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# WHT on dividends obtained by non-resident collective investment undertakings is not applicable in Portugal

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The European Court of Justice (CJEU) has confirmed in *Allianzgi-Fonds Aevn*<sup>(1)</sup> that the withholding tax (WHT) that is applicable on dividends paid to non-resident collective investment undertakings in Portugal is incompatible with EU law.

### Facts

Foreign collective investment undertakings investing in Portugal are subject to WHT on dividends paid by Portuguese companies. This results in a clear disadvantage compared to resident funds, which are not subject to corporate income tax on the same dividends.

In view of this discrimination, several collective investment undertakings have been challenging the application of the WHT based on the breach of EU law (in line with litigation in other member states based on similar grounds). This litigation was initially filed before a tax arbitration court in Portugal, which requested a preliminary ruling on whether the difference in treatment was in breach of the free movement of capital and, therefore, incompatible with EU law.

### Decision

In the 17 March 2022 decision, the CJEU confirmed that there is a breach that renders Portuguese domestic WHT provisions incompatible with the free movement of capital. For the CJEU, "the difference in treatment between resident and non-resident collective investment

undertakings relates to objectively comparable situations" and this difference in treatment may not be justified by an overriding reason in the public interest or the allocation of the powers of taxation.

### **Comment**

This decision further confirms the understanding that has already been observed in several national court decisions, in which rulings have been determined on the basis that there were sufficient grounds for the assessment of a breach of EU law based on CJEU case law.

The impact of this decision goes beyond national borders and paves the way for the elimination of WHT on dividends received by collective investment undertakings throughout Europe.

It is now up to the Portuguese legislator to amend domestic rules to align the WHT regime that is applicable on dividends obtained by investment funds, eventually taking advantage of the fact that the Portuguese State Budget Law for 2022 has not yet been approved.

This decision creates leeway for these funds to claim back WHT suffered in Portugal in the past four years, as well as the WHT suffered until the domestic regime is amended.

As the ECJ decision is based on the free movement of capital, the WHT recovery should also be possible for third-country collective investment undertakings.

*For further information on this topic please contact Tiago Marreiros Moreira, Joana Lobato Heitor, Francisco Cabral Matos or Rita Pereira de Abreu at Vieira de Almeida by telephone (+351 21 311 3400) or email (tm@vda.pt, jlh@vda.pt, fcm@vda.pt or rma@vda.pt). The Vieira de Almeida website can be accessed at [www.vda.pt](http://www.vda.pt).*

### **Endnotes**

(1) C-545/19.