Withholding tax on EU investments

New reclaims opportunity for pension funds

2017

Building a better working world

Our study reveals new reclaims opportunities for pension funds

In view of the fact that a massive trend of claims was filed by investment funds, based on the European Union Court of Justice (CJUE) case law (Aberdeen, Santander), a new opportunity is open to pension funds.

Indeed, the European Commission (EC), supported by the EY network of member firms, has launched a study aiming to identify potential discriminations on EU investments made by pension funds.

The outcomes of the study, to be published soon, reveal that the potential discriminations on EU investments are much more numerous than expected (more than 70, involving at least 20 Member States).

This large number can be notably explained by tax exemption benefiting domestic pension funds, whereas nonresident pension funds incurred a withholding tax (WHT) on outbound revenues.

In other cases, domestic pension funds benefit from a taxation on a net basis (i.e., deductibility of technical reserves), leading to a *de facto* exemption of the income.

Why act now?

Despite positive developments in the regulations of certain countries, discrimination between resident and nonresident pension funds remains widely present across the EU, and opportunities to reclaim unduly collected taxes are not always identified and acted upon.

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 monitored so that opportunities to file claims are not missed.

Pension funds that proceed with a complete review of their European portfolio can identify potential reclaim opportunities and take appropriate actions to preserve their rights. Failing to do so may end up reducing the extent of reclaim opportunities due to statutes of limitations, as was the case for certain pension funds following the Santander reclaim opportunities.

The EY advantage

Firsthand participation in the study	EY has assisted the EC in the study. We have identified many situations where pension funds are being discriminated against, and developed a strong range of technical arguments to defend their position in front of the local tax authorities, which should help increase the chance of success of their reclaims.
Global and coordinated approach	We have a global network of experienced professionals dedicated to the asset management industry. Our ability to work across global locations in a coordinated and consistent way has significantly contributed to our 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.
Proven track record with clients	We have assisted many clients with filing EU reclaims, including EU and non-EU pension funds, investment funds, insurance companies and charities across many European jurisdictions, for the recovery of EU withholding taxes on dividend, interest and real estate investments.

We will adjust our approach to your organization's specific needs and constraints and make sure you develop and document a robust filing strategy to protect your reclaim position from filing to refund.

Pension funds are still being discriminated against in the EU and only the filing of EU reclaims can reverse it

Background

EY assisted the EC in a new study, whose goals were to identify potential tax obstacles on cross-border investments made by pension funds and life insurers (in the framework of their unit-linked contracts).

The starting point of the study was the Commission/Finland CJEU case law whereby the Court ruled that technical reserves booked by Finnish pension funds being directly linked to the income received and leading to a *de facto* exemption of such income put resident and nonresident pension funds in a comparable situation. As a result, resident and nonresident pension funds should benefit from the same tax treatment.

Opportunities for EU and non-EU pension funds are proportionate to the volume of their investments

Today, assets managed by pensions funds represent roughly 5% of the worldwide assets under management. This means that, across the asset management industry as a whole, there are potentially trillions of Euros of dividend withholding tax, relating to open tax periods, for which reclaims are yet to be filed.

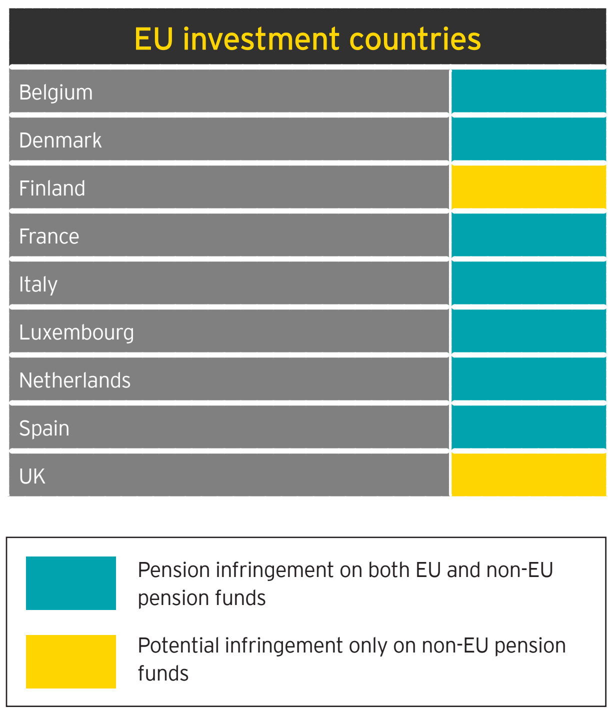
Results of 2017 EY study

The study clearly shows that almost all the EU Member States distinguish between residents and nonresidents on the taxation of a more-or-less range of revenue deriving from investments made on their own jurisdictions (dividends, interest, real estate revenue, capital gains).

The EC intends to challenge any sources of the potential discriminations, which can be categorized as follows:

- Obvious discriminatory tax treatments: tax exemption or *de facto* tax exemption thanks to a taxation on a net basis mechanism of the resident vs. WHT levied on the non-resident (e.g., Germany, Netherlands, Spain, Denmark)
- Heterogeneous tax administrative practices due to unclear legislation (e.g., Poland)
- Higher tax administrative burden on nonresidents (i.e., extra filing procedures to request a refund of the WHT borne).

All of the above situations should lead to restricting the free movement of capital (protected by Article 63 of the Treaty on the Functioning of the European Union) as they discourage nonresidents from making investments in a Member State, or discourage Member States' residents from doing so in other States; for this reason, they must be abolished to achieve a true single market for capital.



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
- Technical watch

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