

A practical guideline on the amended savings tax

THE
EU SAVINGS TAX
ON UNTAXED
**FOREIGN ENTITIES &
LEGAL ARRANGEMENTS**



*The impact on out
of territory trusts,
foundations,
partnerships,
companies and
nominees*

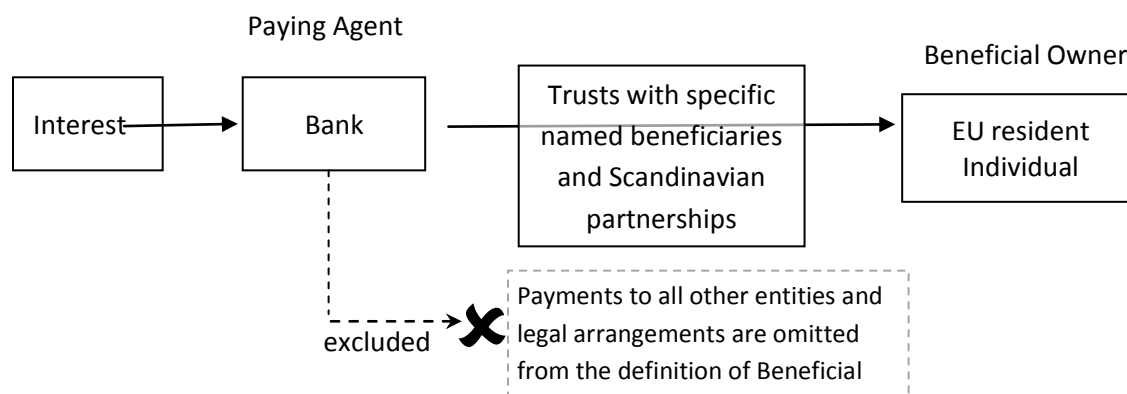
A primer for the wealth management industry utilising fiduciary
structures established outside the savings tax jurisdiction



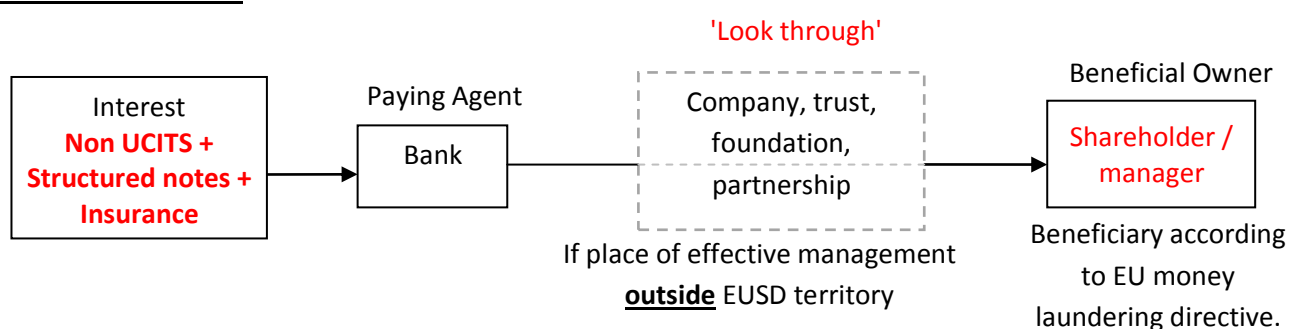
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1. Summary

Current directive on interest paid to entities / arrangements outside savings tax territory



Amended directive



The bank as Paying Agent must look through an entity or legal arrangement if it is effectively not taxed and place of effective management is outside the territory of the EU savings tax directive.

The bank, as Paying Agent must determine the Beneficial Owner according to the 3rd EU money laundering and anti terrorist financing directive.

1.1. For a company:

The Beneficial Owner of a company is:-

- ◆ any shareholder who owns more than 25% equity of a company, or
- ◆ alternatively, it is the natural person(s) who exercises control over the management of an entity

1.2. For a Trust / Foundation:

The Beneficial Owner of a trust or foundation is:-

- ◆ where the future beneficiaries have already been determined, the natural person(s) who is the beneficiary of 25% or more of the property; or
- ◆ alternatively it is the natural person(s) who exercises control over 25% or more of the property of a legal arrangement (usually the principal settlor/ founder);

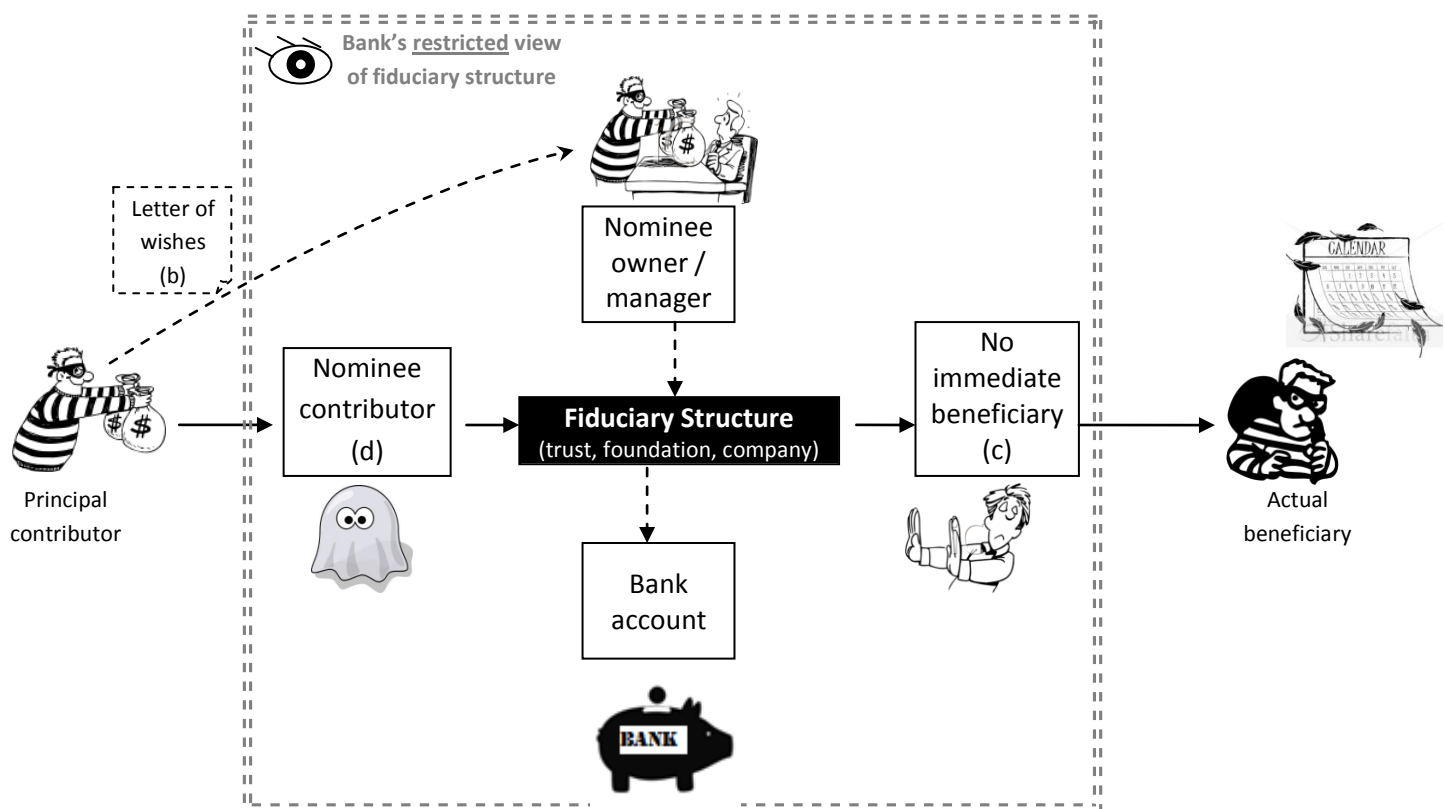
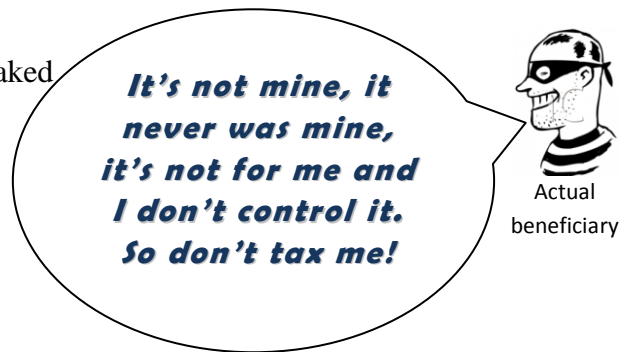
2. Entities and arrangements disguise the actual beneficial owner from tax agents

A prime goal of a tax planner advocating structures such as trusts, foundations, offshore companies and nominees is to separate legal ownership of the assets from the actual beneficiary.

However, paperwork to establish the bank account disguises the actual beneficiary and principal contributor. The beneficial owner seemingly does not contribute, own, control or be entitled to the assets.

To disguise the actual beneficial owner, the fiduciary structure is established so that:-

- 2.1 Legal ownership of assets is given away
- 2.2 Continued control of assets through a nominee
- 2.3 Immediate entitlement to income is delayed or faked
- 2.4 Original source of assets is masked

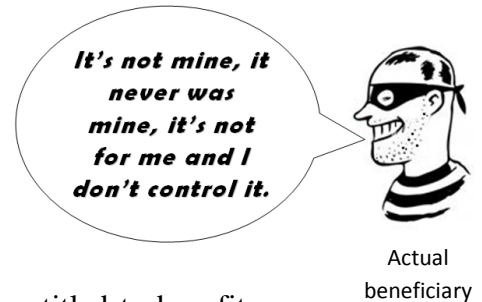


These structures, to date, have successfully avoided international taxes as they are crafted to present an image that no party involved can have a tax liability. This is done in seven stages:-

2.1 Separate legal ownership from principal contributor

If it's not yours, you can't be taxed.

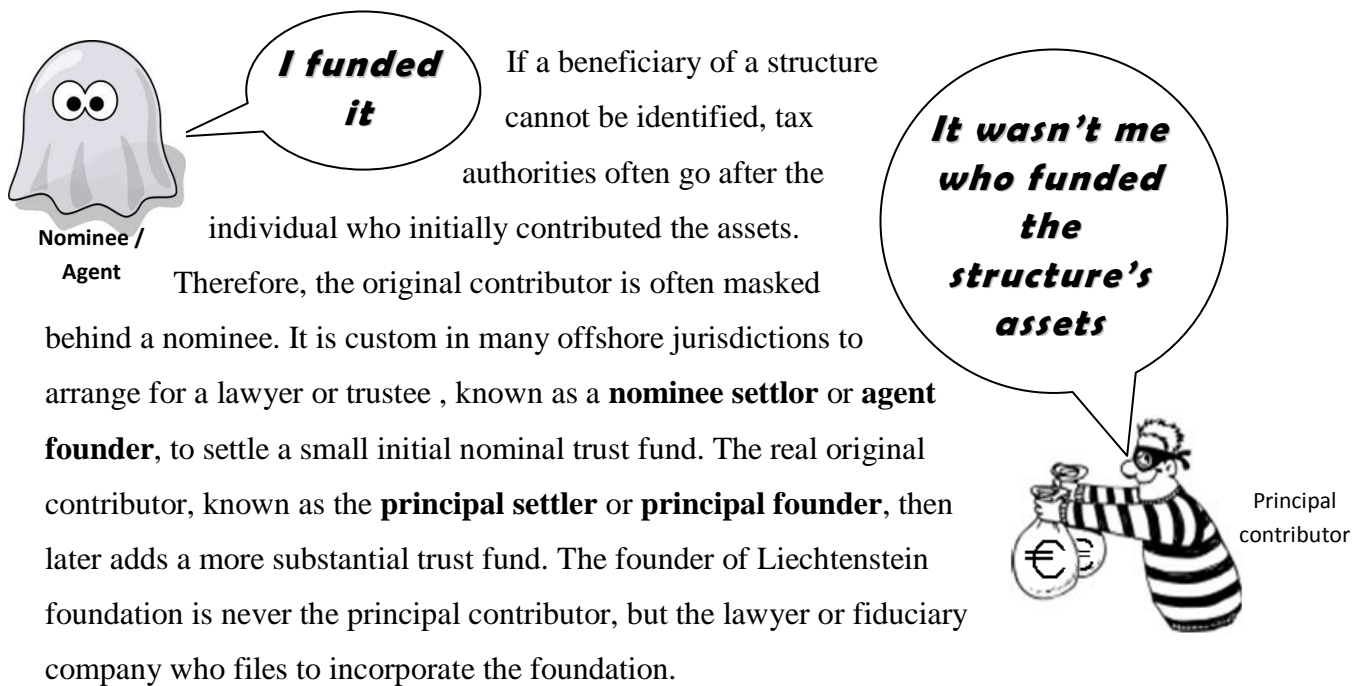
The prime goal of a fiduciary structure is for the principal contributor to give legal ownership of his assets away to a nominee owner, yet still influence how it is utilised. Trustees may have legal ownership of the assets, but they are not personally entitled to benefit from the assets. Some structures don't even have any form of ownership of the assets except in a custodian role. Companies can use nominee shareholders to own the assets on behalf of the actual beneficiary. The “giving” of assets away may be contractually irrevocable to reinforce the concept that the assets no longer belong to the principal contributor.



Tax authorities may indeed accept that you no longer legally own the assets but will still look to see if you originally contributed the assets or still control the assets.

2.2 Mask the original source of assets

If it didn't come from you, you can't be taxed.



Nominee / Agent

I funded it

If a beneficiary of a structure cannot be identified, tax authorities often go after the individual who initially contributed the assets. Therefore, the original contributor is often masked behind a nominee. It is custom in many offshore jurisdictions to arrange for a lawyer or trustee, known as a **nominee settlor** or **agent founder**, to settle a small initial nominal trust fund. The real original contributor, known as the **principal settler** or **principal founder**, then later adds a more substantial trust fund. The founder of Liechtenstein foundation is never the principal contributor, but the lawyer or fiduciary company who files to incorporate the foundation.

It wasn't me who funded the structure's assets

Principal contributor

Many banks in the EU do not request the identity of the principal contributor of a fiduciary structure, thus allowing the contributor to escape tax liability

2.3 Disguise control

If you don't control it, it's not yours.

The principal contributor most likely wants to influence how the assets given away are to be utilised. (Otherwise why give it away?). The problem is that tax authorities may deem the original owner of the assets as a beneficiary if he is still controls the assets supposedly given away. If you control the assets that you supposedly gave away, then you really haven't really given up ownership.

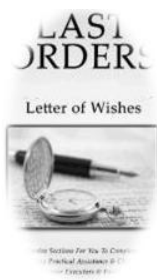
**I control
the
assets**

Principal
contributor



The principal contributor continues to control the assets indirectly and surreptitiously via arrangements and facilities to associated with fiduciary structures such as undisclosed *letter of wishes*, unregistered bylaws, appointing a *protector*, etc.

Generally, no-one outside the fiduciary structure knows the principal contributor still controls the assets.



2.4 Utilise a temporary holder / manager of the assets

Manager does not beneficially own the assets but may have legal ownership.

The custodian of the asset has a role to manage the assets on behalf of beneficiaries at the direction of the principal contributor. In some structures, the manager such as a trustee has legal ownership of the assets but cannot benefit from the assets. In some structures, there is no owner of the assets such as a Liechtenstein foundation or establishment. Generally the trustee / manager of the assets are not taxed because the assets are for the benefit of someone else, who may or may not be identifiable.



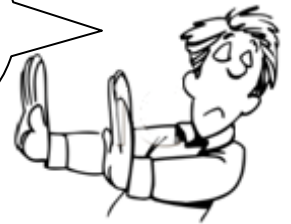
Offshore trustees and foundation councils are generally not taxed on the income of the structure.

2.5 Ensure no beneficiary is immediately entitled to income

If it's not for you now, you can't be taxed now.

The beneficiary will be taxed if he is immediately entitled to the structure's income. Therefore the structure is setup to ensure that the beneficiary is not immediately entitled to the income. The nominee owner will claim to have discretion in deciding who and how much is paid to a future unnamed beneficiary.

I am not an immediate beneficiary, yet



If an immediate beneficiary is not identifiable, nobody will be taxed.

2.6 Perform alchemy on income before distribution

Charity begins at home.

Fiduciary structures may fake a beneficiary by paying nominal amounts to a stated charity beneficiary but pay the beneficiary upon windup or according to the undisclosed letter of wishes. The charity is then presented as the sole beneficiary to tax agents, allowing the actual beneficiary to escape tax liability.



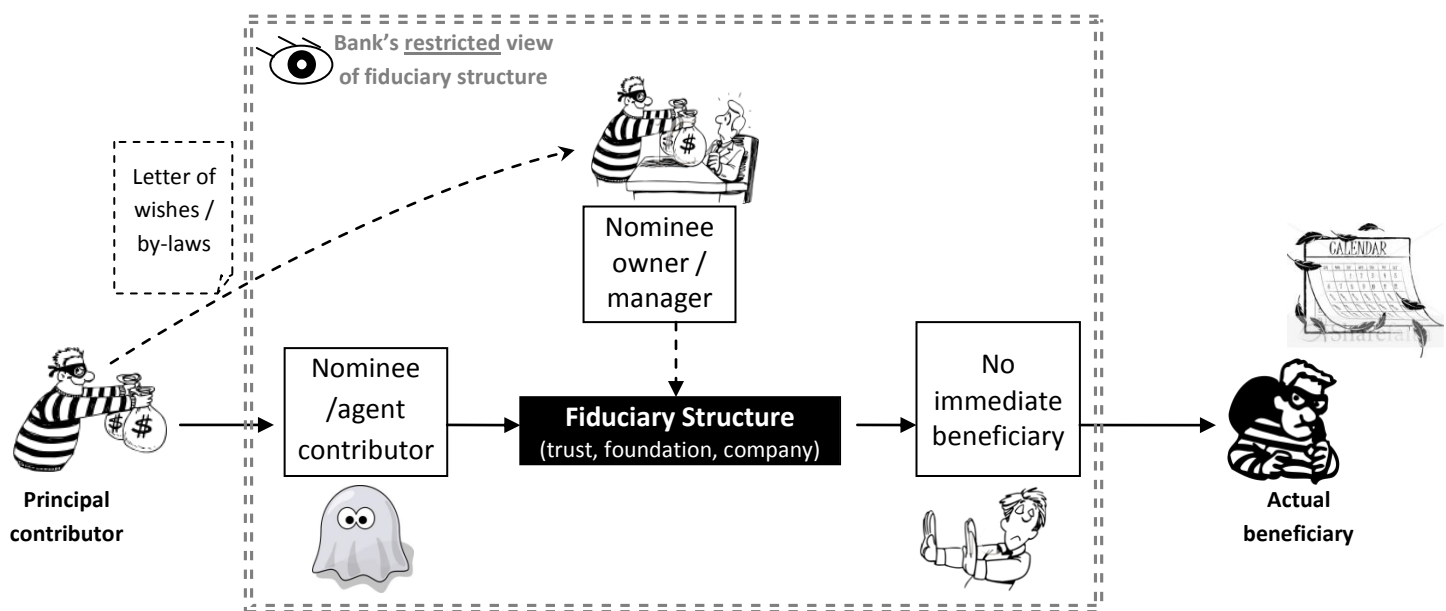
Other methods to avoid income tax is to delay distribution of income secured for several years and convert the income into a capital gain, wage, loan, consulting fee, etc.

A long term delay in distribution enables the controller to change the character of income payment received by the fiduciary structure to a more tax beneficial such as loan or capital

2.7 Present restricted view of structure to bank

They can't snitch on what they don't know

The bank holding the structure's account is the Paying Agent responsible for applying the savings tax. However, with a restricted view presented to the bank, a beneficial owner cannot be identified. As no-one supposedly owns the assets, the bank cannot apply the savings tax.



3. EU savings tax tackles fiscal abuse by foreign entities and arrangements by using EU money laundering directive to identify beneficiaries




3.1. Foreign structures: Annex I of the revised EU savings tax directive contains a list of entities and legal arrangements not subject to effective taxation* and are effectively managed** outside the directive's territory. Any interest paid to these structures is assumed to be for the benefit of its beneficial owners.

3.2. Indicative list - entities and legal arrangements not listed in Annex I:

Annex I is merely an indicative list. If interest is paid to an entity or legal arrangement established outside the savings tax territory which is not listed in Annex I, it is up to the Paying Agent to determine if such a structure levies taxes on interest on the beneficial owner, with particular focus on the fiscal treatment of non residents.

So for instance, if a Paying Agent makes a Payment to a Israeli non-resident trust, or Sechelles foundation, New Zealand limited partnership, Jamaican offshore company, etc. None of which are listed in Annex I, the Paying Agent must still look through these untaxed structures at the beneficial owner.

Invariably, fiduciary structures are not required to publically file beneficial ownership. However banks, these days have a "know your client" responsibility to find out:-

Paying Agent 	i.	Info on the actual beneficiary, even if information is only available through a nominee shareholder or in an undisclosed letter of wishes/ byelaw.	
	ii.	In the case of trusts and foundations, always request info on the principal contributor who directly or indirectly provided the assets. This is required for two reasons: <ul style="list-style-type: none"> ◆ Needs to know the source of funds ◆ The contributor invariably has control over the trustees / foundation council./ 	



4. Paying Agent responsibilities

Look through: The payment shall be regarded as having been made to, or secured for, the immediate benefit of any individual, who is resident in a Member State other than that of the economic operator as the beneficial owner of the entity or legal arrangement. The identity of that individual shall be established in accordance with the customer due diligence measures provided for in the EU directive on anti money laundering and terrorist financing.

4.1. For a company:

The Beneficial Owner of a company is:-

- ◆ any shareholder who owns more than 25% equity of a company, or
- ◆ alternatively, it is the natural person(s) who exercises control over the management of an entity:

4.1.1 Nominee / agent shareholders

It is expected that banks as Paying Agents must look through a nominee / agent shareholder of a company according to the EU money laundering directive. It is inconceivable today that a bank would ignore the “know your client” requirements and accept a nominee / agent as the de facto Beneficial Owner.



4.2. For a Partnership

- ◆ The Beneficial Owners of a partnership are ordinarily, the principal general partners
- ◆ Additionally, any limited partner entitled to at least 25% of the assets is a Beneficial Owner



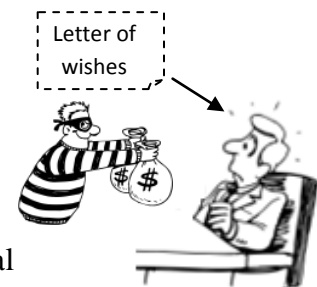
4.3. For a Trust / Foundation:

The Beneficial Owner of a trust or foundation is:-

- ◆ where the future beneficiaries have already been determined, the natural person(s) who is the beneficiary of 25% or more of the property; or
- ◆ alternatively it is the natural person(s) who exercises control over 25% or more of the property of a legal arrangement (usually the principal settlor/ founder);

→ 4.3.1 Unidentifiable Beneficiary?

Bear in mind, the purpose of a trust / foundation is to disguise the beneficial owner. Therefore it is highly unlikely that a beneficiary is identifiable. If an entity or legal arrangement is effectively managed within the EU savings tax territory, and the beneficiary is not identifiable, then the directive explicitly states the Beneficial Owner is the individual who directly or indirectly contributed the assets, i.e. the principal contributor.



However, for entities and legal arrangements effectively managed outside the savings tax territory, the principal contributor is not specified as a Beneficial Owner if the beneficiary is unidentifiable.

This is a weakness of the directive, which will most likely be covered in the second review.

5. If place of effective management is within EU savings tax territory

The place of effective management determines if the entity or legal arrangement is subject for look through by the bank or itself becomes a Paying Agent Upon Receipt. This means that a entity / legal arrangement established outside the EU savings tax territory can become a Paying Agent Upon Receipt if the effectively managed within the EU savings tax territory:

5.1 **Company / Foundation / Partnership** – Place of effective management of an entity, with or without legal personality, shall mean the address where key management decisions are taken that are necessary for the conduct of the entity's activity as a whole. Where key management decisions are taken in more than one country or jurisdiction, the place of effective management shall be considered to be at the address where most of the key management decisions are taken relating to the assets producing interest payments within the meaning of this Directive;

E.g. Panama IBC with directors based in Switzerland is a Paying Agent Upon Receipt.

5.2 **Trust** - Place of effective management of a trust or other legal arrangement shall mean: The permanent address of the natural person who has the principal responsibility for the key management decisions relating to the assets of the legal arrangement, in the case of a trust the trustee. Where more than one natural person has such principal responsibility, the place of effective management shall be considered to be at the permanent address of the person who has the principal responsibility for most of the key management decisions relating to the assets producing interest payments within the meaning of this Directive, or

E.g. Singapore trust with trustee based in Liechtenstein is Paying Agent Upon Receipt.

5.3 **Discretionary mandate managed account** – If a bank account out of savings tax territory is under a discretionary managed agreement by a bank within the savings tax territory, then this legal arrangement becomes a Paying Agent Upon Receipt.

APPENDIX

This is only an indicative list of entities and legal arrangements whose place of establishment or place of effective management is in a country or jurisdiction outside the territorial scope of the EU savings tax.

Place of effective management of an entity, with or without legal personality, shall mean the address where key management decisions are taken that are necessary for the conduct of the entity's activity as a whole. Where key management decisions are taken in more than one country or jurisdiction, the place of effective management shall be considered to be at the address where most of the key management decisions are taken relating to the assets producing interest payments within the meaning of this Directive;

Place of effective management of a trust or other legal arrangement shall mean the permanent address of the natural person who has the principal responsibility for the key management decisions relating to the assets of the legal arrangement, in the case of a trust the trustee.

Subject to effective taxation shall mean that an entity or a legal arrangement is liable to tax on all its income, or on the part of its income attributable to its non-resident participants, including on any interest payments. A taxation at a zero rate, shall in any case be considered to be not subject to effective taxation.

Countries and jurisdictions	Categories of entities and legal arrangements
Antigua and Barbuda	<ul style="list-style-type: none"> • International business company
Anjouan (Comores)	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • International business company
The Bahamas	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • Foundation • International business company
Bahrain	<ul style="list-style-type: none"> • Financial trust, governed by local or foreign law
Barbados	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • International business company • International Society with Restricted Liability
Belize	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • International business company
Bermuda	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • Exempt company
Brunei	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • International business company • International trust • International Limited Partnership
Cook Islands	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • International trust • International company • International partnership

Costa Rica	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • Company
Djibouti	<ul style="list-style-type: none"> • Exempt company • Trust, governed by foreign law
Dominica	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • International business company
Fiji	<ul style="list-style-type: none"> • Trust, governed by local or foreign law
French Polynesia	<ul style="list-style-type: none"> • Société (Company) • Société de personnes (Partnership) • Société en participation (Joint venture) • Trust, governed by foreign law
Grenada	<ul style="list-style-type: none"> • International business company • Trust, governed by local or foreign law
Guam	<ul style="list-style-type: none"> • Company • Sole proprietorship • Partnership • Trust, governed by foreign law
Guatemala	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • Fundación (Foundation)
Hong Kong	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • Private Limited Company
Kiribati	<ul style="list-style-type: none"> • Trust, governed by local or foreign law
Labuan (Malaysia)	<ul style="list-style-type: none"> • Offshore company • Malaysian offshore bank • Offshore limited partnership • Offshore trust
Lebanon	<ul style="list-style-type: none"> • Companies benefiting from the offshore company regime • Trust, governed by foreign law

Liberia	<ul style="list-style-type: none"> • Non-resident company • Trust, governed by local or foreign law
Macao	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • Fundação (Foundation)
Maldives	<ul style="list-style-type: none"> • Company • Partnership • Trust, governed by foreign law
Northern Marianas Islands	<ul style="list-style-type: none"> • Foreign sales corporation • Offshore banking corporation • Trust, governed by foreign law
Marshall Islands	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • International business company
Mauritius	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • Global business company cat. 1 and 2
Micronesia	<ul style="list-style-type: none"> • Company • Partnership • Trust, governed by foreign law
Nauru	<ul style="list-style-type: none"> • Trust • Nominee company • Company • Partnership • Sole proprietorship • Foreign will • Foreign estate • Other form of business negotiated with the Government
New Caledonia	<ul style="list-style-type: none"> • Société (Company) • Société civile (Civil company) • Société de personnes (Partnership) • Joint venture • Estate of deceased person • Trust, governed by foreign law
New Zealand	<ul style="list-style-type: none"> • Trust, governed by foreign law

Niue	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • International business company
Panama	<ul style="list-style-type: none"> • Fideicomiso (Trust, governed by local law) • Trust governed by foreign law • Fundación de interés privado (Foundation) • International business company
Palau	<ul style="list-style-type: none"> • Company • Partnership • Sole proprietorship • Representative office • Credit union (financial cooperative) • Cooperative • Trust, governed by foreign law
Philippines	<ul style="list-style-type: none"> • Trust, governed by local or foreign law
Puerto Rico	<ul style="list-style-type: none"> • Estate Trust, governed by local or foreign law • International banking entity
Saint Kitts and Nevis	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • Foundation • Exempt company • Exempt Limited Partnership
Saint Lucia	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • International business company
Saint Vincent and the Grenadine	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • International business company
Sao Tomé e Príncipe	<ul style="list-style-type: none"> • International business company • Trust, governed by foreign law
Samoa	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • International trust • International company • Offshore bank • Offshore insurance company • International partnership • • Limited partnership
Seychelles	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • International business company

Singapore	<ul style="list-style-type: none"> • Trust, governed by local or foreign law
Solomon Islands Company	<ul style="list-style-type: none"> • Partnership • Trust, governed by local or foreign law
South Africa	<ul style="list-style-type: none"> • Trust, governed by local or foreign law
Tonga	<ul style="list-style-type: none"> • Trust, governed by local or foreign law
Tuvalu	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • Provident fund
United Arab Emirates	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • Offshore company
USA	<ul style="list-style-type: none"> • State of Delaware - Limited Liability Company • State of Wyoming - Limited Liability Company
US Virgin Islands	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • Exempt company
Uruguay	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • Sociedad Anónima Financiera de Inversión
Vanuatu	<ul style="list-style-type: none"> • Trust, governed by local or foreign law • Exempt company • International company