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TOWARDS THE EU CAPITAL MARKET: IMPACT OF THE 'FASTER' DIRECTIVE

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ABSTRACT

The purpose of the article. This article aims to analyse the 'FASTER' Directive and to examine the relevance of its measures, as well as the possible consequences of their implementation.

Methodology. Reports from the European institutions, specifically from the European Parliament, the proposal for a Council Directive and the Directive 2025/50 were consulted. National and international literature on the subject was also analysed in order to better understand the doctrine's perspectives on the subject.

Results of the research. This study revealed that the adoption of a Directive is the best solution for resolving the issues of double taxation and complicated and costly procedures for refunding of withholding tax. This will enable a joint response to the phenomena of tax fraud and abuse, which have caused Member States to lose huge amounts of revenue. The introduction of the new measures will enable an increase in cross-border investment, benefiting the single market and preventing the cases of cum-cum and cum-ex.

Keywords: free movement of capital, withholding taxes, Capital Markets Union, Directive.

JEL Class: K34.

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The importance of using a Directive in tax matters

The Directive in analysis falls under the European Union Tax Law. In fact, this branch of law intends to regulate European taxes and to fight against tax abuse and fraud. The latter is one of the primary concerns of European Tax Law (Sérgio Ribeiro, 2021, p. 14). The former, although it is a goal to strive for, harmonisation in terms of tax abuse has not yet been achieved (Dibout & Offermanns, 1998, p. 93).

The European Union has only residual and limited powers in tax matters. In this area, the European Union aims to influence or rectify the tax systems of the Member States, guaranteeing cohesion with European legal and economic policies. This is also the case in policies against tax abuse of fraud, with the aim of enabling the internal market to function (Pistone, 2017, p. 73). We can therefore say that tax sovereignty belongs primarily to the Member States (Easson, 1993, p. 3).

For this reason, the European Union has essentially used the Directive as its main act of choice to achieve further coordination in tax matters, in accordance to Article 115 of the Treaty on the Functioning of the European Union (TFEU). As a result, the 'FASTER' Directive (Council Directive (EU) 2025/50 of December 10, 2024, whose effects started on January 30th, 2025) follows a special legislative procedure, in which the Council of the European Union is the primary lawmaker and unanimity of the Council is in principle required to approve the Directive, except if the reinforced mechanism applies.

Before the 'FASTER' Directive

In the European legal system, some efforts have been made to combat tax abuse and fraud.

In fact, a proposal for a Directive was presented in 1989, providing for the withholding tax at source of capital income paid to other Member States (Dourado, 2018, p. 336).

Later, the Savings Directive (Directive 2003/48/EC) emerged as the first step towards providing for an automatic exchange of information and the taxation of savings income in the form of interest in the EU. Member States, such as Austria, Belgium and Luxembourg, chose the withholding tax system on a transitional basis and the provision of information was limited to interest income that had been paid by a paying agent to another entity of a Member State (Dourado & Reigada Pereira, 2006, p. 253).

Posteriorly, Directive 2011/16/EU imposed an automatic exchange of information between Member States for certain categories of income and capital. This Directive is mainly concerned with financial income that taxpayers obtained in Member States (different from the State of residence) and provides for an automatic exchange of information in stages, later extending to other categories of income and capital.

The 'FASTER' Directive: Justification

Recently, in 2020, the Commission publicized a legislative initiative about withholding tax and refund procedures. In June of 2023, the Commission presented the proposal for a Council Directive on reducing excess withholding tax, introducing more efficient withholding tax and refund procedures and offering also Member States the necessary tools to fight tax fraud and abuse (Frescurato & Bortolameazzi, 2023). In addition, the Directive's main objective is to support the proper functioning of the Capital Markets Union by facilitating cross-border investment, according to the Proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes (COM/2023/324).

The aim was to change the current paradigm, since cross-border investments, whether in the form of dividends or interest, are taxed in the Member State of source, through the withholding tax technique, and are taxed again in the investor's State of residence (Van Seggern & Elsenburg, 2024, p. 34). A problem of double taxation arises, which is attempted to be resolved with the signing of Double Taxation Conventions, in which states reciprocally balance the tax benefits and costs by establishing a lower rate of withholding tax or an exemption from taxation (Vogel et al., 2006, p. 295).

Even so, these refund procedures are characterised by their length and costliness. Furthermore, the withholding tax procedures applied by the Member States also differ significantly.

In addition, the free movement of capital, combined with banking secrecy, has allowed tax evasion to flourish. Several cases of 'cum-cum' or 'cum-ex' have therefore emerged. These are sales negotiation strategies that allow investors to exploit loopholes in dividend taxes (DWT) (Casi et al., 2021).

These phenomena are not new; in fact, they date back to 1990, when the existence of a loophole in the tax treatment of capital gains derived from share dividends was first detected (Doerfer, 2022). In 2007, Germany's banking association also warned of the dangers and risks of double tax reimbursements. However, it wasn't until 2019 that the authorities and the courts began to repress these phenomena. On July 28, 2021, the German Federal Court of Justice (*Bundesgerichtshof*) confirmed that 'cum-ex' transactions should be considered as criminal act of tax evasion by the German tax authorities. Later, on April 6, 2022, the Court reiterated that 'cum-ex' transactions are illegal in Germany.

In June 2023, the European Parliament adopted the Resolution C/2024/492 in which it stressed that these two phenomena were the biggest tax fraud scandals in the history of the European Union, causing EU Member States to lose around 140 billion Euros[1]

These scandals, as stated by the European Parliament, have justified the need for harmonised withholding taxes procedures within the European Union to prevent tax fraud, double taxation and double non-taxation. To this end, the Directive aims to remove obstacles to cross-border investments, make withholding tax procedures more efficient and at the same time combat tax fraud and tax abuse, according to Recital 1.

[1] In October 2018, a team of investigative journalists published 'the cum-ex files', revealing large-scale tax fraud schemes.

This is, therefore, the framework that makes the emergence of the 'FASTER' Directive urgent and necessary.

The 'cum-ex' cases

The term 'cum' refers to dividend rights being connected to shares and 'ex' refers to no dividend rights connected to shares (Doobay & Ruchelman, 2022).

In cases of 'cum-ex', dividends from a commercial company are subject to withholding tax in the company's jurisdiction. To avoid double taxation of dividends, the foreign shareholder can request a refund of the part of the tax withheld at source in the country where the company is resident, as well as requesting relief from withholding tax in their state of residence.

In practice, taxpayers who practised 'cum-ex' traded the same shares for a short period between the ex-date and the date of registration of the dividends, which subsequently allowed all the people who temporarily held the shares to claim reimbursement, falsely claiming to be shareholders entitled to reimbursement (Hoke, 2023).

The 'cum-cum' cases

While 'cum-ex' cases aim to obtain reimbursements of undue taxes, 'cum-cum' cases aim to reduce or minimize the tax burden on dividends. In fact, taxpayers, who are not entitled to a lower withholding tax rate, take part in transactions with entities eligible to benefit from a reduced withholding tax rate as if they were the owners of the security, in order to split the savings among themselves (Banham & Hodge, 2020).

The Directive's innovations

The digital certificate of tax residence in a Member State

The Directive establishes the rules for the digital tax residence certificate (eTRC) and requires them to be applied in all Member States. This certificate aims to bring speed, simplicity and security to the administrative process.

It is intended for this digital certificate to have an extensive scope of application, being used for withholding tax procedures, as well as for proving tax residence for tax purposes. The aim is for all taxpayers in the European Union to have access to adequate, equal and effective proof of their tax residence, according to Recital 7. These certificates must be issued within 14 days of the application being submitted, in accordance with Article 4(2). In the event of a delay, the Member States must inform the entity requesting the eTRC the reasons for the delay and the additional time required, under the terms of the Article 4(4).

In accordance with paragraph 2 of this article, certain information must be included. If it is a natural person, under paragraph 2 under the point (a), the eTRC must include name, surname, date of birth and VAT number, or an equivalent number for tax purposes. In accordance with point (b), if it is a legal person, it must contain the name, tax identification number or equivalent, and if available, the unique European identifier (EUID) or legal entity identifier (LEI) or other legal entity registration number that is valid for the entire period covered.

It must also contain the taxpayer's address, the date of issue of the certificate, the period covered (which must cover a maximum period of one year or the tax year), the tax authority issuing the eTRC, the applicable double taxation conventions, depending on the taxpayer's residence, and, finally, any other additional information required to prove the taxpayer's tax residence.

We defend that the information on the eTRC should be available in different languages to ensure efficiency in reimbursements.

Through the residence certificate, taxpayers will be able to submit their withholding tax refund requests digitally, during the calendar year in which the request is granted, bringing greater speed and simplicity to the refund processes, and making it possible to prevent the double taxation of income, in clear contrast to the paper-based procedures, which required the submission of physical documents and physical interaction (European Parliament, 2024, p. 4).

It will therefore be a harmonised digital residence certificate, recognised throughout the whole EU territory. To this end, the European Commission will establish computerised forms for issuing the certificates, including the language regime, security standards and technical protocols, in accordance with Article 4(8) of the Directive.

Obligation to register on the European Portal of Certified Financial Intermediaries

It is in Chapter III, Section 1 that the Directive regulates the obligation to register certified financial intermediaries. This obligation to create a national register only applies to Member States that grant relief from excess withholding tax on dividend or interest income to residents of another Member State, under the terms of Articles 5(1) and 5(2).

Under the terms of Article 5(3), Member States are also obliged to designate a competent body to maintain and update this national register.

It should be noted that checking the national register is extremely important, since once registered, certified financial intermediaries are bound to fulfil certain obligations, such as communicating information on dividend or interest payments for which they are responsible. This information will be used to reconstitute the payment chain, preventing the risk of tax fraud or abusive tax practices, which are magnified by the 'cum-cum' and 'cum-ex' phenomena.

To this extent, and in accordance with Article 7, Member States must require national registration for all large financial institutions that process dividend or interest payments on securities,

as well as for central securities depositories that are responsible for withholding tax on such payments. These applications must be submitted through the European Portal of Certified Financial Intermediaries and must be approved within three months by the Member State following their submission.

The registers will therefore be available on the European Portal of Certified Financial Intermediaries, which the Commission will develop using its own resources or those of a third party, according to Article 6.

It is important to note that, for the purposes of the Directive, a financial intermediary refers to an entity that is part of the securities payment chain between the issuer and the registered owner who receives payment for the securities. This entity can take on the guise of a central securities depository, as provided for in Article 2(1) of Regulation 909/2014 of the European Parliament and of the Council, a credit institution, in accordance with Article 4(1) of Regulation 575/2013, an investment firm, a branch of the entities under points (a), (b) or (c) or a legal person from a third country that is authorised to provide services similar to those of the aforementioned entities. Once the financial intermediary has been nationally registered, it becomes a certified financial intermediary.

According to Article 8, financial intermediaries must fulfil certain requirements, such as: being a tax resident in a Member State or in the jurisdiction of a third country, as mentioned in point (a) of the Regulation; having an authorisation from the competent authority carrying out a custody activity in relation to financial intermediaries or in relation to a central securities depository; and having a declaration of compliance with the provisions of Directive 2015/849 or with the comparable rules of the third country jurisdiction not included in Annex I of the Council Conclusions (C/2024/6322) on the Revised EU List of Non-Cooperative Jurisdictions for Tax Purposes or in Table I of the Annex to Regulation 2016/1675.

The national register should include information such as the name of the certified financial intermediary, the date of registration, the contact details and any existing websites of the intermediary, the EUID or LEI, or any legal entity registration number issued by the State of residence.

The Member States may reject the request for registration. The refusal of the registration request can be based alternatively on the commission of one or more offences or violations of the national rules of the Member State or other jurisdiction, should they result in a loss of withholding tax revenue, or if an investigation is opened into possible tax fraud or abusive tax practices by a Member State or other jurisdiction that could result in a loss of withholding tax revenue.

Nonetheless, another application for registration can be submitted if the circumstances that caused the rejection have been remedied, in accordance with Article 8(6) of the Directive.

Finally, a financial intermediary's national registration can be withdrawn if it requests its withdrawal, or if it no longer fulfils the requirements set out in Article 8. However, Article 9(2) elaborates on the grounds for withdrawing the registration. Without prejudice, paragraph 4 allows the financial intermediary to be re-registered if the circumstances are corrected.

Reporting obligations for certified financial intermediaries

In the traditional procedures, the reporting obligations are assigned to the withholding agents who interact with the final beneficiaries of the income and the entire chain of intermediaries is not required to submit additional declarations to the tax authorities, neither the authorities of the other EU Member States. The Directive aims to create a system of trusted intermediaries, who are obliged to communicate information relating to the part of the transaction that is individually visible to each one, which will allow the recipients of the full communication - the tax authority or the withholding agent – to scrutinise the entire chain of transactions.

Certified financial intermediaries will have to fulfil various obligations, including reporting information on income, which can be direct or indirect.

The communication is said to be direct when the certified financial intermediaries communicate the information directly to the competent authority of the source Member State. On the other hand, it is indirect when the certified financial intermediaries communicate the information along the chain of payment of the securities and in a sequential manner. This information then reaches the withholding agent or a specific certified financial intermediary who communicates the information to the competent authority of the source Member State.

To this end, they must communicate the investments made by their clients, the holding period of the securities and the financial agreements on the securities under which a tax reduction is claimed. The purpose of communicating information on the holding period is to find out whether the securities were acquired within two days of the ex-dividend date to avoid new abusive schemes known as cum-ex. Regarding financial agreements, the main purpose is to obtain information on financial agreements with securities that have not been settled or have expired, as a way to detect the cum-cum phenomenon.

Article 10 of the Directive establishes the obligation to communicate information. This communication must be made by the end of the second month following the month of the payment date.

According to Article 10(7), the documentation that corroborates the information communicated must be kept by the certified financial intermediaries with national registration for a period of ten years after reporting.

Relief systems

Directive 2025/50 regulates two accelerated procedures that are intended to be a complement to the normal procedure for refunding of withholding tax. The goal is to harmonise these procedures within the European Union and to speed them up. The system of relief at source is provided for in Article 13 and the accelerated refund system in regulated by Article 14, which can be adopted cumulatively by a Member State.

Article 11 states that applications must be made by certified financial intermediaries who are responsible for maintaining the source of investment of a registered owner who has received dividends or interest paid by a resident of the source Member State.

Nonetheless, they must fulfil certain cumulative conditions set out in points (a) and (b) of the Article 11(1). Firstly, the registered owner must have authorised the financial intermediary to claim the relief on his/her behalf. Secondly, the certified financial intermediary has verified and confirmed the registered owner's eligibility for the relief.

Relief-at-source system

Article 13 of the Directive allows Member States to set up this system, authorising certified financial intermediaries responsible for maintaining the investment account to apply for relief from withholding tax on behalf of a registered owner. To this end, they must provide the withholding agent with a set of information on the tax residence of the registered owner, or the information contained in the documentation deemed appropriate by the source Member State, in accordance with Article 12(2), under the point (b), and, finally, the withholding tax rate applicable to the payment, in accordance with national rules or double taxation treaties.

For this system to be applied, the registered owner must also be the person entitled to relief from withholding tax under the national rules of the source Member State or under the rules of a double taxation treaty.

However, it may happen that the registered owner and the person entitled to relief do not coincide, the provisions on indirect investments should apply instead.

Quick refund system

The quick refund system, as set out in Article 14 of the Directive, concerns a system that authorises certified financial intermediaries responsible for maintaining the investment account of a registered owner to request accelerated repayment of excess withholding tax on behalf of the registered owner.

To this end, certified financial intermediaries must provide the information set out in paragraph 3 of the same regulation, namely: identification of the registered owner, identification of the dividend or interest payment, the applicable withholding tax rate, the total amount of excess withholding tax to be refunded, the tax residence of the registered owner, the eTRC verification code, or the information from the documentation pursuant to Article 12(2), under the point (b) and the declaration of the registered owner pursuant to Article 12.

According to Article 14(2), Member States must process refund claims within 60 days of the expiry of the deadline for applying for an accelerated refund. In the event of late repayment of excess withholding taxes on dividends or interest, interest may be charged on the refund for each day of delay,

if provided for in national law. The implementation of default interest is a penalty to motivate Member States to process procedures more quickly (Van Seggern & Elsenburg, 2024, p. 37).

Grounds for refusal

Member States can refuse a refund request if they consider there is a risk of tax fraud or abusive tax practices. There may therefore grant a refusal when the request does not fulfil the requirements of Article 14(4), Article 11 and Article 12; when it is not possible to reconstitute the payment chain, or when the Member State decides to initiate a tax verification or audit procedure in a case identified as likely to represent a risk of tax fraud or abusive tax practices.

Standard refund system

Under Article 17 of the Directive, Member States must ensure that there is a normal system for reimbursing requests for relief when the procedures of Articles 13 and 14 do not apply because the conditions for their application have not been met. This system is an alternative to the procedures enshrined in the Directive (Radcliffe & Devisscher, 2023, p. 326).

The liability of certified financial intermediaries in the event of total or partial non-compliance with the main obligations of the Directive

The 'FASTER' Directive establishes the personal liability of certified financial intermediaries for improper tax relief, with the possibility of withdrawing their national registration and imposing penalties.

Regarding the possibility of imposing sanctions, under the terms of Article 19, the Directive does not regulate the establishment of sanctions for total or partial non-compliance and leaves this task up to the Member States.

The establishment of sanctions is intended to serve as a prevention for non-compliance with the obligations set out in the Directive. However, it should be noted that these sanctions must be effective and proportional.

It is essential that there are national rules that impose certain sanctions in the event of non-compliance by certified financial intermediaries, since they play an important role in communicating the information that will serve as the basis for relief from withholding tax or for a refund, and in the event of total or partial non-compliance with this obligation, the total or partial loss of withholding tax revenue is possible.

These national rules should regulate the liability of certified financial intermediaries, including those agents who do not act as certified financial intermediaries, as well as registered owners and investors who submit incomplete and inaccurate information to certified financial intermediaries.

Obligation to transpose the Directive

Article 25 of the Directive stipulates that it must be transposed into the national legal order of the Member States by December 31, 2028, with the provisions applying from January 1, 2030.

It is understandable that this three-year deadline was set to give Member States the needed period to transpose the measures correctly and adequately. However, it is urgent that these measures enter into force in legal systems, as this is a powerful and harmonised weapon to combat tax fraud and abusive tax practices and to fully implement the free movement of capital in the EU.

The ECJ and the fight against tax abuse to guarantee the free movement of capital

The ECJ has played an important role in the field of European tax law, in clarifying the concept of tax abuse (Feria, 2008, p. 214), which the Court calls a 'wholly artificial arrangement' (Vanistendael, 2006, p. 194). The legitimacy of its intervention derives precisely from the fact that a national law may restrict a fundamental freedom by giving a discriminatory treatment (Saldanha Sanches, 2006, p. 266). To this extent, the ECJ has been analysing the compatibility of national tax provisions of the Member States with European Union law (Nicoleta Ionescu, 2012, p. 317), even though it recognises the tax competence of the Member States in matters of direct taxation (Case C-374/04, C-379/05, C-540/07, C-487/08, C-284/09).

The Court has therefore made several contributions to the fundamental principle of the free movement of capital enshrined in Article 63 of the TFEU. Cases such as C-387/11 and C-312/22 stand out, where the Court reiterates the prohibition of discrimination against taxpayers, whether they are residents or non-residents of a Member State.

In case C-387/11, the Court considered that Belgian tax legislation gave unfavourable tax treatment to income from capital and securities received by non-resident investment companies that did not have a permanent establishment in Belgium compared to income received by resident companies or with a permanent establishment in Belgium. In fact, Belgian legislation established a tax exemption for income from capital and securities only for companies established in Belgium. It was therefore considered that there was discriminatory treatment, in breach of the obligations arising from Article 49 of the TFEU.

More recently, in case C-312/22, the question was whether the Article 22, 71 and 101 of the Portuguese Income Tax Code were compatible with Article 56 of the TFEU. It turned out that the national legislation in question subjected interest income from bonds and debt securities issued in Portugal, which were paid in that Member State and which were earned by a natural person resident in Portugal, to a rate of 20%. On the other hand, when this income derived from another Member State or from a third country, it was included with the individual's income from other categories and it was applicable a progressive tax rate of up to 40 per cent. There was a distinction between taxpayers depending on where they were resident or the Member State where they invested their capital.

In conclusion, in exercising their tax sovereignty, Member States must follow European Union law, ensuring that their national tax rules are compatible with it. However, the Court recognises that a rule restricting fundamental freedoms may exist, but for it to be considered valid, there must be overriding reasons in the general interest, it must be appropriate to guarantee the achievement of the objective it pursues and it must not go beyond what is necessary.

Conclusions

This European Commission's legislative initiative comes in to enhance the free movement of capital in the EU, but faced with countless cases of fraud and abuse and the risk of their perpetuation and with tax administrations facing a significant loss of public revenue, we believe that this initiative is the best way to solve the problems mentioned above, while also resolving the issues of double taxation and excessively complicated and costly procedures. The Directive allows the harmonisation of specific procedure legislation and a concerted fight against fraud and abuse that would not be achieved through the individual initiatives of each Member State.

It seems to us that this Directive will benefit investors residing in the European Union, with diversified portfolios, encouraging cross-border investment in the EU and benefiting therefore the single market.

To this end, the Directive imposes relevant and important measures, including the introduction of an electronic tax residency certificate, the obligation for financial intermediaries to register on the European Portal of Certified Financial Intermediaries and the obligation for them to report transactions that are individually visible to each one, allowing the entire transmission chain to be reconstructed. It seems to us that these measures will successfully achieve the objectives in question.

Finally, we also believe that establishing sanctions for possible non-compliance with the obligations imposed in the Directive is necessary to ensure that non-compliant behaviour is discouraged. It is also understandable that the provision of sanctions should be left to the Member States, adjusting measures to better fit each State's national reality, with the only limit being that those sanctions should be effective, reasonable and proportional.

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