

## Consultation response

# Faster and Safer Relief of Excess Withholding Taxes



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.7 trillion in 2022, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

## Executive Summary

The Faster and Safer Relief of Excess Withholding Taxes (FASTER) Proposal has the potential to create uniform and pan-European withholding tax (WHT) procedures. In order for this to occur, the proposal must be further refined. It requires further standardisation at the EU level, it must meet the needs of all investors and intermediaries, synergise with adjacent capital markets and corporate processes, and align with the capabilities of custodians, pan-European providers and investors.

## Introduction

The American Chamber of Commerce to the EU (AmCham EU) supports the FASTER Proposal and recognises the contribution it would make to simplifying withholding tax (WHT) procedures for cross-border investments in the EU. Our members engage with WHT tax procedures as custodian banks, pan-European providers, and international investors committed to the development of the single market.

By creating a consistent and pan-European system of WHT procedures, FASTER would benefit small and large businesses alike while contributing to the development of a stronger single market. FASTER could facilitate the quicker reclaim of WHT, which would maximise cashflows for businesses including SMEs, during difficult economic periods. It also has the potential to facilitate cross-border investment and ensure appropriate taxation. In consequence, FASTER can make a major contribution to the development of the Capital Markets Union.

Our feedback draws upon our members' experience with WHT as investors and intermediaries and provides ways to (i) match the needs of non-EU investors and intermediaries, (ii) integrate the proposal with adjacent processes and (iii) efficiently align with the capabilities of custodians, pan-European providers and investors. Overall, FASTER's implementation should be as consistent as possible across Member States, and its operational procedures, including its digital tax residence certificate (eTRC) system, should be integrated as much as possible with other corporate and capital markets processes.

## Making FASTER work for all investors and intermediaries

FASTER is an opportunity to increase the EU's attractiveness as an investment destination by creating simplified and cooperative WHT rules for investors (including non-EU investors) and intermediaries. Lawmakers should take special care to study how the FASTER Directive and secondary legislation impacts non-EU investors and intermediaries and minimise administrative challenges that may impact them uniquely.

Although the FASTER Directive can contribute to the increased attractiveness of the EU, it is missing several key components which could make FASTER more workable for non-EU entities:

- Interoperability with third country eTRCs.

- Procedures tailored to third country intermediaries: These could include a centralised registration system, so that one registration process would apply for all EU countries.
- Common definition of beneficial ownership.
- Common rules on entitlements.

## Ensuring the integration of FASTER measures with other capital market processes

FASTER will constitute a vital corner of a larger ecosystem of capital market processes and procedures impacting taxable income in general. FASTER presents an opportunity to integrate WHT procedures with other procedures impacting qualified transactions and their underlying taxable income. For this to occur, certain alignments must be made.

Firstly, FASTER's WHT processes need to be consistent and coherent with trading, custody and collateral management processes.

In the realm of collateral management, the proposal must be amended to encourage the provision of collateral. At present, a collateral giver must end a collateral agreement in order to benefit from the quick refund or refund at source systems (QR/RAS)—a requirement inconsistent with Eurosystem initiatives, such as the work on the SCoRE standards, to facilitate the provision of collateral.

Regarding corporate actions processes that include tax processing, there may be considerable complexity. Within a single date position in a single security, part of the position may have one tax status, while a different part of the position may have a different tax status.

Similarly, for market claims whose calculation depends on a tax status, some market claims may have one tax status, while other market claims in the same security and for the same investor may have a different tax status, as, for example, they relate to a trade executed less than two days before ex-date, and as they relate to securities transfer that is part of a financial arrangement.

There should be common rules on entitlement, so that whether a market claim represents a taxable dividend, should not vary depending on the member state of the source income.

## Making FASTER efficient

FASTER's success could vary based on how consistently it is implemented by Member States and how workable it is for the certified financial intermediaries submitting QR/RAS requests.

### Consistent implementation

FASTER should be consistently implemented. The FASTER Directive should ensure that all main administrative components of the FASTER system are uniformly implemented across the EU. FASTER must be a consistent, pan-European process to accomplish its goals and contribute to the EU's attractiveness as an investment environment. Fragmented implementation would undermine much of the Directive's effectiveness.

### **Messaging and reporting (articles 4, 9, and 13)**

As is, the FASTER Directive foresees three implementing acts which create the risk that Member States will include national specificities in key elements of the Directive, namely: (i) the issuance of eTRCs (Art. 4), (ii) reporting obligations of intermediaries (Art. 9), and (iii) the QR request (Art. 13). In this regard, forms must be standardised at the EU level. If these standardised forms do not exist, it will jeopardise FASTER's status as a pan-EU process. However, the effective delivery of a common reporting process depends not only on common standardised forms, but also on common rules of entitlement. Without such common rules, intermediaries will, for example, when reporting the information set out in Annex II, section E, have to carry out different calculations depending on the member state of the source income.

### **Verification process (article 1, para. 2 and 3)**

National specificities would cause Certified Financial Institutions (CFIs) operating across the EU to comply with many different reporting and verification systems. This, in turn, would increase risk and complexity and minimise their appetite to continue operating in certain markets. To limit this liability risk, the FASTER Directive should limit the degree to which Member States can create diverging due diligence requirements to satisfy QR/RAS verification requirements for CFIs under article 11.

If Member States take a different view as to the impact of financial arrangements on an investor's entitlement to reduced withholding tax rates, CFIs could be exposed to greater burden and liability while verifying end investors' QR/RAS eligibility as discussed in the following section.

Clarity on the obligations of intermediaries is also essential to determine the WHT of their customers. These obligations should align with data already collected for KYC processes.

The Commission should explore mechanisms that ensure a common implementation across member states to minimise the risk of divergence. Different interpretations will undermine the benefits of having a common process for WHT refunds.

Finally, we support the establishment of a Member State expert group to monitor the implementation, and to identify best practices.

### **Liability Arrangements (article 16)**

Lawmakers should consider establishing a system of common liability rules for CFIs to harmonise reporting systems across Member States and pre-empt inconsistent implementation. This would minimise the risk of divergent national liability rules posed by article 16 of the FASTER Directive. A system of common liability rules was suggested in Option 1 of the Impact Assessment (Section 5.2.1).

## Workability for financial intermediaries

Lawmakers must consider ways to reduce financial intermediaries' burden and liability while verifying QR/RAS eligibility.

Article 11 currently requires Member States to ensure that CFIs have 'adequate procedures' in place to verify QR/RAS eligibility. However, CFIs (particularly custodian banks) often operate as part of larger financial institutions (or group of related institutions) which offer diverse securities and derivatives products to clients. This obligation for a CFI to positively review and confirm that there are no disqualifying financial arrangements in the same legal entity as the CFI, or across related entities, could encumber the CFI's ability to complete article 11 verification.

The CFI should be able to place reasonable reliance on end investors' own declaration for the purpose of supporting reduced WHT rates. End investors are already required to declare that there are no relevant financial arrangements which would impact the reduced WHT rate from applying to a dividend payment. Drawing a parallel to a long form reclaim procedure, a financial institution could not reasonably be expected to review an end investor's reclaim against any potential financial arrangements before passing it on to a member state's tax authority.

This simplified approach would limit the burden put on CFIs while limiting the liability they are exposed to by having to verify every QR/RAS application.

## Consistency and synergies with other legislative texts

The FASTER Directive's common eTRC and reporting requirements lay a blueprint to simplify other processes which require reporting to many member states. For instance, in the context of Unshell, an eTRC could be granted upon submission of a standardised questionnaire submitted to local tax authorities. Accordingly, Unshell could evolve to encompass more of a declaration while eTRCs could be used to simplify reporting of large capital flows.

## Conclusion

The FASTER Proposal has the potential to simplify WHT procedures for cross-border investments in the EU, but it needs to become a consistent, pan-European process.

Developing FASTER as such will have strong benefits for investors, financial intermediaries, and SMEs, as well as positive implications for the CMU and other fledging pan-European tax processes like Unshell. Investors will benefit from more fluidity and certainty for payments across the EU. This, in turn, will limit hedging costs and cash-flow turns. CFIs will, likewise, benefit from standardised procedures—a benefit which could be increased by limiting liability and setting common rules for liability. SMEs, in particular, will benefit from the faster reclaim of WHT. During difficult economic periods, this would helpfully maximise their cashflows.

By facilitating cross-border investment, the FASTER Proposal can make a major contribution to the development of the Capital Markets Union.

Likewise, the eTRC system can be used as a backbone for further simplification on pan-European tax processes like Unshell.