# WTS Global Financial Services Infoletter

## Editorial

## Tax developments affecting the international Financial Services industry

Dear Madam / Dear Sir,

we hope you may find interesting the latest version of the WTS Global Financial Services Newsletter presenting taxation related news from 13 countries with a focus on the international Financial Services industry. [1]

The following participants in the WTS Global network contributed with a diverse range of FS tax topics, e.g. CJEU case law, tax on credit institutions, WHT, VAT, taxation of crypto assets and investment funds:

- Argentina – Rosso Alba & Rougès
- Austria – ICON
- Czech Republic – WTS Alfery
- Finland – Castrén & Snellman
- France – FIDAL
- Germany – WTS
- India – Dhruva Advisors LLP
- Ireland – Sabios
- Netherlands – WTS
- Poland – WTS Saja
- Slovenia – WTS TAX d.o.o.
- Sweden – Svalner Skatt & Transaktion
- Switzerland – Wenger Vieli AG

Thank you very much for your interest.

Frankfurt, 15 December 2021

With best regards,

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1 The editors would very much like to thank their WTS colleague **Amelie Inselmann** for her valuable support.

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Please find the complete list of all contacts at the end of the newsletter.

## Hot topic

## Recent EU developments with respect to WHT

*"…The Financial Services sector plays a critical role in any modern economy. The bundle of institutions that make up an economy's financial system can be seen as 'the brain of the economy', providing the bulk of the economy's need for many functions…"* (WTO, 2021)

When founding the EU based on the main objective of developing a common market in 1957, the idea of the Financial Services industry being the "brain" of the economy may well have been one of the corner stones of the Union: for the first time ever in history, several nations worked together aiming to build a uniform capital market. Since then, the free movement of capital has been one of the four fundamental freedoms of the EU and a key component of perhaps the most successful integration effort of the European Union to date.

In numerous judgements, the European Court of Justice (CJEU) has been ruling in favor of the development of a common capital market by rejecting tax legislation of the member states, which limited the free movement of capital via *"arbitrary discrimination or disguised restriction"* (Art. 65 para 3 TFEU). Through this jurisprudence, the CJEU has become one of the driving forces of integration and of a level playing field for the Financial Services sector, especially with regards to the fund industry.

### National court decisions in contrast to the free movement of capital

On 23 October 2020, the Dutch Supreme Court gave the final decision in the Koeln-Aktienfonds case.[2] The CJEU, in its decision C-156/17 - Koeln-Aktienfonds Deka dated 30 January 2020, had held that both resident as well as non-resident investment funds are principally subject to the same requirements (here: shareholder and annual distribution requirements) for an exemption from Dutch WHT. Nevertheless, applying the requirements to non-resident funds constitutes a restriction of the free movement of capital if it is impossible or excessively difficult for them to meet the Dutch requirements. It was for the referring Dutch Supreme Court to decide, whether the actual administrative process in practice constitutes such an excessive burden.

Subsequently, the Dutch Supreme Court on 23 October 2020 found that, requiring the non-resident investment fund to prove the Dutch shareholder requirement and to calculate a – complex – "replacement payment" according to Dutch tax law is not an excessive burden and thus no restriction of the free movement of capital. The Dutch Supreme Court's approach prevents most non-resident investment funds from the refund of Dutch WHT.

On 24 June 2021, the Danish Supreme Court gave the final decision in the Fidelity Case.[3] The CJEU, in its decision C-480/16 - Fidelity Funds dated 21 June 2018, had held that an exemption from Danish WHT granted solely to funds resident in Denmark that fulfilled certain criteria - most importantly a minimum distribution - was contrary to the free movement of capital.

The Danish Supreme Court interpreted the CJEU ruling as stating that solely the residence criteria was contrary to the free movement of capital. The WHT exemption did not have to be granted to non-resident funds, if they did not meet the additional criteria, i.e. did not make a minimum distribution. In practice, most non-resident investment funds could not prove such minimum distribution and thus were unable to gain a refund of Danish WHT.

2 See also WTS Global FS Infoletter # 20 of 15 March 2021.
3 See also WTS Global FS Infoletter # 22 of 17 September 2021.

### National court decisions in favor of the free movement of capital

In contrast to the above two restrictive decisions, there are national court decisions favorable for the free movement of capital in other jurisdictions, e.g. in Spain.

On 30 July 2021, the Spanish High Court gave a ruling regarding a reduction of the tax rate on dividends to 1%, which was granted to funds resident in Spain, if they fulfilled certain additional criteria, e.g. minimum capital, minimum number of investors. The Spanish High Court held that not applying this tax rate reduction to regulated non-resident fund vehicles would violate the free movement of capital. The funds in question were non-harmonized AIFs resident in Germany. When examining the justification of the restriction, the court conducts a comparability analysis. In essence, it holds that it is sufficient for a non-resident AIF to be a regulated fund vehicle in its (EU) home jurisdiction in order to be comparable to a resident fund vehicle that is entitled to the tax rate reduction. As the fund vehicles were regulated AIFs in Germany, it was concluded that they are comparable to resident fund vehicles in scope of the Spanish tax rate reduction. The court held that comparability cannot be assessed taking into consideration the Spanish domestic law.

### AG opinion challenging the CJEU predence

On 6 May 2021, the Advocate General ("AG") Kokott delivered her opinion in the CJEU case C-545/19 - "AEVN", regarding the WHT reclaim of a German regulated, open-ended contractual investment fund in Portugal. In this case, the fund complained that, under Portuguese law, domestic funds are exempt from WHT on Portuguese dividends (instead, they are charged quarterly with a stamp duty tax of 0.0025% on their net asset value), while foreign funds have no option to be exempt from WHT on Portuguese dividends.

According to the AG opinion, the different tax treatment of domestic and foreign funds (NAV tax vs. dividend WHT) is merely a difference in taxation technique that does not result in a worse position for the foreign fund and thus does not constitute a restriction of the free movement of capital. Moreover, any infringement of the free movement of capital would be justified because - according to the AG - the level of protection under the free movement of capital is lower than under the other three fundamental freedoms.

The named AG opinion constitutes a particularly strong breach with the established jurisprudence of the CJEU regarding the scope of the free movement of capital; academic comments and objections have already been published in specialized literature.[4]

### AG opinion supporting the CJEU precedence

On 6 October 2021, AG Saugmandsgaard Øe gave his opinion in CJEU case C-342/20 – "A SVPI", concerning a French fund in corporate legal form (a Real Estate Investment Company), which was denied a tax exemption in Finland because of its legal form; tax exemption in Finland is only granted to foreign funds in contractual form. According to the AG opinion, the link of the tax exemption to the legal form of a foreign fund constitutes a restriction of the free movement of capital. The AG opinion is in line with the CJEU judgment in the case C-480/19, dated 29 April 2021 related to Finland and a Luxembourg incorporated investment fund (SICAV), where the CJEU held that the different treatment of foreign funds merely on the basis of their legal form is not admissible under the free movement of capital.

4 Stoeber, European Taxation, issue 1-2022 (English); Stoeber, Der Betrieb, 2021, p. 2383 et seq. (German).

Interestingly, at the very end of his opinion dated 6 October 2021, AG Saugmandsgaard Øe refers to the CJEU case C-156/17 dated 30 January 2020 - "Koeln-Aktienfonds Deka", clarifying that the CJEU in that case did not establish a justification, when stating that the member states were free to pass special tax regimes for collective investment vehicle. Instead, member states have to use this autonomy within the established scope of the fundamental freedoms, meaning that the adoption of such special tax regimes - especially their (administrative) requirements - must not constitute a restriction of the free movement of capital. This explicit statement seems to be addressed to the Dutch Supreme Court and its final ruling dated 23 October 2020 in the Koeln-Aktienfonds Deka case, which - as described above - takes an opposing view.

## Conclusion

The above comparison reveals two opposing trends in national jurisprudence as well as in AG opinions. The potential downside of this exchange of arguments concerns the free movement of capital, the common capital market and thus the European Union's competitiveness as a location for the Financial Services industry.

In the upcoming months, the CJEU will have several opportunities to clarify whether its long-standing jurisprudence in favor of the free movement of capital will continue to be a driving force of integration. The opportunities are the upcoming CJEU judgements in the above described cases C-545/19 - "AEVN" (Portugal) and C-342/20 - "A SVPI" (Finland) as well as the case C-537/20 - "L Fund" (Germany).

However, as the above-described examples from national jurisprudence in the Netherlands, Denmark and Spain show, the free movement of capital in practice is ultimately enforced on the national level: in national courts and pre-dominantly in national parliaments passing tax legislation either by favoring the free movement of capital or by putting it at a disadvantage.

If national legislators are not motivated by CJEU judgements to provide for a consistent tax-legal environment for the common capital market including investment fund vehicles in the European Union, it is ultimately up to the European legislator to establish such a level playing field. The EU Commission seems to be taking a first step into this direction; it is currently reviewing the feedback received on its initiative "New EU system for the avoidance of double taxation and prevention of tax abuse in the field of withholding taxes"; a proposal for a respective directive is scheduled for 2022.

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## Argentina

# Tightening of the foreign exchange control framework, increase of Corporate Income Tax, taxation of crypto currencies, & Supreme Court decision on interest deduction

### 1. New resolution limiting transactions of dollar denominates securities (General Resolution No. 907/21 of the ASEC)

In an attempt to reduce the drain of the Argentina Central Bank ("ACB") dollar reserves and the continuous shortage of foreign currency, the Argentine Securities Exchange Commission ("ASEC") issued General Resolution No. 907/21, which was published in the Official Gazette on October 6, 2021. Through this resolution, some new limitations on transactions in dollar denominated securities traded in Argentina - typically used by resident companies and individuals to circumvent foreign exchange controls - were introduced.

This new measure comes in addition to many others, already existing, which generally require (i) ACB approval for accessing to the Argentine foreign exchange market in order to exchange Argentine pesos for foreign currency either to save or to make transfer of funds abroad¸ and (ii) Argentine exporters to bring back to the country their export proceeds. Given such restrictions on many kind of cross border payments (i.e. dividends inclusive) certain alternative methods have become a common standard practice in the Argentine marketplace, like the exchange of pesos for dollar-denominated securities, which could be cashed abroad in foreign currency.

The new rules further restrict such peso for dollar-denominated security transactions. General Resolution No. 907/21 in particular, set forth the following:

- A limit of 50 thousand per week, considering their nominal value, in sales of securities denominated in dollars and issued under Argentine law with settlement in foreign currency (i.e. in tremors of market value it means approximately USD 19 thousand per week).
- Orders to enter into transactions in securities with settlement in foreign currency, or to transfer securities to or from foreign depositories may only be submitted if the following conditions are met:
  - (i) During the previous 30 calendar days, there were no sales transactions of securities denominated and payable in dollars, issued by the Republic of Argentina, under its local law, with settlement in foreign currency; and
  - (ii) A commitment to not perform the transactions defined in point (i), from the moment in which the referred transactions are settled and for the following 30 consecutive days, is assumed.
- The restrictions on the sale of securities denominated in dollars and issued under foreign law with settlement in foreign currency are terminated.

### 2. ACB Communication tightening the foreign exchange control framework (Communication "A" 7340/2021 of the)

In the same vein that the ASEC General Resolution No. 907/21, on 12 August 2021 the ACB issued Communication "A" 7340/2021 ("Communication 7340"). The first restriction relates to the impairment to pre pay imports of goods, in set case, during the next thirty days.

Secondly, it prohibits the settlement of purchase and sale transactions of securities with settlement in foreign currency through payment in foreign currency cash, or through their deposit in custody accounts or accounts of third parties.

Additionally, Communication 7340 provides that securities purchase & sale transactions settled in foreign currency (known as "cash with settlement") must be paid by one of the following mechanisms:

- By transfer of funds to and from demand accounts held in the customer's name with local financial institutions; or
- Against wire transfers on bank accounts in the customer's name with a foreign entity that is not incorporated in countries or territories where the Recommendations of the Financial Action Task Force do not apply, or do not sufficiently apply.

## 3. Reform of corporate income tax rates (law No. 27,630, published in the Argentine Official Gazette on June 16, 2021)

This law includes amendments to the Income Tax Law ("ITL") in relation to corporate income tax rates applicable for fiscal years beginning on or after 1 January 2021, inclusive. The new regime incorporates a scale of rates with three differentiated brackets according to the level of accumulated taxable net profit. With progressive criteria, it was established the following:[5]

| Net Income from | Fixed Amount | Applicable Tax rate | Tax rate in excess of |
|---|---|---|---|
| 0 – 5,000,000 | 0 | 25% | 0 |
| 5,000,000 – 50,000,000 | 1,250,000 | 30% | 5,000,000 |
| 50,000,000 – onwards | 14,750,000 | 35% | 50,000,000 |

These amounts will be updated considering the annual variation of the Consumer Price Index, published by the Argentine Census Bureau.

In all cases, the distributed dividends will be subject to a 7% tax rate. In this respect, please note that such tax rate is lower than the 10% cap for the taxation on dividends in the source jurisdiction, generally established in most Double Tax Conventions entered by the Republic of Argentina (15% in the case of the France-Argentina tax treaty).

## 4. New law to encourage savings and security transactions in local currency

In the previous context of limited dollar reserves at the ACB, the Argentine government enacted Law 27,638, published in the Argentine Official Gazette on August 4, 2021. This law introduces exemptions in the Income Tax and the Personal Property Tax, in order to encourage savings and security transactions denominated in local currency (Argentine pesos) or in set domestic investments.

5 All the amounts of the table are denominated in Argentina pesos (1 USD = 100,25 AR$).

- **Income Tax ("IT"):**
  The exemption established by the ITL for certain kinds of interest is extended to interest payments resulting from the placement of funds through financial instruments issued in Argentine pesos, destined to promote productive investments, as defined in Decree No. 621/2021.
- **Personal Property Tax ("PPT"):**
  Certain financial instruments issued in Argentine pesos, are exempted from the PPT. Among the instruments exempted are the following:

  (a) corporate bonds issued in accordance to Section 36 of the Argentine Corporate Bonds Law;

  (b) financial instruments destined to promote productive investments, as defined in Decree No. 621/2021 and

  (c) units or shares of mutual funds and financial trusts that (i) have been issued through a public offering authorized by the Argentine Securities Exchange Commission and (ii) whose underlying assets are comprised, at least, by a 75% of financial instruments mentioned above.

In turn, as mentioned above, the Decree No. 621/2021 sets forth the criteria to define the financial instruments included in those exemptions. Accordingly, it defines the term productive investments as the direct or indirect investment in productive, real estate and/or infrastructure projects for different economic activities in the goods and services production sectors, such as agriculture, livestock, forestry, real estate, telecommunications, energy, logistics, fishing, science and applied research, among others.

### 5. Decree on taxation of crypto currencies (Decree No. 796/21, issued on November 17, 2021)

The Argentine Federal Government decided to include crypto currency transactions among those covered by the Tax on Credits and Debits in Bank Accounts ("TCDBA"). The TCDBA is a federal tax withheld by Argentine banks and other savings and payment institutions. It applies on any funds deposited that are either withdrawn or transferred from checking or savings accounts. The taxable base is the amount withdrawn or transferred, and the general tax rate is 0.6% on both debits and credits in bank accounts, or 1.2% on other set taxable events (e.g. organized systems of payments aimed at avoiding the use of local bank accounts), with limited exemptions.

In order to tax crypto currency transactions, through Decree No. 796/21 an additional paragraph was added to Section 10 of the Annex to Decree No. 380/01, which provides for the TCDBA exemptions. In fact, this new paragraph establishes that the exemptions of the TCDBA shall not be applicable to the movement of funds related to the purchase, sale, exchange, trading and/or any other transaction on crypto assets, crypto currencies, digital currencies, or similar instruments.

## 6. Argentine Supreme Court ("ASC") ruling on interest deduction in the context of leveraged buyouts (ruling "INC S.A.", issued on July 15, 2021)

This ruling addresses the possibility of a Company to deduct from its CIT, interest derived from a debt contracted through the issuance of corporate bonds, when such debt is applied to the purchase of the shares of a third company. In fact, this was a case related to "leveraged buyouts", for it implies the acquisition of a company using a significant amount of borrowed money to pay the purchase price, followed by the use of such indebtedness in the operating business of the acquired company.

In this regard, the ASC decided to challenge the tax deduction of those financing interests. The highest court understood that – in this case – the issuance of corporate bonds was not destined at refinancing liabilities from productive activities that generate taxable profits, but at sustaining leverage, i.e., the purchase of a company taking debt, and then to absorb it and attribute the debt to the target company.

Therefore, according to the ASC, such interest is not deductible since it is not related to economic events taxed by the IT, and such relation is required by the ITL in order to allow any IT deduction.

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## Austria

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# Draft bill on new Austrian tax regime for crypto currencies published

At the beginning of November 2021, the Austrian Ministry of Finance published a draft bill on the eco-social tax reform 2022 which includes new rules for the taxation of income from crypto currencies. In the following, please find an overview of the most important changes.

The new rules are set to come into force on 1 March 2022 and will integrate "income from crypto currencies" into the existing regime for the taxation of income from capital investment. Income from crypto currencies will include "income from investment in crypto currencies" (i.e. fruits like interest income from crypto currencies, airdrops, bounties, staking) and "income from capital gains from crypto currencies" (e.g. sale, exchange for services / goods including fiat money).

### Taxation of crypto currencies acquired before 1 March 2021

Crypto currencies acquired before 1 March 2021 will be treated as "old stock" and will continue to be subject to the currently existing rules, where capital gains from crypto currencies are taxed at the progressive tax rate (max. 55%) as "other income" if - upon realization of the gain - the related assets have been held for less than a year. As any old stock will be held for one year or longer as soon as the new regime enters into force, capital gains realized after 1 March 2021 will be tax exempt.

### Income from crypto currencies (new stock)

Crypto currencies acquired after 28 February 2021 will be treated as "new stock" and will be subject to the new rules. As of 1 March 2022, income from new stock of crypto currencies shall be subject to the special income tax rate of 27.5% provided that the underlying contract is based on a public offering in legal and factual terms. Pursuant to the new rules, swaps between crypto currencies will be tax-exempt, however the original acquisition costs must be carried forward. The new regulation will further introduce the possibility to offset losses from the sale of crypto currencies with other income from capital assets, which are also subject to the special tax rate (e.g. dividend income, capital gains from stocks, investment funds and derivatives, however not interest related to a savings account) within the same tax year. Losses must not be forwarded to other periods.

According to the draft bill, income from crypto lending and the contribution of crypto currencies to staking pools will constitute interest income from crypto currencies and the progressive tax rate of up to 55% will apply. Airdrops, bounties and staking will not constitute interest income from crypto currencies. These rewards will only be taxed upon a realization of a gain (e.g. sale).

### Withholding tax obligation

The new rules will introduce a withholding tax obligation for domestic debtors and service providers (e.g. crypto exchanges) as of 31 December 2022. The tax must be withheld when income from crypto currencies is paid out or credited, provided that the underlying contractual relationship is based on a public offering in legal and factual terms.

### International aspects

As of 1 March 2022, crypto currencies that fall under the new rules (new stock) will be subject to the rules on exit taxation. In the case of a limitation of Austria's taxing right (e.g. in the case of a relocation of the taxpayer abroad), the accumulated hidden reserves will be subject to tax in Austria. In case of a relocation within the EU / EEA, a postponement of the tax payment is possible. For taxpayers who have accumulated high gains with new stock (acquired after 28 Feburary 2021), the new rules will inevitably lead to a tax liability. This could be avoided by relocating from Austria before 1 March 2022, as until then no exit tax regime applies to cryptocurrencies classified as other income.

### Exchange of information on crypto currencies

In connection with the new rules regarding income from cryptocurrencies, it is important to keep in mind the development of the automatic exchange of information at EU level. The European Commission is currently working on a directive for the automatic exchange of information on crypto currencies and e-money. With the 7th revision of the Directive on Administrative Cooperation (DAC8), the exchange of information is currently planned to become mandatory as of 2022 / 23. In practice, this will mean that crypto brokers and exchanges will have to provide tax authorities with data on their customer's transactions.

### Conclusion

The new classification of crypto currencies under income from capital investments should be welcomed for reasons of legal certainty and represents an about-face regarding the existing rules. However, some points remain unclear. For example, both the draft bill and the accompanying explanations lack clarity on the treatment of non-fungible tokens ("NFT") and do not provide a definite categorization of the popular investment forms of "Liquidity Mining" and "Yield Farming".

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Czech Republic

ALFERY

# Act on Investment Companies and Investment Funds & Green Tax

## 1. Act on Investment Companies and Investment Funds

The most important changes made by amendment to the Act of 2021 are compared to the previous year below.

### Investment fund with legal personality

The Act was broadened by a new provision concerning an investment fund's board of directors, whereby the investment fund's board of directors with legal personality may be only one member, and its member can only be a legal entity, provided that the investment fund with legal personality is not a self-governing investment fund.

### Joint stock company with variable share capital

The statutory director of a joint-stock company with variable share capital, which is an investment fund, no longer has full management and therefore does not determine the basic focus of business management. The general meeting of a joint-stock company with variable share capital now does not elect or dismiss the statutory director nor approve his/her contracts or changes to that contract. Furthermore, the provision authorizing the legal entity to become a statutory director was removed if the conditions for membership of the Board of Directors are met.

In the event that the same person wishes to fill more than one senior position in the same fund or company, a new consent from the Czech National Bank to perform another senior position is not required if the Czech National Bank has already granted one permit.

## 2. Green Tax

### Reduction of support for solar power plants

Thanks to the photovoltaic boom of 2009 and 2010, purchase prices have increased several times over a period of time. For this reason, the government of the Czech Republic has decided to reduce support for solar power plants to a minimum level within the range set by the European Commission. The yield percentage is thus to be reduced from 8.4% to 6.3%. The main reason was the disparity between the support of solar power plants and their share in electricity generation, as they account for only 2%.

### Electricity tax

Taxpayers are obliged to pay a tax on electricity from renewable sources from 1 January 2016, when the law that abolished the exemption of environmentally friendly electricity from the electricity tax came into force. The obligation to pay an electricity tax applies to production plants with an installed capacity of over 30 kWp whose production meets their consumption. Technological consumption is not subject to the tax.

A tax return must be filed monthly. It is necessary to register for the tax at the locally responsible customs office, based on the address of the manufacturer's registered office. However, if the manufacturer is not a payer by law, he/she is not obliged to register; if registered, he/she must file a zero tax return on a monthly basis.

### Subsidies

New projects are no longer eligible for operational subsidies but are entitled to other forms of assistance. Above all, they can apply for an investment grant under the New Green Savings Program. When transferring ownership of a photovoltaic power plant, the new operator must apply for a new license and the previous owner must annul the original license. Unless the technical conditions under which the original license was granted change, the amount of support remains the same. The new operator loses the right to said support when the previous license expires and, at the same time, a new one is not issued.

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## Finland

# Advocate General Opinion (CJEU C-342/20) – Finnish tax exemption criteria designed for contractual funds qualifies as a restriction on free movement of capital

On 6 October 2021, the Advocate General issued its opinion (Opinion) on Finnish CJEU case C-342/20 and stated that the Finnish tax exemption criteria designed only for contractual funds qualifies as a restriction on free movement of capital.

The case concerns the Finnish tax criteria for the exemption from WHT designed for collective investment schemes in contractual form (like Lux FCPs). The Finnish WHT reclaim in question was launched by a French fund in corporate legal form (a French real estate investment company SCSPI, société civile de placement immobilier à capital variable) for the WHT year 2020. The essence of the case is whether the corporate form fund must be treated comparable to a Finnish contractual fund notwithstanding its legal form.

The Finnish tax exemption criteria for investment funds were revised by a legislative change from the beginning of 2020. Pursuant to the in-force tax exemption criteria set out in section 20 a § of the Income Tax Act, only contractual investment funds can be regarded tax exempt in Finland. In the case at hand, the Finnish administrative court requests a preliminary ruling from the CJEU to determine whether the Finnish tax exemption criteria only applicable to contractual funds is discriminatory under the EU law.

The AG Opinion clearly states that a French open-ended corporate form investment fund should be considered comparable to a Finnish open-ended contractual investment fund for Finnish income tax purposes notwithstanding the difference in their legal form.

The AG Opinion is in line with the previous case law of the CJEU and follows established WHT related jurisprudence. Previously this year, the CJEU issued a ruling C-480/19 that assessed the taxation of a Finnish unitholder in a foreign corporate form fund. The CJEU ruled that the income received by a foreign corporate fund should not be treated differently from the income received by a Finnish contractual fund for Finnish income tax purposes, because the two fund types were in a comparable position despite their different legal forms.

It is expected that the upcoming ruling of the CJEU in the case C-342/20 may have a significant impact on the tax treatment of foreign investment funds not established in contractual form. The Finnish courts decided to postpone their decisions on several pending cases and wait for the CJEU to issue its ruling in the matter. Depending on the resolution of the CJEU, the Finnish tax legislation may need to be revised.

### Changes to the Finnish interest deduction limitation rules

The Finnish Ministry of Finance issued a government proposal on changes to the Finnish interest deduction limitation rules. The changes proposed concern the balance sheet exemption, the exemption on infrastructure projects and the right to deduct net interest expenses belonging to the income basket of other income. The proposed changes would tighten the scope of the Finnish interest deduction rules.

### Balance sheet exemption

The current interest deduction rules include a balance sheet exemption. The deduction limitations are not applied if the company provides a clarification that the ratio of the company's equity in the confirmed financial statements is higher or equal to the corresponding ratio in the consolidated group level balance sheet at the end of the tax year.

Conditions for the balance sheet exemption are now planned to be tightened. The aim of the changes is to limit the possibility to transfer income outside Finland's taxing territory by using the balance sheet exemption in capital investment structures and other corresponding structures. The possibility to use the balance sheet exemption would be limited in situations, where a party owning a significant stake in the company has financed the company. In these situations, the group balance used for the basis of the balance sheet exemption would be adjusted so that the shareholder loan would be considered as equity capital. Ownership of 10% would be considered as a significant ownership. The law would also require that the taxpayer's financial statements and consolidated financial statements, which are used as a basis for the balance sheet exemption, should be audited.

### Other changes proposed

The interest deduction changes concerning infrastructure projects and the other income basket can be summarized as follows.

- → The government proposal includes a proposal to broaden the scope of the current exemption on infrastructure projects so that the exemption will also cover public infrastructure entities. In the future, the interest deduction limitation rules would not be applied to public infrastructure entities that are responsible for the execution or maintenance of infrastructure.
- → Companies covered by the infrastructure exemption would be allowed to deduct net interest expenses incurred before 2020 in 2020 – 2022.
- → The proposal also includes a clarification to the deduction rights of entities from which the income basket of other income was removed as a result of the income tax basket reform that came into effect at the beginning of 2020. It is proposed that these entities may in the future deduct from their business income the non-deductible net interest expenses accrued in the other income basket during the tax year 2019.

The law is intended to come into effect on 1 January 2022. The changes to the balance sheet exemption would apply to the 2022 taxation for the first time. Changes in the infrastructure exemption and to the deduction right of non-deductible net interest expenses of the other income basket would be applied retroactively already for the tax year 2020.

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## France

FIDAL

## Amendment to the option for VAT for banking and financial services

The draft of French Budget Bill for 2022 proposes to facilitate the election for VAT taxation of banking and financial in order to make French Funds Managers more competitive as from 1 January 2022. Nevertheless, the current wording of the draft bill leaves it unclear as to what extent French fund management companies will be able to benefit from the amendment.

### Reminder of the provision currently applicable

According to the present version of Article 260 B of the French Tax Code ("FTC"), taxable persons are allowed to opt for VAT for a number of banking and financial services, exempted under Article 261 C 1 of the FTC. If exercised, the option mandatorily covers all eligible activities, including fund management, i.e. all financial activities which are not expressly excluded (Article 260 C of the FTC). In other words, the provision is an all-in option under which it is not permitted to apply VAT to only one or some of the eligible services.

The formal condition to benefit from the option is a formal letter to be sent to the competent tax office. The option is effective as from the 1st day of the following month and covers a five-year-period.

### What changes if the draft Budget Bill is passed?

As from 1st January 2022, Article 260 B of the FTC should be amended in order to provide that taxable persons who opt will be able to apply VAT "only to the chosen transaction". Accordingly, the option will no longer be global (i.e. covering all eligible financial activities) but it will be possible to opt for a limited scope of operations.

Taxable persons may eventually decide whether to opt or not, by taking into account, for each operation concerned, subsequent potential outcomes and consequently improve/ reduce their VAT impacts. No changes to the formal requirements are envisaged.

### Outstanding questions

In principle, an option per "investment fund" will be allowed under the revised provision. If so, this would notably enable to make a choice depending on the recovery rights of the recipient and to opt solely when management fees are invoiced to a fund with VAT deduction rights.

However, the revised provision is not clear. As per the draft itself, the main purpose of this amendment is introducing more flexible conditions to opt for VAT in order to strengthen the attractiveness of France with regards to financial services activities. In these terms, an option per fund would be highly welcomed, insofar as it is comparable to what already exists in other EU countries.

In the coming days, we should have the final version of the Bill of Finances for 2022 and the official comments from the French Tax Doctrine. A VAT option depending on the ability of the fund to deduct VAT could be implemented in France.

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Germany

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## Impact of recent Coalition Agreement on the Financial Services industry

On 25 November, the upcoming German government coalition revealed its political vision for Germany in the upcoming 4 years by presenting the coalition agreement. The agreement is generally good news for the international Financial Services industry, the new government proclaims the importance of the common capital market within the EU and aims to complete the banking union. The agreement is dominated by the idea of digitization and modernization but also emphasizes the importance of countering tax evasion and improper market practices.

Projects of the new government include – among others – the following:

- Issuing of electronic / crypto stocks
  Since June 2021, Germany is allowing the introduction of digital securities (fund units and bonds) and crypto securities (bonds only, fund units to follow soon).[6] The respective rules shall be extended to equity assets.
- Facilitation of IPOs, including the issuance of dual class shares
- Extension of tax reporting obligations under DAC6 to national arrangements
- Prevent improper use of dividend-arbitrage, esp. via blockchain technology and increased exchange of information between regulatory and tax authorities
- The focus on digitized and streamlined administrative procedures as well as the combat against tax fraud - especially related to WHT on dividends - is in line with previous projects of streamlining WHT reclaims procedures.[7]
- Extension of WHT on German sourced income (adjustment of DTTs) and extension of interest barrier (interest rate barrier)
- Make Germany the "leading location for sustainable financing" and increase issuing of green bonds while phasing out public financial investments that contradict the goal of climate neutrality
- Reorganization of retirement financing
- The government plans to introduce (public) capital based German pension insurance with 10 bn Euro annually, to be invested in the capital market with the purpose of gaining additional funds for retirement payments.
- Creating a European reinsurance for national deposit guarantee schemes (contributions strictly differentiated according to risk and under the condition of further reduction of risk in bank balance sheets)

The new government also emphasizes that it will play an active role in the implementation of global minimum taxation.

The agreement contains many projects related to climate protection, infrastructure and digitization which cannot solely be financed by the government. It can be expected that other investors will be engaged in financing respective projects – which might be a chance for the FS industry.

6 See also WTS Global FS Infoletter # 21 of 15 June 2021 and # 22 of 17 September 2021.
7 See also WTS Global FS Infoletter # 21 of 15 June 2021

## New CFC rules applicable in 2022

In June 2021, Germany passed revised CFC rules to transpose the EU Anti Tax Avoidance Directive (ATAD) into national law.[8] The new rules will be applicable from 1 January 2022 and might especially have an impact on Private Equity structures but are also relevant to (international) investment funds with German investors.

### Investment funds as CFC entities

An investment fund subject to the German Investment Tax Act (GITA) is - similar to the previous German CFC regime - usually not considered a CFC. Exceptionally, an investment fund might classify as a CFC if more than 50% of the interest in the fund is held by a German taxpayer (and the fund investor's - German or non-German - affiliates) and if more than one third of the transactions underlying the income of the fund are conducted with the German taxpayer (or its affiliates). This new exception might be relevant for AIFs with German investors holding a controlling stake.

### Blocker function of investment funds

Under previous CFC rules, an investment fund shielded against allocation of passive income from the fund's CFC subsidiaries to the German investor. According to the revised CFC rules, the blocker function only remains for investment funds that are not controlled by a German taxpayer (and its affiliates). If a German taxpayer (together with affiliates) holds more than 50% of the interest of an investment fund, passive income from subordinate CFCs will be allocated - on a pro rata basis - to the German investor. This legislative change might affect e.g. a controlling German investor in a fund vehicle that invests in target companies holding debt instruments. Low taxed interest income of the target companies will be allocated directly to the German investor. In contrast, if the fund vehicle receives the interest income directly and not via a target company, adverse investor taxation under CFC rules can be avoided.

### Impact of revised control concept

The concept of control has been overhauled under the new CFC rules; an entity is controlled if a German taxpayer together with affiliates (under the old regime: together with other German tax payers) holds more than 50% of the entity's capital or voting rights or is entitled to more than 50% of the entity's profits or liquidation proceeds. As the control concept includes profit entitlement as the main criterion, debt instruments might also convey a controlling position to their holder, e.g. a certificate of a securitization company.

A further important change affects investments via partnerships. According to the new CFC rules, it is assumed that the partners of a partnership generally act in concert and therefore are treated as affiliates. Thus, if a majority interest in a target company is held by a partnership (fund vehicle) with a German taxpayer as a partner - even if the German partner only holds a minority interest in the partnership, the target company is considered to qualify as "controlled" under the new German CFC rules. The German taxpayer may prove that the partners - in fact - did not act in concert. However, it is currently unclear how this burden of proof shall be fulfilled. The assumption of control for partners of a partnership might affect especially Private Equity funds in the legal form of a partnership (e.g. Luxembourg SCS) or making investments via a partnership.



8 See also WTS Global FS Infoletter # 21 of 15 June 2021.

### Dividends as (potential) passive income

An important change affects entities qualifying as CFCs and their equity investments. In contrast to the old rules, under the new CFC rules dividends might be passive income and thus allocated to the German investor. Predominantly, this change affects portfolio investments, i.e. dividends received from target companies in which the CFC holds less than 10% of the (target company's) capital. Further, the new CFC rules transfer the so-called correspondence principle to the taxation of CFCs; this means that - in general - dividends are passive income (and thus allocated to the German investor) if the dividend payment reduced the target company's income.

## Introduction of check the box for partnerships in Germany

In June 2021 and for the first time ever, Germany introduced the possibility for partnerships to check the box and opt for (opaque) taxation like an entity in corporate legal form. The new rules will be applicable from 1 January 2022. The check the box regime might be interesting for (German) AIFs.

Traditionally, German AIFs and their investors - depending on investment strategy and entity structure - could chose to either be structured in corporate or contractual legal form and thus be subject to the opaque taxation rules for investment funds under GITA or be structured as a partnership and be subject to pass-through taxation under general tax rules. With the new check the box regime, Germany now offers a third potential taxation regime for AIFs structured as a partnership: to opt for opaque corporate taxation. The main benefit of corporate income taxation is the intercorporate privilege / participation exemption: capital gains from equity are 95% tax exempt, dividends are 95% tax exempt if the opting entity holds more than 10% of the (target company's) capital.

It is advisable to evaluate on a case-by-case basis whether the advantage, e.g. the intercorporate privilege, outweighs potential disadvantages, e.g. additional local trade tax (Gewerbesteuer). The evaluation includes - among others - the following factors:

- → Investor type (corporate entity, tax exempt corporate entity, private person etc.)
- → Asset types
- → Thresholds in equity investments
- → Scope of business activity.

The new check the box regime is available for foreign partnerships as well; however, depending on the entity's tax status in its home jurisdiction: if the partnership opted for or is anyway subject to corporate income taxation in its home jurisdiction, the partnership may opt for corporate income taxation in Germany. If on the other hand the partnership is transparent for income tax purposes in its home jurisdiction, it cannot opt for corporate income taxation in Germany. This latter condition aims at preventing the creation of artificial hybrid structures.

Besides the above described options, the check the box regime is of little relevance for the taxation of investment funds:

- partnerships that opt for corporate income taxation cannot qualify as investment funds from a German tax law perspective
- investment funds in the legal form of a partnership cannot opt for corporate income taxation
- interest in partnerships that opt for corporate income taxation are not in scope of the partial release (Teilfreistellung, sec. 20 GITA) for equity / mixed investment funds under Chapter-2 of GITA
- an interest in a partnership that opts for corporate income taxation does not qualify as a share in a corporation for the purposes of the tax rules governing the investment requirements (sec. 26 GITA) and for the calculation of the Equity Gain (Aktiengewinn, sec. 48 GITA) of Special Investment Funds under GITA (Chapter-3-Funds).

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## India

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## Taxation of Dividend income

### Background

Under the erstwhile Dividend Distribution Tax ('DDT') [i.e. prior to 1 April 2020], taxes on dividend were to be paid by the dividend distributing company at 15% (plus applicable surcharge and cess) and the dividend income was exempt from taxation in the hands of the recipient shareholders. However, resident non-corporate taxpayers were subject to an additional tax at 10% (plus applicable surcharge and cess) on dividends received in excess of INR 1 million.

With effect from 1 April 2020, DDT has been abolished, consequently, dividend income will be taxed in the hands of the recipient shareholder at applicable tax rates.

### Taxability in the hands of non-resident shareholder

As per the Indian domestic income-tax laws, dividend income from shares of an Indian company is subject to tax at 20% (plus applicable surcharge and cess)[9]. Further, as per the provisions of the Indian domestic income-tax laws, where India has entered into a tax treaty with another country, the provisions of the tax treaty shall apply to the extent they are more beneficial [subject to availability of a Tax Residency Certificate ('TRC') and Form 10F[10]]. Where the non-resident obtains a Tax Residency Certificate of the home country, the benefits under the DTAA shall be available.[11]

Further, the Indian Company shall be required to levy WHT at 20% plus applicable surcharge and cess (i.e. rate in Indian domestic tax law) or tax treaty whichever is beneficial.

It is imperative to note that protocol to certain tax treaties which India has entered into (such as India-France tax treaty or India-Netherlands tax treaty), has a Most Favored Nation ('MFN') clause which states that if India enters into a tax treaty on a later date with a third country, which is an Organisation for Economic Co-operation and Development ('OECD') member, providing a beneficial rate of tax or restrictive scope for taxation of dividends, interest and royalties, a similar benefit should be accorded to the subject tax treaty (i.e. tax treaty with France or Netherlands).

Some Indian tax treaties with OECD member countries such as Slovenia, Lithuania and Colombia provide for a lower withholding tax rate of 5% for dividend taxation (subject to conditions). However, these countries were not OECD members when the respective tax treaties were entered into by India but became OECD members only at a later date.

In this regard, the tax authorities in India may contend that the MFN clause should be available only if the country with which India enters into a tax treaty was an OECD member at the time of execution of the subject tax treaty (i.e. India-France or India-Netherlands tax treaty).

9 Provided the non-resident shareholder does not have permanent establishment in India

10 Information in Form 10F may not be required to be submitted where

11 Subject to MLI and GAAR - MLI stands for Multilateral Convention to Implement DTAA Related Measures to Prevent Base Erosion and Profit Shifting. India-Singapore DTAA has to be read along with the provisions of MLI. Article 7 of the MLI state that the benefit under the DTAA shall not be granted if it is reasonable to conclude that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit.
GAAR stands for General Anti-Avoidance Rule under the Indian domestic law. As per GAAR provisions, the benefit under the DTAA can denied if the main purpose of an arrangement is to obtain tax benefit.

In this context, recently, a Court in India has ruled in favour of non-resident tax payers and granted a 5% WHT rate under the MFN clause of India-Netherlands tax treaty applying the principle of parity. Further, on the contention that the third country should be an OECD member 'at the time of execution' of the subject tax treaty, the Court held that the term used in the MFN clause describes the state of affairs at the time of claiming the tax treaty benefits and not necessarily at the time of execution of the tax treaty.

**Tax withheld at a higher rate**

Where taxes are withheld by an Indian company at a higher rate, the non-resident shareholder (other than a Foreign Portfolio Investor) may explore the option of applying to the Indian income-tax authorities for a lower WHT certificate. Typically, the Indian company would levy WHT at the rate prescribed in the WHT certificate (issued by the income-tax authorities).

However, in case the Indian company levies WHT at a higher tax rate, the non-resident shareholder can claim the excess taxes withheld as a refund by filing an income-tax return in India.

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## Ireland

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## The Taxation of crypto currency in Ireland

As more crypto currencies are brought to market and their attractiveness as an asset class broadens (despite their wild volatility swings in value), the taxation consequences of same takes on increasing importance, particularly as more individuals / entities find themselves potentially exposed to taxation on returns on such investments. Here we look at the fundamentals of the Irish regime and the opportunities for tax planning efficiencies.

### 1. Capital Gains tax treatment

Quite simply, Ireland does not have any special tax rules in the context at hand. If a gain is made, then such gain will be taxed at normal Irish CGT rates. Importantly, if a loss is made on a crypto currency, this loss will be available for offset against other gains.

#### Gains made by non-Irish domiciled individuals

Whilst this article does not set out to dive into the common law concept of domicile, an individual without historic ties from birth (and proposed future business and personal ties) in Ireland will be deemed to be non-domiciled in Ireland. The benefits of this concept in relation to crypto currencies are potentially immense. In short, any crypto currency sold outside of Ireland (as a non-Irish situate asset), with any gain made on same not being remitted into Ireland will be entirely tax exempt, notwithstanding that the individual may well be an Irish resident. Benefits potentially also accrue where under any DTA the gain may have been made in a foreign country (which does tax crypto currency gains) but the taxing rights in relation to same fall to Ireland.

Taxpayers should avoid using any Irish brokerage service and bank accounts to hold any crypto currency or to receive the proceeds from any sale of the crypto currency.

### 2. Income tax treatment

Individuals accepting crypto currency as payment as part of the course of their trade are required to calculate their taxable profits using exactly the same rules and norms as those individuals who receive fiat money as a remuneration. In short, Ireland has no special rules / provisions in relation to the utilization of crypto currency by individuals in the course of their trade.

### 3. Corporation Tax treatment

Companies utilizing crypto currencies, akin to individuals, suffer no prejudice arising from same. The taxable profits of the business being calculated in exactly the same manner as they would were crypto currencies not a consideration. The same accounting norms and considerations as to when taxable profits arise will apply.

### 4. VAT treatment

In keeping with the CJEU Hedqvist case (C-264/14 dated 22.10.2015), crypto currencies have been held to be functional currencies and are exempt from VAT in accordance with Ireland's domestic VAT legislation.

A further VAT exemption treatment applies to entities buying and selling crypto currencies in their capacity as a principal. As such, the operation of such financial services is exempt.

### Supplying goods and services and accepting payment in crypto currency

The taxable amount for the purposes of calculating VAT will be the EURO equivalent at the time of supply - of course, the timing of supply being driven by directives and national legislation. This does from time-to-time present value opportunities (in much the same way that foreign exchange movements do) in that anticipated crypto currency valuation swings can be utilized where there is a delay between the physical delivery of goods and services and the timing of supply of such goods and services for VAT purposes.

### Data mining

The act of data mining for crypto currency is outside of the scope of VAT from an Irish perspective in that it is not held to be an economic activity for VAT purposes.

## 5. Employment income treatment of crypto currencies

Where employee emoluments (of any and all kinds) are paid to employees, and such payments are made in the form of crypto currency, then the value of the emolument for the purposes of calculating payroll taxes is the Euro amount of the crypto currency at the time the payment is made to the employee.

## 6. Valuing crypto currency for the purposes of establishing its Euro equivalent

Unlike shares which are listed and momentary values in time firmly established and identifiable, the value of crypto currencies can often differ between exchanges. Other crypto currencies operate on grey markets, further adding to the complexity in establishing their Euro value at a point in time. The Irish taxation authorities' opinion is rather blunt in so much as it expects the holder of such crypto currency to make a "reasonable" effort to establish the crypto currency valuation for any intended transaction. Immediately, the concept of what is "reasonable" arises. The methodology to be used in establishing such a reasonable value is entirely absent. There are clearly benefits in the lack of such prescriptive diktats, and no doubt planning opportunities exist in relation to same. However, just as the lack of a prescriptive diktat provides planning opportunities for the taxpayer, it also provides the same opportunity for the Irish taxation authorities to object to attributed values / methods utilized in establishing reasonable values - thus ensuring a level playing field.

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Netherlands

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## Court decisions on German real estate investment fund with Dutch real estate income & Dividend tax refund for UK pension fund

### 1. Appeals Court case regarding German real estate investment fund with Dutch real estate income

On 3 September 2021, the Appeals Court at 's-Hertogenbosch ruled in a case of a German real estate investment fund in contractual legal form (Immobilien-Sondervermoegen) – 'the Fund', with respect to its foreign tax payer status for its income from Dutch real estate in the years 1997/1998 until 2009/2010. Due to the fact that the Fund had multiple investors, possible tax transparent status for Dutch purposes is apparently not considered, making the Fund in principle eligible to be regarded as a foreign tax payer for its Dutch source income if it would meet the requirements. The Fund tried two main arguments to escape Dutch taxation on its Dutch real estate income, but both failed. Nevertheless, certain points in the ruling are worthwhile to note and comment on.

In the years at hand, Dutch corporate income tax (CIT) is due on income from Dutch real estate realized by foreign tax payers, meaning certain defined entities existing under foreign law that are not considered to be resident in the Netherlands. With respect to a German Sondervermoegen, it would only be considered a foreign tax payer if it would be qualified as a so-called 'doelvermogen', which the Dutch Supreme Court defines as an amount of capital ('vermogen') that is separated for a certain purpose, which has no legal personality and which does not belong to a (legal) person either. Such a separate amount of capital is treated as an independent entity for tax purposes. According to the Supreme Court, an amount of capital cannot be regarded as a 'doelvermogen' if it belongs to one or more (legal) persons, for example because they have a claim on the capital by means of participation certificates.

This latter remark could be interpreted in such a way that if the 'vermogen' issued participation rights or certificates, the 'vermogen' belongs to the participants, even if these participation certificates could be regarded in the same way as shares issued by a legal entity, meaning that the participants are only regarded to have an indirect claim on the capital the participations represent. As a consequence, such wide interpretation would mean that any amount of capital that would be separated for a specific purpose and that has issued 'shares' or certificates to its participants would not be regarded as a 'doelvermogen' and therefore not be regarded as a foreign tax payer and escape taxation on its Dutch source income. This interpretation seemed to be the position of the Fund.

The Court, however, came to a narrower interpretation, which appears to be that the 'vermogen' is not a 'doelvermogen' only in case the participants have a direct claim on the capital of the 'vermogen', because – according to the Court – there would be no separation between the capital and the participants. As the Fund had issued participation certificates that were freely transferable, no such direct claim was deemed to exist. Consequently, the Fund qualified as a 'doelvermogen' under Dutch tax rules.

The weak point in the argumentation of the Appeals Court: the Supreme Court clarified that a specific characteristic of a 'doelvermogen' is that it is an amount of capital separated for a certain purpose, that it has no separate legal personality itself, but also does not belong to another entity. The Supreme Court mentions three separate elements which positively define the status of 'doelvermogen' where separation of the capital is one element and the fact whether the capital belongs to (another) person is another element. The Appeals Court argues the other way around, based on the definition of the Supreme Court: it says that only in case the capital belongs to the participants, in which case there is no separate capital, can the capital not be considered a 'doelvermogen'. From the wording of the definition of the Supreme Court, it could be inferred that both direct and indirect ownership of an amount of capital that is separated (in a fund) for a certain purpose could mean that such fund is not a 'doelvermogen'.

The strong point in the reasoning of the Appeals Court is that it prohibits the possibility that a fund could be regarded as an entity for Dutch tax purposes, but being disregarded as a foreign tax payer on its Dutch source income. Should such possibility exist, then a loophole in Dutch tax legislation would be opened up where foreign, non-resident, contractual funds without separate legal personality could invest tax free in Dutch real estate. The solution of the Appeals Court seems to ensure that there is always an entity that is liable for the Dutch source income: either the fund as 'doelvermogen', or the participants in the fund.

Anyway, this first attempt to escape Dutch taxation failed, which means that the second line of defense was triggered: the claim that effectively no tax was due because of application of the Dutch 'FBI'-regime (the special regime for investment funds that taxes the profit of the fund with a rate of 0% CIT and is in fact an exemption regime). This FBI-regime applies to Dutch funds it they meet certain shareholder requirements (shareholder test), if they annually pay out their profits within 8 months from book year end (distribution test) and if they satisfy certain investment requirements that are meant to prohibit 'business' activities, though it allows certain investments with 'active' investment features (passive investment test). Furthermore, the fund must have a certain legal form. From the year 2008, the FBI-regime also applied to foreign, non-resident funds that met the requirements.

In the end, all these tests were deemed to be met according to the Appeals Court. The shareholder, distribution and legal form tests were not contested. Notable is that regarding the passive investment test the Court concluded that it was met on a very interesting finding. The Fund had stated with some substantiation that with respect to Dutch resident FBI funds the Dutch tax authorities in reality did not test whether such Dutch funds indeed meet the passive investment requirement. The Court found that the burden of proof to disprove the Fund's argument was on the tax inspector. But, as the tax authority was not able to meet the burden of proof, the Court found that the Fund won that argument.

Interesting further is that the Court mentioned that the tax authority could have met this burden of proof by submitting anonymized tax audit reports or questionnaires. In our view – if the argument can be introduced with at least a beginning of substantiation – this could also be of value with respect to the shareholder and distribution tests. If the tax authority is not able to show - via tax audit reports or questionnaires regarding those requirements of the FBI-regime - that the tax authorities are actively checking if those tests are met, this could be an easy way to win that round.

For the period before 2008/2009, the Court dismissed the claim for the FBI-regime based on the reasoning that the Dutch Supreme Court ruling in the Deka case (23 October 2020), that regarded the refund of Dutch dividend WHT to a German UCITS fund (Sondervermoegen), also applied to the case at hand. Consequently, the Court demanded that the Fund would agree to a 'replacing payment' to compensate for the dividend tax that could not be levied on the profit distribution of the foreign fund. As the Fund refused this, it lost the case for those years.

For the later years, the Fund lost as well, as it refused to pay the 'exit' tax that is due when entering the FBI-regime from a taxable status: in short the Fund would have to revalue its Dutch properties to fair market value and pay tax on the gain before it could enter the FBI-regime the next year (2008/2009). This the fund refused as well, being of the opinion that the statute of limitations regarding the 'exit' taxation would prohibit the tax inspector to levy the tax. However, the Court did not accept the argument, stating that paying the 'exit' tax is a precondition for getting the FBI-status, it is not a consequence.

For the later years, the tax inspector argued that an implicit condition to receive FBI-status for a non-resident fund was that it must meet the requirement that the taxation at fund level is replaced with a taxation at investor level (which would be impossible as a foreign fund cannot withhold Dutch WHT). The Court disagreed with this argument on the basis that the legislator had implemented the shift of taxation from fund to investor level through the requirement of the annual profit distribution. Therefore, the fact that a foreign fund does not and cannot withhold Dutch WHT on the profits it distributes is irrelevant for meeting the requirements to apply the FBI-regime.

For the earlier years until 2008/2009, it is remarkable that the Court applied the 'replacing payment'-solution to refuse the application of the FBI-regime for the Fund. In the Deka case, the comparability of the German fund with a Dutch 'FBI' fund was the central theme to force the refund of Dutch dividend WHT. In the current case, the application of the FBI-regime to the German Fund itself is at stake, as it is regarded as a foreign tax payer for Dutch CIT purposes. It makes sense to assume that if the FBI-regime would have been open to foreign funds also in earlier years, there would have been no requirement to levy any Dutch 'replacing payments', as such a requirement has not even been considered when extending the FBI-regime to foreign funds starting in 2008.

We are looking forward to further developments in this case, as we understand that the case has been brought before the Dutch Supreme Court.

### 2. Lower Court case denies dividend tax refund for alleged UK pension fund

On 5 August 2021, the Lower Court at Breda (Rechtbank Zeeland-West-Brabant) ruled in a case that concerned a UK company (claimant) that was held by a UK listed company. The claimant was registered in the UK as an insurance company that had concluded insurance agreements concerning unit linked policies with UK institutional investors. These investors could invest in Pooled Pension Funds via the unit linked policies. With respect to these investments, the claimant had received dividends from Dutch portfolio dividends in the years 2005-2007 and 2009-2010 on which Dutch dividend WHT was levied. The claimant filed corporate income tax returns for the years 2005-2007 and refund requests for 2009-2010 with the aim to recover the dividend WHT paid.

The claimant presented two positions to plead its case. One position was that the claimant was comparable to a Dutch pension fund that qualified for the Dutch corporate income tax exemption and therefore as well for a refund of dividend WHT. The other position concerned the argument that compared to a Dutch company that was subject to Dutch CIT, the claimant should not bear a heavier tax burden. This argument refers to the Société Général case (CJEU 17 September 2015, C-17/14). This case could in practice only lead to success for a claimant if the (corporate income) tax burden of a Dutch domestic investor would be lower than the dividend WHT paid by a foreign investor on the same dividend. In practice, this really never happens, due to the fact that the CIT rate is higher than the dividend WHT rate and the relevant CIT base for the comparison would consist of the dividend income reduced only by the expenses that are directly linked to the actual payment of the dividend. The claimant argued that to restrict the deductible expenses in such a way is a wrong notion, which can be deemed wrong or obsolete in the light of other CJEU case law. In the claimant's case, the dividend income was apparently neutralized by a similar increase in its obligations to policy holders. Consequently, the dividend income did on balance not result in a profit position and therefore not to a corporate income tax burden in a comparable Dutch domestic situation. Unfortunately, the Lower Court held to the strict line of the Société Général case and denied the argument. Consequently, the claimant lost on all counts.

However, interestingly the Court stated that - on a conceptual level - there could be questions raised regarding the relationship between some of the CJEU cases the claimant had presented to support its view and the Société Général case. As a tentative explanation for the strict view on eligible expenses, the Court offered that this may be due to the special nature of dividends. Apparently, the Lower Court had some doubt about the correct interpretation of EU law on this aspect, but not enough to ask a preliminary question to a higher Dutch court or to the CJEU. Remarkably, the case law mentioned in the published judgement includes the Sofina case (CJEU 22 November 2018, C-575/17, Sofina SA and others) but does not include the CPP case (CJEU 13 November 2019, C-641/17, College Pension Plan of British Columbia), though the latter seems to fit perfectly in the argumentation of the claimant.

Needless to say that the market is looking forward to a possible continuation of this legal battle at the Appeals Court.

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## Poland

## Polish Deal – selected WHT issues (incl. CIVs)

On 15 November 2021, the President signed the legislative package introducing a sweeping reform of the Polish tax system, called Polish Deal (Polski Ład). The changes will come into force as of 1 January 2022.[12]

### Changes in WHT collection mechanism as of 1 January 2022 and their impact on foreign collective investment schemes

The new law introduces a WHT collection mechanism, which is a hybrid of two systems:

- Pay and refund (tax to be withheld mandatorily regardless of any preferences under double taxation treaties or special regulations)
- Relief at source (Polish withholding agents may apply preferences under double taxation treaties or special regulations)

The particular collection system applied will depend on the type of the payment (the "what" test), the beneficiary status as related vs. unrelated party (the "who" test) and the total amount paid to the given taxpayer (the "how much" test).

One of the major changes is that the Pay and Refund mechanism, as of 1 January 2022, will have to be applied to:

- Passive income:
  - interest, copyrights and related rights, rights (or sale of rights) to inventions, trademarks or industrial designs, royalties for the transfer of a secret formula or production process, or for the use of (or the right to use) an industrial device, including a means of transport, or a commercial or scientific device, or for the transfer of industrial, commercial or scientific know-how;
  - dividends and other corporate profit distributions;
  - income which, for no valid commercial reasons, was not treated as any of the foregoing;
- paid to related parties;
- if the total amount of such payments made to the same taxpayer has exceeded PLN 2M within the withholding agent's tax year (the tax is withheld from amounts in excess of the PLN 2M threshold).

If those conditions are satisfied, the withholding agent must deduct tax at the statutory rate, which is 19% or 20% depending on the type of payment.

The trigger applies, if all of the conditions are satisfied:

The payment qualifies as passive income
+
The payment is made to a related party
+
The total amount of any passive income paid to that single taxpayer has exceeded PLN 2M within the agent's tax year

12 Regarding further detail on the Polish Deal, please see WTS Global Financial Services Infoletter # 21 dated 15 June 2021 and WTS Global Financial Services Infoletter # 22 dated 17 September 2021.

For collective investment schemes, the key issue in this context is the definition of a "related party".

Related parties are:
- entities which exercise significant influence on at least one other entity, or
- entities which are under the significant influence of:
  - a single entity which is not one of them, or
  - a spouse, or relative by affinity or consanguinity within the second degree, of a natural person exercising significant influence on at least one entity, or
- a company/partnership without legal personality and its partners, or a limited partnership (spółka komandytowa) or partnership limited by shares (spółka komandytowo-akcyjna) with its seat or management in Poland and its general partners, or a registered partnership (spółka jawna) with its seat or management in Poland and subject to CIT and its partners, or
- a taxpayer and its permanent establishment abroad or, in the case of a corporate group, a company that has its member and its permanent establishment abroad.

Further, exercising "significant influence" means:
- having a direct or indirect interest of at least 25%:
  - of the capital, or
  - of the voting rights in the control, decision-making or managing bodies, or
  - of the actual or expected profits, losses or assets or of rights to distributions thereof, including fund units and investment certificates, or
- the actual ability of a natural person to affect the key business decisions of a legal person or an unincorporated organization, or
- being a spouse or a relative by consanguinity or affinity within the second degree.

Given their investment restrictions, most foreign UCITS and UCITS-like schemes that make capital investments in Poland should not fall within the definition of related parties; they should not suffer from the obligatory application of the Pay and Refund WHT mechanism. Thus, for them, there should be no major changes in the WHT collection mechanics after 1 January 2022, compared to the current regime. Still, the potential status of an entity as a related party (direct or indirect) does require verification on a case-by-case basis.

The obligatory withholding mechanism is likely to affect all those collective investment schemes, which under Polish law qualify as related parties in relation to their Polish assets. This could be the case, e.g., for non-Polish private equity funds or real estate funds which hold wholly-owned Polish real estate entities.

Under the new law (as of 1 Jan 2022), any assets making relevant payments via securities accounts or omnibus accounts will have to give the following information to those who operate the accounts:

- whether the relationship between them and the taxpayer is such as described above, so that they are to be treated as related parties, and
- whether passive income payments to the taxpayer have exceeded PLN 2M within the tax year of the withholding agent (not: of the taxpayer).

Such disclosure must be made at least 7 days before payment. The entities making this disclosure must ensure it is updated before payment should any changes occur in the disclosable information.

### WHT refund process

After the new WHT collection set-up will have gone live on 1 January 2022, there will be two procedures in Poland for reclaiming overpaid tax:

- the procedure under Article 28b of the CIT Act for payments subject to the Pay and Refund mechanism,
- the procedure under the Tax Code for all other payments.

The WHT refund process will basically remain the same as before, for all those cases where the obligatory Pay and Refund mechanism does not apply.

But for cases falling within the Pay and Refund regulations, the process will have to follow a formalised procedure under the CIT Act. Unfortunately, this procedure has more drawbacks than advantages.

The drawbacks are as follows:

- The list of documents required by the CIT Act for the refund application does not take into account certain peculiarities of collective investment schemes. The documents include, for example:
  - a certificate of residence, even though such certificates are not issued in certain jurisdictions for certain types of investment funds,
  - a representation that the fund carries on genuine business activities in its home country (business substance test), even though investment funds are in fact forbidden to carry on business activities.
- While certain documents required can concern matters of substantive law, any issues with them or their absence will be treated as formal deficiencies of the refund application, with the result that the application will not be heard on its merits, unless the deficiencies are resolved within 14 days, which is a mandatory time-limit that cannot be extended or renewed (peremptory date).
- The applications will be filed electronically using a logical structure. This is not of practical help due to technical constraints, especially in the situation where applications that are otherwise filed in the customary manner may also be filed electronically but without a rigorous logical structure.

With the WHT refund procedure under the CIT Act being a novelty, its actual drawbacks and advantages will come to light as the new procedure is put in practical use in the near future.

### Certificates of residence can be used in copy

The law has become more lenient for certificates of residence. Under the new regulations, a copy (rather than only the original) of such a certificate may be used as evidence of tax residence, provided the details on the copy may not be reasonably doubted representing the facts.

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### New definition of beneficial owner (no reference to CFC regulations)

The beneficial owner definition has been changed so that now the beneficial owner is an entity that meets all of the following requirements:

- The entity receives the payment for its own benefit, and in particular decides independently on its use and incurs the economic risk of its total or partial loss,
- is not an intermediary, representative, trustee or any other entity required to transfer the payment to some other entity in whole or in part, and
- carries on genuine business activity in the country in which it is established, if the payments are received in connection with business, and whether or not it carries on genuine business activity is to be determined with account taken of the nature and scale of its business in relation to the payment.

The change is in removing the reference to restrictive CFC regulations in the context of the business substance requirement.

### Change in the regulation requiring Polish WHT agents to exercise due diligence (the related party status check in accordance with TP law now to be applied to the relationship between agent and taxpayer)

The lawmakers have not given up on the controversial regulation requiring Polish WHT agents to verify with due diligence whether it is indeed lawful to exempt the payment, to forbear collecting the tax or to apply a preferential tax rate (the due diligence requirement). But the law makes clear now, since 1 January 2021, that the question of whether or not such due diligence has been exercised is to be determined by reference to not only the nature and size of the Polish agent's business, as before, but also to intercompany relations (the related party status as defined in transfer pricing regulations) with the taxpayer. This revision increases the due diligence standard for payments to related parties.

Since May 2019, Polish WHT agents have been waiting for official guidance from the Finance Minister on the new WHT set-up, especially guidance on how to duly comply with the due diligence requirement. The new law that entered into force on 1 January 2019 has given rise to a number of practical issues which have opened the floodgates for numerous disputes with the tax office and increased the uncertainty of interpretation.

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## Slovenia

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## Change in taxation of gains from crypto currencies

Currently, a private person resident in Slovenia, is not taxed on the realized capital gain from the sale or use of virtual currencies, unless the activity is considered to be a professional business.

However, the Slovene tax administration sees the opportunity to expand the fiscal income with the introduction of new taxation rules for virtual currencies for private investors. The draft of a new tax regime for virtual currencies was introduced in October 2021, but its transposition and effectiveness as of 1 January 2022 is currently uncertain *(slo. Zakon o davku od virtualnih valut)*.

The draft bill is not limited to crypto currency but refers to virtual currencies, a broader concept defined in the money laundering legislation. Virtual currency means a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically. The meaning of virtual currency is technologically neutral, as it does not define any specific technology features of the digital asset.

### Taxation of virtual currency at a flat rate of 10%

According to the legislative proposal, the flat tax rate (10%) will apply to (1) any exchange of virtual currency for Fiat currency or (2) purchase of goods or services with virtual currency. Transactions up to 15.000 EUR cumulatively per calendar year are tax-exempt. In order to secure simplicity of taxation, the tax base is the amount of virtual currency sold. Additionally, a tax-exempt transaction is also the exchange of the virtual currency for the purchase of real estate or corporate shares. The timing of taxation is the day, when the exchange for the fiat currency or purchase of the goods / services takes place. The annual report of all sales or exchanges of virtual currency for a specific calendar year must be submitted to the tax authorities electronically by the end of February of the following year. Tax must be paid in 5 days after the submission of the annual report.

### Alternative to the flat rate taxation

Alternatively, the taxpayer may choose taxation of the profit from the exchange or usage of the virtual currency. Profit is defined as the residual between the sale price and purchase price. The tax rate for the alternative method would be 20%.

### Conclusion

The new legislation for the taxation of virtual currencies, including crypto currencies, will probably not be effective from the beginning of 2022. The tax-free sale and exchange of crypto currencies currently entices EU citizens to change their residence to Slovenia to sell their crypto asset tax-free. We expect that - once the date of effectiveness of the new legislation is determined - the sale of crypto (virtual) currency by Slovene residents will rise, as the new legislation will tax all sales and exchanges, regardless of a holding period.

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## Sweden

# Proposed tax on credit institutions & Postponement of new WHT Act

### 1. Proposed tax on credit institutions in Sweden

The Swedish Government is currently working on a new risk tax, which would affect credit institutions carrying out business in Sweden. If passed, the taxable basis is the sum of the credit institution´s total debt. It is proposed that the new law should enter into force January 1, 2022.

Credit institutions with a total debt that exceeds a certain limit at the beginning of the fiscal year would be taxable under the new legislation. The mentioned limit would, for fiscal year 2022, be SEK 150 billion and thereafter be indexed yearly. As for foreign credit institutions, only debt assignable to business which the credit institution carries out from a Swedish branch will be considered.

The taxable basis for a credit institution is the sum of the company's debt at the beginning of the tax year. However, certain debt categories, such as intra-group debt, should not be included in the calculation.

For fiscal year 2022, the tax rate would be 0.05%, and for the following year the rate would increase to 0.06%.

The aim of the bill is to tax credit institutions whose risk exposure in the case of a financial crisis might cause extensive cost for the society, for example in the form of bailouts financed by the state. The proposed law is now subject to a constitutional review and has also been sent to the European Commission for an assessment of its compliance with the EU rules against state aid.

### 2. New Withholding Tax Act postponed

The process to implement a new Withholding Tax Act has been postponed by one and a half years.[13] Consequently, the current proposal shall be applied in respect of dividends paid after December 31, 2023 (instead of after June 30, 2022).

Following recent Swedish case law, which has eased the previous very strict requirements on the receiving party's legal status, it is likely that the new WHT act expressively will cover non-Swedish tax residents entitled to dividend – instead of the current wording: individuals and legal persons.

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13 See also WTS Global FS Infoletter # 21 of 15 June 2021.

Switzerland

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Rechtsanwälte

## Reform of Swiss WHT regime & New legal framework on implementation of international tax agreements

### 1. Reform of Swiss Withholding Tax (and Stamp Tax) – Update

After having informed about the reform of Swiss WHT in the last newsletter,[14] we would like to give a short update on the progress of the reform project.

At the end of September, the National Council discussed the legislative proposal and expanded the reform. In the details, the National Council made various changes to the Federal Council's version. For example, the WHT on interest on bonds held indirectly via a Swiss investment fund shall also be abolished, provided that this interest income is shown separately.

As far as the securities transfer tax is concerned, the National Council decided to abolish this tax not only on Swiss bonds, but also on foreign bonds with a residual term of no more than twelve months. The aim is to move the market for this asset type to Switzerland.

In the overall vote, the National Council adopted the bill by 122 votes to 68 with one abstention. On 29 October and 19 November, the Committee for Economic Affairs and Taxation of the Council of States discussed the reform proposal.

The Committee proposes that the WHT be abolished only for income from bonds issued after the entry into force of this new law. In the Committee's view, this approach would reduce tax revenue losses without calling into question the main objective of the bill. In order to allow the Swiss economy to benefit from the positive effects of this reform as quickly as possible, the Committee proposes that the reform be enacted in a staggered manner. While the abolition of WHT on bond interest should already take place on 1 January 2023, the Federal Council would have to decide when the other reform measures, which take longer to implement, should come into force.

Furthermore, the Commission followed the National Council's decision to extend the abolition of WHT on interest on bonds held indirectly via a Swiss investment fund.

The Council of States will discuss the reform in the upcoming winter session.

### 2. New Legal Framework on Implementation of International Tax Agreements

On 10 November 2021, the Federal Council brought into force the Federal Act on the Implementation of International Tax Agreements (ITAIA) and the associated Ordinance, with effect from 1 January 2022. In this way, the Federal Council is aligning the existing legal framework with developments in international tax law.

Previously, national legislation on certain issues regarding the implementation and application of double taxation agreements (DTA) was governed by the Federal Act of 22 June 1951 on the Implementation of International Federal Conventions on the Avoidance of Double Taxation and the ordinances based thereon. The ITAIA supplements the existing legal provisions as necessary, and introduces new areas of regulation. The revision of the

14 See WTS Global FS Infoletter # 22 of 15 September 2021.

law now also stipulates how mutual agreement procedures are to be carried out at national level, provided the applicable agreement does not contain any deviating provisions. Moreover, it contains the key points for WHT relief based on international agreements, as well as new criminal provisions in connection with relief from WHT on investment income.

According to the newly introduced criminal provisions, an unjustified refund of Swiss WHT or a threat of the Swiss WHT (e.g. by filing a refund request containing untrue statements or which conceals material facts such as e.g. beneficial ownership) based on an international tax agreement will be punishable in the same manner as in domestic cases. The criminal proceedings (against the person responsible for the wrongdoing) is guided by the administrative criminal law and foresees fines up to three times the unlawful advantage.

Against this background, the procedure for filing reclaim forms for Swiss WHT should be reviewed and it must be made sure that any refund request meets all Swiss tax-legal requirements.

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