

# German tax reform and Fokus Bank claims: one step closer to the success?

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## *In brief*

On 8 July 2016, the legislative procedure for the reform of the German Investment Tax Act (Investmentsteuerreformgesetz) has been finalised with the adoption of the Bill by the state council (Bundesrat). The reform provides for a fundamental change in the German tax regime for investment funds. One objective of the reform is to eliminate potential breaches of EU-law.

## *In detail*

The Bill inter alia aims at abolishing the discrimination of foreign investment funds paying withholding tax on German portfolio dividends. According to the new rules, from 1 January 2018 onwards, investment funds not qualifying as so-called "Special Funds" (Non-Special Fund) will generally be subject to German corporation tax with certain German source income and German as well as foreign Non-Special Funds will have to pay German withholding tax of 15% on German source dividends received from that date on.

The general tax exemption/full refund of withholding tax to German investment funds will be abolished. As a result, the arguments brought forward so far with respect to the withholding tax reclaims, so-called Fokus Bank claims, for investment funds should lose their validity for Non-Special Funds with respect to dividends to be received from 1 January 2018 onwards. Nevertheless, the actual impact on the chances of success of the Fokus Bank claims covering dividend distributions post 1 January 2018 will have to be analysed further.

The adopted Bill does not contain any amendment with respect to the withholding tax system for dividends received before 1 January 2018. As a result, any existing discrimination of foreign investment funds would remain with respect to dividends received before that date without any statutory solution foreseeable. However, the fact that the German legislator is of the opinion that a change in statutory rules for future dividends (received from 1 January 2018 onwards) is necessary already supports the argumentation brought forward so far. The legislator acknowledges - at least indirectly without expressing this explicitly - that **there is indeed a discrimination existing**. Still, there are no plans for the introduction of a refund procedure or similar.

Finally, it has to be noted that the initial proposed changes to the draft Bill regarding the unsolved issue of competency for Fokus Bank claims (i.e. Federal vs Local tax office) have not been taken into account in the final text.

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