

MEMO# 33897

November 15, 2021

ICI Files Complaint with European Commission Against Italy for Recovery by Funds of Taxes Withheld on Dividends Received

[33897]

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TO: ICI Members

Investment Company Directors

ICI Global Members

Global Tax Committee

Tax Committee SUBJECTS: International/Global

Tax RE: ICI Files Complaint with European Commission Against Italy for Recovery by Funds of Taxes Withheld on Dividends Received

ICI today filed the attached complaint with the European Commission (EC) against Italy for violating European law by withholding tax on dividends paid to investment funds organized in the United States and certain other countries when tax is not imposed on comparable^[1] Italian funds. Specifically, we asked the EC, as the guardian of the Treaty on the Functioning of the European Union (EU), to exercise its power to bring infringement proceedings against Italy for violating TFEU Article 63. This article prohibits "all restrictions on the movement of capital between Member States and between Member States and third countries."^[2]

Background

The industry has successfully pursued the Article 63 "EU reclaim" issue in several EU Member States including, most recently, in France^[3] and Spain.^[4] The ICI has supported actively the members' efforts by, among other things, (1) filing similar complaints with the European Commission against France and Germany in 2015,^[5] (2) testifying in the Spanish courts during 2016,^[6] and (3) assisting members' counsel such as by preparing a detailed report on the US securities and tax laws applicable to regulated investment companies (RICs).^[7]

Complaint Against Italy

The complaint against Italy references the change to Italian law, effective January 1, 2021, that expands the tax exemption for Italian funds to apply also to funds such as UCITS, organized in EU Member States, and comparable funds organized in the European Economic Area (EEA). Because this change effectively acknowledges that Italy was violating Article 63, the ICI's complaint was filed on behalf of all non-EU/non-EEA funds that have suffered withholding tax on dividends paid by Italian resident companies.

Keith Lawson
Deputy General Counsel - Tax Law

endnotes

[1] This comparability standard was applied by the CJEU in the Santander case that involved ten funds, including two US funds, challenging the French imposition of tax only on non-French funds. See ICI Memorandum [No. 26165](#), dated May 18, 2012. See *also* ICI Memorandum [No. 28035](#), dated April 14 2014 (the CJEU decision in DFA Emerging Markets involving Poland and its ability to receive administrative assistance from the IRS).

[2] In full, Article 63 of the TFEU states:

1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

[3] See, e.g., ICI Memoranda [No. 33809](#), dated October 8, 2021, and [No. 32761](#), dated September 15, 2020.

[4] See, ICI Memorandum [No. 32066](#), dated November 27, 2019.

[5] See, ICI Memorandum [No. 29002](#), dated May 21, 2015.

[6] The testimony was given before the National Court of Appeals in April and before the Madrid High Court of Justice in October.

[7] See, e.g., ICI Memorandum [No. 27579](#), dated September 20, 2013.