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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 11 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. on WHT, VAT, beneficial ownership, carried interest, investment funds, crypto assets and securities lending:

- Austria - ICON
- Belgium – Tiberghien
- Denmark – Lundgrens
- Finland – Castrén & Snellman
- Germany – WTS
- Hungary – WTS Klient Tax Advisory
- Ireland – Sabios
- Italy – WTS R&A Studio Tributario and Studio Biscozzi Nobili Piazza
- Luxembourg – Tiberghien
- Poland – WTS Saja
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Thank you very much for your interest.

Frankfurt, 17 September 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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Hot topic

Germany – Introduction of crypto fund units

On 31 August 2021, the German government issued a draft version of an Ordinance on the issuance of funds units as crypto assets.

Since June 2021, Germany is allowing the introduction of digital securities (including fund units).[2] The respective bill contained general rules on the respective civil law and supervisory law aspects. Besides introducing digital securities, which are registered centrally, the bill further allowed for a decentralized registration of assets (crypto assets). However, the scope of crypto assets was limited to debt securities.

The recently presented draft Ordinance concerns fund regulatory law and closes the remaining gap, finally allowing for decentralized registered fund units, i.e. after adoption of the draft Ordinance, the issuance of crypto fund units will be possible in Germany.

According to the draft Ordinance, the legal terms applicable to decentralized debt securities will generally also be applicable to crypto fund units. Though the registers are decentralized, a formally responsible institution is necessary for supervisory law reasons. In the case of decentralized debt securities, this role can be assumed by the issuer of the security or a service provider. The draft Ordinance clarifies that the register keeping body in case of crypto fund units has to be the fund custodian. This shall enable the fund custodian to fulfill its supervisory law obligations towards the fund investors.

The German Ministry of Finance is asking for industry comments to be filed before 1 October 2021. After final adoption of the Ordinance, we will comment in more detail.

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

Austria

ICON.
YOUR GLOBAL TAXPERTS

VAT exemption for the management of special investment funds – Services provided by a third party – CJEU joined cases C-58/20, K and C-59/20, DBKAG, dated 17 June 2021

According to Art. 6 (1) 8 (i) of the Austrian VAT law 1994, the revenue from the *"management of special investment funds", the "management of holdings in the context of the business of providing capital ... by undertakings holding a concession for this purpose"*, as well as from the *"management of special investment funds as defined by the other Member States"* is exempt from VAT. This legal regulation corresponds to Art. 135 (1) (g) of the European VAT Directive with the aim of fiscal neutrality which does not allow economic operators who carry out similar transactions to be treated differently for tax purposes. According to the principle of fiscal neutrality, it has to be ensured that economic operators are able to choose the form of investment which best suits them – not facing the risk that their operations could be excluded from the tax exemption. Therefore, this regulation intends to protect small investors who would otherwise have a disadvantage compared to large investors who invest directly without being burdened with administration fees.

In the joined cases C-58/20 and C-59/20 the European Court of Justice (CJEU) dealt with the question whether fund management services are covered by the tax exemption according to Art. 135 (1) of the European VAT Directive if the services are (partly) outsourced to a third party.

In the consistent case law, the CJEU has already dealt with the criteria for tax exemption as well as the tax treatment of such services which are outsourced to a third party. For example, in its decision of 2 July 2020, Blackrock Investment Management (UK), C-231/19 the CJEU stated that the services of an external service provider can also be exempt from VAT if they form a distinct whole which is intended to fulfill the specific and essential functions of managing special funds.

In the current case law, the CJEU specified further the respective criteria. According to the CJEU, the following criteria must be met to qualify for the VAT exemption:

Distinct or autonomous character

First of all, it has to be determined whether the services provided by a third party are forming a distinct whole. However, as the CJEU states, it is not required that the services which are specific to and essential for the management of special investment funds must be completely outsourced to the service provider to be covered by the tax exemption which is a fundamental and trend-setting statement in the current legal case. If the application of the tax exemption required the entire outsourcing of the services, management companies which themselves supply those services and economic operators who invest directly, would be favoured from a tax point of view.

Specific and essential character of the service

In a second step, it has to be assessed whether the services provided by a third party are specific to and essential for the management of special investment funds. It is crucial that the services provided are closely linked to the activities of the management company.

Regarding services provided by a third party to a management company, it has to be examined *"whether the service provided ... is intrinsically connected to the activity characteristic of a management company, so that it has the effect of performing the specific and essential functions of management of a special investment fund."* Instead, services which arise regarding any type of investment are not specific and not covered by the term management of a special investment fund.

Conclusion

In its decision regarding the joined cases C-58/20 and C-59/20, the CJEU has given guidance concerning the interpretation of the requested criteria for the VAT exemption. As also the fund management is affected by increasing digitalization, the current legal questions dealt with by the CJEU are of high practical relevance.

Nevertheless, are there any significant differences regarding the interpretation of the criteria followed by differences in the application of the exemption to be expected between the Member States? According to the settled case-law of the CJEU, the exemptions of Art. 135 (1) of the European VAT Directive are independent concepts of the EU law with the purpose to avoid divergences in the application of the VAT system as between one Member State and another. Therefore, in principle, based on this case law of the CJEU, there should not be serious differences in the application of this tax exemption between the EC Member States. Besides, the criteria for the tax exemption according to Art. 135 (1) of the European VAT Directive have to be interpreted strictly as those have to be regarded as exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. Nevertheless, if exclusivity of the services is given – this means if the service is provided exclusively for the purpose of managing special assets and not for other funds, a more frequent interpretation is possible. In this context, it is crucial for assessment what specifically falls under the management of special funds and what is meant by a special fund.

The CJEU has already dealt with the clarification of the question what is regarded as special fund covered by the tax exemption. According to the CJEU, the term "special funds" includes undertakings for collective investment in transferable securities (UCITS), as well as comparable investment vehicles which are based on the principles of risk diversification and which, due to their characteristics, are comparable to and compete with UCITS (among others, see decision of 4 May 2006, Abbey National, C-169/04, decision of 7 March 2013, Wheels Common Investment Fund Trustees Ltd, C-424/11 as well as decision of 28 June 2007, JP Morgan Fleming Claverhouse, C-363/05). Besides, no restriction can be seen with regard to the type of investment or the assets held by the regulated fund vehicle, as there is a direct competition between fixed assets that are subject to special government supervision, regardless of whether the fund vehicles consist of securities or real estate (decision of 9 December 2015, Fiscale Eenheid, C-595/13).

In its decision of 7 March 2013, GfBK (C-275/11), the CJEU indicated a broad interpretation of the term "management" by stating that also advisory services could be covered by the tax exemption if the criteria are met. According to further jurisdictions of the CJEU, this also applies to administrative and accounting services under the conditions. As the CJEU stated in the current joined cases, management and accounting services, such as services *"ensuring that the income received from the fund by unit-holders is taxed in accordance with the national*

law as well as the grant to use software especially for the purpose of the special fund", are covered from the tax exemption *"if they are intrinsically connected to the management of special investment funds and if they are provided exclusively for the purposes of managing such funds."* Besides, it is not necessary that the management function is outsourced in its entirety.

In more detail, in case C-58/20 tax services ensuring the legally compliant taxation of the income received from the fund by unit-holders (preparation of the necessary calculations on the basis of the fund accounting data) and the execution of the corresponding reports required by the law were outsourced to a service provider.

Additionally, the current case law is particularly important for the provision / use of software as the tax exemption for such services is being considered further. Case C-59/20 dealt with the granting of usage rights to software modules that were used to carry out essential calculations concerning performance measurement and risk management. This software was specifically for the investment fund business. With regard to software the CJEU states that the mere fact that a service is carried out entirely by means of electronic data processing does not exclude the application of the tax exemption for these services. Nevertheless, the criteria for the tax exemption are not met if the software has been designed for the management of various types of investments and is used by the management company for the management of special funds as well as for the management of other funds. If, on the other hand, the software is used exclusively for the management of special funds (and not for the management of other funds), it can be regarded as specifically for this purpose according to the CJEU.

Yet, it is up to the national courts to decide whether the requested criteria are met and subsequently, if the tax exemption is applicable in the individual cases. Therefore, even though the national courts have generally tended towards tax exemption concerning the actual cases, it remains to be seen how the national courts will apply the criteria, especially if exclusivity of the services is given.

Nevertheless, what happens if a third party provides different services, that means on the one hand services exclusively for the management of special funds and on the other hand services available for any funds? In this case, the required exclusivity is to be questioned.

In conclusion, it should be noted that this judgment, which provides further clarification and guidance, will have a significant practical impact, but it remains to be seen how the national courts will apply the criteria.

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Investment funds and the new annual tax on securities accounts

In the WTS Global Financial Services Newsletter (# 21) of June 2021, general comments were made on the new Belgian annual tax on securities accounts which was introduced by Act of February 17, 2021. This new tax replaces the Belgian annual tax on securities accounts which was declared unconstitutional by the Belgian Constitutional Court.

In the present contribution, we focus on special rules which apply to dedicated investment funds. In this respect, the notion of dedicated fund is similar both at the level of income taxes and at the level of the new Belgian tax on securities accounts.

Look-through taxation for Belgian investors investing in dedicated funds (income taxes)

As a general rule, when a Belgian taxpayer invests in a fund which clearly has separate legal personality according to the lex societatis (i.e. the company law applicable in the jurisdiction where the company is located), this is also taken into account for Belgian tax purposes, and the fund will consequently be treated as an opaque investment fund. If the lex societatis does not provide a clear answer, it should be verified whether the partnership has or does not have characteristics on the basis of which the partnership can be assimilated to a Belgian company (in view of being treated as an opaque fund) or not (lex fori test). Generally speaking, an opaque fund ("investment company") will only trigger taxation in the hands of its Belgian investor when it proceeds to some kind of a distribution.

However, since 2015, dedicated (compartments of) opaque funds may qualify as a "legal arrangement" falling under the scope of the so-called "Cayman Tax", in which case a look-through tax regime applies in the hands of the Belgian investor, provided that the Belgian investor is subject to Belgian personal income tax or to the tax for non-profit legal entities. For the sake of completeness: there are also other types of "legal arrangements" (e.g. trusts, companies located in low tax jurisdictions, E.E.A.-based entities which do not have a minimum taxation level of 1% on the taxable basis computed according to Belgian standards, etc.). However, we only focus on funds in the present newsletter.

Summarizing, the technical rules regarding the scope of the "Cayman Tax" which are relevant for opaque investment funds are go as follows:

- According to the general rule in the Belgian Income Tax Code, an entity qualifies for the Cayman Ttax if it is not subject to income tax in its state of residence or is subject to an income tax regime resulting in taxation below 15% on its taxable income computed according to the Belgian standards. Most opaque investment funds benefit from a favorable tax regime in their residence State, and may consequently fall under the scope of the legal general definition of "legal arrangement" for the application of the Cayman Tax.

- Investment funds are however excluded from the scope of the Cayman Tax by the Belgian Income Tax Code if they are publicly issued and/or listed. The same goes for "institutional funds" which are only available for "eligible investors" (the notion of "eligible investor" e.g. excludes individual investors).

These exclusions do not apply if the shares relate to a dedicated (compartment of) fund, in Belgium referred to as **"fonds dédié"** entity or "fonds dédié compartment", which is being defined as an entity or compartment, the ownership rights of which are held by one investor or exclusively by "related investors" (family members until the fourth degree; spouses, legal partners and people living at the same address, and also investors controlling another (corporate) investor).

Please note that there is some controversy among Belgian tax specialists as to the exact interpretation of the notion of "fonds dédié" entity or "fonds dédié compartment". Some tax specialists have taken the position that a compartment can qualify as "fonds dédié" as soon as one investor holds over 50% in the compartment.

In our opinion, this reading of the text of the law is not correct, and a compartment should not qualify as a "fonds dédié" as soon as there is at least one second investor which is not "related" to the first one (provided the participation held by this second investor cannot be regarded as abusive).

- As far as EEA-based funds are concerned, specific rules apply according to which the Cayman Tax only applies provided the fund vehicle it falls under one of the entities referred to on the EEA Royal Decree. The initial EEA Royal Decree of 18 December 2015 has been replaced by the Royal Decree of 21 November 2018, which applies as of assessment year 2019. According to Royal Decree of 21 November 2018, (compartments of) investment companies located in the EEA only fall under the scope of the Cayman Tax in case of a "fonds dédié" shareholder structure (with respect to the notion of "fonds dédié", see above). This rule also applies in case of a private fund.

- If the Cayman Tax applies, the income received by the fund will be taxable in the hands of the Belgian resident investor, as if he had received such income directly. The income will be taxable, even if such income is not actually distributed. Subject to facts and circumstances, an exemption may apply when the dedicated fund proceeds to a distribution of the profits which have undergone taxation on basis of the "Cayman Tax rules".

"Fonds dédié" (compartment of) investment fund and the new annual tax on securities accounts

The new Belgian tax on securities accounts is applicable if the average value of the securities account exceeds one million EUR during a given tax year (the year runs from October 1st of "year n" until September 30 of "year n+1"). The tax applies if the securities account is held by Belgian residents, including both individuals and legal entities, regardless of whether the securities account is held in Belgium or abroad. Permanent establishments of foreign companies are assimilated to Belgian residents in this respect. Non-resident individuals and legal entities are only subject if the securities account is held in Belgium.

The new tax on securities accounts also applies if Belgian resident individuals and Belgian resident legal entities subject to the tax regime for non-profit entities hold securities accounts through a "legal arrangement" falling under the scope of the Cayman tax, such as "fonds dédié" (compartments of) opaque investment funds which qualify as "legal arrangements". In other terms, the 0.15% tax will apply to the securities accounts with an

average value exceeding one million EUR which are held by that "fonds dédié" compartment or fund, although the fund may be located outside of Belgium, and in spite of the fact that the securities accounts are not being held with a Belgian intermediary.

Please note that "public funds" and "institutional funds" (i.e. funds which are only accessible for eligible investors) benefit themselves from an exemption from the new annual tax on securities accounts (the same goes for pension funds). The exemption however does not apply for a "fonds dédié" compartment of a public or institutional fund because of an exclusion provided in the Act of 17 February 2021. In this respect, it is the same notion of "fonds dédié" (compartment of) fund which is relevant in view of assessing whether the exclusion from the exemption applies. As far as foreign "fonds dédié" (compartments of) funds are concerned, the exclusion of the exemption at the level of the fund itself will not have any impact "in real life" if no securities accounts are held with a Belgian intermediary. Moreover, depending on the situation of the foreign fund, it may benefit from an exemption from the new Belgian tax on the securities accounts on basis of the applicable double tax treaty.

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Denmark

LUNDGRENS

Fidelity Funds cases – The Danish Supreme Court denies refund WHT to non-Danish investment funds

Conclusion after the judgment of the Danish Supreme Court

The Danish Supreme Court confirms that Danish withholding tax ("WHT") imposed on dividends distributed by Danish companies to several non-Danish investment funds was not in conflict with EU law, and the Supreme Court therefore dismisses the claims made in the Fidelity Funds case.

Introduction and background

The Danish Supreme Court delivered its judgment on 24 June 2021 (case 59/2019).

The case relates to the non-Danish investment funds, Fidelity Investment Funds, Fidelity Institutional Funds and Fidelity Funds (the "Fidelity Funds") being denied entitlement to a refund of dividend WHT which Danish companies had withheld on dividends paid to the non-Danish investment funds during the period 2000-2009.

Under section 16 C of the Danish Tax Assessment Act, investment funds could opt for exemption from WHT. The conditions in section 16 C had to be met, 1) the investment fund must be resident in Denmark, 2) the investment fund must opt for being qualified as a distributing investment fund and compute an annual minimum dividend distribution.

The non-Danish investment funds claimed that section 16 C of the Danish Tax Assessment Act was in conflict with Article 63 in the Treaty on the Functioning of the European Union (TFEU) on the free movement of capital.

Judgment by the Eastern High Court

The Danish Eastern High Court delivered its judgment on 2 April 2019.

The Eastern High Court had requested a preliminary ruling from the Court of Justice of the European Union (CJEU), which found that the condition of Danish residency was in conflict with Article 63 TFEU on the free movement of capital.

In its judgment, the Eastern High Court stated that non-Danish investment funds should generally be treated in the same way as investment funds resident in Denmark, meaning that non-Danish investment funds had to meet the same requirements as investment funds resident in Denmark in order to qualify for exemption from Danish WHT. The Eastern High Court ruled that even though the CJEU had found the residence requirement to be in conflict with EU law, the non-Danish investment funds would not be entitled to refund of WHT as they did not meet the other requirements set out in section 16 C of the Danish Tax Assessment Act.

Judgment by the Supreme Court

The Supreme Court upheld the judgment delivered by the Eastern High Court.

The non-Danish investment funds had stated that as section 16 C of the Danish Tax Assessment Act was in conflict with EU law, they would not be required to meet the second condition of section 16 C including computing an annual minimum dividend distribution.

The Supreme Court upheld the Eastern High Court's ruling that even though the condition of residency in Denmark was found by CJEU to be in conflict with EU law, it did not in itself result in the non-Danish investment funds being entitled to refund of dividend WHT.

The Supreme Court further found that *"...the requirement in Section 16 C to compute minimum dividend distribution comprising e.g., dividends from Danish companies should be considered as being justified by the necessity for correct taxation and coherence of the Danish tax system for investment funds and the requirement was not found to constitute an unproportional restriction conflicting with the free movement of capital under TFEU article 63..."*.

The Supreme Court stated that during the years 2000-2009, the non-Danish investment funds had not elected to be qualified as distributing investment funds and to compute an annual minimum dividend distribution and thus the investments funds did not meet the condition to qualify for exemption from WHT. The Supreme Court subsequently ruled that the non-Danish investment funds were not entitled to the refund of WHT on dividends.

The Supreme Court found that there were no doubts about the understanding of the EU law which would warrant a preliminary ruling from the CJEU in relation to repayment in these cases.

New legislation as a result of the Fidelity Funds case

On 3 July, following the CJEU ruling, the Danish Parliament passed a bill (L 211) with the purpose of aligning the Danish rules with EU law. The bill entered into force on 1 July 2021.

Now all investment funds paying minimum taxation will be obligated to levy 15% Danish WHT on Danish dividends. This revision is meant to ensure that non-Danish investment funds are treated in the same way as Danish investment funds receiving dividends on Danish shares.

The way forward

It has to be expected that the Danish tax authorities (and the lower Danish tax courts) will follow the conclusions of the Danish Supreme Court and will therefore reject the refund of the WHT levied on dividends received by the investment funds.

Given that the rules are now aligned, *if* the rules were to be considered as conflicting with the free movement of capital under TFEU article 63, the CJEU must consider the conditions and requirements in their nature to be so specific to the national market, and thereby find that in fact only the national businesses would be able to meet these conditions and requirements.

Generally, it could be stated that the CJEU rulings vary to some degree regarding the free movement of capital and several relevant questions have not been brought before the CJEU. For now, there is still the pending case "AEVN" (Case C 545/19, Portugal) regarding WHT and this outstanding CJEU judgement could potentially show that the Danish Supreme Court made a wrong judgment.

It is currently considered to bring the judgment of the Danish Supreme Court to the attention of the European Commission. Based on this judgment, it could be argued that Denmark is in breach of the EU treaty and that Denmark in fact is illegally subsidizing the Danish investment funds.

Therefore, it should be considered to keep any current applications or appeals pending, in order to await future developments.

Beneficial ownership – still a hot topic in Denmark

On 3 May 2021, the Danish High Court held two rulings regarding beneficial ownership in the NetApp case and in the TDC case.[3] The Danish Ministry for Taxation has now decided to appeal the NetApp case to the Danish Supreme Court. It is deemed likely that it has been an important factor for the Danish Ministry's decision to file the appeal that a tax haven company is included in the structure. Additionally, TDC A/S has decided to appeal its case as well. We will keep you posted in our upcoming Newsletters.

New rules with respect to tax havens

With effect from 1 July 2021, the Danish Parliament passed new legislation which makes it more expensive to trade with so called "tax havens".

Specifically, Danish individuals and businesses are no longer entitled to tax deductions for payments to affiliated recipients (being physical individuals or legal entities) in the EU's blacklisted countries. As an example, a Danish subsidiary will not be entitled to a tax deduction for payments to a parent company in Panama. Such payments could be in relation to purchases of goods or payments of interest etc.

The only exception to the rule is if the taxable entity proves that the beneficial owner of the payment is a tax resident in an EU/EEA member state or a country which has entered into a DTT with Denmark.

Furthermore, taxation on dividends from Denmark to blacklisted countries is doubled. Before the new legislation was introduced, a shareholder receiving dividends from a Danish company was liable for approx. 22-27% WHT on dividends and in most cases with the possibility of receiving a full or partial reclaim. This has been changed to a final 44% WHT on dividends if the shareholder is established in a blacklisted country.

The list of 12 blacklisted countries includes (not limited to): Anguilla, Dominica, Fiji, Panama, Seychelles, and also Trinidad & Tobago (once the DTT with this country will be abolished within the near future).

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3 For more detail on the two cases, see WTS Global FS Infoletter # 21 of 15 June 2021

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Finland

CASTRÉN & SNELLMAN

Government Budget Proposal broadens the tax base and combats aggressive tax planning

The Finnish Government has agreed on new tax measures, which aim to strengthen general government finances by a total of approximately EUR 100 million on an annual basis. The new decisions will come into force in 2022 and 2023. The Government has published a short description of the planned tax changes. Further information and details of the changes will be specified during their preparation.

The planned tax changes include for example the following:

- Gains derived from the real estate investments of foreign funds will be taxed in Finland as broadly as possible from the beginning of 2023. One aim of the planned change is to make sure that Finland has the right to tax capital gains from real estate also in situations where the disposed entity is an entity that owns real estate indirectly.

- The transfer pricing adjustment provision will be revised from the beginning of 2022 so that it can be applied within the scope of the OECD Transfer Pricing Guidelines.

- The provisions on the limitation of deductibility of interest expenses will be reformed by restricting the application of the balance sheet exemption from the beginning of 2022. The aim is to amend the legislation so that the provisions prevent the transfer of taxable income outside Finnish taxation in private equity structures.

- The capital gains tax for natural persons will be broadened in situations where natural persons move abroad. The changes will take effect at the beginning of 2023.

The proposed changes raise a large amount of open questions and they have already raised public debate in Finland. The planned tax changes will be further clarified and determined as the handling of the Government budget proposal proceeds. However, it is expected that the changes, including the proposed exit tax in particular, will cause difficulties when they are implemented in practice. The Government will debate the budget proposal on 23 September 2021 after which the Government proposal for the 2022 budget will be published.

The Supreme Administrative Court issued clarifying decisions on taxation of carried interest

In decisions issued on 11 May 2021, the Supreme Administrative Court dismissed the Tax Recipients' Legal Services Unit's appeal in a dispute concerning the question whether carried interest must be deemed capital income in accordance with the civil law form or as earned income subject to WHT.

Castrén & Snellman Attorneys assisted ICECAPITAL's real estate private equity funds and the owner-entrepreneurs behind them in the said tax dispute in which the Finnish Tax Administration sought to tax dividends received by the owner-entrepreneurs as earned income. In principle, the Tax Administration argued that part of the income of the companies took the form of carried interest from the funds.

The taxpayers' view was that the only correct interpretation under the regulation in force and the legislative materials is to state that carried interest must also be taxed according to the civil law form as capital income. The Finnish Tax Administration and later the Tax Recipients' Legal Services Unit had disregarded the civil law form and taken the position that carried interest in particular was earned income subject to WHT and possibly constituted tax evasion.

The Helsinki Administrative Court decided the matter to the benefit of the taxpayers in its decision of 12 January 2021. The Helsinki Administrative Court respected the civil law form used. The Helsinki Administrative Court held that carried interest accrued taxable capital income for the entrepreneurs, not earned income. The court also found that the general tax avoidance provision did not apply to the matters.

The Supreme Administrative Court upheld the Helsinki Administrative Court's decisions, which are now final. The Supreme Administrative Court confirmed the taxpayers' understanding that respect for the civil law form also applies to carried interest. The result corresponds to prior decisions issued by the Administrative Court and the Central Tax Board.

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The result indicates the weight that must be given to the civil law form and further clarifies the legal state surrounding the issue. The decision is significant to the entire private equity investment field. Hopefully, this decision along with prior decisions finally closes the long-running debate surrounding the matter. Owner-entrepreneurship must continue to be permitted in the private equity field without significant ambiguity in taxation.

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Germany

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Administrative guidance on securities lending transactions (incl. Cum/Cum)

On 9 July 2021, the German Ministry of Finance ("*BMF*") issued two decrees related to securities lending transactions (and comparable repurchase or spot-transaction scenarios):

- addressing the general topic of the tax-legal allocation of securities out on loan, including the perspective of financial accounting.
- addressing specifically the tax-legal impact of so-called *Cum/Cum-Transactions.*[4] Besides the general evaluation of such transactions, the decree explicitly targets the role of German investment funds under the German Investment Tax Act in force until 31 December 2017 ("*GITA 2004*") and – importantly – the role of custodian banks.

As a general rule under a securities lending transaction, German tax law assigns an asset - and the respective income streams - to the civil law owner of the asset (e.g. to the borrower of the asset). However, in situations where another person is able to exclude the civil law owner from exercising ownership rights over the asset for the general operating life of an asset, the tax-legal ownership of the asset and its streams are allocated to that person, the so-called economic owner (e.g. the lender of the asset).

According to the new guidance, the allocation of economic ownership from the civil law owner to the economic owner of the asset requires an evaluation of all circumstances of the single case as to whether the position of the civil law owner is a mere formal one because chances and risk associated with the asset are not finally transferred to the borrower, e.g. due to hedging against potential loss in value of the asset. Especially the following criteria are mentioned as indicators:

- The borrower holds the asset for a short holding period (usually less than 45 days).
- The securities lending leads to a tax benefit and the lending fee is determined in accordance with this tax benefit, considering also other transactions, which have a material connection with the securities lending.
- The borrower does not enjoy a liquidity advantage from payments under the transactions, e.g. because payments are executed simultaneously and in equal amounts.
- The borrower is not allowed to exercise voting rights usually attached to stocks out on loan.
- The borrower has a weak legal position, e.g. because the lender has the right to terminate the lending contract upon short notice (3 business days).

The main consequences are the following:

- The security out on loan - also in the context of financial accounting - is continuously allocated to the lender.
- A dividend (or other type of income) paid while the security is out on loan is taxable income of the lender (usually 15-25% WHT).
- In the case of a Cum/Cum-transaction involving a German investment fund under GITA 2004, WHT that was reimbursed to such fund (or not levied at source) has to be repaid by the German investment fund.

4 A Cum/Cum-Transaction is defined by the BMF as a trade where the (usually non-German) shareholder transfers German stocks to an entity (often a German bank), which is able to credit the German WHT levied on dividends against its CIT. The stocks are usually transferred via a securities lending agreement, with delivery a few days before the dividend record date and re-delivery a few days after the dividend pay date. The transaction aims at preventing a definite effect of German WHT for the non-German shareholder.

- Besides the German investment fund, the custodian paying out the dividend might be held liable for the WHT repayment, unless it can prove that the incorrect levy of WHT was based on neither intent nor gross negligence.
- Additionally, custodian banks might be held liable in other constellations of Cum/Cum-Transactions, especially if they offered Cum/Cum-Transactions as an investment model.

Even if the above described criteria are not fulfilled, the same consequence may be applied if a securities lending transaction is in scope of the German general anti-abuse rule (GAAR). This shall be the case where the main economic background of a transaction is obtaining a tax benefit. In this case, taxes will be due as if an economically and legally appropriate structure had been employed, i.e. usually leading to taxable income for the lender and WHT reclaims from the tax authorities.

Previous administrative guidance on this topic generally denied the applicability of German GAAR, if the borrower obtained a positive pre-tax return from the transaction. The BMF now denying this general opportunity for exculpation suggests that the tax authority will take a closer look at the single transactions.

It is advisable for custodians and investment funds under GITA 2004 to monitor their risk of assessments from tax authorities.

The two administrative decrees are applicable in all open cases.

Draft administrative guidance on income tax treatment of crypto assets

On 17 June 2021, the German Ministry of Finance published a first draft version of administrative guidance regarding the income tax treatment of crypto assets. The draft decree focuses on crypto currencies and their respective income streams, but also covers other types of tokens.

The guidance does not specifically target the topic of investment funds and their crypto investments. Thus, general German tax rules will be applicable, possibly leading to tax advantages of crypto investments via investment funds (tax deferral effect) compared to the direct investment in crypto assets, especially in the case of standard retail investment funds (so-called Chapter-Two-Funds within the meaning of the German Investment Tax Act). However, from 2 August 2021 onwards, crypto assets are now an eligible asset class also for the 2nd German tax law category of investment funds, the Special Funds (or so-called Chapter-Three-Funds under GITA).

Though it is generally appreciated that the Ministry tries to clarify the field of crypto asset taxation, the draft decree reveals the discrepancy between innovative, crypto based assets and German tax law with its rather physical asset affinity.

In a nutshell, the decree applies the wording of the law to all tax events relevant in the life-cycle of a crypto asset. The decree clarifies that all activities with respect to crypto currencies are relevant for income tax purposes, i.e. mining, staking, airdrops are consid-

ered tax relevant events. For example: if staking is performed as part of a business activity, the value of the coins gained from staking is to be reported as operating revenue. For private investors, the coins from staking are taxable as other income.

Remarkable and important especially for private crypto investors is the extension of the vesting period from 1 year to 10 years. Usually, the private investor can realize a tax-free gain from selling his (crypto) asset after a holding period of 1 year. This tax-free holding period is extended to 10 years, in the case of generating additional income from the asset. The guidance clarifies that staking, lending and other activities generating additional income lead to such extension of the vesting period. Though this view is in line with the wording of the law, the Ministry might want to remember that the respective revision of the law (i.e. the extension of the vesting period from 1 to 10 years) was introduced to prevent a specific fact pattern of tax abuse, which is not comparable to the economic activity related to crypto assets.

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In August 2021, the draft decree was discussed with the industry groups concerned. Though the Ministry faced harsh criticism from the industry, it did not give up on the before described positions. However, the Ministry will continue its work on crypto taxation. It remains to be seen how this work will develop under a new Government after federal elections are held in Germany in September.

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New taxation rules for crypto assets

With effect from 1 January 2022, the profit realised on crypto asset transactions should be treated as separately taxed income in Hungary. It is definitely good news for Hungarian taxpayers who found it so far difficult to pay their taxes on income from crypto assets.

What are crypto assets and crypto asset transactions?

The European Parliament and the European Council jointly developed the so-called draft MiCA (Markets in Crypto Assets) regulation that defines crypto assets as digital representations of value or rights, which may be transferred and stored electronically, using distributed ledger technology (DLT) or similar technology.

From 2022, the Hungarian Personal Income Tax Act will also use this definition. Crypto asset transactions are ones in which the private individual *"acquires financial assets other than crypto assets through the transfer of crypto assets"* in a transaction available to anybody.

Taxation of crypto assets in Hungary so far

Given that the Hungarian Personal Income Tax Act currently does not include special rules on the taxation of crypto assets, the income realised through these has to be taxed as other income. Other income forms part of the aggregate tax base and, accordingly, it is also subject to a 15.5% social contribution tax besides the 15% personal income tax.

If private individuals are obliged to pay the social contribution tax themselves, e.g. if the crypto asset is not acquired from a Hungarian financial enterprise, the base of the personal income tax and the social contribution tax is 87% of the income obtained with the crypto asset. So, the overall tax burden in Hungary is 26.5%.

The new legislation

From 2022, the income realised through crypto asset transactions will qualify as separately taxed income. The taxation will be similar to that of controlled capital market transactions.

Generation of revenue

As mentioned above, taxation may arise if the crypto asset is exchanged for a non-crypto asset. So the cases when a crypto asset is exchanged for another crypto asset will not qualify as crypto asset transactions for personal income tax purposes, thus in these cases, no taxable income is generated. In the same way, no revenue is generated upon the production (mining) of the crypto asset.

Additionally, no tax has to be paid (no income assessed) if the revenue from the transaction does not exceed 10% of the minimum wage in Hungary. One additional condition is that no revenue should be generated from other identical transactions on the given date, and that the sum of these smaller revenues should not exceed the minimum wage in the fiscal year.

Defining income

When defining income, the revenue achieved from the transaction must be reduced by the amount used to acquire the asset.

What can qualify as an amount used for acquisition? When participating in mining a crypto asset or in the operation of a related system, the expense that arose in connection with such activity (e.g. IT devices, electricity) can be considered an amount used to acquire the asset. However, it is more common to acquire crypto assets through purchasing than mining. In this case, the amount spent to acquire the asset can be deducted from the revenue.

The transactional profits and losses established this way and realised in the fiscal year should be treated in aggregate. Taxable income is generated if the realised transactional profits exceed the sum of transactional losses as well as the fees and commissions related to the holding of the crypto assets, but not directly connected to the transactions of the fiscal year and the given transaction.

Tax equalisation in Hungary

The taxpayer can apply the loss carry forwards known from controlled capital market transactions in the case of crypto asset transactions as well. If losses are incurred during the transactions in the given fiscal year, the taxpayer can reduce the tax payable by the amount of tax pertaining to the loss within the framework of tax equalisation in the next two years.

Social contribution tax

Considering that the income achieved with the crypto assets will not be part of the aggregate tax base, it will not be subject to social contribution tax. This means the previous overall tax burden of 26.5% will fall to 15% in Hungary.

Transitional rules

For those who previously did not declare their income from crypto assets, the new regulation has a very favourable option in store. Previously unreported income can be declared as a transactional result of 2022, at a more preferential tax rate.

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A Note on Share Schemes in the Irish Tax System

Employers in Ireland are looking towards more innovative ways of retaining key individuals within the business. Fintech financial services payment processing companies and crypto-currency companies in particular, face the real challenge of offering attractive remuneration packages that are competitive with the many large multinationals now operating in the local market. Such start-ups often have difficulty matching multi-national salaries on monetary terms. Employee equity participation can be an important factor in contributing to the success of start-up Fintech companies operating in a very competitive market. Not only does it bridge the gap between salary offerings made by more established market participants and start-ups in the financial services sector it also facilitates "buy-in" by key employees in such financial services start-ups.

A study on the promotion of employee ownership and participation prepared for the European Commission's Directorate-General for the Internal Market in 2014 states:

"Thirty years of research have confirmed that companies partly or entirely owned by their employees are more profitable, create more jobs and pay more taxes than their competitors without employee ownership. At the macroeconomic level, EFP leads to higher productivity and, therefore, higher competitiveness and growth as well as strategic stabilisation of ownership. At the company level, it can contribute to solving problems such as absenteeism, labour turnover and the retention of key employees, as well as business succession and funding, especially in SMEs and micro-enterprises."

Involving employees in the ownership of the business has been proven to create growth for the company and assist in retaining key staff. As a result, employees are motivated to help the company grow, thus increasing the value of their investment in the business. Whether the business is a start-up, an established, growing business or undergoing a merger, acquisition or sale, the objectives of the company to retain and reward key employees are often the same.

What Are the Tax Benefits of a Share Scheme?

For many employers, the tax benefits of an incentive plan are not the sole driver. Where large numbers of employees are involved, simplicity is often key. For SMEs and start-up companies wishing to incentivise a small number of key employees/managements, equity plays a vital role in incentivising these individuals.

Key employees can make a real difference to the bottom line and having ownership in the business can be a significant incentive to drive the business forward. Obtaining beneficial tax treatment for such a share plan (i.e., CGT rather than income tax) may also be an important feature.

For individuals who participate in equity plans, it is usually possible to achieve CGT treatment on a disposal of their equity to a third party; currently, the rate of CGT is 33%. However, there are some situations where this can be difficult to achieve – see the anti-avoidance provisions below. A reduced CGT rate of 10% can be applied to the first €1m of gain where the individual qualifies for entrepreneur relief (ER). However, it can be difficult for the individual to meet the qualifying ER criteria due to the requirement to own 5% of the ordinary share capital over the qualifying period. Although an employee may be given

a 5% shareholding at the outset, often the introduction of new equity investors as companies move through to equity raising rounds of investment, dilution occurs and causes such employees to no longer to meet the qualifying criteria.

From the employer's perspective, in addition to the commercial benefits mentioned previously, if an equity plan is established, an employer PRSI saving of 11.05% can be achieved where the conditions for PRSI exemption on share-based remuneration are met. It is worth noting that the PRSI exemption should be applied only where the employee receives shares in the company in which he or she is employed or in a company that has control of the company in which he or she is employed.

Where a cash bonus or shadow share plan is proposed, the value received by the individual will be subject to income tax under PAYE. Although there may be good, solid commercial reasons for implementing such a plan, they are generally subject to tax rates in excess of 50% plus employer PRSI of 11.05%.

One such Share scheme which is popular in Ireland and has a tax saving attached is the Restricted Share Scheme.

Restricted shares

Restricted shares are also often referred to as "clogged" shares and are dealt with under s128D TCA 1997. This section provides for a reduction in tax payable on the award of free shares, or shares awarded at undervalue, provided certain conditions have been fulfilled.

Under such schemes, shares are typically acquired by an EEA trust, although Revenue can accept other methods for holding shares, such as a secure brokerage account.

Under a written agreement entered into at the time of acquisition, the employee agrees to a *"restriction on the freedom… to assign, charge, pledge as security for a loan or other debt, transfer, or otherwise dispose of the shares for a period of not less than one year"*.

This restriction reduces the amount chargeable on the exercise of a share option or the vesting of an RSU (where the share is restricted) and a share award.

An employee would otherwise be charged to income tax, USC and PRSI on the market value of the share award less the amount paid for the shares. The chargeable amount is reduced depending on the period of the restriction.

Restriction period	Abatement
1 year	10%
2 years	20%
3 years	30%
4 years	40%
5 years	50%
Over 5 years	60%

It is current Revenue opinion that the restricted period must be mandatory and imposed by the company. Revenue will accept that some shares may have to be sold by the employee to fund the upfront tax liabilities. The tax relief afforded by s128D does not apply to these unrestricted shares.

The capital gains tax (CGT) base cost is the amount brought into the charge to tax where the shares are from an issue of shares. Where the shares are already in existence, the base cost is the pre-abated market value.

On sale of the shares, the gain made by the individual should be subject to CGT at the prevailing rate, currently 33%.

A restricted share scheme is often implemented for key employees or directors where the employer wishes to reward the individual with "free" shares, but the upfront value of the shares is high and the company would therefore like to suppress the tax cost on acquisition of the shares.

This is worth reflecting that "Clogged share scheme" gives employers an opportunity to reward Key employees. So, it is a very useful staff retention tool particular for a start -up that needs to lock in key workers for initial five year start up.

Restricted Stock Units (RSU)

An RSU is a promise to receive shares or cash to the value of those shares in an employer or related company at a future date.

There is often a delay between the date of grant and vesting e.g. a time-based restriction, where the employee must stay in employment for a stated period or on the happening of an event, such as the company raising external equity or there is an IPO. The units are often forfeitable or cannot be sold prior to vesting.

There is no specific Irish legislation covering RSUs however Revenue have issued Tax Briefing 63 to set out their view of the tax treatment. Revenue state that the RSUs do not become taxable until the earlier of the RSU vesting date or the date shares or cash are actually passed to the employee.

RSUs are fully taxable in Ireland if they vest at a time when the holder is Irish resident, without any apportionment by reference to any part of the vesting period during which the holder was resident elsewhere. If the RSUs vest and the holder is no longer Irish resident, the RSUs are not taxable in Ireland, regardless of the fact that the holder may have been resident in Ireland at the time of the grant. This rule could be useful, in particular, for employees in fintechs who are required to change jurisdiction because of the differing regulatory landscape/conduct of business rules within the various EU member states. However, it is important to note that RSUs awarded to a director in his/her capacity as a director of an Irish company who is not tax resident in the State at the time of vesting, are still fully taxable in the State at the time of vesting (subject to any relieving provisions of an appropriate DTA.)

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Concluding thoughts

Share-based remuneration has become a very popular in Ireland, and in some cases a required, part of employee remuneration. Certain Irish schemes like the illustrated clog scheme can afford tax relief for employees. In most cases, there is no employer PRSI cost for the company. In designing a remuneration package to attract and retain employees it is important to consider the applicability and desirability of an equity offering.

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Italian tax exemption on interest from medium / long term loans paid to foreign investment funds

The Italian tax authorities have recently ruled that the domestic WHT exemption granted to certain foreign investment funds and other qualified investors on interest deriving from medium / long term loans is not applicable to interests paid through an intermediate entity, thus rejecting a "look through" approach (see ruling 569 of August 30,2021).

In the case at hand, a (2,5%) interest bearing long term loan (20 years) was granted by a regulated Luxembourg investment fund to a fully owned Luxembourg holding, and the amount received by the holding was in turn used to finance its fully owned Italian subsidiary at an increased rate (4,25%).

The Italian tax authorities reminded that foreign investment funds may benefit of such interest WHT exemption if, amongst the various conditions, (i) either the fund or its investment manager are subject to regulatory supervision in their State of establishment (the local regulator being the CSSF in Luxembourg), (ii) they are established in a (*"white list"*) State that allows a satisfactory exchange of information with Italy (such as Luxembourg) and (iii) the loan is not regarded as granted *"to the public"* and as such not subject to the Italian banking law (hence allowing loans granted to group entities).

Although the fund's eligibility to the tax exemption was not disputed, nor it was argued that another person should be regarded as the beneficial owner of the interest income (e.g. the intermediate holding company, taking into account the significant difference in the interest rates, or possibly the fund's sole Luxembourg participant), the exemption was denied on the ground that the fund was not the direct recipient of the interest income, thus refusing a *"look through approach"*.

Nevertheless, the ruling leaves some room for intermediate companies to take advantage of the WHT exemption, which was however denied in the present case because the Luxembourg holding was established to manage the investments of a limited number of investors and therefore could not be regarded as a qualified investor. Moreover, being the conclusion of the ruling based on the wording of the domestic law on medium / long term loans (article 26, par. 5-bis, CTA), the possibility that a more favorable *"look through"* approach will be taken under other domestic or international law provisions cannot be excluded.

Italian tax regime of interests on loan granted to Italian tax resident persons by non-resident banks

With the answer n. 500/2021 of 21.7.2021, the Revenue Agency discussed the tax liability of interests received on mortgages granted to Italian tax resident persons by foreign banks without a permanent establishment in Italy.

The issue has been risen by a Liechtenstein tax resident bank, without PE in Italy, granting loans (Lombard loans and mortgage) to Italian individuals for their foreign investments. As private investors do not act as withholding agents, the bank asked to the Italian tax authority to clarify the tax treatment applicable to the interests paid by the Italian individuals.

As general rule, non-resident companies with no permanent establishment in Italy are taxed on income sourced in Italy only if interest are paid by an Italian tax resident person. In the case at issue, the bank has invested the capital in Italy (i.e. income has been sourced in Italy, regardless the use of the capital then made by the borrower) and interests have been paid by Italian individuals. As a consequence, such income is taxed in Italy.

However, no WHT is applicable as interests are paid by individuals. Therefore, the foreign bank has to fulfill its tax duty filing the Italian annual corporate income tax return (RL sheet).

Anyway, in case of loans granted to Italian companies, we strongly advice foreign banks to verify the correct application of the WHT on Italian sourced income and, if necessary, file the annual Italian CIT return.

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No refund of Luxembourg dividend WHT without sufficient proof of beneficial ownership

On 9 December 2020, the Luxembourg Administrative Tribunal rendered a decision relating to the refund of the Luxembourg 15% withholding tax ("*WHT*") on dividends distributed by several Luxembourg corporate entities to another Luxembourg company (the "*Company*"). In short, the Tribunal estimated that the Company did not demonstrate that the conditions for the refund were fulfilled, in particular those having regard to the beneficial ownership, and confirmed the denial of the refund.

The Luxembourg Income Tax Law conditions the exemption of WHT to (among other) the detention of a minimum participation of at least 10% (or with a minimum acquisition price of 1,2 MEUR) held during a 12-month period. In the case at hand, whereas the Company provided several supporting documents including daily position reports, audited annual accounts or copies of tax returns, the Luxembourg tax authorities considered that the Company failed to establish its status as beneficial owner of the shares during the said 12-month period.

The dividends were paid in relation to fungible and dematerialized shares. The processing of such dividend payment usually requires the intermediation of several intermediaries, notably including a paying agent and a custodian agent. Such intermediation results in a chain of payments where each provider is not aware of the identity of the actual owner of the shares. In this context, the tax authorities were asking for a documentation allowing the reconciliation between the payments made by the paying agent and those received by the Company as shareholder - in other words a documentation substantiating the entire chain of payments. According to the tax authorities, a very cautious analysis of the WHT refund request was justified due to the recently revealed *Cum-Ex* fraud scheme, in which bad actors were claiming several refunds of WHT for one and same distribution.

In the case at hand, the Company had provided "tax vouchers" issued by one of the intermediaries. These were however disregarded by the tax authorities and considered as an insufficient proof because they were not mentioning the identity of the Company as beneficial owner nor the holding period of the shares.

In its decision, the Tribunal acknowledged that the burden of proof of the facts triggering the tax liability belongs to the administration but the burden of proof of the facts reducing or releasing the tax liability belongs to the taxpayer. Moreover, while not expressly mentioned in the Luxembourg Income Tax Law, the Tribunal also confirmed that only the beneficial owner of the shares was entitled to the exemption and refund of the WHT and therefore, that the fulfillment of this condition had to be demonstrated by the Company.

The Tribunal considered that most of the documents provided by the Company were self-generated, whereas the fulfillment of the conditions for the exemption needs to be proved by the provision of objective elements. Regarding the "tax vouchers", the Tribunal noted that these were addressed to the Company, with a mention of the number of shares, the amount of the dividend, as well as the date of the payment with mention of a bank account. The Tribunal considered however that they were lacking an indication of the beneficial owner and holding period of the shares, as well as the required double signature.

One argument of the Company was that the documentation requested was impossible to obtain given the complexity of the chain of payments and taking into account that most intermediaries actually ignored the identity of the beneficial owner. The Tribunal considered here that the Company did not sufficiently demonstrate that it had taken steps aiming at obtaining the relevant documentation, or to which extent those steps had proven to be unsuccessful.

For these main reasons, the Tribunal decided to confirm the decision of the Luxembourg tax authorities to deny the refund of the WHT. An appeal against this decision has been filed.

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Although rendered in a specific context, where other elements were also taken into consideration by the judges, this case law gives an indication on the crucial importance for taxpayers to maintain an appropriate WHT related documentation in order to demonstrate their quality of beneficial owner - or, when not possible, their inability to do so.

Such considerations may apply to WHT refund requests made under Luxembourg domestic provisions, but also to those made based on double tax treaties' provisions.

In Luxembourg, WHT refund claims usually need to be introduced by the end of the year following the payment of the WHT (subject to double tax treaty provisions).

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Polish Deal (*Polski Ład*) as proposal for a wideswept tax reform – key points for financial markets

On 26 July 2021, the government published a broad legislative proposal (hereinafter: the "*Draft*") to make important amendments in various tax laws, including income tax and VAT regulations. The changes may be relevant for the financial services industry and investors in Poland.

The Draft is currently undergoing the consultation process and its ultimate wording is not decided yet.

Among other proposals, the Draft:

1. Seeks to change the WHT framework as promised by the Finance Ministry;
2. Introduces various relief and incentive measures to spur interest in investing in Poland (including the "Polish holding company" regime);
3. Makes it possible to elect the application of VAT to financial services (previously exempt).

1. WHT changes

The Polish income tax laws were amended, with effect as of 1 January 2019, to change the WHT collection procedures. But the Finance Ministry has already deferred the application of these changes on **six** occasions for CIT and on **five** occasions for PIT, with the most recent deferment until 31 December 2021.[5]

The regulations proposed in the Draft are very likely to determine the ultimate structure of the Polish WHT collection framework.

WHT collection mechanism

The Draft proposes a hybrid WHT collection mechanism with both the *pay and refund* and the *relief at source* approach. Which of these applies will depend on the payment type (the *what* test), the status of the payee as a related vs. unrelated party (the *who* test), and the total amount of payments made to the given taxpayer (the *how much* test).

The pay and refund mechanism will apply to:

- income that is passive or should be treated as such, being:
  - dividends and other corporate profit distributions;
  - 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;
  - income which, for no valid commercial reasons, was not treated as any of the foregoing;
- income paid to related parties, if the total amount of payments in any way subject to Polish WHT which are made to the same taxpayer has exceeded PLN 2 million within the withholding agent's tax year.

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

The relief at source mechanism will apply to:

- income other than passive income, such as payments for professional/management services (advisory, accounting, market research, legal, advertising, management and control, data processing, staff recruitment and acquisition, guarantees and suretyships, etc.);
- passive income paid to unrelated parties;
- passive income paid to related parties, if the total amount of payments in any way subject to Polish WHT which are made to the same taxpayer has not exceeded PLN 2 million within the withholding agent's tax year.

Other WHT changes

The Draft retains the anti-fraud due diligence rules which require the Polish withholding agent to verify if it is indeed lawful to exempt the payment, forbear collecting the tax or apply any tax rate other than the standard one. The only change is that 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 but also to intercompany relations as defined in transfer pricing regulations.

The Draft modifies the available options allowing the agent to apply WHT collection preferences, such options being:

- a representation by agent's management, or
- an opinion on preferential treatment (earlier this was an exemption opinion).[6]

The most important change here is as follows:

Currently, an exemption opinion may be requested by foreign taxpayers or Polish withholding agents (with the latter being allowed to do so only if they have incurred the economic burden of the tax) who enjoy the WHT exemption under PS Directive and/or IR Directive.

The solution proposed in the Draft:

- Opinions on preferential treatment may be requested by foreign taxpayers, withholding agents or entities making payments through entities operating securities accounts or omnibus accounts.
- An opinion on preferential treatment may be requested if the taxpayer is entitled to exemption under PS Directive and/or IR Directive and/or if he is entitled to preferential WHT treatment under the double tax treaty.

Additionally, the Draft slightly changes the definition of the beneficial owner. However, it keeps the controversial requirement of having business substance (genuine business activity).

2. Relief and incentive measures to spur interest in investing in Poland (the "*Polish holding company*" regime)

The Draft proposes a number of investment relief measures, including by introducing what is called the Polish holding company regime.

The regime is designed to create an environment conducive to locating holding companies in Poland.

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

The proposed solution is intended as an alternative to tax groups and to PS Directive exemptions.

The relief would be available for Polish entities with domestic or foreign subsidiaries.

The idea is as follows:

- CIT exemption for 95% of dividend amounts received by the holding company from its subsidiaries (with the remaining 5% being subject to Polish CIT at the standard rate for dividends, which is 19%);
- CIT exemption for gains on sale of shares in subsidiaries, on condition the purchaser is not a related party (the exemption will not apply to shares in a domestic or foreign subsidiary if at least 50% of the value of its assets is represented directly or indirectly by real estate or rights in real estate situated in Poland).

However, the exemptions named will apply subject to a number of conditions.

For a company to be considered a holding company, it must have the required legal form, i.e. it must be a *spółka z ograniczoną odpowiedzialnością* (limited liability company) or a *spółka akcyjna* (joint-stock company), and must have its seat or management in the territory of Poland.

Further requirements for a Polish holding company:

- It must directly own at least 10% of the share capital of its subsidiaries for a continuous period of at least one year.
- It may not belong to a tax group.
- It may not be tax-exempt under SEZ (special economic zone) regulations or PIZ (Polish Investment Zone) regulations, or have PS Directive exemptions.
- It must have business substance (genuine business activity).
- No shares in it may be held, directly or indirectly, by a person who is located or registered, or whose seat or management is located, in a country or territory:
  - which is a tax haven (harmful tax competition), or
  - which is listed by the European Council as an uncooperative tax jurisdiction, or
  - with which the Republic of Poland has not ratified the relevant international agreement.

For a company to be a subsidiary of a Polish holding company, it must satisfy the following conditions:

- The holding company must directly own at least 10% of its share capital for a continuous period of at least one year.
- It must not hold more than 5% of the share capital of any other company.
- It must not hold participations or units in any investment funds or collective investment schemes, or interests in any partnerships, or interests with the right to payment as a beneficiary or founder of any foundation, trust or similar fiduciary structure or arrangement, or any similar interests.
- It may not belong to a tax group.
- It may not have tax exemptions under SEZ regulations or PIZ regulations.

Advantages of the Polish holding company regime:

- shorter required minimum duration of shareholding than in PS Directive;
- 95% CIT exemption for dividends; and
- exemption for gains on disposal of shares in subsidiaries.

However, the solution has its drawbacks:

- The Polish holding company regime is available to the exclusion of the PS Directive exemption (it's *"either ... or"*);
- The relief is generally intended for one-level structures (subsidiaries are prohibited from themselves having any meaningful shareholdings or fund units);
- The tax exemption for share deals relating to subsidiaries is limited to transactions with unrelated parties;
- The tax exemption for share deals relating to subsidiaries will not apply to transactions involving shares in real estate companies.

3. New option to elect the application of VAT to certain financial services (previously exempt from VAT).

The Draft offers taxable persons an option to abandon the exemption and elect to apply VAT to certain financial services, more specifically:

- transactions (including those made in the capacity of an agent) relating to currencies, banknotes or coins used as legal tender;
- the management of:
  - investment funds, alternative investment funds or collective securities portfolios,
  - entire or partial portfolios of investment funds or alternative investment funds,
  - insurance capital funds as defined by the insurance business legislation,
  - public or voluntary pension funds,
  - occupational pension schemes,
  - the compulsory compensation system or settlement fund created under the public trading in securities legislation, or any other monies or funds collected or established to secure the proper settlement of transactions on a regulated market or commodities exchange by a central counterparty, settlement agent or clearing chamber;
- money lending services or agency in relation to such services; the management of money loans by the lender;
- services involving provision of guarantees, suretyships or any other security for financial or insurance transactions, or agency in relation to such services; the management of credit guarantees by the lender;
- services involving cash deposits, the operation of money accounts, all kinds of payment transactions, money remittances or transfers, debts, cheques or bills, or agency in relation to such services;
- services involving shares in companies or other legal persons, or agency in relation to such services;
- services involving financial instruments, or agency in relation to such services.

The right to elect taxation will apply only where such services are provided to other taxable persons (only in B2B settings).

Once taxation of such services is elected, the choice will have to be continued for at least two years. Exemption can be resumed after that time. However, if a taxable person elects to resume exemption after a period of taxation, the exemption, too, will have to be continued for at least two years, counting from the beginning of the first reference period for which the person chose to resume exemption.

The Draft is currently undergoing the public consultation process in which WTS&SAJA is actively involved.

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Substantial reform of Swiss WHT and Stamp Tax

After more than ten years of discussions, the reform of the Swiss WHT on interest has taken a decisive hurdle. The Federal Council wants to strengthen Switzerland as a location for the debt capital market and for group financing activities in all sectors and has finally adopted the dispatch on the Federal Withholding Tax Act (strengthening the debt capital market) at its meeting on 14 April 2021.

Unlike the initial proposal more than ten years ago, the reform provides for the abolition of the WHT on domestic interest without replacement. However, this revision does not apply to interest on customer deposits by domestic natural persons (e.g. interest on bank accounts held by Swiss resident natural persons). The proposed abolishment of WHT on domestic interest will make it possible to issue bonds in Switzerland without triggering the prohibitingly high WHT of 35% on interest payments. Consequently, Swiss bonds will also become interesting for foreign investors as they must no longer file for a refund of the WHT (in case of treaty protection) or assume the (non-refundable part of the) WHT as a final tax burden. It is expected that the issuance of bonds, which has so far been carried out abroad, will in future increasingly take place out of Switzerland. Furthermore, the abolishment of Swiss WHT on interest will also simplify the structuring of group financing when the financing takes place abroad as guarantees and securities by Swiss group companies may no longer lead to adverse Swiss WHT consequences. The Swiss debt capital market as well as intra-group financing activities in Switzerland shall be strengthened.

In addition to the abolishment of WHT on interest, the Federal Council proposes to abolish the securities transfer tax on domestic bonds. This will make it more attractive to acquire domestic bonds (and bond-like securities such as structured products) via a domestic securities dealer.

Whether the long awaited reform of Swiss WHT on interest will finally be implemented has not yet been decided. However, by refraining from implementing replacement measures the reform proposal has certainly gained support from the financial industry sector. On 18 August, the Economic Affairs and Taxation committee of the national council has adhered to the proposal of the Federal Council while proposing some minor amendments to stimulate the Swiss debt capital market.

Notification procedure for WHT on dividends

The Federal Council proposes to extend the applicability of the notification procedure for WHT on dividends to corporate shareholders. The Council proposes that the procedure can be used from a participation of 10% instead of currently 20%. The authorisation procedure required in the international context shall also be simplified administratively. Authorisations obtained shall be valid for five years instead of currently three years. It is expected that this proposal by the Federal Council will be implemented.

Securities transfer tax upon redemption in kind by collective investment schemes

In January 2021, the Swiss Federal Tax Administration has published a communication regarding the levy of securities transfer tax upon redemption in kind by collective investment schemes. The communication clarifies under which circumstances non-cash

disbursements in the form of taxable securities by a collective investment scheme to the investor are not subject to the securities transfer tax.

The Swiss Stamp Tax Act exempts from the securities transfer tax the contribution in kind of taxable securities against issuance of shares in collective investment schemes. By implication, the redemption in kind can only be exempted from the securities transfer tax if the collective investment scheme is thereby partially or fully liquidated. In the case of a domestic collective investment scheme, WHT is then generally due on the corresponding liquidation surplus.

In contrast, a redemption in kind within the meaning of the Swiss Stamp Tax Act does not exist if the investor exercises his contractual right of termination and thus asserts the claim to the share of the net assets of the collective investment scheme to which he is entitled. Pursuant to the Federal Act on Collective Investment Schemes investors are in principle entitled to demand the redemption of their units and their payment in cash at any time.

If such claim is settled by delivery of taxable securities from the fund assets instead of a cash payment, this constitutes a transfer of taxable securities for consideration and is consequently in principle subject to securities transfer tax. In these cases, there is therefore no redemption in kind which would not be subject to securities transfer tax.

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