To:

Belgian Presidency

Fiscal Attaches to Permanent Representation to the EU

Commission's DG FISMA

Commission's DG TAXUD

20 February 2024

Joint Financial Industry Submission on the FASTER Proposal:

Dear Sir/Madam,

We, the undersigned associations, **welcome efforts to simplify and digitise withholding tax processes within the Union**. Slow and complex withholding tax reclaim processes act as a barrier to efficient investment, and a simple, fast, and safe system will encourage intra-union and foreign investment. It is important to note in this context that many EU jurisdictions are presently slow to pay withholding tax reclaims and there is a significant opportunity for improvement in this area – particularly compared to certain other jurisdictions within or outside the EU offering relief at source systems.

With regard to current version of the EU Directive "FASTER", we note that the proposed rules are **complex, require significant due diligence and reporting, and place extensive, even overwhelming, obligations on Financial Intermediaries and investors** which are even more burdensome than those currently applied, and which will be very difficult to operate under. **This excessive administrative burden appears to be contrary to the objective of simplification and speed initially envisaged** by the proposal.

We would therefore argue that the directive should refocus on its initial aim of "faster and safer relief from excess withholding tax", removing elements likely to disproportionately increase the complexity of withholding tax processes for financial intermediaries, investors, and tax authorities. Incremental burdens may in fact discourage participation in the proposed withholding tax regime and fail to encourage intra-union and foreign investment.

The rationale for the above is the starting assumption that EU capital markets are currently not commensurate to the size of the European economy at a time when significant investments are required for the financing of the green and digital transitions. In order to address these challenges, regulatory and administrative obstacles should be streamlined

in order to boost the integration and development of EU capital markets. The completion of practical and harmonised solutions to the existing operational challenges related to the collection of withholding taxes and in processing Double Tax Treaty refunds on cross-border securities income is a key part of this equation.

Considering this background, we support the introduction of a legislative proposal that would yield genuine **simplifications for both investors and Financial Intermediaries** when investing in and handling securities issued within the EU. The ability of the FASTER proposal to effectively achieve these objectives is accompanied by several caveats due to the structure of the current proposal.

We note the positive elements in the proposal that include the issuance of electronic tax residence certificates, the contemplated fast-tracking of withholding tax payment, as well as common reporting obligations.

Nevertheless, the proposed rules are accompanied by **extensive due diligence and a high frequency of reporting obligations** that contrast unfavourably with existing regimes in place in certain jurisdictions. We are concerned that these obligations would place an **excessive administrative burden** on Financial Intermediaries handling EU securities. As a result, this situation could compromise the ability of EU companies to access capital markets financing, an outcome ultimately **frustrating the political ambition of achieving a Capital Markets Union.**

We therefore believe that **refocussing of the proposal on administrative simplification** is both necessary and critical. We believe **greater proportionality** is required regarding obligations vested to Financial Intermediaries. In particular, the requirement to report relevant payments on a rolling basis should be replaced by a form of periodical (e.g. on a yearly basis) reporting discussed in greater detail below. In this regard we note the US use of a yearly reporting scheme to support relief at source on US securities.

We also strongly call for the directive to remain **optional** for Financial Intermediaries, considering the operational burden and related compliance costs of the measure. Many Financial Intermediaries in Europe will be unable to sustain these related costs, making optionality a critical feature to avoid detrimental effects on European companies.

Furthermore, we would like to note several specific concerns relating to **tax technical requirements** in further detail:

As mentioned above, in terms of **reporting,** we understand Certified Financial Institutions (CFIs) shall be required to report the data outlined in Annex 2 for each payment date within 28 days after the month in which the payment date arose. This represents a much higher frequency of reporting than required under existing, comparable tax reporting regimes, such as existing relief at source regimes in certain countries, including the US QI Finnish TRACE regimes which require annual reporting. Further, the type of information that is required to be reported requires investor attestation regarding whether they have entered into other financial arrangements at the relevant dividend date as well as confirmation regarding holding period – both of these requirements present significant challenges given such datapoints would need to be collected and, under the proposed regime, some level of due diligence would need to be applied to those declarations.

While we appreciate Member States may wish to collect information in a timely manner to allow them to process quick refunds, an extension of refund payment timelines to match reporting timelines is fair and commensurate – i.e. we would appreciate an extension of reporting timelines to match other, existing regimes, and would understand a need to align refund payment timelines to the reporting timeline.

Regarding **due diligence** matters, we understand the need for Financial Intermediaries to perform due diligence of investor declarations and we understand the importance of verifying the investor's jurisdiction of residence. However, we would like to point out that custodian banks and Financial Intermediaries typically have limited information concerning the precise trading strategies or other financial arrangements of clients for whom they are providing a safekeeping service. It is therefore important that any requirement to validate an investor declaration regarding other financial arrangements is proportionate and bears in mind the information available to the relevant bank. It is also important to note the inherently subjective nature of what the investor is being asked to declare and the tax technical complexity – it would be unfair to expect financial institutions to effectively audit the activities of their clients or impute broad knowledge concerning financial arrangements to custodian banks when such products are offered by particular segments of the financial services industry.

In addition, given investors are required to declare whether they have entered into other financial arrangements concerning the securities they hold, a clear definition of "other financial arrangements" should be a core element of the regime. We understand that the scope of financial arrangements may be defined broadly to cover common financial instruments or transactions such as derivatives (e.g. options, futures, and swaps), securities lending, sale and repurchase transactions ("repo") and collateral transfers. Any policy decision to exclude investors who have entered into such transactions from FASTER should bear in mind the commercial scale of such activity. ESMA's market report for 2023 states the total notional value of the EU equity derivatives market stood at 15 trillion EUR at Q4 2023.[1] The aforementioned financial transactions are commonplace and entered into at high volume for legitimate business reasons (such as hedging, enhancing portfolio returns, etc.). We would therefore stress the importance of bearing in mind the proportion of the investor base that may be excluded from the FASTER regime based on specific policy and design choices and whether such exclusion may frustrate the fundamental purpose of the proposal.

Furthermore, in the registration procedure of the CFI, documents required should be simplified. In particular, this concerns the declaration of compliance with the provisions of Directive 2015/849, which could be limited to a confirmation of the CFI being in compliance with its obligations.

Finally, concerning **liability**, we appreciate the question of liability is an important factor for tax authorities and government. To the extent an under-withholding of tax arises as a direct result of the negligence or wrongdoing of a CFI, it is reasonable to assume that some level of liability for the under-withheld tax might arise for the CFI. However, it is of paramount importance that a Financial Intermediary acting in good faith and following due diligence requirements in a reasonable manner should not be liable for tax losses. Typically, the CFI does not itself directly benefit from any such under-withholding and, to the extent it has discharged its obligations, any tax controversy between a tax authority and investor should be resolved bilaterally. In particular, it is noted that strict liability is incompatible with a scenario where due diligence obligations are not clear and objective, or where a Financial Intermediary must necessarily place reliance on an investor's declaration. In such cases, strict or joint and several liability would effectively impute any

[1] ESMA Market Report on EU Derivatives Markets 2023 (ESMA50-54821-2930), 6 December 2023. Pg. 5. Available: https://www.esma.europa.eu/sites/default/files/2023-12/ESMA50-524821-2930_EU_Derivatives_Markets_2023.pdf.

fraud on the part of the investor onto a service provider acting in good faith and that would appear to be incongruous with fundamental principles of fairness.

If custodian banks are strictly liable for any withholding tax reductions granted to an investor, that would represent an enormous financial risk on an ongoing basis due to the high nominal value of withholding tax relief at source and reclaims processed in any given year. It would also present a risk that is difficult to effectively mitigate given – irrespective of the actions of the bank – such liability would still exist.

We remain at your disposal for any clarification.

Yours sincerely,

Adam Farkas

Association for Financial Markets in Europe (AFME)

Alexandra Minkovich

Association of Global Custodians (AGC)

Wim Mijs

European Banking Federation (EBF)

Annex 1 – Information about Signatory Organisations

AFME (Association for Financial Markets in Europe) is the voice of all Europe's wholesale financial markets, providing expertise across a broad range of regulatory and capital markets issues. It represents the leading global and European banks and other significant capital market players. AFME advocates for deep and integrated European capital markets which serve the needs of companies and investors, supporting economic growth and benefiting society.

AGC (Association of Global Custodians) is an informal group of 12 member banks that provide securities safekeeping and asset servicing functions to cross-border institutional investors worldwide, including investment funds. In providing global custody services, AGC members routinely seek appropriate withholding tax relief on behalf of custody clients by processing millions of such claims in the aggregate each year, affecting substantial amounts of cross-border portfolio investment flows in and out of countries worldwide.

EBF (European Banking Federation) is the voice of the European banking sector, bringing together 32 national banking associations in Europe that together represent a significant majority of all banking assets in Europe, with 3 500 banks – large and small, wholesale and retail, local and international – while employing approximately two million people. EBF members represent banks that make loans available to the European economy in excess of €20 trillion and that reliably handle more than 400 million payment transactions per day. Launched in 1960, the EBF is committed to a single market for financial services in the European Union and to supporting policies that foster economic growth.