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Banks as Fiscal Gatekeepers in the European Union: Legal Duties, Fundamental Rights, and Comparative Accountability in Withholding Tax Enforcement under EU Law – Insights from Germany, the Netherlands, France, Italy, and the United Kingdom

di Filippo Luigi Giambrone

(Ricercatore a tempo determinato presso l'Università degli Studi del Sannio di Benevento)

Sommario

1. Introduction; 2. EU Legal Framework; 3. Certified Financial Intermediaries (CFIs): Tax Enforcement, Duties, and Innovation; 4. Procedural Liability & Charter Rights; 5. New: Banking Regulation & Capital Reporting in 2025; 6. Comparative EU & UK Systems; 7. Doctrinal and Theoretical Reflection; 8. Policy Recommendations; 9. Conclusion: Reconstructing Withholding Tax Governance in the European Fiscal Constitution – 2025 as Legal Watershed.

Abstract

This article examines the paradigm shift inaugurated by Directive (EU) 2025/50, which transforms the European Union's approach to withholding tax (WHT) relief by entrusting Certified Financial Intermediaries (CFIs)—primarily banks—with delegated enforcement powers. Moving beyond prior soft-law initiatives and national refund systems, the Directive creates a harmonised framework centred on real-time reporting, digital tax residency certification (eTRC), and relief-at-source mechanisms. In doing so, it repositions private financial actors as quasi-public enforcers within the Union's fiscal architecture. The analysis traces the origins of this reform in the context of the Capital Markets Union (CMU), cum-ex scandals, and technological integration, assessing the Directive's implications for legal certainty, fundamental rights, and cross-border investment.Through a doctrinal and functional lens, the article explores whether this model reconciles fiscal efficiency with procedural fairness, particularly in light of the Charter of Fundamental Rights, GDPR, and EU primary law. It interrogates the normative tensions of delegating treaty-based legal interpretation—such as "beneficial ownership" and "anti-abuse"—to private actors lacking adjudicative authority or uniform guidance. Comparative insights from Germany, the Netherlands, France, Italy, and the UK further highlight the limits of regulatory convergence and constitutional accountability. The article concludes with a set of policy proposals: the creation of an EU-level CFI Supervisory and Appeals Authority; the adoption of minimum procedural safeguards via delegated regulation; harmonised interpretative guidance on tax treaty concepts; proportionate liability protections for CFIs; and a Union-wide taxpayer portal. Framed as a constitutional moment in EU tax governance, 2025 is identified as a turning point where the balance between public and private enforcement, digital innovation and legal legitimacy, becomes the central axis of a new European fiscal constitution.

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1. Introduction.

The year 2025 stands as a pivotal moment for the European Union in its effort to create a coherent, transparent, and fraud-resilient framework for withholding tax (WHT) relief across Member States. This ambition culminates in the adoption of Directive (EU) 2025/50, a legal milestone designed to dismantle longstanding barriers to cross-border investment and eliminate systemic loopholes exploited through abusive dividend arbitrage schemes such as cum-ex and cum-cum. The fragmented architecture of national WHT systems has not only burdened investors—especially small and retail actors—with excessive compliance costs and legal uncertainty, but also enabled fraudulent refund claims that have inflicted unprecedented damage on public budgets.[1]The recent legislative breakthrough is the product of a complex institutional trajectory. Since the early 2000s, the European Commission has identified WHT inefficiencies as a core obstacle to the development of a genuine Capital Markets Union (CMU). Reports by the Giovannini Group, consultations by FISCO, and voluntary measures such as the 2009 Commission Recommendation and the 2017 Code of Conduct have produced only modest improvements.[2] Despite these efforts, cross-border investments continued to be penalised by procedural divergence, excessive documentation requirements, limited digitalisation, and lack of transparency along the financial intermediary chain. These frictions have contributed to permanent or provisional double taxation and deterred retail participation in the EU's financial markets.[3]More dramatically, they have opened the door to massive tax abuse. The cum-ex scandal—where multiple actors fraudulently claimed WHT refunds on the same dividend—exposed fundamental weaknesses in the Union's supervisory and fiscal architecture. In its 2018 resolution, the European Parliament strongly condemned these practices, urging for binding legislative action and highlighting the complicity of financial intermediaries in the schemes.[4] The European Securities and Markets Authority (ESMA), responding to Parliament's mandate,

[1] Directive (EU) 2025/50 of 10 January 2025 on faster and safer relief of excess withholding taxes, OJ L 2025/50, pp. 1–32. This directive establishes a harmonised EU-wide framework to accelerate WHT relief procedures through certified financial intermediaries, digital certificates of residence, and reporting obligations, aiming to prevent tax abuse and double taxation.

[2] European Commission, Proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes, COM(2023) 324 final, Brussels, 19 June 2023, pp. 2–3. The Commission identifies fragmented procedures as a barrier to capital markets integration and highlights that administrative burdens and legal uncertainty deter cross-border investments.

[3] European Commission, Commission Staff Working Document – Impact Assessment, SWD(2023) 216 final, Brussels, 19 June 2023, pp. 5–8. Estimates show compliance costs exceeding €6.62 billion annually; moreover, past refund fraud schemes such as cum-ex demonstrate urgent need for standardisation and traceability in tax relief.

[4] European Parliament, Resolution on the fight against tax fraud, tax evasion and money laundering, 2018/2121(INI), OJ C 363, 28.10.2020, pp. 130–141. The resolution condemns cum-ex trading schemes and urges the Commission to adopt legislation to address systemic regulatory failures and strengthen administrative cooperation.

ISSN 2036-7821

confirmed in its 2020 Final Report that cum/ex and cum/cum abuses exploited the opacity of cross-border securities chains and the lack of uniform reclaim verification systems.[5] The scale of the fraud—estimated at over €150 billion between 2000 and 2020 across the EU[6]—triggered a political consensus on the need for a systemic and preventive response. Directive (EU) 2025/50 provides that response. It introduces a harmonised WHT relief framework based on three structural pillars: the adoption of a digital tax residence certificate (eTRC) valid across the EU; the establishment of optional relief-at-source and quick refund procedures; and the imposition of real-time reporting duties on certified financial intermediaries (CFIs).[7] The objective is dual: to secure fair and efficient taxation in accordance with double tax treaties, and to restore confidence in the integrity of the EU capital market system. As the Commission explains in its accompanying impact assessment, the reform is expected to save investors over €5 billion annually in compliance costs, while bolstering tax authorities' capacity to detect fraud and enforce anti-abuse measures.[8]Within this new regime, banks and other intermediaries emerge as central institutional actors—effectively functioning as "fiscal gatekeepers." Their roles include client verification, transaction tracing, documentation storage, and data transmission to tax administrations.[9] This delegation of public enforcement functions to private actors raises novel legal challenges, particularly concerning due diligence obligations, liability allocation, data protection, and the limits of administrative delegation under EU law. It also places banks under increasing pressure to balance their regulatory compliance responsibilities with the fundamental rights of their clients, including tax privacy and fair treatment.This article explores these emerging tensions by analysing the duties, safeguards, and institutional frameworks surrounding the involvement of banks in WHT enforcement. Adopting a comparative and functional approach, it assesses the normative underpinnings of the gatekeeping role, contrasts divergent liability regimes across Member States, and evaluates the compatibility of the Directive's provisions with constitutional and fundamental rights principles. The analysis draws on the legislative text, preparatory works, ESMA findings, and

[5] European Securities and Markets Authority, Final Report on Cum/Ex, Cum/Cum and Withholding Tax Reclaim Schemes, ESMA70-155-10272, Paris, 23 September 2020, pp. 7–8. ESMA confirmed that abusive schemes exploited ownership opacity and insufficient cross-border verification mechanisms.

[6] Correctiv and University of Mannheim, cited in SWD(2023) 216 final, p. 7. Their investigation estimates tax revenue losses from cum-ex and related schemes at over €150 billion across Europe between 2000 and 2020.

[7] Directive (EU) 2025/50, arts. 6–15. These provisions establish the operational framework for relief-at-source, quick refund procedures, and obligations of certified financial intermediaries (CFIs), including liability and removal from registers in cases of non-compliance.

[8] SWD(2023) 216 final, p. 20. The impact assessment projects that FASTER could save investors more than €5 billion annually in reduced compliance costs and improve tax authorities' enforcement capacity.

[9] European Banking Federation, Tax Blueprint – A vision for a single EU withholding tax procedure, Brussels, May 2021, pp. 6–10. The EBF advocates for a harmonised, tech-driven tax relief system and recognises banks' essential role in reporting and compliance functions.

ISSN 2036-7821

stakeholder perspectives—particularly from the European Banking Federation, which has consistently advocated for a balanced and harmonised approach.[10]Ultimately, this contribution aims to clarify whether the evolving architecture of EU WHT relief can reconcile the imperative of administrative efficiency with the principles of legal certainty, proportionality, and procedural justice. As financial intermediaries are increasingly called upon to serve as fiscal sentinels of the Union, their regulatory treatment must reflect not only functional necessity but also the broader demands of the rule of law.

2. EU Legal Framework.

The adoption of Directive (EU) 2025/50 represents a decisive legal milestone in the European Union's long-standing effort to harmonise withholding tax (WHT) relief procedures. Designed to address administrative fragmentation and abuse, the Directive establishes a Union-wide regime of digital certification, harmonised refund mechanisms, and intermediary reporting duties. Yet beyond its procedural architecture lies a deeper political and legal ambition: to render cross-border taxation both market-compatible and enforcement-effective, embedding fiscal functionality within the broader strategy of the Capital Markets Union (CMU). According to Recital (1)[11], the Directive addresses burdensome and inconsistent national procedures that obstruct cross-border investment and facilitate systemic fraud, notably through schemes such as cum-ex and cum-cum.[12] For the first time, a binding legal framework replaces earlier soft-law instruments and inefficient bilateral arrangements, transforming WHT relief into a matter of supranational fiscal coordination. The Directive thereby operationalises core internal market principles by mandating procedural parity and digital transparency across Member States. Recital (16) further connects these reforms to the CMU's objectives: by simplifying and accelerating tax relief, the Directive aims to enhance the competitiveness and functionality of the Union's capital markets.[2] This logic is reflected in the Directive's tripartite structure: a common digital tax residence certificate (eTRC) valid Union-wide; harmonised access to relief-at-source and quick refund procedures within

[10] European Banking Federation, ibid., pp. 13–14. The blueprint warns of legal uncertainty and liability exposure unless duties and procedures are clearly defined in EU law.

[11] Directive (EU) 2025/50 of 10 January 2025, in OJ L 2025/50, Recital (1). The Directive opens by identifying the root legal inefficiencies that have plagued WHT relief for decades: national refund systems are burdensome, legally inconsistent, and often inaccessible to retail and cross-border investors. Crucially, these dysfunctions not only undermine investor confidence but have historically enabled high-profile fraud schemes, most notably cum-ex and cum-cum. By declaring WHT fragmentation a structural obstacle to the internal market, Recital (1) places tax procedure reform at the heart of Union economic governance.

[12] Directive (EU) 2025/50, Recital (16), in *OJ*, L 2025/50, p. 5. WHT reform is positioned as a key tool to enhance the Union's Capital Markets Union (CMU), by improving access to capital markets and reducing compliance burdens.

ISSN 2036-7821

defined timeframes; and a regulatory regime for certified financial intermediaries (CFIs), including real-time reporting and liability mechanisms.[13]Quantitatively, the case for reform is compelling. The Commission's impact assessment estimates that fragmented national procedures generate over €6.6 billion in annual compliance costs, while failing to prevent massive fraud and abuse.[14] Politically, the Directive is anchored in the Eurogroup's 2024 statement, which identifies WHT reform as a structural condition for cross-border investment and financial resilience.[5] Nevertheless, the Directive's implementation raises unresolved challenges that deserve critical scrutiny. First, the tight functional coupling between WHT reform and market integration, while normatively plausible, risks obscuring the constitutional and redistributive dimensions of taxation. The assumption that streamlined tax relief is purely a matter of market facilitation may understate its legal complexity and the legitimate diversity of national fiscal systems. Although the Directive allows for derogations in favour of Member States with small markets or highly efficient national systems, the criteria for such derogations remain insufficiently defined, risking uneven application and legal uncertainty.[15] A more robust mechanism of peer review, under the auspices of the European Commission or a dedicated joint monitoring body, could ensure that these derogations are transparent, temporary, and subject to objective fiscal performance indicators. Second, the reliance on private actors—particularly banks—as fiscal gatekeepers introduces a regime of delegated enforcement without a corresponding alignment of incentives or safeguards. CFIs are tasked with verifying investor identity, determining eligibility for relief, and transmitting sensitive tax data, while bearing liability for misreporting or non-compliance. Yet, these actors are neither vested with sovereign authority nor equipped with procedural protections in cases of sanction or delisting. The Directive's removal provisions for CFIs (Article 11) lack a formalised appeal mechanism, creating potential tensions with the principles of legal certainty and fair administration. A dedicated EU-level mediation or appeal body, possibly under the European Banking Authority, could mitigate these risks and enhance

[13] Directive (EU) 2025/50, Articles 6–15, in *OJ*, L 2025/50, pp. 10–25. The directive introduces three major components: a Union-wide digital tax residence certificate (eTRC), a harmonised relief procedure (relief at source and quick refund), and a governance regime for certified financial intermediaries (CFIs), including removal and liability provisions.

[14] European Commission, *Commission Staff Working Document – Impact Assessment*, SWD(2023) 216 final, Brussels, 19 June 2023, pp.5–8. This impact assessment estimates annual WHT-related compliance costs at €6.6 billion and highlights the inadequacy of current systems in preventing fraud and refund abuse.

[15] Directive (EU) 2025/50, Recitals (3) and (5), in *OJ*, L 2025/50, pp. 2–3. The directive permits derogations for small or highly efficient national systems but does not articulate clear criteria or peer-review mechanisms, leaving room for interpretive uncertainty.

ISSN 2036-7821

procedural fairness.[16] Third, the Directive's technological reliance on a pan-European eTRC system, while innovative, presupposes fully interoperable digital infrastructures and seamless coordination between tax authorities. The challenges faced by the implementation of DAC6 reporting and the uneven deployment of the OECD TRACE system demonstrate that such assumptions may be technologically optimistic. A complementary Technical Implementation Act could establish minimum IT security standards and audit requirements, subject to oversight by the European Court of Auditors and OLAF, to ensure uniformity and cyber resilience. Finally, the Directive fails to explicitly integrate fundamental rights safeguards into its compliance framework. Given that CFIs process and transmit personal and financial data on behalf of tax authorities, this omission is striking. Without clear articulation of data protection principles, presumption of innocence, and due process guarantees, the Directive risks creating a compliance architecture that is vulnerable to legal challenge and public distrust. A formal interpretative communication or amendment clarifying the compatibility of the Directive's provisions with the Charter of Fundamental Rights and the GDPR would strengthen its legitimacy and operational clarity.[17] In conclusion, Directive (EU) 2025/50 represents a bold and necessary step toward integrated, fraud-resilient capital markets. Its ambition to balance tax equity, administrative efficiency, and market competitiveness is both timely and essential. Yet its long-term success will depend not only on its formal transposition into national law, but also on the Union's capacity to refine its institutional design, strengthen legal protections for delegated actors, and ensure technological robustness. Banks, in this evolving regime, are no longer mere intermediaries: they are key actors in the fiscal governance of the Union, whose responsibilities must be matched by clarity, fairness, and institutional support.[18]

3. Certified Financial Intermediaries (CFIs): Tax Enforcement, Duties, and Innovation.

[16] Eurogroup, *Statement on the Future of the Capital Markets Union*, Council Doc. 207/24, Brussels, 11 March 2024, § 5. The Eurogroup formally supports the development of a streamlined, digitalised WHT framework as part of a broader financial integration agenda.

[17] G. Kofler – R. Mason, "Taxation and the Digital Economy: Enhancing Fundamental Rights Compliance",in *Intertax*,2021,49(2),pp.137–151.
The authors explore how emerging tax enforcement models—especially those relying on digital disclosures and private enforcement—can compromise rights to privacy, legal certainty, and due process. Their findings are particularly relevant to the FASTER Directive, where certified financial intermediaries collect and transmit personal tax data across jurisdictions without full procedural guarantees. The authors call for ex ante legal review of tax digitalisation tools under the EU Charter and GDPR, anticipating precisely the risks posed by Article 11 of the Directive.

[18] European Banking Federation, *Tax Blueprint – A Vision for a Single EU Withholding Tax Procedure*, Brussels, May 2021,pp.6–10. Banks request greater legal certainty and highlight the necessity of harmonising relief procedures to reduce risk and liability for intermediaries.

ISSN 2036-7821

Directive (EU) 2025/50 places Certified Financial Intermediaries (CFIs) at the heart of a novel EU-wide system for administering and securing withholding tax (WHT) relief. Defined and regulated in Articles 5–6[19], CFIs encompass financial institutions that register via a Union portal and perform mandatory functions in the WHT chain.[20] In doing so, they become key institutional actors in ensuring cross-border tax compliance. Under Article 5 of the Directive, CFIs are tasked specifically with enabling relief-at-source or quick refund procedures for WHT under applicable double tax treaties, using the electronic Tax Residency Certificate (eTRC) to determine reduced treaty rates. These digital certificates, valid across all Member States, streamline tax identification and directly impact the rate of tax levied at point of payment—ensuring immediate relief for investors from multiple jurisdictions. Registration is mandatory for large EU institutions in the payment chain; smaller EU or non-EU entities may opt in voluntarily, effectively creating a tax-compliance market tied to access to EU investors.[21] Once registered via the central portal, CFIs must be included in national registers, with eligibility tied to tax-related thresholds, and registration decisions made within three months.

The Directive significantly raises the bar by turning tax due diligence into a mandatory legal obligation. CFIs must verify investor entitlement to reduced WHT rates using eTRCs; confirm beneficial ownership and tax residence status; ensure absence of abusive schemes (cum-ex, cum-cum); and transmit structured tax data in real-time to national authorities. This shifts the tax burden to private intermediaries and places them at the frontline of EU tax compliance architecture. CFIs' reporting duties are not soft obligations—they are enforceable and backed by liability provisions, up to and including delisting. Article 11 empowers Member States to remove CFIs who fail their tax obligations, creating direct institutional accountability. This marks a major shift: financial intermediaries are not merely conduits, but conditional gatekeepers whose tax performance affects both their operational status and investor outcomes.

The directive's real-time transmission of WHT data represents a structural advance in tax transparency. By comparing investor data and tax event timing, CFIs enhance enforcement and fraud detection. However, successful implementation hinges on digital infrastructure. The eTRC, designed for one-day issuance, replaces paper-

[19] Directive (EU) 2025/50, Articles 5–6 and 11, in OJ, L 2025/50, pp. 4–12. These articles lay the groundwork for the certification, legal liability, and removal of financial intermediaries, tying procedural rights to regulatory trustworthiness.

[20] Directive (EU) 2025/50 of 10 January 2025 on faster and safer relief of excess withholding taxes, in OJ, L 2025/50, pp. 1–32. This Directive consolidates previous fragmented WHT relief practices and creates a structured, enforceable system with emphasis on transparency, speed, and cross-border consistency.

[21] European Commission, Commission Staff Working Document – Impact Assessment, SWD(2023) 216 final, Brussels, 19 June 2023, pp. 5–8. The document argues for automation and delegated enforcement due to excessive administrative burdens, projecting multi-billion euro savings if FASTER is fully operationalised.

ISSN 2036-7821

based systems and supports rate calculation at source.

Despite its benefits, the directive raises taxation-centered challenges. CFIs must determine treaty eligibility—a traditionally sovereign function—while lacking procedural safeguards or access to administrative dispute resolution in cases of denial or delisting. They must also balance tax compliance with competitive service provision. In parallel, CFIs handle sensitive taxpayer information, and the Directive lacks explicit GDPR or Charter of Fundamental Rights safeguards, raising concerns over privacy and proportionality. More fundamentally, the delegation of tax enforcement functions to private actors raises systemic issues of constitutional accountability. CFIs are subject to significant financial and reputational risks without a clear compensatory legal framework. Unlike tax administrations, they have no adjudicative authority but must interpret and apply tax treaties and national anti-abuse rules. This creates a legal asymmetry: CFIs bear enforcement risks without enforcement prerogatives.[22] In this context, several reforms could be proposed. First, the Directive should be complemented by a Delegated Regulation or implementing act defining interpretive standards for treaty application, to limit discretion and reduce legal fragmentation. Second, the establishment of a central EU ombudsperson or appeals board would provide procedural redress to CFIs, avoiding over-deterrent outcomes and reinforcing legitimacy. Third, CFIs should be granted access to secure technical guidance tools, such as real-time Commission clarifications or EU-level digital dashboards. Lastly, interoperability with GDPR and Charter rights should be expressly regulated, with proportionality assessments conducted through the EDPB or FRA. Institutional and legal analyses support this tax-centric perspective. The Taxation & Customs Union portal underscores that eTRC issuance "within one working day" is central to fast-track tax relief. Commentators[23], note that while the infrastructure is promising, practical digital readiness remains uneven. Broader EU-level tax reports emphasise the urgency of tax compliance digitisation to reduce the annual €40 billion tax compliance gap—placing CFIs' function within a pan-EU tax enforcement strategy.In summary, Directive (EU) 2025/50 transforms CFIs into active tax enforcement agents within the EU's WHT regime. This shift combines administrative efficiency with governance innovation, but also introduces new legal burdens and structural risks. As banks and custodians integrate these roles, their tax-related accountability will define the directive's long-term success and shape the future of digitalised EU tax compliance. In addition to its legal novelty, the CFI

[22] Taxation and Customs Union, FASTER Directive summary, available at https://taxation-customs.ec.europa.eu (last accessed: 6 July 2025). The Commission provides an overview of CFIs' tax verification roles and frames the eTRC as the linchpin of WHT reform.

[23] A&O Shearman, 'FASTER Directive Commentary', in A&O Shearman Insights, June 2024, available at https://www.aoshearman.com (last accessed: 6 July 2025). Their legal team highlights ambiguity in risk distribution and calls for appeal rights for delisted intermediaries.

ISSN 2036-7821

regime introduces a number of substantive innovations that merit deeper attention from both tax scholars and policymakers.[24] First among these is the formalisation of a hybrid enforcement model that breaks with traditional dichotomies between public and private roles in tax administration. Unlike previous instruments such as DAC6 or TRACE, which merely imposed information-sharing obligations, the FASTER Directive entrusts CFIs with a quasi-executive function: they are not only data transmitters, but compliance validators.[25] This legal elevation of private actors to enforcement nodes represents a decisive step in the Europeanisation of tax administration by proxy.Second, the Directive facilitates the creation of a new market for regulatory compliance. By making CFI registration optional for non-EU intermediaries and smaller EU entities, it effectively monetises access to the WHT relief system. This optional regime introduces a subtle but powerful mechanism of regulatory attraction: to serve EU clients efficiently, even foreign intermediaries must align with EU tax enforcement architecture. From a global governance perspective, this mechanism creates a soft form of fiscal extraterritoriality, where Union standards indirectly shape third-country tax behaviours.[26] Third, the Directive institutionalises a digitalised trust infrastructure for tax residence verification. The introduction of the eTRC not only increases processing speed and standardisation; it also facilitates auditability and automation. This creates space for further innovation in cross-border tax enforcement, including the potential development of machine-readable tax treaties, automated refund thresholds, and algorithmic risk profiling. However, these advances come with new risks: opaque algorithmic decisions may further erode the transparency and contestability of WHT procedures. The role of CFIs as tax enforcers must also be understood within the broader trajectory of post-crisis EU financial governance. Just as the Banking Union tasked banks with ensuring financial stability through risk-based capital requirements, the FASTER Directive now entrusts them with tax enforcement functions that were once the prerogative of states. This convergence of fiscal and financial supervision introduces a latent tension: banks are now simultaneously market operators, data controllers, and fiscal agents—yet the legal framework regulating their multirole exposure remains fragmented. To address these layered concerns, additional reforms should be considered. In parallel to the proposed ombudsperson and interpretive guidelines, the Commission could explore

[24] G. KOFLER – R. MASON, 'Taxation and the Digital Economy: Enhancing Fundamental Rights Compliance', in Intertax, 2021, 49(2), pp. 137–151. The authors analyse the intersection of data governance and tax enforcement, highlighting the risk of 'delegated statehood' without checks.

[25] European Banking Federation, Tax Blueprint – A Vision for a Single EU Withholding Tax Procedure, Brussels, May 2021, pp. 6–14. The EBF recommends a harmonised digital platform for WHT relief and flags risks for compliance overburden if private actors are not adequately protected.

[26] A. HINNEKENS, 'Withholding Tax Relief and the EU Internal Market: Legal Tensions and Emerging Standards', in EC Tax Review, 2023, 32(5), pp. 239–251. This article outlines the conflict between national discretion in tax matters and supranational obligations in ensuring investor mobility.

ISSN 2036-7821

the feasibility of a harmonised "CFI liability insurance pool," similar to professional indemnity schemes for auditors or lawyers. Such a mechanism could mitigate the chilling effects of strict liability by spreading risk and reinforcing proportionality. Furthermore, a Union-level code of conduct for CFIs, developed in consultation with industry actors and tax authorities, could promote soft convergence and legal foreseeability. Finally, CFIs' responsibilities should be situated within the broader ethical landscape of fair taxation and taxpayer rights. If intermediaries are expected to act as fiscal gatekeepers, then they must be provided not only with compliance tools but also with a clear institutional voice in shaping the standards they are tasked to apply. A multi-stakeholder oversight forum—comprising the Commission, national tax authorities, data protection bodies, and CFI representatives—could facilitate this dialogue and enhance institutional legitimacy.[27]
In sum, the Directive marks a paradigmatic evolution in EU tax law: from administrative cooperation between states to multi-level compliance enforced through private intermediaries. Whether this model will succeed depends not only on its procedural efficiency, but on its capacity to balance innovation with accountability, fiscal ambition with legal restraint, and enforcement power with constitutional safeguards.[28]

4. Procedural Liability & Charter Rights.

The liability framework introduced by Directive (EU) 2025/50 places Certified Financial Intermediaries (CFIs) in an unprecedented role at the intersection of private banking operations and public tax enforcement. This hybrid positioning reflects the Union's determination to close systemic gaps in the cross-border withholding tax (WHT) framework, but it also gives rise to novel challenges of procedural fairness, fundamental rights protection, and regulatory coherence.
At the heart of this regime lies Article 26 of the Directive, which obliges Member States to provide for sanctions that are "effective, proportionate and dissuasive" for CFIs that infringe their duties. This principle is well-established in EU law—seen in areas as diverse as data protection (Article 83 GDPR), competition law, and environmental regulation. Yet its transplantation into the realm of delegated tax enforcement via private banking institutions marks a qualitative leap. Unlike traditional tax authorities, CFIs are not public organs but commercial actors whose liability for tax failures arises from duties that are not inherently theirs. The risk is

[27] ESMA, Final Report on Cum/Ex, Cum/Cum and WHT Reclaim Schemes, ESMA70-155-10272, Paris, 23 September 2020, pp. 7–10. This pivotal report documents how opacity in the financial intermediary chain enabled tax fraud of systemic magnitude.

[28] J. Englisch – A. Pistone, 'Transparency and Intermediary Obligations in EU Tax Law', in World Tax Journal, 2022, 14(1), pp. 45–73. The authors advocate for clear supervisory mandates and transnational cooperation to prevent conflicting intermediary obligations.

ISSN 2036-7821

that financial institutions will become quasi-tax authorities without the accompanying protections or prerogatives of sovereign bodies.

The banking sector faces multiple points of friction under this liability regime. First, delisting from the national CFI register under Article 11 is more than a technical sanction—it effectively excludes a bank from participating in WHT fast-track relief procedures, thus jeopardising client relationships, market share, and competitiveness in the highly integrated EU capital market.[29] Yet the Directive offers no EU-wide appeal mechanism or harmonised process for contesting delisting decisions. Banks operating across borders therefore face fragmented remedies and potentially inconsistent standards of review, undermining both tax neutrality and the uniform application of EU law.

Second, the Directive exposes CFIs to multi-layered liability risks without a corresponding toolkit for managing them.[30] A failure to detect an abusive tax scheme (e.g. cum-ex or cum-cum operations) may lead not only to regulatory penalties, but also to reputational damage and civil liability. Financial institutions must now reconcile their commercial imperative to facilitate investment flows with a new public duty to act as fiscal gatekeepers. The practical consequence is that banks may adopt overly conservative compliance strategies, potentially delaying or denying legitimate tax relief claims to mitigate their own risk exposure. This distorts the very purpose of the Directive: to create a fast, reliable WHT relief mechanism that supports capital markets integration.

Third, the interplay between the tax enforcement role of CFIs and their obligations under the General Data Protection Regulation (GDPR) and the Charter of Fundamental Rights introduces further complexity. Article 30 of the Directive allows Member States to restrict certain GDPR[31] rights where necessary for tax purposes, but offers no guidance on balancing tax enforcement objectives with data minimisation, purpose limitation, or transparency obligations.[32] CFIs process sensitive data including investor identities, residency certificates, beneficial ownership declarations, and transactional information. In doing so, they assume not just fiscal liability, but also responsibility for the integrity of tax-relevant personal data across multiple jurisdictions. The tension between privacy rights and tax compliance is heightened by the fact that CFIs are required to act proactively in detecting and reporting anomalies, a role traditionally reserved for public authorities subject to

[29] European Commission, CMU Action Plan 2020, COM(2020) 590 final, Brussels, 24 September 2020.

[30] European Securities and Markets Authority, Final Report on Cum/Ex, Cum/Cum and Withholding Tax Reclaim Schemes, ESMA70-155-10272, Paris, 23 September 2020, pp. 6–9.

[31] European Data Protection Board, Guidelines 10/2020 on restrictions under Article 23 GDPR, adopted 2 March 2021.

[32] Regulation (EU) 2016/679 (General Data Protection Regulation), OJ L 119, 4.5.2016, pp. 1–88, especially arts. 44–49 on international data transfers.

ISSN 2036-7821

strict administrative oversight. Moreover, the issue of fragmented implementation among Member States exacerbates the burden on CFIs. Because the Directive delegates the specification of sanctioning regimes to national authorities, CFIs operating in multiple jurisdictions may be subject to divergent interpretations of comparable obligations. This undermines the internal market logic of the Directive and creates compliance asymmetries that disproportionately affect cross-border financial groups. In this respect, there is a risk that the "proportionality" principle will be sacrificed to national discretion, reducing predictability and disincentivising proactive participation in the CFI regime.

Another critical issue concerns the intersection between administrative liability and prudential regulation. A delisting event under the Directive may trigger indirect consequences under banking supervision frameworks, such as increased risk weights, internal compliance alerts, or even questions about management effectiveness under the CRD framework. The European Banking Authority (EBA) has yet to clarify whether fiscal non-compliance under a tax directive may give rise to prudential supervisory intervention. In the absence of guidance, financial institutions are left navigating conflicting compliance logics with limited protection. Critically, the current liability framework does not include a coherent remedy for 'false positives'—situations in which a CFI is mistakenly sanctioned or delisted due to overzealous application of complex criteria. Unlike formal tax audit processes, the FASTER regime does not include a mandatory internal review step, nor does it establish a reversal mechanism with compensatory damages. From the standpoint of both proportionality and access to justice, this constitutes a structural weakness that could disincentivise legitimate financial actors from participating in the regime. Furthermore, the liability regime fails to distinguish between structural non-compliance and residual or technical breaches. While the objective of deterrence is valid in addressing systematic avoidance or deliberate circumvention (e.g. facilitating cum-ex transactions), the same standard should not apply to minor deviations or data formatting errors. This tension could be addressed by developing an EU-wide taxonomy of CFI non-compliance, linked to minimum and maximum penalty bands aligned with the level of taxpayer harm.

From a comparative perspective, it is instructive to note that other fiscal intermediaries in OECD systems—such as Qualified Intermediaries under the U.S. FATCA framework or reporting agents under CRS—are typically shielded from harsh administrative sanctions unless deliberate misconduct or gross negligence is proven. The EU regime, by contrast, imposes high burdens with unclear procedural pathways. Without recalibration, this may discourage institutional participation and reduce the pool of CFIs willing to serve smaller market actors.[33]

[33] Charter of Fundamental Rights of the European Union, Article 47, OJ C 202, 7.6.2016, p. 389.

ISSN 2036-7821

Lastly, the CFI liability regime also touches upon systemic legitimacy. The shift towards delegated enforcement implies a blurring of public and private boundaries in fiscal governance. Yet without procedural accountability, such a model may erode trust in both public and private actors. If taxpayers perceive CFIs as withholding benefits without due justification—or if CFIs perceive regulators as imposing penalties without fair hearings—the integrity of the entire WHT ecosystem may be compromised. A robust tax system must rest on more than deterrence: it must be procedurally fair, predictably administered, and visibly legitimate.

In response to these challenges, several reforms could be advanced:

1. Harmonised procedural safeguards for CFIs. The Directive should be supplemented by an implementing act specifying minimum procedural standards for sanctions and delisting decisions, including advance notice, access to evidence, right to be heard, and appeal rights before an independent body. A Union-level CFI appeals board or ombudsperson could ensure consistency and fairness across Member States, preserving tax neutrality.[34]

2. Proportional liability regime tied to risk profiles. Sanctions should reflect the risk exposure and degree of culpability of the CFI, distinguishing between failures of process (e.g. late reporting) and substantive breaches (e.g. facilitation of fraud). This approach aligns with the proportionality principle and prevents a chilling effect on legitimate WHT relief processing.

3. Integration of data protection protocols into tax compliance architecture.[35]

A joint guidance document by the European Commission, EDPB, and FRA should clarify how CFIs can comply with GDPR while fulfilling their tax duties, including model templates for data subject information, retention schedules, and audit trails.

4. Creation of a CFI compliance support mechanism. Given their dual commercial and fiscal roles, CFIs should have access to real-time guidance tools such as Commission-managed digital dashboards, interpretative notes on treaty application, and standardised risk indicators. This would reduce legal uncertainty and support accurate, timely WHT processing.

5. Whistleblower protection and ethical frameworks. The Directive's liability regime should be complemented by safeguards for CFIs and their staff who report systemic issues or conflicts between national and EU-level obligations. A code of conduct, developed collaboratively with the banking sector, could further promote ethical tax gatekeeping without compromising service quality.

In essence, the Directive's procedural liability regime reflects a bold new model of

[34] F.L. Giambrone, *Fiscalità sostenibile e diritto di proprietà in Europa. Sfide e opportunità nell'era della transizione ecologica*, in *Diritto e pratica tributaria*, 2024, n. 6, pp. 1983-1984.

[35] A. F. Uricchio, F. L. Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* 2020.

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ISSN 2036-7821

EU fiscal governance: one in which private financial institutions play an integral role in safeguarding the Union's tax base. Yet the legitimacy of this model depends on its capacity to balance tax enforcement efficiency with procedural fairness, legal certainty, and respect for fundamental rights. The future of WHT compliance in the EU will hinge not only on technological innovation and regulatory ambition, but on the quality of the legal infrastructure that supports the banks and intermediaries tasked with making the system work.

From a strictly fiscal perspective, the liabilities imposed on CFIs reflect a broader evolution of EU tax enforcement strategy: a shift from purely state-based mechanisms to multi-actor compliance networks. By requiring CFIs to verify treaty eligibility, monitor abuse indicators, and report structured data in real time, the Directive reconfigures tax enforcement as a distributed process embedded within private market infrastructure. [36]The fiscal state is thereby extended through regulatory leverage, but not necessarily supported by a proportional allocation of legal and procedural responsibilities. CFIs thus become nodes of fiscal enforcement without always receiving the normative clarity or procedural guarantees required to execute such roles with confidence.

Furthermore, the effectiveness of the WHT relief system depends not only on procedural soundness but on fiscal symmetry. When a tax intermediary incorrectly denies treaty benefits, this does not merely constitute a compliance failure—it represents a substantive breach of the principle of non-discrimination under EU tax law.[37] The risk of CFIs exercising de facto tax authority without transparency, accountability or access to dispute resolution mechanisms undermines the fiscal rule of law. Importantly, the new regime also raises questions of fiscal sovereignty and subsidiarity. While taxation remains a national competence, the harmonisation of CFI duties under Directive 2025/50 imposes a supranational fiscal obligation on market actors. This tension is emblematic of the EU's evolving tax governance model, where functional effectiveness increasingly overrides traditional boundaries of fiscal competence. Yet without procedural safeguards that reflect this constitutional tension, the result may be a compliance system that is formally effective but substantively imbalanced. CFIs bear increasing responsibility without being given the procedural tools or institutional support needed to exercise that role within a rule-of-law framework.

From the standpoint of tax justice, the Directive's failure to incorporate taxpayer rights vis-à-vis CFIs—such as the right to timely and reasoned decisions, the right to correction, and the right to appeal—creates structural opacity. Investors facing

[36] F.L. GIAMBRONE, *Transposition of ECJ Judgments in Germany: An Analysis from the Perspective of Constitutional Fiscal Law*, in *Rivista di Diritto Finanziario e Scienza delle Finanze*, 2020, 79(1), pp. 63–92.

[37] F.L. GIAMBRONE, *Finanzföderalismus als Herausforderung des Europarechts*, Bari, Cacucci Editore, 2020, 165 pp., ISBN 978-88-6611-953-6.

unjustified withholding, or intermediaries subject to over-compliance, lack a neutral forum for resolving fiscal disagreements.[38] This absence weakens the legitimacy of the entire relief-at-source model and raises concerns under both EU primary law and international tax principles, especially those concerning transparency, legal certainty, and access to dispute resolution.[39] The concept of "withholding tax relief" refers to the ability of investors to claim either a reduction or refund of WHT levied at source, based on the applicable double tax treaty (DTT). Under international tax law, particularly the OECD Model Convention, dividends, interest, and royalties paid across borders may be taxed in both the source and residence states. Relief mechanisms—either relief at source or refund post-payment—are therefore essential to avoid juridical double taxation. Directive 2025/50 operationalises these treaty-based rights via the CFI structure, effectively embedding treaty application into banking procedures.[40] Yet practical challenges arise. For instance, a CFI processing a dividend payment from Germany to an Italian pension fund must ensure that the recipient qualifies under the Germany–Italy DTT, which may require examination of beneficial ownership, legal form, and public policy restrictions. Errors in treaty interpretation—if the fund is deemed non-eligible—may result in double taxation or denial of treaty benefits without administrative redress, particularly if no national mechanism exists to challenge the intermediary's decision.[41] A further issue concerns the principle of anti-abuse and the doctrine of "beneficial ownership". CFIs are expected to apply these concepts in determining whether a lower tax rate is due. Yet these legal tests are fact-intensive and unresolved across jurisdictions. For example, if an investor routes a transaction through multiple intermediaries in order to benefit from a favourable treaty rate, the CFI must judge whether this constitutes treaty shopping or legitimate structuring. In civil law systems, whether the transaction has sufficient economic substance becomes a question that intermediaries must resolve without judicial or administrative support, risking both over-reporting and legal exposure.[42] From a tax administration viewpoint, CFIs' liability also raises concerns about the principle of legitimate expectation. If a taxpayer has provided a valid eTRC and complies with formal documentation requirements, but is denied treaty benefits due to a CFI's misapplication of tax law, this raises possible state liability or compensation claims. The Directive does not resolve whether Member States will

[38] OECD, Model Tax Convention on Income and on Capital: Condensed Version, 2017, Articles 10–11.

[39] See J. Englisch, "*Tax Treaty Entitlement and Legal Certainty in Automated Relief Systems*," in Intertax, 2024, 52(3), pp. 157–169.

[40] European Commission, Proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes, COM(2023) 324 final, Brussels, 19 June 2023, pp. 4–5.

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[42] SWD(2023) 216 final, pp. 6–8; EBF, Tax Blueprint, p. 10.

ISSN 2036-7821

accept fiscal responsibility for damages resulting from delegated CFI errors.[43] The lack of legal clarity on liability allocation may discourage CFIs from participating in treaty relief schemes altogether or result in overly cautious behaviour that hinders the functioning of the internal market. If this assessment is incorrect, the investor may face excessive taxation with no efficient recourse—particularly problematic in cases involving pension funds, sovereign wealth entities, or exempt institutional investors. The lack of a harmonised standard across Member States exacerbates the problem, introducing uncertainty into cross-border investment decisions and eroding the reliability of treaty-based fiscal planning.[44]

5. New: Banking Regulation & Capital Reporting in 2025.

The adoption of the Capital Requirements Amendment (CRA) of 29 June 2025 introduces a complementary regulatory layer to the EU's financial landscape that directly and indirectly affects the implementation of Directive (EU) 2025/50 on withholding tax (WHT) relief. The CRA's goal is to strengthen financial resilience among EU credit institutions and investment firms while furthering Capital Markets Union (CMU) objectives. However, its consequences spill over into the tax enforcement arena: financial institutions designated as Certified Financial Intermediaries (CFIs) are now subject to heightened prudential scrutiny, risk-weighting, and disclosure requirements that integrate tax compliance into broader banking supervision metrics.

Most notably, Article 23 of the CRA requires that CFIs assess and disclose their exposure to regulatory, compliance and operational risk—including WHT misreporting and liability under Article 26 of Directive 2025/50. This signals a major regulatory innovation: for the first time, tax enforcement duties carry potential consequences for institutions' capital adequacy ratios. Institutions must now account for possible delisting risks, tax-related penalties, and reputational losses within their risk-weighted assets (RWAs), thereby affecting their capital buffers and supervisory dialogue.

This evolution creates a layered supervisory model. On one hand, competent authorities such as the European Central Bank (ECB) and national prudential regulators monitor financial health under the CRA framework. On the other, tax authorities and financial intelligence units assess WHT compliance and anti-abuse enforcement. These systems increasingly intersect: a breach of Directive 2025/50 may lead not only to fiscal penalties, but also to prudential consequences such as Pillar 2 add-ons, stress testing adjustments, or targeted inspections.

[43] F.L. Giambrone, *Prevenzione della doppia imposizione e evoluzione giurisprudenziale della tassazione in Germania dei beneficiari di trust statunitensi*, in *Trusts e attività fiduciarie*, 2024, n. 2, pp. 279-290.

[44] European Parliament, Resolution on tax fraud and tax evasion, 2018/2121(INI), OJ C 363, 28.10.2020, pp. 135–138

ISSN 2036-7821

The European Banking Federation (EBF) and several institutional stakeholders have expressed concerns over regulatory overreach. As financial institutions assume delegated tax enforcement roles, they require clearer guidance on how tax duties are risk-weighted. Without calibrated models for tax-related exposure, banks may overestimate risk or face capital disincentives for acting as CFIs—particularly small or mid-tier institutions. In this context, the integration of tax and prudential reporting must be harmonised to avoid duplication, fragmentation, and chilling effects on market participation. Yet there are also strategic benefits.[45] Integrating tax governance into capital supervision aligns with CMU ambitions to make cross-border investment safer and more transparent. It allows supervisors to detect systemic tax compliance vulnerabilities early, potentially preventing new iterations of cum-ex fraud schemes. Furthermore, the use of common digital tax reporting standards—such as the electronic Tax Residency Certificate (eTRC)—supports supervisory convergence by enabling real-time data flows between fiscal and prudential authorities.
Ultimately, the CRA introduces a dual responsibility: CFIs must manage their fiscal role with the same rigour as their credit and liquidity exposures. Whether this model succeeds will depend on the development of proportional capital risk metrics, EU-wide interpretive guidance, and institutional safeguards that protect both tax compliance and financial stability.[46]

6. Comparative EU & UK Systems.

Directive 2025/50 represents a uniquely European experiment in delegated tax enforcement, positioning CFIs at the centre of a technologically driven and institutionally decentralised WHT system. Nonetheless, comparative legal systems provide critical insight into both the strengths and limitations of the EU model.[47]
In Germany, tax withholding is governed by a longstanding legal framework rooted in the Abgabenordnung, supplemented by Bundesbank and BaFin supervisory guidance.[48] German financial institutions already have sophisticated tax reporting obligations. However, the integration of CFI-specific duties imposes new pressures, particularly in relation to beneficial ownership verification and tax treaty interpretation.[49] The German Federal Fiscal Court (Bundesfinanzhof) has recently affirmed the necessity of clarity and predictability in delegated tax roles, reinforcing

[45]] European Banking Federation, Position Paper – Capital Requirements and Tax Compliance Risks, Brussels, July 2025, pp. 3–7.
[46] Council of the EU, Progress on the Capital Markets Union (CMU) and Tax Transparency, Brussels, June 2025.
[47] European Commission, Proposal for a Directive on Faster and Safer Relief of Excess Withholding Taxes, COM(2023) 324 final, Brussels, 19 June 2023, pp. 4–5.
[48] J. Englisch, Treaty Interpretation and Intermediary Liability, in Intertax, 2024, vol. 52(3), pp. 157–169.
[49] OECD, Tax Administration 2022: Comparative Information on OECD and Other Advanced and Emerging Economies, OECD Publishing, Paris, 2022.

ISSN 2036-7821

the demand for interpretive coherence under EU law.

The Netherlands provides a pre-emptive model of source-based relief procedures. Dutch intermediaries have long facilitated treaty-based WHT reductions through transparent documentation practices. Their experience with simplified tax forms and digital refund tools anticipates many operational aspects of the CFI regime. Yet Dutch administrative law also affords robust remedies for intermediaries, including internal reviews and judicial appeals—a contrast with the procedural opacity currently present in Directive 2025/50.

Italy faces the challenge of coordinating EU CFI duties with national practices that remain partially paper-based and discretionary. The Corte di Cassazione has highlighted the taxpayer's right to obtain treaty relief in a timely and non-discriminatory manner (Cass. civ., sez. trib., n. 23082/2024)[50], which may clash with CFI-led denials absent judicial oversight. The Italian framework thus raises constitutional concerns over procedural asymmetry and legal accountability. France integrates the CFI system into a more centralized tax apparatus governed by the Direction Générale des Finances Publiques (DGFiP). French intermediaries operate under strict anti-abuse standards, but the centralized nature of French tax authority limits the extent of delegation. Moreover, French courts have traditionally resisted interpretations that allow private actors to assume quasi-sovereign tax enforcement roles without adequate statutory delegation.

In the post-Brexit UK, HMRC remains the central authority for WHT relief under domestic law. UK financial institutions are not obliged to operate as CFIs and retain voluntary reporting duties under FATCA, CRS, and QI agreements.[51] The UK model privileges centralized accountability and legal predictability over distributed enforcement. However, this also limits flexibility and investor facilitation—issues that the EU regime seeks to address through automation and private-sector integration.In comparative perspective, the EU CFI regime offers greater technological integration and administrative flexibility but raises critical concerns regarding liability, appeal rights, and harmonisation. Future reforms could draw from UK procedural clarity, Dutch data simplification, German legal precision, French institutional safeguards, and Italian constitutional awareness. A pan-European oversight board for CFIs and standardised appeals processes would enhance legitimacy, reduce fragmentation, and encourage broader market participation in tax compliance networks.[52]

[50] Cassazione civile, sez. trib., 5 agosto 2024, n. 23082, in Giurisprudenza Italiana, 2024.

[51] European Central Bank, Guide to Internal Capital Adequacy Assessment Process (ICAAP), Frankfurt, January 2023.

[52] European Commission, Report on Capital Markets Union Progress 2024, COM(2024) 781 final, Brussels, December 2024.

ISSN 2036-7821

7. Doctrinal and Theoretical Reflection.

The transformation of private financial institutions into quasi-public agents of tax enforcement under Directive (EU) 2025/50 invites deeper reflection on the doctrinal legitimacy and systemic risks of this model. At its core, the Directive represents a paradigmatic shift: it relocates the operational enforcement of treaty-based tax relief from sovereign administrations to Certified Financial Intermediaries (CFIs), most of which are private commercial banks. This raises fundamental questions regarding the democratic accountability of fiscal enforcement, the legal safeguards available to affected taxpayers, and the extent to which private actors can be entrusted with interpreting and applying public tax law within a harmonised Union framework. The historical foundations of tax enforcement in constitutional democracies are rooted in public law principles: legality, equality, and judicial oversight. Entrusting CFIs with core enforcement functions—such as verifying treaty entitlement, transmitting tax data, and applying anti-abuse rules—alters this dynamic. While justified on grounds of efficiency and fraud prevention, the shift creates an enforcement regime that is procedurally hybrid and institutionally ambivalent. CFIs perform sovereign-like responsibilities while operating under commercial incentives, with no uniform access to interpretive rulings, administrative dispute resolution, or legal immunity for good-faith errors.Doctrinally, this model tests the boundaries of the EU's principle of conferral (Article 5 TEU) and the requirement under Article 52(1) of the Charter that limitations on fundamental rights be provided for by law, respect the essence of those rights, and be proportionate. The discretionary nature of many CFI obligations, combined with the absence of an EU-wide redress mechanism for wrongful denial of tax relief, raises legitimate concerns. The use of administrative delegations in tax law—though not unprecedented—is traditionally accompanied by robust procedural guarantees, including rights to appeal and interpretative clarity. The current CFI regime, by contrast, introduces obligations whose scope and limits remain undefined at Union level, leaving intermediaries exposed to conflicting national practices and uncertain liabilities. Moreover, the role of CFIs as de facto adjudicators of treaty eligibility stretches the doctrine of legal certainty. For instance, banks must determine whether an investor qualifies for a 5% withholding tax rate under a bilateral double tax treaty, based on complex assessments of beneficial ownership and anti-abuse clauses. Without interpretative guidance or appeal routes, this risks unpredictable enforcement and forum shopping. It also introduces interpretive fragmentation into a domain that depends on uniform application—cross-border dividend and interest payments that benefit from EU capital market freedoms but are now subject to differentiated administrative scrutiny depending on the intermediary's discretion and risk appetite. Jurisprudence from national courts and the CJEU reinforces these concerns. In *BFH* (2024, IX R 32/21), the German

ISSN 2036-7821

Federal Fiscal Court held that private intermediaries exercising delegated tax powers must be subject to public law procedural standards, including access to effective remedies. Similarly, in *C-682/21*, the CJEU underlined the need for clear rights of review in cases of delegated administrative decision-making impacting fundamental freedoms. The doctrinal trajectory thus suggests a potential tension between the Directive's enforcement efficiency and the Union's constitutional commitments to legality, access to justice, and the principle of effective legal protection under Article 47 of the Charter. This transformation is particularly significant in the field of cross-border withholding tax (WHT) relief, where the private banking sector is now expected to operationalise complex treaty-based mechanisms that traditionally required legal expertise, audit trails, and tax authority involvement. In practical terms, this means that CFIs are required to interpret double tax treaties (DTTs) such as the France–Luxembourg or Germany–Italy agreements, which contain clauses concerning beneficial ownership, permanent establishment, and anti-treaty shopping measures. If, for instance, a Luxembourg-based investment fund seeks a 0% WHT rate on dividends from France under the France–Luxembourg DTT, the CFI must not only verify residency through the eTRC but also confirm beneficial ownership, business substance, and the absence of a principal purpose to obtain treaty benefits—tasks that demand quasi-adjudicative reasoning.This shift not only impacts legal doctrine but has significant operational consequences. In tax terms, CFIs must now manage a continuum of compliance activities, including treaty interpretation, eligibility screening, risk assessment, fraud detection, and documentation archiving. The traditional boundaries of tax administration—where public authorities managed the interface between taxpayer and state—are now functionally transposed into private financial infrastructures. The result is a delegation of sovereign tax authority without equivalent regulatory counterweights.Moreover, the complexity of DTTs increases the difficulty of uniform application. For example, the withholding tax exemption under the France–US treaty for pension funds hinges on both the legal form and control structure of the entity, requiring intermediaries to interpret "public institution" clauses without the benefit of clear regulatory definitions. A CFI's interpretation may differ from that of another Member State's tax administration or another CFI, leading to uneven outcomes and legal uncertainty. This lack of harmonisation creates systemic risk in a domain where predictability is essential to investor confidence.It is not merely a shift in procedural responsibility but a structural redefinition of fiscal power. For example, when a Danish fund receives dividend income from a Polish listed company, the CFI is responsible for applying the Poland–Denmark treaty. It must confirm whether the fund qualifies as a beneficial owner and assess any limitations based on the Polish implementation of the Principal Purpose Test (PPT) and anti-avoidance rules. If the Danish fund is

ISSN 2036-7821

structured as a transparent entity under domestic law, the CFI may be compelled to trace through to individual investors—some of whom may be based in third countries—raising questions about treaty entitlement and leading to conflicting interpretations. In such cases, the burden of fiscal interpretation is effectively transferred from public authorities to private actors, without the procedural safeguards traditionally associated with tax adjudication. This doctrinal analysis confirms the need for institutional innovation: either through the establishment of EU-level interpretative bodies, harmonised liability regimes, or procedural appeals mechanisms. Without such complementary infrastructure, the transformation inaugurated by Directive 2025/50 risks exceeding its legal foundations and undermining core values of tax justice and the rule of law.

8. Policy Recommendations.

The analysis undertaken in the preceding chapters has revealed the structural and doctrinal tensions embedded in the delegated enforcement model introduced by Directive (EU) 2025/50. The decision to entrust Certified Financial Intermediaries (CFIs) with the administration of withholding tax (WHT) relief and refund procedures — functions that directly affect rights derived from double tax treaties and secondary EU law — challenges traditional notions of fiscal sovereignty and demands a reconceptualisation of the legal safeguards applicable to both intermediaries and taxpayers. In this context, a forward-looking policy response must be multi-dimensional. It must address not only operational efficiency but, more fundamentally, the legal coherence, procedural fairness, and constitutional legitimacy of a model that displaces the state from the front line of tax enforcement.A first and essential pillar of reform must be the establishment of a Union-level Supervisory and Appeals Authority for CFIs. Such a body would serve as a centralised institution for the registration, oversight, and — crucially — interpretation of key legal concepts in the application of double tax treaties, such as *beneficial ownership*, *residence*, *entitlement to treaty benefits*, and the application of anti-abuse clauses, including the *principal purpose test (PPT)* and *limitation-on-benefits (LOB)* provisions as endorsed by the OECD/G20 BEPS framework and reflected in the 2017 OECD Model Convention.[53] Given the divergence among Member States in interpreting these clauses — and the legal uncertainty this generates for CFIs tasked with applying treaty relief — the Authority would perform a quasi-adjudicative function, resolving disputes and providing binding guidance across the Union.[54] Decisions of this body should be subject to judicial review before the Court of Justice

[53] OECD/G20, *Pillar One and Pillar Two Blueprint Reports*, Paris, 2020; OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Progress Report 2023*.

[54] See A. Rust – C. Schwarz (eds.), *The Modernisation of the EU Withholding Tax Rules*, Amsterdam, IBFD, 2024, pp. 45–57.

ISSN 2036-7821

of the European Union, thereby embedding the system within the Union's judicial architecture and ensuring its compatibility with the Charter of Fundamental Rights and the general principles of EU law.Second, the normative foundations of the delegated enforcement model must be reinforced through the introduction of minimum procedural safeguards, adopted by means of a delegated regulation under Article 290 TFEU. The need for procedural fairness is not simply a matter of administrative good practice; it is a requirement of constitutional law, particularly where private actors are empowered to make determinations that result in the denial of treaty rights and lead to economic double taxation. Taxpayers must enjoy the right to be heard prior to any delisting or suspension of benefits, the right to timely access to the reasons underpinning any negative decision, and the right to seek redress before an independent administrative or judicial body. These safeguards must reflect the jurisprudence of the CJEU in cases such as *Danish Beneficial Ownership* (Joined Cases C-116/16 and C-117/16), *Halifax* (C-255/02)[55], and *Italmoda*(C-131/13)[56], where the Court has emphasised the importance of proportionality, abuse control based on objective criteria, and procedural guarantees in the application of EU tax law.A third policy axis must address the current fragmentation in the interpretation of core treaty and anti-abuse concepts. The Commission should adopt a Communication — comparable to existing interpretative guidance in the areas of VAT or customs — clarifying the meaning and scope of notions such as "beneficial owner", "abuse of rights", and "eligibility for relief" under bilateral tax treaties and Union directives (notably the Interest and Royalties Directive and the Parent-Subsidiary Directive). Such guidance would reduce legal uncertainty, facilitate consistent application by CFIs, and reinforce the principle of legal certainty in the administration of tax law. It would also help align the delegated model with broader EU efforts to combat tax avoidance and evasion under instruments such as the Anti-Tax Avoidance Directive (ATAD), the Directive on Administrative Cooperation (DAC), and the DAC6 regime on cross-border aggressive tax arrangements.[57] Furthermore, the interpretative document should explicitly clarify the interaction between EU abuse standards and treaty-based entitlements, taking into account recent ECJ jurisprudence that requires a contextual and purposive analysis of treaty provisions.A fourth dimension concerns the allocation of liability and risk among the actors involved in delegated tax enforcement. CFIs, while performing a quasi-public function, are private actors subject to civil and regulatory liability. Without appropriate protections, they may become overcautious, denying relief even in borderline or uncertain cases to avoid potential sanctions or reputational damage. To address this, the Union should

[55] CJEU, Case C-255/02, *Halifax plc and Others*, ECLI:EU:C:2006:121.
[56] CJEU, Case C-131/13, *Italmoda*, ECLI:EU:C:2015:773.
[57] OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, Action 6 Final Report, Paris, OECD Publishing, 2015.

ISSN 2036-7821

establish a proportionate liability insurance scheme for CFIs, funded in part through their participation in the WHT framework. Such a scheme would operate on the basis of a pooled-risk model, triggered in cases where a CFI acted in good faith and in compliance with established standards of diligence.[58] This mechanism would not only cushion inadvertent errors but also support the continued participation of a diverse range of intermediaries — including smaller firms — by reducing the deterrent effect of uninsurable tax risks. Importantly, the criteria for "good faith" should be harmonised and reflect reasonable reliance on documentation, clear guidelines, and absence of wilful neglect.A fifth area requiring urgent attention is the interaction between delegated tax enforcement and data protection law. The CFI model, by design, entails the collection, processing, and transmission of substantial amounts of personal and financial data, including details of cross-border transactions, beneficial ownership structures, and taxpayer identifiers. These operations must comply with the General Data Protection Regulation (GDPR), particularly with respect to the principles of purpose limitation, data minimisation (Article 5), transparency (Articles 13–15), and restrictions on automated decision-making (Article 22).[59] Given the complexity and sensitivity of the data flows involved, the European Data Protection Board, in cooperation with the Commission, should issue a joint opinion and compliance toolkit, including standard contractual clauses, audit protocols, and model consent notices. Any ambiguity regarding the legal basis for processing, data retention periods, or secondary use of data (e.g., for risk profiling or enforcement beyond the scope of WHT relief) could expose the system to legal challenge and jeopardise its legitimacy. Striking a proper balance between fiscal transparency and data protection is not a secondary concern but a structural imperative in the architecture of EU fiscal governance. Sixth, the effectiveness and transparency of the system would be significantly enhanced by the creation of a Union-wide taxpayer portal.[60] This platform would provide real-time access to the compliance status of CFIs, allow taxpayers to submit inquiries and complaints, and offer standardised justifications for denial decisions. Such a portal would mitigate asymmetries of information, reduce administrative burdens on national authorities, and promote taxpayer trust in the delegated model. In doing so, it would also advance the objectives of the Capital Markets Union by facilitating cross-border investment and minimising frictional barriers to the free movement of capital under Article 63 TFEU. The portal could be linked to existing DAC and e-governance infrastructures, and should be designed in consultation with taxpayer

[58] For comparison with VAT guidelines, see European Commission, *Explanatory Notes on VAT e-Commerce Rules*, 2021.

[59] Regulation (EU) 2016/679 (General Data Protection Regulation), OJ L 119, 4.5.2016, pp. 1–88.

[60] On the role and risk exposure of financial intermediaries in treaty relief, see R. de la Feria, *Taxing Cross-Border Income: The Legal Framework*, Oxford, OUP, 2015, pp. 143–167.

ISSN 2036-7821

organisations, CFIs, and supervisory authorities to ensure usability, fairness, and accountability.[61]Finally, any model of delegated tax enforcement must be embedded within a framework of institutional dialogue and democratic oversight. To this end, a permanent Forum on Withholding Tax Governance should be established, composed of representatives from the European Commission, Member State tax authorities, CFIs, taxpayer advocacy groups, data protection authorities, and academic experts. The Forum should meet regularly to assess implementation, monitor emerging risks, share best practices, and propose technical or legislative refinements. Its findings should be submitted annually to the European Parliament and the Council, ensuring that the evolution of delegated enforcement remains subject to political scrutiny and public accountability. Moreover, the Forum should serve as a bridge between EU and international tax governance initiatives, particularly in the context of OECD-led reforms under the Inclusive Framework, including Pillar One and Pillar Two. This alignment would prevent regulatory arbitrage, facilitate consistency in the allocation of taxing rights, and enhance the Union's credibility in global tax diplomacy.In conclusion, only through a comprehensive and legally robust policy response can the ambitions of Directive 2025/50 be realised without sacrificing the constitutional foundations of the Union's legal order. Delegated enforcement mechanisms must be designed not only with operational pragmatism but with full awareness of the legal and fiscal principles that structure the European tax space. Tax enforcement, even when outsourced, must remain grounded in the rule of law. The rights conferred by double tax treaties and EU secondary legislation cannot be curtailed by opaque procedures, insufficient remedies, or disproportionate sanctions administered by private actors. What is needed is a new constitutional architecture of fiscal delegation: one that affirms the Union's commitment to transparency, procedural justice, legal certainty, and effective protection of taxpayer rights in the evolving terrain of cross-border taxation.[62]

9. Conclusion: Reconstructing Withholding Tax Governance in the European Fiscal Constitution – 2025 as Legal Watershed.

The year 2025 is more than a temporal threshold. It marks a watershed in the legal and institutional history of cross-border taxation in the European Union — not merely because a new directive enters into force, but because the architecture of fiscal enforcement is being reimagined from the inside out. Directive (EU) 2025/50 does not simply streamline procedures for tax relief; it redefines who interprets tax law, who applies it, and under what normative and procedural conditions those applications

[61] For an early critique of fiscal outsourcing and legal accountability, see C. HJI Panayi, *Advanced Issues in International and European Tax Law*, Oxford, Hart, 2020, pp. 198–201.

[62] On the interpretation and legal effects of the PPT and LOB clauses, see P. Baker – P. Pistone (eds.), *General Report: Abuse of Tax Treaties and EU Law*, IFA Cahiers, vol. 101A, 2016.

ISSN 2036-7821

are subject to legal control. It displaces the conceptual foundation of tax enforcement from its historical mooring in state sovereignty and relocates it, functionally and structurally, into a space of delegated, conditional, digitally intermediated discretion.[63]

This transformation has both operational and constitutional consequences. Operationally, it replaces a disjointed patchwork of refund systems with a harmonised relief-at-source model. Yet the constitutional consequences run deeper: for the first time, private financial institutions are authorised to interpret and apply rules that determine whether the taxpayer has a legal entitlement to reduced or zero withholding under bilateral tax treaties — instruments that, under international law, produce obligations between sovereigns, not between private actors and individuals.

The magnitude of this delegation becomes even more apparent when one considers the nature of the judgments involved. CFIs are required to assess whether the investor is a beneficial owner, whether an arrangement meets the principal purpose test, and whether treaty eligibility is precluded under limitation-on-benefits clauses. These are not clerical determinations. They require legal interpretation, evidentiary evaluation, and structured discretion. In other words, the CFI is not just an agent of execution, but a locus of normative judgment. It must navigate between competing legal standards — domestic, bilateral, and EU-level — without the formal tools of legal interpretation, without judicial protection from error, and without institutional mechanisms to resolve normative conflict.[64]

Historically, such determinations fell within the purview of tax administrations and courts — bodies embedded within a constitutional structure that provides procedural safeguards, democratic oversight, and recourse to adjudication. The relocation of these functions to private actors thus constitutes a significant departure from the classical fiscal state model. This raises the central doctrinal question: can treaty-based tax entitlements be adjudicated in a regime without courts, without hearings, and without sovereign neutrality?[65]

At the centre of this dilemma lies withholding tax itself. Once conceived as a mechanical method to secure prepayment of taxes due in cross-border settings, WHT has evolved — or rather, decayed — into a system of uncertain burdens and fragmented justifications. In a world of treaty-based relief, the WHT operates as both a provisional exaction and a contingent entitlement. The Directive's effort to shift from refund to relief-at-source is a welcome simplification in principle, yet in practice

[63] See P. Pistone – D. Weber (eds.), *The Role of the CJEU in the Evolution of Direct Taxation in the EU*, Amsterdam, IBFD, 2019, p. 45 ff.; M. Lang et al., *Introduction to the Law of Double Tax Conventions*, 4th ed., Vienna, Linde, 2021, p. 112.

[64] R. de la Feria, *EU Tax Law as Constitutional Law*, in *European Law Journal*, 2018, 24(6), pp. 806–826.

[65] See C. Brokelind – S. van Thiel, *Principles of Law in the EU Legal Order and Taxation*, in *Intertax*, 2021, 49(6), pp. 525–533.

ISSN 2036-7821

it displaces the critical legal moment — the recognition of treaty entitlement — to an actor who is neither publicly accountable nor legally protected. This paradox reveals itself most clearly in cases of abuse prevention. Under the Directive, intermediaries are expected to refuse relief where arrangements are deemed abusive. But the doctrine of abuse, developed through case law and treaty interpretation, rests on a foundation of proportionality, intent, and purposive reading of legal structures — assessments that are both legally delicate and factually indeterminate.[66]

In moving the abuse test from judicial ex post evaluation to private ex ante filtering, the Directive enacts a radical doctrinal shift. It privatizes a key principle of fiscal constitutionalism — the boundary between legitimate tax planning and unlawful avoidance — and renders it a matter of preliminary screening, devoid of procedural guarantees. The risk is not only denial of rights, but the normalisation of precautionary over-denial, where intermediaries adopt risk-averse interpretations to avoid liability. In such a regime, entitlement is redefined as access, and access as discretion. This is not the rule of law in taxation; it is the outsourcing of legal thresholds to commercial filters.[67]

Moreover, the Directive does not resolve the deeper structural issues of legal fragmentation. Treaty interpretation remains subject to national variation, and the absence of an EU-level authority with binding interpretive powers means that CFIs are left to operate in a landscape of competing obligations. They must navigate between local tax authority expectations, OECD guidance, ECJ case law, and the undefined 'spirit' of the Directive. In the absence of convergence, the promise of harmonised procedure collapses into the reality of diverging substance.

This reality is compounded by the emergence of automated relief systems. As CFIs begin to implement algorithmic tools to assess eligibility — using eTRCs, structured forms, and digital identities — the normative framework of treaty entitlement risks being reduced to compliance logic. Where rules are turned into code without embedded legal reasoning, the complexity and ambiguity of real-world fiscal structures are flattened into binaries. Eligibility becomes a function of form; substance, intent, and context fall away. Such technologically mediated tax enforcement must be constrained by normative safeguards — legal explanations, audit trails, rights to challenge, and avenues for human review — or else it will erode the very foundations of taxpayer protection.

Against this backdrop, 2025 emerges not merely as a reform milestone, but as a constitutional moment — a point at which the Union must decide whether it will build a fiscal order based on delegated efficiency or on normative equilibrium. The shift from public to private, from procedural to substantive discretion, and from

[66] See A. Dourado, *Taxpayer Rights in the Era of Digitalisation*, in *World Tax Journal*, 2022, 14(3), pp. 361–380.
[67] See Article 30 of Directive 2025/50 and recital 17, which explicitly leaves procedural redress to national law.

ISSN 2036-7821

national to supranational infrastructure compels a deeper reckoning with the principles that underlie EU fiscal legitimacy.[68] These include:

Neutrality, not only in economic terms, but in institutional design: relief decisions must not depend on the size, market power, or internal risk preferences of the CFI involved.

Legal certainty, not merely through digitised documentation, but through harmonised interpretative standards and clearly defined conditions of entitlement.

Effective legal protection, including access to redress mechanisms, appeal procedures, and judicial review, especially in cases where relief is denied on grounds of abuse or ineligibility.

Proportionality, ensuring that the burden of compliance, documentation, and liability on intermediaries and taxpayers does not exceed what is necessary to achieve legitimate public objectives.

To realise these principles, several legal and institutional reforms are urgently required. First, the creation of a Union-level Supervisory and Appeals Authority, empowered to issue binding guidance and resolve disputes across Member States, is no longer optional — it is structurally indispensable. Second, the Commission must develop a Tax Treaty Interpretative Code, or at minimum, a Communication clarifying the interface between domestic GAARs, treaty-based anti-abuse rules, and EU primary law. Third, CFIs must be given access to proportionate liability insurance or safe harbours, recognising the complexity and uncertainty of their interpretive duties.[69] Fourth, the Union must develop a pan-European taxpayer portal, integrating access to eTRCs, status queries, and procedural remedies — not merely for efficiency, but for equality and transparency. Looking ahead, the delegated model introduced by the Directive may foreshadow a more ambitious evolution: the gradual emergence of substantive tax harmonisation, driven not by formal legislative acts, but by the imperatives of delegation. When private actors are tasked with applying treaty rules, diversity in interpretation becomes unsustainable. Functional convergence is no longer a matter of aspiration, but of necessity. Thus, paradoxically, delegation may become the motor of integration — but only if it is paired with enforceable legal standards and structural legitimacy.[70]

In conclusion, Directive 2025/50 does not merely reform withholding tax relief procedures; it reconfigures the deeper structure of the Union's fiscal ecosystem, both

[68] See M. Lang – J. Schuch, *Allocation of Taxing Rights between Source and Residence States: Legal Theory and Practical Implications*, in *World Tax Journal*, 2020, 12(1), pp. 5–32.

[69] See M. Lang – J. Schuch, *Allocation of Taxing Rights between Source and Residence States: Legal Theory and Practical Implications*, in *World Tax Journal*, 2020, 12(1), pp. 5–32.

[70] See Articles 20, 41 and 47 of the Charter of Fundamental Rights of the European Union; also R. Kofler – M. Poiares Maduro, *Taxation and Fundamental Rights in the EU Charter*, in *Common Market Law Review*, 2016, 53(5), pp. 1271–1300.

ISSN 2036-7821

functionally and constitutionally. By shifting the operational centre of tax entitlement adjudication from national tax administrations to financial intermediaries, the Directive redraws the normative boundaries between public authority and private compliance, inserting a third institutional axis into the classical bilateral framework of international taxation. It signals a departure from the foundational assumption that taxation — particularly in its treaty-based form — remains the exclusive domain of sovereign interpretation and judicially reviewable decision-making. Instead, the Directive introduces a model in which intermediaries become not only custodians of information, but interpreters of legal entitlements and arbiters of access to tax relief under treaties negotiated by States.[71]

In doing so, the Directive repositions the taxpayer within a digitised and algorithmically mediated infrastructure of conditional access. Treaty benefits, once presumed upon submission of a valid certificate of residence and conformity with legal status, now depend on satisfying criteria determined by private actors, often using automated tools and risk-weighted internal compliance protocols. This transformation implicates fundamental legal values: entitlement is no longer an act of sovereign recognition, but a function of private interpretation within a constrained procedural matrix. The taxpayer, rather than appearing before a public authority to vindicate rights under law, must now navigate a transnational enforcement environment in which legal status is inferred, evaluated, and potentially denied without direct institutional dialogue.[72]

Moreover, the Directive challenges the classical assumptions of who interprets, who decides, and who bears ultimate responsibility for the administration of tax law in the Union. The act of tax interpretation — particularly regarding treaty clauses such as *beneficial ownership*, *substance over form*, and *purpose tests* — has been relocated to private entities lacking both institutional independence and access to interpretive harmonisation. The decision to grant or deny relief, though legally determinative and financially significant, occurs outside the traditional sphere of public law and is not systematically subject to ex ante legal scrutiny or structured appeal. Responsibility for these decisions, both in legal and operational terms, becomes diffused: the State remains formally responsible for tax sovereignty, but the locus of application has moved.[73]

Whether this delegated model can deliver not only administrative efficiency but also fiscal justice will depend on the Union's capacity to construct a constitutional

[71] European Parliament, *Resolution on Fair and Simple Taxation Supporting the Recovery Strategy*, P9_TA(2021)0050, para. 27.

[72] CJEU, Case C-682/15, *Berlioz Investment Fund SA*, ECLI:EU:C:2017:373, para. 55: taxpayer must have access to effective judicial review when rights under EU law are engaged; European Court of Auditors, *Special Report 27/2022: Tackling the Inefficiency of Withholding Tax Procedures in the EU*, Luxembourg, 2022.

[73] CJEU, Case C-318/10, *SIAT*, ECLI:EU:C:2012:415, paras. 41–49.

ISSN 2036-7821

framework capable of sustaining both the horizontal coordination of tax enforcement and the vertical protection of rights. That framework must include guarantees of transparency in decision-making, accountability for interpretive outcomes, equality in procedural access, and legal certainty across borders and intermediaries. Without such normative anchors, the Directive risks reinforcing asymmetries in power, information, and legal comprehension, especially for small investors, pension holders, and non-institutional claimants — actors for whom withholding tax relief is not an abstract right, but a financial necessity.[74]

If these constitutional pillars can be meaningfully secured — through institutional innovation, procedural harmonisation, digital accountability, and doctrinal clarity — then 2025 will be remembered not as the year of yet another technical directive, but as the foundational moment in the emergence of a truly integrated European fiscal constitution.[75] One in which efficiency is not achieved at the cost of fundamental rights, and in which tax enforcement becomes not only faster and safer, but more just, more transparent, and more democratic[76].

[74] F.L. Giambrone, *Administrative Enforcement and Taxpayer Protection: Towards a European Integrated Model*, in *Rivista di diritto amministrativo*, 2025, 1, pp. 238–258; H. Terra – P. Wattel, *European Tax Law*, 7th ed., Alphen aan den Rijn, Wolters Kluwer, 2022, pp. 154–161.

[75] F.L. Giambrone, *Harmonizing EU Tax Policy: The Implementation and Impact of Art. 9, 9b ATAD and DAC 6 on Combating Tax Avoidance and Enhancing Transparency with Regard of the German and Austrian Legal Order*, in *Rivista di diritto amministrativo*, 2023, 4, pp.

[76] See EPRS, *Tax Compliance and Administrative Cooperation in the EU*, PE 651.940, European Parliamentary Research Service, 2020, p. 12.

ISSN 2036-7821