FASTER, but softer: How the Council lowered the standards to make a quick match

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On 14 May 2024, the Economic and Financial Affairs Council (ECOFIN) agreed on a general approach on a draft directive on Faster and Safer Relief of Excess Withholding Taxes (FASTER) (hereafter the draft Directive). This political match was only possible due to the increased flexibility guaranteed under the text prepared by the Belgian presidency of the Council, as some Member States could not anticipate any benefits from the implementation of new rules on this matter in their national context.

The text agreed upon is not yet final: firstly, because it will still be subject to a legal linguistic revision (which should not modify its content); but especially, because the European Parliament will be reconsulted due to the substantial differences between the draft text and the Commission's proposal, which the European Parliament has provided its views upon in its first opinion. Even though the European Parliament's opinion is non-binding, this new consultation could culminate in recommendations that the Member States may still be open to include in the text, before the formal adoption.

The draft text that gathered consensus between the Member States should, however, be very close to what will become EU law, and we should now be able to identify the minimum standards of harmonization.

So what are the main differences from the initial proposal, and what do they mean? What are the main options available to Member States?

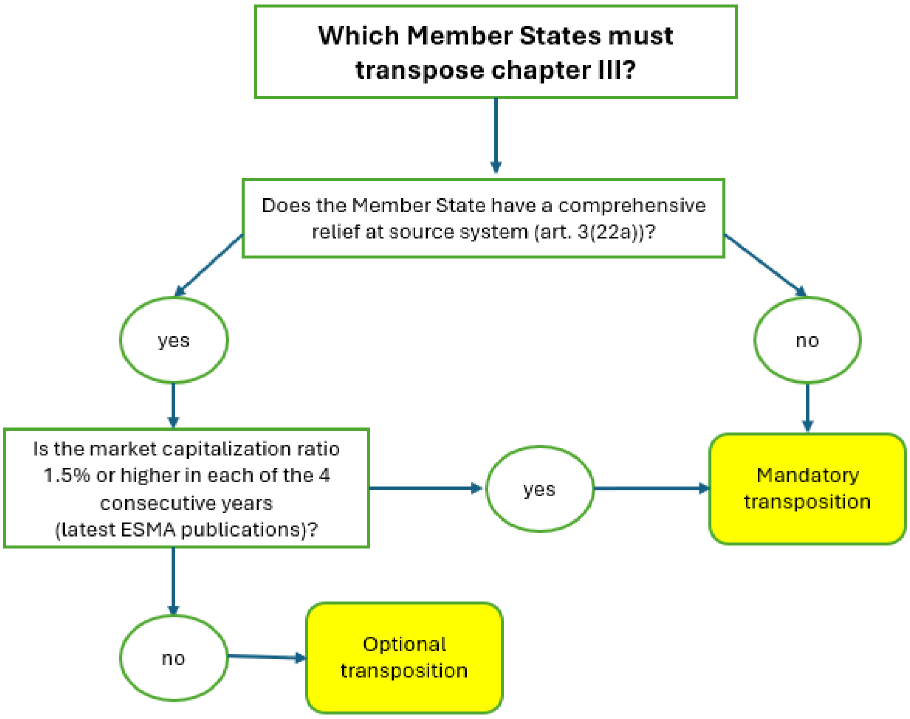
1. Scope and structure of the draft Directive

The draft directive is divided into two main chapters, providing for rules on:

(1) The issuance of an EU-wide digital tax residence certificate (eTRC) by Member States (chapter II of the draft Directive); and

(2) The procedure to relieve excess withholding tax withheld by a Member State on dividends from publicly traded shares (or, where applicable, interest from publicly traded bonds) paid to non-residents of that Member State (chapter III of the draft Directive).

While the rules on the eTRC will apply throughout the European Union, the rules regarding the relief of excess withholding tax on dividends are optional for some Member States. The transposition of chapter III is not mandatory if the relevant domestic system provides for the relief of excess withholding tax on dividends paid for publicly traded shares issued by a resident through a comprehensive relief at source system, as defined in the draft directive, *and* the Member State's market capitalization ratio – which correlates with the size of the economy – is below 1.5% (as published by the European Securities and Markets Authority from 2026 at latest) (*see* table below).



If an initially excluded Member State reaches or surpasses the established market capitalization ratio for 4 consecutive years, the procedures provided in the draft directive become mandatory and irrevocably applicable within 5 years.

The Commission proposal did not foresee this flexibility in the implementation of the Directive. It aimed for the harmonization at the EU level of the relief procedures of excess withholding tax on dividends for publicly traded shares (while keeping the relief of interest paid for publicly traded bonds at the discretion of the Member States), which the Council, however, did not manage to achieve.

2. Digital tax residence certificate

Member States will have to put in place an automated process to issue digital tax residence certificates (eTRCs).

The draft Directive provides the rules for issuance of the eTRCs and the information they must include. It also requires Member States to recognize eTRCs issued by another Member State as valid proof of residence therein and to foresee the obligation for taxpayers to inform the tax authorities about any relevant changes that may affect the information in an eTRC.

Also here, the Council lowered the ambitious standards proposed by the Commission, notably by extending the issuance deadlines and limiting their validity.

	Commission's proposal	European Parliament Opinion	Council General Approach
eTRC issued in …	1 working day	3 working days; if more time is needed, should not be longer than 5 working days.	14 calendar days
eTRC is valid for …	At least for the whole year of issuance	At least for the whole year of issuance	For a maximum of 1 year

3. Withholding tax relief procedures

Certified Financial Intermediaries

All Member States that apply Chapter III must establish a national register of Certified Financial Intermediaries (CFIs), in which all relevant institutions are required to register. The obligation will encompass large financial sector entities as defined in the Capital Markets Regulation – e.g. those handling payments of dividends and interest on securities – or central securities depositories that act as withholding tax agents for the same payments. Member States may go further than what is established in the Directive and include smaller financial intermediaries.

Registered CFIs are central actors in the draft framework, as they will be the ones required to request relief, under one of the available procedures, on behalf of the registered owners of investment accounts. This obligation is, however, dependent on the prior authorization by the owner of the request for relief on its behalf and the verification, by the CFI, of the owner's eligibility for relief, in accordance with the procedure established in article 11 (or article 13a, in the case of indirect investments) of the draft Directive.

National registers will be maintained and updated by a national competent authority, designated by the Member State. Information on CFIs will become publicly available through a web portal – the European Certified Financial Intermediary Portal.

Financial intermediaries do not have to be tax residents of the European Union in order to request registration, but, if there is no framework in place to ensure assistance in the collection of taxes in the residence state, Member States may require sufficient guarantees to ensure possible loss in relation to relief requests.

CFIs are required to report information to the Member State's competent authority regarding, at least:

- the person that is providing the information;
- the recipient of the dividend or interest payment;
- the payer of the dividend or interest payment;
- the dividend or interest payment; and
- application of anti-abuse measures to be fulfilled by the certified financial intermediary requesting the relief (not applicable to procedures related to interest paid on bonds).

CFIs that do not comply with their obligations as provided in the draft Directive can be held liable for the loss of withholding tax.

Fast-track procedures

There are two fast-track procedures: (i) a relief-at-source system; and (ii) a quick-refund system. These (one of them, or both) will coexist with the standard domestic relief procedures, so that taxpayers may have access to excess tax relief even where the access to fast procedures is limited.

In brief:

- The relief-at-source system allows CFIs to request the relief at source on behalf of the account owner by providing the withholding tax agent with information regarding the tax residence of the owner and the applicable withholding tax rate.

- Under the quick-refund system, CFIs provide to the Member State a set of information, notably on the registered owner, the dividend or interest and the legal basis for the applicable tax rate and amount to be refunded. Member States may decide to foresee, in their domestic legislation, grounds for rejection of quick-refund requests, such as incomplete information or the existence of verification procedures or tax audits.

Moreover, Member States may prevent access to fast-track procedures in a number of cases that represent a higher chance of fraudulent or abusive behaviour, such as transactions carried out very close to the ex-dividend date, claims of exemption of withholding tax or of a reduced tax rate not derived from tax treaties. Another point of flexibility proposed by the Presidency in the latest stages of the negotiation and that is now observed in the Directive is the possibility to exclude dividend payments exceeding a gross amount of EUR 100,000.

4. Final remarks

The negotiation of the draft Directive granted a degree of flexibility to the relief framework that was not foreseen in the Commission's proposal. The optional application of a broad section of the Directive and the provision of wider-ranging exclusions than initially foreseen comes at the expenses of the harmonization that the Commission had in sight when presenting the proposal.

The Commission, the European Central Bank and several Member States wanted more from this initiative. But it is better to lower one's standards and achieve some degree of convergence than to lose the possibility of making a match. Or is it not?

IBFD references

› For an overview of legislative initiatives at the EU level on direct tax matters from the moment they are planned by the European Commission until their adoption by the Council of the European Union, *see* the EU Direct Tax Law Initiatives Tax Dossier

› A. Xygka, *Can FASTER come any faster (pun intended)?*, EU Tax Focus (12 March 2023), IBFD

› J.J.A.M. Korving, *"BEFIT and HOT: FASTER and SAFE!" EU Law or Slogan for Slimming Pills?*, 63 Eur. Taxn. 12 (2023), Journal Articles & Opinion Pieces IBFD.

› P. Radcliffe & R. Devisscher, *FASTER: The European Commission Publishes a Proposed Council Directive Aimed at Improving the Withholding Tax Process within the European Union*, 63 Eur. Taxn. 8 (2023), Journal Articles & Opinion Pieces IBFD.

› For details on the Harmonization of Corporate Taxation in the European Union, *see* C. Valério & S. Kale, Direct Taxation, Global Topics IBFD.

› EU tax law developments are reported in the daily IBFD Tax News Service.