IBFD Report for The Netherlands' Ministry of Finance

Dividend stripping and anti-dividend stripping approaches in selected countries

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1. Introduction

The International Bureau of Fiscal Documentation (IBFD) in Amsterdam, the Netherlands, has been requested by the Ministry of Finance of the Netherlands to carry out research in relation to anti-dividend stripping measures adopted in selected countries.

The countries included in the research are:

- Austria;
- Belgium;
- Denmark;
- Finland;
- France;
- Germany;
- Norway;
- Sweden; and
- Switzerland.

The research is aimed at getting insight in the different forms of dividend stripping that has occurred in these countries and how these countries have responded to the different appearances of dividend stripping. While analysing the responses of the selected countries a distinction is made between legislative and administrative responses. To achieve a uniform approach in the research and to facilitate an analysis of the different country approaches, for each of the selected countries the following 5 questions have been answered.

Question 1 – Definition of dividend stripping in the domestic legislation

Does your country's tax legislation provide a definition of dividend stripping? If so, could you please state the definition and its legal source? In addition, is there any official statement (e.g., from the tax authorities or any other relevant body) regarding this definition and the application of double tax treaties? If so, please include it.

Question 2 – Forms of dividend stripping

What forms of dividend stripping occurred in your country? Please list these forms, regardless of whether they led to litigation or not.

Question 3 – Explicit anti-dividend stripping measures

Are there any explicit anti-dividend stripping measures in your country's legislation? If so:

- are these measures part of tax legislation, or is there a different anti-abuse mechanism?
- are these measures aimed at preventing dividend stripping, or are they reactive?
- is dividend stripping considered a tax offence? If so, what penalties apply?

Question 4 – Rules and procedures for applying the specific anti-dividend stripping measures

Has the tax administration issued rules or procedures for applying the anti-dividend stripping measures referred to in Question 3?

Question 5 – Case law regarding dividend stripping

Is there any case law regarding dividend stripping and the anti-dividend stripping legislation? If so, could you please provide a short summary of relevant case(s)?

The answers for the various countries are included in the annexes to this study.

2. Dividend stripping in the selected countries

2.1. Definition of dividend stripping in the domestic tax legislation

Although many countries have introduced anti-dividend stripping legislation, it is clear that none of the selected countries have a definition of dividend stripping in their domestic tax legislation. Most of the countries have also not issued an official statement regarding the relation between dividend stripping and the application of tax treaties. However, during discussions in the French parliament on the scope of the anti-dividend stripping, the French government pointed at the fact that many of the proposals made by French members of parliament would be contrary to the provisions of tax treaties concluded by France.

2.2. Forms of dividend stripping in the selected countries

In the letter of the State Secretary of Finance to the Second Chamber of the Netherlands' parliament of 3 December 2018[1], issues relating to cum/ex and cum/cum transactions were mentioned. According to this letter, cum/ex situations in which no dividend withholding tax was paid but where the entitlement to a refund of dividend withholding tax existed, could not occur in the Netherlands.

In this report, we will focus on cum-ex[2] and cum-cum[3] schemes as well as the sale of dividend coupons. It appears that most of the selected countries have been confronted with these forms. Austria and Denmark have seen all three of these types of dividend stripping while Belgium and Germany seem more familiar with cum-ex and cum-cum schemes. In the case of Norway and Sweden, dividend stripping seems to be less of a priority although the Norwegian tax authorities recently announced that they were part of a Nordic task force that would look into the lending and borrowing of shares close to dividend dates.

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[1] https://zoek.officielebekendmakingen.nl/kst-25087-225.html

[2] Cum-ex trading schemes generally involve the establishment of an equity position 'cum' (with)-dividend in a jurisdiction providing favourable tax treatment. After payment of the dividend, the shares are returned 'ex' (without)-dividend to the jurisdiction in which they were originally held. Cum-ex trading is typically carried out before the dividend is paid out, with settlement taking place after the distribution date. The abuse of cum-ex trading involves multiple parties claiming refunds of dividend withholding tax on the same dividends. In cum-ex trades, shares with and without dividend rights were quickly traded between various market participants just before the payout date for the dividend, allowing traders to reclaim double the taxes.

Three or more entities are needed for a successful Cum-ex scheme. A simplified example of cum-ex schemes is as follows:

1. Three investors, A, B and C come together.
2. Investor A owns shares with a value of EUR 20 million in company X.
3. Investor B sells the same shares worth €20 million to Investor C without owning them himself (short selling) before the dividend pay-out day.
4. Company X then distributes its dividends. Investor A receives a dividend pay-out of €750,000 (assuming dividend withholding tax of 25%, A receives 75% of total dividend - €1 million). After the dividend pay-out, the shares are worth €19 million.
5. Investor A receives a tax certificate to reimburse €250,000 of dividend tax (representing the 25% tax reclaim).
6. Investor A sells the shares worth €19 million to Investor B.
7. Investor B delivers the shares worth €19 million to Investor C and pays C an additional €750,000
8. Investor C sells shares worth €19 million back to Investor A.
9. Investor C receives a tax certificate to reimburse €250,000 of dividend tax. Investors A, B & C share the tax reimbursements.

[3] Cum-cum trading generally involves an investor in a jurisdiction with no (or limited) entitlement to tax relief in respect of tax incurred in relation to a dividend trading with a party in a jurisdiction where there is an entitlement (or a greater entitlement) to such tax relief with a view to sharing the available tax relief (or an equivalent amount). Cum-cum trading transactions are typically carried out and settled prior to the dividend being paid out.

2.3. Anti-dividend stripping measures included in the domestic (tax) legislation

The third question is divided into three elements:

a. are the anti-dividend stripping measures part of tax legislation, or is there a different anti-abuse mechanism?
b. are the anti-dividend stripping measures aimed at preventing dividend stripping, or were they introduced in a response to dividend stripping in the selected countries.
c. is dividend stripping considered a tax offence? If so, what penalties apply?

It appears that a number of the selected states have until now not introduced specific anti-dividend stripping rules. Countries like Denmark, Finland, Norway and Sweden rely on the application of the general anti-avoidance rules[4] (GAARs). Also Switzerland has not introduced anti-dividend stripping legislation. In Switzerland, the federal tax authorities have trained their staff that deal with refunding withholding taxes to recognize dividend stripping situations. It appears that Denmark is currently working on new legislation to prevent and combat withholding tax schemes through expanding the tax administration's option to obtain information from third parties.

Specific anti-dividend stripping legislation has been introduced in Austria, Belgium, France and Germany. In all these countries, the measures were introduced in response to the so-called Cum-Ex and Cum-Cum schemes. Therefore, in this respect the legislation was reactive.

Looking at the content of the specific anti-dividend stripping legislation, there are important similarities in the legislation. The legislation in Austria, France and Germany all include a provision targeting transactions a temporary sale of sales within 45 days of the ex-dividend date. It should be noted that the introduction of Section 32, paragraph 4, of the Austrian Income Tax Act also relates to a decision of the Administrative Supreme Administrative Court of 28 June 2022, in which the court ruled that Austrian withholding tax could only be refunded to the person who owned the shares at the time of the general meeting of shareholders[5]. The German rules are rather rigid and contrary to the approach of Austria and France, do not provide for a possibility for the taxpayer to demonstrate or proof that the case at hand is not a case of dividend stripping. Questions have been raised as to the relation between this legislation and EU law.

[4] In Denmark, Section 3 of the Tax Assessment Act contains the GAAR of Directive (EU) 2016/1164 and prior to the date of effect of that provision, Denmark applied a substance-over-form approach. In Finland, Section 28 of the Law on Tax Procedure contains a GAAR. In the case of Sweden, A GAAR is included in Section 4 of the Swedish Withholding Tax Act while also the Swedish Tax Evasion Acts may also be used in combatting dividend stripping schemes.

[5] https://steuernachrichten.pwc.at/en/blog/2023/07/10/austrian-tax-amendment-act-2023-passed/

Art. 266 and 281 of the Belgian Income Tax Act provides for pension funds an uninterrupted holding period of 60 days, therefore slightly longer than the periods included in the tax legislation of Austria, France and Germany.

In most of the selected countries (Austria, Belgium, Finland, Germany, Sweden and Switzerland) dividend stripping is in general not specifically regarded as a tax offense. However, under circumstances, it may be considered as tax evasion which is a tax offense.

In Denmark, dividend stripping which is aimed at unlawfully obtaining multiple refunds of dividend withholding tax is considered a tax offense which may lead to fines and imprisonment. If France, the intentional failure to withhold tax may be considered a tax offense with severe fines and penalties. Norway may impose penalties or start criminal prosecution in the case of wrong reporting in connection with a refund claim for withholding tax.

2.4. Development and publication of rules and procedures by the tax authorities

From the countries that have introduced specific anti-dividend stripping measures in their domestic (tax) legislation, Austria and Germany have published rules and procedures regarding the application of the anti-dividend stripping measures included in their tax legislation. France has also published public guidance which seems to have been inspired by the approach adopted by the US. However, in late 2023, the French Supreme Administrative Court ruled that the position adopted by the French tax authorities exceed the legislation. No new or updated public guidance has been published by the French authorities. The Belgian tax authorities until now have not published any procedures or guidance in relation to the Belgian anti-dividend stripping measures.

Interesting is the case of Denmark. Although Denmark has not introduced specific anti-dividend stripping legislation and relies on the application of its GAAR, the Danish tax authorities have issued rules and procedures to combat dividend stripping. For a refund of Danish dividend withholding tax, five conditions must be met. For further information see the Annex for Denmark.

2.5. Case law regarding dividend stripping

In all of the selected countries, except Finland, case law may be found in relation to the different forms of dividend stripping. Most of the decisions relating to dividend stripping are in favour of the tax authorities. No case law exists in relation the recently introduced specific anti-dividend stripping legislation apart from the decision of the French Supreme Administrative Court in relation to the French administrative rules and procedures (see also 2.4). For an overview of the various cases, please see the various country annexes.

Austria

Question 1

Does your country's tax legislation provide a definition of dividend stripping? If so, could you please state the definition and its legal source? In addition, is there any official statement (e.g., from the tax authorities or any other relevant body) regarding this definition and the application of double tax treaties? If so, please include it.

There is no definition on dividend stripping as such. Further, no official statement has been made by the tax authorities regarding to the relation of dividend stripping and the application of double taxation conventions.

Sec 27(6)(4) Income Tax Act however defines income from sale of dividend or interest coupon as investment income and in particular, as income from the realisation of capital assets provided that the underlying share remains in the disposition of the seller. In other words, the seller is considered to derive capital gains from the alienation of dividend coupon. As for the buyer, the dividend is treated as current investment income.

As for dividend stripping within the meaning of a short-term cum-ex-trade or cum-cum-trade, Sec 32(4) Income Tax Act provides for special rules on attribution of dividends with respect of stocks held by a CSD. The attribution of dividends follows the legal and economic ownership in respect of stocks at the end of the record date. In fact, the stocks must be recorded on the custody of the legal owner at the end of the record date at the latest. For purposes of the foreign tax credit or the withholding tax refund, as the case may be, the legal owner must bear the economic risks in respect of the stocks. In other words, the owner must be, considering hedging transaction, subject to at least 70% of the loss in value. In addition, the stocks must be held for 45 days within a period of 45 days prior to the record date and 45 days post the record date. The foregoing requirements do not apply if the total amount of dividends does not exceed EUR 20,000 in the calendar year.

For other stocks, shares and equity participations, the economic ownership principle applies. In fact, the dividend is attributed to the legal owner of the shares if the latter is in the position to dispose over the shares and the income thereon.

Question 2

What forms of dividend stripping occurred in your country? Please list these forms, regardless of whether they led to litigation or not.

Cum-ex-trades, cum-cum-trades and sale of dividend coupons have been identified in Austria. According to the investigative journalists collective the loss of Austrian tax revenue from cum-ex schemes is estimated to be around EUR 187 million[6]. To our knowledge no detailed information is available as to the size and revenue loss of cum-cum schemes and the sale of dividend coupons.

Question 3

Are there any explicit anti-dividend stripping measures in your country's legislation? If so:

- are these measures part of tax legislation, or is there a different anti-abuse mechanism?

- are these measures aimed at preventing dividend stripping, or are they reactive?

- is dividend stripping considered a tax offence? If so, what penalties apply?

Sec 32(4) Income Tax Act[7] was introduced to tackle cum-ex- and cum-cum-trades.

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[6] https://correctiv.org/en/latest-stories/cumex-files-en/2021/10/21/cumex-files-2-0-how-did-we-calculate-e150-billion-in-tax-loss/

[7] The text of Section 32(4) of the Austrian Income Tax Act is as follows.

(4)Für Einkünfte im Sinne des § 27 Abs. 2 Z 1 lit. a, die über das Wertpapierliefer- und Wertpapierabrechnungssystem eines Zentralverwahrers ausbezahlt werden, gilt Folgendes:

1. Die Zurechnung der Einkünfte setzt wirtschaftliches Eigentum an den zugrundeliegenden Anteilen am Ende des Record-Tages voraus. Record-Tag ist der erste Handelstag nach dem Tag, an dem die Anteile erstmals ohne Auszahlungsanspruch gehandelt werden. Wirtschaftliches Eigentum liegt ab dem Zeitpunkt vor, zu dem die Anteile tatsächlich geliefert worden sind.

2. Die volle Anrechnung oder Rückerstattung der für die Einkünfte einbehaltenen Kapitalertragsteuer setzt bei zeitnahen Übertragungen zum Record-Tag voraus, dass der Steuerpflichtige ein angemessenes wirtschaftliches Risiko (lit. a) trägt und während der Mindesthaltedauer (lit. b) ununterbrochen wirtschaftlicher Eigentümer der zugrundeliegenden Anteile ist. Ansonsten kann die Kapitalertragsteuer nur insoweit angerechnet oder rückerstattet werden, als die Übertragung zu keinem Steuervorteil führt. Dabei gilt:

Neither kind of the trade is defined as tax offense. The lower tax courts have dealt with the cases based on Sec 241a Federal Fiscal Code. According thereto, the tax authorities may reclaim the withholding tax repaid in a withholding tax refund procedure if the repayment has been made without legal ground. Currently, the cases are pending before the Supreme Administrative Court aimed at clarifying the question if the refund has been done without legal ground.

The (tax) criminal proceedings around the cum-ex trades and cum-cum trades were initiated by the Financial Market Authority, whose attention was caught by the number of derivative trades around Austrian stocks primarily of insurance companies and the respective reporting obligation. The question was raised if the volume of stocks was actually traded on the market. In the following, the public prosecutor opened criminal proceedings inter alia based on accusation of organised tax fraud. To our knowledge, the cases are pending as the tax criminal proceedings depend on the withholding tax refund cases based on Sec 241a Federal Fiscal Code and in the following, the developments in Germany.

Question 4

Has the tax administration issued rules or procedures for applying the anti-dividend stripping measures referred to in Question 3?

The Income Tax Guidelines 2000 Paras 6914 to 6922 deal with the interpretation of Sec 32(4) Income Tax Act. The relevant paragraphs of the Income Tax Guidelines 2000 provide guidance with respect to the attribution of the income to taxpayer. According to paragraph 6915 requires that the economic owner exists at the end of the so-called record date, which under paragraph 6916 is the first day of trading of the shares on which the shares are traded ex-dividend. Paragraph 6917 stipulates as from when the economic

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a) Ein angemessenes wirtschaftliches Risiko setzt voraus, dass der Steuerpflichtige das Risiko aus einem sinkenden Wert der Anteile im Umfang von mindestens 70 Prozent wirtschaftlich selbst trägt. Dabei sind Ansprüche des Steuerpflichtigen und ihm nahestehender Personen aus Kurssicherungsgeschäften zu berücksichtigen.

b) Die Mindesthaltedauer umfasst 45 Tage und muss innerhalb eines Zeitraumes von 45 Tagen vor und 45 Tagen nach dem Record-Tag erreicht werden.

c) Die vorstehenden Bestimmungen sind nicht anzuwenden, wenn die Einkünfte im Sinne des § 27 Abs. 2 Z 1 lit. a, für die die Anrechnung oder Rückerstattung der Kapitalertragsteuer erfolgen soll, im Veranlagungszeitraum nicht mehr als 20 000 Euro betragen.

Zentralverwahrer sind juristische Personen gemäß Art. 2 Abs. 1 Z 1 und 2 der Verordnung (EU) Nr. 909/2014 zur Verbesserung der Wertpapierlieferungen und -abrechnungen in der Europäischen Union und über Zentralverwahrer sowie zur Änderung der Richtlinien 98/26/EG und 2014/65/EU und der Verordnung (EU) Nr. 236/2012, ABl. Nr. L 257 vom 28.08.2017 S. 1.

ownership of the shares exists. Paragraphs 6918 and 6919 make clear that the income attribution rules also apply with respect to the exemption or reduction of dividend withholding tax. Paragraphs 6921 and 6922 provide guidance with respect to the burden of proof in relation to the income attribution and for dividend payments exceeding EUR 20,000.

The full German language text of these paragraphs have been added to this country chapter.

Question 5

Is there any case law regarding dividend stripping and the anti-dividend stripping legislation? If so, could you please provide a short summary of relevant case(s)?

The ruling has been issued by the Supreme Administrative Court on 28 June 2022 (Ro 2022/13/0002). In the underlying case, a non-Austrian corporation, which was a tax resident in Dubai, made over-the-counter purchase and sale transactions in Austrian shares. The shares were purchased after the date of the dividend resolution (record date), but prior to the date, starting from which the shares traded ex dividend (ex-date). Thus, the shares were purchased cum dividend and sold shortly after the ex-date. Based on the tax treaty between Austria and the UAE, which provides for a zero withholding tax rate on Austrian dividends, the Dubai company lodged withholding tax claims with the Austrian tax authorities. The tax office in charge however rejected the claims arguing that the shares were delivered into the custody after the ex-date and thus, too late. For this reason, the claimant was not considered as having economic ownership in respect of shares on the dividend payment date. The decision of the tax office was later upheld by the lower tax court.

Based on its earlier case law (VwGH 21 November 1995, 95/14/0035) and the 2022 decision of the German Federal Tax Court, the Supreme Administrative Court stated that the attribution of dividends for income tax purposes follows the economic ownership in respect of shares on the dividend resolution date. Whether the claimant qualifies as economic owner on the dividend payment date shall be of no relevance. It stems from the foregoing that the withholding tax can be only claimed by the taxpayer who qualifies as shareholder at the time of the shareholders meeting and the dividend resolution. It however remains unclear whether the claimant must be in the position to vote on the dividend resolution. In fact, the participation in the voting requires the acquisition of shares one to 14 days prior to the shareholders meeting.

Relevant Provisions in the domestic tax legislation of Austria

23.7 Einkünftezurechnung bei Dividenden aus zentralverwahrten Aktien (§ 32 Abs. 4 EStG 1988)

23.7.1 Allgemeines

6914

§ 32 Abs. 4 EStG 1988 sieht für Dividenden im Sinne des § 27 Abs. 2 Z 1 lit. a EStG 1988, die über das Wertpapierliefer- und Wertpapierabrechnungssystem eines Zentralverwahrers ausbezahlt werden, eine ausdrückliche Regelung vor, wem diese Dividenden ertragsteuerlich zuzurechnen sind. Nur diese Person kann als Abgabenschuldner in weiterer Folge zur allfälligen Rückforderung oder Anrechnung der KESt berechtigt sein. Zudem sieht die Regelung zur Verhinderung von unerwünschten KESt-Vermeidungsmodellen auch eine Anrechnungs- bzw. Erstattungsbegrenzung vor, die eine Anrechnung und Erstattung von bereits abgeführter Kapitalertragsteuer in bestimmten missbräuchlichen Fällen begrenzt.

Die Regelung kommt unabhängig von der Erfassung der Dividendeneinkünfte als Einkünfte aus Kapitalvermögen oder als betriebliche Einkünfte sowohl im Rahmen der Einkommen- als auch der Körperschaftsteuer zur Anwendung.

23.7.2 Einkünftezurechnung

6915

Die Zurechnung einer Dividende aus einer zentralverwahrten Aktie setzt gemäß § 32 Abs. 4 Z 1 EStG 1988 voraus, dass wirtschaftliches Eigentum (siehe Rz 6917) an den zugrundeliegenden Anteilen am Ende des Record-Tages (siehe Rz 6916) besteht.

Voraussetzung für die Anwendung der Zurechnungsbestimmung ist somit, dass die Auszahlung von Dividenden und dividendenähnlichen Zahlungen (zB aus Genussrechten) über das Wertpapierliefer- und Wertpapierabrechnungssystem eines Zentralverwahrers erfolgt; in diesen Konstellationen fallen bei inländischen Gesellschaften Kapitalertragsteuerabzug (bei der ausschüttenden Körperschaft) und Auszahlung der Dividende (über den Zentralverwahrer an die einzelnen Banken bzw. weiter an deren Kunden) auseinander.

Zentralverwahrer sind definiert als juristische Personen gemäß Art. 2 Abs. 1 Z 1 und 2 der Verordnung (EU) Nr. 909/2014 zur Verbesserung der Wertpapierlieferungen und -abrechnungen in der Europäischen Union und über Zentralverwahrer sowie zur Änderung der Richtlinien 98/26/EG und 2014/65/EU und der Verordnung (EU) Nr. 236/2012, ABl. Nr. L 257 vom 28.08.2014 S. 1.

6916

Record-Tag ist der erste Handelstag nach dem Tag, an dem die Anteile erstmals ohne Auszahlungsanspruch gehandelt werden: Nach den Börsenusancen werden Aktien bis zu einem bestimmten Tag mit Dividendenanspruch (cum-Dividende) gehandelt, wobei hier grundsätzlich das Verpflichtungsgeschäft maßgeblich ist. Ab dem folgenden Tag (ex-Tag) erworbene Aktien beinhalten keinen Dividendenanspruch mehr (ex-Dividende), wobei in der Regel eine entsprechende Reduktion des Aktienkurses stattfindet. Die Auszahlung der Dividende erfolgt in weiterer Folge an denjenigen, der spätestens am Record-Tag (erster Tag nach dem ex-Tag bzw. der zweite Tag nach dem cum-Tag) die Aktien auf seinem Depot eingebucht hat. Der Record-Tag ist damit jener Tag, an dem der Zentralverwahrer die Anspruchsberechtigung feststellt. Dieser Tag ist künftig auch für die steuerliche Einkünftezurechnung relevant.

Damit weicht für diese Dividenden aufgrund der ausdrücklichen gesetzlichen Anordnung die Einkünftezurechnung von den allgemeinen Grundsätzen ab (siehe Rz 6110a). Wird somit eine Aktie cum (mit) Dividende erworben und - zB aufgrund eines Lieferverzuges - erst nach dem Record-Tag geliefert, ist diese Dividende dem Erwerber nicht zuzurechnen. Da die Aktie allerdings mit Dividendenanspruch gekauft und ohne geliefert wurde, erhält der Erwerber der Aktie anstelle der Dividendenzahlung eine Zahlung aus dem Marktregulierungsverfahren (sogenannter "Market Claim"). Diese Zahlung aus dem Marktregulierungsverfahren führt zu einer Kürzung der Anschaffungskosten der erworbenen Aktie, wenn dieser vor einer allfälligen Veräußerung der Aktie geleistet wird. Fließen diese Zahlungen aus dem Marktregulierungsverfahren hingegen nach einer allfälligen Veräußerung zu, stellt dies - unabhängig von der Höhe der ursprünglichen Anschaffungskosten - einen zusätzlichen steuerpflichtigen Veräußerungserlös dar, der - nach den Bestimmungen des § 27 Abs. 8 EStG 1988 - mit einem allfälligen realisierten Veräußerungsverlust verrechenbar ist (siehe auch Rz 6143). Für den Veräußerer führt diese Zahlung zu einer steuerwirksamen Kürzung des Veräußerungserlöses. Wird hingegen eine Aktie ex (ohne) Dividende erworben und dennoch bereits am Record-Tag geliefert, erfolgt eine Regulierungszahlung vom Käufer (dem die Dividende steuerlich zuzurechnen ist) an den Verkäufer (sogenannter "Reverse Claim"). Diese Zahlung hat weder Auswirkungen auf die Anschaffungskosten des Käufers noch auf den Veräußerungserlös des Veräußerers.

6917

Ausdrücklich gesetzlich geregelt ist zudem, dass wirtschaftliches Eigentum ab dem Zeitpunkt vorliegt, zu dem die Anteile tatsächlich geliefert worden sind (Verfügungsgeschäft, Erfüllung des Verpflichtungsgeschäfts). Das Datum der Einlieferung ist somit das Datum, an dem der Kaufauftrag erfüllt (nicht abgeschlossen) wird. Das wirtschaftliche Eigentum an diesen depotverwahrten Gesellschaftsanteilen kann somit nur bei jenem Steuerpflichtigen vorliegen, auf dessen Depot die Wertpapiere (die Aktien) tatsächlich eingebucht (geliefert) sind. Dabei müssen zudem sämtliche sonstige für das Vorliegen des wirtschaftlichen Eigentums notwendigen Voraussetzungen erfüllt sein.

Die Regelungen des § 32 Abs. 4 EStG 1988 kommen dabei - unabhängig vom Tag der Hauptversammlung - erstmals für Zahlungen zur Anwendung, deren Record-Tag nach dem 30. Juni 2023 liegt.

6918

Die Grundsätze der Einkünftezurechnung sind auch für Zwecke der Entlastung an der Quelle anzuwenden. Eine Befreiung vom Kapitalertragsteuerabzug an der Quelle gemäß § 94 Z 2, Z 6 und Z 12 EStG 1988 sowie aufgrund völkerrechtlicher Verpflichtungen setzt daher bei Dividendenausschüttungen ebenso voraus, dass die Voraussetzungen für die Befreiung spätestens am Ende des Record-Tages erfüllt sind. Kann die ausschüttende Gesellschaft daher nicht nachweisen, dass die Voraussetzungen für die Entlastung an der Quelle erfüllt wurden, kommt eine Haftungsinanspruchnahme gemäß § 95 Abs. 1 EStG 1988 in Betracht.

23.7.3 Anrechnungs- bzw. Erstattungsbegrenzung

6919

§ 32 Abs. 4 Z 2 EStG 1988 sieht zudem für bestimmte Fälle eine Anrechnungs- bzw. Erstattungsbegrenzung vor. Die Bestimmung ist dann anzuwenden, wenn die Einkünfte (= Bruttodividenden) aus der jeweiligen Gesellschaft, für die die Anrechnung oder Rückerstattung der Kapitalertragsteuer erfolgen soll, im Veranlagungszeitraum mehr als 20.000 Euro pro Steuerpflichtigem betragen (Bagatellfreigrenze). Die Bagatellfreigrenze ist somit gesellschaftsbezogen und nicht auf sämtliche Dividendeneinkünfte des Steuerpflichtigen zu beziehen. Für Dividenden unter 20.000 Euro soll Z 2 nicht zur Anwendung kommen; hier genügt das wirtschaftliche Eigentum am Ende des Record-Tages nach Z 1.

Die volle Anrechnung oder Rückerstattung der für die Einkünfte einbehaltenen Kapitalertragsteuer setzt dabei voraus, dass der Steuerpflichtige ein angemessenes wirtschaftliches Risiko trägt und während der Mindesthaltedauer ununterbrochen wirtschaftlicher Eigentümer der zugrundeliegenden Anteile ist. Da es sich um kumulative Voraussetzungen handelt, kommt die Regelung bereits zur Anwendung, wenn nur eine der beiden Voraussetzungen nicht erfüllt ist.

Ein angemessenes wirtschaftliches Risiko setzt voraus, dass der Steuerpflichtige das Risiko aus einem sinkenden Wert der Anteile im Umfang von mindestens 70 Prozent wirtschaftlich selbst trägt. Dies liegt beispielsweise dann nicht vor, wenn durch eine entsprechend ausgestaltete Wertpapierleihe, ein Pensionsgeschäft oder ein Derivat der Steuerpflichtige, dem die Einkünfte zuzurechnen sind, wirtschaftlich (nahezu) kein Kursrisiko trägt. Dabei sind Ansprüche des Steuerpflichtigen und ihm nahestehender Personen aus Kurssicherungsgeschäften zu berücksichtigen. Das Mindestwertänderungsrisiko (= angemessenes wirtschaftliches Risiko) ist dabei während der Mindesthaltedauer durchgehend zu tragen.

Die Mindesthaltedauer umfasst 45 Tage und muss innerhalb eines Zeitraumes von 45 Tagen vor und 45 Tagen nach dem Record-Tag erreicht werden. Bei Bestandsveränderung innerhalb eines Depots rund um den Record-Tag ist im Zweifel davon auszugehen, dass früher angeschaffte Wertpapiere als zuerst veräußert gelten (FIFO).

6920

Durch diese Bestimmung soll Gestaltungen vorgebeugt werden, die nicht auf eine Mehrfachverwertung, sondern eine Vermeidung der Kapitalertragsteuer abzielen. Aufgrund des Charakters der Norm als Missbrauchsvermeidungsvorschrift (vgl. Art. 29 Abs. 9 OECD-MA) soll die Anrechnung oder Erstattung der Kapitalertragsteuer nur insoweit versagt werden, als die Übertragung zu einem Steuervorteil führt (zB weil der Entleiher - anders als der Verleiher - nicht oder nur in geringerer Höhe der Kapitalertragsteuer unterliegt). Für das Vorliegen eines Steuervorteils ist dabei auf das Gesamtbild der Verhältnisse abzustellen (zB bei mehrfachen Übertragungen der Wertpapiere).

Kann vom Steuerpflichtigen nachgewiesen werden, dass durch die Übertragung kein oder ein geringerer Steuervorteil entstanden ist, kommt es somit - selbst wenn kein angemessenes wirtschaftliches Risiko getragen wird oder die Mindesthaltedauer nicht erfüllt ist - zu einer entsprechenden Anrechnung und Erstattung der KESt.

Beispiel:

A verleiht zentralverwahrte Aktien an B, wobei B die Aktien am Record-Tag auf seinem Depot eingebucht hat. Nach dem DBA zwischen Österreich und dem Ansässigkeitsstaat von A steht Österreich ein Quellenbesteuerungsrecht in Höhe von 15% zu. Nach dem DBA zwischen Österreich und dem Ansässigkeitsstaat von B steht Österreich nur ein Quellenbesteuerungsrecht in Höhe von 10% zu, weshalb ein Steuervorteil vorliegt. Es kann daher nur zu einer Erstattung von Kapitalertragsteuer in Höhe von 12,5% (27,5% minus 15%) kommen.

Die Regelung ist dabei sowohl im Veranlagungsverfahren als auch im Rückerstattungsverfahren (zB aufgrund völkerrechtlicher Verpflichtungen oder § 21 Abs. 1 Z 1a KStG 1988) anzuwenden.

23.7.4 Nachweismöglichkeiten

6921

Im Rückerstattungsverfahren sowie im Veranlagungsverfahren (zB im Rahmen der Verlustausgleichsoption oder weil Zahlungen von ausländischen Gesellschaften gemäß § 93 Abs. 5 letzter Teilstrich EStG 1988 unrichtig durch den Abzugsverpflichteten zugerechnet wurden) ist die Einkünftezurechnung nachzuweisen. Dazu muss der Nachweis des Einlieferungszeitpunktes anhand entsprechender Bankbestätigungen erfolgen, wobei es dem Finanzamt vorbehalten ist, deren Echtheit (auch im Wege der Amtshilfe) nachzuprüfen bzw. weitere Unterlagen (zB Verträge über Zu- und Verkäufe sowie Verleih von Wertpapieren) anzufordern. Dabei muss aus den Unterlagen bei Kaufvorgängen sowohl das Datum des Vertragsabschlusses als auch das Datum der tatsächlichen Einlieferung erkennbar sein. Zudem muss aus den Unterlagen deutlich hervorgehen, wer am Record-Tag der entsprechende Depotinhaber war. Ist bei Dividenden aus Inlandsgesellschaften Kapitalertragsteuer vom Schuldner gemäß § 95 Abs. 2 Z 1 lit. a EStG 1988 einbehalten worden, kann im Rahmen der Veranlagung grundsätzlich von einer Einkünftezurechnung an den Steuerpflichtigen ausgegangen werden, wenn eine solche auch von der inländischen depotführenden Stelle gemäß § 93 Abs. 5 letzter Teilstrich EStG 1988 vorgenommen wurde (siehe dazu Rz 7739b).

6922

Übersteigen die Dividendenzahlungen aus einer Gesellschaft den Bruttobetrag von 20.000 Euro (Bagatellfreigrenze) im Veranlagungsjahr, sind zusätzlich die Depotumsätze in Zusammenhang mit den betroffenen Aktien für einen Zeitraum von 50 Tage vor bis 45 Tage nach dem Record-Tag nachzuweisen (insbesondere Jahresdepotauszüge, die Zu- und Abgänge vergleichbar einem Journal enthalten), wobei durch die Frist jedenfalls ersichtlich sein soll, wann die Aktien zwischen dem 45. Tag vor und nach dem Record-Tag am Depot eingebucht worden sind. Dadurch kann in jedem Fall festgestellt werden, ob die Mindestbehaltefrist von 45 Tagen innerhalb dieses Zeitraums von 90 Tagen erfüllt wurde. Zudem hat der Antragsteller zu bestätigen, dass er ein angemessenes wirtschaftliches Risiko trägt. Weiters ist eine unterfertigte Bescheinigung der depotführenden Bank vorzulegen, die bestätigt, dass ihr kein risikominderndes Geschäft im Zusammenhang mit dem Erwerb der Aktie bekannt ist. Eine solche

Bestätigung ist nicht auszustellen, wenn die Bank Kenntnis von einer finanziellen Vereinbarung im Zusammenhang mit den zugrundeliegenden Wertpapieren hat, die eine Risikotragung ausschließen oder vermindern. Dies kann beispielsweise ein Pensionsgeschäft oder eine Wertpapierleihe sein, aber auch Derivatprodukte. Um diese Bestätigung abgeben zu können, ist allenfalls eine Entbindung vom Bankgeheimnis notwendig.

Belgium

Question 1

Does your country's tax legislation provide a definition of dividend stripping? If so, could you please state the definition and its legal source? In addition, is there any official statement (e.g., from the tax authorities or any other relevant body) regarding this definition and the application of double tax treaties? If so, please include it.

The Belgian tax legislation does not contain a definition of dividend stripping. There is also no official statement on dividend stripping and the application of double tax treaties.

Question 2

What forms of dividend stripping occurred in your country? Please list these forms, regardless of whether they led to litigation or not.

The main forms of dividend stripping in Belgium are cum-/ex transactions, situations where the economic and legal ownership of shares is split and distributions which reduce the value of shares.

Question 3

Are there any explicit anti-dividend stripping measures in your country's legislation? If so:

- *are these measures part of tax legislation, or is there a different anti-abuse mechanism?*
- *are these measures aimed at preventing dividend stripping, or are they reactive?*
- *is dividend stripping considered a tax offence? If so, what penalties apply?*

Legal provisions

Belgian tax legislation contains various provisions to combat dividend stripping. Many dividend stripping rules were introduced by a law of 11 January 2019 to combat tax fraud and avoidance with respect to withholding tax (*précompte mobilier/roerende voorheffing*), which amongst other things, applies to dividends.[8]

Article 262(2)(3) of the Income Tax Code (*Code des Impôts sur les revenus/Wetboek inkomstenbelastingen)* (ITC) provides that the recipient of dividends must pay withholding tax in case of an unjustified refund or exemption.

Special provisions are introduced to combat abuse, cum-ex transactions, and a temporary split between the legal and economic ownership of shares.

Article 266 of the ITC provides that no exemption from withholding tax will be granted for artificial and non-genuine constructions aimed to obtain a dividend deduction under the participation exemption, an exemption from withholding or the benefits of the EU parent Subsidiary Directive.

Article 266(4) of the ITC provides that the tax administration can combat all artificial constructions for which the administration shows that they are set up with the main or one of the main purposes to avoid dividend withholding tax or to obtain the benefits of the Parent Subsidiary Directive.

From 22 January 2019, Article 266(4) of the ITC also provides that the fact that a beneficiary of dividends, whose social purpose consists solely or mainly of the management and investment of funds collected for the purpose of paying statutory or supplementary pensions, has not held the securities in full ownership for an uninterrupted period of at least 60 days constitutes a rebuttable presumption that the legal act or set of legal acts with which the dividends are linked, is non-genuine. Under this provision, the pension fund in that case is not regarded as the beneficial owner.

This addition, which was implemented after fraud signals from practice, intends to make a distinction between long and short-term investments. In the explanatory memorandum to the bill proposal, the Belgian government indicated that it presumes that pension funds, generally, have a long term investment policy.[9]

[8] Act containing measures to combat tax fraud and evasion regarding withholding tax (*Loi portant des mesures de lutte contre la fraude et l'évasion fiscales en matière de précompte mobilier/Wet houdende maatregelen van bestrijding van de belastingfraude en -ontwijking inzake roerende voorheffing*), published in the Official Gazette no. 7578 of 21 January 2019.

[9] Parliamentary Documents 2018-19, no. 3400/1, 6 and 7.

Short term investments may, therefore, bear a bigger risk to be fiscally driven. The legislator regarded a 60 days period sufficient for this distinction.

The term full ownership is not defined in Belgian tax legislation. However, in the Ministry of Finance commentary on article 276 ITC concerning the granting of a credit for withholding tax it is indicated that term implies that the owner must have the bare ownership and usufruct of the shares, The owner must be entitled to the dividends and be authorized to fully dispose of the shares which, for example, means that he can sell or lend the shares.

Based on article 281 ITC a credit for withholding tax on dividends on securities which the recipient uses to exercise his professional activity is only granted on condition that he owned the full ownership of the securities on the date on which the beneficiaries of the dividends are identified. Because this identification of the shareholders usually takes two working days, usually an entitlement to a credit existed if taxpayer bought shares with dividend coupons. Taxpayers who did not yet own the shares at the date of identification of the beneficial owners were entitled to a claim to compensation for the dividends. Also, for this compensation a credit was granted.

From 2019, a right to a credit for withholding tax is no longer granted for the compensation payment.

Article 106(6bis) of the Royal Decree to the Income Tax Code (*Arrêté royal d'exécution du Code des Impôts sur les revenus/Koninklijk Besluit tot uitvoering van het Wetboek inkomstenbelastingen)*(RD ITC) provides from 2019 that taxpayers are only entitled to a credit for the withholding tax on dividends if they have full ownership of the shares on the day before the dividends have made payable. This means that a credit will be granted to the beneficiary of the dividends and no longer to a taxpayer who receives compensation for not receiving dividends.[10]

This provision aims to combat dividend stripping in form of a double credit for the withholding tax on dividends by both the owner of the shares at the time that dividends were made payable and the new owner of the shares at the day of identification of the shareholders.

Article 281/1 ITC contains a similar provision for pension funds. The provision regulates that no credit is granted for withholding tax on dividends if the fund has not held full ownership of the securities producing the dividends for an uninterrupted period of at least 60 days.

[10] Parliamentary Documents 2018-19, no. 3400/1, 8 and no. 3400/2, 3.

If the 60 days period is not met, a construction is deemed to be non-genuine. However, this presumption is rebuttable. The provision does, therefore, not apply if the beneficiary shows that the dividends are not linked to a non-genuine legal act or set of legal acts which is set up to obtain, as the main purpose or as one of the main purposes, a credit for the withholding tax on these dividends.

Based on article 282 of the ITC no credit for withholding tax will be granted for dividends if such dividend would trigger a write-down or capital loss of the shares to which they relate.[11]

However, this rule does not apply to dividends on shares for which the taxpayers show that:

(1) those were owned in full ownership during an uninterrupted period of twelve months prior to the receipt of the dividends;
(2) the shares during this period were not fully owned at any time by another taxpayer than a company subject to corporate income tax; and
(3) the shares were not owned by a foreign company that invested these shares in a Belgian establishment over an uninterrupted period.

The aim of this ownership rule is that the denial of the withholding tax credit in case of a value decrease will only apply in cases of dividend stripping.[12]

Article 123 of the RD ITC indicates that a credit for withholding tax is only granted with respect to income which is included in the taxable base. In this context income is deemed not to be included to the extent that it is exempt or when the recipient is subject to a limited taxable base under a special regime under which only abnormal and favorable benefits and non-deductible expenses are taxed, which for example is the case with international pension funds and certain collective investment funds.

As an exemption to this rule a credit is granted for withholding tax on the exempt amount of dividends of EUR 833 (indexed annually) received by individuals based on article 21(1)(14) ITC.[13]

In addition, taxpayers may only credit the withholding tax up to the amount of the withholding tax on income that is taxable in proportion to the period in which they had full ownership of the shares.

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[11] In an earlier Circular Ci.D.19/416.334 of 9 September 1992 it was clarified that for the application of this provision it is irrelevant if the value decrease is reflected in the commercial accounts. However, the Court of Appeal Antwerp on 17 June 2003 *Fiscale Jurisprudentie/Jurisprudence Fiscale* No. 2004/75 decided that only booked value decreases must be taken into account for the application of this provision.

[12] Parliamentary Documents Chamber 2001-02, nr. 1918/001, 31.

[13] Royal Decree of 28 April 2019, to amend the Royal Decree to the Income Tax, Published in the Official Gazette no. 2019012136 of 9 May 2019.

Circular for pension funds

Further clarifications regarding the application of article 266(4) are provided by Circular 2019/C/28 on the waiver of the collection of withholding tax on dividends granted or allocated to pension funds. The Circular indicates that a legal act or a series of legal acts will be regarded as artificial to the extent that such act or series of acts is not set up based on valid business reasons that reflect economic reality. In the case of pension funds, the rebuttable presumption exists that a construction is artificial if the shares are not owned for an uninterrupted period of 60 days.[14]

Share-buy-backs

In a ruling the credit of withholding tax on dividends in case of a share-buy-back was clarified. The ruling concerned the situation where a Belgian company sells shares to another Belgian company in the context of share-buy-back. Under this ruling, the selling company is entitled to a credit if the following cumulative conditions are met:

1) the shares are withdrawn within the same taxable period;

2) the withholding tax is withheld on the purchasing price;

3) the shares were owned by the selling company for an uninterrupted period for more than 1 year at the time of the share-buy-back.[15]

Audits

Since 2023, Belgium also extended the period for audit and assessment in dividend tax cases from 3 to 6 years if the case involves deductions or reductions granted on the bases of a double-taxation agreements or European directives. This will allow the tax administration to perform additional audits and assess omitted

[14] Circular 2019/C/28 of 11 April 2019 on the waiver of the collection of withholding tax on dividends granted or allocated to pension funds (*Circulaire 2019/C/28 concernant la renonciation à la perception du précompte mobilier sur les dividendes alloués ou attribués à des fonds de pension*/*Circulaire 2019/C/28 betreffende de verzaking aan de inning van de roerende voorheffing op dividenden verleend of toegekend aan pensioenfondsen*), published at the website of the Federal Public Service for Finance.

[15] Rulings No. 600.223 of 20 June 2006 and no. 600.208 of 27 June 2006.

tax in more complex dividend stripping cases. In cases of fraud, the audit and tax assessment period were extended from 7 to 10 years.

Liability risks

A withholding agent who wants to avoid the risk of liability when paying dividends to a pension fund without withholding tax must request a certificate showing that the following conditions are met:

1) That the sole or main social purpose of the management and investment of funds is that those are collected for the purpose of paying out statutory or supplementary pensions.
2) The securities from which the dividends arise have been retained in full ownership for an uninterrupted period of at least 60 days either on the date of the allocation or payment of the dividends, or on a later date within 15 days of the date of the allocation or payment of the dividends.

The recipient of the dividends may file an appeal to obtain a repayment of the withholding tax if he has effectively retained the shares in full ownership for at least 60 days or shows that, notwithstanding a shorter period of ownership, the legal act or set of legal acts to which the dividends are linked is genuine.

However, even if the 60 days holding period is met the tax administration may refuse to repay the withholding tax if the administration proves that the legal act or set of legal acts to which the dividends are linked is artificial.

Withholding tax payment

In case of an unjustified exemption or refund, the recipient of the dividends must pay the withholding tax on the dividends based on article 262(4) ITC.

Question 4

Has the tax administration issued rules or procedures for applying the anti-dividend stripping measures referred to in Question 3?

The Belgian tax authorities have not issued any rules or procedures for applying the anti-dividend stripping measures referred to above.

Question 5

Is there any case law regarding dividend stripping and the anti-dividend stripping legislation? If so, could you please provide a short summary of relevant case(s)?

Jurisprudence

The Belgian Supreme Court on 27 September 1991 decided that a company that purchased share coupons after the issuing company had decided to distribute a dividend but before the actual payment of the dividend is not entitled to a credit for the withholding tax on the dividends. Because the coupons were not owned at the time the dividends were made payable, the Court held that no dividends were received but income from a commercial transaction.[16] The Belgian Supreme Court in that case also decided that an entity collecting a dividend (to which it was legally entitled) for the account of someone else could not be considered to be the recipient of that dividend for tax purposes and was therefore not entitled to credit the tax withheld.

In a more recent case, the 6th Fiscal Chamber of the Court of Brussels dealt with a case regarding a split between the ownership of the shares and the entitlement to the dividends.[17] In the context of a demerger by acquisition of a company A, the assets were divided between the acquiring companies B and C. The demerger agreement provided that the shares of company X, owned by company A, were allocated to the acquiring company B and that the latter undertook to allocate the dividends paid by X and related to its activities in the current financial year, to the acquiring company C.

[16] Hof van Cassatie 27 September 1991, published in Algemeen Fiscaal Tijdschrift 1992, 222. In the same sense was decided by Court of Appeal Brussels 20 March 1997, Fiscale Jurisprudentie/Jurisprudence Fiscal (FJF) No. 97/1331.; Court of Appeal Liège 28 March 1997, F.J.F., nr. 97/226.

[17] Brussel (Fr.) (6e Fiscal Chamber.) no. 2010/AR/3286, 25 February 2016 (no. 2010/AR/3286).

Company C requested both the participation exemption deduction and the offsetting of the withholding tax withheld at source by company X. The Court of Appeal decided that the amounts received by company C were not dividends within the meaning of the dividend definition included in article 18 of the ITC. Company C had never been the owner or usufructuary of the shares in company X. The fact that company C received the dividends was exclusively due to the commitment of company B. Consequently, the Court held that the tax administration correctly refused the application of the participation exemption deduction and the offsetting of the withholding tax.

Relevant Provisions in the domestic tax legislation of Belgium

Art. 262(2)(3) Wetboek inkomstenbelastingen

3° inkomsten van roerende goederen en kapitalen, loten van effecten van leningen en de in artikel 90, eerste lid, 11°, bedoelde inkomsten, waarvan de voorheffing ten onrechte aan de verkrijger van de inkomsten is terugbetaald of die ofwel op grond van een onjuiste verklaring, ofwel op collectieve of individuele spaarrekeningen die niet voldoen aan de vereisten van artikel 21, eerste lid, 8°, onrechtmatig met vrijstelling van voorheffing zijn verkregen;

Artikel 266(4) Wetboek inkomstenbelastingen

De in het eerste lid bedoelde verzaking van de inning van de roerende voorheffing kan geen

uitwerking hebben op dividenden die verbonden zijn met een rechtshandeling of een geheel van rechtshandelingen waarvan de administratie, rekening houdend met alle relevante feiten en omstandigheden, heeft aangetoond, tenzij bewijs van het tegendeel, dat deze handeling of dit geheel van handelingen kunstmatig is en is opgezet met als hoofddoel of een van de hoofddoelen de aftrek op de in artikel 202, § 1, 1° en 2°, bedoelde inkomsten, de in het eerste lid bedoelde verzaking op deze inkomsten of één van de voordelen van Richtlijn 2011/96/EU in een andere lidstaat van de Europese Unie te verkrijgen. Een rechtshandeling of een geheel van rechtshandelingen wordt als kunstmatig beschouwd voor zover zij niet is opgezet op grond van geldige zakelijke redenen die de economische realiteit weerspiegelen. Het feit dat een verkrijger van dividenden waarvan het maatschappelijk doel uitsluitend of hoofdzakelijk bestaat uit het beheer en het beleggen van fondsen ingezameld met het doel wettelijke of aanvullende pensioenen uit te betalen, de effecten waaruit de dividenden voortkomen niet gedurende een ononderbroken periode van ten minste 60 dagen in volle eigendom heeft behouden, vormt een weerlegbaar vermoeden dat de rechtshandeling of het geheel van rechtshandelingen waarmee de dividenden verbonden zijn, kunstmatig is.

Art. 276 Wetboek inkomstenbelastingen

De in artikel 1 vermelde belastingen worden naar de mate als hierna is bepaald gekweten door verrekening van de onroerende, de roerende en de bedrijfsvoorheffing, het forfaitair gedeelte van buitenlandse belasting en de belastingkredieten.

Artikel 281 Wetboek Inkomstenbelastingen

De roerende voorheffing betreffende dividenden waarvan de verkrijger de effecten gebruikt voor het uitoefenen van zijn beroepswerkzaamheid, wordt slechts verrekend op voorwaarde dat de belastingplichtige de volle eigendom van de effecten had op de datum waarop de rechthebbenden van de dividenden worden geïdentificeerd.

Artikel 281/1 Wetboek Inkomstenbelastingen

Uit hoofde van dividenden wordt geen roerende voorheffing verrekend indien de verkrijger, waarvan het maatschappelijk doel uitsluitend of hoofdzakelijk bestaat uit het beheer en het beleggen van fondsen ingezameld met het doel wettelijke of aanvullende pensioenen uit te betalen, de effecten waaruit de dividenden voortkomen niet gedurende een ononderbroken periode van ten minste 60 dagen in volle eigendom heeft behouden.

Het eerste lid is niet van toepassing op de dividenden waarvan de verkrijger heeft aangetoond dat zij niet verbonden zijn met een rechtshandeling of een geheel van rechtshandelingen die kunstmatig is en is opgezet met als hoofddoel of een van de hoofddoelen de verrekening van de roerende voorheffing op deze dividenden te verkrijgen.

Artikel 282 Wetboek Inkomstenbelastingen

Uit hoofde van dividenden wordt geen roerende voorheffing verrekend in zover de toekenning of betaalbaarstelling daarvan een waardevermindering of een minderwaarde tot gevolg heeft van de aandelen waarop de dividenden betrekking hebben.

Het eerste lid is niet van toepassing op de dividenden die voortkomen uit aandelen waarvoor de belastingplichtige aantoont dat hij de volle eigendom ervan heeft gehad tijdens een ononderbroken periode van twaalf maanden vóór de toekenning van de dividenden of dat, tijdens de bewuste periode, de genoemde aandelen, in volle eigendom, op geen enkel ogenblik toebehoord hebben aan een belastingplichtige die geen vennootschap is die onderworpen is aan de vennootschapsbelasting of aan een buitenlandse vennootschap welke deze aandelen op een ononderbroken wijze heeft belegd in een Belgische inrichting.

Artikel 106(6) Koninklijk Besluit Wetboek Inkomstenbelastingen

§ 6. Van de inning van de roerende voorheffing wordt volledig afgezien met betrekking tot dividenden waarvan de schuldenaar en de verkrijger binnenlandse vennootschappen zijn niet van toepassing indien het aandelenbezit van de moedermaatschappij uit hoofde waarvan de dividenden worden betaald niet het in § 6bis vermelde minimumpercentage van het kapitaal van de dochteronderneming vertegenwoordigt en die minimumdeelneming niet gedurende een ononderbroken periode van ten minste één jaar wordt of werd behouden.

Voor de toepassing van deze paragraaf wordt voor de vaststelling van de minimumdeelneming in het kapitaal van de dochteronderneming ten name van de overdrager, van de pandgever of van de leninggever geen rekening gehouden met de aandelen die, op het ogenblik waarop de inkomsten toegekend of betaalbaar gesteld zijn, het voorwerp zijn van een zakelijke zekerheidsovereenkomst of van een lening met betrekking tot deze aandelen.

Artikel 123 Koninklijk Besluit Wetboek Inkomstenbelastingen

De roerende voorheffing, de fictieve roerende voorheffing en het forfaitaire gedeelte van buitenlandse belasting worden, in de mate bepaald in de artikelen 276 tot 294 van het Wetboek van de inkomstenbelastingen 1992, met de personenbelasting, de vennootschapsbelasting of de belasting van niet-inwoners verrekend voor zover zij betrekking hebben op inkomsten die in de belastbare grondslag van die belastingen zijn opgenomen.

FOD Financiën, 11.04.2019

Algemene Administratie van de Fiscaliteit - Roerende voorheffing

Inhoudstafel

1. Betrokken wettelijke bepaling

2. Draagwijdte van de wijziging van art. 266, vierde lid, WIB 92

3. Gevolgen voor de inhouding van de RV

1. Deze circulaire heeft als doel de toepassingsmodaliteiten van de verzaking aan de inning van de RV op dividenden te verduidelijken als gevolg van de wetswijziging betreffende de inkomsten die worden toegekend aan een pensioenfonds (1).

Deze wijziging treedt in werking op 22.01.2019 (2).

(1) Zie art. 266, vierde lid, WIB 92, zoals aangevuld door art. 3, W 11.01.2019 houdende maatregelen van bestrijding van de belastingfraude en -ontwijking inzake roerende voorheffing (W 11.01.2019, BS 22.01.2019).

(2) Datum van bekendmaking van de W 11.01.2019 in het Belgisch Staatsblad (zie art. 6, W 11.01.2019).

1. Betrokken wettelijke bepaling

2. Art. 266, van toepassing op 22.01.2019, bepaalt:

'*De Koning kan, onder de voorwaarden en binnen de grenzen die Hij bepaalt, geheel of ten dele afzien van de inning van de roerende voorheffing op inkomsten van roerende goederen en kapitalen en van diverse inkomsten, indien het verkrijgers betreft van wie de identiteit kan worden vastgesteld, of door collectieve beleggingsinstellingen naar buitenlands recht die een onverdeeld vermogen zijn dat wordt beheerd door een beheersvennootschap voor rekening van deelnemers, wanneer hun aandelen in België niet openbaar worden uitgegeven en niet in België worden verhandeld, of effecten aan toonder en gedematerialiseerde effecten waarvan de inkomsten begrepen zijn in één van de volgende categorieën:*

1° inkomsten van voor 1 december 1962 uitgegeven effecten die wettelijk van mobiliënbelasting of van zakelijke belastingen zijn vrijgesteld of aan belastingen zijn onderworpen tegen een aanslagvoet van minder dan 21 %;

2° inkomsten uit certificaten van Belgische instellingen voor collectieve belegging;
3° uitgiftepremies met betrekking tot obligaties, kasbons of andere effecten van leningen uitgegeven vanaf 1 december 1962.

In geen geval kan hij afzien van de inning van de roerende voorheffing op inkomsten:

1° van door effecten vertegenwoordigde leningen waarvan de interest wordt gekapitaliseerd, behalve indien de schuldenaar en de gerechtigde verbonden vennootschappen zijn die hij definieert;
2° van effecten die geen aanleiding geven tot een periodieke uitbetaling van interest en die worden uitgegeven voor een looptijd van ten minste één jaar met een disconto dat overeenstemt met de tot op de vervaldag van het effect gekapitaliseerde interest, behalve indien de schuldenaar en de gerechtigde verbonden vennootschappen zijn die hij definieert;
3° Uit vastgoedcertificaten, voor wat de toekenningen of betaalbaarstellingen van inkomsten betreft die geheel of gedeeltelijk betrekking hebben op de verwezenlijking van het onderliggend onroerend goed.
4° (...).

Het tweede lid is niet van toepassing op effecten voortgekomen uit de splitsing van lineaire obligaties uitgegeven door de Belgische Staat.

De in het eerste lid bedoelde verzaking van de inning van de roerende voorheffing kan geen uitwerking hebben op dividenden die verbonden zijn met een rechtshandeling of een geheel van rechtshandelingen waarvan de administratie, rekening houdend met alle relevante feiten en omstandigheden, heeft aangetoond, tenzij bewijs van het tegendeel, dat deze handeling of dit geheel van handelingen kunstmatig is en is opgezet met als hoofddoel of een van de hoofddoelen de aftrek op de in artikel 202, § 1, 1° en 2°, bedoelde inkomsten, de in het eerste lid bedoelde verzaking op deze inkomsten of één van de voordelen van Richtlijn 2011/96/EU in een andere lidstaat van de Europese Unie te verkrijgen. Een rechtshandeling of een geheel van rechtshandelingen wordt als kunstmatig beschouwd voor zover zij niet is opgezet op grond van geldige zakelijke redenen die de economische realiteit weerspiegelen. Het feit dat een verkrijger van dividenden waarvan het maatschappelijk doel uitsluitend of hoofdzakelijk bestaat uit het beheer en het beleggen van fondsen ingezameld met het doel wettelijke of aanvullende pensioenen uit te betalen, de effecten waaruit de dividenden voortkomen niet gedurende een ononderbroken periode van ten minste 60 dagen in volle eigendom heeft behouden, vormt een weerlegbaar vermoeden dat de rechtshandeling of het geheel van rechtshandelingen waarmee de dividenden verbonden zijn, kunstmatig is.'

2. Draagwijdte van de wijziging van art. 266, vierde lid, WIB 92

3. Sinds 01.01.2017 (3) voorziet een antimisbruikmaatregel ingevoegd in art. 266, WIB 92, erin dat de bevoegdheid van de koning om af te zien van de inning van de RV krachtens die bepaling geen uitwerking kan hebben op dividenden die verbonden zijn met een rechtshandeling of een geheel van rechtshandelingen waarvan de administratie, rekening houdende met alle relevante feiten en omstandigheden, heeft aangetoond, tenzij bewijs van het tegendeel, dat deze handeling of dit geheel van handelingen kunstmatig is en is opgezet met als hoofddoel of een van de hoofddoelen voor:

- de aftrek van de in art. 202, § 1, 1° en 2°, WIB 92, bedoelde inkomsten;

- de verzaking aan de RV op de in art. 266, eerste lid, WIB 92, bedoelde inkomsten;

- of één van de voordelen van richtlijn 2011/96/EU in een andere lidstaat van de Europese Unie te verkrijgen.

Een rechtshandeling of een geheel van rechtshandelingen wordt beschouwd als zijnde kunstmatig voor zover deze handeling of dit geheel van handelingen niet is opgezet op grond van geldige zakelijke redenen die de economische realiteit weerspiegelen.

(3) Zie art. 266, vierde lid, WIB 92, zoals ingevoerd door art. 4, W 01.12.2016 houdende fiscale bepalingen (W 01.12.2016, BS 08.12.2016).
Bepaling van toepassing op de inkomsten die worden toegekend of betaalbaar gesteld vanaf 01.01.2017 (zie art. 5, derde lid, W 01.12.2016).

4. Met het oog op de strijd tegen de belastingfraude en -ontwijking inzake RV heeft de wetgever deze maatregel aangevuld voor bepaalde verkrijgers van de inkomsten.

Zo wordt voorzien dat voor een verkrijger waarvan het maatschappelijk doel uitsluitend of hoofdzakelijk bestaat uit het beheer en beleggen van fondsen ingezameld met het doel wettelijke of aanvullende pensioenen uit te betalen, het feit dat hij de effecten waaruit de dividenden voortkomen niet gedurende een ononderbroken periode van ten minste 60 dagen in volle eigendom heeft behouden, een weerlegbaar vermoeden vormt dat de rechtshandeling of het geheel van rechtshandelingen waarmee de dividenden verbonden zijn, kunstmatig is (4).

(4) Zie art. 266, vierde lid, WIB 92, zoals aangevuld door art. 3, W 11.01.2019.

3. Gevolgen voor de inhouding van de RV

5. Rekening houdende met deze wijziging, zal, opdat de verzaking van de inning van de RV aan de bron kan worden toegepast op dividenden toegekend of betaalbaar gesteld vanaf 22.01.2019 aan pensioenfondsen, de schuldenaar van de RV, zoals bedoeld in art. 261, WIB 92, zich op basis van een attest, ervan moeten verzekeren, dat de verkrijger van de inkomsten zich niet in de situatie bevindt zoals bedoeld in art. 266, vierde lid, in fine, WIB 92.

Aldus dient de schuldenaar van de RV in het bezit worden gesteld van een attest waarmee wordt verklaard dat de verkrijger van de inkomsten (5):

- enerzijds, het beheer en het beleggen van fondsen ingezameld met als doel het uitbetalen van wettelijke of aanvullende pensioenen als uitsluitend of hoofdzakelijk maatschappelijk doel heeft en

- anderzijds, de effecten waaruit de dividenden voortkomen gedurende een ononderbroken periode van ten minste 60 dagen in volle eigendom heeft behouden ofwel op de datum van de toekenning of de betaalbaarstelling van de inkomsten, ofwel op een latere datum gelegen binnen de 15 dagen vanaf de datum van toekenning of betaalbaarstelling van de inkomsten (zie ook nr. 6).

(5) Naast de naleving van de bijkomende voorwaarden eventueel voorzien op dit vlak (zie art. 106 en volgende, KB/WIB 92).

In het geval dat andere elementen moeten worden bevestigd voor de toepassing van de verzaking, kan het geheel van de nuttige vermeldingen worden opgenomen in een enkel attest (6).

(6) Zie bv. art. 117, § 2, KB/WIB 92.

De schuldenaar van de RV kan echter, onder zijn eigen verantwoordelijkheid afzien om zich een attest te laten overhandigen met betrekking tot de naleving van de voormelde voorwaarde van behoud, in de hypothese waarin de aandelen waaruit de inkomsten voortkomen, zijn ingeschreven op naam en ten minste gedurende 60 dagen in volle eigendom worden aangehouden door het pensioenfonds.

6. In voorkomend geval zal de verkrijger van de dividenden een bezwaarschrift (7) kunnen indienen met het oog op de terugbetaling van de RV indien hij effectief de aandelen in volle eigendom gedurende ten minste 60 dagen heeft behouden (8) of indien hij meent en kan aantonen dat, niettegenstaande een kortere bezitsduur, de rechtshandeling of het geheel van rechtshandelingen waarmee de dividenden verbonden zijn, oprecht is.

(7) Zie art. 366 en volgende, WIB 92.
(8) Wat betreft het bezwaarschrift, mag de periode van het behouden van de effecten, die zou volgen op de datum zoals vermeld in nr. 5, tweede lid, hiervoor, in aanmerking worden genomen.

Als het bezwaarschrift wordt ingediend op basis van de grief dat de periode van het behoud van de effecten 60 dagen bereikt, kan de administratie de terugbetaling van de RV weigeren als ze aantoont dat de rechtshandeling of het geheel van rechtshandelingen waarmee de dividenden verbonden zijn, kunstmatig is.

NAMENS DE MINISTER:
Voor de Administrateur-generaal van de Fiscaliteit,

Danny DELVAUX,
Adviseur-generaal

Denmark

Question 1

Does your country's tax legislation provide a definition of dividend stripping? If so, could you please state the definition and its legal source? In addition, is there any official statement (e.g., from the tax authorities or any other relevant body) regarding this definition and the application of double tax treaties? If so, please include it.

No, Denmark's tax legislation does not provide a definition of dividend stripping.

According to the Danish tax authorities, dividend stripping refers to transactions where a party temporarily becomes entitled to dividends with the intention of reducing or crediting the dividend withholding tax on these dividends. Since 2016, Danish tax authorities have significantly tightened their practice and documentation requirements for the recovery of paid dividend withholding tax as a result of a major dividend scandal in which foreign shareholders have been wrongfully repaid more than DKK 12 billion from the Danish state. For example, the practice has been tightened regarding documentation, e.g. in relation to documentation proving beneficial ownership and that the shares have not been lent to or borrowed by third parties on or close to the dividend disbursement date. As a result, it has become much more difficult to get dividend tax refunded and the processing time has been extended.

The main purpose for these tightened documentation requirements is to prevent that multiple parties get a reduction/credit for the same dividend withholding tax paid. The documentation requirement provide the tax administration more information to determine who is the beneficial owner. In Denmark it works roughly the same as in the Netherlands. There are two legal terms which are relevant here, Rette Indkomstmodtager (which corresponds with opbrengstgerechtigde/revenue beneficiary) and Retmæssige ejer (which corresponds to beneficial owner as the term is used in articles 10 to 12 of the OECD Model Convention). The difference is that the indkomstmodtager focuses on the legal recipient of the payments, while the retmæssige ejer focuses on the factual recipient. Like in the Netherlands the first is used to combat cum-ex and the second to combat cum-cum transactions.

Further guidance by the Danish tax authorities on the precise documentation requirements can be found here and here.

Question 2

What forms of dividend stripping occurred in your country? Please list these forms, regardless of whether they led to litigation or not.

Denmark is one of the countries involved in the so-called Cum-Ex files, which were made public in 2018 by the investigative journalists collective, CORRECTIV.[18] This group uncovered a dividend withholding tax scheme in at least twelve countries: Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Spain, Switzerland, the United States. It is estimated that the Cum-Ex scheme has cost these countries collectively in excess of EUR 150 billion. In Denmark alone the estimated loss amounted to about EUR 1.7 billion (DKK 12 billion).

This involves the rapid buying and selling and/or loaning of shares belonging to foreign investors around the dividend disbursement date to claim multiple refunds of dividend withholding tax that was only paid once. The speed with which these transactions were carried out meant that the tax authorities could no longer identify the beneficial owners. This inability to clearly identify the beneficial owner subsequently allowed for receiving multiple refunds of the dividend withholding tax.

Other forms of dividend stripping that have been identified in Denmark, include:

- Cum-Cum Transactions: These transactions involve transferring shares to a party that can claim a tax exemption or refund on dividends under Danish tax rules, and then transferring them back after the dividend is paid. Similar to Cum-Ex transaction, this allows the original owner to benefit from exemptions indirectly. Also cum-cum transactions are combatted by the Danish tax authorities with the same rules and requirements that are used to combat cum-ex transactions.

- Dividend Arbitrage: This strategy involves exploiting differences in tax treatment of dividends across jurisdictions. Investors might temporarily transfer shares to entities in jurisdictions with favourable tax treaties to reduce or avoid withholding tax. Dividend arbitrage could manifest itself as a form of treaty shopping. In such a case, this could then also be combatted through the PPT in the applicable treaty, or failing that the GAAR would also be applicable. However, dividend arbitrage can also be related to national law. Therefore, dividend arbitrage is not limited to treaty shopping situations.

[18] https://correctiv.org/en/latest-stories/2018/10/18/the-cumex-files/

Question 3

Are there any explicit anti-dividend stripping measures in your country's legislation? If so:

- *are these measures part of tax legislation, or is there a different anti-abuse mechanism?*
- *are these measures aimed at preventing dividend stripping, or are they reactive?*
- *is dividend stripping considered a tax offence? If so, what penalties apply?*

1. As Danish tax law does not address dividend stripping separately, it falls under the purview of the General Anti-Avoidance Rule in Section 3 of the Tax Assessment Act (Ligningsloven). The GAAR in Denmark is a general provision that targets any and all transactions by companies that constitute abuse. So, the GAAR is also applicable to transactions involving portfolio shares. In fact, the GAAR also would also apply vis-a-vis transactions between a company and an individual, so also abusive transactions involving an individual should be caught. Moreover, if the GAAR would somehow not apply to transactions involving private persons a general substance-over-form doctrine can also be applied to combat such abusive transactions.

   Section 3 of the Tax Assessment Act was first enacted in May 2015 and changed in 2018 as a result of the implementation of the GAAR in Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (Anti-Tax Avoidance Directive)[19][20]. Before the implementation of the GAAR in Danish national legislation, there has been a long-standing practice, supported by court cases, that follow a (similar) substance over form approach, which means that if the formal legal form does not align with the actual economic reality, the courts disregard the formal transactions and instead allow taxation to take place based on the economic reality. In Danish this is referred to as "realitetsgrundsætning".

   In Section 3, Subsection 1 of the Tax Assessment Act, it is stipulated that taxpayers must disregard

[19] The provision was first introduced in 2015 as a general anti-avoidance rule to prevent abuse of the Parent-Subsidiary and Interest and Royalty directives, and was amended in 2018 as implementation of the adoption of the ATAD in 2016.

[20] The GAAR legal basis is Ligningsloven § 3, which is a law that is in principle applicable to all forms of income taxation in Denmark. As dividend taxation is part of the corporate income tax (it is not a separate law like in the Netherlands, for example) the GAAR also applies here.

arrangements or series of arrangements that are designed with the main purpose, or one of the main purposes, of obtaining a tax advantage that is contrary to the purpose and intent of tax law, and which are not genuine considering all relevant factual circumstances. This also applies to the benefits arising from Directive 2011/96/EU on a common tax regime for parent and subsidiary companies from different member states.

It is also stipulated, according to Section 3, Subsection 5 of the Tax Assessment Act, that taxpayers do not benefit from a double taxation agreement if it is reasonable to conclude, considering all relevant factual circumstances, that obtaining the benefit is one of the main purposes of any arrangement or transaction that directly or indirectly results in the benefit, unless it is demonstrated that granting the benefit under these circumstances would be in accordance with the content and purpose of the relevant provision in the agreement.

While Section 3 of the Tax Assessment Act has some prophylactic, preventative effect, the measure itself is reactive.

2. Very recently a legislative proposal has been made public that would increase the tax authority's ability to prevent and combat withholding tax schemes. The public consultation period for this proposal ended 22 August 2024.

   The proposal suggests expanding the Tax Administration's ability to obtain information from third parties, particularly financial institutions, to enhance tax reporting and withholding tax controls.

   Currently, the administration can request information from third parties for tax assessment purposes but lacks the authority to do so for verifying tax reporting and withholding obligations. The proposal aims to allow the Tax Administration to track financial transactions more effectively, helping to identify errors, misuse, and fraud early. Moreover, the proposal aims to target the use of "straw men" which are used to manipulate tax systems in order to claim refunds fraudulently.

   By obtaining such information from financial institutions, the Tax Administration can better monitor and control such activities, ensuring accurate reporting and payment of taxes.

   It is expected that the legislative proposal will be send to parliament soon, and that it will take effect from January 1, 2025. More information on the public consultation and its supporting documents can be found here.

3. Specifically regarding dividend stripping, the Danish tax authorities have adopted a significantly stricter administrative practice for the repayment of dividend withholding tax. The details of these tightened practices are further explained in question 4.

4. Dividend stripping, aimed at unlawfully obtaining multiple refunds of dividend withholding tax, is generally considered a tax offence in Denmark. Penalties for engaging in this practice can include fines and, in severe cases, imprisonment. The severity of the penalties depends on the extent of the offence and its financial impact on tax revenues.

   Chapter 8 of the Tax Control Law (Skattekontrolloven) outlines the specific administrative consequences for non-compliance or failure to provide required information. Chapter 9 details the penal provisions: specifically, Section 82 of the Tax Control Act states that a taxpayer who deliberately submits incorrect or incomplete information with the intent to evade taxes may be charged with tax fraud, punishable by a fine or imprisonment of up to 1 year and 6 months. If the offence warrants a more severe penalty, Section 289 of the Penal Code may apply, which can result in imprisonment to up to 8 years.

Question 4

Has the tax administration issued rules or procedures for applying the anti-dividend stripping measures referred to in Question 3?

The Danish Tax Administration (Skattestyrelsen) has issued several rules and procedures for applying anti-dividend stripping measures. These guidelines are designed to ensure compliance and assist with the effective application of anti-abuse provisions in the Danish Tax Assessment Act and related tax laws.

The procedures include that there are now five conditions that have to be met by a shareholder to be entitled to a refund of Danish dividend withholding tax:

1. The shareholder or their representative must submit an application for a refund of Danish dividend tax using the digital form (web form). Representatives who need to submit applications for many shareholders can use a special bulk submission format.
2. The shareholder must either be limitedly liable to tax in Denmark or not liable to tax in Denmark.

3. Danish dividend tax must have been withheld from the dividends from the Danish company for which a refund is being sought.
4. The shareholder must be the beneficial owner of the shares at the time of the approval of the dividend.
5. The withheld Danish tax must exceed the final tax for the rightful owner of the dividends according to the double taxation treaty, the parent/subsidiary directive, or applicable Danish tax law.

The taxpayer must provide detailed documentation on that all 5 conditions are met and this documentation has to be included in the digital application for the refund. This documentation must demonstrate the genuine nature of any transactions and the economic substance behind them and provide the information on the basis for which it is clear that the shareholder is entitled to a refund of dividend tax.

Regarding point 3. and 4. the documentation should, for example, include:

a) Dividend Note.

It must be clear that Danish dividend tax has been withheld. This follows from correspondence from the shareholder's custodian bank regarding received share dividends. The time of the dividend declaration date will often also appear here.

b) Account Statement

The shareholder must document that the money has entered their account, for example, by attaching a copy of the shareholder's account statement, supplemented with SWIFT confirmation or a screen print from the bank's system. If the dividend has been transferred through several banks, documentation for the transfer must be submitted for all links in the chain.

c) Portfolio Overview

The shareholder must attach a portfolio overview, which should provide an overview of the shareholder's shareholding at the time of the dividend decision, so that the number of shares at this point corresponds to the number of shares for which a refund is sought. The portfolio overview should also show movements in the shareholding for the period 6 months before the dividend date to 6 months after the dividend date. If the shareholder applies before 6 months have passed since the dividend date, the overview should instead show movements up to the application date.

d) <u>Purchase Documents</u>

If the shareholder has bought or sold shares 6 months before or after the date of the dividend decision, documentation for this must be attached, such as a trade proof, receipt, or SWIFT confirmation. If the shareholder apply before 6 months have passed since the dividend decision, they should instead attach documentation for purchases and sales up to the application date.

e) <u>Power of Attorney</u>

If someone is applying on behalf of a shareholder, they need a power of attorney from the shareholder. If there are multiple representatives between the applicant and the shareholder, there must be powers of attorney from all representatives.

f) <u>Stock Loan</u>

When applying, it must be made clear whether the shares were borrowed from others or lent to others at the time of the dividend decision.

- In practice, stock loan agreements with a duration of at least 6 months are – for tax purposes – considered loans of shares and not transfers of shares. Similarly, agreements where no expiry date is agreed upon, but where both the lender and borrower can terminate the agreement with a few days' notice, these arrangements are qualified as loans of shares and not as transfers.
- Stock loan agreements are usually drawn up based on the Danish standard terms or the standard terms in the international stock loan agreements ISLA or OSLA. However, it is not decisive for the tax treatment of stock loans whether the stock loan agreement is concluded on these framework terms. The decisive factor for the tax treatment of a stock loan agreement is that the agreement has the character of a loan agreement. Thus, there must be a concrete assessment of the stock loan agreement.
- The same will apply to stock loan-like transactions, which can be equated with the lending of shares. In a stock loan agreement between the lender and borrower, the lender will still be considered the rightful owner (beneficial owner) of the shares for tax purposes. Only the party considered the rightful owner of the shares for tax purposes has the right to get any excess withheld dividend tax refunded. The Danish tax authorities do not really give further clarification, because they want this category to be open to a case-by-case evaluation. However, it seems logical to assume that transactions that can be equated with the lending of shares include certain derivatives and hedging activities. Examples could be equity swaps or total return swaps. With the former two parties exchange

future cash flows based on the performance of an equity asset, and with the latter the total economic performance of reference asset is transferred. This can be similar to lending shares as it involves transferring the economic benefits of the shares without transferring ownership.

- The lender's status as the rightful owner of the shares must be seen in connection with the fact that the lender is still considered the current shareholder after the loan. Whether one is a current shareholder is based on whether one is a shareholder at the time the dividend is declared, i.e., whether one is a shareholder at the acquisition time.
- The declaration of dividends will usually take place at the company's ordinary or extraordinary general meeting. For tax purposes, dividends are understood as everything distributed by a company to current shareholders.
- If the borrower sells the shares to a third party, the lender is not subject to capital gains tax. The third party becomes the rightful owner of the dividend, and thus the lender is not considered the rightful owner. The dividend is taxed with the third party, who may be entitled to receive a refund of any excess withheld dividend tax.

Question 5

Is there any case law regarding dividend stripping and the anti-dividend stripping legislation? If so, could you please provide a short summary of relevant case(s)?

Yes, there is case law in Denmark regarding dividend stripping. Most recent and relevant cases are:

a. The most notable case regarding dividend stripping is the large scale fraud case involving Sanjay Shah and others. Sanjay Shah, the main suspect in the case, is one of nine British and US nationals accused of defrauding Denmark by exploiting weaknesses in national tax laws and administrative practices and focused on huge share trades, which were carried out with the purpose of generating multiple refunds of dividend withholding tax.

Shah is the founder of London-based hedge fund Solo Capital Partners, and denies any wrongdoing. He has been held in custody in Denmark since being extradited to Denmark in December 2023 following his arrest in Dubai in 2022.

Prosecutors alleged that Shah fraudulently obtained a dividend tax refund from the Danish treasury via the trading schemes. In order to maximise the potential gains, elaborate structures were built which allowed huge quantities of shares, often borrowed, to be passed in a circular manner between a number of different parties. The court case has run between March and August 2024 and the decision is expected in the fall of 2024.

Currently the decision in this case is still pending.

b) In case BS-20331/2022 (20 November 2023), ECLI:DK:HJR:2023:BS0000006252, the Danish Supreme Court held a Danish law firm liable for DKK 400 million in damages for the Danish Tax Administration's loss due to unjustified dividend tax refunds.

Facts

In 2014, the law firm advised North Channel Bank on potential liabilities related to transactions involving Danish listed shares. These transactions involved issuing dividend notes used to apply for tax refunds. In 2014 and 2015, North Channel Bank issued these notes, leading to tax authorities paying out approximately DKK 1.135 billion. These refund applications were later found to be based on fictitious transactions, with no actual shares, dividends, or cash flows.

Issue

The main issue was whether the law firm's advice made them liable for the tax authority's losses. The Supreme Court stated that a lawyer's liability depends on whether they negligently disregarded the tax authorities' interests. This assessment considers the business purpose and unusual nature of the transactions advised on, as well as the specific advice given.

Decision

The court found that the law firm should have realized the risk of the bank's involvement in a scheme for unjustified tax refunds. By advising the bank, including stating in a legal opinion that the bank should not be liable, the lawyer acted negligently. The court also found a causal link between the law firm's advice and the tax authority's loss. The claim was reduced from over DKK 700 million to DKK 400 million, considering settlements with other parties.

Finland

Question 1

Does your country's tax legislation provide a definition of dividend stripping? If so, could you please state the definition and its legal source? In addition, is there any official statement (e.g., from the tax authorities or any other relevant body) regarding this definition and the application of double tax treaties? If so, please include it.

There is no definition of dividend stripping in the law. Subsection 6 of Section 31 of the Income Tax Act (*Tuloverolaki* (TVL), in Finnish), however, includes rules how a so called substitute dividend (*sijaisosinko*, in Finnish) is taxed. Accordingly, compensation corresponding to the amount of the dividend, which the taxpayer has paid instead of the dividend on the basis of a share repurchase agreement, a loan agreement or other such agreement or a set of contracts formed by two or more related agreements, in which the taxpayer has the right to receive a dividend for a fixed period of time or until further notice (substitute dividend), is not a deductible expense from insofar as the dividend, instead of which the taxpayer has paid a substitute dividend, is tax-free income for the taxpayer. The substitute dividend is considered to have been paid, even if it has not been separately agreed upon.

The tax authorities have stated that the provisions concerning dividends in the Law on Taxation of Non-Residents (*Laki rajoitetusti verovelvollisen tulon verottamisesta (LähdeVL)*) also apply to substitute dividends. However, the OECD Model Tax Treaty's provisions do not equate the substitute dividends as dividend income. Instead, from the perspective of the relevant tax treaty and how it is applied, such a compensation is "business profits" for the payee as referred to in Article 7, or "other income" as referred to in Article 21. This concerns situations where the contracting states have a tax treaty where the Article on dividends is based on the OECD Model Tax Treaty. If the applicable tax treaty poses no restriction against Finland's taxing rights, the payor needs to withhold tax on a paid amount sourced to Finland in the same way as tax is withheld at source when paying out normal dividends. The party that withholds the tax at source is the actual payor of the substitute dividend (available at https://www.vero.fi/en/businesses-and-corporations/business-operations/financial-sector/paying-dividends/special-circumstances-affecting-dividend-payments/).

Question 2

What forms of dividend stripping occurred in your country? Please list these forms, regardless of whether they led to litigation or not.

The law does not include a definition of dividend stripping. The guidance from the Tax Administration mentions that substitute dividends may occur due to a share repurchase agreement, a loan agreement or other such agreement or a set of contracts formed by two or more related agreements.

Main form of divided stripping is to make use of the Finnish nominee-registered shares legislation which is available for non-residents. Under section 10 of LähdeVL tax treaty benefits can be granted on dividends paid to a nominee-registered share, when the dividend beneficiary has been identified and their eligibility for tax treaty benefits verified. An Authorised Intermediary (AI) registered in the Tax Administration's register can take responsibility for dividends paid by publicly listed companies to nominee-registered shares, when the dividend beneficiary is a non-resident. Any custodian in the custodial chain can apply into the register, whether they are a domestic or foreign entity, as long as the custodian fulfils the requirements for registration. In practice, taking responsibility for dividends means that the AI is responsible for any under withholding, if it has not used reasonable measures to investigate and identify the dividend beneficiary, and therefore verified the beneficiary's entitlement to the granted tax benefit. Identifying information on dividend beneficiaries, such as name, tax identification number and address, also need to be reported to the Tax Administration on an annual information return when the applied tax-at-source is less than 35%.

Question 3

Are there any explicit anti-dividend stripping measures in your country’s legislation? If so:

- *are these measures part of tax legislation, or is there a different anti-abuse mechanism?*
- *are these measures aimed at preventing dividend stripping, or are they reactive?*
- *is dividend stripping considered a tax offence? If so, what penalties apply?*

There are no specific anti-dividend stripping measures in place in the current legislation. The general anti-avoidance rule under section 28 of Law on Tax Procedure (*Laki Verotusmenettylestä* (VML)) may, however, be applied in dividend stripping arrangements. The Finnish tax authorities and tax courts apply the principle of substance over form. If they conclude that there is no business reason underlying a transaction or if they believe that a transaction is given a legal form which does not correspond to its substance, they consider the former void for tax purposes, and impose tax on the latter.

There is no pending legislation to target dividend splitting.

Dividend stripping is not considered a tax offence unless its characteristics fulfil the definition of tax evasion or tax fraud.

Question 4

Has the tax administration issued rules or procedures for applying the anti-dividend stripping measures referred to in Question 3?

As there are no specific anti-dividend stripping rules, there is no further rules or procedures issued by the tax administration. There is, however, a reporting obligation of an intermediary facilitating securities lending operations. This is a separate reporting obligation. Finland does apply the OECD TRACE initiative but only in respect of dividends paid by publicly listed companies to nominee-registered shares, the beneficiaries of which are non-resident taxpayers. Accordingly, central securities depositories, investment service companies, foreign investment service companies or other investment service providers, that act as intermediaries between the stocks' lender and borrower, must give details on the substitute dividends they have paid or transferred to the extent that they have the relevant information and details. A form 7847 (available at https://www.vero.fi/tietoa-verohallinnosta/yhteystiedot-ja-asiointi/lomakkeet/kuvaus/sijaisosinkojen_vuosiilmoitus_784/) must be submitted annually either electronically or in a paper form.

However, the Finnish Tax Administration introduced in 2020 a new control project which targets dividend stripping. On 8 June 2022, the Tax Administration issued a press release stating that it has identified that Finland has suffered a tax revenue loss of approximately EUR 80 million per year between 2018 and 2021. The press release does not distinguish which part of this amount was caused by dividend stripping but states that "most of the schemes detected have involved securities lending and manufactured payments".

Question 5

Is there any case law regarding dividend stripping and the anti-dividend stripping legislation? If so, could you please provide a short summary of relevant case(s)?

There is no case law regarding dividend stripping in Finland

France

Question 1

Does your country's tax legislation provide a definition of dividend stripping? If so, could you please state the definition and its legal source? In addition, is there any official statement (e.g., from the tax authorities or any other relevant body) regarding this definition and the application of double tax treaties? If so, please include it.

Dividend stripping (in French "*arbitrage de dividendes*, i.e. dividend arbitration) was not defined in French legislation until 2018 but is under great attention of the media, Parliament, tax authorities and National Financial Prosecutor since the publication on 18 October 2018 of the "CumEx Files" by several European newspapers, including the French leading newspaper *Le Monde*.

Following these revelations, the Parliament introduced specific anti-dividend stripping rules under article 119 bis A of the General Tax Code (*Code général des impôts*, CGI), through article 36 of the Finance Law for 2019 of 28 December 2018. Under these rules (applicable to payments made on or after 1 July 2019), the withholding tax applicable to French source dividends paid to non-resident individuals or legal entities (under article 119 bis of the CGI) is extended to certain payments made by residents to non-residents under a temporary sale of shares in a French company (deemed dividends). Article 119 bis A of the CGI does not specify the articulation of the measure with tax treaties. It seems, however, that the deemed dividends should be treated as dividends for the application of tax treaties. Therefore, the withholding tax should apply only if (and to the extent) allowed by the applicable tax treaty.

More specifically, the new rules target payments made with respect to a temporary sale or any transaction giving the right or obliging to sell back or resell French shares or rights on such shares, provided that the temporary sale or transaction occurred within a 45-day period including the day when dividends are accrued ("ex-dividend" date). The withholding tax must be levied by the French short-time resident shareholder who makes the payment (of the deemed dividends) to the non-resident beneficiaries.

A safe harbour clause provides that beneficiaries of the payment may claim the refund of the withholding tax if they prove that the payment was not aimed at avoiding the dividend withholding tax or obtaining an undue tax benefit. To date, there are no indications on how beneficiaries might provide such proof, as the new measure was neither commented by the tax authorities nor reviewed by a court. In practice, taxpayers should demonstrate that the arrangement was motivated by business reasons, and not tax reasons only.

Members of parliament first intended to adopt anti-dividend stripping rules with a wider scope of application, including so-called “external” arrangements, i.e. temporary sale of shares to non-resident intermediaries located in a state that concluded with France a tax treaty prohibiting withholding tax on dividends (e.g. Qatar, Bahrain, Egypt, United Arab Emirates, Finland, Kuwait, Lebanon, Oman and Saudi Arabia). However, the government considered that these rules would have been contrary to the tax treaties and supported the closer scope of application finally adopted.

The tax authorities did not publish any guidelines commenting article 119 bis A of the CGI (contrary to their usual practice which is to comment new rules). However, on 15 February 2023, they published two general rulings introducing the concept of “dividend equivalent”. The Supreme Administrative Court (Conseil d’Etat) annulled these rulings in December 2023 (see question 4).

Question 2

What forms of dividend stripping occurred in your country? Please list these forms, regardless of whether they led to litigation or not.

There is no official list of dividend stripping cases that occurred in France.

The parliamentary documents regarding the Finance Bill for 2019[21] mentioned two main types of situations of “Cum-Cum” arrangements:

- “Internal arrangements” (montages internes), i.e. transactions where a non-resident shareholder temporarily sells French shares to a resident intermediary (usually a bank[22]);
- “External arrangements” (montages externes), i.e. transactions where a non-resident shareholder temporarily sells French shares to a non-resident intermediary (usually a bank) located in a state that concluded with France a tax treaty prohibiting the withholding tax on dividends.

[21] See also the report published on 25 September 2019 by an adhoc parliamentary group on this matter within the National Assembly (Rapport d'information n°2252 de la mission d'information commune sur le bilan de la lutte contre les montages transfrontaliers).

[22] It does matter where the non-resident is located, as the treaty concluded between France and the residence state might prevent or limit the application of the French withholding tax. In other words, the treaty benefits for the taxpayer are identical, whether the taxpayer implements an internal arrangement or not. In practice, however, the measure relies on the assumption that taxpayers set up an internal arrangement (i.e. avoided a standard dividend distribution) because the treaty is not favourable enough. If the tax treaty prohibits the French dividend withholding tax, the taxpayer has no reason to implement an internal arrangement. Therefore, internal arrangements should only exist in situations where tax treaties allow France to apply its withholding tax.

As mentioned above, article 119 bis A of the CGI only target “internal” Cum-Cum arrangements, as the government considered that tax treaties do not allow domestic rules prohibiting “external” Cum-Cum arrangements. This caused some frustration among certain members of parliament.

The parliamentary documents and literature also mentioned “Cum-Ex” arrangements, i.e. arrangements which are aimed at obtaining multiple foreign tax credits with respect to a single dividend distribution. However, these arrangements received less attention as they seem not to have been observed in France.

On 15 February 2023, the tax authorities published their owned list of financial transactions that may give rise to the payment of a “dividend equivalent” (see question 4). However, the Supreme Administrative Court (Conseil d’Etat) considered that their position was not in line with the applicable legislation and annulled the two rulings (see question 5).

Question 3

Are there any explicit anti-dividend stripping measures in your country’s legislation?

Yes. Please see answer to question 1.

If so:

- **are these measures part of tax legislation, or is there a different anti-abuse mechanism?**

Article 119 bis A of the CGI is part of the tax legislation. Parliamentary documents also mentioned a German anti-abuse measure contained in company law which prohibits certain short-term sales of shares, but such measures have not been introduced into French company law.

The tax authorities may also rely on the general rule aimed at fighting abuse of law (*abus de droit*), pursuant to article L 64 or L 64 A of the Tax Procedure Code (*Livre des procédures fiscales*, LPF).

- **are these measures aimed at preventing dividend stripping, or are they reactive?**

Article 119 bis A of the CGI is aimed at preventing dividend stripping, as the withholding tax applies if certain conditions are met. Beneficiaries must claim a refund of the tax if they consider that the transaction is not motivated by tax considerations.

General rules on abuse of law are reactive, as they may be used by the tax authorities to make a reassessment. However, they also have a dissuasive character.

- **is dividend stripping considered a tax offence? If so, what penalties apply?**

Yes, the failure to apply a withholding tax might be considered as a criminal offence (*délit de fraude fiscale*) if is in intentional. For legal entities, such offence might give rise to a penalty of up to EUR 2.5 million, raised to a maximum of EUR 15 million for aggravated fraud (e.g. if it involves the use of foreign intermediaries). Individuals considered as accomplices may face an imprisonment of up to 5 years and a EUR 500,000 (respectively 7 years and EUR 3 million for aggravated fraud).

Question 4

Has the tax administration issued rules or procedures for applying the anti-dividend stripping measures referred to in Question 3?

The tax authorities did not publish any guidelines commenting article 119 bis A of the CGI (contrary to their usual practice which is to comment new rules). There is not (yet) any case law or publicly available case of application of these specific anti-dividend stripping rules.

However, on 15 February 2023, the authorities published in their public guidance two general rulings (*rescrits*) that renewed the issue of dividend stripping through the new concept of “dividend equivalent” (BOI-RES-RPPM-000122 and BOI-RES-RPPM-000123). It seems that the French tax authorities were inspired by the anti-dividend stripping measures existing in the United States (section 871(m) of the Internal Revenue Code).

The rulings elaborated on whether amounts paid by a bank to non-resident taxpayers in the context of certain financial transactions (e.g. securities lending or derivatives contracts) are subject to the dividend withholding tax under article 119 bis of the CGI.

Pursuant to the rulings, the dividend withholding tax applies not only to actual dividends but also to the various forms of "dividend equivalent", which is defined as any transfer of value subordinated or determined, explicitly or implicitly, with reference to a dividend. The amount of the dividend equivalent must be calculated with respect of all amounts received by and returned to non-resident taxpayers.

In the rulings, the tax authorities provided specific details on the following transactions:

- temporary acquisition of French securities from non-resident taxpayers;
- transactions covering short selling;
- monetization of optional dividends;
- transactions guaranteeing the smooth functioning of settlement transactions; and
- transactions on derivatives concluded with non-resident taxpayers.

The rulings did not rely on the specific anti-dividend stripping measures introduced by article 119 bis A of the CGI but on the general treaty concept of “beneficial owner” or merely on the recharacterization of certain payments into the dividend category.

In a judgement rendered on 8 December 2023, the Supreme Administrative Court considered that the tax authorities’ position exceeded the applicable legislation and annulled the two rulings (see question 5).

Question 5

Is there any case law regarding dividend stripping and the anti-dividend stripping legislation? If so, could you please provide a short summary of relevant case(s)?

There is not (yet) any case law regarding article 119 bis A of the CGI applicable since 1 July 2019.

However, the Supreme Administrative Court rendered as landmark judgement on 8 December 2023 (case no. 472587) regarding the two general rulings published by the tax authorities on 15 February 2023, which introduced in France the concept of “dividend equivalent” inspired from the US legislation. The validity of these rulings was contested by the French Banking Federation (*Fédération bancaire française*, FBF).

The Court did not uphold the tax authorities’ position, according to which the dividend withholding tax applies not only to actual dividends but also to the various forms of "dividend equivalent".

On the contrary, the Court ruled that the tax authorities are not allowed to apply the withholding tax to distributions made to a resident taxpayer, even if they consider that the distributions are beneficially owned by a non-resident investor.

The Court ruled that there are only two situations in which such distributions may be taxed:

- if the distributions are within the scope of the specific anti-abuse rule introduced with effect from 1 July 2019 under article 119 bis A of the CGI, which targets dividend stripping schemes; and
- if the distributions are within the scope of the general anti-abuse rule set by article L 64 of the Tax Procedure Code, targeting situations of abuse of law.

In other words, the tax authorities may not extend the dividend withholding tax beyond its legal scope, except if taxpayers committed an abuse of the law.

The Court annulled the two rulings, as well as the general guidelines which extended the scope of the dividend withholding tax to dividends paid to resident shareholders but beneficially owned by non-resident investors (BOI-RPPM-RCM-30-30-10-10, paras. 1 and 5).

The rapporteur public (equivalent of the Advocate General at the CJEU) indicated in his opinion that withholding tax reassessments made by the tax authorities on the basis of the concept of “beneficial ownership” should be annulled. He also stated that reassessments based on the abuse of law rules might be practically very complex, because taxpayers (i.e. French banks) made thousands if not millions of transactions. The perspective for the tax authorities is therefore unfavourable. The rapporteur public emphasized, however, that criminal prosecutions initiated by the National Financial Prosecutor may be continued, despite the cancellation of the tax reassessments. In his opinion, French banks may still be condemned for tax fraud if the Prosecutor proves that they had the intention to avoid taxation.

In that respect, it is worth noting that the National Financial Prosecutor (*Parquet national financier*, PNF) made dawn raids into the offices of 5 major French banks on 28 March 2023 in order to gather evidence of an eventual tax fraud regarding dividend stripping. In a rather unusual way, the National Financial Prosecutor published a press release on the same day informing of the dawn raids and asking any witnesses to collaborate and provide evidence of a fraud. This confirms that dividend stripping is not only a tax issue but also a sensitive criminal issue.

On 2 May 2024, some members of parliament presented a new legislative proposal aimed at amending the anti-dividend stripping legislation currently applicable (article 119 bis A of the CGI). They intend to implement the initial version of article 119 bis A proposed in October 2018, with a scope much larger than the current version. It is uncertain though whether this change will be adopted or not, given the current complex political situation.

Relevant Provisions in the domestic tax legislation of France

Article 119 bis Code Général des Impôts

1. Les revenus de capitaux mobiliers entrant dans les prévisions des articles 118,119,238 septies B et 1678 bis donnent lieu à l'application d'une retenue à la source dont le taux est fixé par le 1 de l'article 187, lorsqu'ils bénéficient à des personnes qui ont leur siège en France ou à l'étranger ou qui n'ont pas leur domicile fiscal en France.

Toutefois, les produits des titres de créances mentionnés au premier alinéa de l'article 124 B sont placés en dehors du champ d'application de la retenue à la source. Il en est de même pour la prime de remboursement visée à l'article 238 septies A.

Les revenus des titres émis à compter du 1er janvier 1987, tels qu'ils sont définis aux articles 118,119 et 238 septies B, sont placés hors du champ d'application de la retenue à la source.

2. Les produits visés aux articles 108 à 117 bis donnent lieu à l'application d'une retenue à la source dont le taux est fixé par l'article 187 lorsqu'ils bénéficient à des personnes qui n'ont pas leur domicile fiscal ou leur siège en France, autres que des organismes de placement collectif constitués sur le fondement d'un droit étranger situés dans un Etat membre de l'Union européenne ou dans un autre Etat ou territoire ayant conclu avec la France une convention d'assistance administrative en vue de lutter contre la fraude et l'évasion fiscales et qui satisfont aux deux conditions suivantes :

1° Lever des capitaux auprès d'un certain nombre d'investisseurs en vue de les investir, conformément à une politique d'investissement définie, dans l'intérêt de ces investisseurs ;

2° Présenter des caractéristiques similaires à celles d'organismes de placement collectif de droit français relevant de la section 1, des paragraphes 1,2,3,5 et 6 de la sous-section 2, de la sous-section 3, ou de la sous-section 4 de la section 2 du chapitre IV du titre Ier du livre II du code monétaire et financier.

Les stipulations de la convention d'assistance administrative mentionnée au premier alinéa du présent 2 et leur mise en œuvre doivent effectivement permettre à l'administration des impôts d'obtenir des autorités de l'Etat dans lequel l'organisme placement collectif constitué sur le fondement d'un droit étranger mentionné au même alinéa est situé les informations nécessaires à la vérification du respect par cet organisme des conditions prévues aux 1° et 2°.

La retenue à la source s'applique également lorsque ces produits sont payés hors de France dans un Etat ou territoire non coopératif au sens de l'article 238-0 A du présent code autre que ceux mentionnés au 2° du 2 bis du même article 238-0 A.

Toutefois, la retenue à la source ne s'applique pas aux sommes visées au premier alinéa du a de l'article 111.

La retenue à la source ne s'applique pas aux distributions des sociétés de capital-risque qui fonctionnent dans les conditions prévues à l'article 1er-1 de la loi n° 85-695 du 11 juillet 1985 modifiée lorsque :

a) la distribution entre dans les prévisions du 5 de l'article 39 terdecies ;

b) le bénéficiaire effectif est une personne morale qui a son siège de direction effective dans un Etat ayant conclu avec la France convention fiscale comportant une clause d'assistance administrative pour l'application du droit interne ;

c) la distribution est comprise dans des bénéfices déclarés dans cet Etat mais bénéficie d'une exonération d'impôt.

Les produits mentionnés au premier alinéa du présent 2 distribués par des sociétés mentionnées au 3° nonies de l'article 208, par des sociétés mentionnées au I et au premier alinéa du II de l'article 208 C et, pour la part des produits distribués à des bénéficiaires autres que des sociétés mentionnées au 3° nonies de l'article 208 qui les détiennent dans les conditions mentionnées au III bis de l'article 208 C, par des sociétés mentionnées au même III bis, ayant leur siège en France, donnent lieu à l'application d'une retenue à la source au taux prévu au 2° de l'article 219 bis lorsqu'ils sont prélevés sur des résultats exonérés en application de l'article 208 C ou du 3° nonies de l'article 208 et qu'ils bénéficient à des organismes de placement collectif de droit français relevant de la section 1, des paragraphes 1,2,3,5 et 6 de la sous-section 2, de la sous-section 3, ou de la sous-section 4 de la section 2 du chapitre IV du titre Ier du livre II du code monétaire et financier ou à ceux constitués sur le fondement d'un droit étranger mentionnés au premier alinéa et satisfaisant aux conditions prévues aux 1° et 2° du présent 2.

La retenue à la source mentionnée à l'avant-dernier alinéa du présent 2 n'est pas libératoire de l'impôt sur le revenu ou de l'impôt sur les sociétés et ne donne lieu ni à restitution ni à imputation.

Article 119 bis A Code Général des Impôts

1. Est réputé constituer un revenu distribué soumis à la retenue à la source prévue au 2 de l'article 119 bis tout versement, dans la limite du montant correspondant à la distribution de produits de parts ou d'actions mentionnée au b, effectué, sous quelque for et par quelque moyen que ce soit, par une personne qui est établie ou a son domicile fiscal en France au profit, directement ou indirectement, d'une personne qui n'est pas établie ou n'a pas son domicile fiscal en France, lorsque les conditions suivantes sont réunies :

a) Le versement est réalisé dans le cadre d'une cession temporaire ou de toute opération donnant le droit ou faisant obligation de restituer ou revendre ces parts ou actions ou des droits portant sur ces titres ;

b) L'opération mentionnée au a est réalisée pendant une période de moins de quarante-cinq jours incluant la date à laquelle le droit à une distribution de produits d'actions, de parts sociales ou de revenus assimilés mentionnés aux articles 108 à 117 bis est acquis.

2. La retenue à la source est due lors de la mise en paiement du versement mentionné au 1 et acquittée par la personne qui assure ce paiement.

3. Lorsque le bénéficiaire du versement mentionné au 1 apporte la preuve que ce versement correspond à une opération qui a principalement un objet et un effet autres que d'éviter l'application d'une retenue à la source ou d'obtenir l'octroi d'un avanta fiscal, le 1 n'est pas applicable. Le bénéficiaire peut alors obtenir le remboursement de la retenue à la source définitivement indue auprès du service des impôts de son domicile ou de son siège.

4. La personne qui assure le paiement du versement mentionné au 1 transmet à l'administration fiscale, à sa demande et sous format dématérialisé, le montant, la date, l'émetteur des parts ou actions objets de l'opération mentionnée au b du même 1 et le destinataire du versement.

Germany

Question 1

Does your country's tax legislation provide a definition of dividend stripping? If so, could you please state the definition and its legal source? In addition, is there any official statement (e.g., from the tax authorities or any other relevant body) regarding this definition and the application of double tax treaties? If so, please include it.

Answer:

There is no definition of dividend stripping in Germany's tax legislation. There is also no official statement from the tax authorities regarding the definition and the applicability of tax treaties.

Question 2

What forms of dividend stripping occurred in your country? Please list these forms, regardless of whether they led to litigation or not.

Cum/ex transactions

Cum/ex transactions are aimed at the double or multiple crediting or reimbursement of capital gains tax (Kapitalertragssteuer). In particular, short sales of shares cum and ex dividend around the dividend record date are intended to ensure that the shares are attributable to several persons at the same time. Each beneficiary should then be entitled to a credit or refund of the capital gains tax paid only once. The legislator has revised the capital gains tax deduction for shares and investment units held in collective safe custody from 1 January 2012. For transactions from the years prior to 2012, the primary question is whether the type of transactions can really (albeit temporarily) give rise to an entitlement to several shares in the same securities that can be recognized under tax law. The Bonn Regional Court and the Federal Court of Justice have clearly denied this in criminal cases. The Federal Financial Court (Bundesfinanzhof, BFH) denies the transfer of beneficial ownership and the conditions for recognition if a model overall contractual concept exists. The BFH expressly left open the subordinate question of whether there is an abuse of structuring if multiple authorization must be affirmed.

Cum/cum transactions

Cum-cum arrangements involve foreign taxpayers in particular temporarily transferring their dividend-bearing shares, e.g. by way of structured securities lending, to a tax resident entitled to a credit in order to avoid a definitive charge to capital gains tax. The tax authorities initially assumed abuse if no non-tax reasons could be cited for such an arrangement. According to the amended opinion, the transfer of beneficial ownership should now be denied in the first instance. Section 42 of the General Tax Act (AO) should only be considered in a subsidiary manner. In their official guidance from 2021, the tax administration refers to the following types of cum/cum arrangements:

Cum/cum arrangements based on securities lending (basic case)

In the context of cum/cum arrangements based on securities lending, shareholders who are not or not fully entitled to capital gains tax[23] (lender of the shares) lend their shares for a short period over the dividend record date to a domestic recipient who is fully entitled to capital gains tax (borrower of the shares). A holding period of less than 45 days is always deemed to be a short period over the dividend record date[24]. The borrower of the shares collects the dividend without deducting capital gains tax or claims the withheld capital gains tax by way of offsetting or refund. The compensation payment owed by the borrower of the shares to the lender of the shares from the securities lending is generally lower than the (gross) dividend payment.

Cum/cum arrangements based on a tax-induced spot transaction

In the context of cum/cum arrangements based on a spot transaction, a shareholder who is not or not fully entitled to capital gains tax sells shares with a dividend entitlement shortly before the dividend record date to a buyer in Germany who is fully entitled to capital gains tax with the aim of a short-term retransfer after the dividend record date. The domestic buyer collects the dividend without deducting capital gains tax or claims the withheld capital gains tax by way of offsetting or refund. If the price for the retransfer to the seller is not fixed between the parties when the shares are acquired, hedging transactions are regularly agreed at the

[23] The wording "entitled to capital gains tax" refers to the exemption, reduction or refund of Kapitalertragsteuer (withholding tax)

[24] In the case of a securities loan that only lasts for a short period of time, the tax authorities and case law assume that the borrower does not become the beneficial owner of the securities. The new provision in Section 36a EStG therefore contains a legal presumption that anything shorter than a holding period of 45 days (which must be reached within a period of 45 days before and 45 days after the capital gains fall due) is deemed to be a short period of time, with the result that the borrower does not become the beneficial owner of the securities in such cases. Please see the text of Section 36a EStG at the end of the document.

same time as the purchase of the shares in tax-induced transactions to hedge market risks, in particular via futures and swap transactions. The positive margin for the domestic buyer entitled to capital gains tax is then generated by the fact that the prices of the securities purchases and the fees for the hedging transactions are agreed accordingly. With this special form of transaction, a purely tax-induced business model can be assumed.

On-lent securities with simultaneous reverse transaction with fixed-interest securities

In a first step, shares with a dividend entitlement are lent shortly before the dividend record date by a shareholder who is not or not fully entitled to capital gains tax to a domestic bank A that is fully entitled to capital gains tax. In the second step, these shares are lent by Bank A to another domestic bank B that is fully entitled to capital gains tax. This loan is (formally) made as collateral for a simultaneous loan of fixed-interest securities from Bank B to Bank A with a lending fee above the market level. Borrowed shares are transferred back to Bank A after the dividend record date. In some cases, the shares are also replaced by other shares with an upcoming dividend record date.

As a result, Bank B is placed in the same economic position as if it had carried out the cum/cum transaction directly with the shareholder (abroad) and realized a margin of e.g. 1.5% of the gross dividend; Bank A may retain e.g. 0.5%. Bank B does not bear any price risk. At the end of the lending period, it transfers the shares to Bank A regardless of the price performance and receives its original portfolio of fixed-interest securities back in full.

Cum/cum arrangements on the basis of repurchase agreements (repo transactions)

Securities repurchase agreements (repo transactions) are concluded between an A-bank domiciled abroad and a domestic B-bank for German shares with dividend subscription rights. The B-Bank acquires shares from the A-Bank before the dividend record date at the agreed price. B-Bank receives the profit distribution and claims the capital gains tax credit. The net dividend is forwarded by B-Bank to A-Bank immediately upon receipt and the withheld capital tax is forwarded as an equalization payment after reimbursement or offsetting by the tax office. B-Bank receives remuneration and interest income based on the agreed (standard market) interest rate, the respective share price and the individual holding period. The bank sells the shares back to A-Bank at the original price a few days after the dividend record date.

Question 3

Are there any explicit anti-dividend stripping measures in your country's legislation? If so:

- *are these measures part of tax legislation, or is there a different anti-abuse mechanism?*
- *are these measures aimed at preventing dividend stripping, or are they reactive?*
- *is dividend stripping considered a tax offence? If so, what penalties apply?*

There are explicit anti-dividend stripping measures in Germany's tax legislation.

With effect from tax year 2016, Germany introduced explicit anti-dividend stripping rules contained in section 36a of the Income Tax Act (EStG) and section 50j of the EStG. Section 36a EStG introduces a specific holding requirement for taxpayers claiming the credit or refund in the form of a 45-day holding test during which the taxpayer must be economically at risk with respect to the underlying equities. The rule applies to every kind of taxpayer. The restrictions under Section 36a EStG do not apply if the dividend creditor has been the beneficial owner for an uninterrupted period of at least 1 year (FIFO rules apply) or if the relevant income during a given financial year is less than EUR 20,000. Section 36a EStG is meant to deny the German-resident buyers in cum/cum transactions the credit or refund of the dividend withholding tax. For details of section 36a of the EStG, see below.

Section 50j EStG is modelled in the same way as section 36a EStG and is focused on "cum/cum treaty shopping".

Section 36a EStG does not cover tax arbitrage that utilizes different tax treaty positions. If the party requesting the reduced withholding tax rate in accordance with a tax treaty is the "benefici-al owner", he can claim the respective favourable withholding tax rate under a tax treaty of generally 15 % or less. The beneficial owner of the shares is entitled to utilization and relief in accordance with the tax treaty. The term "cum/cum treaty shopping" describes cases in which a beneficial owner, resident in Germany or abroad, of a dividend flowing out of Germany by means of a transaction to a non-resident taxpayer to obtain a lower withholding tax rate under a tax treaty to which he would not be entitled to without a specific arrangement.

By way of a treaty override[25], Section 50j EStG shall prevent cum/cum transactions between partners that generate a refund claim under the general rules that would not exist without the transaction. The regulatory technique of Section 36a EStG is largely adopted (minimum holding period and economic risk bearing) adopted. According to Section 50j (4) sentence 1 no. 1 EStG, the more extensive relief requirements should only apply if the respective tax treaty provides for a withholding tax of less than 15 %. Section 50j (4) sentence 1 no. 2 also restricts the application to free float cases, i.e. interlocking shareholdings with at least 10 % of the nominal capital of the domestic corporation are not affected. Finally, the restriction does not apply if the dividend creditor has been the beneficial owner for an uninterrupted period of at least 1 year (FIFO rules apply).

Both rules are rather reactive dealing with unwanted dividend-stripping scenarios.

Generally, dividend stripping is not considered a tax offence.

Key question in dividend-stripping scenarios is whether the economic ownership of the underlying assets has shifted. The definition of economic ownership is included in section 39 of the General Tax Act (AO). In the absence of explicit anti-dividend stripping rules, previous court decisions relating to dividend stripping transactions dealt with the question whether or not economic ownership had shifted between the involved parties to a transaction. If in such cases a change in economic ownership was considered to have taken place, it was further examined whether or not the general anti-avoidance rule contained in section 42 AO could be applicable.

With regard to cum/ex transactions the Federal Financial Court (Bundesfinanzhof, BFH) opined that economic/beneficial ownership of shares is not acquired in cum/ex transactions if the acquisition of the shares is part of a so-called model overall concept (modellhaft aufgelegtes Gesamtkonzepts), which means that the civil law acquirer in such transactions can neither exercise the rights associated with the acquisition of the shares nor should he exercise them according to the design concept, which is why he only has the function of introducing his legal form (which enables him to organize the transaction on the basis of a tax treaty) into the course of business and. In view of the comprehensive control of every detail of the transaction by third parties, he can only be regarded as a ”passive participant” (“transaction vehicle”) in the course of business. As such, the acquirer cannot become a creditor of the investment income from the shares, meaning that he is not entitled to a refund of the income tax withheld on this investment income. The BFH did not explicitly rule on the question whether cum/ex transactions are considered abusive under the general anti-

[25] German national law such as for instance the Aussensteuergesetz can override the application of a tax treaty. This is not dependent on the application of an anti-abuse clause in a tax treaty.

avoidance rule contained in section 42 AO. In 2021, The Federal Court of Justice (Bundesgerichtshof, BGH) ruled for the first time that cum/ex transactions by investors and banks constitute criminal tax evasion punishable by imprisonment.

With regard to cum-cum transactions there are no recent decisions by the BFH. The tax administration wanted to infer the illegality of cum/cum arrangements from the considered illegality of cum/ex transactions. In 2017, the tax administration issued official guidance on the treatment of cum-cum transactions and took the position that such transactions constitute abuse and the general anti-avoidance rule contained in section 42 AO should apply as such transactions are primarily “tax-induced”, i.e. essentially tax-motivated. However, the official guidance issued in 2017 was superseded by a new official guidance issued in 2021, where the tax administration changed its opinion and considered that the acquirer does not become the economic/beneficial owner of the shares. According to the tax administration’s position, in the case of cum/cum arrangements, ownership of the shares under civil law is transferred to the borrower or acquirer when the securities are in the securities account of the borrower or acquirer before the dividend record date. The contracts concluded on the occasion of the transaction and the manner in which they are executed mean, however, that the beneficial ownership is not transferred to the owner of the shares under civil law. In the case of cum/cum structures, there is no definitive transfer of the opportunities and risks that are usually associated with the ownership of the securities. The recipient of the shares transfers the shares back to his contractual partner after the dividend distribution and does not bear any price risks until the shares are retransferred. As a consequence, the recipient of the shares from a cum/cum arrangement is not the shareholder for tax purposes. Thus, he is not authorized to offset or refund the capital gains tax paid on the dividend payment. The capital gains tax paid on the dividend payment is not deductible from the tax liability of the recipient of the shares or refunded to the recipient. If no capital gains tax has been deducted from the dividend payment or the withheld capital gains tax has been refunded, the capital gains tax must be paid in arrears.

Question 4

Has the tax administration issued rules or procedures for applying the anti-dividend stripping measures referred to in Question 3?

The tax administration issued official guidance on the application of the anti-dividend stripping rule contained in section 36a EStG (BMF vom 3.4.2017 IV C 1 - S 2299/16/10002 BStBl 2017 I S. 726). The guidance comments on all aspects of the application of section 36a EStG, but the main part of the guidance focuses on the calculation of the minimum risk of change in value under section 36a(3) EStG.

In addition, the tax administration issued official guidance on the treatment of cum/cum transactions (BMF vom 9.7.2021 IV C 1 - S 2252/19/10035 :014 BStBl 2021 I S. 995).

Question 5

Is there any case law regarding dividend stripping and the anti-dividend stripping legislation? If so, could you please provide a short summary of relevant case(s)?

There is no case law available yet regarding the application of the explicit anti-dividend stripping legislation.

Relevant Provisions in the domestic tax legislation of Germany

Section 36a EStG*:*

(1) Notwithstanding a treaty for the avoidance of double taxation, in the case of investment income within the meaning of section 43(1) sentence 1 number 1a, the full crediting of income tax levied by way of tax deduction also requires that the taxpayer, with regard to the shares or profit participation certificates underlying this investment income

1. is the beneficial owner without interruption during the minimum holding period pursuant to paragraph 2,

2. bears the minimum risk of changes in value pursuant to paragraph 3 without interruption during the minimum holding period pursuant to paragraph 2 and

3. is not obliged to remunerate the investment income wholly or predominantly, directly or indirectly to other persons.

If the above requirements are not met, three fifths of the capital gains tax shall not be credited.

(2) The minimum holding period is 45 days and must be reached within a period of 45 days before and 45 days after the due date of the capital gains. In the case of acquisitions and disposals, it must be assumed that the shares or profit participation certificates acquired first were sold first (FIFO method).

(3) The taxpayer must bear at least 70% of the risk of a fall in the value of the shares or profit participation certificates (minimum risk of change in value), taking into account offsetting claims and claims of related parties. In particular, there is no sufficient minimum risk of change in value if the taxpayer or a related party has entered into hedging transactions that directly or indirectly reduce the risk of change in value of the shares or profit participation certificates by more than 30%.

Special reporting and additional payment obligations are imposed on taxpayers on whose account tax was not withheld or on whose account tax withheld was subsequently refunded.

The restrictions under Section 36a EStG do not apply if the dividend creditor has been the beneficial owner for an uninterrupted period of at least 1 year (FIFO rules apply) or if the relevant income during a given financial year is less than EUR 20,000. Section 36a(7) EStG declares that the application of the general anti-avoidance rules contained in section 42 AO remains applicable in addition to the application of Section 36a EStG.

Income within the meaning of Section 43(1) sentence 1 number 1a EStG is defined as investment income within the meaning of section 20 (1) no. 1 EStG (Profit shares (dividends) and other emoluments (including income received instead of dividends from a party other than the legal shareholder if the shares are acquired with dividend entitlement but are delivered without dividend entitlement)) from shares and profit participation certificates)

a) which are authorised for collective safe custody by a central securities depository in accordance with Section 5 of the German Securities Deposit Act and have been entrusted to it for collective safe custody in Germany,

b) which are held in special safe custody pursuant to Section 2 sentence 1 of the German Securities Custody Act,

c) for which the income is paid out or credited in return for the delivery of dividend coupons or other income coupons, or

d) which are entered in an electronic securities register within the meaning of Section 4 (1) of the German Electronic Securities Act (Gesetz über elektronische Wertpapiere).

Norway

Question 1

Does your country's tax legislation provide a definition of dividend stripping? If so, could you please state the definition and its legal source? In addition, is there any official statement (e.g., from the tax authorities or any other relevant body) regarding this definition and the application of double tax treaties? If so, please include it.

Norway's tax legislation does not provide a definition of dividend stripping. The regulation of withholding tax is tied to a foreign owner of shares in Norwegian companies. Apart from the concept of ownership, there is no further regulation of withholding tax in itself.

For reduced rates according to a DTT, Norwegian tax legislation incorporates the DTT as such as part of Norwegian law. The regulation in the DTT will therefore be decisive. The Norwegian DTTs will normally not address dividend stripping in particular, but there are examples in DTTs concluded around the year 2000. The DTT with Australia, signed 8 August 2006, mentions dividend stripping in the Non-Discrimination clause, art. 24. Art 24 no. 6 says that the non-discrimination clause does not apply to national provisions designed to prevent the avoidance or evasion of taxes. Art 27 no. 7 describes measures designed to address thin capitalisation, dividend stripping and transfer pricing as such avoidance or evasion of taxes.

Question 2

What forms of dividend stripping occurred in your country? Please list these forms, regardless of whether they led to litigation or not.

Up until 2003/2004 there were several cases with a classic dividend stripping. Foreign holders of Norwegian shares sold their shares to Norwegian banks shortly before the distribution of dividends, and bought them back at a pre-agreed price after the distribution date. These cases were targeted by the Norwegian Tax Administration using the Norwegian GAAR – General Anti-Avoidance Rule.

One of these cases involved foreign shareholders resident in other EU/EEA-states. With the EEA-agreement in force from 1994, Norway must comply with the four freedoms of the internal market and comply with non-discrimination based on nationalities. At the time, Norwegian holders of shares in Norwegian companies were not taxed on dividends, using an indirect tax relief. In the EFTA court decision E-1/4 Fokus Bank the Norwegian rules were found in violation of the EEA agreement.

Following this decision, Norway included all outgoing dividends to companies resident within the EEA in the current Norwegian participation exemption. The Norwegian participation exemption applies to all holdings of shares in qualifying companies, without any minimum ownership share. Thus, all outgoing dividends to company shareholders resident within the EU or the EEA are exempt from dividend taxation. The tax treaties therefore do not play a major role in such dividend distributions.

With this change in national rules, the tax authorities seem to have focused mainly on these rules. It also seems that the international investors have responded to this change by investing via companies resident in the EU or EEA. The tax authorities seem to have concentrated mainly on whether or not the establishment of such EU/EEA companies are wholly artificial or not. If the establishment is found wholly artificial, the effects would be to look into the DTT with the relevant country, and, if completely artificial, the DTT with the country of the beneficial owner. There are however not many examples of this, if any.

Dividend stripping in its traditional form does not seem to have been high up on the agenda of the tax authorities. However, in July 2024 the Norwegian Tax Administration announced that they were part of a joint Nordic task force that would look into the lending and borrowing of shares close to dividend dates. Factual analysis of Norwegian listed companies indicate that lending/borrowing (short) of shares increases significantly shortly before the dividend dates, and decreases shortly after.

Question 3

Are there any explicit anti-dividend stripping measures in your country's legislation? If so:

- are these measures part of tax legislation, or is there a different anti-abuse mechanism?

- are these measures aimed at preventing dividend stripping, or are they reactive?

- is dividend stripping considered a tax offence? If so, what penalties apply?

There are no explicit anti-dividend stripping measures in Norway's legislation. However, the exemption from withholding tax given to companies resident within the EU/EEA, is conditioned upon the establishment of the company in the relevant country not being wholly artificial. In the words of the Norwegian legislator the company must be genuinely established in the EU/EEA country.

Further, the withholding tax is reported and paid by the distributing company. In case of underpayment of withholding tax, the distributing company will be liable to pay the full amount, even though the actual distribution has been paid put in full to the shareholder. Thus, the distributing companies have an economic interest in getting the withholding tax correct before the payment is made.

An incorrect withholding tax in itself is not considered a tax offence in Norway. Sanctions in Norway is connected to any false reporting. However, with withholding tax, the distributing companies report both the distributed dividend, and the withheld tax. The foreign shareholder does not report anything to Norway. The distributing company is not the taxpayer, and the taxpayer does not report to the tax authorities. Hence, there is no taxpayer that may be sanctioned from any wrong reporting (Supreme court decision HR-2016-1179-A).

In case of any wrong reporting in connection with a claim for refund of too much withheld tax, both penalty taxes and criminal charges may be imposed.

Question 4

Has the tax administration issued rules or procedures for applying the anti-dividend stripping measures referred to in Question 3?

There are no such rules or procedures, given the lack of specific anti-dividend stripping measures.

There are numerous statements and rulings on the application of the establishment of a company within the EU/EEA being genuine (not wholly artificial). This is however not only related to dividend stripping, but also to incoming dividends and gains under the participation exemption, as well as to certain aspects of Norwegian CFC-taxation.

Question 5

Is there any case law regarding dividend stripping and the anti-dividend stripping legislation? If so, could you please provide a short summary of relevant case(s)?

Following the introduction of the Norwegian participation exemption in 2004, there really has not been many (if any) cases on the more traditional dividend stripping. From an investor or investment bank perspective, it would appear easier and more robust using a holding in Europe, thus being part of the participation exemption.

In addition to the case regarding Fokus Bank mentioned above, with regards to the EEA-dimension, some of the earlier cases regarding dividend stripping is mentioned in the books Bedriftsbeskatning i praksis, 2000 and 2006. These cases were more traditional dividend stripping, with what was seen as a preliminary holding using a financial institution over the distribution date. This was not accepted when applying the Norwegian GAAR, with the holder before and after the distribution found liable to pay withholding tax (the actual tax was demanded from the distributing company, which is jointly liable with the tax payer for the payment of the withholding tax).

Sweden

Question 1

Does your country's tax legislation provide a definition of dividend stripping? If so, could you please state the definition and its legal source? In addition, is there any official statement (e.g., from the tax authorities or any other relevant body) regarding this definition and the application of double tax treaties? If so, please include it.

There is no tax definition of dividend stripping in the Swedish tax legislation.

There is no official statement from the Tax Agency.

Question 2

What forms of dividend stripping occurred in your country? Please list these forms, regardless of whether they led to litigation or not.

A form of Dividend stripping that has been tested by the Swedish tax courts is when the shareholder of a Swedish company holds the shares in the company in someone else's place and that third party must thereby achieve a tax benefit.

Tax advisors do not recommend any dividend stripping structures in Sweden. These structures should in general be avoided.

Question 3

Are there any explicit anti-dividend stripping measures in your country's legislation? If so:

- *are these measures part of tax legislation, or is there a different anti-abuse mechanism?*

There is tax legislation covering abuse of the Swedish Withholding Tax Act and also general provisions in the Swedish Tax Evasion Act but this legislation does not contain specific provisions on dividend stripping.

The main rule under section 4 of the Swedish Withholding Tax Act is that withholding tax of 30 per cent is levied on dividends paid by Swedish companies. Yet exemption from withholding tax exists in certain situations (e.g. if the shareholder is an entity covered by the EU Parent-Subsidiary Directive and holds at least 10 per cent of the shares in the Swedish company). Withholding tax of 30 per cent is nevertheless levied if the shares in the Swedish company are held in “such a manner that someone else thereby receives an unjust benefit in regard to income tax or exemption from withholding tax”.

For this GAAR to apply, the shareholder of the Swedish company must hold the shares in the company in someone else’s place and that third party must thereby achieve a tax benefit. There is limited case law (see below) and virtually no guidance in the preparatory works to the scope of this rule. The EU introduced a GAAR to the Parent-Subsidiary Directive under which dividends between companies in the EU are exempt from withholding tax in certain situations. The changes in the directive obliged member states to implement a tax-evasion rule for dividends within the EU.

In Sweden, discussions have been ongoing for long to implement a new law on withholding tax, including a general anti-tax avoidance rule. However, the preparatory work were put on hold while waiting for the so-called FASTER Directive.

On 14 May 2024, the Council reached an agreement on the Faster and Safer Tax Relief of Excess Withholding Taxes (FASTER) Directive. The Ministry of Finance will now continue the work with the new Withholding Tax Act considering the FASTER Directive.

- *are these measures aimed at preventing dividend stripping, or are they reactive?*

Both, the abovementioned laws can be applied for previous financial years but are also meant to prevent abuse of the Swedish withholding tax.

- *is dividend stripping considered a tax offence? If so, what penalties apply?*

Under current Withholding Tax Act tax surcharge cannot be levied. The Ministry of Finance is working on a new Withholding Tax Act and under the new amended Tax Act tax it will be possible to levy tax surcharges.

Question 4

Has the tax administration issued rules or procedures for applying the anti-dividend stripping measures referred to in Question 3?

No, the tax administration has not issued rules or procedures for applying the measures referred to in Question 3.

Question 5

Is there any case law regarding dividend stripping and the anti-dividend stripping legislation? If so, could you please provide a short summary of relevant case(s)?

Yes. Swedish domestic law includes an anti-avoidance provision, that if applied, 30 per cent withholding tax may be imposed on outbound dividends. The rule in Section 4, paragraph 3 of the Withholding Tax Act (1970:624) applies to situations where a person or company owns shares in a Swedish company in circumstances where someone else is unauthorizedly exempted from paying withholding tax. The purpose of this rule is to prevent tax evasion through the use of intermediaries, or "front men", to avoid tax liability. For this anti-avoidance tax rule to apply, the shareholder of the Swedish company must hold the shares in the company in someone else's place and that third party must thereby achieve a tax benefit. There is limited case law and virtually no guidance in the preparatory works to the scope of this rule is a verdict from the Administrative Court of Appeal in Sundsvall on 15 June 2007. The circumstances of the case were as follows. A German investment bank lent shares in a listed Swedish company, in immediate connection to a distribution day, to a Swedish securities institution. The Swedish Securities Institute obtained the dividend on the shares and then returned the shares to the German investment bank. For loan of the shares, the Swedish securities institute paid an amount that corresponded to it received the dividend to the German investment bank. The Administrative Court of Appeal explained that the Swedish securities institution may be considered to have held the shares under such conditions that the German the investment bank has been unauthorizedly exempted from coupon tax. The Front man rule was therefore applicable, and the Swedish Securities Institute was subject to withholding tax.

Switzerland

Question 1

Does your country's tax legislation provide a definition of dividend stripping? If so, could you please state the definition and its legal source? In addition, if there is any official statement (e.g., from the tax authorities or any other relevant body) regarding this definition and the application of double tax treaties, please include it.

No, Swiss tax law does not provide a definition of dividend stripping. Consequently, no official statement on the definition of dividend stripping has been issued. However, Swiss withholding tax of 35% is levied on every dividend distributed by a Swiss company. Withholding tax is refunded in full to the recipient of the dividend resident in Switzerland and to a limited extent to the recipient of the dividend resident abroad, provided that the legal or treaty requirements are met. In the case of a recipient resident abroad, the extent of the refund depends on the residual tax rate applicable under the relevant double taxation agreement. One of the requirements for a refund of Swiss withholding tax is that the recipient has the right to use the share yielding the dividend ("beneficial ownership") when the dividend falls due. According to the case law of the Swiss Federal Supreme Court, the right of use is to be denied if there is a legal obligation to pass on (the majority of) the net income or if it can be concluded from the circumstances as a whole that the recipient will not retain the capital gains.

Question 2

What types of dividend stripping have appeared in the state? Please list the types that led to case law as well as other types of dividend stripping that may or may not have led to litigation and legislation.

The Swiss Federal Supreme Court had previously denied the effective beneficial ownership in connection with the following derivatives and hedging transactions: - Total return swap (BGE 141 II 447 of 5 May 2015) - Index futures (judgment 2C_895/2012 of 5 May 2015) - Single stock futures (judgment 2C_383/2013 of 2 October 2015) - Borrowing of shares, "securities lending" (BGE 146 I 105 of 16 December 2019) - Swap transactions (judgment 2C_880/2018 of 19 May 2020). For summaries of these cases, see under question 5.

In addition, the Swiss Federal Tax Administration (FTA) has identified the following situations in which the FTA believes that the right of use (beneficial ownership) should be denied, but which have not yet been judged by the Swiss Federal Supreme Court:

- Interest stripping. Interest stripping means that when buying government bonds that only distribute interest payments, a swap transaction, e.g. a cross-currency swap, is concluded at the same time and the buyer of the government bond thus effectively undertook to pass on the income generated from it. In a recent judgment, the Swiss Federal Supreme Court concluded that, based on the facts of the case, the purchaser of the government bond had no contractual or legal obligation to transfer the income, and therefore could not be denied the right to use it. However, the Swiss Federal Supreme Court left open the question of whether an abuse of treaty might have occurred. This will have to be examined in further proceedings by the lower court (judgment 9C_635/2023 of 3 October 2024).

- Conversion strategy. The conversion strategy is an options strategy that can be used to achieve a risk-free profit. A stock is purchased and hedged using a synthetic short position by buying a put option and selling a call option, both with an identical strike price and the same expiration. This neutralizes the market-specific price risks, since the shares and the synthetic short position form an economic zero position. While the price to be paid for the purchased put option is calculated including the dividend, the premium to be collected on the call option is only on a (low) time value.

- “Deep in the money” put strategy. At the same time (or in a package) a “deep in the money” put option (i.e. a put option with a strike price well above the current market price) is purchased with expiry after the ex date and the underlying share of the put option shortly before or on the last cum date. On or shortly after the ex-date, the put option is exercised and the underlying security is immediately sold at the strike price. As the option is deep in the money, the investment horizon is very short (often only overnight) and a deep in the money put option moves in the opposite direction to the underlying, there is no risk in relation to price performance. The difference to the conversion strategy is that due to the shorter investment horizon and the higher strike price, selling the call option to (additionally) hedge price risks is not even necessary.

- ADR conversion strategy. This strategy involves the purchase of ADRs (**A**merican **D**epositary **R**eceipts) issued on Swiss SMI (**S**wiss **M**arket **I**ndex) stocks before the ex-date and the simultaneous short sale of the SMI stocks underlying the ADR (also known as ORD). Subsequently, SMI securities are borrowed in a securities lending or borrowing transaction for the purpose of covering the short sale. On or after the ex-date, the ADRs are converted into ORDs for the purpose of returning the borrowed securities. Since the ADRs are surrogates for the ORDs, long ADRs and short ORDs constitute an economically neutral position that is not associated with any significant price risks. However, the collection of the dividend on the long ADR position is offset by the obligation to make a substitute payment on the SMI securities borrowed for the purpose of covering the short sale.

Question 3

Are there any explicit anti-dividend stripping measures in your country's legislation? If so:

- are these measures part of tax legislation, or is there a different anti-abuse mechanism?

- are these measures aimed at preventing dividend stripping, or are they reactive?

- is dividend stripping considered a tax offence? If so, what penalties apply?

No, there are no explicit anti-dividend stripping measures in Swiss legislation. However, the FTA specifically trains its employees in the area of refunding withholding tax in the assessment of the respective right of use and thus in the recognition of dividend stripping. The refusal to refund withholding tax at a rate of 35% regularly has the economic effect of an eventual tax penalty.

Question 4

Has the tax administration developed and published rules or procedures for applying the anti-dividend stripping measures referred to in Question 3?

No, apart from the measures mentioned in question 3, Switzerland has not developed or published any rules for the application of anti-dividend stripping measures.

Question 5

Is there any case law regarding dividend stripping and the anti-dividend stripping legislation? If so, could you please provide a short summary of relevant case(s)?

The Swiss Federal Supreme Court has ruled on the cases already mentioned in question 2 and denied the right of use in each case. The most groundbreaking cases are briefly summarized below.

- Total return swap (BGE 141 II 447 of 5 May 2015)

A bank from Denmark had issued a derivative that allowed foreign investors to participate in the success of Swiss securities without having to hold the securities themselves. The Danish bank hedged its risk by acquiring the underlying securities, although there was no legal obligation to do so. The Swiss Federal Supreme Court came to the conclusion that the effective right of use and thus the refund of Swiss withholding tax to the Danish bank must be denied if the recipient of the benefit (Danish bank) receives the dividend distributed by a Swiss company, but must pass on this income due to contractual performance obligations or actual restrictions that already existed at the time of payment. An actual restriction of the right of use is to be assumed if the following two characteristics are cumulatively present: On the one hand, the generation of the income must be dependent on the obligation to pass on this income; on the other hand, the obligation to pass on the income must be dependent on the generation of the income.

According to the latest Swiss Federal Supreme Court ruling, this condition of mutual dependence has been relaxed and the question has been raised as to whether the entitlement to use can depend on whether the recipient would have generated the income subject to withholding tax even if he had not entered into the payment obligation in question (first dependence). The second dependence is essential for assessing the right of use, according to which the recipient's payment obligations can only lead to a denial of the right of use if the payment or at least its amount depends on the recipient achieving the income subject to withholding tax (judgment 9C_635/2023 of 3 October 2024, E. 9.4.2)

- Single stock futures (judgment 2C_383/2013 of 2 October 2015)

A Swiss bank acquired SMI securities on a large scale and held them beyond the dividend record date, while at the same time issuing single stock futures on these securities. All transactions were carried out with the participation of the same foreign counterparties. The bank forwarded most of the dividends received from the securities to the foreign investors. The Swiss Federal Supreme Court came to the conclusion that the Swiss bank ultimately did not effectively have the right to use the securities it held and therefore confirmed the refusal to refund withholding tax. In its judgment, the Swiss Federal Supreme Court focused in particular on three characteristics: Firstly, the transactions took place shortly before the payment of dividends and beyond this point in time. Secondly, the two transactions (share purchase and issue of single stock futures) were inextricably linked, and thirdly, the two transactions were each concluded with the same counterparty known to the Swiss bank.

- Borrowing of shares (BGE 146 I 105 of 16 December 2019)

In case of foreign borrowers in securities lending transactions, withholding tax is not to be refunded if there is a contractual obligation to pass on the dividend and the borrower is therefore not to be classified as a beneficial owner.

