EU FASTER Proposal: Are we moving towards more efficient withholding tax procedures within the European Union?

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On 29 October 2024, IBFD broadcast a webinar on the FASTER Directive aiming to shed light on the question which has been associated with this proposal: will it lead to more efficient withholding tax procedures within the European Union or add an additional layer of complexity?

To approach the topic from all angles, IBFD managed to secure the participation of experts from the financial institution industry – Anzhela Popova, Global Head of Tax Product for Security Services at Citi Bank – and from tax practice – Paul Radcliffe, Partner at Ernst & Young LLP. The agenda of the webinar was divided equally between practical and theoretical questions behind FASTER so that tax experts, representatives of certified financial institutions and investors would grasp all the key items after having watched the session.

This note offers a mere glimpse into the webinar session's discussions, and the author strongly encourages watching the full session for deeper insights.

1. Underlying Problems and Policy Objectives

The issue that FASTER aims to solve is centred around withholding tax (WHT) refund claims arising for cross-border portfolio investors who hold publicly traded shares and bonds (and receive dividend/interest income that has been subject to WHT). In a situation in which investors are potentially entitled to lower WHT rates by virtue of a tax treaty or domestic law provision, the questions that often arise are how does that investor practically get that lower rate of WHT, how does the tax authority know that the investor is entitled to that rate and, finally, what would be the most efficient and correct process to obtain any tax refund due?

In a relatively recent study, it was found that 70% of investors do not engage in WHT refund procedures due to administrative complexities.

The goals behind FASTER can be condensed into three pillars which, while distinct, are in their essence very much intertwined:

1. boosting capital markets union: creating an effective single market so that capital (investment, savings, etc.) can flow across EU consumers/investors/companies;
2. reducing fraud: ensuring a fairer taxation and avoid cum-cum/cum-ex scandals sequels; and,
3. procedural improvements.

2. Key Concepts

EU digital tax residence certificate

FASTER aims to introduce an electronic tax residence certificate (eTRC) to be issued in a standardized digital format through an automated process. Member States have long waited for this moment, and while the full details of eTRCs are not yet known, the key principles are that:

- Member States have 14 days to issue them after receipt of the request;
- they must clearly state the relevant treaty based on which relief is sought; and
- they are valid for 1 year.

Due diligence and reporting obligations for certified financial intermediaries

The key players of FASTER are certified financial intermediaries (CFIs), as they will have to assume the obligations and carry the liability before the tax authorities under FASTER. CFIs are divided into two categories:

1. those that are required to register (in the CFI Portal, which is under construction) and participate: large institutions which handle dividend payments (e.g. custodians); and
2. those that do not fall into category (1), which can register voluntarily (even non-EU financial institutions can participate, as long as they are not in a country included on the EU list of non-cooperative jurisdictions). Financial intermediaries that do not register will be named as non-CFIs and will have to contractually agree with CFIs if they want to seek relief on behalf of their clients.

CFIs that do not comply with their obligations can be held fully liable for the loss of WHT.

CFIs requesting WHT relief on behalf of a registered owner must undertake due diligence processes, which practically entail obtaining a declaration filled with information that in turn translates into verifying the entitlement to relief, ensuring that the registered owner is also the beneficial owner of the income and confirming the absence of linked financial arrangements. This opens a Pandora's box of questions for CFIs, which are discussed in detail in the webinar.

In terms of reporting obligations, the basic questions are:

- who reports: only CFIs are liable to report, i.e. non-CFIs are not required to report;
- what should be reported: details of the recipient, the payer, payment details (minimum reportable data), the holding period and potential links to open financial arrangements; and
- how the reporting should be made: FASTER provides for two ways of reporting, and it is open to Member States to declare their preference:
    1. direct reporting: each and every intermediary in the chain reports to the tax authorities; and
    2. indirect reporting: every intermediary reports to its upstream agent until this reaches the withholding agent, who then reports to the tax authorities.

Fast-track withholding tax procedures

FASTER provides that Member States should have a relief-at-source process and/or a quick-refund process (to coexist with the standard domestic relief procedures).

In the former process, the registered owner will need to authorize the CFI to file a claim and provide a declaration that they are by all means entitled to a relief. Then, the CFI needs to perform its due diligence actions and, if all is in order, contact the WHT agent for the remaining steps.

In the latter process, the maximum amount of tax will be withheld at the time of the payment, and the CFI can then file, on behalf of the investor, a WHT refund with the tax authorities (also submitting the eTRC, a beneficial ownership declaration, etc).

3. Which Countries Are in, and What Should Affected Stakeholders Do?

It should be mentioned that some countries are largely exempt from FASTER if there is a comprehensive and functioning relief-at-source system in place and the market cap ratio is below 1.5%. If both these conditions are met, that country does not have to participate in certain parts of the Directive (the requirement for a CFI register and the reporting) but still has to provide the eTRC.

Are you an investor?

Cross-border investors are advised to be proactive and specifically discuss with their custodians how to approach FASTER and whether they will be their CFIs. Then, once CFIs start communicating their requirements and operating models, investors would need to fully understand them and be open to discussing more efficient procedures in terms of data sharing, liabilities and risks.

Are you a certified financial intermediary?

CFIs are key elements of FASTER, which in a way seems a lot but also provides them with a competitive advantage vis-à-vis the implementing acts of FASTER. CFIs are then advised primarily to be informed about what is coming, engage in and contribute to the FASTER discussions (either with their local tax administrations or at the EU level) and, finally, start designing their operating models (think about resources, budget and technology needs).

4. Current State of Play

The adoption of FASTER has certainly been a roller-coaster ride so far: the proposal was introduced on 19 June 2023, the approving opinion of the European Parliament was released on 28 February 2024 and, on 14 May 2024, ECOFIN managed to obtain political approval on a modified text of the proposal. In September 2024, the European Commission established a stakeholder working group to provide input on the content of the final draft.

This practically entailed that the European Parliament had to issue another opinion green-lighting the new text of the proposal (in view of its substantial modification), which took place on 14 November 2024. In terms of next steps, FASTER is expected to be formally adopted and published into the Official Journal in early 2025 and, from then onwards:
- be transposed domestically by 31 December 2028; and
- enter into force by 1 January 2030.

Does this timeline seem optimistic considering potential tax turbulence from upcoming Council presidencies? Perhaps yes, but, in any case, our tax radars will remain active on what comes next.

IBFD references

- IBFD Webinar: The FASTER Directive Proposal: Towards More Efficient Withholding Tax Procedures within the EU?
- 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.
- 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* ch. 3, Global Topics IBFD.
- EU tax law developments are reported in the daily IBFD Tax News Service.