

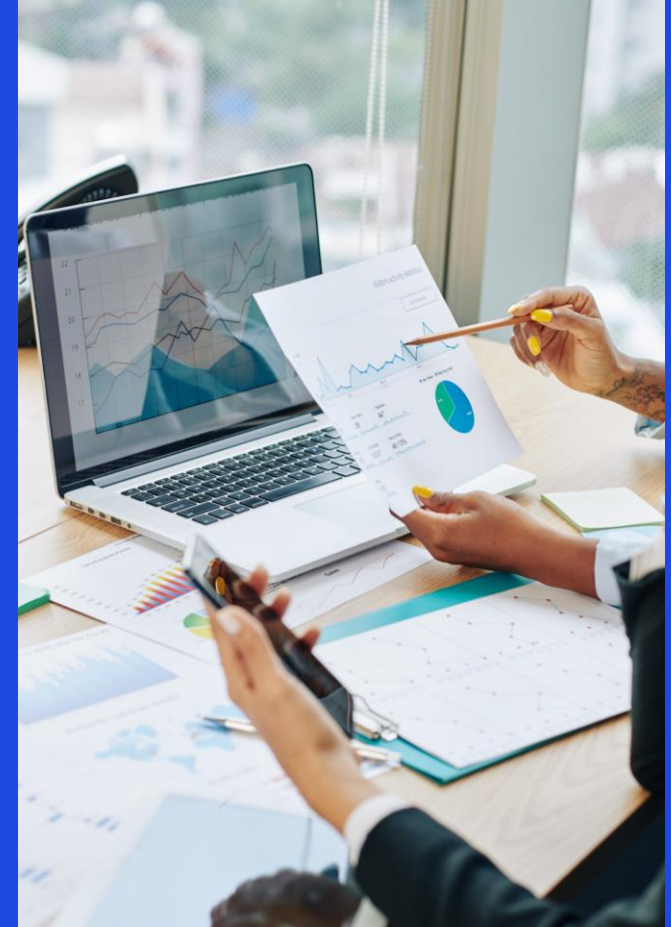


EU law based WHT Reclaims (Fokus Bank and MOD Claims)

Quarterly update 40

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June 2023



Quarterly update 40

KPMG quarterly update: June 2023

This note provides a high level summary update on the status of:

- EU law based claims seeking recovery of withholding tax (“WHT”) levied by EU Member States (also known as ‘Fokus Bank claims’).
- EU law based claims seeking recovery of UK WHT suffered on Manufactured Overseas Dividend (MOD) income arising from stock lending (also known as ‘MOD claims’).
- Action taken by the EU Commission/EFTA Surveillance Authority against EEA/EU Member States where KPMG in the UK claimants are not pursuing claims.

This note has been compiled by KPMG in the UK and also from feedback received by other KPMG network firms in Europe. This note provides a high level summary update on the status of claims filed by pension funds, EU investment funds, life companies and third country claimants. This note includes comments on actions taken by the EU Commission against EU Member States (for their discriminatory measures on outbound dividend payments to Investment Funds and to Pension Funds) where KPMG in the UK claimants are not currently pursuing claims (Appendix 1). This note does not comment on the status of individual KPMG in the UK claimants’ claims. To the extent that claimants require updates specific to the status of their own claims, such information should be requested from claimants’ KPMG in the UK team contacts. Next KPMG quarterly update: September 2023.

Contents



	Page
EU Member states/EEA	
• Current claims status summary	4
• Table of updates	5
• Austria	8
• Belgium	10
• Denmark	12
• Finland	14
• France	18
• Germany	22
• Hungary	25
• Italy	26
• Luxembourg	28
• Netherlands	29

	Page
EU Member states/EEA	
• Norway	32
• Poland	35
• Portugal	39
• Spain	41
• Sweden	45
• UK (MOD Claims)	47
Appendices	
1. Other EU Member States – European Commission action	48
2. Infringement procedures summary	49
KPMG contacts	50

Quarterly update 40 – current claims status summary

The table below provides a snapshot of the current status of reclaims filed by EU and third country resident funds and companies in EU Member States.

Territory	Pension funds	EU Investment Funds ^(a)	Life Companies	Third Country Claimants
Austria		Lux SICAVs		Government owned entities
Belgium				
Denmark	Cases Pending at DNTT level		Cases pending at DNTT level	Cases pending at DNTT level
Finland				
France				
Germany				
Hungary				
Italy		Lux SICAVs		
Luxembourg				Sovereign funds only
Netherlands				Sovereign funds
Norway				
Poland		ITCs, Lux SICAVs		
Portugal				Sovereign funds, Investment funds, Investment funds
Spain		ITCs		
Sweden				

a) EU investment funds may include OEICs, ICVCs, Unit Trusts, Luxembourg (Lux) SICAVs, UK Investment Trust Companies (ITC) and Irish investment funds.

Key: No claims filed Country is paying out Queries raised Litigation No response

Quarterly update 40 – table of updates since update 39

	Pension Funds	Investment Funds	Life Companies	Third Countries
Austria	New guidelines on the requirements to reclaim Austrian WHT on dividends by non-resident shareholders have been issued that holding shares the day before the Annual General Meeting on which the dividend was approved (AGM day -1day) is decisive for determining the beneficial ownership of the shares.			
Denmark	A DNTT ruling has suggested a 5 year statute of limitation should apply as opposed to 3 years. This is being considered by the Danish Court.	A complaint regarding the Danish Supreme Court ruling has been filed with the EU Commission in December 2022.		
Finland		In December 2022 the Finnish Supreme Administrative Court held that a contractual FCP umbrella fund domiciled in Luxembourg with an open-end contract-based sub-fund as well as a French FPCI which was a fixed-term contract-based special investment fund have met the requirements of the tax exemption laid down in the Income Tax Act and should be exempted from WHT.		In November 2022 the Finnish Supreme Administrative Court held that a US registered open ended Delaware Statutory Trust is comparable with a Finnish mutual fund and is therefore exempt from WHT on its dividend income.
France	The French tax authorities has started to issue information request to UK pension funds in respect to WHT reclaims filed pre-2010. Following responses we are now seeing repayments being issued.		In February 2023, an Italian life insurance company with segregated fund policies was held eligible to receive a refund for the majority of the WHT it paid (under net taxation arguments) in respect of French source dividends by the administrative Court of appeal of Versailles	
Germany	Since March 2023 The German Central Tax Office (the BZSt) have started issuing letters to UK pension funds to announce that all claims filed with the local tax offices will be combined at the BZSt , and that they preliminarily reject the claims.	The test cases of a Luxembourg SICAV and a French FCP are pending before the German Federal Tax court, and decisions are expected in 2023.		In December 2022 the German Federal Tax Court rejected the Canadian pension fund's claim, and ruled the CJEU decision was not binding because a Canadian pension fund is tax exempt whereas a German pension plan is de facto tax exempt – it is able to deduct its pension liabilities from its dividend income effectively leaving a tax base of zero (net-taxation principle). KPMG currently has a Finnish pension fund test case before the Cologne Tax Court and we await to see if the decision can be reversed.

Quarterly update 40 – table of updates since update 39 (cont.)

	Pension Funds	Investment Funds	Life Companies	Third Countries
Italy	See Third Countries' column.	In July 2022, the Italian Supreme Court issued a positive decision that the dividend exemption available to resident investment funds must also be applied to dividends distributed to a mutual fund resident in Germany.		<p>In July 2022, The Italian Supreme Court issued a positive decision to a US collective investment fund that the claimant was entitled to recover, in the claim period of 2007-2010, the difference between the DTT rate of 15% WHT levied on dividends and the Italian substitute tax of 12.5% that was applied to Italian investment funds on the annual increase in the net asset value. In April 2023, the Pescara Tax Court ruled in favour of the a further six US investment funds on the same basis.</p> <p>In September 2022, The Italian Supreme Court issued two positive decisions to non-EU pension funds that certain US pension funds were entitled to a refund of the difference between the rate of WHT levied on dividends paid to US pension funds (15% and 27%) and the Italian substitute tax (11%) that would have applied on the net income earned by Italian pension funds.</p>
Netherlands		The Dutch Court of Appeal judgment of 26 October 2022 (concerning the old refund system) and the judgment of 18 January 2023 (concerning the new remittance system) considered the Dutch Supreme Court ruling of 9 April 2021 to be wrong, however, the Court of Appeal decided against the claimants on the basis that a German investment fund does not apply withholding tax on all shareholders on redistribution.		
Poland		The Polish Supreme Administrative Court has issued conflicting decisions in relation to non-UCITS self-managed funds on whether they are comparable to Polish funds. Such funds are required to have an external management company.		Submissions have been made to the CJEU which is considering whether late interest should be awarded to funds who have had successful withholding tax reclaims.
Portugal	<p>The CJEU concluded that the Portuguese legislation on WHT levied on dividends paid by Portuguese companies to foreign pension funds is incompatible with the EU law.</p> <p>Given that under Portuguese Law, EU and EEA based pension funds are now exempt (provided certain requirements are met), claims were filed in order to recover tax withheld on dividends received, which are now in the litigation phase.</p>	Following the positive CJEU decision in March 2022 that the Portuguese legislation on WHT levied on dividends paid by Portuguese companies to foreign UCITS is incompatible with the EU law, there have been several favorable decisions issued by arbitration courts upholding the taxpayer's claims. Some Investment funds have received repayments and some are waiting for repayments to be made.		

Quarterly update 40 – table of updates since update 39 (cont.)

	Pension Funds	Investment Funds	Life Companies	Third Countries
Spain				The Spanish National Court has accepted multiple WHT claims on the basis that the STA cannot deny a WHT refund on the grounds that there is a possibility that the taxpayer (fund) or fund unitholder benefits in its jurisdiction from a tax credit for taxes paid abroad when all the necessary documentation has been provided to support the comparability analysis and, therefore, the existence of discrimination has been proven. In this regard, the Spanish National Court has determined that the neutralization of discrimination is an "exception" and, as such, the burden of proof is on the party asserting it, in this case the STA.
Sweden	In January 2023 the Swedish Supreme Administrative Court have requested a preliminary ruling from the CJEU in a case regarding taxation of dividends to three Finnish public pension institutions, concerning whether the Swedish taxation on dividends for non-resident public pension institutions is contrary to the free movement of capital.			

Quarterly update 40 – Austria

Austria	Pension Funds	Investment Funds	Life Companies	Third Countries
<p>1. Status of KPMG in the UK claimants' claims. (0. no KPMG claims made; 1. no response received; 2. claims accepted; 3. queries raised; 4. litigation)</p>	<ul style="list-style-type: none"> 2 & 4 – Repayments have been made by the Austrian Tax Authority (ATA) to EU claimants. 	<ul style="list-style-type: none"> 4 – In the past repayments have been made to Lux SICAVs and a UK ITC. Currently claims where the claimant has the legal structure of an investment fund are being rejected or suspended. 	<ul style="list-style-type: none"> 2 – Repayments have been made. 3 – Since 2014 the ATA has issued information requests seeking the details of the beneficial ownership at the time the dividend was paid. 	<ul style="list-style-type: none"> 2 – The Supreme Administrative Court decided in September 2020 in favour of a Canadian Crown Corporation (Third country claimants are therefore entitled to apply for a WHT refund according to the national law). 4 – Claims have also been filed December 2014 for a number of US RICs.
<p>2. Relevant KPMG and/or non KPMG led litigation challenging Austrian WHT rules proceeding through domestic courts/referred to the CJEU</p>		<ul style="list-style-type: none"> The VwGH (the Supreme Administrative Court) ruled in January 2021 that, up to and including 2013 (relating to fund financial years began on or before 21 July 2013), foreign corporate funds could file WHT reclaims according to national law, provided that the fund is comparable to a domestic corporation and Austrian dividends are attributable to the fund. Since the implementation of the AIFMG (in July 2013), domestic and foreign entities are treated equally (for tax transparent regime), which means that the discrimination argument is no longer applicable. 		<ul style="list-style-type: none"> In September 2020, the Supreme Administrative Court granted a full WHT refund to a Canadian Crown Corporation. A US-RIC fund has received a positive decision in April 2022 from the Austrian Tax Court in respect of the 2013 period. A further appeal has been filed to the Court of Appeal by the ATA in June 2022 in respect of 2013 claim.
<p>3. Status of EU Commission action taken against Austria in respect of taxation of outbound dividends (0. no action; 1. 'letter of formal notice' issued; 2. 'reasoned opinion' issued; referral by Commission to CJEU; proceeding closed)</p>	<ul style="list-style-type: none"> 2 	<ul style="list-style-type: none"> 0 	<ul style="list-style-type: none"> 0 	<ul style="list-style-type: none"> 0

Quarterly update 40 – Austria (cont.)

Austria	Pension Funds	Investment Funds	Life Companies	Third Countries
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p> <p>New</p>	<ul style="list-style-type: none"> The ATA requests a certificate issued by the foreign supervisory authority confirming that: an authorisation according to the provisions of directive 2003/41/EC has been obtained in the respective years; and proof that the pensions benefits do not exceed 80% of the last regular remuneration of each beneficiary/retiree. Beneficial ownership of the shares has to be proven. The WHT application process from 2019 onwards is via an online system. Claimants must register on the new system to submit a WHT request. The ATA are also requiring the claim forms to include an attestation of residence from the claimants local tax authority (instead of accepting separate certificates of residence). Submission of documents after the initial registration is still by courier to the relevant tax office. The Austrian Ministry of Finance has issued new guidelines about the requirements to reclaim Austrian WHT on dividends by non-resident shareholders. The guidelines build on the decision made by the VwGH in June 2022, which held that holding shares the day before the Annual General Meeting on which the dividend was approved (AGM day -1day) is decisive for determining the beneficial ownership of the shares. 	<ul style="list-style-type: none"> Generally the ATA requires a certificate of residence and evidence that the majority of the ultimate beneficial owners are not tax residents in Austria. Please see pension fund reference (2nd and 3rd bullet point). Please see pension fund reference (6th bullet point). 	<ul style="list-style-type: none"> Please see pension fund reference (2nd and 3rd bullet point). The ATA has started to refund WHT suffered on Austrian source dividends. In order to obtain a refund the ATA has requested a certificate issued by the foreign tax authority which confirms that WHT, for which the claims have been filed, cannot be/has not been offset against local tax liabilities. Beneficial ownership of the shares has to be proven. Please see pension fund reference (6th bullet point). 	<ul style="list-style-type: none"> Please see pension fund reference (6th bullet point).

Quarterly update 40 – Belgium

Belgium	Pension Funds ^(a)	Investment Funds ^(b)	Life Companies ^(c)	Third Countries ^(d)
<p>1. Status of KPMG in the UK claimants' claims. (0. no claim; 1. no response; 2. accepted; 3. queried; 4. litigation)</p>	<ul style="list-style-type: none"> 0 for UK pensions funds; 3 for certain non-UK (EU) pension funds (domestic law exemption) 	<ul style="list-style-type: none"> 2 (several claims accepted) 4 (claims outside 5-year statute period applied by BTA for pre-2011 dividends) However, unsuccessful at the first tier Court to date. 	<ul style="list-style-type: none"> 3 	<ul style="list-style-type: none"> 2 & 3 4 (see Inv Funds)
<p>2. Relevant litigation challenging Belgian WHT rules</p>	<ul style="list-style-type: none"> Truck Centre (C-282/07) CJEU ruling 22/12/08 – Int from Belgian corporates to foreign corporates subject to WHT but exempt to domestic corporates who suffer income tax instead – EU compliant Tate & Lyle Investments (C-384/11) CJEU ruling 12/07/12 - Exclusion of non-resident corp shareholders from the 95% participation exemption for dividends may be in breach EU Law 	<ul style="list-style-type: none"> Please see Pension Funds 	<ul style="list-style-type: none"> No information. 	<ul style="list-style-type: none"> Please see Pension Funds
<p>3. Status of EU Commission action taken (0. no action; 1. 'letter of formal notice'; 2. 'reasoned opinion' issued; referral to CJEU; proceeding closed</p>	<ul style="list-style-type: none"> 4. Commission's ref 2004/4347 of 18/09/08 4. EU Commission Complaint in 2020 (discrimination, as non-Belgian recipient of Belgian interest is taxed, domestic recipient is not. No action taken given Commission v Portugal (C- 105/08). 	<ul style="list-style-type: none"> 4. Commission v Belgium case (C-387/11) CJEU ruling 25/10/12- Judgment of 25 October 2012: Taxation of income, from capital of foreign investment companies without PE in Belgium in breach of EU Law 4. Commission proceedings, see IP/10/94 of 28/01/10 	<ul style="list-style-type: none"> Please see Pension Funds 1. Letter of formal notice sent to Belgium (on 30 October 2020) due to heavier dividend taxation of foreign life insurance companies than Belgian life insurance companies. 	<ul style="list-style-type: none"> Please see Investment funds

Note:

- (a) Pension fund claims are only considered viable for WHT suffered on income received as from 1 January 2007.
- (b) May refer to UK OEICs, Unit Trusts, Lux SICAVs, Spanish SICAVs and Investment Trust Companies.
- (c) UK Life Company claims are only considered viable for WHT on dividends suffered in excess of the final taxation for similar Belgian insurance companies (through 2017: burden of approximately 1.7% accounting for 95% participation exemption & corporation income tax rate of 33.99%); generally from 2018: full participation exemption for Belgian insurance companies that hold the shares as covering assets for their insurance liabilities.
- (d) Refers to US open-ended diversified management company (insurance company), US Investment Funds (RICs) and Pension Funds.

Quarterly update 40 – Belgium (cont.)

Belgium	Pension Funds ^(a)	Investment Funds ^(b)	Life Companies ^(c)	Third Countries ^(d)
<p>1. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> Exemption from Belgian WHT on dividends and MODs to non-residents tightened from 07/01/13. Applicable after only to qualifying foreign pension funds. UK-Belgian tax treaty amendment from 01/01/13 - No WHT on outbound interest or dividends to qualifying pension schemes. Statute of limitations clarified in Art. 20 & 24 Law of 28/12/11, set as 5 years including the year a claim is filed, for years from 01/01/11. Please see also under Investment Funds (4th, 7th and 8th bullet points). 	<ul style="list-style-type: none"> Generally from FY2013, WHT on Belgian dividends to domestic Funds is not creditable/repayable; therefore no longer discrimination of foreign funds. For earlier periods, WHT reclaims for foreign Funds has been recognised to 12 June 2003, subject to conditions. See circular 04/03/13 & addendum 16/06/13 From 2016 domestic law foresees the possibility to apply a reduced WHT rate of 1.6995% on dividends from a Belgian sub to a non-resident parent co, where the non-resident parent holding is greater than €2.5m and other procedural points are met. As from 2018, such dividends may even be fully exempt at Belgian parent level. Foreign non-UCITS funds may be able to invoke 100% exemption even without holding threshold (but this will require litigation as the law only foresees the exemption for non-resident companies that are subject to a normal corporate income tax regime). BTA seek evidence of share ownership from claimant funds (e.g. acquisition dates, and holding periods). The BTA have issued three forms/certificates requiring signature by the claimants tax authority, regulatory/supervisory authority and claimant, relating to the circular 04/03/13 refund conditions. During 2014-15, the BTA granted and repaid an EU law-based refund of Belgian dividend WHT to an Irish UCITS with the legal form of a plc, plus interest. Positive decisions have followed for UK, Luxembourg, Denmark and German UCITS funds. For statute of limitation, please see under Pension Funds. The BTA have asked for waivers of refund claims for those dividends that fall outside the 5-year statute of limitation period. Repayments are expected within 2-6 months of acceptance. Following the suspension of the processing of EU law based claims several years ago (due to fraud and cum/ex investigations) which resulted in an enormous backlog of claims of more than 6,000, the BTA are slowly restarting the claim handling, from dividend years 2011 and 2012. The BTA invited KPMG to focus their attention to pending claims with substantial claim amounts. Document requirements have been further clarified (individual dividend vouchers, bank account statements, transaction reports for dividend payments in case the WHT claim amount exceeds EUR 100k). 	<ul style="list-style-type: none"> For the statute of limitation period, please see under Pension Funds reference (3rd bullet point). See also under Investment Funds (7th and 8th bullet points) 	<ul style="list-style-type: none"> 04/03/12 circular – BTA acknowledged that third country investment companies may be entitled to refund claims. An exchange of information (if any) with the non-resident investment company's residence state are relevant. The BTA have confirmed that non-EU funds claims are currently not being processed.

Note:

- (a) Pension fund claims are only considered viable for WHT suffered on income received as from 1 January 2007.
- (b) May refer to UK OEICs, Unit Trusts, Lux SICAVs, Spanish SICAVs and Investment Trust Companies.
- (c) UK Life Company claims are only considered viable for WHT on dividends suffered in excess of the final taxation for similar Belgian insurance companies (through 2017: burden of approximately 1.7% accounting for 95% participation exemption & corporation income tax rate of 33.99%); generally from 2018: full participation exemption for Belgian insurance companies that hold the shares as covering assets for their insurance liabilities.
- (d) Refers to US open-ended diversified management company (insurance company), US Investment Funds (RICs) and Pension Funds.

Quarterly update 40 – Denmark

Denmark	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>1. Status of KPMG in the UK claimants' claims. (0. no claim; 1. no response; 2. accepted; 3. queried; 4. litigation)</p>	<ul style="list-style-type: none"> • 3 	<ul style="list-style-type: none"> • 3 - Luxembourg SICAV/SIF (and other fund types) claims filed – the DTA issued draft rejections and received comments from claimant's tax authority before issuing final rejections. Appeals filed since April 2017 were initially expected to have a 26 months processing time. Due to pending Court rulings, the processing time was prolonged. The processing of the appeals has commenced following the Supreme Court ruling, however, no appeals have been processed for a period indicating that the processing may once again have been put on hold. • 4 – KPMG Denmark appealed at the highest administrative level (National Tax Tribunal). 	<ul style="list-style-type: none"> • 1 	<ul style="list-style-type: none"> • Claims for US RICs have been rejected and appealed to the Danish NTT.
<p>2. Relevant KPMG and/or non KPMG led litigation challenging Danish WHT rules proceeding through domestic courts/referred to the CJEU</p>	<ul style="list-style-type: none"> • National Tax Tribunal ruled against the taxpayer (Dutch Pension Fund) and denied repaying the WHT in April 2011. (Reference number: LSR af 11/04-11. Journalnr. 08-00154). (not appealed). • No updates on cases currently pending at DNTT level. 	<ul style="list-style-type: none"> • May 2009 – NTT denied WHT reclaim of a UK umbrella company. (Ref LSR af 27/05-09. Journalnr. 06-04152). This ruling has been appealed to the Danish Supreme Court (HR). • Ref SKM2016.462.ØLR - Danish District Court referred questions to CJEU. Dec 2017 AG opinion confirmed Danish WHT rules breach EU law and referred to min distribution requirements being met by non-resident funds. Jun 2018 CJEU ruling found foreign and domestic UCITS are comparable and difference in treatment in breach of EU Law. The justifications on the grounds of public interest and coherence of the tax system were rejected. CJEU did not address minimum dist. requirements. Danish Courts may consider a minimum distribution (or equivalent) necessary in order for a claim to succeed. • The DTA have issued draft and then final rejections to European Investment funds, requiring appeal to the Danish National Tax Tribunal ("DNTT"). • The DNTT has issued information requests in May 2020 asking some funds to submit additionally comments following the Danish High Court ruling in the Fidelity case. It appeared that the case officer didn't refer to the pending case at the Supreme Court. • On 24 June 2021, the Danish Supreme Court ruled in the Fidelity Funds case in favor of the Danish Ministry of Taxation that the funds were not entitled to any repayment of Danish dividend WHT as the IMB requirements were not met. 	<ul style="list-style-type: none"> • No information. 	<ul style="list-style-type: none"> • A number of US RICs have received draft and final rejections from the Danish tax authorities. • On the basis that discrimination is justified to ensure fiscal coherence of the tax system. These rejections have been appealed to the Danish National tax Tribunal (administrative appeal level) See final sentence in the Investment Funds section.
<p>3. Status of EU Commission action taken against Denmark in respect of taxation of outbound dividends (0. no action; 1. 'letter of formal notice' issued; 2. 'reasoned opinion' issued; referral by Commission to CJEU; proceeding closed) Please refer to appendix 2.</p>	<ul style="list-style-type: none"> • 2. Please refer to IP/09/1018 dated 25 June 2009. • Denmark applies a discriminatory treatment on foreign pensions funds as it does on investment funds. No cases have yet been initiated by foreign pension funds, but the recent practice from the European Commission e.g. the German discrimination of pension funds indicates that pension funds should apply for refunds in order to suspend the statute of limitation. 	<ul style="list-style-type: none"> • 4. Please refer to IP/08/1021 dated 19 March 2009. • In 2012 the Commission initiated infringement proceedings and the DTA acknowledged the different tax treatment of Danish and foreign UCITS, arguing this was justified by the need to maintain the coherence of the tax system and the exercise of fiscal sovereignty. On 25 April 2013 the Commission requested that Denmark change taxation of certain foreign investment funds within 2 months. The ruling in a German case van Caster (C-326/12), states that national legislation that does not allow the taxpayer to provide evidence or information to prove the actual size of that income breaches article 63, supports claims based on the discriminating nature of the Danish rules. These rules prevent investors in non-resident investment funds from providing reporting information to obtain the same tax treatment as investors in a Danish IMB fund. Though a non-resident fund can elect status as IMB, the administrative burdens means a non-resident fund is less likely to make this election unless it is specifically targeting the Danish market. However, we are aware that a complaint has been filed with the EU Commission due to the fact that the ruling in their opinion is contrary to EU law. • A complaint regarding the Danish Supreme Court ruling has been filed with the EU Commission in December 2022. 	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 0

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
(b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 40 – Denmark (cont.)

Denmark	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p> <p>New</p>	<ul style="list-style-type: none"> From 13th September 2016 the statute of limitation, was reduced from 5 to 3 years. The statute of limitation runs from the date on which the dividend was paid. However, a ruling in 2022 from the DNTT ruled in favor of the 5 year statute of limitation. This has been appealed to the Danish Court, A change of law has been passed in Denmark implying that certain Danish resident entities will be subject to Danish WHT effective from 2023. Based on the preparatory works of this amendment, clear arguments support that foreign entities comparable to Danish 'section 1.1.6' entities should be exempt from WHT with retroactive effect-up until end of 2022. As Pension Funds are likely comparable to Danish "section 1.1.6" entities, reclaims should be possible subject to an analysis of the pension fund characteristics. Amendment of the law introduces tax exemption for foreign charitable and other non-profit foundations etc, as these should be subject to the same tax relief as Danish domestic comparable foundations etc. The tax exemption for foreign foundations etc. has taken effect on from 1 January 2023. It is our view that foreign foundations etc. that are comparable to Danish tax exempt charitable and non-profit foundations etc. should be eligible to reclaim WHT for Danish dividend WHT suffered until 31 December 2022. 	<ul style="list-style-type: none"> Please see Pension Funds reference on statute of limitation. From 1 January 2022 Danish law has introduced taxation of Danish IMB's so the discrimination has ceased to apply. From this date Danish funds which have elected IMB status will be subject for Danish WHT on Danish sourced dividends. 	<ul style="list-style-type: none"> Please see Pension Funds reference on statute of limitation 	<ul style="list-style-type: none"> Please see Pension Funds reference on statute of limitation

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 40 – Finland

Finland	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>1. Status of KPMG in the UK claimants' claims. (0. no claim; 1. no response; 2. accepted; 3. queried; 4. litigation)</p>	<ul style="list-style-type: none"> N/A for UK Pension Funds which receive dividends gross under the DTT. 	<ul style="list-style-type: none"> 4 (Lux SICAV). The CJEU gave its ruling in the case C-480/19 concerning the interpretation of Articles 63 and 65 TFEU and the possible discriminatory taxation in Finland on 29 April 2021 (please see below for more detailed information). As a result, all non-listed SICAVs and other foreign corporate formed funds are advised to apply for a claim for adjustment regarding the negative decisions they have received concerning WHT reclaims. N/A for UK Investment Funds which receive dividends gross under the DTT. 	<ul style="list-style-type: none"> N/A for UK Life co which receive dividends gross under the DTT. 	<ul style="list-style-type: none"> 2. KPMG has filed claims for US Investment Funds which are accepted and repaid. Claims have also been accepted for 3rd country government owned entities.
<p>2. Relevant KPMG and/or non KPMG led litigation challenging Finnish WHT rules proceeding through domestic courts/referred to the CJEU</p>	<ul style="list-style-type: none"> Commission v Finland case (C-342/10) - The Commission has challenged the Finnish rules allowing the deductibility of increases in the technical reserves of pension insurance companies and institutions. Foreign funds are not allowed a corresponding deduction. In Nov 2012 the CJEU held the different treatment is in breach of the free movement of capital. In Feb 2014, the SAC ruled that a Government Pension Fund within the EEA is comparable to a tax-exempt, Finnish, public entity and thus exempted from tax on Finnish dividends 	<ul style="list-style-type: none"> (C-303/07) - The SAC granted a refund to Aberdeen SICAV, but the ruling was restrictive. The Administrative Court of Helsinki has granted WHT refunds to Swedish Investment Funds. The Central Tax Board (CTB) ruled that a Luxembourg FCP (a UCITS) was exempt from Finnish WHT. From Feb 2014, the FTA has issued repayments to UCITS FCPs. Apr 2015, the CTB confirmed the comparability of a Maltese non-UCITS SICAV to a Finnish LLC, confirmed in Dec 2016 by the SAC. Thus, the fund was liable to WHT on the dividend income. Similarly May 2017, the CTB confirmed the comparability of a French SPICAV (legal form SAS) to a Finnish LLC. The ruling has been appealed to the SAC. The CTB confirmed the comparability of a Dutch quoted company (naamloze vennootschap) to a Finnish LLC. The ruling has been appealed to the SAC. In Dec 2017, the CTB confirmed the comparability of a Belgian SICAV non-UCITS common fund with legal personality (Société Anonyme) to a Finnish LLC. The ruling was upheld by the SAC. The SAC issued a decision on 19 September 2018 concluding that a French FCPE fund (Fonds Commun de Placement D'Enterprise) is comparable to a Finnish personnel fund and that tax should not be withheld at source on dividends paid by a Finnish company to an FCPE fund. The SAC requested preliminary ruling in June 2019 from the CJEU concerning the local interpretation of a foreign fund's legal form and its compliance with Articles 63 and 65 TFEU. The main question was whether a Luxembourg based non-listed UCITS SICAV can be considered comparable with a Finnish tax-exempt mutual fund on the grounds of the functions and purposes of the fund, rather than the legal form. The CJEU gave its ruling on 29 April 2021 stating that the unitholders of Luxembourgian SICAV fund formed in accordance with the UCITS Directive should be treated similarly as the unitholders of Finnish contractual based UCITS fund. The principles identified by the CJEU in context of unitholder taxation should be also applicable to the cases concerning the taxation of corporate form investment funds. Accordingly, the Finnish Supreme Administrative court gave a reasoning (KHO:2021:90) in which it stated that a Luxembourg based non-listed UCITS SICAV can be considered comparable with Finnish tax-exempt mutual fund in accordance with the CJEU's decision C-480/19. Therefore, income received from UCITS SICAV must be treated as capital income within the meaning of the Section 32 of the Finnish Income Tax Act. 	<ul style="list-style-type: none"> In Nov 2014, the CTB ruled the WHT on gross Finnish dividends is not in breach of free movement of capital despite domestic life co's paying tax on net dividend income. In May 2017 the SAC overruled the CTB, stating that WHT is levied on the net dividend income (i.e., after deducting the amount which should be transferred to the reserve for unearned premiums). 	<ul style="list-style-type: none"> In Jan 2015, the SAC found in favour of a US closed ended quoted RIC – compared to a Finnish quoted LLC– and an open ended RIC – compared to a Finnish investment fund. The FTA now accepts and repays WHT reclaims to US open and closed ended RICs. In Jun 2016, 3rd country government owned entity claims have also been accepted, with the FTA agreeing these entities are comparable to Finnish public entities which are exempt from tax in Finland. In Jun 2017 the Corporate Tax Office ruled that an open-ended Massachusetts business trust (one that was legally a partnership in the US and registered as a RIC) to be comparable to a Finnish investment fund. Thus tax-exempt. Investment funds of a similar structure should have good chance to receive WHT refunds from Finland. A US RIC which is a Maryland company (not a Delaware Statutory Trust) has received a positive ruling from the Finnish Administrative Court and the case is currently on appeal to the Supreme administrative Court.

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 40 – Finland (cont.)

Finland	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>3. Status of EU Commission action taken against Finland in respect of taxation of outbound dividends (0. no action; 1. 'letter of formal notice' issued; 2. 'reasoned opinion' issued; referral by Commission to CJEU; proceeding closed) Please refer to appendix 2.</p>	<ul style="list-style-type: none"> 2. Please refer to IP/09/1018 dated 25 June 2009. The case has already been decided by the ECJ. Please see slide 9 (Section 2 above) Commission v Finland case (C-342/10). 	<ul style="list-style-type: none"> 0 	<ul style="list-style-type: none"> 0 	<ul style="list-style-type: none"> 0
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> Finnish WHT rules changed from 1 January 2009. WHT is no longer payable on dividends distributed to an entity from EEA/EU with limited liability to pay taxes that is comparable to a resident entity, to which the dividend would be tax exempt income. This new rule does not specifically mention either Pension or Investment Funds. According to the guidelines given by the Finnish Tax Authorities (FTA), WHT refunds can be claimed from 1 January 2005 onwards. Since 2015, dividends paid to EU/EEA resident pension funds that fulfil the comparability criteria are taxed on a net basis rather than suffer WHT on gross Finnish dividends. Retrospective application of the net taxation principle seems to be possible. UK Pension funds will continue to receive Finnish dividends gross under the DTT. 	<ul style="list-style-type: none"> Funds are exempt from Finnish WHT, provided that they are comparable to Finnish Investment Funds. The application for this ruling was prepared by KPMG in Finland on behalf of a Norwegian contractual-based Investment Fund. Following the ruling, the Finnish tax authorities updated their guidelines to make the rules compliant with the CBT ruling. An Icelandic (EEA) Investment Fund has received positive refund decisions from the Tax Administration in March 2012. The decision is final. Further Danish and Spanish UCITS funds have received positive refund decisions from the Tax Administration. The Corporate Tax Office has issued positive refund decisions to listed Luxembourg SICAVs. It rejected the applications of non-listed SICAVs. The rejections were based on the fact that the recipients of the dividends were not publicly listed. Both the payer of the dividend and the recipient should be publicly listed companies. In March 2013, the CTB concluded that a Luxembourg FCP is comparable to Finnish Investment Funds and therefore no WHT should be levied on Finnish-source dividend income received by FCP funds. In September 2013, the Supreme Administrative Court confirmed that a non-resident taxpayer is entitled to interest on a refund of WHT which has been levied in contradiction to EU law. This approach will be applied automatically to cases pending before the Tax Administration. In respect of WHT already refunded by the Tax Administration without interest, KPMG Finland recommends that appeals are filed with the Tax Administration in order to receive interest on the refunded amount. 		<ul style="list-style-type: none"> In case A Oy (C-48/11), the CJEU concluded that no justification for the restriction of the freedom of establishment exists provided that there is an information exchange arrangement in place between Finland and EEA State, which is as efficient as the information exchange regulated in the EU's Mutual Assistance Directive. The case dealt with information exchange between Norway and Finland. The Nordic Mutual Assistance Treaty provides for extensive information exchange and other forms of cooperation between the Nordic tax administrations. The ruling may also be relied on in other third country relations, such as between Finland and the US and Canada, where applicable tax treaty provides for extensive information exchange.

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 40 – Finland (cont.)

Finland	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> The statute of limitation to recover Finnish WHT will reduce from 5 years to 3 years in respect of dividends received from 2017. 	<ul style="list-style-type: none"> In March 2016, the Supreme Administrative Court of Finland rejected the Finnish Tax Administration's petition for leave to appeal a decision of the Administrative Court of Finland, in which the court held that a non-resident real estate investment fund was comparable to a Finnish special fund investing in real estate. Given that Finnish special funds are tax-exempt under the Finnish Income Tax Act, no tax could be levied in Finland from income received in Finland by a non-resident real estate investment fund. The administrative court's decision is mainly based on the principle of free movement of capital under TFEU and related case law of the ECJ. As a result, the Finnish Tax Authority has started to process the pending WHT reclaims of non-resident real estate investment funds. In September 2016 the Finnish Tax Administration decided that a German special investment fund was comparable to a tax exempt Finnish special investment fund. Therefore, the German special investment fund was tax exempt from Finnish dividend WHT. It did not matter that the total amount of investors was limited to 100 nor that under a tripartite agreement a mutual consent of the investor, investment management company and custodian was required for additional investors to join the fund. The fund was refunded. Non-UCITS based special funds have a good chance of obtaining WHT refund from Finland provided they are broadly comparable. In June 2021 the Supreme Administrative Court issued a ruling about whether income received from a corporate UCITS SICAV, domiciled and incorporated in Luxembourg should be treated as earned income or as capital income within the meaning of Finnish Income Tax Act. Based on EU law and the CJEU decision C-480/19 the Supreme Administrative Court stated that the income should be treated as capital income, because the SICAV should be treated as comparable to the Finnish mutual investment funds regardless of the difference in the legal form. Crucially, both funds are exempt from income tax and are taxed only at the level of income recipients. The Finnish Tax Administration has published revised instructions on claiming refunds of Finnish WHT. In July 2020 Helsinki Administrative Court requested a preliminary ruling from the CJEU to confirm are Articles 49, 63 and 65 TFEU to be interpreted as meaning that they preclude national legislation under which only foreign open-ended investment funds constituted by contract can be regarded as equivalent to Finnish investment funds exempt from income tax, meaning that foreign investment funds established in a legal form other than by contract are subject to WHT in Finland, even though there are otherwise no significant objective differences between their situation and that of Finnish investment funds. In October 2021 the Advocate General submitted a proposal for decision stating that the requirement that an investment fund must be contractual in order to be regarded as a flow-through unit is incompatible with the free movement of capital. The CJEU decided in April 2022 that Articles 63 and 65 TFEU must be interpreted as precluding domestic legislation which limits entitlement of exemption solely to investment funds constituted in accordance with contract law. 	<ul style="list-style-type: none"> No information. 	<ul style="list-style-type: none"> Under an application for an advance ruling, the Finnish Central Board of Taxes regarded a US based open-ended Delaware Trust Series fund as comparable to a Finnish tax exempt special investment fund. The fund was exempt from Finnish dividend WHT. This ruling strengthens the position of third country non-UCITS based funds as tax exempt entities. In November 2022 the Supreme Administrative Court in Finland held that a US registered open ended asset management company Delaware Statutory Trust with an open-end sub-fund is exempted from WHT in accordance of the Act on the Taxation of Nonresidents' Income. The question was whether a sub-fund can be compared with a Finnish mutual fund and is therefore exempt from WHT on dividend income, even though it is not contract-based. The CJEU's ruling C-342/20, A SCPI, confirms that TFEU articles 63 and 65 precludes national legislation where the tax exemption is only applied to contract-based investment funds.



Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 40 – Finland (cont.)

Finland	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<p>New</p> <p>New</p>	<ul style="list-style-type: none"> The Finnish Tax Administration has published a revised instructions on the taxation of investment funds and the provisions of the Income Tax Act. In December 2022 the Supreme Administrative Court in Finland held that a contractual FCP umbrella fund domiciled in Luxembourg with an open-end contract-based sub-fund is exempted from WHT in accordance of the Income Tax Act. The question was whether the sub-fund meets all the requirements of the tax exemption laid down in the Income Tax Act as the sub-fund was mainly investing its assets in real estate projects and had only one direct investor. The Supreme Administrative Court held that the sub-fund was not liable to WHT in Finland solely because it had only one direct shareholder. In December 2022 the Supreme Administrative Court in Finland held that a French FPCI which was a fixed-term contract-based special investment fund is exempted from WHT in accordance of the Income Tax Act. The question was whether the fund meets all the requirements of the tax exemption laid down in the Income Tax Act, especially the requirement of having over 30 investors. The fund had 33 investors of which 18 were regional banks of a company group and one was a group company of such a regional bank. In addition, the fund's management company and 12 of its employees had been investing in the fund. The Supreme Administrative Court held that the investments of the company group should not be considered as a single entity when calculating the number of investors. Thus, the fund had more than 30 investors. 	<ul style="list-style-type: none"> No information. 	

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 38 – France

France	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>1. Status of KPMG in the UK claimants' claims (0. no claim; 1. no response; 2. accepted; 3. queried; 4. litigation)</p>	<ul style="list-style-type: none"> 3 / 2 	<ul style="list-style-type: none"> 2 / 4 (for lack of chains of payment) 	<ul style="list-style-type: none"> 4 	<ul style="list-style-type: none"> 2 / 3 / 4
<p>2. Relevant KPMG (Fidal) and/or non KPMG led litigation challenging French WHT rules proceeding through domestic courts/referred to the CJEU</p>	<ul style="list-style-type: none"> The Conseil d'Etat (i.e the French Supreme Tax Court) ruled that a foreign NPO must evidence its comparability with a French NPO by evidencing that (i) its management must be disinterested and (ii) that it does not compete with for profit organisations (or if this is the case it must carry on its activity differently). Positive decisions rendered by the Administrative tax courts and Administrative Court of Appeal of Versailles (CAA Versailles n°10VE1462 National Pensions Reverse Fund commission n°0705123/2 dated 1 July 2010). <p>Regarding the condition linked to disinterested management :</p> <ul style="list-style-type: none"> In July 2019, the Administrative Court of Appeal of Versailles ruled that this condition is met when compensations exceeding the limits are not linked to the performances of the investments. They are justified by the difficulty of the tasks entrusted to board members who are responsible for the operation and management of the pension fund. Furthermore, said compensations represent only a small part of the wage bill and the resources of the fund, and does not appear to be disproportionate in its home jurisdiction. The above position has been confirmed by various decisions: Administrative Court of Appeal of Versailles 19 May 2020 (n°18VE03038 for a US pension fund), Administrative Court of Appeal of Versailles 3 March 2020 (n°18VE03037) and Administrative Court of Appeal of Versailles 11 February 2020 (n°18VE03045). 		<p>Tax loss position</p> <ul style="list-style-type: none"> On 22 November 2018, the CJEU ruled in the Sofina case (CJEU C-575/17) that levying WHT on dividends paid to foreign loss making companies violates the free movement of capital. The Conseil d'Etat rendered its final decision on 27 February 2019 (Conseil d'Etat, 9th and 10th sub-section, 27 February 2019, n°398662) based on the CJEU responses and concluded that the loss making position should be considered with regards to the residence tax rules. Questions have been raised by the FTA to evidence the tax loss position. <p>Net taxation basis</p> <ul style="list-style-type: none"> The Administrative Court of Appeal of Versailles concedes that the application of WHT under Article 119 bis of the FTC on a gross basis without taking into account professional expenses constitutes an obstacle to the free movement of capital, but considers that in this case the British company did not justify the charges it intended to deduct (Administrative Court of Appeal of Versailles 1 October 2019 n°17VE03599, Sté UBS Asset Management Life Ltd). 	<p>Investment Funds :</p> <ul style="list-style-type: none"> CJEU ruled in the 2012 Santander case that French WHT on foreign investment funds was contrary to EU law. In August 2020, the FTA started to refund US RICs and requested several documents including documents detailing the functioning of the funds (for US funds the Form N-CEN and Form N-1A including the prospectus and the statement of additional information), Declaration of Trust, Articles of Association, By-Laws, registration number with the SEC, investment advisory and service agreement, custody agreement, and identity information of the custodian, management company, and the auditor. A procedure was initiated by US funds at the French Supreme Tax Court to consider guidelines which do not provide an immediate exemption for third countries investment funds. It has been denied by the Court. <p>Pension Funds:</p> <ul style="list-style-type: none"> WHT claims by Swiss Funds are in appeals at the Montreuil Administrative Tax Court. The Administrative Court of Paris ruled in October 2011 that a Monaco fund is comparable to a French fund when it sells real estate.

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
(b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 38 – France (cont.)

France	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>2. Relevant KPMG (Fidal) and/or non KPMG led litigation challenging French WHT rules proceeding through domestic courts/referred to the CJEU</p>	<p>In respect to non-competition condition for Pension Funds:</p> <ul style="list-style-type: none"> The Conseil d'Etat ruled that Spanish pension funds which provide pensions for individuals or optional supplementary pensions are (despite being regulated by specific statutory rules in Spain) engaged in competition between each other and therefore are not regarded as non-profit organisations. In addition, the Court ruled that being exempting from CIT the Spanish funds are not eligible to the DTT concluded between France and Spain. This decision was confirmed by the Conseil d'Etat regarding a German Pension Fund case (27 July 2016, n° 394518) and by the Administrative Court of Appeal of Versailles (26 October 2017, 15VE03433). However, the Administrative Court of Versailles ruled that offering optional supplementary pensions does not lead to falling within the competitive sector especially when it is supplementary compared to the core activity (CAA Versailles 25 July 2019 n°17VE011778). <p>From a procedure stand point:</p> <ul style="list-style-type: none"> The Conseil d'Etat ruled on January 24th, 2018 that a judgment cancelling administrative guidelines that reiterate a law provision which is incompatible with a superior rule of law (such as EU law) is an "event" allowing the re-opening of a claim period. This decision relating to DTT was recently confirmed by the Administrative Court of Appeal of Versailles in several cases.⁹ 	<p style="text-align: center;">New</p>	<ul style="list-style-type: none"> In May 2021, the French Supreme Tax Court has for the first time agreed for the refund of WHT suffered by non-French life insurance companies on the ground of the net basis argument. In February 2023, in a case defended by Fidal, an Italian life insurance company proposing "gestione separata" policies was held eligible to get the refund of most of the WHT it paid in respect of French source dividends by the administrative Court of appeal of Versailles. The Court provides in its decision, interesting details about the nature of the evidence required in order to establish there is effectively a discrimination. 	<ul style="list-style-type: none"> The Conseil d'Etat in January 2018 for the Korean National Pension Service case, refused to refer a constitutional preliminary ruling that was based on the grounds of discrimination between a direct investment by a foreign pension fund into French companies (subject to 15% WHT) and an indirect investment via an investment fund which in turn invests into French companies (WHT exempt).
<p>3. Status of EU Commission action taken against France in respect of taxation of outbound dividends (0. no action; 1. 'letter of formal notice' issued; 2. 'reasoned opinion' issued; 3. referral by Commission to CJEU; 4. proceeding closed)</p>	<ul style="list-style-type: none"> 3. The infringement procedure that was launched on 19 May 2011 (IP/11/603) was closed on 30 May 2013 (according to the press release on European Commission website). 	<ul style="list-style-type: none"> 3. Please refer to the Pension Funds section. 	<ul style="list-style-type: none"> 1. In February 2021, a formal notice was sent to France by the EU commission, requesting it to change its WHT rules on dividends paid to "Unit Linked insurance" companies resident in other EEA Member States. 	

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 38 – France (cont.)

France	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p> <p>New</p>	<ul style="list-style-type: none"> For, FYs closed as from December 31 2009 French NPOs are subject to CIT on their French source dividends at the rate of 15%. For historic claims, foreign pension funds should demonstrate their comparability through a questionnaire. The French Tax Authorities has started to examine the pending claims since late 2022 and issue information request to UK pension funds in respect to WHT reclaims filed pre-2010. They request to be provided with, amongst other items, an attestation issued by the entity paying remuneration to the board members of the pension fund. Following responses we are now seeing repayments being issued. As of the change in law (as from FY closed as from December 31, 2009), EU/EEA NPOs (and notably pension funds) should get a certificate by filing a questionnaire to evidence their comparability with a French NPO to benefit from a 15% WHT. The questionnaire aims at verifying that the claimant is in a comparable situation to that of French equivalent NPOs. Insofar as an EU/EEA NPO is deemed comparable to a French NPO, the FTA would issue a certificate that will be valid for 3 years (the year of issuance plus the following two years) and which grants the benefit of the 15% WHT regardless the provisions of the DTT. <p>From a procedure stand point:</p> <ul style="list-style-type: none"> The Administrative Court of Appeal of Versailles requested for an opinion of the Conseil d'Etat concerning the obligation to respect a reasonable time limit to bring a case before a court in the absence of a response from the administration (Administrative Court of Appeal of Versailles, 19 May 2020 n°18VE04118). The Conseil d'Etat rendered its opinion on 21 October 2020 (n°443327) that there is no reasonable time limit to respect for bringing the case before the court in presence of an implicit rejection from the FTA (no reply from the FTA). 	<ul style="list-style-type: none"> France has provided for an exemption of French WHT on dividends paid to foreign investment funds since the 17 August 2012 which is applicable for all dividends paid after that date. To benefit from this exemption, the EU/EEA investment fund must be located in an EU Member State or in a State or territory that has entered into an administrative assistance agreement with France in view of fighting against tax fraud and evasion and must meet the following two conditions: <ol style="list-style-type: none"> The investment fund raises capital from a certain number of investors, with a view to invest it in accordance with a defined investment policy for the benefit of those investors. The investment fund presents characteristics similar to those of the following French Undertakings for Collective Investment (UCIs): OPCVMs (Sicav and FCP), OPCIs (Sippicav and FPI) and SICAFs. A WHT (limited to 15%) is provided for distributions that are drawn from the exempt income realised by certain entities - SIICs, SPPICAVs or subsidiaries of SIICs, or SPPICAVs - in favour of French and foreign UCI that also satisfy the same conditions. <p>New</p>	<p>Tax loss position</p> <ul style="list-style-type: none"> The 2020 Finance Act implemented the Sofina decision. Foreign companies in a tax loss position may obtain on request the temporary restitution of WHT. This restitution is subject to a tax deferral which ends if the company returns to a profitable situation (article 235 quater of the FTC). Following the decision of the French Supreme Tax Court (see above), Article 24 of the Finance Act for 2022 introduced a procedure for requesting the refund of the difference between the WHT levied and the WHT calculated on a net basis (Art. 235 quinquies of the FTC). The application and the deadline of the WHT refund/deferral mechanism for loss-making foreign companies have been specified and modified by this same article. <p>Liquidation</p> <ul style="list-style-type: none"> Foreign companies in compulsory liquidation may benefit from the exemption from WHT provided by article 119 quinquies of the FTC). The above exemption could apply to life companies. <p>From a procedure stand point:</p> <ul style="list-style-type: none"> For claim time limits, please refer to pension funds. 	<p>Investment Funds:</p> <ul style="list-style-type: none"> The FTA's guidelines relating to WHT exemption indicate that undertakings for collective investment located outside the EU/EEA would not be allowed the same benefit from the paying agent but would need to file a claim and provide the FTA with appropriate documentation evidencing their comparability to French UCIs. Mainly because one required document is issued by an EU resident regulatory body. The Second Corrective 2014 Finance Act, indicated that the provisions of the convention on administrative assistance should effectively allow the French tax administration to gather from the authorities, where the non EU/EEA investment fund is established, the required information to verify that conditions (i) and (ii) are satisfied. (see investment funds bullet point 2) The Finance Act 2014 requires foreign funds to demonstrate similarity to French funds and refers to treaty exchange of information clauses. Given the Emerging Markets case, we don't think this can be used to restrict claims. The Supreme Tax court ruled on 9th December 2015 that the guidelines do not constitute an abuse of power because, due to the lack of common regulatory framework (e.g. UCITS, AIFMD) for third country funds, a third country fund needs to prove that they are comparable through a claim. They are not excluded from a refund but comparability must be proved to ensure exemption.

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 38 – France (cont.)

France	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<p>In February 2022, the French Supreme tax Court rendered a decision on the claim time limit regarding WHT claims. A distinction must be made according to the claimant by considering that the two-year time limit applies to the paying agent which pays the WHT, whereas the one-year time limit applies to the beneficiary of the distribution (R. 196-1 of the French Tax Procedure Code (FTPC)).</p> <p>However, the Tax Court ruled that the principle of equivalence entails that the procedural modalities for dealing with situations originating in the exercise of a freedom guaranteed by EU law should not be less favorable than those concerning the handling of domestic situations. Therefore, the judge applied the two year time limit instead of the one year time limit to the EU claimants.</p>	<ul style="list-style-type: none"> The French Supreme Tax Court reaffirmed on 26 January 2018 the possibility with respect to WHT reimbursement claims to produce any documents showing the amount of WHT suffered. In practice, the production of 2777 forms should remain the preferred way of supporting WHT reclaims for clients. This, however, introduces the possibility for the claimant to bring the required proof with the production of the account statement or any similar document should they be unable to provide the information required in the normal manner. <p>From a procedure stand point:</p> <ul style="list-style-type: none"> For claim time limits, please refer to pension funds 		<p>Investment Funds:</p> <ul style="list-style-type: none"> In October 2021 the FTA' guidelines have been amended that non-EU investment funds can apply for WHT exemption by attaching a positive decision (refund decision or advance ruling) from the FTA. The relief at source applications are not required to be renewed every two years. <p>Pension Funds:</p> <ul style="list-style-type: none"> The Administrative Tax Court of Montreuil (Dec 2014) partially rejected claims based on time limits and lack of 2777 forms, but accepted comparability between a US pension fund and a French NPO. For 2009 WHT onwards, the tax guidelines do not include 3rd country pension funds, claims can be filed to challenge the levy of the 30% domestic WHT (if no DTT applies) and request the refund of the difference between 30% and 15%. The claimant should be located in a state that has entered into a tax treaty with France that provides for mutual administrative assistance in order to prevent tax evasion and fraud. The claim can cover 3 years. The Administrative Tax Court of Montreuil rejected in February 2022 comparability between a pension fund from Cayman Islands and a French NPO, based on its interested management, and the absence of tax assistance agreement between France and Cayman Islands. For claim time limits, please refer to pension funds. Until now the FTA have not rejected the two-year claim time limit for claims filed by third countries claimants.

New

New

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 40 – Germany

Germany	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>1. Status of KPMG in the UK claimants' claims. (0. no claim; 1. no response; 2. accepted; 3. queried; 4. litigation)</p>	<ul style="list-style-type: none"> 4. 	<ul style="list-style-type: none"> 4. 	<ul style="list-style-type: none"> 1 	<ul style="list-style-type: none"> 4.
<p>2. Relevant KPMG and/or non KPMG led litigation challenging German WHT rules proceeding through domestic courts/referred to the CJEU</p>	<ul style="list-style-type: none"> Please see Third Countries reference with regard to companies, and the Canadian pension fund case. Please see section 3. 	<ul style="list-style-type: none"> The Court of First Instance issued negative decisions in respect of two of the three German test cases (a Luxembourg SICAV and a French FCP) in August 2019 based on the coherence justification. The test claimants appealed to the Federal Tax court, and decisions are expected in 2023. A KPMG Investment fund test-case for WHT-refund paid from 2018 until today will be launched soon. 	<ul style="list-style-type: none"> No litigation known with regards to a Life Company. Please see Third Countries reference with regard to companies, Pension Fund considerations should be transferred to Life insurance companies 	<ul style="list-style-type: none"> German Federal Tax Court (BFH) Decision dated 22 April 2009, reference no. I R 53/07 with regard to a company. Based on the decision of the BFH, the Finance Court of first instance (i.e. the Finance Court of Cologne) has decided that the local financial authorities are competent to decide on WHT reclaims of corporations (final decision in the CJEU Gaz de France case C-247/08; Decision of Finance Court of Cologne dated 28 January 2010, ref. No. 2 K 4220/03 and 2 K 3527/02). However, this decision does not apply to portfolio investors generally. Final decision of the CJEU in the case C-284/09 Commission v Germany with regard to corporations which do not fulfil the requirements of the Parent-Subsidiary Directive regarding WHT refunds. The differences in the tax treatment of dividends are considered to be in breach of Art. 56 EC Treaty, now Art 63 TFEU and, respectively, Art. 40 EEA Treaty. There remains a discrimination even in the case of available DTT relief, as the relief would not lead to a complete refund of the suffered WHT. A test case for US RIC has been put on hold until the final decisions in the French FCP and Luxemburg SICAV test cases.

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.


Quarterly update 40 – Germany (cont.)

Germany	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
				<ul style="list-style-type: none"> In October 2017, the Finance Court of Munich submitted questions to the CJEU in relation to a Canadian pension fund case (C-641/17). In November 2019 the CJEU ruled that the German legislation constitutes an unjustified restriction to the free movement of capital and noted that the derogation from the prohibition on restrictions to the free movement of capital with non-EU countries (also referred to as the 'Standstill Clause') does not apply to the case at hand. In December 2022 the Federal Tax Court rejected the Canadian pension fund's appeal against the rejection by the Munich Tax Court. The Court found the CJEU decision was not binding because a Canadian pension fund is tax exempt whereas a German pension plan is de facto tax exempt – it is able to deduct its pension liabilities from its dividend income effectively leaving a tax base of zero (net-taxation principle). KPMG currently has a Finnish pension fund test case before the Cologne Tax Court (No. 2 K 2442/21 – decision expected in 2023) and we wait to see if the decision can be reversed.
<p>3. Status of EU Commission action taken against Germany in respect of taxation of outbound dividends (0. no KPMG claims made; 1. noresponse received; 2. claims accepted; 3. queries raised; 4. litigation)</p>	<ul style="list-style-type: none"> 3. Please refer to Commission v Germany case (C-600/10). The EU Commission has informally communicated to KPMG that with regard to the level of filing of claims, due to the complexity of the competence issue, a decision may not be reached in the short term. Therefore, the EU Commission has informally recommended that claims continue to be filed with all German tax offices where competence is being questioned in order to preserve the claimants' rights (i.e. BZSt, tax office which is competent for Clearstream, the local tax offices of the distributing companies and the tax offices assigned with the largest WHT amount per individual year). The case Commission v Germany (C-600/10) was restricted to business expenses of pension funds directly linked with dividend income (deductible for German but not foreign pension funds which are subject to WHT on gross dividend payments). The case was dismissed as in the opinion of the CJEU the Commission has not proved that a foreign pension fund is discriminated against by the German provisions (for foreign and domestic pension or superannuation funds) regarding the deduction of business expenses directly linked to dividend income. 	<ul style="list-style-type: none"> 3. Please refer to Commission v Germany case (C-284/09). 	<ul style="list-style-type: none"> 0 	<ul style="list-style-type: none"> CJEU decision on the case C- 284/09 Commission v Germany with regard to corporations. KPMG considers that there are no convincing arguments that the difference in treatment affecting portfolio investors from third countries would not be covered by the provisions applicable in Germany on the free movement of capital.



Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 40 – Germany (cont.)

Germany	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p> <p> New</p>	<ul style="list-style-type: none"> With the entry into force of the Withholding Tax Modernisation Act, a special responsibility of the Federal Central Tax Office ("the BZSt") was introduced for refund applications based on EU law if the application attacks the settlement effect of the WHT. The BZSt is now responsible for all EU law based WHT reclaims. The authorities have advised us that they were collating all applications from the tax offices and would start considering them once this has been done. Since March 2023 The BZSt have started issuing letters to UK pension funds to announce that all claims filed with the local tax offices will be combined at the BZSt, and that they preliminarily reject the claims. German Law has been amended so that all German portfolio dividends paid post 1 March 2013 are taxable income for German corporations. By this action Germany has reacted to the CJEU decision C- 284/09 and abolished discriminatory treatment in the fact pattern underlying this decision. The amendment of the law only covers corporations, however it is a strong sign for other claimants (such as pension funds, investment funds and life companies) that discrimination existed. On 19 May 2021 the German Federal Tax Court held that a non-resident corporation can claim a refund of Dividend-WHT under the same requirements as than resident corporations. This meant that the expiring period for non-resident corporations is the same as for resident corporations who do not file a tax assessment. The Court held that for foreign corporations a seven-year expiring period may be applicable under the ECJ requirements of equivalency and efficiency. 	<ul style="list-style-type: none"> Please see Pension Funds reference. With effect for dividends received from 1 January 2018 onwards, German and foreign investment funds can benefit from a 15% WHT rate provided they are able to furnish a "Status Certificate" to the German tax authorities. In all other cases, the rate of 26.375% applies. At the level of the investors, German investors will be compensated for the new taxation at fund level by a partial tax exemption system. Foreign investors will not be able to get compensation for the same tax burden at fund level. Consideration is being given to the possibility of continuing claims beyond the 1 January 2018. 	<ul style="list-style-type: none"> Please see Pension Funds reference. 	<ul style="list-style-type: none"> Please see Pension Funds reference. With Decision of 6 March 2013 (I R 14/07) the German Federal Tax Court confirmed its opinion about the third-country-effect of Article 63 TFEU in connection with the trade tax add-backs on third country dividends (shareholding in a company greater than 10%) i.e. agrees it applies to third countries.

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 40 – Hungary

Hungary	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>1. Status of KPMG in the UK claimants' claims. (0. no KPMG claims made; 1. no response received; 2. claims accepted; 3. queries raised; 4. litigation)</p>	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • Settlement reached/litigation closed 	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 0
<p>2. Relevant domestic actions which impact on claims (including but not limited to changes/ proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> • No information. 	<ul style="list-style-type: none"> • In December 2010, a Lux SICAV received a repayment following a favourable Court decision. However, the Tax Authorities have appealed on procedural grounds to the Supreme Court, who in turn referred the case to the CJEU. The Tax Office has withdrawn from the case which led to the withdrawal of the EU referral as well. Therefore, the repayment is now seen as final. • A UK Investment Company has also received a favourable decision. In this case, the Court did not decide whether the WHT should be refunded and has asked the Tax Authorities to re-analyse the tax position of the company in relation to the WHT suffered. In the meantime, the case has also been referred to the Supreme Court. In this case the Tax Office offered an out of court settlement which has been accepted by the claimant. • A Lux FCP (Common Contractual Fund) submitted a WHT refund claim to the Tax Authorities. The Hungarian Tax Authorities have issued a preliminary rejection. An appeal which was submitted in November 2012 has been rejected due to the Ministry of Economy claiming there was no procedural grounds for a foreign recipient (who is not a Hungarian taxpayer with Hungarian Tax ID) to ask for a valid refund under the Hungarian rules of taxation. The tax should have been claimed by the distributor entities instead. A final decision is yet to come in this case. 	<ul style="list-style-type: none"> • No information. 	<ul style="list-style-type: none"> • No information.
<p>3. Status of EU Commission action taken against Hungary in respect of taxation of outbound dividends (0. no action; 1. 'letter of formal notice' issued; 2. 'reasoned opinion' issued; 3. referral by Commission to CJEU; 4. proceeding closed) Please refer to appendix 2.</p>	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 0
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/ proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> • Hungarian legislation changed from 1 January 2006 and there is no WHT on outbound dividend payments anymore. Claims are viable for WHT on dividend payments suffered from 1 May 2004 until 31 December 2005. (Please note that claims for these periods are likely to be time barred). 	<ul style="list-style-type: none"> • Please see Pension Funds reference. 	<ul style="list-style-type: none"> • Please see Pension Funds reference. 	<ul style="list-style-type: none"> • No information.

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 40 – Italy

Italy	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>1. Status of KPMG in the UK claimants' claims. (0. no claim; 1. no response; 2. accepted; 3. queried; 4. litigation)</p>	<p>• 1 & 4</p>	<p>• 1 & 4</p>	<p>• 2. In general, the ITA refund life companies 4.</p>	<p>• 1 & 4</p>
<p>2. Relevant KPMG and/or non KPMG led litigation challenging Italian WHT rules proceeding through domestic courts/referred to the CJEU</p>	<p>• In January 2019, the Supreme Court ruled in favour of a UK Pension Fund (for Italian tax credits on Italian source dividend income distributed in 1996-2003 originally claimed under the UK/Italy DTT) confirming the discrimination on the dividend taxation because the Pension Fund was tax exempt so it could not offset the tax on the Italian dividends in its country of residence. Following this decision the ITA paid the refund to the UK Pension Fund.</p> <p>• In January 2020, the Supreme Court ruled that Spanish pension funds, subject to tax in Spain although tax exempt, are entitled to the refund of the difference between WHT levied on Italian dividends (15% DTT rate) and the tax imposed on dividends paid to Italian companies (1.65% from 2004 to 2007; 1.375% from 2008 to 2016; 1.2% from 2017). According to the decision, the discrimination has to be analysed between foreign pension funds and Italian companies instead of Italian pension funds (subject to 11% domestic tax rate).</p> <p>• For recent developments see the Third Countries column.</p>	<p>• In February 2022 the Tax Court of Pescara issued a decision against the Italian Revenue Agency and awarded a Lux-SICAV a full refund of WHT levied on dividends distributed by Italian companies. This is the first decision to award a SICAV in Italy a full WHT refund based on previous rulings of the CJEU. The repayment has been received by the Lux SICAV fund.</p> <p>• In February 2022, the Italian Supreme Court issued two identical decisions confirming that Spanish investment funds, SICAVs and pension funds are all entitled to the refund of WHT levied on dividends paid by Italian companies. The Court declared that any entity, established within the EU, which is considered as a taxable person for corporate income tax purposes, is entitled to the application of the Italian tax rate on dividends. This WHT rate was 1.375 percent (for the years 2008-2016) and 1.2 percent (from 2017 onwards), instead of the 27 percent WHT rate or the 15 percent DTT rate.</p> <p>• In July 2022, the Supreme Court issued a decision confirming the discriminatory treatment of German investment funds by Italy's dividend tax regime (article 27 of Presidential Decree no. 600/1973). Ruling on a claim for a refund of WHT applied on dividends distributed to a German investment fund holding shares in companies resident in Italy, the Supreme Court unequivocally found that the dividend exemption available under Italian law to resident investment funds must also be applied to dividends distributed to a mutual fund resident in Germany.</p> <p>• The implementation of the above decisions must be evaluated case by case considering all the essential characteristics of each claimant based on which the comparison has to be made.</p> <p>• In light of these decisions, we strongly advise EU and EEA investment funds to: (i) continue filing WHT refund claims, (ii) keep previously filed claims 'alive' by submitting a refresher letter and (iii) launch court proceedings to obtain a refund..</p>	<p>• Commission v Italy case C-540/07, the CJEU issued its decision on 19 November 2009 and stated that Italian WHT rules were in breach of EU law.</p> <p>• On 3 July 2012, the Provincial Court of Pescara decided in favour of the taxpayer (a French corporation). The court declared that the claimant was able to prove that the Italian WHT had not been used to offset income tax liability in France (as it was in a loss position). The ITA appealed to the Regional Tax Court. In early December 2013, the decision was made to refund the claimant (the ITA decided to abandon the tax litigation).</p> <p>• In September 2014, The ITA withdrew from the tax litigation initiated by KPMG Italy and authorised a WHT refund to a Dutch Company who submitted a Fokus Bank claim at the end of 2011.</p> <p>• In February 2015, the ITA granted a partial refund to a UK Insurance company which predominantly operated in the pension sector. The ITA granted a refund of over half of the claim value together with interest due to the fact that it had already been partially recovered in the UK.</p> <p>• On 30 October 2018 the Regional Tax Court of Pescara decided in favour of the taxpayer (a Luxembourg corporation). The Court stated that the WHT on dividends applied to a non-resident company was in breach of the European Union principles of free movement of capital and freedom of establishment. Therefore the difference between the WHT applied to a non-resident entity (20% in 2013) and the WHT applied to a resident entity (1.375% in 2013) is refundable.</p>	<p>• In July 2022, the Supreme Court issued a decision confirming that the Italian tax treatment of dividends paid to a US collective investment fund was discriminatory and contrary to EU law. The claimant filed claims to recover WHT paid between 2007 and 2010, requesting a refund of the difference between the DTT WHT rate of 15% levied on dividends and the Italian substitute tax of 12.5% applied to Italian investment funds on the annual increase in net asset value. Furthermore, since 1 July 2011 Italian investment funds have no longer been subject to taxation, which means a refund of the full WHT amount, i.e. 15%, should be claimed.</p> <p>• In September 2022, the Supreme Court, in two judgments, stated that the discriminatory tax treatment of dividends received by non-EU pension funds as compared to Italian pension funds is contrary to article 63 TFEU. In the cases examined, certain US pension funds had claimed a refund of the difference between the rate of WHT levied on dividends paid to US pension funds (15% and 27%) and the Italian substitute tax (11%) that would have applied to the net income earned by Italian pension funds.</p> <p>• In April 2023, the Pescara Tax Court of first instance issued six positive rulings in respect of six US investment fund claimants confirming the Italian tax treatment of dividends paid to investors in the US is discriminatory and breaches EU law, and that the claimants were entitled to the refund of the difference between the DTT rate (15%) and the domestic rate (12.5%) applicable to Italian investment funds during 2007-2010 (from 1 July 2011 Italian investment funds are tax exempt).</p> <p>• In light of these decisions, we strongly advise non-EU entities to: (i) continue filing WHT refund claims, (ii) keep previously filed claims 'alive' by submitting a refresher letter and (iii) launch court proceedings to obtain a refund.</p>

New

New

Note: (a) May refer to UK OEICs (until 31.12.2020), Unit Trusts, Lux SICAVs and Investment Trust Companies.

(b) May refer to Canadian Pension Funds, US Investment Funds (RICs), US Pension Funds, UK Pension Funds (starting from 01.01.2021), and UK Investment Funds (starting from 01.01.2021).

Quarterly update 40 – Italy (cont.)

Italy	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>3. Status of EU Commission action taken against Italy in respect of taxation of outbound dividends (0. no action; 1. 'letter of formal notice' issued; 2. 'reasoned opinion' issued; referral by Commission to CJEU; proceeding closed) Please refer to appendix 2.</p>	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 0
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> • On 29 July 2009, a new law concerning WHT rates applicable to EU Pension Funds entered into force. WHT rate on dividends paid to EU Pension Funds from 29 July 2009 onwards decreases from 27% to 11%. Such a measure is intended to equate the tax treatment of EU Pension Funds to that of domestic Pension funds, which are subject to a 11% substitute tax, though on a different taxable basis (i.e. on the result of management activity). The 11% substitute tax for domestic pension funds has been temporarily increased to 11.5% for 2014 only. • According to the Decree 138/2011, the 11% WHT on dividends paid to EU Pension Funds was raised to 20% effective from January 2012. The substitute tax was raised to 20% effective from January 2015. • The discrimination between EU Pension Funds and Italian Pension Funds with reference to the payments made before 29 July 2009 is still an open issue. • Furthermore, even though the WHT rate and the substitute tax rate is the same, the taxable basis is different so it could still be demonstrated that a EU Pension Fund recipient is subject to a higher burden of tax in Italy than a comparable Italian Fund because of the different taxable basis of the dividend. • Given the ITA have extended corporate relief to periods prior to the introduction of the lower WHT rate in 2009, KPMG believes that there is a good chance the lower 11% rate for Pension Funds can also be applied to periods before 29 July 2009 due to the approach adopted by the Supreme Court (see point 3 of section 2). 	<ul style="list-style-type: none"> • The 2021 Italian Budget Law introduces a favourable set of provisions for foreign funds investing in shares of Italian resident companies, aimed at repealing the discriminatory tax treatment of dividends distributed to foreign investment funds and also capital gains realised by these funds. • The new provisions introduced a 0% WHT rate – instead of the previous 26% - when the EU/EEA equity investor is: <ul style="list-style-type: none"> • a fund complying with the UCITS Directive 2009/65/EC; or • a non-UCITS fund led by a management company subject to regulatory supervision in its country and established in accordance with the AIFM Directive 2011/61/EU. • Both UCITS and AIF funds must be established in EU member states or in EEA member states that provide a suitable exchange of information. • The new measures apply to dividends distributed and capital gains realised from 1 January 2021. However it could be argued that previously the law breached EU primary law due to the discrimination between resident and non resident funds regarding WHT on dividends applied in the past. 	<ul style="list-style-type: none"> • Income earned and distributed to EU and EEA resident shareholders is subject to WHT applied to corporate recipients at the rate of 1.20%. • Corporate claimants in Italy should seek to recover Italian WHT suffered for the last 4 years. • Non-EU insurance companies are subject to WHT at the rate of 26%. 	<ul style="list-style-type: none"> • Until now, the ITA have not actively addressed the WHT issue. • The ITA clarified that foreign tax exempt Pension Funds are entitled to the benefits of DTT (Risoluzione no.167/E, 21 April 2008). However, Centro Operativo di Pescara (the ITA dealing with the Fokus Bank claims) seem not to follow this ruling. • Non-EU investment funds are subject to WHT at the rate of 26%. However limiting the scope of the exemption to EU/EEA UCITS covered by the EU Directives does not fully comply with the EU principle of free movement of capital, especially in respect of third countries that provide an adequate exchange of information.

Note: (a) May refer to UK OEICs (until 31.12.2020), Unit Trusts, Lux SICAVs and Investment Trust Companies.

(b) May refer to Canadian Pension Funds, US Investment Funds (RICs), US Pension Funds, UK Pension Funds (starting from 01.01.2021), and UK Investment Funds (starting from 01.01.2021)

Quarterly update 40 – Luxembourg

Luxembourg	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>1. Status of KPMG in the UK claimants' claims. (0. no KPMG claims made; 1. no response received; 2. claims accepted; 3. queries raised; 4. litigation)</p>	<ul style="list-style-type: none"> 2 – Repayment made in one case by the Luxembourg tax authorities to a Swedish and Finnish pension funds 3 – Depending on the tax office concerned, some questions/requests for additional information were raised. 	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> Possible tax reclaim based on net taxation principle. 0. no claims filed so far. 	<ul style="list-style-type: none"> Third country pension funds can benefit from a WHT exemption under certain conditions 4. Litigation performed on behalf of a foreign sovereign fund
<p>2. Relevant KPMG and/or non KPMG led litigation challenging Luxembourg WHT rules proceeding through domestic courts/ referred to the CJEU</p>	<ul style="list-style-type: none"> Domestic court case on Swedish pension funds filed by KPMG Luxembourg (no preliminary ruling to ECJ by the court) – positive decision 	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> Litigation on behalf of sovereign fund – Final negative issued by administrative court of appeal.
<p>3. Status of EU Commission action taken against Luxembourg in respect of taxation of outbound dividends (0. no action; 1. 'letter of formal notice' issued; 2. 'reasoned opinion' issued; 3. referral by Commission to CJEU; 4. proceeding closed) Please refer to appendix 2.</p>	<ul style="list-style-type: none"> 0 – No action 	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> 0. no action 	<ul style="list-style-type: none"> 1. Letter of formal notice issued regarding the discriminatory treatment of foreign sovereign funds.
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> Court case mentioned above New law dated 20th September 2018 on the time-limitation period for WHT reclaims has been introduced. The time-limitation period to file a WHT reclaim is 12 months, but it has been clarified that it starts on 1st January following the date when the 12 months holding period – provided by the Luxembourg requirement. Participation exemption was met. Before this case law, the administrative practice was that the 12 months time-limitation started to elapse as of the 1st January following the dividend distribution date. 	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> No action 	<ul style="list-style-type: none"> Memo to be provided to the Luxembourg tax authorities concerning the discriminatory tax treatment of pension funds resident in a third country. Case law on time-limitation period mentioned for pension funds is also applicable.

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
(b) May refer to Canadian Pension Funds, US Investment Funds(RICs) and US Pension Funds.

Quarterly update 40 – Netherlands

Netherlands	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>1. Status of KPMG in the UK claimants' claims. (0. no KPMG claims made; 1. no response received; 2. claims accepted; 3. queries raised; 4. litigation)</p>	<ul style="list-style-type: none"> • 2 	<ul style="list-style-type: none"> • 3, 4 	<ul style="list-style-type: none"> • 3, 4 	<ul style="list-style-type: none"> • 2, 3
<p>2. Relevant KPMG and/or non KPMG led litigation challenging Dutch WHT rules proceeding through domestic courts/referred to the CJEU</p>	<ul style="list-style-type: none"> • Amurta (C-379/05). • On 30th November 2007, the Dutch Supreme Court (Nr. 42 679) decided that the Netherlands must refrain from taxing a dividend paid to a Luxembourg shareholder (outside scope of Parent Subsidiary directive) if the dividend was exempt in the scenario where the Luxembourg shareholder was a resident in the Netherlands. • On 13th May 2011, the Dutch Supreme Court decided that the statutory limitation period under Dutch law does not need to be extended where the rule is found to be inconsistent with EU law. However, the Court indicated that challenges to extend the limitation period may gain more favour through civil court action. 	<ul style="list-style-type: none"> • On 22nd March 2010, a Dutch Lower Court ruled that Spanish investment funds are not comparable to Dutch investment funds. On 30 January 2015, the Court of Appeals ruled that the two Spanish investment funds are not eligible for a refund. One Spanish fund was considered transparent for Dutch tax purposes (and therefore denied the refund). The other Spanish fund was unsuccessful because it did not meet the so called distribution requirement. • On 12 March 2013, a Dutch Lower Court denied a refund to a Luxembourg SICAV (both under the old and the new Dutch investment fund regime). On 1 July 2014 the Court of Appeal denied the refund, ruling that the SICAV was not comparable to a Dutch fiscal investment institution. The Court of Appeal stated that a fund with accumulation shares could not be comparable. On 19 March 2015, the Advocate General of the Supreme Court has issued opinion that a resident and non-resident investment fund are not comparable as a resident fund is liable to withhold Dutch WHT and a non-resident fund has no withholding obligation. This opinion was upheld by the Supreme Court on 10th July 2015. • The Dutch District Court requested in August 2016 that the Dutch Supreme to reconsider its negative decision and has decided to put claims on hold until a response is received. On 3 March 2017, the Dutch Supreme Court referred preliminary questions to the CJEU regarding the German public fund Köln Aktienfonds Deka case (C-156/17) concerning the compatibility with EU law of the Dutch WHT on dividends distributed to non-resident investment funds. The CJEU decided in January 2020 that the Dutch FBI distribution requirements were contrary to free movement of capital and concluded that the referring court should consider whether shareholder requirements for non-resident investment funds constitute discrimination relative to resident funds. In respect to the shareholder requirement, the CJEU further stated that non-resident taxpayers should not be subject to an excessive administrative burden in order to demonstrate comparability with a Dutch FBI however, any difficulty the non-resident taxpayer has in providing evidence that it fulfils the Dutch FBI comparability requirements is not a problem for which the Netherlands should have to answer. This judgment supports the argument that a non-resident fund should be broadly comparable rather than exactly the same. 	<ul style="list-style-type: none"> • On 3 August 2010, the Dutch Lower Court accepted the net taxation principle regarding a French company that had claimed a partial refund of Dutch dividend WHT and allowed the application of a 5 year claim period. On 24 May 2012, the Amsterdam Court of Appeal overruled the Dutch Lower Court decision and ruled that a 3 year claim period applies. The Dutch Court of Appeal denied the application of the net taxation principle in this case. The Court of Appeal decision has been appealed before the Dutch Supreme Court. The AG has concluded that the net taxation principle should be accepted, although he believes that the claimant in this specific case has not provided sufficient evidence on the related costs. The Supreme Court issued its ruling on 20 December 2013 and refer the case to the ECJ. 	<ul style="list-style-type: none"> • Dutch Supreme Court 25 September 2009 (Nr. 43874) held that a Canadian individual was entitled to protection of free movement of capital provision under EC Treaty. • On 14 February 2014, the Dutch Supreme Court concluded that a Swiss pension fund is not entitled to a refund of Dutch dividend tax suffered in 2005. This is because there was no obligation or mechanism for the exchange of information which would enable the Dutch tax authorities to verify information provided by the Swiss pension fund.

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
(b) May refer to Canadian Pension Funds, US Investment Funds(RICs) and US Pension Funds.

Quarterly update 40 – Netherlands (cont.)

Netherlands	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>2. Relevant KPMG and/or non KPMG led litigation challenging Dutch WHT rules proceeding through domestic courts/referred to the CJEU</p>		<ul style="list-style-type: none"> In October 2020 the Dutch Supreme Court issued its ruling in the Köln Aktienfonds Deka case stating that foreign funds should be entitled to a refund of the WHT levied if certain conditions are met. The conditions set out by the Court would be very difficult to meet in practice and the Court failed to clarify a number of points on the profit distribution, shareholder requirements and tax suffered by participants/shareholders. Furthermore, some of the conditions set out by the Dutch Supreme Court were in our view, a potential breach of EU law. The case was referred back to the Dutch Lower Court and during the hearing in December 2020, KPMG argued that the replacement payment methodology cannot be accepted. The Dutch Lower Court raises some doubt on the calculation basis ruled by the Supreme Court, as it seems to question whether 'the worldwide profit' of the fund should be used as a basis for the replacement payment instead of only Dutch dividends received. However, it subsequently decided that (a) there was no need to refer queries to the CJEU for a preliminary ruling on the compatibility of the legal remedy prescribed by the Supreme Court and (b) the entity was not entitled to the requested dividend tax refund. KPMG maintain the belief that the above argument is contrary to the EU Law. Two further negative judgments were issued by the Dutch Supreme Court in April 2021 (one in a US RIC case, and one in a UK investment fund case), and KPMG believe the arguments of the Supreme Court are very weak. A complaint to the European Commission has been submitted by a number of funds on the grounds that the Supreme Court judgment amounts to infringements of treaty rights. There is active litigation before the Court of Den Bosch which presents an opportunity for the Dutch Court to reconsider the points above. The Court of Appeal judgment of 26 October 2022 (concerning the old refund system) and the judgment of 18 January 2023 (concerning the new remittance system) considered the Supreme Court ruling of 9 April 2021 to be wrong, however, the Court of Appeal decided against the claimants on the basis that a German investment fund does not apply withholding tax on all shareholders on redistribution. 	<ul style="list-style-type: none"> The ECJ ruled that only costs that can be taken into account are those limited for the collection of dividends, therefore limiting the cost which can be deducted. However on 13 July 2016 in the Brisal Case (C-18/15) the CJEU concluded that financing costs might be deducted. Please see Pension Funds reference regarding Supreme Court decision dated 13 May 2011 re time limits. 	<ul style="list-style-type: none"> On 1 March 2018, a Dutch Lower Court ruled with respect to a US investment fund that the free movement of capital provisions prevail over the freedom of services provision. The US fund was therefore able to claim protection under the EU rules relating to the free movement of capital. The court ruled however that the Dutch rules regarding the FBI-regime are grandfathered under the standstill provision as they have not significantly changed since 31 December 1993.
<p>3. Status of EU Commission action taken against Netherlands in respect of taxation of outbound dividends (0. no action; 1. 'letter of formal notice' issued; 2. 'reasoned opinion' issued; referral by Commission to CJEU; proceeding closed) Please refer to appendix 2.</p>	<ul style="list-style-type: none"> 4. Please refer to IP/07/616. The proceeding was closed on 30 September 2010. 	<ul style="list-style-type: none"> 4. Please refer to IP/07/66. The proceeding was closed on 30 September 2010. 	<ul style="list-style-type: none"> 2 	<ul style="list-style-type: none"> 1. (dated 30 March 2010, no Press Release)

New

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
(b) May refer to Canadian Pension Funds, US Investment Funds(RICs) and US Pension Funds.

Quarterly update 40 – Netherlands (cont.)

Netherlands	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> • KPMG’s test claimant in the Netherlands, the Strathclyde Pension Fund, was successful in January 2009 in securing refunds of WHT back to 1 January 2003. Since this date WHT refunds have been made to the majority of UK Pension Fund claimants and are also available to other EU resident pension funds and non profit organizations. • In relation to the refund of year 2002, on 13 May 2011, the Dutch (tax) Supreme Court rejected the 2002 refund request. The Supreme Court did however refer to the possibility to start a civil court case to extend the time limits under EU law. Discussions are ongoing in respect of creating a cost sharing agreement to fund litigation before a civil court. • Further to KPMG’s action in the Netherlands, the Dutch Tax Authorities have now declared (letter dated 6 October 2010) that UK Pension Fund that have invested through a CIF or a similar Pension Funds Pooling Schemes, can under certain circumstances obtain refunds of Dutch dividend tax as well. 	<ul style="list-style-type: none"> • In anticipation of the CJEU ruling in Orange European Smallcap Fund (C-194/06), delivered on 20 May 2008, the Dutch domestic legislation was amended to end the potential discrimination. Dutch Investment Funds are not eligible for a refund of Dutch dividend WHT suffered in accounting years starting on or after 1 January 2008. As a result, the discrimination seems less obvious. Good arguments may nevertheless remain available for taking the position that a refund of Dutch dividend WHT should be available. 	<ul style="list-style-type: none"> • First formal steps for litigation on a test case for UK based companies have been taken. Although not formally agreed, the Dutch Tax Authorities appear to have put the test case on hold pending the ECJ’s decision on the Société Générale case (see above). • Infringement proceedings may commence against the Netherlands in respect of the discriminatory treatment of non-resident insurance companies (unit-linked parted). A reasoned opinion has been issued on 16th April 2014. 	<ul style="list-style-type: none"> • The DTA have recently granted a full WHT refund to some funds resident in a third country. • Based on a Dutch provision (effective as from 1 January 2012), entities (not being Investment Funds) that are: <ul style="list-style-type: none"> • resident in qualifying 3rd countries (3rd countries that have concluded a tax treaty with the Netherlands that provides for exchange of information), and • that are exempt from profits tax in their home country and exempt from profits tax in Netherlands (if resident in the Netherlands) • are eligible for a full refund of Dutch WHT to the extent the WHT relates to portfolio dividends.

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds(RICs) and US Pension Funds.

Quarterly update 40 – Norway

Norway	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>1. Status of KPMG in the UK claimants' claims. (0. no KPMG claims made; 1. no response received; 2. claims accepted; 3. queries raised; 4. litigation)</p>	<ul style="list-style-type: none"> • 2 	<ul style="list-style-type: none"> • 2 (UK OEIC, Lux SICAVs), 3 	<ul style="list-style-type: none"> • 2 	<ul style="list-style-type: none"> • n/a
<p>2. Relevant KPMG and/or non KPMG led litigation challenging Norwegian WHT rules proceeding through domestic courts/referred to the CJEU</p>	<ul style="list-style-type: none"> • Fokus Bank (EFTA Court, E-1/04). 	<ul style="list-style-type: none"> • Please see Pension Funds reference. 	<ul style="list-style-type: none"> • Please see Pension Funds reference. 	<ul style="list-style-type: none"> • n/a
<p>3. Status of EU Commission action taken against Norway in respect of taxation of outbound dividends (0. no action; 1. 'letter of formal notice' issued; 2. 'reasoned opinion' issued; 3. referral by Commission to CJEU; 4. proceeding closed) Please refer to appendix 2.</p>	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 4 	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • n/a
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> • The Ministry of Finance's statement of 29 September 2009 (see column 2) will in principle also be relevant to Pension Funds. The statement will however most likely not lead to a more speedy treatment as each case must still be examined on its own merits. The COFTA caseload is still substantial. • From 1 January 2017 WHT claims must be filed within five years after the end of the assessment year. The deadline is calculated from the point in time when the decision to distribute the dividends was made by the Norwegian company and WHT was levied. This is normally the pay date. Under the new regulations, claims for 2015 to 2019 can be filed by 31 December 2020. A reclaim for 2020 is also possible. However, a reclaim cannot be filed until the self-reassessment period of the dividend-paying entity has expired. Refund for WHT on dividends may therefore at the earliest be claimed approximately 4 months after the payment date. • The Norwegian tax authorities have experienced a problem with duplicate claims. Double applications may be regarded as fraud by the Norwegian tax authorities. The beneficial owner must also specifically confirm the authorization to apply for a refund for tax levied on each individual dividend payment. 	<ul style="list-style-type: none"> • Please see pension funds points 3 and 4 for deadline and documentation requirement information. • If the applicant is a FCP fund, a certificate of residence for the management company must be provided in order to prove that the entity is genuinely established within the EEA. 	<ul style="list-style-type: none"> • Please see pension funds points 3 and 4 for deadline and documentation requirement information. • Refer to the guidelines regarding the power of attorney in the Pension Funds Section. 	<ul style="list-style-type: none"> • n/a

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
(b) May refer to Canadian Pension Funds, US Investment Funds(RICs) and US Pension Funds.

Quarterly update 40 – Norway (cont.)

Norway	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> In 2017, COFTA issued a revised memo regarding the documentation that must accompany an application for refund of WHT: <ul style="list-style-type: none"> Full name, address and tax ID number of the applicant (and of the representative, if relevant). Payment details including IBAN, SWIFT, name of bank and name of account holder. The account must be able to receive NOK. A spreadsheet listing the names of the companies from which the dividends were received, with dates and amounts in NOK of gross dividends and tax withheld. A claim under the tax treaty must include: an original certificate of residence. The certificate must be issued by the relevant authority and certify that the claimant was resident in the EEA for tax purposes in the relevant year <ul style="list-style-type: none"> within the EEA and established in that country. A certificate of residence will normally be sufficient. If the claimant is an FCP fund, documentation for the management company must be provided in order to prove that the entity is established within the EEA Dividend vouchers issued by the applicant's bank confirming that the dividends have been paid onto an account belonging to the applicant and that "withholding tax" has been paid (and not just "tax"). The amounts on the vouchers must be in NOK. Dividend vouchers must include: the payment recipient's name, name and ISIN of stock, exact amount of shares, gross amount and WHT amount in NOK, ex date, record date and pay date and dividends per share. Power of attorney: a general power of attorney from the beneficial owner authorizing the filing of the claim. For dividend payments received from the year 2016 onwards, information about which account in the Norwegian central securities depository (VPS) the dividend was initially made to, i.e. account number and account holder. If the claimant does not have an account with VPS, the information should be requested from the bank that paid the dividend to the claimant. If the claimant is a UCITS fund, a UCITS attestation valid at the time of the dividend payment should be submitted. Please note that the Norwegian Tax Authorities can request additional information if they find it necessary in order to be able to treat the application for refund of WHT 	<ul style="list-style-type: none"> According to the Ministry of Finance statement of 29 September 2009 the exemption method also applies to foreign investment funds. Under this revised position it is not necessary for a fund resident in an EU/EEA Member State to be a taxable entity in its residence state in order to benefit from the participation exemption method in Norway. As a result, most EEA based funds will be able to benefit from the exemption from WHT under Norwegian law, and gains on such funds will be exempt for Norwegian corporate shareholders. The Ministry is however making a reservation in relation to funds that have no legal personality. For such funds, the situation is still not entirely certain An Investment Fund has received a rejection from COFTA because the fund did not submit the necessary refund documentation within the former 3 year deadline. The fund submitted the application within the 3 year deadline but forwarded additional documentation after the expiration of the deadline. COFTA's basis for the rejection is discretionary and similar cases have previously been accepted by COFTA. Future applications should however aim to be as complete as possible to avoid any rejections. 	<ul style="list-style-type: none"> Please see pension funds points 3 and 4 for deadline and documentation requirement information. Refer to the guidelines regarding the power of attorney in the Pension Funds Section. Shares that are part of the collective investment portfolios of pension funds and life insurance companies are not exempt from tax on gains and dividends, and will be taxed at a rate of 22%. Losses are deductible. The amendment also applies to indirectly owned shares in partnerships. Gains and dividends from shares that are part of a company's portfolio are still exempt from tax. The amended administrative regulation includes life insurance companies covered by the Norwegian Insurance Activity Act and pension funds. In addition, branches of foreign life insurance companies that engage in insurance activities in Norway are covered. 	

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds(RICs) and US Pension Funds.

Quarterly update 40 – Norway (cont.)

Norway	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> The Norwegian Finance Department has evaluated the tax exemption method in the white paper of 1 April 2011 regarding the condition of genuine establishment and real economic activity. The Department stated that it will weigh heavily against the fulfilment of this condition in cases where tax avoidance is clearly the primary motive for the arrangement. Regarding the condition of taxable entity, the Department says that the comparison between Norwegian resident companies and foreign resident companies will be based on a specific overall evaluation. The paper does not imply any changes to COFTA's current understanding and treatment of claims under the tax exemption method. See section on life company section 1 and 2 regarding comparability and application of exemption method. A refund application for a Swedish sovereign fund was rejected by COFTA on 27 February 2013 because the fund was considered as part of the Swedish state and not an entity comprised by the tax exemption method. An appeal was made on 21 March 2013 but was put on hold while waiting for clarification from the Ministry of Finance. Due to a negative interpretation from the Ministry, the appeal has been forwarded to the Tax Appeal Board. On 9 November 2016 the Finance Ministry made a statement regarding pension funds that are owned and administered by the Swedish state. The Finance Ministry stated that income received by foreign states are not part of the Norwegian exemption method. COFTA is awaiting a new statement from the Finance Ministry on whether this point of view is in compliance with the applicable EU/EEA law. New rules for claiming relief at source are effective from FY2019. The rules entail, inter alia, that reduced rates or full relief at source is only available subject to documentation requirements, which varies depending on the type of basis for relief. The main requirements are (a) a previous positive refund decision or a pre-approval from the tax authorities, and (b) a certificate of residence or confirmation of residency. For shares entered in the central securities depository (VPS), the documentation must be provided to the account operator or custodian (for nominee accounts). The new rules are relevant for all types of non-resident shareholders. 	<ul style="list-style-type: none"> On 12 September 2012, the Norwegian Supreme Court delivered a ruling stating that a German partnership company under certain conditions was comparable to a Norwegian limited company, and that the exemption method applied to the German partnership company. The Supreme Court restates the earlier conclusion of the Aberdeen case and the subsequent tax authority statements; the foreign company need not be a taxable entity in its residence state. On 27 October 2014, KPMG Law Advokatfirma AS reached a settlement with the Norwegian tax authorities regarding refund of WHT for a Luxembourg Fonds Commun de Placement (FCP). In the settlement, the Norwegian tax authorities agreed to refund the WHT for the FCP. Several pending reclaims for other FCP funds have resulted in a favourable outcome in 2015. The tax authorities will normally request a Certificate of Residence for the fund's management company for the relevant income years. This is requested to establish whether the entity is genuinely established within the EEA area. See Pension Funds regarding relief at source procedure. 	<ul style="list-style-type: none"> Norwegian life insurance companies are not covered by the exemption method for their collective portfolio, and comparability may consequently not ensure exemption for EU/EEA based life companies. However, they should arguably be exempted from Norwegian WHT, as Norwegian life companies benefit from a technical tax deduction which provides for a de facto tax exemption, cf. e.g. Commission v. Finland (C-342/10). See Pension Funds regarding relief at source procedure. 	

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds(RICs) and US Pension Funds.

Quarterly update 4Q – Poland

Poland	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>1. Status of KPMG in the UK claimants' claims. (0. no KPMG claims made; 1. no response received; 2. claims accepted; 3. queries raised; 4. litigation)</p>	<ul style="list-style-type: none"> • 2 	<ul style="list-style-type: none"> • 2,4 • A number of Polish tax offices have issued negative decisions for EU self-managed funds arguing that they are not comparable to Polish funds which are required to have an external management company. This argumentation has been rejected by the District Administrative Court ("DAC") in Warsaw with respect to both UCITS and non-UCITS funds. However, recently certain appeals for self-managed funds have been dismissed by the DAC. The cassation appeals have been filed and recently the Supreme Administrative Court in two cases cancelled unfavourable judgments of the first instance court and also the negative decisions of the tax authorities. However, in a recent case concerning a non-UCITS self-managed fund, the SAC has issued conflicting decisions. • A number of late interest reclaims based on the CJEU case law and recent Polish courts judgments are pending at different levels of proceedings. The PTA are rather reluctant to repay interest as there is no obligation to do so under domestic law (i.e. where discriminative taxation hasn't been confirmed by the CJEU judgment) and court appeals are needed. Recently, in several such cases the courts suspended proceedings due to the SAC referral in 3rd country claimant case C-322/22. • Poland has not been subject to a CJEU judgment and as a result there is currently no direct legal basis for late interest payments which is in direct contrast to non EU funds. 	<p style="text-align: center;">New</p>	<ul style="list-style-type: none"> • 2, 4. A number of US Investment Funds filed claims with the Polish tax offices. To date many different offices have issued positive decisions accepting that US investment funds are comparable to Polish investment funds and should benefit from the same tax treatment. Many cases are still pending and EoI procedures are often initiated. • One of the largest offices, the Warsaw office (second instance level) has issued many decisions following detailed review comparability reviews. • Following supplementary interest reclaims two Polish Tax Offices have paid interest for the period from the date the tax was initially withheld until the date of the actual repayment. As a consequence of the CJEU Case (C-190/12) which formed the legal basis for an interest award. • A late interest case concerning funds based outside of the EU/EEA has been referred to the CJEU by the Supreme Administrative Court (case C-322/22). It concerns the admissibility of limiting late interest awards only to those cases in which relevant motion for late interest has been filed within 30 days from the publication of the CJEU's judgment in the light of the fact that the provision of Polish domestic law found as being in breach of the EU law in the CJEU's Case C-190/12 is still formally binding. Some of the parties to the proceeding (i.e. the Polish Government, the Tax Chamber in Warsaw, Polish Official Advocate for SMEs and the European Commission) presented their standpoints to the case. It is important to note that the European Commission and Polish Official Advocate for SME's presented the favourable approach that the current Polish tax provisions are not compliant with the EU law. On the other hand, as expected, the Polish Government and the Tax Chamber presented the unfavourable approach. • Many pending proceedings concerning interest reclaims of the US funds are now being suspended in anticipation of the coming judgment of the CJEU.
<p>2. Relevant KPMG and / or non KPMG led litigation challenging Polish WHT rules proceeding through domestic courts/referred to the CJEU</p>	<ul style="list-style-type: none"> • No information <p style="text-align: center;">New</p>	<ul style="list-style-type: none"> • The Supreme Administrative Court issued a judgment (case no II FSK 3047/13) in which the Court confirmed literal interpretation of exemption conditions provided for in Art. 6 (1) (10a) of the Polish CIT Act. • On the other hand, recently, the Supreme Administrative Court issued a judgment in which the court found a Luxembourgish SICAV-SIF incomparable to a Polish investment fund regarding management rules, and denied the tax exemption. Following the judgment certain appeals for self-managed funds have been dismissed by the District Administrative Court in Warsaw. The cassation appeals have been filed and recently the Supreme Administrative Court in two cases cancelled unfavourable judgments of the first instance court and also the negative decisions of the tax authorities. • Recently a motion for a preliminary ruling to the CJEU has been submitted by the District Administrative Court in Gliwice concerning compliance of one of the Polish tax exemption conditions imposed on EU funds, namely the management company condition, with EU law. 	<ul style="list-style-type: none"> • No information 	<ul style="list-style-type: none"> • 10th April 2014, CJEU Emerging Markets Series case (C190/12) taken by KPMG. The Court held claims could be filed by third country claimants provided there is appropriate exchange of information procedure between the claimant's country of residence and the claim country. Following this the DAC cancelled previous negative decisions and referred the cases back to the Polish tax authorities, which issued positive decisions based on EOI procedures with the IRS which confirmed comparability of US RICs to Polish investment funds. • June 2014 the Supreme Court found in favour of 2 US funds. The court rejected the PTA's argument that they were not comparable because the authorization procedure is different. • A number of positive judgments of various district administrative courts have been issued for US RICs. They generally confirm the PTA must do a proper comparability analysis and that the comparability analysis itself must be made at a general level (general similarities and differences should be taken into account as opposed to detailed provisions of national laws).

Note: (a) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

(b) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.

Quarterly update 40 – Poland (cont.)

Poland	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>2. Relevant KPMG and / or non KPMG led litigation challenging Polish WHT rules proceeding through domestic courts/referred to the CJEU</p>	<ul style="list-style-type: none"> No information 	<p>period starting from the day the tax was withheld but only until 30 January 2011 (i.e. 30 day after Art. 6 (1) (10a) of the CIT Act has entered into force) – as long as the WHT claim has been filed post 30 January 2011. In our view the standpoint presented in the above mentioned judgment may be questionable and there are number of arguments supporting the entitlement to interest for the whole period (i.e. from the date the tax was initially withheld until the date of actual repayment).</p> <ul style="list-style-type: none"> On 9 March 2017 the District Administrative Court in Wrocław issued a judgment confirming that the EU investment funds are entitled to interest for the period starting from the day of withholding of the tax until the day of actual refund with respect to the tax withheld before 1 January 2011, i.e. before the tax exemption for the EU/EEA entered into force (we note, however, that the abovementioned limitation of the interest calculation period applied by the Supreme Administrative Court could not be followed in that case by the District Administrative Court as the interest claim was filed before 30 January 2011). Some tax authorities (namely the Tax Chamber in Poznan and the Malopolski Tax Office in Kraków) have already issued decisions to confirm that tax was originally withheld on the basis of provisions being in breach of the EU law and followed the limitations rules of the interest calculation period applied by the Supreme Administrative Court (i.e. the interest should be due for the period starting from the day the tax was withheld but only until 30 January 2011). In many cases the applicability of interest limitation rules was challenged and appeals were filed. Recently the District Administrative Court in Warsaw issued several judgments limiting interest awards until 30 January 2011, though WHT reclaim was filed prior to this date. We disagree that there are grounds for such a limitation, which does not follow the SAC judgments of 2 February 2017 referred to above. These judgments are being appealed to the SAC. 	<ul style="list-style-type: none"> No information 	<ul style="list-style-type: none"> In two judgments (in 2015) the DAC cancelled negative decisions of the Polish tax authorities and required new more detailed comparability analysis. However, in a later judgment of 25 June 2015 it did not follow such a strict approach and repeated the positive view of expressed by the Polish courts. In one of the judgments the DAC indicated that it is not necessary to initiate another EOI procedure if the tax office is already in a possession of information obtained by a different tax office as a result of EOI. In April 2018, several judgments were issued by the DAC which confirmed that the overpayment should be reimbursed along with interest for the period starting from the day the tax was suffered by the US investment funds. Several judgments denying late interest award for the period after 10 July 2014 (i.e 30 days after publication of the EMS C-190/12 judgment), in case a claim letter was filed after that date, have been issued at the first instance court level. These judgments have been further appealed to the SAC on the basis that domestic provisions governing the late interest issue are in breach of EU law. In 2021 the SAC issued a judgment upholding the standpoint that the late interest is due only for the period as of the day the tax was withheld until 10 July 2014, however did not provide any justification concerning instances where the WHT was suffered after 10 July 2014. Please see comments on the previous slide with respect to the referral to the CJEU of the late interest award case for funds based outside of the EU/EEA.

Note: (a) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

(b) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.

Quarterly update 40 – Poland (cont.)

Poland	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>3. Status of EU Commission action taken against Poland in respect of taxation of outbound dividends</p> <p>(0. no action; 1. 'letter of formal notice' issued; 2. 'reasoned opinion' issued; referral by Commission to CJEU; proceeding closed) Please refer to appendix 2.</p>	<ul style="list-style-type: none"> 4. During the infringement procedure (IP/11/ 720 dated 16 June 2011) the exemption conditions have been challenged by the European Commission, especially requiring to be "subject to tax". However, the Polish Government explained that "subject to tax" should be understood as being subject to the taxation regime in the state of residence, regardless of whether the investment fund in fact pays any income taxes or benefits from an exemption and the Ministry of Finance issued an official interpretation in this respect [ref. no DD5/033/4/12/RDX/DD-363]. In consequence, the infringement proceeding was closed on 24 January 2013. 	<ul style="list-style-type: none"> 4. Please refer to point 3 in Pension Funds column - the infringement proceeding (IP/11/ 720 dated 16 June 2011) was closed on 24 January 2013. In our opinion the conditional exemption for foreign funds is still in breach of EU law (free movement of capital) as it does not cover all EU/ EEA funds (e.g. tax transparent funds such as Luxembourg FCPs, or self-managed funds which have not appointed authorised management company) and does not apply to third country funds (which should also benefit from free movement of capital), whereas all Polish funds are exempt unconditionally with respect to dividend and interest income received from portfolio investments. At the end of May 2013 KPMG Poland submitted an official complaint with the European Commission against Poland concerning the above regulation, challenging specific conditions of CIT exemption for EU/EEA funds (in particular "subject to tax" and "management company" conditions). On 25 June 2013 the complaint was recorded by the Commission, but on 19 June KPMG was informed that EU Commission does not intend to pursue this issue further. Please also see the slide above concerning the recent referral to the CJEU of the DAC in Gliwice regarding the management company condition. 	<ul style="list-style-type: none"> 0 	<ul style="list-style-type: none"> 0
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> From 1 January 2011 the corporate income tax exemption has been extended to pension funds from EU and EEA countries which meet specified conditions. The exemption is conditional upon the existence of an exchange of information clause in the particular DTT or other agreement to which Poland is a party. The remitter must obtain a certificate of tax residence of the fund and a written statement confirming the fulfilment of the above requirements by the taxpayer (fund). 	<ul style="list-style-type: none"> Starting 1 January 2011 the corporate income tax exemption has been extended also to Investment Funds from EU and EEA countries which meet specified conditions. In September 2011, the Polish Parliament approved the CIT amendment imposing additional conditions for the WHT exemption for EU and EEA investment funds with effect 4 December 2011. With effect from 4 June 2016 the Polish Investment Funds Act has been amended to ensure compliance with the AIFM Directive. However, the introduced amendments do not include any changes with respect to taxation of funds managed by AIFMs, in particular no additional category of tax exempt entities has been introduced. Starting 1 January 2017 the CIT exemption has been amended. The main change concerned exemption of closed-end investment funds and aimed at narrowing of the tax exemption for those funds. 	<ul style="list-style-type: none"> No information 	<ul style="list-style-type: none"> The Polish Tax Authorities are requesting detailed documentation, including full translations of the US legal acts regulating activities of US RICs. Such requests are seen as aimed at discouraging claimants. The Polish Tax Authorities are also requesting information from the claimants tax authority under exchange of information provisions in the relevant treaty. As of 1 January 2021 the Lubelski Tax Office ('the LUS') has become the competent office with respect to all WHT reclaim cases. Recently filed claims before the LUS show that it has a less demanding approach towards claims' formalities than the other Tax Offices which in practice simplifies and speeds up the WHT reclaim process.

Note: (a) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

(b) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.

Quarterly update 40 – Poland (cont.)

Poland	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>		<ul style="list-style-type: none"> • New WHT rules have been introduced starting from 2019, including a new WHT refund mechanism and electronic procedure, in place of reduction/exemption at source for payments made in favor of the same taxpayer which total amount exceeds PLN 2 million in a particular year. The new rules are complex, public consultations were held to work out official guidelines regarding the application of the new provisions, but the guidelines are still in a draft phase (at the same time the Ministry of Finance is working on some amendments to the new rules). • The applicability of the 'pay & refund' mechanism which was to be introduced to the Polish tax system as of 2019 (ultimately it has been deferred until the end of 2021) has been limited to the payments of passive nature (dividends, income, royalties) made between related entities (within the meaning of the Transfer Pricing provisions – hence the shareholding of at least 25% is decisive). Therefore, it should generally not concern portfolio investments of pension or investment funds. It remains to be seen how this will take effect in practice. • The obligations imposed on the tax remitters based on the provisions binding from 1 January 2019, in particular obligation of performing due care during verification of conditions required for WHT exemption or preferential rates remain applicable. • "Pay and refund" mechanism will be excluded for certain payments made from 1 January 2023 to 31 December 2023 with respect to the specific category of tax remitters / tax agents ("technical tax remitter") i.e. entities holding omnibus accounts or securities accounts, if payments are made through such accounts. 		

New

Note: (a) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.
 (b) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.

Quarterly update 40 – Portugal

Portugal	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>1. Status of KPMG in the UK claimants' claims. (0. no claim; 1. no response; 2. accepted; 3. queried; 4. litigation)</p>	<ul style="list-style-type: none"> • 4 	<ul style="list-style-type: none"> • 1 	<ul style="list-style-type: none"> • 2 	<ul style="list-style-type: none"> • 4
<p>2. Relevant KPMG and / or non KPMG led litigation challenging Portuguese WHT rules proceeding through domestic courts/referred to the CJEU</p>	<ul style="list-style-type: none"> • Claims were presented regarding EU pension fund's discriminatory treatment under EU law, when compared to a Portuguese entity whose main purpose is not commercial, industrial or agricultural. • Decisions from the Supreme Administrative Court required Portuguese tax authority (PTA) to apply the case law of CJEU which addressed the discriminatory WHT rules to pension funds. • The CJEU concluded that the Portuguese legislation on WHT levied on dividends paid by Portuguese companies to foreign pension funds is incompatible with the EU law. • Given that, under Portuguese Law, EU and EEA based pension funds are now exempt (provided certain requirements are met), therefore claims were filed in order to recover tax withheld on dividends received, which are now in the litigation phase. 	<ul style="list-style-type: none"> • Claims were filed in 2018 regarding discriminatory treatment under EU law, for the first time. • PTA were arguing that they did not have the authority to assess the conformity of domestic rules with EU Law, or to assess their conformity with the Portuguese Constitution (therefore litigation would be expected be required in pursuit of the claims). • In December 2021, the Arbitration Court confirmed its position that the Portuguese tax regime which treats comparable resident and non-resident fund differently is restricting the free movement of capital. • In March 2022, the CJEU concluded the Portuguese legislation on WHT levied on dividends paid by Portuguese companies to foreign UCITS is incompatible with EU law, since it is contrary to the free movement of capital. • At this stage there are mostly favorable decisions to the tax payer at the level of the arbitration court, i.e., stating that the Portuguese tax regime which treats comparable resident and non-resident fund differently is restricting the free movement of capital. Some Investment funds have received repayments and some are waiting for repayments to be made. 	<ul style="list-style-type: none"> • Claims were filed by non-resident life insurance companies, which, with exception to the residence in Portugal, fulfilled all the conditions which are required for the application of the participation exemption regime to enable Portuguese source dividends not to be taxed. The Portuguese Supreme Administrative Court has already sustained this constitutes a discriminatory tax treatment. 	<ul style="list-style-type: none"> • A Portuguese resident entity whose main purpose is not a commercial, industrial or agricultural activity is only liable to tax in Portugal over 50% of the dividends received, whereas a non-resident entity of a similar nature is liable to tax over the full amount of the dividends received. Claims have been rejected by the Portuguese Tax Authorities and judicial appeals have been filed. These appeals have been filed by external lawyers as KPMG is prohibited from providing legal services in Portugal. The Portuguese Court has referred a question to the CJEU asking if Portuguese WHT rules are compatible with EU law. The CJEU ruled in January 2020 that the domestic legislation is interpreted as contrary to EU Law unless the difference can be neutralised by the Portugal-Canada DTT. • There have been positive rulings for government owned entities in Portugal since January 2021. These have now been passed to the Portuguese tax authorities in order to process repayments. A sovereign wealth fund/government owned entity is expecting repayments from the Portuguese tax authorities, although the PTA hasn't yet reimbursed the amounts claimed or confirmed the expected reimbursement date.

New

New

New

Note: (a) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.
 (b) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.

Quarterly update 40 – Portugal

Portugal	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>3. Status of EU Commission action taken against Portugal in respect of taxation of outbound dividends (0. no action; 1. "letter of formal notice" issued; 2. "reasoned opinion" issued; 3. referral by Commission to CJEU; 4. proceeding closed) Please refer to appendix 2.</p>	<ul style="list-style-type: none"> 4. Following the decision on the Commission vs Portugal case (C-493/09), the Law was amended with effects after 1 January 2012, extending the exemption to EU or EEA pension funds. 	<ul style="list-style-type: none"> 0 	<ul style="list-style-type: none"> 0 	<ul style="list-style-type: none"> 0
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> Portuguese law changed from 1 January 2012 onwards; EU and EEA based pension funds are now exempt, provided certain requirements are met. Claims are viable for WHT on dividend payments within the respective statute of limitation period (4 years). 	<ul style="list-style-type: none"> The Portuguese collective investment vehicles tax regime entered in force from July 2015. As a result, dividends received by a Portuguese investment funds are exempt from CIT, whereas Portuguese dividend income received by a foreign investment fund is subject to a 25% WHT (which can be reduced in case a Double Tax Treaty applies). To date no actions have been taken by the Portuguese tax authorities in respect of this situation. 	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> N/A

Note: (a) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

(b) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.

Quarterly update 39 – Spain

Spain	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>1. Status of KPMG in the UK claimants' claims. (0. no KPMG claims made; 1. no response received; 2. claims accepted; 3. queries raised; 4. litigation)</p>	<ul style="list-style-type: none"> 2 Successful in litigation and now EU pension funds are repaid by the STA as a matter of course 	<ul style="list-style-type: none"> 4,2 	<ul style="list-style-type: none"> 4, 2 	<ul style="list-style-type: none"> 4, 2
<p>2. Relevant KPMG and/or non KPMG led litigation challenging Spanish WHT rules proceeding through domestic courts/referred to the CJEU</p>	<ul style="list-style-type: none"> On 31 March 2010 a Spanish Court ('Audiencia Nacional') issued three consecutive rulings accepting the refunds requested by three Dutch pension funds. The decisions have not been appealed by the Spanish Tax Authorities (STA) and the appeal period has now elapsed. The Spanish Administrative Regional Court (TEAR) has accepted the allegations included in the appeals filed and concluded that the difference in the tax treatment between resident and non-resident Pensions Funds in Spain is contrary to EU Law as it breaches the principles of non-discrimination, free movement of capital and freedom of establishment. The resolution makes express reference to the decisions issued on 31 March 2010 by the Spanish National Court 'Audiencia Nacional' (see point 1). Likewise, the TEAR has accepted the claims submitted by several claimants. No specific technical analysis has been made on such resolutions, being the acceptance of such claims based on the incorrect formal procedure followed by the STA. The arguments raised by the TEAR are the following: <ul style="list-style-type: none"> Checking and verifying i) that the claimant is comparable to a Spanish fund and ii) the validity of the WHT claimed should have already been done by the STA. 	<ul style="list-style-type: none"> The Supreme Court decided in an investment fund case that daily interests should be calculated from the date on which the tax was withheld (previously Administrative Courts and Civil Courts calculated delay interests from six months after the claims were filed). The Supreme Court has admitted on June 20 2022 an appeal to determine whether the comparability analysis between non-resident hedge funds (non-UCITs funds) and Spanish hedge funds, for the purpose of applying Article 63 TFEU, must be carried out under Spanish domestic law applicable to hedge funds or under Directive 2009/65/EC. Additionally, the Supreme Court will clarify which parameters must be taken into account for the purposes of the comparability analysis between non-resident Hedge Funds and Spanish Hedge Funds. Additionally, the Supreme Court would clarify who bears the burden of proof that the comparability requirements are met and, in particular, that the discriminatory treatment has been neutralized by the possible application of the provisions of the Tax Treaty signed between Spain and the country of residence of the hedge fund, which would enable the claimant fund to deduct in its country of residence the tax borne in Spain. 	<ul style="list-style-type: none"> The TEAR has issued several resolutions rejecting the refund of the withholding borne by UK life companies on the following basis: <ul style="list-style-type: none"> a life company, (in connection with its pension business) located in the UK, investing in Spanish entities could be comparable to a Spanish pension fund carrying out the same kind of investments, irrespective of the fact that the final beneficiaries are UK pension funds. In addition, the TEAR states that the taxation of UK life insurance entities on a gross basis, whilst Spanish life companies are entitled to deduct the expenses incurred in order to determine its taxable base, does not determine an infringement of the EC principle of non-discrimination provided that both entities are not in a comparable position. 	<ul style="list-style-type: none"> The TEAR has rejected claims submitted by a US pension fund claiming the refund of the WHT suffered on the receipt of Spanish source dividends based on the following arguments: <ul style="list-style-type: none"> as the claimant is tax resident in the United States, Directive 77/799 concerning mutual assistance for seeking cooperation in tax matters is not in force between both jurisdictions (Spain and the US). Based on the above and on the jurisprudence of the CJEU in case C-540/07, the Administrative Court considers that the movement of capitals between EU member States and non-EU States takes place in a different legal context and that the above mentioned difference in treatment is justified due to the need to right against tax evasion and the impossibility of seeking tax cooperation from the US. The TEAR considers that the above is not affected by the fact that the US has signed a DTT with Spain given that the power for collecting information under the terms of Article 27 of such DTT is not comparable to that granted in Directive 77/779. Positive rulings have been issued for a US investment fund and a US pension fund on the basis that the Spanish Tax Authorities (STA) have followed the incorrect procedure in dealing with the claim by undertaking a "Data verification procedure" and should have analysed the substance of the claim by comparing a US fund to a Spanish investment fund under the "Limited Audit Procedure". Therefore the TEAC ruled in favour of the claimant. The Superior Court of Cataluña (litigation procedure) has accepted to refund three US pension fund based on the following arguments: <ol style="list-style-type: none"> The documentation provided by the US pension funds is sufficient for the purpose of certifying and describing the nature and characteristics of the US pension funds. The information exchange clause of the Spain-USA DTT is sufficient to verify the elements that define the existence of an acceptable comparability between an US Fund and a Spanish fund. Therefore the TFEU restriction on the free movement of capital cannot be justified base on the lack of tax controls.

New

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
(b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 39 – Spain (cont.)

Spain	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>2. Relevant KPMG and/or non KPMG led litigation challenging Spanish WHT rules proceeding through domestic courts/referr ed to the CJEU</p>			<ul style="list-style-type: none"> The STA has issued repayments of the WHT suffered by some clients following a positive resolution from the Spanish Administrative Courts based on procedural issues. The Central Administrative Court (administrative procedure) and the Audiencia Nacional (litigation procedure) has recognized the right of non-resident life insurance company to deduct technical provision related to pension business to determine the Spanish taxable base. The discrimination was originally embedded in the Non-resident Income Tax Law. The Audiencia Nacional calculated delay interests from the date on which the tax was withheld. 	<p>The Superior Court of Cataluña (litigation procedure) has accepted to refund three US pension fund based on the following arguments:</p> <ol style="list-style-type: none"> The documentation provided by the US pension funds is sufficient for the purpose of certifying and describing the nature and characteristics of the US pension funds. The information exchange clause of the Spain-USA DTT is sufficient to verify the elements that define the existence of an acceptable comparability between an US Fund and a Spanish fund. Therefore the TFEU restriction on the free movement of capital cannot be justified base on the lack of tax controls. <ul style="list-style-type: none"> In November 2019, the Spanish Supreme Court issued positive decision after a cassation appeal was filed by a US investment fund reclaiming WHT suffered on Spanish dividends. The court confirmed the Spanish legislation restricts the free movement of capital in Article 63 TFEU, and the fund is entitled to repayment of the excess WHT over 1% applicable to Spanish resident funds, plus delay interests. The following main arguments were considered: <ul style="list-style-type: none"> The ruling states that the burden of proof is satisfied by the taxpayer if a reasonable comparability is shown. The Court accepts that US investment schemes cannot be exactly the same as UCITS or Spanish ones, and that the taxpayers need only to show that they are just "equivalent". The Court also says that if the STA is unsure it its their burden to seek the information they need from the IRS. It states the information exchange mechanisms of the Spain-US DTT are sufficient to enable this information exchange. The Court recognizes that if the taxpayer has made efforts to demonstrate reasonable comparability and the STA hasn't made additional efforts in examining it, it is not appropriate to retroact proceedings to an administrative phase for the STA to reconsider the comparability. Several US RICs have received repayments from the Spanish tax authorities. In December 2020, the Spanish Supreme Court issued a positive decision after a cassation appeal was filed by a Canadian Pension Fund that 0% WHT should apply to the pension fund. Similar arguments were raised with the decision issued in November 2019. The Spanish Supreme Court issued two decisions in 2021 confirming that the WHT applied to Spanish sourced dividends received by non-resident sovereign wealth funds is contrary to the principle of free movement of capital. The Superior Court of Madrid has issued new resolutions to reject WHT claims for 2013 and 2014 period, despite the positive resolutions issued by the Spanish Supreme Court in November 2019 and December 2020. The Superior Court of Madrid argues that those resolutions from the Supreme Court refer to situations previous to the amendment of the Non-Resident Income Tax Law introduced in March 2010, where the Spanish legislation did not expressly foresee a mechanism enabling non-resident taxpayers to request the refund of WHT suffered in Spain. Therefore, for non-residents entities who wish to obtain the refund of WHT suffered in Spain from 2010 onwards, the Court requests them to prove additionally its comparability with a Spanish fund/Collective investment institution. STA and the Tribunal's have stard arguing in several cases that where WHT credits are passed through to underlying shareholders this neutralises the WHT suffered at fund level. Since late 2022 the Spanish National Court has been issuing favorable judicial decisions, related to US RICs WHT claims, applying the precedent that had been set by the Supreme Court in various Resolutions (among others, Sentences dated 13th November 2019 and 12th September 2022). In these rulings, the Spanish National Court has analyzed the possible neutralization of the discrimination by the potential deduction of the tax borne in Spain by the Fund or the participants of the fund in its jurisdiction. In this regard, the Spanish National Court ruled that, having proven the facts that demonstrate the existence of discrimination, the neutralization of such discrimination is an "exception" and, as such, the burden of proof is on the party asserting it, in this case the STA.

New

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
(b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 39 – Spain (cont.)

Spain	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>3. Status of EU Commission action taken against Portugal in respect of taxation of outbound dividends (0. no action; 1. "letter of formal notice" issued; 2. "reasoned opinion" issued; 3. referral by Commission to CJEU; 4. proceeding closed) Please refer to appendix 2.</p>	<ul style="list-style-type: none"> 3. Please refer to IP/08/1817 dated 23 November 2008.(i) 	<ul style="list-style-type: none"> 4. Please refer to IP/07/66. The proceeding was closed on 14 March 2011. 	<ul style="list-style-type: none"> 4. Please refer to IP/08/1533. The proceeding was closed on 28 October 2010. 	<ul style="list-style-type: none"> 0
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> On 2 March 2010, Law 2/2010 was officially published to modify among other taxes, the Non-Residents Income Tax (NRIT) Law, effective from 1 January 2010 to any income obtained. Under the new law, dividends obtained by European Union (EU) Pension Funds are exempt from taxation in Spain provided that such Pension Funds are comparable to the Spanish Pension Funds regulated in the Royal Legislative Decree 1/2002 dated 29 November. For the purposes of this 'comparability analysis' the EU institutions that are considered equivalent/comparable to Spanish Pension Funds are social welfare institutions where: 	<ul style="list-style-type: none"> Law 2/2010 introduced some modifications that affect dividends and other profit distributions obtained by Collective Investment Vehicles covered by the EC Directive 2009/65/EC dated 13 July 2009 (regulated UCITs) which are exempt from taxation in Spain. The Tax Law includes a provision under which an exemption would apply to the extent that it does not lead to non resident UCITs suffering a lower level of taxation than the Spanish resident 	<ul style="list-style-type: none"> Following the Law 2/2010, in order to determine the taxable base, non-resident life companies resident in the EU, operating in Spain without a permanent establishment, will be able to deduct the expenses incurred for obtaining income or capital gains from Spanish sources as long as those expenses are allowed under the Spanish Personal Income Tax and are directly related to the income obtained in Spain, provided that the direct relationship can be justified. Please refer to our comments included for Investment Funds. 	<ul style="list-style-type: none"> The Law 2/2011, of 5 March 2011, has amended the NRIT Law establishing the following with effects from 6 March 2011: <ul style="list-style-type: none"> Dividends and any other profit distribution obtained by Pension Funds resident in the European Economic Area (EEA) states, such as Norway, Liechtenstein and Iceland, as long as they have signed with Spain a Double Tax Treaty including an exchange of information clause, will be likewise tax exempt under the same terms applicable to those EU domiciled Pension Funds comparable to the Spanish Pension Funds regulated in the Royal Legislative Decree 1/2002 dated 29 November. The Law 2/2011, of 5 March 2011, has amended the NRIT Law establishing the following with effects from 6 March 2011:

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 39 – Spain (cont.)

Spain	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> – The contingencies upon which the participants can collect the complementary proceeds from the institution are exclusively those listed in article 8.6 of the Spanish Pension Fund Law (namely retirement, disability and death). – Employer’s contributions, if any, are allocated for tax purposes to the participants in favour of whom the benefits are recognized and the right to collect the future income is irrevocably transferred to those participants. – Preferential deferral tax treatment to the contributions. This regime must be characterised by way of an effective taxation of all the contributions and the profitability obtained in its management at the time the proceeds are obtained. • There is a new Spanish tax form that shall be used to declare income received from 1 January 2011. • Late payment interests calculation carried out by the STA when the refund is agreed is calculated incorrectly. The interest amount could be significant in some cases. Challenges against the STA criteria in respect to the calculation are required to be appealed before the Administrative Court. We have received positive resolutions from the Administrative Court in respect to appeals. 	<ul style="list-style-type: none"> • Collective Investment Vehicles. The extent of this limitation is not completely clear, although the most likely interpretation is that EU UCITs would be in principle subject to final taxation in Spain at the rate of 1% (current CIT rate applicable to Spanish UCITS). • The STA have proceeded to refund WHT claimed by Investment Funds where both the UCITs Certificate and the best practice documentation evidencing that the claimant was the beneficial owner of the dividends subject to WHT (i.e. Spanish custodian vouchers and paying agent vouchers) were provided to them when submitting the claim. • Refer to the new Spanish tax form under Pension Funds at point 4. No specific form or proforma wording has been approved for Investment Funds. However, in order for a UCIT to be entitled to the 1% tax rate on its Spanish sourced dividends and profits, a certificate issued by the Competent Authority (i.e. financial regulator) confirming the claimant is a Collective Investment Vehicle covered by Directive 2009/65/EC dated 13 July 2009 (regulating UCITS) must be provided. • Please refer to the delay interests claim under Pension Funds (point 4, bullet point 5). 	<ul style="list-style-type: none"> • Refer to the new Spanish tax form under Pension Funds at point 5. In order to tax its Spanish sourced income on a net basis EU tax payers will need to provide a tax residence certificate issued by the relevant local Tax Authority, confirming its residence in an EU member state. • Law 2/2010 includes an amendment affecting taxation on a net basis. In order to determine the taxable base, non-resident taxpayers resident in the EU, operating in Spain without a permanent establishment, will be able to deduct the expenses incurred to generate the Spanish income or capital gains as long as those expenses are allowed under the Spanish Personal Income Tax and are directly related to the income obtained in Spain. 	<ul style="list-style-type: none"> • Dividends and any other profit distribution obtained by Pension Funds resident in the European Economic Area (EEA) states, such as Norway, Liechtenstein and Iceland, as long as they have signed with Spain a Double Tax Treaty including an exchange of information clause, will be likewise tax exempt under the same terms applicable to those EU domiciled Pension Funds comparable to the Spanish Pension Funds regulated in the Royal Legislative Decree 1/2002 dated 29 November. • Dividends and any other profit distribution obtained by Collective Investment Vehicles resident in the EEA (i.e. <ul style="list-style-type: none"> – Norway, Liechtenstein and Iceland) as long as they have signed with Spain a Double Tax Treaty including an exchange of information clause, will be likewise tax exempt under the same terms applicable to those covered by the EC Directive 2009/65/EC dated 13 July 2009 (regulated UCITs). • The STA have started issuing information requests in January 2021 to some US RICs to obtain additional information on the nature and structure of the funds to assess their comparability with the US RIC in the case that the Spanish Supreme Court issued its positive ruling on in November 2019. This represented a change in stance from the STA as they typically have been rejecting the claims filed by the US RICs.

Note: (a) May refer to UK OEICs, Unit Trusts, Lux SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs) and US Pension Funds.

Quarterly update 39 – Sweden

Sweden	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>1. Status of KPMG in the UK claimants' claims. (0. no KPMG claims made; 1. no response received; 2. claims accepted; 3. queries raised; 4. litigation)</p>	<ul style="list-style-type: none"> • 4 	<ul style="list-style-type: none"> • 2 (repayments where certain conditions are met) 	<ul style="list-style-type: none"> • 4 	<ul style="list-style-type: none"> • 2 • 3 • 4
<p>2. Relevant KPMG and/or non KPMG led litigation challenging Swedish WHT rules proceeding through domestic courts/referred to the CJEU</p>	<ul style="list-style-type: none"> • The Supreme Administrative Court ("SAC") ruled on 22 February 2017 in the two test cases related to foreign pension funds which seek a refund of the Withholding Tax Act ("WTA") suffered by reference to EU Law. One case concerned a Dutch private pension fund ("PMT") (this case has also been the subject of preliminary ruling of the Court of Justice of the European Union (CJEU C-252/14) and the other concerned a Finnish pension insurance company ("Veritas"). One of the main questions in the proceedings was whether it is contrary to the free movement of capital to levy Swedish WHT on dividends paid to foreign pension funds while the Swedish pension foundations and life insurance companies are instead subject to yield tax. Referring to the CJEU's judgment, the SAC came to the conclusion in the test cases that dividends cannot be exempt from WHT on the basis of a comparison with the Swedish Pension foundations or life assurance companies. However, the SAC found that it is contrary to EU law not to allow foreign pension funds the right to deduct expenses that are directly related to the collection of dividends on invested capital. This means that there is an opportunity to claim deduction for expenses that are directly related to the collection of dividends, in the calculation of the WHT liability. In the Veritas case, discrimination was also assessed in relation to the Swedish AP-funds, which are completely exempt from income tax under the Swedish legislation. The SAC considered that the AP-funds operate in different circumstances compared to Veritas, both organisationally and in terms of function and purpose and therefore are not in a comparable situation. • In January 2023, the SAC requested a preliminary ruling from the CJEU in a case regarding taxation on dividends to three Finnish public pension institutions. The main question is whether the Swedish taxation on dividends for non-resident public pension institutions is contrary to the free movement of capital. 	<ul style="list-style-type: none"> • In February 2012, The Administrative Court of Appeal ("ACA") ruled that WHT on dividends paid to foreign investment funds is contrary to the EU-law. • Under the main rule in the current WTA, only private individuals and foreign legal entities (as defined in the Income Tax Act) are subject to WHT in the first place. • The ACA has held that a foreign contractual fund, a Luxembourg FCP, was not a foreign legal entity and hence not taxable under domestic law and granted a repayment. Repayments have been made to contractual funds, e.g. Luxembourg FCPs and German investment funds. • There is also a positive ruling from the ACA (2nd Tier) as regards a German Spezialfund, which was not considered a foreign legal entity and hence not liable to tax under the WTA. Furthermore, there was a positive ruling, in regards to an Irish Unit Trust (UCITS) in the ACA (1st Tier). The position for the UK Unit Trusts has not necessarily been clarified by these causes. However, we have seen STA repayments to UK Authorized Unit Trusts (UCITS). • In June 2020, the SAC ruled that a trust in an investment fund, organised as a unit trust (UCITS), is to be considered "entitled to dividends" (beneficial owner) under the WTA. • In June 2022 the STA have issued repayments to UK Investment Trust companies, to grant the full WHT claimed. The STA determined that the funds do not constitute "legal entities" and therefore should not be liable to WHT under the current WTA. 	<ul style="list-style-type: none"> • Please see Pension Funds reference. (LIC subject to same yield tax regime). 	<ul style="list-style-type: none"> • Please see bullet point 1 section 2 of Investment Funds. • Repayments have been made to a large number of open end US RIC funds fulfilling the criteria set out in the judgements from the ACA in December 2014 (which are final). A case by case analysis should be done to determine whether the fund in question is comparable to Swedish investment funds. • In February 2020, the SAC provided a positive ruling stating that legal form should not be an issue when considering comparability. The case was about a US RIC fund (open end) Further the fund was entitled to repayment of WHT plus interest, applied from the day after the tax was withheld to the date of repayment. • In June 2021, positive decisions were issued in respect of a number of closed end US funds. The ACA decided that US closed end funds are comparable to Swedish investment funds, and/or Swedish investment companies, and that they are entitled to a full refund of the WHT suffered. In April 2022 a number of US closed end funds have received positive proposed decisions. • Claims involving government owned entities were appealed to the SCA, but leave to appeal was refused. • From April 2022 the STA have issued positive decisions and repayments to some US Massachusetts Business Trusts, and a Canadian Unit Trust to grant the full WHT claimed. The STA determined that the funds do not constitute "legal entities" and therefore should not be liable to WHT under the current WTA.

New

Note: (a) May refer to UK OEICs, Unit Trusts, Lux FCP's , SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs), US Pension Funds and Kuwait funds.

Quarterly update 39 – Sweden (cont.)

Sweden	Pension Funds	Investment Funds ^(a)	Life Companies	Third Countries ^(b)
<p>3. Status of EU Commission action taken against Sweden in respect of taxation of outbound dividends (0. no action; 1. "letter of formal notice" issued; 2. "reasoned opinion" issued; 3. referral by Commission to CJEU; 4. proceeding closed) Please refer to appendix 2.</p>	<ul style="list-style-type: none"> In February 2021, the Commission sent a letter of formal notice to Sweden, drawing its attention to the potential incompatibility of its legislation with EU law on taxation of dividends paid to public pension institutions. Whereas Swedish public pension funds are, as government agencies, entirely exempt from tax liability, dividends paid to equivalent non-resident public pension institutions are subject to WHT, commonly at a reduced rate of 15% as provided for in the tax treaties concluded between Sweden and other EU/EEA countries. Sweden had two months to reply to the arguments raised by the Commission after which the Commission may decide to send a reasoned opinion 	<ul style="list-style-type: none"> In June 2020, the SAC ruled that a trust in an investment fund, organized as a unit trust (UCITS), is to be considered "entitled to dividends" (beneficial owner) under the WTA. In June 2022 the STA have issued repayments to UK Investment Trust companies, to grant the full WHT claimed. The STA determined that the funds do not constitute "legal entities" and therefore should not be liable to WHT under the current WTA. 	<ul style="list-style-type: none"> 0 	<ul style="list-style-type: none"> 0
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<p style="text-align: center;">New</p>	<ul style="list-style-type: none"> Changes were introduced to the Swedish tax legislation to exempt EU/EEA Investment Funds from WHT on dividends, provided certain conditions are satisfied (2010/11:131). The new rules came into force as at 1 January 2012. The rules also apply to third countries with which Sweden has a treaty in force that contains an exchange of information clause. The STA on 23 May 2012 issued a statement regarding the criteria the STA thinks should be fulfilled for a foreign fund to be equivalent to a Swedish investment fund. This was amended on 22 March 2017 and then again on 29 September 2022. In its latest statement, the STA concluded that legal form is irrelevant for comparability when applying the WHT exemption for investment funds in the WTA. The STA on 30 April 2014 issued a statement that it now considers it possible for certain foreign contractual funds to be beneficial owners of dividends. A prerequisite is that they are regulated under civil law in approximately the same way as Swedish investment funds. If so, they are not liable to WHT since they are not foreign legal entities. For other foreign contractual funds the investors may be the beneficial owners. Hence, certain foreign contractual funds, can reclaim Swedish WHT referring to domestic law. See above under 2 regarding non-UCITS funds that are legal entities. In June 2022, the Swedish Ministry of Finance published a revised proposal of amended legislation on WHT on dividends. The draft legislation entails fundamental changes for both foreign recipients of dividends and Swedish companies that distribute dividends compared to the current WTA, both in terms of liability to tax and procedure. They are intended to be in force from 1 July 2023 and be applied from 1 January 2024, but are not yet final or approved. This may be delayed as the STA await the outcome of EU Commission's FASTER initiative. 	<ul style="list-style-type: none"> No information. 	<ul style="list-style-type: none"> Please refer to the Investment Fund update.

Note: (a) May refer to UK OEICs, Unit Trusts, Lux FCP's , SICAVs and Investment Trust Companies.
 (b) May refer to Canadian Pension Funds, US Investment Funds (RICs), US Pension Funds and Kuwait funds.

Quarterly update 40 – UK

UK	UK Pension Funds	Investment Funds	UK Life Companies
<p>1. Status of KPMG in the UK claimants' claims. (0. no KPMG claims made; 1. no response received; 2. claims accepted; 3. queries raised; 4. litigation)</p>	<ul style="list-style-type: none"> • 3 	<ul style="list-style-type: none"> • 3 	<ul style="list-style-type: none"> • 3
<p>2. Relevant KPMG and/or non KPMG led litigation challenging Swedish WHT rules proceeding through domestic courts/referred to the CJEU</p>	<ul style="list-style-type: none"> • Statement of facts have now been agreed with HMRC. • Test case pending and test claimant has been identified. KPMG and Pinsent Masons have prepared Tribunal pleadings including supporting evidence and statement of the case. • HMRC has reviewed the supporting evidence and statement of case and confirmed it wishes to litigate. The test claimant has been agreed and it has been agreed all other GFA members claims will be placed on hold until the outcome of the test case. In October 2012 however the HMRC solicitor changed and further questions have been raised which may slow the process down. • A hearing took place at the First Tier Tribunal in March 2013. This was prompted by Pinsent Masons against HMRC requesting HMRC issue closure notices in respect to the test claimant's claims and allow for the First Tier Tribunal case to take place. The Tribunal directed that HMRC should issue closure notices which were issued. • The test case was heard at the First Tier Tribunal in November 2015. A decision was issued on 27th June 2016. The Tribunal rejected the claim to recover WHT on manufactured overseas dividends. The Tribunal compared the receipt of a manufactured dividend to a foreign dividend, whereas we believe it should have been compared to a UK manufactured dividend. An application was rejected from the test claimant reference to the CJEU. • The hearing took place at the Upper Tribunal ("UT") in February 2018, and decision was issued on 16 May 2018. In summary, the UT found in favour of the claimant and considers the application of WHT on MODs was in breach of EU law. This ruling overturns the First Tier Tribunal decision from June 2016. HMRC have been granted leave to appeal to the Court of Appeal and a hearing took place in June 2019. The Court of Appeal judgment was issued in October 2019 and found in favour of the claimant and dismissed HMRC's appeal. HMRC has applied for permission to appeal to the Court of Appeal decision directly to the Supreme Court, and the Supreme Court has granted HMRC's permission to appeal application in May 2020. The Supreme Court hearing for the MODs test case took place in October 2021 and in April 2022 the Supreme Court ruled in favour of HMRC, upholding their appeal and overturning the judgment of the Court of appeal. The Supreme Court held that there was no restriction on the free movement of capital, and it also went on to state if there had been a breach of EU law, the Court considered the claims to fail in the alternative as the remedy sought (i.e. a repayment of WHT on the MOD) did not match the breach. 	<ul style="list-style-type: none"> • Test case pending and test claimant identified. Please refer to Pension Funds section. 	<ul style="list-style-type: none"> • Test case pending and test claimant identified. Please refer to Pension Funds section.
<p>3. Status of EU Commission action taken against Portugal in respect of taxation of outbound dividends (0. no action; 1. "letter of formal notice" issued; 2. "reasoned opinion" issued; 3. referral by Commission to CJEU; 4. proceeding closed) Please refer to appendix 2.</p>	<ul style="list-style-type: none"> • n/a 	<ul style="list-style-type: none"> • n/a 	<ul style="list-style-type: none"> • n/a
<p>4. Relevant domestic actions which impact on claims (including but not limited to changes/proposed changes in domestic law, informal feedback received from local tax authorities, etc.)</p>	<ul style="list-style-type: none"> • High Court claims and tax returns have been filed by the majority of funds. • The Court has agreed to hold all High Court claims pending the outcome of a test case taken via the tax tribunals. • The Court has not granted a GLO but will revisit the issue if the High Court claims do need to be taken for example if the Tax Tribunal route fails. • Group Funding Agreement in place to cover both the Tax Tribunal and the High Court claims as necessary. • From 1 January 2014 HMRC will no longer apply WHT to MOD payments. 	<ul style="list-style-type: none"> • Please see UK Pension Funds reference. 	<ul style="list-style-type: none"> • Please see UK Pension Funds reference.

Other EU Member States – European Commission action

		Pension Funds	Investment Funds
1. Status of EU Commission action 0. no action; 1. 'letter of formal notice' issued; 2. 'reasoned opinion' issued; referral by Commission to CJEU; proceeding closed	Bulgaria^(a)	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 4. Please refer to IP/08/712. The proceeding was closed on 27 November 2008.
	Czech Republic^(b)	<ul style="list-style-type: none"> • 4. Please refer to IP/07/616. The proceeding was closed 19 March 2009. • 4. Please refer to IP/10/1406. The proceeding was closed on 16 February 2011. 	<ul style="list-style-type: none"> • 4. Please refer to IP/08/143. The proceeding was closed on 25 June 2009.
	Estonia^(b)	<ul style="list-style-type: none"> • 4. Please refer to IP/08/143. The proceeding was closed on 18 September 2008. 	<ul style="list-style-type: none"> • 2. Please refer to IP/11/718 dated on 16 June 2011. Proceedings closed on 28/03/2014 (Estonia changed its legislation)
	Latvia^(b)	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 4. Please refer to IP/07/66. The proceeding was closed on 31 January 2008.
	Lithuania^(b)	<ul style="list-style-type: none"> • 4. Please refer to IP/07/616 and IP/08/334. The proceeding was closed on 14 April 2009. 	<ul style="list-style-type: none"> • 0
	Luxembourg^(c)	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 4. Please refer to IP/06/1060. The proceeding was closed on 6 May 2008.
	Romania^(a)	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 4. Please refer to IP/08/712. The proceeding was closed on 14 May 2009.
	Slovenia^(b)	<ul style="list-style-type: none"> • 4. Please refer to IP/07/616. The proceeding was closed on 27 November 2008. 	<ul style="list-style-type: none"> • 0

Note: (a) The Member State joined EU on 1 January 2007.

(b) The Member State joined EU on 1 May 2004.

(c) The Member State joined EU on 25 March 1957.

Infringement procedures summary

Outline steps in the infringement procedure

- **Step 1:** The 'letter of formal notice' represents the first step in the infringement procedure (pre-litigation), during which the EU Commission requests a Member State to submit its observations within a given time limit on an identified problem within its national legislation regarding the application of Community law.
- **Step 2:** The 'reasoned opinion' is the second step in the infringement procedure. The purpose of the reasoned opinion is to set out the EU Commission's position on the infringement and to determine the subject matter of any action, requesting the Member State to comply within a given time limit. The reasoned opinion must give a coherent and detailed statement, based on the letter of formal notice, of the reasons that have led it to conclude that the Member State concerned has failed to fulfil one or more of its obligations under the Treaties or secondary legislation.
- **Step 3:** The third and last step of the infringement procedure is the referral by the EU Commission to the CJEU. This begins the litigation process.

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