EU Claim

Refund of (Dividend) Withholding Tax
Financial Services Tax

May 2016
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Claims to recover (Dividend) Withholding Tax based on EU Law

The influence of EU law on tax systems across Europe is growing. Individuals and corporate entities in EU Member States and third countries are increasingly making use of EU law in order to challenge the alignment of member state tax rules. Changes to member states tax rules are being driven by the influence of EU law. This brochure considers the implications of EU law and recent EU tax cases for overseas investors with European sourced dividends and Manufactured Overseas Dividends (MOD).

**Dividend Withholding Tax Refund**

All across the European Union a significant number of entities as corporations, pension funds, investment funds, life insurance companies and charities (hereinafter claimants) are challenging the withholding tax rules applied to dividend payments arising from various member states. There is supposed to be a four-to-five digit number of claims to recover withholding tax on dividend income suffered in other EU member states to be lodged with tax authorities. All of these claims are possible due to the rules applied by some member states, under which domestic and overseas recipients of dividends are treated differently for tax purposes. The so-called Aberdeen or Santander Claims (formerly Amurta, Denkavit or Fokus Bank claims) are pan-European claims by EU or third country resident claimants to recover withholding tax on dividend income suffered in other EU member states. The claims made to date could materially enhance a corporation’s, pension or investment funds, life insurance company’s or charity’s asset base and investment returns, and in the case of pension funds’ could go some way to addressing any funding deficit.

**Manufactured Overseas Dividends**

Many of the entities that have made claims to recover withholding tax across Europe are involved in securities lending arrangements. These entities will have received manufactured payments on certain stocks rather than actual dividends. As these entities are aware, the withholding tax claims made to date do not extend to these manufactured payments, they only apply to actual dividend receipts. EU law provides significant opportunities for lenders to recover withholding tax effectively suffered on Manufactured Overseas Dividend receipts in recent periods.
The influence of EU law on tax systems across Europe is growing.
The Legal Base

Groundbreaking Court of European Union decisions in the past

From 2006 onwards the Court of the European Union (CJEU) established in more than a handful of cases a European case law that tax rules, pursuant to which a withholding tax is levied on dividends paid to non-resident entities when similar resident entities benefit from are exemption, are in fact contrary to the EU law principles. The claims could be based on the Treaty on the Functioning of the European Union (TFEU) as successor of the Treaty establishing the European Community (EC). When EU or Third Country entities suffer such a discriminatory tax treatment, they should consider filing a claim for obtaining the refund of unduly paid withholding tax in another EU Member State or a State of the European Free Trade Association (EFTA; currently Norway, Iceland and Liechtenstein). In particular with respect to investment funds the CJEU issued three ground-breaking decisions in 2009 and 2012:

On 18 June 2009 the CJEU considered in the Case 303/07 Aberdeen that the Finish dividend withholding tax on outbound dividends, distributed to an investment fund resident in Luxemburg, constituted a restriction on the freedom of establishment (Article 49 TFEU former Article 43 EC) insofar Finland does not tax domestic investment funds. The freedom of establishment grants the freedom to choose the place of residence, which basically prevents the dividend source state from imposing a less favorable tax treatment to a non-resident by merely relying on the fact that the legal form (entity type) is unknown in the dividend source state.

On 10 May 2012 the CJEU considered in the Case 338/11–348/11 FIM Santander that the French dividend withholding tax on outbound dividends, distributed to investment funds in other European Member States and the United States of America, constituted a restriction on the free movement of capital (Article 63 TFEU, former Article 56 EC) insofar as France does not finally impose a dividend (withholding) tax vis-à-vis domestic investment funds. The freedom of capital movement grants the free movement of capital and payments between the Member States and Third Country States, which basically must not be restricted by less favorable tax-treatment of non-resident in relationship to domestic entities/bodies which are deemed comparable under the so-called type comparison.
On 10 April 2014 the CJEU ruled in the case C-190/12 (Emerging Markets Series of DFA Investment Trust Company) that an US-based investment fund may recover withholding taxes incurred in Poland on outbound dividends to the extent, that Polish and EU Funds receive such a refund. This CJEU-decision is a third country milestone as it opens the door to investment funds based in the US or any other third country to recover Dividend Withholding taxes incurred in a European Union (EU) member state.

The basic opportunity principle

The cases above reflect the general principle of basic freedoms of the EU Treaties. Domestic and non-resident corporations, investment funds, pension funds, life insurance companies and charities (claimants) are typically treated differently for tax purposes in the source state of the dividend paying company: Domestic claimants are in many cases exempt from income taxation, and for this reason either exempt from withholding tax levy on dividend payments (i.e. tax levy at source), or able to credit such payment in the assessment procedure. Whereas, on payments to comparable non-resident claimants (i.e. claimants resident in another state), often the dividend source state imposes a withholding tax without the ability to obtain tax exemption, or any other kind of tax refund under local tax law. As many of these non-resident claimants (investors) will typically be exempt from tax on income in their own residency state, the different treatment of the dividend source state will typically constitute an absolute cost, because due to the tax exempt status of the investor in its own residency state, the investor cannot take into account a credit against its own tax liability with regard to the withholding tax payment levied in the dividend source state.

The different treatment by the dividend source state highlighted above will in these cases result in a lower post tax return on investments in non-resident companies. This constitutes a disincentive to invest in the member state operating a final withholding tax only on payments to non-resident investors (corporations, funds, life insurance companies and charities):

The basic freedoms of the European Treaties do not permit such a less comfortable treatment of non-resident investors and grant them the same treatment as comparable resident investors enjoy. Based on this principle, the European Treaties grant EU or Third Country resident investors repayments of withholding tax on dividends received from the source state.
The following source states provide promising refund opportunities

- Belgium
- Finland
- France
- Germany
- Italy
- The Netherlands
- Norway (EFTA-State)
- Poland
- Romania
- Spain
- Sweden

Please note that in states marked in purple in the map, refund opportunities may also exist depending on the fact pattern of the case. Therefore, in any case of substantial dividend withholding tax levy which cannot be recovered/utilized, it is highly recommendable to contact a local tax consultant to examine refund opportunities on a case-to-case basis.
Pursuing claims may achieve substantial tax repayments from a number of EU tax authorities. There are, however, a number of issues to consider both in terms of claim practicalities and the wider impact of making claims. The following questions need to be considered when deciding whether to file repayment claims across the EU:

**Why act now?**
For historic periods, as time passes, claims may become time barred. Dividend recipients should therefore seek to make claims as soon as reasonably possible in order to ensure that the maximum refund potential can be achieved.

**Do time limits exist?**
Valid claims can be lodged in a number of EU territories (see selected refund countries above) for prior years. The time limits vary from country to country. Due to the fact, that sometime limits may by themselves infringe EU Law, it is recommended to discuss as soon as possible (with your local advisor) claims for all years in which substantial dividends were received to avoid the failure of claims from formal reasons (expiring periods).

**Who can make claims (claimant’s profile)?**
Corporations, investment funds, pension funds, life insurance companies and charities resident in an EU Member State or a Third Country receiving Withholding Tax burdened Dividends from refund-countries.

**Likelihood of success?**
A strong claim supported by the above mentioned line of CJEU/EFTA cases. Meanwhile in Norway, Finland and the Netherlands tax authorities began refunding unduly levied dividend withholding tax.

**Where to claim?**
Claims should be lodged in the Member State in which the dividend paying entity is resident. A significant number of European and Non-European funds have made such claims. It is crucial that the claim is filed with a competent tax authority who are able to deal with such cases under the applicable local law. It is important to note that the formal prerequisites for lodging a valid claim are tied to the local tax procedural law of the dividend source state, i.e. will differ as the time limitations vary from member state to member state.
Aberdeen/Santander claims: Claim process - timescale and costs

In General
It is likely that litigation will be required (very possibly up to the level of the CJEU) in each claim territory before a repayment, in respect of claims made, will be received. Timescales for such a process will vary territory by territory. Claimants should therefore expect to need to wait for a couple of years before they may benefit from repayments. However, in this context it should also be mentioned that in some member states it was not necessary to litigate up to CJEU level, but already national courts have assessed EU law infringement and ruled that subsequently refund of withholding tax to non-resident clients had to be granted.

Filing of the claims with the Tax Authorities
In a first step, claimants should file the claim with the competent tax authorities in the refund countries. Should tax authorities refuse a refund, litigation before the courts will usually be required (depends on applicable local procedural law).

Test case approach
Only a few territories operate formal test case mechanisms, whereby one or a small number of claimants litigate claims while all other claims are put on hold. However, in practice in many territories it should be possible (and has already been practiced), that an agreement can be achieved with the tax authorities/courts to only proceed with a sample claim case with any ultimate court decision being binding on all claimants affected. The other claims will be suspended on the administration level. We expect therefore that the litigation process will avoid each claim having to be brought to court.

Costs and cost sharing
Formal cost sharing arrangements administered by court orders are not operated in most EU territories. However this does not, in many cases, preclude claimant groups from privately concluding a cost sharing contract. KPMG may assist to find cost sharing agreements partners to cover such claim expenses.

Should it be necessary to litigate a claim, as an initial guide, litigation costs (which we would expect to be shared) to pursue a single claim to conclusion — i.e., through the initial appeal process and domestic and CJEU court system could be in the region of Euro 200.000 (excluding court fees) per claim territory. This cost is significantly reduced by sharing potential costs.

As an alternative to litigating or as part of a group it may also be possible to file claims which are not actively pursued, but protect the claimants’ position pending the outcome of successful existing taxpayer litigation.
Feasibility review to assess potential size of claim
Based on the claimants’ information, we will provide an initial summary about the claim potential.

Filing claims for recent years with the Tax Authorities
In accordance with your needs, we will prepare and file claims with the tax authorities and provide technical opinions to support the action.

Filing appeals against negative decisions and ongoing pursuit of claims
If the tax authorities refuse a refund, we will draft appeal documents together with conduct and advice on appeals through tax tribunals/courts as required.

Launching Test Cases to the Courts to accelerate the refund-procedure
We will launch for you a test case to the German Tax Courts and probably the CJEU to accelerate the Refund-procedure.

Further actions on a case-to-case basis
According to the applicable tax procedural rules of the dividend source state, KPMG can assist as the case may be on e.g.

- concluding suspense-of-procedure arrangements for claim applications during a pending test litigation at court;
- negotiating with tax authorities on the supporting documentation to be presented along with the claim applications in order to obtain finally reimbursement of withholding tax;
- and similar, as may be appropriate to handle certain claim types.
Country Sections

France

National administrative practice and case law
Following the Santander Case the administrative Court of Montreuil has now to rule on the 2500 pending cases and the French Tax Administration will have to deal with thousands of similar tax reclaims that have not yet been rejected.

An administrative guideline has been issued by the French Tax Authorities to organize the modalities of filing and documenting of the withholding tax reclaims that have still not been filed, and the burden of proof.

The French legislator has formally put an end to this difference in treatment by bringing the treatment of non-resident (mutual) investment funds in line with that of domestic investment funds. But they have not defined which entities can benefit from WHT exemption. As a result, in practice French paying agents continue to levy the WHT, which shall be claimed back. On the other hand, such an amendment has no retroactive effect on past claim periods. Also, for other investor types there may still be a discriminatory treatment of domestic and non-resident cases in place.

Time limitation period
The general time-limit for claiming is 2 years (counted from end of the year when dividend has been received). However, in case where a French rule has been regarded as non conform to the EU or international laws by decision of a Higher Court like EUCJ an extended period is granted to the taxpayer to make a claim. As a result, since the Santander decision by EUCJ was rendered in 2012 it is possible to file before end of 2014 a Fokus Bank claim that can cover dividends received from 1st January 2009 onwards. It has to be noted that the Law changed on 2012, but only for decisions and events taking place from 2013 onwards. Consequence is that claims on the ground of an EUCJ decision rendered up from 2013 need to be filed in the regular prescription duration above (2 years-period), whereas the time limit for claims on the ground of a decision rendered before 2013 will remain the extended period.

Germany

With decision of 20 October 2011 in the Commission/Germany Case (C-284/09), CJEU concluded that German rules regarding the payment of dividends by a German company to a foreign corporate shareholder are discriminatory. This does not directly concern investment funds but could be transferred on the position of other investors’ cases to reimburse withholding tax.

On 22 November 2012, the CJEU has decided on the Commission/Germany case (C-600/10) concerning the non-compatibility of German competition law with EU Law by rejecting the Commission’s complaint, arguing that the Commission has not brought forward sufficient evidence on the factual discriminatory treatment.

Competence issue between Tax Offices and central administration
Under German tax law, the following local tax office(s) should be competent for lodging a refund claim on foreign investment funds:

- Tax office in whose district assets of the taxpayer are located and — if this applies to several tax offices — the tax office in whose district the most valuable part of the assets is located;
- Tax office in whose district the activity is or has been predominately performed or exploited;
- Tax office in whose district the matter requiring the official act arises.
Based on the above, the following tax offices could potentially be competent:

- **Custodian tax office**: The district in which assets of the taxpayer are located may be interpreted as being the district in which the German custody bank performing depositary services for the claimant is located.

- **Main local tax office**: Given the fact that a daily evaluation of every participation contained in the non-resident investor’s portfolio is almost impossible, our evaluation method assumes (estimate) that the dividend distribution amount represents the participation value (assuming a comparable price-profit-ratio). The district in which the taxpayer’s activity is predominantly performed or exploited may be considered as being the district, in which the effective place of management/seat of the distributing company is located, which represents the “predominant” investment of the fund. As a consequence, the local tax office which has received in one assessment period (i.e. the calendar year) the highest amount of the withholding tax would be competent.

- **Distributing company’s local tax office**: If no other tax office has competence, in the case of dividend distributions, jurisdiction would then be attributed to each local tax office which has received withholding taxes from the distributing corporation(s), i.e. the local tax offices competent for the district in which the seat of the dividend distributing company is located.

- **German federal tax office**: Both the factual connection (between withholding tax reclaims based on double tax treaty and EU Law), and the imperative of administrative efficiency support the view that the Federal Tax Office should have jurisdiction for both double tax treaty based (partial) withholding tax refunds and complementary EU Law based withholding tax refunds. Despite this, the Federal Tax Office has denied its responsibility via circular recently issued.

**Decision of the German Supreme Tax Court as of 11 January 2012**

The decision states that the German federal tax office is not competent (scope of competence limited to reclaims based on double tax treaties and on the Parent-Subsidiary Directive), but instead the local tax offices are. Such legislation ruling that the local tax offices are competent is not in breach of EU Law, since it is the decision of each EU Member State to define which authority should be competent (insofar as it is not de facto impossible for the claimant to file a claim to safeguard his rights).

Formally, this decision does not apply to investment or pension funds. It should be the responsibility of the German legislator to adopt a competency rule, which would be applicable to claims based on EU Law. A complaint for lack of certainty as to which is the competent tax office has been filed by KPMG Germany, stating that such uncertainty in itself is a breach of EU Law since it imposes excessive administrative burdens to non-residents. The KPMG Germany approach contains filing claims with all abovementioned tax authorities.

Currently all claims filed with the Federal Tax Office are registered but put on hold, following an unofficial instruction of the Federal Ministry of Finance ("Bundesfinanzministerium") to put all claims on hold as long as there is a pending action before the CJEU initiated by the EU Commission. Furthermore, the local tax offices grant — formal or factual — suspense-of-procedure for the uncertainty of local competence.

A Test Case with some claimant’s will be launched in spring 2016 by KPMG. However additional test cases will be helpful to accelerate the refund process.
Country Sections

Italy

Legislative changes
The 12.5% substitute tax applied on the increase of the net asset value (NAV) at the level of the Italian fund has been abolished with effect from 1 July 2011. Moreover, as of 1 January 2012 a 20% withholding tax (12.5% for government bonds and other eligible securities) is levied on the income derived from the fund and on the capital gain at the time of the disposal of the participations/units by Italian investors.

The new legislation constitutes a shift of taxation from the Italian investment fund to the Italian investor, who bears directly the tax liability. A dividend distribution from an Italian company to an Italian investment fund is tax exempt, whereas the same distribution to a foreign investment fund is subject to a withholding tax levy. This brings an even more discriminatory character of the Italian legislation, and it should therefore constitute an additional argument for EU investment funds to file EU law-based withholding tax refund reclaims in Italy.

National administrative practice and case law
Until now, no explicit rejections have been issued by the Italian tax authorities. However, a claim is deemed rejected after 90 days without an explicit reaction by the Italian tax authorities. In such cases, an appeal may be filed before the tax courts within 10 years. Current focus lies on having proper evidence that the claims have been duly submitted to the competent tax office (“Centro Operativo di Pescara”).

Time limitation period
Claims need to be filed with the competent tax office (“Centro Operativo di Pescara”) within 48 months from the date of the respective dividend distribution subject to withholding tax levy.

Netherlands

National administrative practice
There has been a special situation with respect to investment funds having only one “qualifying” participant, since the Dutch tax authorities did not regard them as investment funds, but applied a ‘look-through approach’ for such claims: As a consequence, where the investor had been eligible to a tax reimbursement entitlement in the case of a direct investment, withholding tax was also refunded for investments conducted through said investment funds. In this way, several million Euros have been recovered for such investment funds.

Recently, the Dutch tax authorities also issued a notification whereby they agreed to refund dividend withholding tax suffered by a non-EU portfolio investor. This is the first significant Third Country EU law based withholding tax reclaim to be accepted by any of the larger EU investment markets.

While the Dutch tax authorities have not explicitly confirmed that the Dutch rules are contrary to EU law, the refund nevertheless constitutes a significant development. The Dutch government has in the meantime amended its legislation to allow some Third Country residents to benefit from a withholding tax refund if amongst others, an appropriate exchange of information is possible. Although the refund was granted only to tax exempt entities that are not investment funds and thus not had direct impact on the Aberdeen claims filed by investment funds, it nonetheless constitutes an additional argument for claimants resident in Third Countries to file withholding tax reclaims in the Netherlands.

National case law
Through a positive decision of the Dutch court of appeal of Den Bosch (as of 9 March 2012), a full withholding tax refund was granted to a Finnish investment fund, given that the court accepted in this case that the non-resident investment fund was objectively comparable to Dutch resident tax exempt entities (such as charities, pension funds etc.) and thus entitled to suffer a zero withholding tax in the end. However, it is unsure to what extent claimants that are not tax exempt in...
their residence country can benefit from this decision. In this respect, two other cases are pending before the same Court of Appeal in respect to Spanish investment funds (which are themselves subject to 1% profits tax).

The Dutch tax authorities have appealed this decision and the decision of the Supreme Administrative Court on this case is to be expected in the course of 2013. Given the potential exposure (more than EUR 1 billion), it is likely that the Dutch Ministry of Finance will do their utmost to have this decision overruled by the Dutch Supreme Court. However, the positive decision from the Court of Appeal may also make it more difficult for the Supreme Court to deny refunds without asking for a preliminary judgment from the CJEU first.

**Time limitation period**

All claimants should be able to use a statutory 3 year claim time limit in the Netherlands.

All claimants can take the position that this 3 year period starts to run at the end of the calendar year in which the WHT has been suffered (for pension funds it is sure that the 3 year period starts to run at the end of the calendar year, for life companies and investment funds this is not fully sure, see below). Under this calendar year approach, claims relating to WHT that is e.g. suffered in the calendar year 2010 should be filed no later than 31 December 2013.

For life companies, it may, at the end of the day, be determined that the 3 year period starts to run at the end of the financial year in which the WHT has been suffered. Hence, claims relating to WHT that is e.g. suffered in the financial year 1 October 2009 through 30 September 2010, should then be filed before 1 October 2013.

In addition to the aforementioned 3 year period (on a calendar year basis), investment funds could — based on another line of defense — take the position that no deadline applies in respect of WHT suffered in financial years that have started on or after 1 January 2008. The Dutch tax authorities (obviously) do not agree with that and take the position that — based on that line of defense — the deadline should be 9 months or in any way no more than 3 years (both starting at the end of the financial year in which the WHT has been suffered).

Apart from the above, it could be argued that a 5 year period rather than a 3 year period should be applied by the Dutch tax authorities. The Dutch tax authorities, however, only apply this extended claim period in cases where they believe that an entitlement to a refund exists (e.g. pension funds, charities). Non-application of this 5 year period could be challenged before a Dutch civil court (this relates to an ex officio decision by the Dutch tax authorities). The non-application of the 5 year period is arguably in violation with EU law. For this matter, a complaint has been filed with the EC. So far, however, the EC has been reluctant to start an infringement procedure against the Netherlands.
Poland

Legislative changes
a) On 10 August 2010 the draft amendments to the Polish Corporation Income Tax Act prepared by the Ministry of Finance were accepted by the Polish Government:
- Extension of corporation tax exemption to all EU/EEA comparable investment and pension funds. Limitations contrary to local case law (Warsaw Administrative Court’s judgment of 14 March 2008) and EU law amendments submitted to EU Commission at beginning of October 2010. New amendments to the Corporation Income Tax Act adopted on 26 November 2010 with entry into force on 1 January 2011.

b) The following requirements must be fulfilled to be eligible for the exemption regime:
- The fund must be subject to an unlimited (worldwide) tax liability in the country of residence;
- the object of the fund has to be the collective investment of funds in securities, money market instruments or other property rights;
- the fund must carry its activity under the permission granted by a competent authority of its residency state;
- the fund must be supervised by this authority; and
- the fund must have a depositary maintaining a registry of its assets.

c) Amendment on the Polish Corporation Income Tax Act on 4 December 2011: Foreign funds would have to be managed by an entity having been delivered an agreement by the Polish financial sector authorities (it is likely to draw the conclusion that self-managed SICAVs are exempt from the exemption regime). Closeended funds operating without permission of the competent supervisory body may benefit from the new law under the following conditions:
- Their investment certificates (units) are not offered publically (traded on the stock exchange), or traded on any regulated market or other multilateral trading facilities; and
- in case the latter investment certificates can be acquired by individuals, such individual purchases must have a minimum value of EUR 40,000.

National administrative practice and case law
EU action:
- Reasoned Opinion on 14 May 2009 regarding discriminatory taxation of outbound dividend payments to foreign investment funds.

- Reasoned opinion on 16 June 2011, where the EU Commission asked Poland to amend its new legislation since the latest amendments to the Polish Corporate Income Tax Act were not sufficient to eliminate the existing discriminations: The corporation income tax exemption should apply to any type of EU-resident fund (e.g. FCP, SICAV).

The Polish tax authorities have refunded in the meantime withholding tax on pension funds, investment funds (SICAV as well as FCP) and on investment trust company claimants.

In several cases Polish courts have also accepted claims in respect of non-EU funds (e.g. US or Switzerland).

With Decision in the Case 190/12 of 10 April 2014 DFA Emerging Markets CJEU constituted that the Polish practice with respect to third country investment funds is an infringements of the freedom of capital movement (Article 63 TFEU)

Time limitation periods
The Tax Office is obliged to issue a decision within 2 months of the claim’s delivery. This limit may be extended where additional documentation is required. In practice proceedings take up to 6-9 months.

The period to file a valid claim is 5 years after the end of a year in which tax was withheld.
Spain

Legislative changes
Law 2/2010 with effect from 1 January 2010 provides for an exemption from withholding tax levy for EU-resident pension funds and UCITS — compliant investment funds insofar as they do not suffer a lower level of taxation than if they were a Spanish resident UCITS-funds (e.g. 1% profit flat tax).

Further to the above, 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.

Concerning third countries, Law 2/2011, of 5 March 2011, amended the non-resident income tax (NRIT) law establishing the following with effects from 6 March 2011:
- Dividends and any other profit distribution obtained by Collective Investment Vehicles 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 covered by the EC Directive 2009/65/EC dated 13 July 2009 (regulated UCITs).

National administrative practice and case law
The Spanish National Court (“Audiencia Nacional”) has issued three resolutions on 31 March 2010, accepting the refund of withholding tax levied on dividend payments made by Spanish entities to three Dutch pension funds.

The Spanish Court makes direct reference to the amendment of the NRIT, with effect from 1 January 2010, by virtue of which a withholding tax exemption on dividends paid by Spanish companies to EU resident pension funds has been introduced. The Spanish Administrative Regional Tax Court has issued resolutions that partially accept the arguments put forward by the claimants. Further to these resolutions, the Spanish tax authorities are now issuing communications informing that they are going to start up the review process and that for such purposes they require further documentation, inter alia certificate of supervision by the local supervisory body (e.g. CSSF in Luxembourg). If the documentation is complete, this may lead to reimbursement of suffered withholding tax plus interest thereon.

Likewise, the Spanish Regional Administrative Court, has been partially accepting the allegations included in the appeals filed and concluded that the difference in the tax treatment between resident and non-residents in Spain is contrary to EU Law as it breaches the principles of non-discrimination, free movement of capital and freedom of establishment. These resolutions make express reference to the decisions issued on 31 March 2010 by the Spanish National Court “Audiencia Nacional”. The Spanish Regional Administrative Court agrees to refer back the matter to the Spanish Tax Authorities in order to verify (i) the validity of the tax residence and tax exemption certificates previously filed by the claimants; (ii) the claiming fund is comparable to a Spanish entity.
In more recent resolutions, both the Central Administrative Court and taking the same criteria also the Spanish Regional Administrative Court have fully accepted the claims submitted by several claimants based on the inappropriate formal procedure followed by the Spanish Tax Authorities (STA). It must be noted that 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 Administrative Courts are the following:

– 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.

– As long as such work was not carried out on due time by the STA it is not possible, to refer back the matter to the STA. The Spanish Regional Administrative Court / Central Administrative Court consider that the procedure followed by the STA to handle the claims ("verification of data procedure") is inappropriate being the right one to have been launched the so called "limited tax audit procedure":

– However, the The Spanish Regional Administrative Court / Central Administrative Court point out that the STA can launch a new and different tax-audit procedure to check whether the refund is correct.

In addition, in this regard, the STA have already executed some positive Resolutions of the Spanish Administrative Courts regarding fokus claims submitted by several claimants and have agreed the refund of the withholding suffered by issuing the relevant cheques.

Time limitation periods
The Spanish statute of limitations is four years and the claims have to be filed on a quarterly basis until 1 January 2011 (as from that date the claims are filed on an annual basis). Consequently, claims could be filed to request the refund of WHT borne as from 1st quarter 2009 onwards. The nearest deadline to be considered at this moment would be next 20 April 2013, specifically with regard to claims corresponding to the 1st quarter of 2009.
EU Claim — Refund of (Dividend) Withholding Tax

Turn EU law into value!
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<td>France</td>
<td>As from 2006, the French team has prepared and filed more than 2,500 claims and appeals with the Court for investment funds, pension funds, and life insurance companies. Fidal has a long standing relationship with the French tax authorities and especially with the “Centre des Impôts des non-résidents” (&quot;non-resident’s tax office&quot;). Fidal’s pending petitions with the Administrative Tax Court of Montreuil and the French tax authorities amount to approximately EUR 800 million. Fidal has also represented four out of ten applicants in the CJEU Santander case.</td>
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<td>Germany</td>
<td>The German team started to work in the field of withholding tax reclaims in early 2006. They have prepared and filed more than 4,000 claims for numerous investment funds, pension funds, and insurance companies registered worldwide. KPMG Germany’s pending Aberdeen claims amount to approximately EUR 2 billion (years 2001-2015). KPMG Germany’s pending third country claims amount to EUR 200 million.</td>
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<td>Italy</td>
<td>KPMG in Italy (KStudio Associato) is currently managing around 160 claims. The majority of them are referred to entities located in the UK, but KStudio has also worked for Luxembourg, US, Dutch, Spanish and Finnish claimants. The latter are mainly pension funds and investment funds, life insurance companies, investment trusts, open-ended investment companies (OEIC) and Unit trusts. KStudio’s pending claims with the Italian tax authorities amount to approximately EUR 90 million (30% of which relate to non-EU claims).</td>
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| The Netherlands | KPMG Meijburg has been responsible for a large number of Aberdeen claims filed by/on behalf of investment funds resident in the UK, Austria, Denmark, Ireland, Finland, France, Germany, Guernsey, Luxembourg, Norway, the US, Sweden and Spain. KPMG Meijburg’s pending claims amount to more than EUR 1 billion. Moreover, KPMG Meijburg successfully represented:  
- an investment fund client before the Den Bosch Court of Appeals in obtaining reimbursement of Dutch withholding tax on dividend income,  
- several non-EU/EEA resident portfolio investors before the Dutch tax authorities in obtaining reimbursement of Dutch withholding tax.  
- UK pension funds before the Dutch tax authorities leading to the first major breakthrough in EU claims in the EU, resulting a refund of more than EUR 100 million (January 2015).  
- UK pension funds before the Breda Lower Court in obtaining an interest award (compensation for damages in the form of late payment). |
### Poland

KPMG Poland has filed numerous EU law-based withholding tax reclaims for the past three years. Until present, withholding tax refunds obtained for those Aberdeen claimants in total exceed PLN 20 million. KPMG Poland is in the process of obtaining additional refunds for a number of EU-based investment and pension funds. KPMG Poland has extensive experience in advising EU-based clients in matters concerning compatibility of local law with EU law principles and CJEU infringement procedures. KPMG Poland represented a US investment fund in claiming refund of dividend withholding tax based on EU Law; this case was referred to the CJEU on 28 March 2012 and decided on 10 April 2014 (Case 190/12 DFA Emerging Markets) (pending case 190/12, Emerging Market Series of DFA Investment Trust Company).

### Spain

The Madrid-based Aberdeen claim team has broad experience in this type of claims: KPMG Spain currently manages over 2000 claims of this nature for over 100 claimants, and has recently filed several appeals against withholding tax reclaim rejections before Spanish Courts. Likewise, we have made an estimation of the total amount of WHT requested for reimbursement in Spain and it is about Euros 200 million (200,000,000.00) on behalf of approximately 110 claimants.

In this regard, as previously commented KPMG Spain has already obtained positive resolutions from the Spanish Administrative Courts (i.e. TEAR) and the STA in compliance with their execution has already refunded approximately EUR 3,000,000 for numerous funds from across Europe.

### Finland

KPMG Finland has filed hundreds of withholding tax reclaims for non-resident investment funds, and also has received reimbursements for both listed corporate investment funds (i.e. such having own legal capacity) and contractual based UCITS-compliant open-ended investment funds. In addition, KPMG Finland has obtained a positive advance ruling for one of its clients from the Finnish Central Tax Board in relation with the reimbursement of withholding tax levied in breach of EU Law. KPMG Finland has also assisted two clients in third-country appeals to Finnish Supreme Administrative Court on the breach of EU law. Meanwhile the first refunds were granted to overseas claimants.

### Norway

KPMG Norway has assisted 110 overseas funds, 69 of which are investment funds and 41 pension funds to recover Norwegian dividend withholding tax. Starting in 2006, claims go back to 2003. KPMG Norway has assisted 26 Luxembourg SICAVs in preparing and filing claims to recover Dividend Withholding Tax. Claims cover all years from 2003 until 2015.

### Sweden

KPMG Sweden’s pending claims amount to approximately SEK 2 billion (EU clients SEK 1.5 billion, EEA clients SEK 167 million and Third Country clients approximately SEK 358 million). KPMG Sweden has advised approximately 200 German-resident investment funds on filing Aberdeen claims for years 2007 to 2015.
Why choose to work with KPMG?

KPMG adopts a scalable approach in considering the possible claims, and wider implications of EU law on the EU law-based dividend withholding tax refund (ordinary dividends and manufactured dividends).

We offer a tailor-made full scope service package, taking claimants from the awareness phase through to settling a claim. We recommend all entities to evaluate their position as soon as possible, and then to decide to which extent it makes sense to take some form of action now (e.g. a joint initiative by all interested parties to gain clarity on the main rules going forward).

Our international practice group has extensive experience of EU law and EU law-based claims. This is combined with the skills we have in the Financial Sector, where KPMG holds a market leading position across Europe. Our dedicated Financial Services team has experience in advising on all withholding tax dividend refund claims. We also have a broad network of specialists across Europe with whom we work closely on these issues and EU law-based claims.

KPMG member firms are actively advising a number of their clients on challenges to EU withholding tax regimes and are in an exchange process with tax authorities across Europe in that regard. A significant number of claims have now been made in a number of territories (e.g. the Netherlands, France, Germany, Spain and Italy). For detailed information about the current situation in the European countries please see the country section.
The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

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