

IMMEDIATE

15th February, 2001

PRESS STATEMENT

IPMA releases standard language and guidance on EU Savings Tax Directive

IPMA is pleased to publish new standard tax exemption language for inclusion in bond and medium term note issues, which is attached.

The suggested language is intended to allow issues to continue with minimum disturbance after the grandfathering date of 1 March 2001 of the proposed European Union savings tax directive. It may be referred to as the "IPMA Standard EU Exception " and included in usual tax gross up clauses.

The language has been prepared in co-operation with a group of leading law firms active in the international capital market and has been the subject of wide consultation with other law firms and practitioners in Europe.

At the same time, IPMA is releasing suggested disclosure language for inclusion in disclosure documents, developed on the same basis.

The two wordings are accompanied by a Guidance Note setting out the current position in respect of the Directive.

Two specific areas of concern covered in the Guidance Note are the fungibility of bond issues, and the grandfathering of Medium Term Notes. At the date of publication the position on both is unclear.

IPMA expects to publish additional guidance as soon as the situation becomes clear.

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International Primary Market Association

New Tax Gross Up Clause for the EU Directive on the taxation of savings proposed at the Nice ECOFIN Council on 26-27 November 2000

The International Primary Market Association is making available to issuers, lead managers, arrangers and their legal and tax advisers withholding tax clause language for inclusion in the terms and conditions of bond issues (Annex 1), and suggested disclosure language for inclusion in disclosure documents (Annex 2). The suggested language is intended to allow issues to continue with minimum disturbance after the proposed European Union Directive on the taxation of savings comes into effect, taking into account the 1 March 2001 grandfathering date in the Directive.

The information exchange provisions in the Directive are also grandfathered up to this date.

1. Background

The Directive was the subject of consultation for three years and certain aspects of it are still under active debate. No draft of the Directive is currently available. The former draft dated May 1998 will be withdrawn and replaced shortly, but no firm date is fixed for a redraft.

The analysis below is based on the EU Presidency paper entitled “Conclusions of the ECOFIN Council on 26-27 November 2000 on the tax package” dated 27 November 2000.

Even when the Directive has been formally approved, it will have to be implemented by way of national legislation.

Accordingly, IPMA can only highlight a number of areas raised by the Directive that issuers, lead managers and arrangers should bear in mind when arranging a new issue of bonds. They should continue to take their own legal advice, as the position may change radically at any time.

2. Outline of proposals

The Directive will:

- Apply when a person located in one Member State makes a payment to an individual resident in another Member State
- Of income on a debt claim, including Eurobonds
- Where that individual is an EU resident
- From 2003 subject to various conditions

Where the Directive applies, the person making the payment will collect information from the individual receiving payment and transmit that information to the individual's tax authority. As an interim measure, for a period of seven years from the introduction of the Directive, Austria, Belgium and Luxembourg will impose a withholding tax in place of information reporting. These countries will transmit to the tax authorities of the country of residence of the individual suffering the withholding 75% of any tax withheld under "revenue sharing" arrangements.

There are proposals for "grandfathering" existing issues, under which neither the information collection or withholding tax provisions of the Directive will apply if:

- The issue date of the bonds is prior to 1 March 2001, or
- The prospectus for the issue is certified by the competent authority prior to 1 March 2001.

3. Gross up and tax call

Most Eurobonds contain a provision requiring the issuer to gross up payments if a withholding or deduction has to be made under the laws of the issuer's country of incorporation (or that of the guarantor, if there is one) for tax on payments by or on behalf of the issuer.

To protect the issuer against the additional cost of such gross up provisions, most Eurobonds also permit the issuer to call the whole issue at par if the issuer is (or would be on the next payment date) required to gross up.

The Directive poses a problem for both issuer and investor. The issuer will be faced with the possibility that its issue will have to be grossed up, giving it the choice of refinancing the issue by exercising the tax call, or bearing the additional cost of grossing up. The investor will be faced with the prospect of having the bond redeemed early and (depending on market conditions) losing an investment carrying a favourable interest rate.

4. New tax language

For issues that settle after 28 February 2001 and therefore are not grandfathered, we attach language for two additional exceptions (see Annex 1). Both this language and Annex 2 have been prepared in co-operation with a group of leading law firms active in the international capital markets and have been the subject of wide consultation with other law firms and practitioners in Europe.

The language has been approved by all relevant IPMA Committees.

It may be referred to as "IPMA Standard EU Exception" for inclusion in usual tax gross up clauses.

The first exception removes the gross up obligation from any payment to an individual where the withholding results from the proposed Directive. The second exception deprives a holder of the bond of the benefit of the gross up if the payment would not have attracted withholding if presented to another paying agent in the EU.

On the current basis of the Directive, bonds including this language would not be subject to grossing up for tax and consequent early redemption as a result of the Directive.

5. Avoidance of gross up

There will be no gross-up and hence no call if:

- The bonds are issued under the grandfathering arrangements referred to above, or
- The bond contains the additional exceptions set out in Annex 1 to the gross up provision.

6. Non-EU issuers

The Directive will only affect payments to individuals who are residents of a Community State. As the gross up provision in Eurobonds is almost invariably limited to taxes imposed by the issuer's (or guarantor's) jurisdiction, it is unlikely that the Directive will ever trigger a gross up on Eurobonds issued by non-EU issuers.

However, in the absence of the text of the Directive and its implementing legislation, it will be safer to include the additional exceptions from the gross up provision in such issues. The proposals contemplate non-EU countries and dependent and associated territories' implementing "comparable" withholding or information reporting arrangements; it is possible that these may include arrangements for sharing of revenue from withholding. Any such revenue sharing could result in any withheld tax being treated as tax of the issuer's country, thus triggering the gross up.

There is also considerable benefit in a standard form of tax clause applicable to the entire international debt market.

7. Medium Term Notes

The grandfathering proposals include an exemption for issues made on or after 1 March 2001, where the prospectus for the issue was certified by the competent authority before 1 March 2001. It is not entirely clear how this is intended to operate in the context of Medium Term Note programmes. In the absence of any clarity, it is unsafe to assume that the language is intended to permit drawdowns after 1 March 2001 to be grandfathered, even if the base prospectus was dated before that date.

There are two alternative ways of including the additional exceptions in the gross up provision in the terms and conditions of the notes – by updating the programme (i.e., the base prospectus); and by inserting the additional exceptions into the pricing supplement for

each drawdown on or after 1 March 2001. It will normally be impractical to carry out an emergency update of current programmes, but the necessary amendments should be made at the next update of the programme. In the meantime, care must be taken to ensure that the necessary amendments to the gross up provisions are included in the pricing supplement for each drawdown.

A number of programmes include a guarantee that is given to cover all issues under the programme from time to time (rather than requiring a specific guarantee to be executed for each drawdown). Such guarantees may require amendment for drawdowns occurring on or after 1 March 2001, even though no other update of the programme is contemplated.

8. Fungible issues

The decision to grandfather issues settled before 1 March 2001 inevitably will make it very difficult to issue add on tranches which are fungible with existing issues. The problem arises in two main areas.

First, a condition of fungibility is that the terms and conditions of the old and new tranches are identical in every respect. Therefore, if the new bonds contain the additional exceptions set out in Annex 1, they will not be fungible with the old bonds.

Second, any mixing of grandfathered and non-grandfathered issues will potentially jeopardise the position of any individual holding a direct or indirect interest in the grandfathered bond, who may lose the ability to receive payment gross as a result of the fungible issue.

Bond issues which do not add the additional exceptions to new bonds or where old and new bonds do not contain tax gross up provisions will have identical terms and conditions in the old and new issues but the tax treatment under the Directive of the old and new bonds will be different.

If the bonds are considered to be fungible, it will be impossible to distinguish between the pre 1 March bonds and the new bonds. Therefore, all the bonds may be subject to withholding or information reporting. Issuers will want to consider carefully whether they are prepared to jeopardise the position of holders of the grandfathered bonds.

In addition, the new issue will be at risk from future changes in the Directive and in any implementing legislation.

IPMA has concluded, after careful review, that the risk of confusion and mistakes among investors, traders, paying agents, collecting agents, clearing and settlement organisations and custodians, if issuers attempt to make new issues fungible with grandfathered issues, outweighs the potential benefits of fungibility.

At the date of this Guidance Note, the criteria for effective fungibility are not clear. The terms and conditions of securities intended to be fungible will have to be identical to each other, and another essential factor will be the allocation of the same ISIN or other securities identity number as that of the relevant outstanding securities. It will be important to check with the relevant clearing systems and ISIN number generator before issue.

Clearstream Bank and Euroclear Bank are currently considering what will be their policy in this area.

These questions are unlikely to be resolved before 1 March 2001.

Certain EU Member States are concerned about the effect of grandfathering on their own, outstanding central government securities, as loss of fungibility will mean that they will not be able to reopen their issues. This may pose problems for strips, liquidity facilities and reaching the Euro MTS thresholds. Developments in this area may mean that the provisions of the Directive change and in any case are likely to delay the production of a publicly available draft of the Directive.

IPMA expects to publish additional guidance on fungibility as soon as the situation becomes clear.

9. Additional undertaking from issuers

The second additional exception referred to in 4. above excludes payments where the withholding or deduction would have been avoided if presentation had been made to another EU paying agent. In order to give full effect to this exception, consideration should be given to including in the documentation for the issue a provision which would require the issuer to maintain an EU paying agent in a country that will not implement a withholding regime under the proposed Directive, along the following lines:

“The [issuer] undertakes that, if the conclusions of the ECOFIN Council meeting of 26-27 November 2000 are implemented, it will ensure that it maintains a paying agent in an EU member state that will not be obliged to withhold or deduct tax pursuant to the Directive”

This, or other appropriate wording, could be included in the underwriting agreement, if the managers wish to be party to the arrangements, and in the terms and conditions, fiscal agency agreement or trust deed.

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Annex 1

Usual tax clause to which, in addition to the typical exceptions from the obligation to gross up for withholding or deduction from payment by the issuer (or guarantor, if any) in respect of any Note or Coupon, should be added:-

[The gross up language will not apply in respect of any Note or Coupon...]:

- (·) where [such withholding or deduction] is imposed on a payment to an individual and is required to be made pursuant to any European Union Directive on the taxation of savings implementing the conclusions of the ECOFIN Council meeting of 26-27 November 2000 or any law implementing or complying with, or introduced in order to conform to, such Directive or
- (·) presented for payment by or on behalf of a [holder] who would have been able to avoid such withholding or deduction by presenting the relevant [Note/Coupon] to another [Paying Agent] in a Member State of the EU

Annex 2

The European Union is currently considering proposals for a new directive regarding the taxation of savings income. Subject to a number of important conditions being met, it is proposed that Member States will be required to provide to the tax authorities of another Member State details of payments of interest or other similar income paid by a person within its jurisdiction to an individual resident in that other Member State, subject to the right of certain Member States to opt instead for a withholding system for a transitional period in relation to such payments [and subject to the proposals not being required to be applied to [Notes]* issued before 1 March 2001.]**

* Insert appropriate terminology for particular issue

** Delete for prospectuses under which no pre-1 March issues are made.