EUROPEAN
PRIVATE PLACEMENT
ASSOCIATION

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Email: Tony.Sadler@hmrc.gsi.gov.uk;
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Dear Mr Sadler and Mr Lafone,

Income tax: deduction at source from interest paid on private placements

1. The European Private Placement Association ("EUPPA") is an organisation focussing on the interests of institutional investors in private placement markets across Europe. It represents a community of investors and financial institutions who share information and work towards the development of industry standards in the Pan-European Private Placement market.

2. The EUPPA has been represented in the working groups established by ICMA and LMA (e.g. the steering committee of the ICMA-led Pan-European Private Placement Working Group).

3. The EUPPA very much welcomes the steps taken by HMT and HMRC in reducing the barriers to the development of efficient private placement market in the UK. Some European jurisdictions already have withholding tax exemptions that cover most private placements (e.g. France and Ireland) or do not impose withholding on this kind of interest (e.g. Germany and The Netherlands). However many others have no exemption applicable to private placements, and we would hope the UK's approach encourages those jurisdictions to adopt a similar approach. Clearly the more consistent the approach taken by different taxing jurisdictions, the more likely it is that an efficient market will develop.

4. We are grateful for the opportunity to comment on the Technical Note published on 3 December 2014. That said, there are elements of the proposal which limit the

proposed exemption in a way that we believe is incompatible with how the private placement market is likely to develop. These limitations risk making the exemption of limited use, and the private placement market being fragmented between UK and non-UK deals. Our strong preference is for the exemption to be as simple and straightforward as possible, with technical UK-specific terminology and concepts only used where absolutely necessary.

5. We would note in particular the following points:

   (a) Whilst not entirely clear, it appears to be the intention to limit the exemption to private placements that take the form of note issuances rather than lending. We would strongly recommend that this limitation is removed. Whether a private placement takes the form of notes or lending will be dependent upon the particular commercial requirements of the investors and the borrower, but does not reflect any fundamental economic difference between the two. Treating the two forms differently from a tax perspective is in our view arbitrary and distortive. We do not believe this limitation is necessary from HMRC's perspective - if the concern is to prevent intra-group lending being "dressed up" as a private placement then that would be better negated by an anti-avoidance rule (of the kind already contemplated) than by restricting the form of the private placement.

   (b) The Technical Note suggests that the exemption will be limited to investors that are regulated persons. This seems to us unnecessarily narrow. The usual investors in a private placement will be primarily institutional investors such as insurance companies, fund managers and asset management companies (investing on behalf of funds or financial institutions). Whilst insurance companies will be regulated, many funds will not be (because, whilst retail funds are generally regulated, funds targeted at financial institutions and other non-retail investors are often not required to be regulated). The effect of this restriction may therefore be to put UK borrowers at a competitive disadvantage compared to borrowers in France and elsewhere. We would suggest that either this restriction is removed, or replaced with a wide "financial institution" concept that encompasses banks, insurance companies and other traditional financial institutions as well as funds and other all entities whose business is or includes the making of debt investments in unconnected companies.

(c) We appreciate that HMRC wishes to restrict the exemption to persons resident in appropriate treaty jurisdictions, however the creation of an ongoing certification requirement seems to us unnecessarily burdensome. It would be preferable to require recertification if status changes. More preferable still would be to leave the identity/residence of investors to be controlled contractually by the parties (e.g. through representations).

(d) The requirement that issuers are carrying on a trade, and that the securities be a "loan relationship of a company" is in our view too narrow and too technical – few foreign investors would appreciate the UK tax distinction between a trade and an investment business, or recognise the term "loan relationship". If the intention is simply to exclude private use of the exemption then a simple "trade or business" test would seem more practicable.

(e) If (contrary to the view we express in the above paragraph) HMRC does wish to limit the use of the exemption to entities carrying on an active trade, then it is important that such companies be permitted to seek private placement funding indirectly, with an SPV or holding company issuing the private placement debt, and then on-lending to the business. It will be appreciated that there are a variety of legal and commercial reasons why a business may not be able to issue directly (e.g. Companies Act restrictions on private limited companies or centralisation of group finance functions).

(f) The requirement that interest be at a "normal commercial rate" is also, we believe, unnecessarily technical and potentially difficult for investors to assess. If the intention is to exclude exotic instruments than that could be achieved by a simple requirement that the interest rate be fixed rate, floating rate or RPI linked. If the intention is to exclude non-arm's length arrangements then we would query if that is necessary, given that any interest in excess of an arm's length amount would be denied deductibility under the transfer pricing rules. Our preference would be no restriction here at all.

(g) The 30 year maximum term proposed in the Technical Note is, we expect, likely to be sufficient in the great majority of cases. There may, however, be some long term infrastructure financings which could go past 30 years – a 50 year limit would provide additional flexibility in this regard.

(h) The 3 year minimum term is not of itself problematic, but raises questions as to how it applies to the usual provisions requiring mandatory repayment in

certain specified circumstances (e.g. illegality). Provisions could be included clarifying this point, but our preference would be to avoid complication and simply eliminate the minimum term restriction (as we do not see it as necessary to protect HMRC).

(i) Given the variety of different businesses that will seek to use the exemption, we would suggest a higher maximum than the proposed £300m. £1bn would seem to us more appropriate, although it is not apparent to us why any maximum is required. We assume these figures relate to individual issuances (and not the total debt outstanding at any one time).

(j) We assume that the exemption will apply to all interest paid from the date the exemption comes into force, and not be limited to securities issued from that date. It would be helpful to clarify this.

6. Please let us know if it would be helpful to discuss any of the above more fully.

Yours sincerely,

Calum Macphail
Board Member
European Private Placement Association