Stamp Taxes on Shares Policy Team
HM Revenue and Customs
Room 3/63
100 Parliament Street
London
SW1A 2BQ

By email

21 June 2023

Consultation on Stamp Taxes on Shares modernisation

Dear Sir/Madam,

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the consultation on Stamp Taxes on Shares modernisation.

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

We support the principle of a single tax on securities and the approach set out in the consultation document. We welcome the opportunity to modernise and simplify the legislation.

Intermediary relief under FA 1986 s.88A has worked well in promoting market liquidity and has adapted well to the ever-changing landscape of trading venues and the associated regulations. We suggest in our responses below ways in which the relief can be simplified, and implementation made easier.

We note that the consultation does not consider including the 1.5% charge on the transfer of securities to a clearance service or depositary receipt issuer, which will be addressed later. We have therefore excluded any reference to the 1.5% charge in our responses, but we look forward to discussing the topic in the future.

Our responses to the consultation questions are included as an Appendix to this letter.

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We would be happy to provide further information on the above points or to discuss on a call or at a meeting.

Yours faithfully,

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Appendix

CONSULTATION ON STAMP TAXES ON SHARES MODERNISATION

Question 1: Do you agree that the government should pursue a single tax on securities instead of maintaining two separate taxes?

Yes. We support a single tax on securities, with legislation consolidated into a single Act. We also agree that the framework for the single tax should in broad terms be based on the SDRT rules rather than the stamp duty rules, given that the latter contains a number of antiquated elements which are difficult to apply to modern business practices.

Question 2: Do you agree that any new single tax should be self-assessed with transactions that are not processed through CREST being reported and paid via a new HMRC online portal?

Yes. We agree that a new tax should be self-assessed and that transactions not processed through CREST should be reported via a new HMRC online portal. We request that detailed guidance should be provided on the new online portal prior to its release, so that potential users can provide feedback before the portal goes live.

However, we would like to maintain existing operational processes such as being able to make SDRT payments to HMRC via SWIFT directly (essentially where payment has not been made via CREST for any number of reasons, including where incorrect CREST flags have been used, or manual processes mean that SDRT payments cannot be made via CREST).

Question 3: Do you agree that having a non-statutory pre-clearance system is an appropriate approach? If not, why not?

Yes. We would suggest that HMRC guidance should set out in detail what the non-statutory clearance system covers and how the process works. As stated in our response to Q2, any guidance should be published in draft for consultation to ensure that all areas are covered.

Question 4: Do you agree that the need for a UTRN to be presented to registrars is an appropriate assurance and detection measure to have in place?

Yes. A UTRN can be presented to registrars to enable them to register the transfer. If the wrong amount of stamp is paid, tax and penalties can be assessed against the taxpayer, but the conveyance is still valid.

We do not think it is appropriate to place undue obligations and consequences on registrars. They can refuse to register a conveyance unless they have appropriate evidence the UK SDRT is paid (i.e., the UTRN) but they should not be liable if the UTRN was issued incorrectly due to the incorrect payment of tax.

Question 5: Do you agree with the proposed approach in respect of the liable and accountable persons? If not, why not and what would you suggest instead?

Yes. We agree that the current arrangements should be retained for CREST transactions. We agree that the purchaser should be the liable and accountable person for non-CREST transactions. We note that this may impact the tax charging and payment process for some transfers outside of CREST (e.g., where a fund transfers securities between its sub-funds, where there is no movement of physical securities and therefore no CREST transaction) where currently the intermediary is seen as the accountable party.

Question 6: Do you agree that a single charging point as outlined can work and is the correct approach in any new single tax? If you do not think it is the best approach, what would you propose and why?

Yes. We would suggest retaining trade date as the charging point for transactions settling in CREST. This has the effect that SDRT is currently charged on trades that are executed, but which are cancelled prior to settlement. We would suggest that a refund mechanism be introduced to cover the situation where an error has been corrected before a trade has settled.

Question 7: Do you agree that a single accountable date of 14 days from the charging point would work and is the correct approach? If not, what would you do differently and why?

We support a single accountable date of 14 days from the charging point.

Question 8: Do you agree that the current SDRT geographical scope rules should apply to any new single tax on security transactions? If not, what would you suggest and why?

Yes. We agree that the geographical scope should be as for SDRT, and the stamp duty geographical scope rules should be abolished. However, we believe that the definition of "chargeable securities" should be amended so that only shares (or debt with equity-like features) issued by UK incorporated companies are in scope i.e., non-UK securities registered on a UK register or paired with UK shares are not in scope. It is easy to identify listed shares issued by UK companies but difficult to establish if there are UK share registers or if shares are paired.

Question 9: Do you agree it is not necessary to define where an electronic share register is kept under any new single tax on securities? If not, why not?

Yes. As discussed in our answer to question 8, we do not think that the location of a share register is an appropriate mechanism to determine if a share is in scope, and it would add unnecessary complexity to the rules. The scope of the tax should be limited to shares in UK incorporated companies (or equity-like debt issued by those companies), and therefore the location of an electronic share register (or any share register) would no longer be relevant.

Question 10: Do you agree that the proposed scope is appropriate, captures what you would expect it to capture and excludes what you would expect it to exclude?

Yes. We support scoping the tax in a clear and pre-defined way rather than having wide definitions and then having a list of exemptions – e.g., shares and equity like loans are in scope. This would simplify the legislation through enabling not just the removal of the loan capital exemption but also the various exclusions for debt in bearer form.

The consultation does not cover the stamp treatment of security tokens or exchange tokens, which the HMRC Manuals at CRYPTO24000 state are not likely to meet the definition of chargeable securities, although consideration may be required "on a case-by-case basis". We believe that if the legislation is to be modernised as proposed, the new legislation should provide clarity on when the transfer of a digital asset could be subject to stamp.

Question 11: Is there anything that is currently captured by Stamp Duty and SDRT that would not be captured through this approach to scope?

Transfers of securities issued by non-UK entities registered on a register kept in the UK or paired with UK shares. However, we do not believe that excluding these would materially affect the scope of the tax, and any loss of tax would be outweighed by the benefits of simplifying the scope.

Question 12: Do you agree that the government should explore a different approach to the loan capital exemption? Do you foresee any issues with such an approach?

Yes. We support scoping the tax in a clear and pre-defined way rather than having wide definitions and then having a separate list of exemptions.

Question 13: Do you agree that the granting of security interests is currently out of scope?

Yes.

Question 14: Do you think that the government should specify that the granting of security interests is out of scope in legislation and that it wouldn't open up any route for avoidance?

Yes. We support a specific exclusion for the granting of a security interest involving a transfer of title, as such transfers are intended to be temporary. These transactions should thus be exempt in the same way that temporary transfers of shares under repos and stock loans are exempt. Targeted anti-avoidance rules could be introduced to deal with any concerns that the exemption could be used to avoid tax.

Question 15: If we chose not to specify that the granting of security interests is out of scope, can you share how much time you would expect to spend establishing and showing the correct tax position for lenders and how often you would be likely to do this?

It is not feasible to estimate the time. However, we believe that the key point is that the new legislation should be drafted to exclude any known uncertainties or ambiguities in the existing legislation.

Question 16: Do you agree that non-UK fund equivalents should have an equal statutory footing to UK funds? What are the benefits and disadvantages of doing so in your view?

Yes. We support the existing treatment of in specie contributions and redemptions and believe that it is correct in law. We therefore think that the treatment for non-UK funds should match. We suggest that HMRC should publish a list of overseas funds which have an equivalent form to a UK unit trust. We would also suggest that the variance test could be made clearer and more targeted.

Question 17: Do you have any alternative suggestions for how the government might deal with in specie contributions and redemptions, bearing in mind the need to guard against significant losses to the Exchequer?

Question 18: Do you agree this is the correct approach to mergers? If not, why not and what would you propose? If you are proposing an alternative what are the benefits and disadvantages of that option?

Question 19: Do you agree that this is the correct way to deal with call options and warrants?

Yes. We agree that the grant of call options and warrants should be exempt from the new tax as there is no transfer of securities involved.

Question 20: Do you think that this treatment of options and warrants may open up any routes to avoidance?

We think that any potential avoidance (e.g., using off market premiums and low consideration for shares) could be tackled with targeted anti-avoidance rules which would treat the premium as part of the consideration for the shares.

Question 21: If you do not think the government's proposal is the correct way to deal with options and warrants, what would you do differently and why?

Question 22: Is there any reason why you think the government should not retain the existing treatment of land transactions that are currently in the scope of Stamp Duty rather than SDLT?

Question 23: Do you agree that taking partnership interests out of scope and dealing with any potential avoidance issues through anti avoidance legislation is the correct approach? If not, what approach do you think we should take, why, and how would that approach deal with any potential abuse?

Yes. We support taking partnership interests out of scope and using anti-avoidance legislation to deal with any potential abuse.

Question 24: Do you agree with this view on the payment of pension benefits and agree with the proposed approach?

Question 25: Do you think there is any potential for avoidance with the government's proposed approach to the payment of pension benefits?

Question 26: If you don't agree with the government's view on the payment of pension benefits and the proposed approach please explain why?

Question 27: Do you agree that life insurance policies would fall into scope and do you agree with the proposed approach? If not, why not?

Question 28: Do you support the proposal to use money or money's worth for consideration under any single STS tax?

Yes. We agree that the consideration should be money or money's worth.

Question 29: Are there any further instances that are not captured where transactions would be brought into scope where adding a charge would be disruptive that you think we should consider? When telling us of further instances, please illustrate the impact of adding a charge and the extent of the disruption.

Question 30: Are there any further instances where transactions would be brought into scope by using the SDRT definition of consideration that wouldn't naturally fit into the system as outlined that government needs to consider?

Question 31: Is there anything proposed in this section on consideration that could open up a route for avoidance?

Question 32: Do you agree with the government's proposals for dealing with uncertain and unascertainable consideration?

Yes.

Question 33: If not, how do you think we should deal with uncertain and unascertainable consideration for any single tax on securities?

Question 34: Do you agree with the reasoning behind the proposal to remove the de minimis? If not, what justification can you give for retaining it?

Yes. In the interest of administrative simplicity, we do not think a de minimis is required for the new tax.

Question 35: Is there anything that you do not think has been sufficiently considered in relation to the geographical application of intermediary relief?

Yes. Following Brexit, we do not see any reason for limiting intermediary relief to UK, EEA and Gibraltar based entities. We suggest that intermediary relief be available to broker dealers in countries with Double Tax Agreements with the UK.

Question 36: Do you think that the government should explore whether there is an easier way for intermediaries to apply or not apply intermediary relief to particular transactions?

Yes. We would like to retain the direct recognition of intermediaries by HMRC under FA 1986 s.80A/88A (1B) and (1C) based on the intermediary's activities rather than membership of a regulated market, a multilateral trading facility or a recognised foreign exchange. Existing HMRC approvals should continue to be valid. However, we suggest simplifying the operation of the relief under FA 1986 s.80A/88A (1) and (1A).

To claim relief under FA 1986 s.80A/88A (1A), an intermediary must be a member of a regulated market, a multilateral trading facility or a recognised foreign exchange, and recognised by that market/facility/exchange in accordance with arrangements approved by the Commissioners. It can be difficult for an intermediary to determine whether certain non-UK venues satisfy the qualifying condition, and it would be helpful for HMRC to publish a list of regulated markets, multilateral trading facilities and recognised foreign exchanges whose arrangements are approved by the Commissioners (similar to the list of recognised stock exchanges published for the purpose of ITA 2007 s.1005).

Under current rules, where an intermediary is a member of a regulated market or is directly approved as an intermediary by the Commissioners, relief applies to all transfers of securities to that intermediary (FA 1986 s.88A(1)). However, where an intermediary is only a member of a multilateral trading facility or a recognised foreign exchange the exemption will only apply to agreements effected on that facility/exchange (FA 1986 s.88A(1A)). We do not consider that there is any rationale for this distinction and would suggest that it is removed, so that an intermediary who is a member of a multilateral trading facility or a foreign exchange can claim relief for all transactions. This would simplify operations and promote liquidity by improving the confidence of intermediaries to operate across a number of venues without unexpected tax charges.

We would also suggest that HMRC should publish a list of recognised intermediaries on their website so that firms can use it for internal checks.

One of the requirements for Intermediary Relief in FA 1986 s.88A (and for stock lending relief in FA 1986 s.89AA) is that the securities are "regularly traded". Euroclear publishes a list of securities that are regularly traded, which is available to market participants, but there are occasions when HMRC will have a different view on which securities are regularly traded. We suggest that intermediaries should be able to rely on the list published by Euroclear.

We would appreciate further clarity on the definition of excluded business in FA 1986 s.80A(5) and s.88A(5), specifically to explain what is meant by "wholly or mainly" in s.80A and s88A (5)(a) and (b) and to confirm that activity which falls short of "wholly or mainly" will not cause an intermediary to lose its intermediary relief if stamp is paid on the relevant transactions.

The current legislation makes it difficult for a branch or a division of an entity to qualify as an intermediary, as it is necessary to determine whether any excluded business is conducted by any part of the entity anywhere around the world. As a result, application must be made to HMRC for a ring-fenced exemption for part of the business. We suggest that the new legislation should address this by allowing a separately identifiable part of a company that does not carry on an Excluded Business to be able to qualify as an intermediary.

Question 37: Is there any reason why you think the government should change the geographical application of Stock lending and repurchase relief that it may not be aware of?

Yes. As with intermediary relief we would support an extension of stock lending and repurchase relief to broker dealers in countries with Double Tax Agreements with the UK.

Question 38: Do you agree that this is the correct approach to debentures? If not, why not and what would you do differently?

Yes. There is no need for a specific exclusion for debentures if the scope of the tax is shares and equity like loans.

Question 39: Do you agree that this is the correct approach to share buybacks? If not, why not and what would you do differently?

Question 40: If outlining an alternative approach to share buybacks, what are the benefits and disadvantages of that approach?

Question 41: Do you agree that we should include group relief in any new single tax?

Yes. We recommend that group relief should be available on a self-assessed basis rather than through the current complex system of adjudication.

For transactions settling in CREST, the relevant exempt CREST TSS would be input (TSS Flag 3*no SDRT liability, intra-group transfer) by self-assessment, without the need for a letter of direction to have been adjudicated as exempt by the Stamp Office.

For transactions not settling in CREST, relief could be claimed through the new HMRC portal so that the transfer can be registered by the registrar against production of a UTRN.

If the relief is not to be self-assessed, we recommend that the current 30-day time limit is maintained, with no need for adjudication prior to flagging with CREST TSS Flag 3.

Question 42: Do you agree that the government should include reconstruction and acquisition reliefs in any new single tax?

Yes.

Question 43: Is there anything you would like to highlight with regards to making the legislation for reconstruction and acquisition reliefs clearer?

Question 44: Do you agree that the growth market exemption should be retained under any new single tax? If not, why not?

Yes.

Question 45: In light of the consideration of reliefs and exemptions and their continued functionality, are there any market developments that should be considered?

Question 46: Do you agree that the compliance regime as outlined above is appropriate and proportionate for any new single tax on shares?

Yes. We agree with retaining the existing penalty regime. We support the proposals for 'first time' incidents, given the potential under the current rules for an inadvertent mistake to result in the accumulation of substantial penalties before the error is discovered.

Question 47: If not, what do you think should be different, how would you change the proposed compliance regime and why?

Not applicable.

Question 48: Do you agree that these provisions are now redundant and no longer needed? If not, can you explain why not including them in legislation for any new single tax would be an issue?

Yes, we support the simplification of the tax legislation and the repeal of redundant provisions.

Question 49: Are there any other existing provisions that are now redundant and no longer needed?

Question 50: Are there any other existing provisions that do not work in practice?