

EU dividend withholding tax reclaims

Defining your strategy in a moving
landscape



Building a better
working world

New developments and key drivers

The free movement of capital provisions in the Treaty on the Functioning of the European Union (the Treaty) extend to third (i.e., non-EU) countries:

- ▶ This principle has been reaffirmed by the Court of Justice of the European Union (CJEU) in its April 10, 2014, decision (C-190/12) in relation to a US regulated investment company (US RIC) investing in Polish shares as well as in its November 13, 2019, decision (C-641/17) related to a Canadian pension fund with respect to German-sourced dividends.
- ▶ It has also been enforced in decisions issued by EU national courts with respect to US RICs.
- ▶ Refunds for dividend withholding tax are currently granted to US RICs and Canadian funds by Finland and Poland. We expect this trend to continue and to expand to France, Spain and Sweden.
- ▶ Across the asset management industry as a whole, there are billions of euros of dividend withholding tax estimated relating to open tax periods for which reclaims are yet to be filed.

European investment funds have been filing claims for refunds of dividend withholding tax in reference to the “free movement of capital” principle established by the Treaty (EU WHT reclaims) for a number of years.

The European courts have indeed consistently established that it is discriminatory and contrary to the free movement of capital principle for EU member states to impose a higher level of taxation on dividends from portfolio investments paid to non-residents compared with similar payments paid to resident investors.

The free movement of capital provisions in the Treaty extend to third countries, notably provided the investor does not have a direct (controlling) interest, which is generally not the case for investment funds.

This position was reinforced in the CJEU decisions in *FIM Santander* and *Emerging Markets Series of DFA Investment Trust Company*, which both involved US RICs, and more recently in *College Pension Plan of British Columbia* regarding a Canadian pension fund.

How EY can help

We can assist you throughout the process with:

- ▶ Initial feasibility study and cost-benefit analysis
- ▶ Filing reclaims in relevant jurisdictions
- ▶ Post-filing steps up to refund
- ▶ Regular technical updates

The EY experience

Global and coordinated approach

We have a global network of experienced professionals dedicated to the asset management industry. The ability to work across global locations in a coordinated and consistent way from Canada and the US has significantly contributed to the successful delivery of well-controlled and timely service to clients.

Detailed knowledge

We provide a thorough understanding of the potential for reclaims in EU countries, coupled with a detailed case-by-case approach, taking into account the different and specific fact patterns at hand.

Established track record with clients

We have successfully assisted large global asset managers and small single fund managers for Australian, Canadian, Cayman Islands, US and other non-EU domiciled investment funds, as well as many EU-domiciled investment funds.

We will adjust our approach to your organization's specific needs and constraints, so you can develop and document a robust filing strategy and protect your reclaim position.

EU reclaim is a very rapidly evolving landscape

Here are some recent developments

EU reclaim – US overview

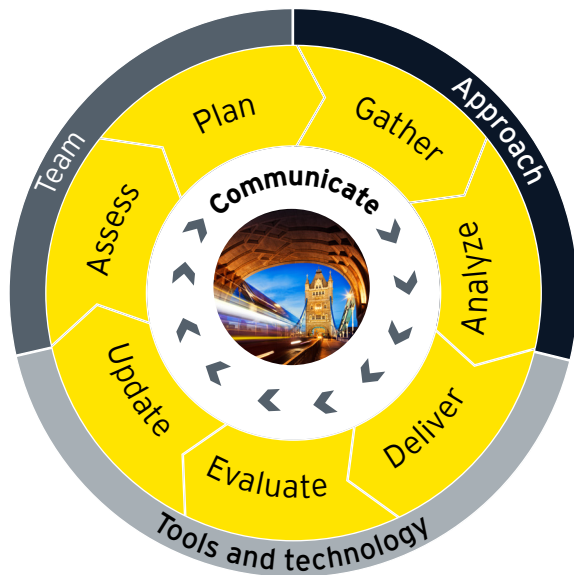
Notice 2016-10, released by the IRS on January 15, 2016, provides guidance for US RICs on how to account for refunds of foreign withholding taxes under Sections 853 and 905(c).

In order to support the position of US RICs with foreign tax authorities, the U.S. Securities and Exchange Commission (SEC) has issued a statement in March 2017 on the issuance of SEC certificates in the context of EU reclaims.

EU reclaim – country overview

Austria	▶ Positive 2019 Austrian Federal Fiscal Court decision related to a Canadian pension fund. A Supreme Court decision is still pending regarding foreign investment funds (corporate structure).	Italy	▶ Refunds granted to UK life insurance companies. Positive impact expected from the 2019 CJEU decision <i>College Pension Plan of British Columbia</i> (C-641/17) on Italian tax litigation proceedings. Absence of case law regarding the situation of US RICs and Canadian funds.
Belgium	▶ Refunds granted to undertakings for collective investment in transferable securities (UCITS) funds subject to the Directive 2009/65/EC. The situation of alternative investment funds (AIFs) and third countries funds, such as US RICs and Canadian funds, is still unresolved. Belgium removed the discrimination against foreign investment funds as of 2013. Litigation regarding statutes of limitation is ongoing.	Netherlands	▶ Positive 2020 CJEU ruling issued regarding a German investment fund (C-156/17). Dutch Supreme Court decisions expected in 2020 and/or 2021 in several landmark cases. These decisions will be of great importance to all EU reclaims filed.
Denmark	▶ Danish Supreme Court decision expected in 2020 or 2021, following a positive 2018 CJEU decision related to a European fund (C-480/16) and a 2019 High Court of Eastern Denmark decision.	Poland	▶ While the reclaim assessment process and length still vary among the different Polish tax offices, refunds have consistently been granted to both US RICs and Canadian funds since the <i>Emerging Markets Series of DFA Investment Trust Company</i> CJEU decision (C-190/12).
Finland	▶ Positive case law on US RICs (close-end and open-end funds). US RICs and Canadian funds reclaims positively processed (refunds granted). New domestic withholding tax exemption applicable to qualifying foreign investment funds in effect since January 1, 2020 (currently lack of clarity on how the requirement of being contractually established will be interpreted). These new provisions should not impact prior years' reclaims.	Portugal	▶ Opportunity since July 1, 2015, following the new tax regime for domestic investment funds.
France	▶ Refunds granted to UCITS funds and AIFs. First positive refund decisions issued to the benefit of some US RICs.	Spain	▶ In November 2019, the Spanish Supreme Court issued a decision related to a US RIC assisted by EY. Following this decision, Spanish courts granted refunds to US RICs that had established their comparability to UCITS funds. These recent developments present a great opportunity for new and existing US RICs and Canadian funds claimants that are comparable to UCITS funds.
Germany	▶ Started taxing German foreign investment funds in 2018. Positive 2019 CJEU decision related to a Canadian pension fund (C-641/17). German courts are also reviewing the case of various funds claimants (including a US RIC). Recent 2019 decision of the German Federal Fiscal Court clarifies the conditions for the accrual of interest on refunds of taxes levied in violation of EU law.	Sweden	▶ Refunds expected in Sweden for US RICs and Canadian funds following positive 2020 Swedish Supreme Administrative Court decision and Swedish Administrative Court of Appeal ruling.

Key phases of a successful EU reclaims project



In summary, the *FIM Santander* and *Emerging Markets Series of DFA Investment Trust Company* rulings and the increasing number of refund decisions have made it clear that there is a significant opportunity for non-EU-resident funds to successfully file EU WHT reclaims.

Why act now?

There are statutes of limitations to restrict the periods for which claims can be made. These are typically, but not always, on a calendar-year basis, and they need to be considered so that opportunities to file claims are not missed.

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