

Joint Statement - Concerns position of investment institutions under EU FASTER Proposal

20 November 2023

Introduction

On 19 June, the European Commission published a proposal for a directive, COM(2023) 324 final, on "Faster and Safer Relief of Excess Withholding Taxes", known as EU FASTER. We as industry associations are following with great interest the developments regarding this proposal. We support the European Commission's initiative for less administrative burden and more efficient procedures for the refund of withholding tax withheld in Member States. We recognize the picture painted by the European Commission, in which current procedures are often complicated and lengthy, with an uncertain outcome in some cases. We also support the European Commission's efforts to use EU FASTER to combat the risk of fraud and abuse in the refund of withholding tax.

However, we do have concerns that the EU FASTER proposal will negatively affect regulated investment funds. A wide range of investment funds appear to be denied access to EU FASTER. We are concerned that regulated investment funds will in the end be worse off which would negatively affect (retail) investors in such funds.

Below we have set out the objections that we as industry associations in various Member States share regarding the position of funds under the EU FASTER proposal as well as our suggestions to ensure access for all regulated investment funds to the EU FASTER procedures, hence securing a level playing field between regulated investment funds from various Member States as well as between retail investors investing through regulated investment funds and those making direct investments.

Investment institutions affected

Tax transparent funds

We understand that the European Commission has at a point taken the position that transparent investment funds do not have access to the benefits of EU FASTER because the tax transparent investment fund is the registered owner but not the beneficial owner. As a consequence, tax transparent investment funds would not be able to benefit from the withholding tax relief procedures of EU FASTER.

This would affect the following investment funds:

- Fonds voor gemene rekening in the Netherlands
- Sijoitusrahasto in Finland
- Erikoissijoitusrahasto in Finland

Suggested solution

The solution could be to allow that, in case of a tax transparent investment fund, the legal owner of the securities uses the EU FASTER procedures for relief on behalf of the investors in the fund (the beneficial owners). Please see also below on the legal owner in various EU contractual fund setups.

Contractual funds

In a number of EU Member States contractual funds are treated for tax purposes as legal entities and consequently as a tax resident .

Article 4 of the proposal provides for each Member State to set up an automated process to issue digital tax residence certificates ("eTRC") to a person deemed resident in their jurisdiction for tax purposes. If the taxpayer is an entity, a European Unique Identifier number (EUID) needs to be provided. Also section B of Annex II of the proposal only refers to a "natural person" or "legal entity" as the final taxpayer.

However, a significant number of collective investment funds in Europe do not have legal personality, do not qualify as a legal entity and do not avail of an EUID. This is true for:

- Fonds voor gemene rekening in the Netherlands
- Sijoitusrahasto in Finland
- Erikoissijoitusrahasto in Finland
- Värdepappersfonder in Sweden (all Swedish UCITS)
- Specialfonder in Sweden

Because these investment funds are not a legal entity, they cannot benefit from the withholding tax relief procedures of EU FASTER under the current proposal although they are a tax resident in the above EU member states or can make treaty claims.

Suggested solution

Instead of using 'natural person' and 'legal entity', we propose to follow the definition of 'person' as used in DAC (Article 3, paragraph 11 Directive 2011/16/EU), in order for contractual investment funds to be in scope. That definition is as follows:

'person' means:

- (a) *a natural person;*
- (b) *a legal person;*
- (c) *where the legislation in force so provides, an association of persons recognised as having the capacity to perform legal acts but lacking the status of a legal person; or*
- (d) *any other legal arrangement of whatever nature and form, regardless of whether it has legal personality, owning or managing assets, which, including income derived therefrom, are subject to any of the taxes covered by this Directive.*

Alternatively, the options c and d could be restricted to EU investment funds regulated under the UCITS or AIFM Directives.

Legal ownership investments

In some Member States, contractual funds are constructed in such a way that a separate entity holds legal ownership of the portfolio for the account and risk of the participants of the investment fund. It is not clear how the concepts of registered owner and beneficial owner should be dealt with in this case.

Suggested solution

By not referring to a beneficial owner in the legal text, misunderstandings are avoided.

The solution could be to allow that, in case of an investment fund constructed in a way that legal ownership of investments is held by a separate legal entity, the management company or another designated entity within the fund structure uses the EU FASTER procedures for relief. The management company or the other designated entity do this on behalf of the person entitled to relief.

For tax transparent funds this means that the request for relief is made for the underlying investor(s). Information from the underlying investor is provided for this purpose.

For non-tax-transparent funds this means that the request for relief is made for the investment fund itself. Because there are often many participants in such investment funds and the participants change frequently, it is not feasible to provide information for all participants, but this should not be an issue as in that case the fund itself is the beneficial owner.

The management company and/or the other designated entity are entities that are described in the prospectus of the investment fund.

The above could be limited to EU investment funds regulated under the UCITS or AIFM Directives.

Maximum threshold

We understand that there is discussion about establishing a threshold, which concerns a maximum amount for reclaiming withholding tax via the EU FASTER procedures. Such a threshold would be counterproductive for regulated investment funds and pension funds. Such funds often hold significant numbers of securities and only material amounts of withholding tax are reclaimed, as the costs of a reclaim do not outweigh the benefits for small amounts of withholding tax. If a threshold amount is used above which the EU FASTER procedures cannot be used, EU FASTER effectively cannot be used by investment funds and pension funds.

Suggested solution

If threshold amounts are used above which EU FASTER procedures cannot be used, then these threshold amounts should not apply to regulated investment funds / pension funds.

Regulated investment funds benefiting from exemptions

If Member States may, according to Article 10(3)(b), decide not to allow relief where (a full) exemption of the withholding tax is claimed. We are concerned that this would negatively impact the situation for regulated investment funds, which are currently exempt from tax on dividends from shares issued by companies resident in various Member States. This is especially true for UCITS, but to a certain extent also for AIFs. It is easy to identify a UCITS or AIF, and it is of great importance to European fund investors that relief at source remains allowed.

Suggested solution

For regulated investment funds, no withholding tax should be withheld after introduction of EU FASTER where relief at source is currently available. Consequently, regulated investment funds should be exempted from Article 10(3)(b)

Consequences for (retail) investors

Under the current proposal, the investment funds with the above-mentioned characteristics cannot make use of the EU FASTER procedures. We find this worrying, because such investment funds are, apart from individual investors, often used by pension funds and life insurers to collectively invest in an efficient way pension assets of pensioners, using the principle of risk spreading, in order to provide in an adequate old age provision. These type of investment funds are also used by pension funds, life, non-life, health and funeral insurers to invest assets to meet their obligations or to cover certain risks. In addition, these investment funds are also widely used for the collective investment of assets by private individuals through distribution channels, such as banks or other intermediaries. It should not be the case that (retail) investors that invest directly have an advantage over investors who spread risks by investing indirectly through investment funds.

In addition, it is also problematic that investment funds *with* legal personality can use EU FASTER procedures, while investment funds *without* legal personality cannot. This would result in an uneven playing field, although both are regulated as UCITS or AIFs.

Finally, taking into account that the intention is for EU FASTER to become the new standard for withholding tax relief procedures, our concern is that this will lead to a substantial increase of requirements under withholding tax relief procedures outside EU FASTER. The abovementioned regulated investment funds that cannot use EU FASTER procedures will have to apply the same procedures as parties that are out of scope of EU FASTER due to their lack of ability to demonstrate that they are the beneficial owner. Our concern is that this will substantially increase the risk that regulated investment funds are confronted with additional delays or rejections when applying the non-EU FASTER procedures in EU Member States. This potentially also will increase the burden on tax authorities due to more discussions and potential litigation by investment funds to secure their withholding tax position for and on behalf of their investors.

Conclusion

If the proposal remains as published by the European Commission on June 19, there is a risk that EU FASTER will mainly bring benefits to direct (retail) investors in European companies, but not for (pension) investors who invest through pension and investment funds in accordance with the

principles of risk spreading. EU FASTER may even disadvantage this last category, which is not in line with other ambitions of the European Commission, such as the Retail Investment Strategy.

.....

For more information, please contact:

- Manouk Fles, Manager Regulatory Affairs, Dutch Fund and Asset Management Association, mf@dufas.nl
- Marja Blomqvist, Head of Tax Regulation, Finance Finland, marja.blomqvist@financefinland.fi
- Helene Wall, General Counsel, Swedish Investment Fund Association, helene.wall@fondbolagen.se