving the current procedures. Therefore, it is our opinion that the ICG (and later the OECD) should elaborate in this area.

3.5 Establishing Compliance with the Procedures (paragraphs 137 - 141)

It is understood that governments should not give up their right to see information held by intermediaries regarding beneficial owner. However, market-efficient procedures should be set forth in this area, allowing both the interests of the business community and that of states be taken into account. We note that the ICG's proposal includes using approved independent reviewers at least for initial fact-findings.

The FBF would not object the intervention of external auditors, but only if this would effectively help lower the number, scope and costs of audits, and if such audits are indeed standardized as suggested in the report. Our experience is that interventions of external auditors are often very costly and must therefore be limited (see e.g. the experience of paying agents with the US QI audits shows that it would not be possible to bear multiple audits). We therefore agree that independent reviewers provide multiple source countries a single report.

In addition, we fully agree that the verifications of the external reviewers should only consist of « *system checks* » or initial fact-finding. The ICG (and later the OECD) should however elaborate on procedures to be implemented when specific or more complex claims are made to banks, which would not be included in systems checks or initial fact-finding verifications.

3.6 Reducing or Eliminating Reliance on Certificates of Residency (paragraphs 142 - 144)

The ICG notes that certificates of residence requirements create a set of barriers for investors claiming treaty benefits and that countries that currently require government-issued certificates should re-consider their position. The ICG goes on to state that ideally, certificates of residency should be replaced by investor self-declarations.

The FBF fully agrees with these conclusions and warmly supports this major breakthrough. This is the central prerequisite for a truly enhanced system where granting treaty benefits to investors would be allowed on a large scale. In other words, using self-certifications is the only way to "industrialize" the process of granting treaty benefits for CIVs' investors.

However, it must be made clear that the use of self-certification forms means that the legal framework of many countries, including France, is modified: banks should no longer be required to check whether investors are entitled to treaty benefits, and they should no longer be held liable for the wrong application of reduced treaty rates, when they have acted in « good faith » on the basis of the information provided by investors (unless they have knowledge that the forms obtained contain obvious mistakes). We think a paying agent may not be held liable for an investor's bad faith when it has carried out all appropriate actions.

Finally, we agree that self-declarations filled out by investors should remain valid as long as the investor's situation has not changed (no periodical updates). As for residency certificates, we also agree that they should remain valid at the very least for one year.

3.7 Increased use of Electronic Transmissions (paragraph 145)

The FBF fully supports the ICG's recommendation in this area.

3.8 Final remarks on Application of the Best Practices to Claims by CIVs (paragraphs 146 - 149)

As already commented above, **the FBF favors the approach under which a CIV would be entitled to treaty benefits with respect to all of the income it receives, without regard to the identity of the owners of interests in the CIV.**

As the scenario where the CIV is granted treaty benefits without consideration of its investors is unlikely to happen often, the FBF thinks the most acceptable and practicable approach would be the one where the CIV would be entitled to treaty benefits with respect to all of its income if a certain threshold of treaty-eligible investors is met. As an alternative, it would also be acceptable to us to have an approach where the CIV would be entitled to treaty benefits on a portion of its income, according to the percentage of treaty-eligible investors in the CIV. The first of these two approaches is however the most practicable one considering the structure of the banking industry.