

## Client Information

March 28, 2019

### ■ German exit tax in its current form violates the Agreement on the Free Movement of Persons (AFMP) between Switzerland and the EU

On February 26, the European Court of Justice (ECJ) ruled in the Wächtler case that the German exit tax in its current form violates the Agreement on the Free Movement of Persons (AFMP) between Switzerland and the EU (ECJ, 26 February 2019, E-CLI:EU:C:2019:138, Wächtler case) and fully endorsed the Advocate General's pleading.

This means in particular that an unrestricted, interest-free deferment of payment must be granted by Germany also in relation to Switzerland.

However, the ECJ allows the German tax authorities to make this deferment dependent on a security deposit (e.g. a bank guarantee) in deviation from the EU/EEA cases (cf. section 6 para. 5 sentence 1 AStG).

This applies at least to taxpayers who establish themselves in Switzerland in order to exercise an independent activity there. There is no certainty yet, if the AFMP also protects taxpayers in different situations, e.g. when they are moving to Switzerland after their retirement and not for working / business reasons.

It will be interesting to see how the German legislator reacts. At the first glance, there seem to be different options:

- Possibly, Switzerland will be included in the previous regulation on EU/EEA cases (section 6 subsection 5 AStG). Thus, the legislator would exceed the requirements of the ECJ, since in these cases the deferment of payment would take place without any security deposit.
- Another possibility is that Switzerland could get its own deferment regime (unlimited and interest-free, but with security deposit).

- Finally, the legislator could even extend the deferment regulation demanded by the ECJ to all third country cases. This would appear desirable from a systematic point of view, since the German tax base would remain protected (security deposit!) and, at the same time, the exit out of Germany would not be unreasonably impeded. For this, however, the legislator would have to accept certain fiscal disadvantages - namely the later levying of the tax.

If you have any questions in this matter, please do not hesitate to contact us.



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