



## PwC's EU Direct Tax Group

EUDTG is PwC's pan-European network of EU law experts. We specialise in all areas of direct tax, including the fundamental freedoms, EU directives and State aid rules. You will be only too well aware that EU direct tax law is moving quickly, and it's difficult to keep up. But, it is crucial that taxpayers with an EU or EEA presence understand the impact as they explore their activities, opportunities and investment decisions. Find out more on: [www.pwc.com/eudtg](http://www.pwc.com/eudtg)

Interested in receiving our free EU tax news? Send an e-mail to [eudtg@nl.pwc.com](mailto:eudtg@nl.pwc.com) with "subscription EU Tax News".

For more detailed information, please do not hesitate to contact:

Job Hoefnagel  
PwC Netherlands  
+31 6 23 83 70 43  
([job.hoefnagel@pwc.com](mailto:job.hoefnagel@pwc.com))

Hein Vermeulen  
PwC Netherlands  
+31 6 20 94 10 31  
([hein.vermeulen@pwc.com](mailto:hein.vermeulen@pwc.com))

Or your usual PwC EUDTG contact

# EU Direct Tax Newsalert

## CJEU Judgment in *Aktienfonds Deka* on comparability of Dutch and foreign investment funds

On 30 January 2020, the European Court of Justice ("CJEU") rendered its judgment in the *Köln-Aktienfonds Deka* ("Deka") case (C-156/17).

The Dutch Supreme Court referred three procedural questions to the CJEU regarding a refund of Dutch dividend withholding tax to foreign investment funds. These questions concern the compatibility of the Dutch Fiscal Investment Institution ("FII") regime (as it read until 2007) with EU law, and, more specifically, the shareholder and distribution requirements under the regime.

### Köln-Aktienfonds Deka

Deka is an investment fund established under German law in the form of a *Publikums-Sondervermögen*. The activities of Deka consist of investing the fund's assets. Furthermore, Deka is exempt from German corporate income tax and qualifies as an Undertaking for Collective Investment in Transferable Securities ("UCITS"). Deka received dividends from Dutch shares which were subject to Dutch dividend withholding tax. Deka applied for a refund of Dutch dividend withholding tax, considering itself comparable to a Dutch FII.

### Dutch FII

A Dutch FII is effectively entitled to a refund of the dividend withholding tax withheld from it. The Dutch tax authorities rejected the application for a refund made by Deka on the grounds that Deka did not comply with all the requirements to qualify as FII, being the distribution requirement (i.e. the FII regime requires distribution of the fund's taxable profit within eight months following the end of the year) and the shareholder requirements (participation thresholds which are not to be exceeded by holders of shares or certificates of participation in a fund in order to qualify for the FII regime).

### Meeting the FII requirements

In the CJEU's view, EU Member States are free to define material and formal requirements which must be met to benefit from such a specific tax regime applicable to collective investment undertakings and to the dividends received by those undertakings. However, these requirements should apply indiscriminately and the burden of proof should not make it impossible or excessively difficult for a non-resident taxpayer to obtain the tax advantage at hand.

### Shareholder requirements

Deka argued that it was difficult to prove that it met the shareholder requirements because its shares were publicly traded via an electronic trading system. Deka, therefore, had no information on the identity of its shareholders.

Based on the CJEU judgment, it is for the referring court to verify that the shareholder requirements under the FII regime do not de facto disadvantage non-resident investment funds. Provided that the tax authorities require proof of compliance with those requirements for resident investment funds and non-resident investment funds alike, these requirements apply indiscriminately. However, if the tax authorities impose a more stringent burden of proof on non-resident investment funds, this constitutes a breach of the freedom of capital movement.

### Distribution requirement

Deka argued that the legal framework to which it is subject in Germany effectively also required a minimum distribution to its shareholders which may be topped-up with an additional deemed distribution for tax purposes, as a result of which non-distributed profits were effectively subject to taxation at the level of the end investors. As such, Deka argued that this method of distribution and taxation had a similar object and purpose as the distribution requirement under the FII regime.

The CJEU held that it is for the referring court to verify whether the object and purpose of the FII regime lie principally in the taxation of profits of the shareholder in an investment fund (i.e. achieving fiscal neutrality for investors in the investment fund). If so, a resident investment fund which makes an actual distribution of its profits, and a non-resident investment fund whose profits are not distributed but are deemed to have been distributed and are taxed as such at the shareholder in that fund, must be regarded as being in objectively comparable situations. In both cases, the level of taxation is shifted from the investment fund to the shareholder.

### Takeaway

The CJEU judgment brings positive news for foreign investment funds which filed claims in the Netherlands for the period up to 2007. The fact that they did not actually distribute their profits to their investors does not make them automatically incomparable with a Dutch FII. The Dutch Supreme Court will now have to issue its final judgment taking into account the CJEU's judgment. We advise foreign investment funds to continue protecting their rights for refund for claims already filed and by filing new claims timely. We expect further litigation on the compatibility of the FII regime in force since 2008, which contains a changed methodology, which effectively provides resident investment funds with a refund of Dutch dividend withholding tax. We are of the view that the regime de facto has the same object and purpose and that this CJEU judgement could be applicable to the post 2007 regime as well.

