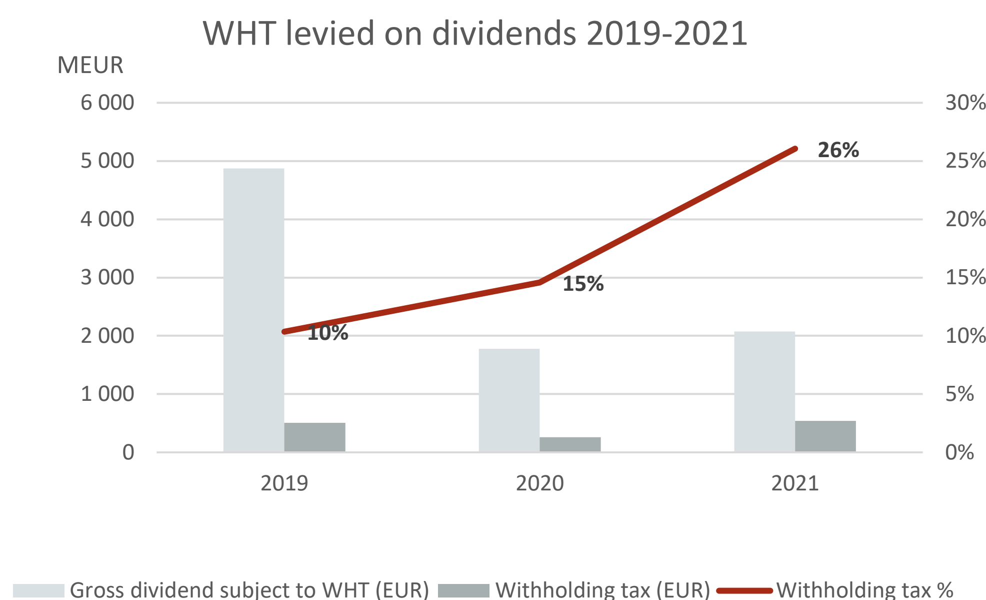
2.1 Which national measure(s) do you think are in breach of EU law and why?*

2.1.1 Background

The Finnish legislation related to the withholding taxation of dividends paid to nominee-registered shares has been amended. The legislative changes entered into force on 1 January 2021. The legislative process involved the adoption of the OECD Treaty Relief and Compliance Enhancement (TRACE) procedure. The objectives of the procedure, i.e. developing an efficient treaty relief system and ensuring proper compliance with tax obligations,[1] are desirable. However, the way in which the procedure has been implemented in Finland has been unsuccessful, and the amended legislation is likely to discourage non-residents from making investments in the shares of Finnish listed companies.

Figure 1. Withholding tax ("**WHT**") levied on dividends 2019–2021[2]



Along with other experts, the complainants who are Finnish publicly listed companies, have been concerned over the effects of the amended legislation, which was constantly highlighted during the legislative process.[3] Unfortunately, the concerns have not been taken into consideration. The first data received from Euroclear Finland Oy (pictured above and attached hereto as Schedule 2.1(A)) indicates that the payors have been compelled to withhold significantly higher taxes from non-Finnish dividend recipients ever since the new legislation was adopted. The average withholding tax levied by the complainants on dividends paid to non-Finnish owners of nominee-registered shares during spring 2021 was 26% resulting in levy that was 2.5 times higher on foreign shareholders than in 2019, for example. Therefore, the companies are forced to request the European Commission to

[1] OECD (2013). *TRACE Implementation Package for the Adoption of the Authorised Intermediary System*, p. 3.
[2] See Schedule 2.1(A) for further information.
[3] See for instance the statements made by the Confederation of Finnish Industries (EK) and Finance Finland (FA) during the parliamentary proceedings on the website of the Finnish Parliament (in Finnish) https://www.eduskunta.fi/FI/vaski/KasittelytiedotValtiopaivaasia/Sivut/HE_282+2018_asiantuntijalausunnot.aspx. Both EK (Lehmusoja, p. 2) and FA (p. 1) state that the legislation would make the shares of Finnish companies less attractive for foreign investors. Also, the Commerce Committee of the Finnish Parliament concluded in its statement on the Government Bill (TaVL 66/2018 vp – HE 282/2018 vp, p. 7) that the legislation would create significant risks for the Finnish capital market.

investigate whether the amended Finnish legislation is a non-justified restriction on the free movement of capital and thus in violation of the basic freedoms of the European Union.[4]

2.1.2 The new legislation restricting the free movement of capital

2.1.2.1 New punitive WHT rate on nominee-registered shares introduced as of 1 January 2021

Under Section 7(1) of the Act on the Taxation of Nonresidents' Income (in Finnish: *Laki rajoitetusti verovelvollisen tulon verottamisesta* 11.8.1978/627; the "**Tax at Source Act**"), the general tax at source or withholding tax rate for dividends is 20% for non-resident corporations and 30% for other non-residents.

In accordance with the new Section 7(2), instead of the general WHT rates, a higher WHT rate of 35% is, however, applied on dividend paid by a publicly listed company on nominee-registered shares.

Under Section 7(2), the application of the general WHT rates on dividends paid on nominee-registered shares requires that the payor or an authorised intermediary (the "**AI**")[5] at the time of payment possesses "final recipient information" (in Finnish: *loppusaajatiedot*) on the dividend beneficiary, in accordance with Section 15 e of the Act on Assessment Procedure (in Finnish: *Laki verotusmenettelystä* 18.12.1995/1558). Unless this requirement is satisfied, the payor is liable to withhold the punitive 35% WHT rate instead of the general domestic law rates (20% for corporations and 30% for others, such as individuals).

Section 15 e(1) of the Act on Assessment Procedure contains a list of the identifying information that the payor and the AI must possess.[6] However, the law does not contain a definition of "final recipient", wherefore it is not realistically possible to exclusively conclude whether such information is possessed or not.

2.1.2.2 Procedure for granting tax treaty benefits

Markets are traditionally described as "relief at source markets" or as "reclaim markets", depending on whether treaty benefits are granted at dividend payment or whether treaty benefits are only granted retroactively via a refund application process.

Finland has traditionally granted tax treaty benefits at source (treaty relief at source). Relief at source is the primary means by which reduced withholding would be claimed also in accordance with the OECD's TRACE Implementation Package.[7]

With the introduction of the new legislation, the previous *simplified procedure* for granting tax treaty benefits, and whereby the tax treaty WHT rate of 15% or higher was applicable under a simplified process, was abolished.[8]

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[4] Similarly, the Finnish tax legislation was determined not to be compatible with the EU law in *European Commission v Republic of Finland*, C-342/10,

[5] An Authorised Intermediary means a financial intermediary entered into the Register of Authorised Intermediaries maintained by the Finnish Tax Administration. The financial intermediary might be e.g. a global custodian which provides investors a single access point to national central securities depositories via a network of other financial intermediaries, i.e. sub-custodians.

[6] The information consists of e.g., the amounts of dividends paid and tax at source withheld, identifying information such as the name, date of birth, address in the country of residence, Tax ID in the country of residence – if they are issued in the country in question – and the legal form of legal persons.

[7] OECD (2013). *TRACE Implementation Package for the Adoption of the Authorised Intermediary System,* p. 6.

[8] Under the repealed Section 10 b of the Tax at Source Act, the payor had to "carefully verify" that the dividend provisions of the tax treaty were applicable. Under the provision, the agreement on the custody of the nominee-registered shares

Under Section 10 of the Tax at Source Act, instead of the WHT rates under Finnish law, the WHT rate of a double tax treaty shall be applied if the beneficiary has presented to the payor proof of the beneficiary's country of residence and that the other requirements for the application of the tax treaty are met. As proof, the beneficiary can present a tax-at-source card issued by the Finnish Tax Administration, or provide their name, date of birth, possible other official identification code, and the beneficiary's address in the state of residence. In the Government Bill from 2005 concerning Section 10 (HE 118/2005 vp), considering the legality principle in the Finnish Constitution, it was deemed necessary that the list of proof be included in the law (instead of a lower decree as it was until 2005).

The abovementioned rules continue to apply to non-listed companies paying dividends abroad. Conversely, regarding listed companies, along with the implementation of TRACE, a new Section 10 b was introduced, which includes new stricter regulation for treaty application on dividends paid on nominee-registered shares, applied instead of Section 10.[9] Under the new regulation, the dividend provisions of a tax treaty may be applied if the dividend payor or the AI closest to the dividend beneficiary has "carefully investigated" the beneficiary's country of residence and "verified" that the dividend provisions can be applied to the beneficiary.

Under Section 10 b(4) of the Tax at Source Act, a tax-at-source card issued by the Finnish Tax Administration, a certificate issued by the tax authority of the beneficiary's country of residence, or an Investor Self-Declaration ("**ISD**") that indicates the beneficiary's information necessary for the levying of WHT, can be deemed as careful investigation to determine the beneficiary's country of residence. The ISD must be sufficiently reliably documented and consistent with the other information on the dividend beneficiary possessed by the AI. Under the section, the Tax Administration shall issue regulations on the investigation of the reliability of the ISD.

In contrast, and unlike Section 10, the new Section 10 b, which is applicable to listed companies, does not make any clear reference to how the applicability of the dividend provisions of the tax treaty should be verified in order for the payor or the AI to ascertain that they cannot retroactively be considered to have acted "negligently".

According to Section 3 of the Tax Administration's decision on the contents and period of validity of the Investor-Self Declaration, and the procedure with which its reliability is verified (issued 14 September 2020; the "**ISD Decision**"; attached hereto as Schedule 2.1(B)):

> The payor or the Authorised Intermediary referred to in § 10 d of the Act on the Taxation of Nonresidents' Income must ensure, that the dividend beneficiary has in the Investor Self-Declaration provided the information referred to in § 1 of this decision and confirmed the information to be correct. The reliability of the Investor Self-Declaration must be verified based on the information required by the common information exchange standards, and anti-money laundering and know your customer legislation, as well as the information otherwise available to the payor or the Authorised Intermediary on the dividend beneficiary.

between the account operator or its agent and the foreign asset management firm was deemed a careful verification of the applicability and no other proof was required in order for the dividend payor to be able to apply the 15% (or higher) WHT rate.

[9] It is noted that in the Government Bill (HE 282/2018 vp, section 2.1.5), it is stated that already under current law (i.e. under Section 10), the dividend payor is obligated to carefully investigate whether a double tax treaty may be applied, including verification that the dividend beneficiary is the beneficial owner of the dividend. However, this does not seem to be in line with the wording of Section 10 or the related Government Bill (HE 118/2005 vp).

> The reliability of the declaration must then be verified again, if the payor or the Authorised Intermediary receives information on a change in the dividend beneficiary's circumstances.
>
> The payor or the Authorised Intermediary must, based on the information available to them, confirm before the dividend payment whether the declaration is reliable.
>
> The confirmation referred to above in subsection 3 is not required, if the tax at source withheld from the dividend is at least 15 per cent or the dividend amount is under 10 000 euros.
>
> The information referred to above in subsection 1 must be available to the payor or the Authorised Intermediary when verifying the reliability of the declaration in accordance with the procedure referred to in this section.

The Tax Administration guidelines "The contents, period of validity and verifying the reliability of the Investor Self-Declaration" (issued 1 October 2020; the "**ISD Guidelines**"; attached hereto as Schedule 2.1(C)) include further guidance on how the reliability of the ISD should be verified. According to the ISD Guidelines, for instance the "information otherwise available" to the payor or the AI refers to the information that affects the reliability of the ISD and that the AI or a Contractual Intermediary (hereinafter the "**CI**"), who verifies the reliability of the ISD on behalf of the AI, has received on their customer in their business activities. Under the ISD Guidelines, the AI is not required to search information only for this purpose from public sources, such as the internet, public registries, or commercial databases. Otherwise, the ISD Guidelines do not include any further information on what information is referred to. Furthermore, according to the ISD Guidelines, the ISD cannot be deemed reliable if the AI knows "or has reason to know" that the ISD is unreliable.

It is noted in the ISD Guidelines that, in addition to an ISD, a tax-at-source card issued by the Finnish Tax Administration or a certificate issued by the tax authority of the beneficiary's country of residence can be deemed as careful investigation to determine the beneficiary's country of residence. Under the guidelines, the AI shall in that case additionally verify that the person presenting the tax-at-source card or residency certificate is the beneficial owner within the meaning of the tax treaty (in Finnish: "*verosopimuksen tarkoittama osingonsaaja*") applicable on the dividend. The ISD Guidelines, or the Tax Administration guidelines "Authorised Intermediary's responsibilities and liabilities" (issued 21 December 2021, the "**AI Guidelines**"; attached hereto as Schedule 2.1(D)) referred to therein do not include guidance on how the verification shall be done in order to comply with the law.

This, *de facto,* means that Finnish listed companies can be deemed to have acted negligently in confirming the applicability of tax treaties based on a very wide and unforeseeable universe of "other information", which makes it impossible for these dividend payors to achieve legal certainty on their tax risk position when paying dividends abroad.

2.1.2.3 Tax liability of the payor and the AI

Under Section 16(2) of the Tax at Source Act, the tax is levied from the beneficiary if the tax has not been withheld for a reason other than the negligence of the payor. Consequently, the payor is released from the tax liability if the tax has not been left unwithheld due to its negligence. According to the previous Government Bill from 2005 (HE 118/2005), where the dividend payor applies a double tax treaty even if the information listed in Section 10 has not been provided, or where such information is evidently erroneous (e.g. where the information of the foreign bank acting as a nominee is given instead of the dividend beneficiary), the dividend payor could be deemed as negligent and thus liable for the unwithheld tax. This standard of duty enacted in 2005 is still as such applicable to non-listed companies.

In contrast, according to the new Government Bill (HE 282/2018 vp, section 2.2.2), the starting point of the new implementation of the TRACE system is that it imposes a strict liability on the listed company payor and the AI when paying dividends to foreign nominee-registered shareholders. [10]

Along with the implementation of TRACE, a new Section 10 c was introduced, including new regulation on the liability of an AI. In order to be released from liability, the AI must prove that the error was not due to its negligence. An AI is not liable for the tax left unwithheld if it can prove that it has forwarded the information received from another AI for the payment of the dividend with the same content to the next AI in the custody chain or to the payor.

> According to the Tax Administration's guidelines on the responsibilities of an AI[11], an AI may be released from liability by:
>
> - proving that the liability has been transferred to another AI, or
> - proving that it has fulfilled its responsibilities to take reasonable measures and that it did not know or did not have reason to know that the dividend beneficiary provided incorrect and/or incomplete information.
>
> According to the guidelines, "[a]n AI is deemed to have used reasonable measures when it demonstrates that it has followed the procedure in accordance with the Tax Administration's decision on the contents and period of validity of the Investor-Self Declaration, and the procedure with which its reliability is verified, as well as the Tax Administration's guidance that instructs the decision".

Under the new Section 10 c(4), the dividend payor and the AI, provided that the AI has accepted responsibility for tax withholding, are responsible for any unwithheld tax. According to the Government Bill (HE 282/2018), where tax has not been withheld due to negligence of an AI, any unwithheld tax would be levied from both the dividend payor and the AI. The dividend payor would eventually be credited the tax, provided that payment is received also from the AI.

The abovementioned rules ultimately mean that if (and when) AIs have not accepted to bear the tax risk stemming from information deemed incomplete, the Finnish listed companies paying dividends abroad are solely responsible for any "negligence" in relation to data that is deemed erroneous, unless the Finnish listed companies voluntarily withhold the maximum 35% WHT rate (instead of treaty rates) on all dividends paid abroad.

2.1.3 Free movement of capital in EU law

2.1.3.1 Prohibited restrictions on free movement of capital

Under Article 63(1) of the Treaty on the Functioning of the European Union (the "**TFEU**"), all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. Based on the case law of the Court of Justice of the European Union (the "**CJEU**"), the prohibited restrictions include measures of a Member State that are likely

[10] The unclarity of the new legislation with this regard was brought up during the legislative process. In its statement on the Government Bill (TaVL 66/2018 vp – HE 282/2018 vp, p. 5), the Commerce Committee of the Finnish Parliament concluded that the bill is not clear with regard to the tax liability of the payor.
[11] AI Guidelines, chapter 6.3.

to discourage non-residents from making investments in the Member State or to discourage the Member State's resident from doing so in other states.[12]

Specifically, the CJEU has held that the less favourable treatment by a Member State of dividends paid to non-resident taxpayers, compared to the treatment of dividends paid to resident taxpayers, is liable to deter non-residents from undertaking investments in the Member State and, consequently, amounts to a restriction of the free movement of capital.[13]

Even if the tax burden itself would not be higher, the treatment may be in conflict with the free movement of capital if the cross-border situation is subject to more burdensome procedural or administrative requirements.[14] Tax provisions that apply without distinction to domestic and cross-border situations may constitute a restriction if they impose conditions that are difficult or impossible to fulfil in cross-border situations.[15]

2.1.3.2 Disproportionate measures are not justified

The free movement of capital, as a fundamental principle of the TFEU, may be restricted only by national measures which are justified by overriding requirements of the public interest and which are not applied in a discriminative manner. Furthermore, in order to be justified, the measure must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality, i.e. the restriction must not be unreasonable in comparison to the objective reached with the measure.[16]

The CJEU has accepted, inter alia, safeguarding the effectiveness of fiscal supervision, the anti-avoidance purpose, safeguarding the fiscal cohesion of the national tax system, and the territorial principle as justifications for a tax treatment constituting a restriction on one of the basic freedoms. In contrast, administrative burden of the national authorities, loss of tax revenue, and other reasons based on state finance are examples of reasons that the Member States have put forward as justifications for restrictive tax treatment which the CJEU has rejected.[17]

It should be noted that even if the effectiveness of fiscal supervision may, in principle, serve as a justification, the CJEU has rejected it in most cases on direct taxes. The justification has been rejected for the reason that the Member State would have had a less restrictive measure available, or the Member State could have relied on the Directive on Administrative Cooperation and the Recovery[18] to receive the necessary information from other Member States.[19]

[12] See e.g. *Sofina*, C-575/17, para. 23, and case law cited therein; *Svensson and Gustavsson,* C-484/93, para. 10; *Trummer and Mayer,* C-222/98, para. 26; *Sandoz,* C-439/97, para. 19; *Commission v. Portugal* C-20/09, para 54; see also Helminen, Marjaana (2020). *EU Tax Law – Direct Taxation,* p. 126-127.
[13] *Sofina*, C-575/17, para. 24, and case law cited therein.
[14] See e.g. *Schumacker*, C-279/93, para. 49; *Futura*, C-250/95; *Vestergaard*, C-55/98, para. 21; Helminen, Marjaana (2020). *EU Tax Law – Direct Taxation,* p. 73.
[15] See e.g. *Van der Weegen and Pot*, C-580/15; Helminen, Marjaana (2020). *EU Tax Law – Direct Taxation,* p. 73.
[16] *Commission v. Portugal*, C-367/98, para. 49; See also Helminen, Marjaana (2020). *EU Tax Law – Direct Taxation,* p. 150.
[17] Helminen, Marjaana (2020). *EU Tax Law – Direct Taxation,* p. 150-151.
[18] Council Directive (2011/16/EU) of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC and Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.
[19] Helminen, Marjaana (2020). *EU Tax Law – Direct Taxation,* p. 153.

2.1.4 The new legislation is a forbidden restriction of the free movement of capital

2.1.4.1 The taxation of a foreign investor is comparable to the taxation of a Finnish investor

Whereas measures that are such as to discourage non-residents from making investments in the Member State may constitute a forbidden restriction of fundamental rights even when not discriminatory as such, it is noted that in this case it seems that the restriction would in fact be specifically discriminatory.

In considering whether a measure is discriminatory (direct or indirect discrimination), it shall first be established that the favourable and less favourable situations are comparable.

The matter concerns the withholding taxation of foreign resident shareholders of Finnish listed companies. It is settled case-law of the CJEU that as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income not only of resident taxpayers but also of non-resident taxpayers from dividends which they receive from a resident company, the situation of those non-resident taxpayers becomes comparable to that of resident taxpayers.[20]

It thus seems clear that the taxation of a foreign investor is comparable to the taxation of a Finnish investor, wherefore the discriminatory treatment may constitute a forbidden restriction.

2.1.4.2 The new punitive 35% WHT rate on nominee-registered shares constitutes less favourable treatment of certain foreign investors

2.1.4.2.1 Finnish tax resident shareholders are not subject to a similar punitive tax

It is settled case-law of the CJEU that the measures prohibited by Article 63(1) TFEU as restrictions on the movement of capital include measures which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States.[21] Specifically, the less favourable treatment by a Member State of dividends paid to non-resident companies, compared to the treatment of dividends paid to resident companies, is liable to deter companies established in a Member State other than that first Member State from undertaking investments in that same first Member State and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, under Article 63 TFEU.[22]

As described, the general WHT rates under Finnish domestic law, applicable on dividends payable to shares held by foreign shareholders, are 20% for corporates and 30% on others. However, under the new rules, a new punitive WHT rate of 35% is applicable on nominee-registered shares. It is an established fact that foreign investors primarily own shares on nominee-registered accounts – a procedure which enables many foreign portfolio investors to invest in Finnish shares.

The tax rates applicable on dividends paid to shares in listed companies, owned by Finnish tax resident shareholders, are generally subject to taxation at either the general corporate income tax rate of 20%, or at an effective tax rate of 25.5%–28.9% for individuals and estates (85% of the dividend is taxable capital income, the applicable capital income tax rates being 30% and 34% for capital income exceeding EUR 30,000 per tax year).

> Under Section 4 a(1) of the Prepayment Act (in Finnish: *Ennakkoperintälaki,* 20.12.1996/1118), a tax prepayment of 50% is withheld from a dividend payment on a nominee-registered share, where the dividend beneficiary is a Finnish tax resident, and the

[20] See C-575/17 *Sofina*, para. 47, and case law cited therein.
[21] See C-575/17 *Sofina*, para. 23, and case law cited therein.
[22] See C-575/17 *Sofina*, para. 24, and case law cited therein.

payor does not receive, or the AI is not able to provide the Tax Administration with, the "final recipient information" on the dividend beneficiary within the meaning of Section 15 e of the Act on Assessment Procedure. Unlike WHT, the tax prepayment is not a final tax by nature, and any tax prepayment withheld in excess is automatically refunded in connection with the regular annual income tax assessment without a separate refund claim process. In addition, it should be noted that under current law in Finland, nominee registration is only allowed for foreign shareholders, whereas Finnish residents are not allowed to hold shares issued by a Finnish issuer on nominee-registered accounts in the Finnish central securities depository (Euroclear Finland Oy).[23] Section 4 a(1) therefore seems to add an exaggerated tax prepayment liability on a form of shareholding from which Finnish residents are in any case generally excluded to begin with, and the practical meaning of such a precaution measure is ambiguous.

2.1.4.2.2 Application of general tax rates, or tax treaty rates, instead of the punitive 35% tax rate has been made practically impossible from a procedural viewpoint

As mentioned above, the liability of the dividend payor (and the AI) for unwithheld tax is extremely strict, i.e. the payor/AI must be able to show that tax has not been left unwithheld due to their negligence.

The application of the general WHT rates on dividends paid on nominee-registered shares requires that the payor or the AI at the time of payment possesses "final recipient information" (in Finnish: *loppusaajatiedot*) on the dividend beneficiary; however, the law does not contain a definition of "final recipient", making it practically impossible to conclude whether such information is possessed or not.

In the Government Bill, it is noted that "a requirement for the application of a tax treaty is that the "final recipient information" of the dividend beneficiary is provided to the Tax Administration.[24] Furthermore, it has been noted that the purpose of the regulation is that the Tax Administration will receive, as comprehensively as possible, information of the "final beneficiaries" already in the annual notifications.[25] The Government Bill thus clearly indicates that in the law, "final recipient" is meant to refer to "beneficial owner" within the meaning of the tax treaties.

In contrast, in its guidelines, the Finnish Tax Administration has concluded that identity information on the *dividend beneficiary* (instead of any "final recipient", "final beneficiary", or "beneficial owner") would be sufficient for the application of the general 20/30% WHT.[26]

The discrepancy between the wording of the law, the legislative works, and the administrative guidelines on the correct application of the law highlights the difficulty of the situation from the viewpoint of the company distributing dividends and the AI, who thus have no other realistic option than to withhold a 35% WHT instead of the general rates.

As mentioned above, for the application of tax treaty rates, the law requires verification of the applicability of the tax treaty. However, unlike Section 10 of the Tax at Source Act, the new Section

[23] Sections 2 and 5 a of the Act on Book-Entry Accounts (in Finnish: *Laki arvo-osuustileistä* 17.5.1991/827).
[24] HE 282/2018 vp, Summary.
[25] HE 282/2018 vp, p. 37.
[26] AI Guidelines, chapter 3.1.1.

10 b does not contain any regulation on the measures required from the payor (or AI) for verifying the applicability of the tax treaty when paying out the dividend.

Under the Tax Administration's guidelines, the AI must ensure before paying out the dividend that the person presenting the tax-at-source card or certificate of residence is the beneficial owner of the dividend in accordance with the relevant tax treaty.[27] The guidelines do not include any definition of a "beneficial owner" or any guidance on the sufficient procedure for such verification by the dividend payor or the AI.

> In accordance with the Tax Administration's guidance regarding an application for a tax-at-source card, a foreign corporation must separately confirm that they are the beneficial owner of the dividend income.[28] According to the guidance, a corporation applying for a tax-at-source card must separately confirm to be the beneficial owner of the dividend income. Where the shares held and referred to in the application are, fully or partially, part of a swap deal, a futures contract, or other derivative contract, or where the shares are lent to some other party, or where they are subject to some other arrangement, the applicant shall enclose a copy of the contract on a lending arrangement, etc., with an additional free-form account providing information on the reasons why the applicant believes it should be treated as the beneficial owner of the dividends. The list of information required by the Tax Administration for tax-at-source cards perhaps sheds some light on what kind of circumstances the Tax Administration considers as to have at least some effect on the beneficial owner status. However, based on law, it is not possible to exclusively conclude whether and to what extent the listed circumstances may have an effect and whether or not such effect constitutes a categorical denial of beneficial ownership status.

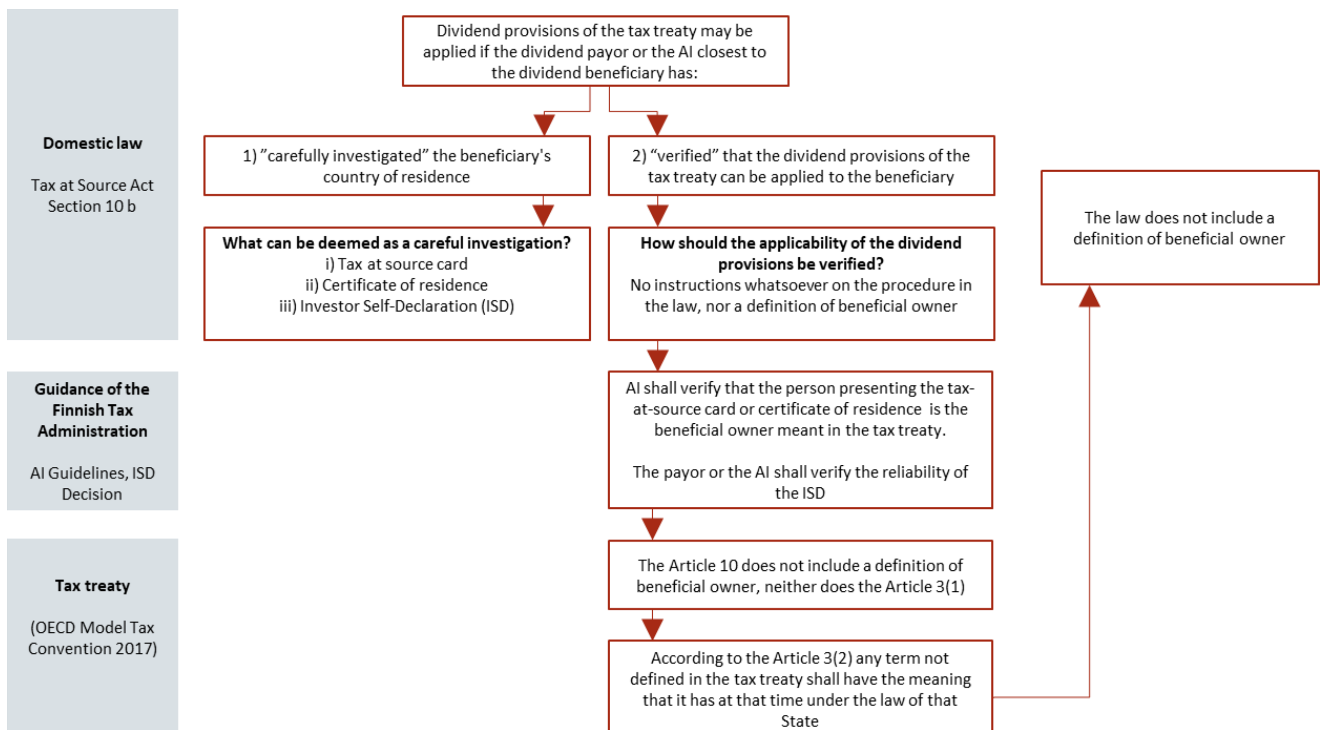
If the dividend beneficiary provides the payor (or the AI) with an ISD, the dividend beneficiary shall assure on the ISD that they are "not acting as an agent, nominee or conduit with respect to the dividend to which this declaration relates" and that they are the "beneficial owner of the dividend as referred to in the tax treaty" (see § 1 of the ISD Decision). As regards the verification of the reliability of the ISD, the Tax Administration has issued a decision (ISD Decision, attached hereto as Schedule 2.1(B)) and further guidance (ISD Guidelines, attached hereto as Schedule 2.1(C)), referred to above in Section 2.1.2.2. Neither of these includes any definition of the beneficial owner. Thus none of the guidelines available, let alone the law, includes any information on who should be considered the beneficial owner, e.g. in case of share lending.

From the point of view of both the dividend payor and the AI, as well as the dividend beneficiary, the situation is clearly unbearable:

- The law (or the Tax Administration's guidelines) does not include a definition of the beneficial owner and refers to the tax treaty.
- However, the term "beneficial owner" has not been defined in the provisions of the tax treaties (see e.g. the OECD Model Tax Convention 2017), but instead, according to Article 3(2) of the OECD Model Tax Convention 2017, any term not defined in the tax treaty shall have the meaning that it has at that time under the law of that State.

[27] AI Guidelines, chapter 3.1.2; ISD Guidelines, chapter 10.
[28] The Tax Administration's guidance "Foreign corporation's tax-at-source card application for dividend, interest and royalty income (Form 6211e), how to fill out the form".

Figure 2. The concept of beneficial owner in domestic law and tax treaties.



Furthermore, as noted, even an explicit confirmation by the dividend beneficiary that they are indeed the beneficial owner does not free the payor or the AI from tax liability since they are still subject to scrutiny of "other information available to them". In practice, of course, at the payment of dividend, the payor or the AI has absolutely no realistic possibility to verify the information of a single shareholder, let alone any agreements the shareholder might be involved in. The dividend payment process of Finnish listed companies is handled by the central custodian Euroclear Finland Oy and the custodian banks, who are organised in chains of international sub-custodians. All information, including what treaty rates should be applicable, is passed on through this chain from the foreign custodian that is closest to the foreign shareholder. The dividend payors (i.e. the Finnish listed companies) are not part of this process and they receive all shareholding information from the process "as is". The dividend payment takes place after a matching period of three (3) banking days from the record date. Naturally, trading with listed shares is continuous, and thousands of shares may exchange hands during any bank day. It is unrealistic to expect that any significant human interaction could be involved in the delivery of data on several thousands of shareholders during a period of three banking days (in practice two nights taking into account the time difference) and therefore the delivery of shareholder information can be described as an automated and summary process without, or with minimal, human interaction (see Schedule 5). In the absence of a clear definition of beneficial owner and taking into account that the standard of duty imposed on the dividend payors and the AIs is extremely extensive and almost infinite, as it concerns e.g. "other available information", it is unrealistic to expect that the payors or the AIs could be in possession of such information within three banking days (with regard to several thousands of foreign shareholders). In fact, all information available to them stems from this thoroughly automated process and, in practice, no data can be input to the process outside of it or, in any case, outside of what the IT systems available to the custodians are capable of providing. Put simply, it is clear that

computerised systems cannot provide information that is not holistically determined and that is thus unable to take the form of a computerised algorithm.

Considering the strict liability of the dividend payor and the AI and the unclear and unrealistic verification requirements, a dividend payor or the AI has, in practice, no way to ensure that they will not be subject to retroactive tax liability and thereby may not have other realistic alternatives than to apply the 35% punitive WHT on dividends paid on nominee-registered shares.

As mentioned above, the general dividend WHT rates for non-residents are 20% and 30%. The most common WHT rate for dividends in tax treaties is 15%, however, lower rates also apply in many cases. In addition, there are many investors, such as US pension funds, sovereign wealth funds, state funds, and central banks to whom a 0% WHT applies. As shown in Schedule 1, in 2019, when tax treaty rates were still applied at source to a large extent, the average WHT rate withheld was 10%. Considering Finland's broad network of tax treaties, where 15% is the most common WHT rate, as well as the number of investors entitled to a lower rate, the 10% WHT seems to be a realistic applicable average WHT rate. The data from 2021 clearly indicates that the punitive 35% WHT rate has been applied widely instead of the correct applicable domestic or treaty rates, as the average WHT rate of 26% is significantly higher than the most common tax treaty rate of 15% or even the WHT rate applied on dividend payments to foreign corporations under domestic law (20%).

2.1.4.2.3 Investors from different countries may be subject to different WHT treatment

As described above, the law provides a different treatment of investors holding shares via nominee registration compared to investors holding shares directly. Most foreign shareholders hold shares via nominee registration, whilst direct holding is not a generally available option in most countries.

In addition, as regards nominee-held shares, as mentioned above in Section 2.1.2.2, the Tax Administration's ISD Decision sets forth that when the amount of dividend exceeds EUR 10,000, the payor or the AI must, based on the information available to them, confirm before making the dividend payment whether the declaration given by the dividend beneficiary is reliable, provided that the WHT withheld from the dividend is less than 15%.

In practice, the dividend payor (or the AI) is thus obligated to impose stricter scrutiny on dividends paid to investors resident in countries with which Finland has a tax treaty allowing a WHT of less than 15% than that payable to other investors. This can lead to companies (or AIs) favouring investors resident in certain countries (such as the US or Germany, where the tax treaty provides a 15% WHT on portfolio dividends) and applying the treaty rate on dividends payable to them over investors resident in other countries (such as France and Ireland, where the tax treaty WHT rate on portfolio dividends is 0%).

Furthermore, in fear of sanctions levied on the basis of a deemed negligence in verifying the applicability of treaties, and considering that the standard of duty on determining the beneficial owner is not enacted in the law, there is no way to ensure that the Finnish companies would not treat investors resident in different Member States differently when applying their standard of duty. Certain countries or certain types of ownership structures may – in the absence of clear rules in law – be subject to more negative interpretations and at the same time for example investors from countries closer to Finland and with similar legal systems may be more easily regarded as "beneficial owners" than the ones from more distant countries with different legal systems.

2.1.4.2.4 The law can also make it less enticing for Finnish companies to accept foreign investors

Where a Finnish company is in practice forced to levy an excessive punitive tax from dividends payable to foreign shareholders instead of the general domestic tax rates, let alone the treaty rates, there is a risk that this affects the valuation of the company's shares among foreign investors and thereby the valuation of the shares generally in the stock market. This may result in Finnish companies being less interested in having foreign investors as shareholders.

2.1.4.3 Procedural obstacle

The prohibited restrictions of the basic freedoms of the EU include more burdensome procedural or administrative requirements that are likely to discourage non-residents from making investments in the Member State or to discourage the Member State's resident from doing so in other states.[29] The Finnish legislation related to the withholding taxation of dividends paid to nominee-registered shares imposes requirements for both foreign dividend beneficiaries and dividend payors/ AIs. As described above, a foreign dividend beneficiary who requests application of a lower WHT rate, or applies for a WHT refund after the dividend payment is obligated to provide proof that they are indeed the "final recipient" or "beneficial owner" of the dividend income. The dividend payor or the AI shall carefully investigate the dividend beneficiary's country of residence and verify the applicability of the tax treaty.

The CJEU has held that the tax authorities of a Member State are entitled to require the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for a tax advantage provided for in the legislation at issue have been met and, consequently, whether to grant the advantage. The CJEU has concluded, however, that non-resident taxpayers may not be subject to excessive administrative burdens which would make it impossible for them to benefit from a tax advantage.[30]

The first data from Euroclear Finland Oy (attached as Schedule 2.1(A)) indicates that the tax treaty benefits have not in fact been granted for many dividend beneficiaries, which is clear proof of the excessive administrative burden. The requirement that the payor or the AI should within a very short time frame (see Schedule 2.1(E) depicting the dividend payment process) verify the information on the shareholders is evidently not realistic.

Based on the case law of the CJEU, the content, the form, and the degree of detail which the information submitted by the taxpayer must satisfy in order to benefit from a tax advantage are determined by the Member State conferring such an advantage in order to enable it to apply the tax advantage properly. The CJEU has clarified that the taxpayer cannot be required e.g. to produce documents which comply in all respects with the form and degree of detail of the documentary evidence laid down in the national legislation of the Member State provided by that taxpayer do enable that Member State to ascertain, clearly and precisely, that the conditions for obtaining the tax advantage in question have been met.[31] As described above, the Finnish regulations do not include clear guidance on when a dividend beneficiary is considered as a "final recipient" or a "beneficial owner". In other words, the information which the taxpayer shall provide has not been clearly determined. Therefore, the requirement to provide proof seems difficult to fulfil and would constitute a procedural obstacle.

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[29] See C-318/07 Persche, para. 72; C-262/09 Meilicke and others, para. 40.

[30] C-156/17 Köln-Aktiefonds Deka, para. 61-62; Joined Cases C-436/08 and C437/08 Haribo Lakritzen, para. 95 and case law cited therein.

[31] C-156/17 Köln-Aktiefonds Deka, para. 61-62 and case law cited therein.

The procedural obstacle in this case is the most obvious with regard to the requirements set on the dividend payors and AIs, see 2.1.4.2.2. above. The objective of the OECD TRACE is that treaty benefits could be granted at source when the dividend recipient is entitled to such benefits. The Finnish implementation of TRACE, with added Finnish domestic procedural obstacles, has led to a situation where instead of treaty rates foreign shareholders are likely – as a default setting – to be subject to a punitive 35% WHT rate (see data in Schedule 2.1(A)). It cannot be in compliance with EU law to set a suspicion of abuse on all nominee-registered shareholders when this type of shareholding is very typical for non-Finnish portfolio investors (and – at the same time – generally not available to Finnish investors[32]).

2.1.5 The restriction is disproportionate and goes beyond what is necessary

The amended Finnish legislation concerning withholding taxation of dividends paid to nominee-registered shares is likely to discourage non-residents from making investments in Finland. The effectiveness of fiscal supervision or the anti-avoidance purpose do not justify this restriction on the basic freedoms of the EU.[33] To be justified, the restrictive measure would have to be suitable for securing the objective which it pursues and should not go beyond what is necessary in order to attain it, i.e. the restrictive measure must be proportionate.[34] The amended Finnish legislation does not fulfil these requirements.

The Government Bill sets forth that the purpose of the new rules is to ensure that the Finnish Tax Administration has access to information on the beneficial owners of nominee-registered shares and to make sure that tax treaty benefits are not granted to taxpayers who are not entitled to them (in other words, to prevent tax avoidance).[35]

The mere existence of a higher WHT rate for nominee-registered shares is clearly disproportionate. For instance, for foreign corporate shareholders (with the standard domestic WHT rate of 20%), this means an additional 15% punitive tax simply for holding shares via nominee registration without any indication of tax avoidance.

The new rules require an investigation of the dividend beneficiary in a manner that is not possible. Under the new rules, the general WHT rates can only be applied if undefined “final recipient” information is available. Furthermore, the application of tax treaty rates is only possible if the dividend payor or the AI have verified that the tax treaty can be applied, i.e. that the dividend beneficiary is the beneficial owner of the share. These requirements for the AI and the dividend payor are impossible to fulfil and thus disproportionate. The concept of “beneficial owner” has not been defined in the law, making it impossible for the payor, the AI, or the dividend beneficiary itself, to conclude whether they are the “beneficial owner” or not. Furthermore, the investigation requirements are practically impossible. The net dividend is paid to the custodian bank already on the fourth day after the record date, and Finnish banks have several thousands of nominee-registered accounts, and several thousands of dividend payments are made to these accounts each year. Consequently, the general requirement to verify the applicability of the tax treaty at each dividend payment is simply impossible to fulfil.

[32] Sections 2 and 5 a of the Act on Book-Entry Accounts.
[33] During the parliamentary process, the Finance Committee of the Finnish Parliament concluded in its statement on the Government Bill (VaVM 38/2018 vp, p. 5) that the necessity of the legislative change had not been proven and the process for the application of the tax treaties in existence before the proposed amendments seemed to be functioning.
[34] See e.g. *Oy AA,* C-231/05, para. 44.
[35] HE 282/2018 vp, p. 19-20.

The Directive on Administrative Cooperation and the Recovery[36] already allows the Tax Administration to receive the necessary information from other Member States. Under Section 10 of the Tax at Source Act, in force as of 15 December 2005, the WHT rates of the tax treaty shall be applied if the beneficiary has presented to the payor a tax at source card or their name, date of birth, possible other official identification code, and the beneficiary's address in the state of residence. On the basis of this information, the Finnish Tax Administration can request the necessary information from the other Member States. Thus, there is no need to enact impossible verification requirements for dividend payors and AIs.

Instead of targeting tax avoidance, the measures now in practice target nearly all foreign investors, as nominee registration is the main way for foreign portfolio shareholders to own shares in Finnish listed companies. In addition, the new rules even apply to shareholders who *directly* hold shares issued by a Finnish issuer in a central securities depository outside Finland (shares in multi-listed companies), as in the system of Euroclear Finland Oy, these are considered nominee registered.

Measures targeting tax avoidance may only be targeted at dividend payors and AIs to a proportionate extent; any measures exceeding this should be targeted at the dividend beneficiaries.[37] Measures affecting all shareholders of nominee-registered shares go beyond what is necessary for the purpose of tackling tax avoidance.

The TRACE procedure was also adopted in Finland by these legislative changes. In accordance with the procedure, the tax treaty benefits should be granted at source[38], which is consistent with the method Finland has traditionally applied. The new stricter regulation for treaty application will very likely result in more refund claims and turn Finland into a reclaim-market, contrary to the objectives of the TRACE procedure. Consequently, the Finnish implementation of the TRACE procedure is not suitable for securing the objectives which it pursues and constitutes a non-justified restriction on the free movement of capital.

> It is noted that in individual cases, the CJEU has concluded that under the general principles of EU law, the right to directive benefits can be refused in case of fraudulent or abusive practice even where there are no domestic (or agreement based) provisions in place providing for such refusal.[39] Here, the CJEU also concluded that where the beneficial owner of the dividends is resident in a third state, refusal of the directive tax exemption is not subject to fraud or abuse of rights.[40] Although it is of course important and necessary to tackle tax avoidance, and to provide tax treaty (as well as directive) benefits only to the beneficial owners of the income, as described in the complaint, the measures implemented in Finland go far beyond what is necessary to tackle tax avoidance or to make sure that treaty benefits are only applied to beneficial owners of dividend income.

2.1.6 Conclusion

As described above, the Finnish implementation of the TRACE procedure is likely to discourage non-residents from making investments in Finland. The new legislation is disproportionate and goes

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[36] Council Directive (2011/16/EU) of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC and Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

[37] See *Deister Holding* C-504/16, para. 61. The CJEU concludes that a general presumption of fraud and abuse cannot justify a fiscal measure which prejudices the enjoyment of a fundamental freedom guaranteed by the treaties.

[38] OECD (2009). *Report of the informal Consultative group on the taxation of collective investment vehicles and procedures for tax relief for cross-border investors on possible improvements to procedures for tax relief for cross-border investors*, p. 32.

[39] Joined Cases C-116/16 and C-117/16 and Joined Cases C-115/16, C-118/16, C-119/16, and C-299/16.

[40] Joined Cases C-116/16 and C-117/16, para 111.

beyond what is necessary to achieve e.g. the purpose of tackling tax avoidance or collecting information. Along with other experts, the complainants constantly highlighted their concern over the effects of the amended legislation during the legislative process. These concerns were not taken into consideration.

As mentioned above in section 2.1.1, first data (attached hereto as Schedule 2.1(A)) also indicates that significantly higher WHT has been withheld on dividends ever since the new legislation was adopted, and the complainants have also been contacted by concerned foreign investors.

The amended legislation clearly constitutes a non-justified restriction on the free movement of capital and must be considered a breach of the EU law.

SCHEDULES

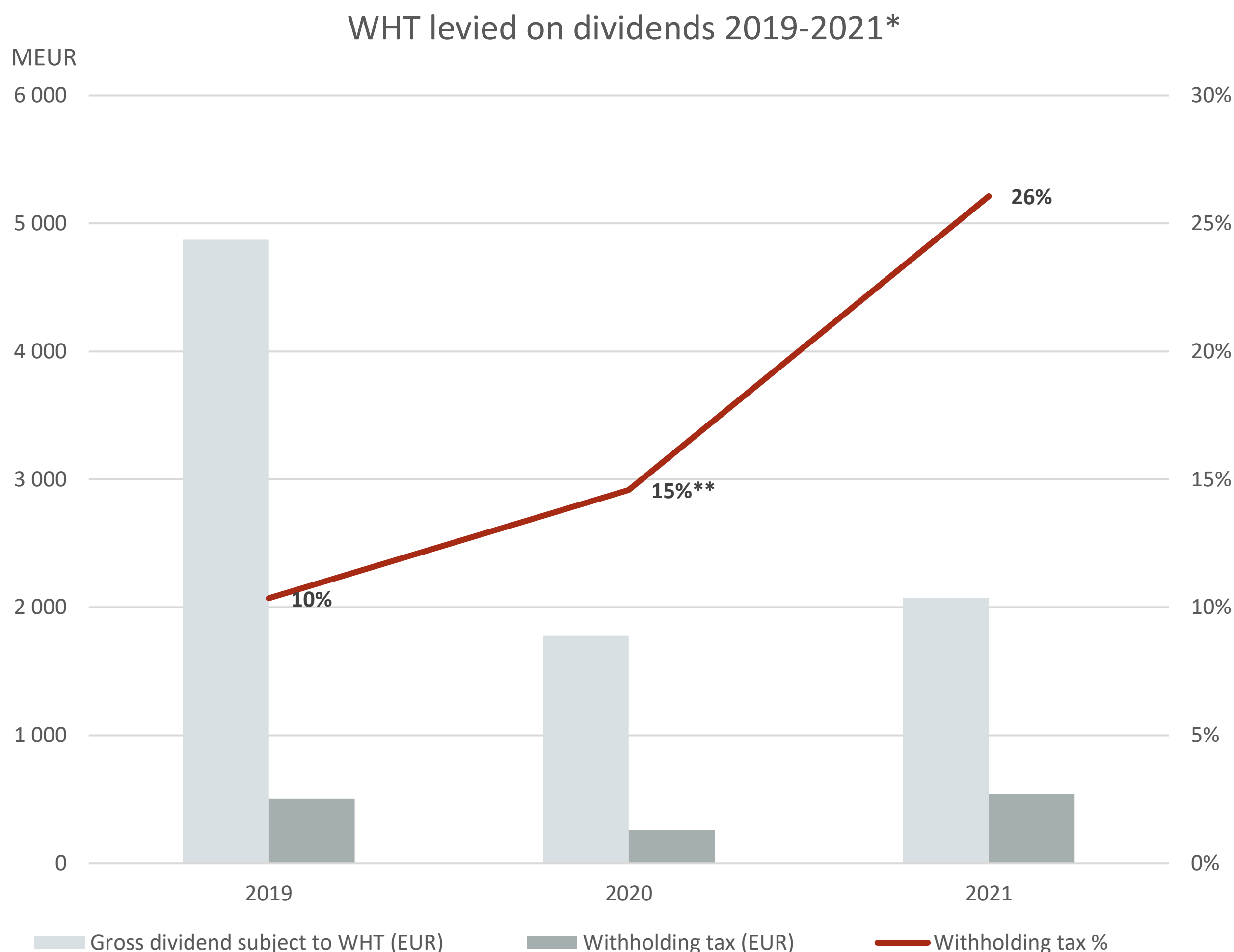
2.1(A) Euroclear Finland Oy data on dividend distributions and tax withholding

2.1(B) ISD Decision

2.1(C) ISD Guidelines

2.1(D) AI Guidelines

2.1(E) Dividend payment process



*The chart includes the dividend information of the claimant companies from 2019–2021, as received from Euroclear Finland Oy, and includes the amount of gross dividend subject to WHT, and the WHT withheld. The data is preliminary and has not been verified. The year 2021 data may not be complete. WHT refunds recorded on the TaxMill service of Euroclear Finland Oy during the tax year have been taken into account in the figures.

** Due to certain changes in the guidance of the Finnish Tax Administration, higher WHT rates were partially applied already in 2020, before the legislative changes entered into force. The complainants note that already these changes could have been considered a restriction of the free movement of capital. However, this complaint focuses on the current legislation in force as of 2021.

Source of data: Euroclear Finland Oy

Dividend payment process

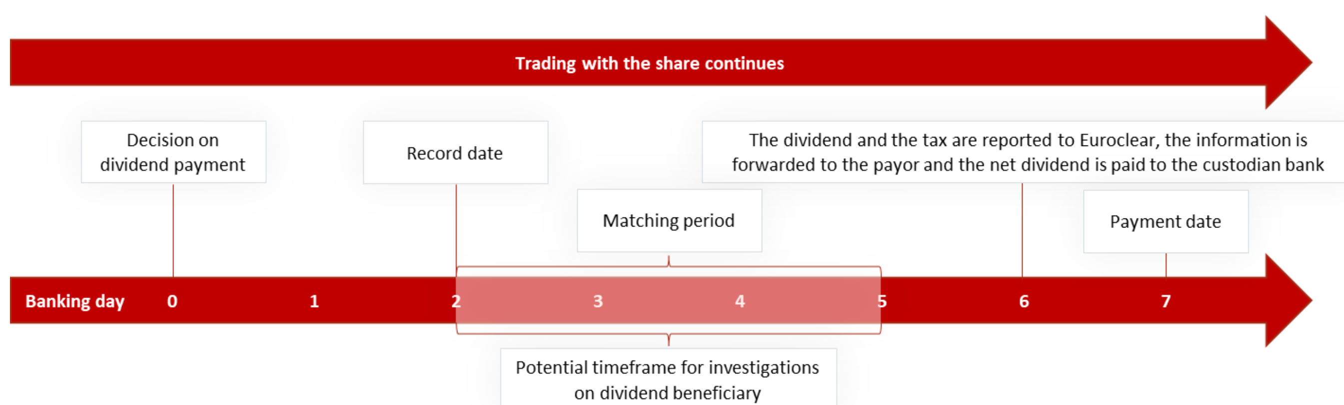
Dividend is paid to shareholders recorded in the register of shareholders as at the end of the record date. If the share is nominee-registered, the custodian administering the foreign owner's book-entry account shall be entered in the register of shareholders instead of the owner. The record date is usually two days after the shareholders' meeting that has resolved on the payment of dividend.

Transactions are entered into the register of shareholders after a settlement period of two days. This means that in order to be registered on the record date and to be eligible to the dividend, the new owner must have bought the share by the end of the day when the shareholders' meeting is held.

All transactions are not always settled by the end of the record date. After the record date, there is a matching period of three days, the purpose of which is to settle the transactions and manually correct the dividend payments so that the dividend is paid to the owner of the shares.

On the fourth day after the record date, the custodian reports to Euroclear Finland Oy (the Finnish Central Security Depository, "**Euroclear**") the total amount of the dividend and the amount of either tax prepayment or tax at source which shall be withheld from the dividend. On the same date, Euroclear forwards this information to the company paying the dividend or the bank functioning as a paying agent. The company paying the dividend or the paying agent transfers the net dividend to the custodian.

The net dividend is then paid to the account of each shareholder based on the number of shares they possessed on the record date.



Settlement of shares

In a share transaction, the settlement instructions come from the parties via the SWIFT messaging system. The instructions are delivered through the chain of intermediaries to the Finnish custodian. The custodians forward this information to Euroclear's transaction settlement system.

The settlement instructions contain standardised information on the date of the transaction, the settlement date, the foreign custodians, and the account where the share has been registered and the account to which it is transferred (book-entry accounts and money accounts attached them).

The settlement instructions also contain information on the transaction type. This information is entered in the SWIFT system by the sender and there are no common rules for completing this information. Thus, the transaction type is not a reliable source of information and it cannot be used as a basis for assessing whether the share has been e.g. bought, received as a gift, or lent as part of a share-lending transaction.