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23 May 2012Id. no.
131 128777-12/111**What is meant by foreign investment funds, with regard to the application of the Income Tax Act, the Investment Savings Account Act and the Coupon Tax Act?**

1 SUMMARY

The Swedish Tax Agency is of the opinion that an assessment in accordance with the Investment Funds Act is required in order to establish the basis on which a foreign collective investment undertaking may be considered equivalent to a Swedish investment fund. The Swedish Tax Agency is of the opinion that the same assessment should be made irrespective of whether the issue concerns the term "investment funds" in the Income Tax Act and the Investment Savings Account Act, or whether it concerns exemption from tax liability in Section 4, paragraph 9 of the Coupon Tax Act.

The Swedish Tax Agency considers that the legal form of the undertaking is of no significance. Both contractual funds, trust funds and funds constituted in accordance with company law can be foreign equivalents to Swedish investment funds. This applies irrespective of whether the foreign undertaking has been established within or outside the EEA and irrespective of whether it falls within the scope of the UCITS IV Directive or not, provided that the tax legislation in the undertaking's home state does not provide that the owners of the undertaking are liable to tax on the income received by the undertaking.

The Swedish Tax Agency is of the opinion that the foreign collective investment undertaking shall meet the following criteria that apply for Swedish investment funds in accordance with the Investment Funds Act.

- It shall be authorised and supervised in its home state.
- It shall only invest in assets in which Swedish investment funds are allowed to invest.
- It shall raise capital from the public or from a specifically identified and limited group of investors.
- It shall apply the principle of risk spreading.
- It shall repurchase or redeem units at the demand of the holders using the undertaking's assets.
- It shall make certain information available.
- If the undertaking is not constituted in accordance with company law, its assets shall be administered by an authorised management company.
- Its assets shall be entrusted to a depositary.

The Swedish Tax Agency considers that all undertakings that are authorised in accordance with the UCITS IV Directive are foreign investment funds.



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The same applies to foreign collective investment undertakings that don't fall within the scope of the UCITS IV Directive but that are authorised for sale in Sweden by the Swedish Financial Supervisory Authority.

The Swedish Tax Agency considers that foreign collective investment undertakings that don't fall within the scope of the UCITS IV Directive but upon comparison meet the conditions of the Directive, constitute foreign investment funds if they are authorised and adequately supervised in their home state. This applies irrespective of whether the undertaking is established in a state within or outside the EEA.

Foreign collective investment undertakings that do not meet the conditions of the UCITS IV Directive can be considered to be foreign investment funds if they are authorised and adequately supervised in their home state and if they do not deviate from the Directive to a greater extent than an equivalent Swedish special fund would do. This applies irrespective of whether the undertaking is established in a state within or outside the EEA. The Swedish Tax Agency considers that the undertaking can be open to a limited group of investors but it must be offered for redemption at least once a year. As far as provisions regarding the investments and the spreading of risk are concerned, an overall assessment of these two criteria must be made.

2 THE QUESTION AT ISSUE

With effect from 2012, investment funds are no longer liable to tax on income from assets of the fund according to the provisions of the Income Tax Act (1999:1229), ITA. Instead, the unit holders are taxed on a flat-rate income, based on the value of their units. This flat-rate taxation includes units held in Swedish and foreign investment funds.

With effect from 2012 a new form of saving has also been introduced, investment savings account, that is regulated by the Investment Savings Account Act (2011:1268), ISAA. Holders of investment savings accounts are taxed on a flat-rate income based on the value of the assets in the account. Units in foreign investment funds are considered to be investment assets.

In connection with the abolition of tax liability for Swedish investment funds, foreign investment funds are now exempt from liability to pay Coupon Tax on dividends according to the provisions of the Coupon Tax Act (1970:624), CTA.

What is meant by foreign investment funds with regard to the application of ITA, ISAA and CTA?

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3 APPLICABLE LAWS, ETC.**3.1 The Income Tax Act**

An investment fund is not a legal entity. Despite that, the provisions in ITA regarding legal entities are to be applied to them (Chapter 2, Section 3, paragraph 2 ITA).

Pursuant to new legislation that entered into force on 1 January 2012 and is applied for the first time in the tax assessment 2013, investment funds are not liable to pay tax on income from the assets of the fund (SFS 2011:1271). This applies to Swedish investment funds (Chapter 6, Section 5 ITA) and foreign investment funds (Chapter 6, Section 13 ITA). Instead, natural persons and legal entities are liable to tax on a flat-rate income resulting from the holding of units in investment funds (Chapter 42, Sections 43 and 44 ITA). This applies also to business income pursuant to Chapter 15, Section 1 and Chapter 24, Section 2 ITA.

Units held in foreign investment funds shall also be included in the calculation of the flat-rate income. Despite previous tax liability regulations in Chapter 6, Sections 10 a and 16 a ITA, foreign investment funds were not normally liable to tax in Sweden. Therefore it was considered that they would not be subject to the regulations of a system where tax liability was transferred from the investment fund to its unit holders. However, it was not considered possible to allow flat-rate income to be based purely on units held in Swedish funds since, from a Swedish perspective, there cannot be any difference as far as tax liability is concerned, between investing in a Swedish or a foreign fund (prop. 2011/12:1 p. 404).

The assets in an investment savings account are also taxed based on flat-rate income (Chapter 42, Section 36 ITA). Units in an investment fund that, at the start of the calendar year, are deposited in an investment savings account, are included in the calculation of the flat-rate income on that account. If the units are deposited in an investment savings account and therefore subject to flat-rate income on that account they are not also subject to the provisions of flat-rate income on directly owned units in an investment fund (Chapter 42, Section 43, paragraph 2 ITA).

A unit in an investment fund is regarded as a share for income tax purposes (Chapter 48, Section 2, paragraph 1 ITA). Natural persons are liable to tax on dividends from investment funds and capital gains/losses resulting from the sale or disposal of units in the investment fund (Chapter 42, Section 1 ITA). For legal entities, tax liability on dividends from investment funds is assessed in accordance with the regulations in Chapter 24 ITA, and tax liability on capital gains/losses resulting from sale or disposal is assessed in accordance with Chapter 25 ITA, which refers to the regulations in Chapters 44 and 48 ITA. For companies that



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report units in investment funds as stock, the regulations in Chapter 17 ITA apply instead.

ITA has no definition of what is meant by "investment fund". The preparatory work to ITA states that the term has the same meaning as in the applicable law (1990:1114) with regard to UCITS funds (prop. 1999/2000:2 Part 2 p. 453). The term now has the same meaning as in the Investment Funds Act (2004:46), IFA (prop. 2002/03:150 p. 261).

The terms and expressions used in ITA also include the equivalent foreign phenomena, if it is not stated or evident from the context that only Swedish phenomena are concerned (Chapter 2, Section 2 ITA). In ITA, the concept "investment fund" is used in a manner that include both Swedish and foreign investment funds. In connection with the introduction of flat-rate income on units in investment funds, the question arose of what foreign fund units that have to be taken into consideration. The Government provides no guidance here but assigns the matter for judicial application (prop. 2011/12:1 p. 404).

The Supreme Administrative Court has considered that funds constituted in accordance with company law and established in accordance with legislation based on the UCITS Directive shall be considered to be such investment funds as referred to in ITA (RÅ [Yearbook of the Supreme Administrative Court] 2006 ref. 38).

German immovable property funds have not been considered to be such foreign investment funds that were previously liable to tax on income from immovable property in Sweden, pursuant to Chapter 6, Sections 10 a and 16 a ITA (RÅ 2003 notes 67 and 160). Due to their investment strategy, they were not considered to be UCITS funds in the sense implied by the UCITS Directive, nor were they considered to have a Swedish equivalent.

Chapter 1, Section 5 of the Tax Return and Statements of Income Act (2001:1227) and Chapter 3, Section 2 of the Tax Procedures Act (2011:1244) state that, unless otherwise prescribed, the terms and expressions used in these laws shall have the same meaning and areas of application as in, for example, ITA. This implies that the expression "investment fund" has the same meaning in these laws as in ITA.

3.2 The Investment Savings Account Act

With effect from 1 January 2012, a new form of saving, the investment savings account, has been introduced. Units in investments funds are investment assets that may be deposited in an investment savings account (Section 6 ISAA). Terms and expressions that are used in ISAA have the same meaning and areas of

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application as in ITA. Equivalent foreign phenomena are also included if it is not evident from the context that only Swedish phenomena are concerned (Section 2 ISAA). Therefore, units in foreign investment funds may also be deposited in an investment savings account.

3.3 The Coupon Tax Act

Coupon tax shall be paid on dividends from shares in Swedish limited companies and units in Swedish investment funds (Section 1 CTA).

In connection with the abolition of tax liability for investment funds in ITA, the liability to Coupon Tax has also been abolished for foreign investment funds with effect from 1 January 2012 (SFS 2011:1273). A new ninth paragraph has been entered into Section 4 of CTA which states that, with reference to Chapter 1, Section 1, paragraph 1, point 8 IFA, there is no tax liability for foreign collective investment undertakings established in a state within the European Economic Area or in a state with which Sweden has entered into a tax treaty which contains an article on the exchange of information or an agreement on the exchange of information in tax matters.

The provision has been introduced because the government decided that it would be contrary to the free movement of capital in the FEU Treaty to retain liability to Coupon Tax for foreign investment funds when tax liability has been abolished for Swedish investment funds (prop. 2011/12:1 p. 408 et seq.). For reasons of control, the exemption from tax liability has been limited to funds from countries where the possibility to exchange information exists. Such a requirement has not been considered as too far-reaching.

3.4 The Investment Funds Act**3.4.1 Based on the UCITS IV Directive**

IFA contains regulations regarding Swedish investment funds and provisions with regard to the fund operations of foreign companies in Sweden. The legislation is based on the EU's 'UCITS Directive' the most recent of which is the European Parliament and Council Directive 2009/65/EC, the UCITS IV Directive. The Directive applies within the European Economic Area (EEA).

"Investment fund" is a collective term for UCITS funds (Sw. värdepappersfonder) and special funds (Sw. specialfonder) (Chapter 1, Section 1, paragraph 1, point 15, IFA). UCITS funds are funds that meet the requirements of the UCITS IV Directive. Special funds are regulated nationally and are not covered by the regulations of the Directive. However, the regulations in IFA are in many ways



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the same for UCITS funds and special funds. The special funds may however deviate in certain respects from the provisions that apply to UCITS funds. This applies primarily to provisions regarding investments (prop. 2010/11:135 p. 96). UCITS funds are sometimes described as harmonised funds and special funds as unharmonised funds.

The Swedish Financial Supervisory Authority is the authority responsible for the authorisation and supervision of fund operations in Sweden. The Swedish Financial Supervisory Authority has published a regulatory code for investment funds, FFFS (The Swedish Financial Supervisory Authority Regulatory Code) 2008:11.

In the assessment of what can be considered to constitute a foreign equivalent of a Swedish investment fund, the extent to which the fund deviates from the UCITS IV Directive is important. The sections below therefore describe the provisions that apply to UCITS funds, with reference to both the UCITS IV Directive and IFA, and the deviations from the Directive that are possible for special funds in accordance with IFA. The standpoint uses the term "UCITS funds" for those funds that fall within the scope of the UCITS IV Directive, irrespective of the fund's legal form, if nothing to the contrary is evident from the context.

3.4.2 The definition of foreign funds

The expression "foreign collective investment undertaking" is used in IFA to denote foreign funds, those that meet the requirements of the UCITS IV Directive as well as other funds (prop. 2010/11:135 p. 96). The definition of foreign collective investment undertakings can be found in Chapter 1, Section 1, paragraph 1, point 8 IFA.

A foreign collective investment undertaking refers to a foreign undertaking

- a. which is authorised in its home state to conduct operations the sole purpose of which is to make collective investments in such assets as are set forth in Chapter 5, Section 1, paragraph 2 or Chapter 6, Section 2, paragraph 2 using capital raised from the public or from a specifically identified and limited group of investors,
- b. which applies the principle of risk spreading, and
- c. the shares of which, upon demand by the holders, are repurchased or redeemed using the undertaking's assets

3.4.3 Legal form

Swedish investment funds are contractual funds and cannot acquire rights or assume obligations (cf. Chapter 4, Section 1 IFA). According to the UCITS IV



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Directive, funds can be formed either on a contractual basis, in accordance with trust legislation or company legislation (Article 1.3). The contractual funds and trust funds are called "common funds" in the Directive, and the funds constituted in accordance with company law are called "investment companies", jointly called UCITS.

3.4.4 Administration and depositing of funds

The administration of the fund is managed by a specific fund manager authorised to execute this role (cf. Article 6 of the UCITS IV Directive and Chapter 1, Section 1 IFA). However, an investment fund can manage its assets itself (cf. Articles 29 and 30 of the UCITS IV Directive). The definition of Swedish management companies and foreign management companies is found in Chapter 1, Section 1, paragraph 1, points 7 and 12 IFA.

The assets of the fund shall be entrusted to a depositary (Article 22 of the UCITS IV Directive and Chapter 3, Section 1 IFA).

The provisions in IFA regarding administration and depositing are the same for both UCITS funds and special funds.

3.4.5 Operations in another country

The aim of the UCITS IV Directive is to coordinate the regulations within the EU in order to remove barriers to the free movement of units in UCITS funds.

Foreign management companies that have their registered office within the EEA and are authorised to operate their business in accordance with the UCITS IV Directive may operate in Sweden (Chapter 1, Section 6 IFA). Foreign collective investment undertakings from a state within the EEA that fall within the scope of the UCITS IV Directive may be sold in Sweden (Chapter 1, Section 7 IFA). Equivalent opportunities exist for Swedish management companies that manage UCITS funds to operate within the EEA (Chapter 2, Sections 12 and 15 IFA).

Foreign management companies and foreign collective investment undertakings that are not established in the EEA or that are established in the EEA but don't fall within the scope of the UCITS IV Directive, may only operate their business or be sold in Sweden after authorisation has been obtained from the Swedish Financial Supervisory Authority (Chapter 1, Section 8 and 9 IFA). The foreign collective investment undertakings are assessed in the same way as Swedish special funds. A Swedish management company that don't fall within the scope of the UCITS IV Directive may, after authorisation has been obtained from the Swedish



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Financial Supervisory Authority, establish a branch abroad (Chapter 2, Section 16 IFA).

3.4.6 Supervision

The UCITS IV Directive contains provisions regarding the powers of control and intervention that the member states must ensure that the competent authority has, in order to be able to carry out its supervisory tasks. The competent authority shall be a public authority or a body appointed by a public authority (Article 97.2 of the UCITS IV Directive). In Sweden it is the Swedish Financial Supervisory Authority that exercises supervision and is capable of intervention (Chapter 10, Section 1 and Chapter 12 IFA).

The Directive lists the powers that the supervisory authority must possess. These include, inter alia, the right of access to documents, the right to request information and execute on-site controls, revoke authorisation, request temporary prohibition of trading, and the right to submit the case for legal proceedings. The powers are to be exercised directly, in collaboration with other authorities, under the authority's responsibility through delegation to other bodies or at the request of the competent judicial authorities (Article 98 of the UCITS IV Directive). The member states shall also prescribe the measures and sanctions that are to be applied in the event of non-compliance (Article 99 of the UCITS IV Directive). These provisions have been implemented in Chapters 10 and 12 IFA.

The provisions in IFA regarding supervision and intervention are the same for both UCITS funds and special funds.

3.4.7 Information

An important part of the regulation of funds in both the UCITS IV Directive and IFA are provisions regarding the information that must be submitted to the unit holders (prop. 2002/03:150 p. 177). In IFA, these provisions are the same for both UCITS funds and special funds.

The fund rules are of central importance. They regulate the relationship between the unit holders, the fund and the fund manager. They shall, inter alia, state the name of the fund, the management company and the depositary, the fund's investment policy, rules regarding dividends, the principles for the calculation of the value of the fund and the units, information on sales and redemptions, the fees charged, etc. (Chapter 4, Section 8 IFA and Chapter 14 FFFS 2008:11). The fund rules may not be altered without the prior approval of the supervisory authority (Article 5.6 of the UCITS IV Directive and Chapter 4, Section 9 IFA).



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Each fund shall have its own prospectus which shall contain the fund rules and any additional information required for the investor to be able to make an assessment of the fund and the risk associated with the investment. The prospectus shall also contain an explanation of the fund's risk profile that is clear and easy to understand. See Articles 68-75 of the UCITS IV Directive. In IFA, the term "information brochure" is used and the provisions can be found in Chapter 4, Sections 15 and 16.

Furthermore, for each fund there shall be a short document that summarises fundamental information concerning the fund in a manner easy to understand. This document is called "key investor information" in the UCITS IV Directive (Article 78) and "fact sheet" in IFA (Chapter 4, Section 16 a).

An annual report shall also be submitted for each financial year and a half-yearly report for the first six months of the financial year (Article 68 of the UCITS IV Directive). In IFA, the terms "annual report" and "half-yearly report" are used (Chapter 4, Section 18).

3.4.8 Criteria for foreign collective investment undertakings

In the definition of the expression "foreign collective investment undertaking" (the term for foreign funds) in Chapter 1, Section 1, paragraph 1, point 8 IFA, a number of criteria are stated that have to be met.

1. The fund shall be authorised in its home state to conduct operations.
2. Its sole purpose shall be to make collective investments in such assets as are set forth in Chapter 5, Section 1, paragraph 2 or in Chapter 6, Section 2, paragraph 2 IFA.
3. It shall use capital raised from the public or from a specifically identified and limited group of investors.
4. The principle of risk spreading shall be applied.
5. The shares shall at the demand of the holders be repurchased or redeemed using the undertaking's assets.

Each one of these criteria is explained more in detail in section 3.4.9 - 3.4.13.

3.4.9 Authorisation

The definition states that a foreign collective investment undertaking shall be authorised to conduct operations in its home state (Chapter 1, Section, paragraph 1, point 8 IFA).



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The UCITS IV Directive states that no UCITS may carry on its business without authorisation (Article 5.1).

Swedish investment funds have no legal capacity of their own, which is why their fund operations are conducted by a management company (Chapter 1, Section 1, paragraph 1, point 7 and Chapter 4, Section 2 IFA). Authorisation from the Swedish Financial Supervisory Authority is required to conduct a fund operation and can be given to a Swedish limited company (Chapter 1, Section 4 IFA). Authorisation in respect of special funds can also be given to certain securities companies and Swedish credit institutions (Chapter 1, Section 5 IFA).

3.4.10 Collective investments in certain assets

The definition states that the sole purpose of the foreign collective investment undertaking shall be to make collective investments in such assets as are stated in Chapter 5, Section 1, paragraph 2 or Chapter 6, Section 2, paragraph 2 IFA (Chapter 1, Section 1, paragraph 1, point 8 IFA).

UCITS funds

The UCITS IV Directive contains a detailed listing, in Article 50.1, of the assets in which a UCITS fund may invest. They are divided into the following types of assets.

1. Transferable securities. This refers to shares and other securities equivalent to shares, bonds or other forms of securitised debt, and other negotiable securities that carry the right to acquire such transferable securities by subscription or exchange.
2. Money market instruments. This refers to financial instruments normally sold on the money market, that are liquid and that have a value that can be accurately determined at any time. IFA mentions, inter alia, treasury bills and certificates of deposit, i.e. short-term, interest-bearing securities with a lifetime of up to one year.
3. Units of UCITS or other collective investment undertakings.
4. Deposits with credit institutions.
5. Financial derivatives, including equivalent cash-settled instruments, if they are based on instruments such as those mentioned in the points above, financial indices, interest rates, foreign exchange rates or currencies.

The conditions linked to the different types of assets are dependent on where they are traded, etc. As a general rule, they are to be sold on a regulated market.

A UCITS fund may also have supplementary liquid assets (Article 50.2).



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The provisions of the UCITS IV Directive regarding UCITS funds have been implemented in Chapter 5 IFA. In Chapter 15 of the Swedish Financial Supervisory Authority's regulatory code, FFFS 2008:11, there are further provisions regarding the assets that are permitted in a Swedish investment fund.

A UCITS fund may not invest in certain types of assets. It may not, for example, invest in immovable property or commodities.

Borrowing on a temporary basis is allowed if it represents no more than 10 % of the assets of an investment company or of the value of the fund. (Article 83 of the UCITS IV Directive and Chapter 5, Section 23 IFA). An investment company or a management company or depositary that is acting on behalf of a UCITS fund may not grant loans or act as a guarantor (Article 88 of the UCITS IV Directive and Chapter 5, Section 23 IFA). Neither may they carry out uncovered sales of transferable securities, money market instruments or other financial instruments, "naked short selling" (Article 89 of the UCITS IV Directive and Chapter 5, Section 23 IFA).

Special funds

The same investment provisions apply for special funds as for UCITS funds, if no exception has been permitted by the Swedish Financial Supervisory Authority. However, special funds may invest in derivative instruments that have certain other underlying assets, e.g. commodities, if the instrument is traded on a financial market and does not result in an obligation to deliver or receive the underlying assets (Chapter 6, Section 2, paragraph 2 IFA).

The preparatory work to IFA provides several examples of exceptions to these investment provisions (prop. 2002/03:150 p. 238 et seq.). It is stated there that a special fund can be granted permission to invest in securities that are unquoted or that are traded on markets other than those specified for UCITS funds. Special funds can make investments in funds in countries where the regulatory framework is different, or in OTC derivatives where the counterparty is not subject to supervision. However, certain assets are not permitted for special funds either, such as immovable property or commodities.

Special funds can be granted exemptions from the provisions regarding borrowing or short selling (prop. 2002/03:150 p. 240).



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3.4.11 Capital shall be raised from the public or from a specifically identified and limited group of investors

The definition states that the foreign collective investment undertaking shall be open to the public or to a specifically identified limited group of investors (Chapter 1, Section 1, paragraph 1, point 8 IFA).

UCITS funds

A UCITS fund shall be open to the public (Article 1.2 of the UCITS IV Directive and Chapter 1, Section 1, paragraph 1, point 25 IFA). It is therefore not possible to deny someone acquiring units in the fund. However, this public requirement should be differentiated from, for example, the minimum amount that may be invested in the fund. It is considered possible to have a minimum investment requirement and this then becomes a natural way of restricting those who wish to invest capital (prop. 2002/03:150 p. 116).

Specific provisions apply for master funds. If such a fund has at least two feeder funds as unit holders, it does not need to be open for capital contribution from the public (Article 58.4 of the UCITS IV Directive and Chapter 5 a, Section 47 IFA).

Special funds

A special fund can be directed to a more limited group of investors than UCITS funds (Chapter 1, Section 1, paragraph 1, point 23 IFA). The preparatory work to IFA states that this group should not be too limited (prop. 2002/03:150 p. 254). As an example of the possible limitations it mentions that the fund is open to all employees of a medium-sized company, all members of an association with a not inconsiderable number of members or all those within a certain profession. The limitation must not appear discriminating or otherwise contradict values that society wishes to protect. The group can consist of, for example, institutional investors. The management company must sell units to those investors who are included in the specific and limited group. However, it is possible to refuse to let an investor purchase units in a special fund if this would in some way contravene Swedish or foreign law. A special fund that wishes to limit the group of investors shall mention this in the fund rules and these rules shall be approved by the Swedish Financial Supervisory Authority.

3.4.12 The spreading of risks

A foreign collective investment undertaking shall apply the principle of risk spreading (Chapter 1, Section 1, paragraph 1, point 8 IFA).



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UCITS funds

Risks are spread not just through the type of financial assets that are permitted in the fund, but also through the size of the holding that is allowed in a certain type of asset. Investment provisions can be found in Article 49-57 of the UCITS IV Directive. The corresponding regulations in respect of UCITS funds have been implemented in Chapter 5 IFA. In section 3.4.10 is explained what type of assets that are permitted. In this section the essential features regarding the spreading between the various types of assets is described.

Transferable securities and money market instruments must be traded on a regulated market. 10 % of the fund's value may however be invested in unquoted holdings (Article 50 of the UCITS IV Directive and Chapter 5, Section 5 IFA).

Transferable securities and money market instruments from the same issuer may not exceed more than 5 % of the fund's value. However, holdings of up to 10 % are permitted under the condition that the combined value of such holdings does not exceed 40 % of the fund's value (Article 52 of the UCITS IV Directive and Chapter 5, Section 6 IFA). These limits imply that a UCITS fund must have at least 16 holdings (prop. 2002/03:150 p. 105).

Other limits apply to transferable securities and money market instruments issued and guaranteed by certain public bodies (Article 54 of the UCITS IV Directive and Chapter 5, Sections 6 and 8 IFA).

Index funds may include shares or debt securities from the same issuer of up to 20 % of the fund's value. In exceptional circumstances, the limit can be raised to 35 % (Article 53 of the UCITS IV Directive and Chapter 5, Section 7 IFA).

A UCITS fund may hold units in other funds under the condition that a maximum of 20 % of its value is invested in one single fund (Article 55 of the UCITS IV Directive and Chapter 5, Section 16 IFA).

Investments in deposits in the same credit institution may not exceed 20 % of the fund's value (Article 52 of the UCITS IV Directive and Chapter 5, Section 11 IFA).

The fund may not have an excessively large holding from the same issuer. Nor may the fund hold shares with voting rights that makes it possible to exercise a significant influence over the company (Article 56.1 of the UCITS IV Directive and Chapter 5, Section 20 IFA). Non-voting shares, debt securities and money market instruments from a single issuer may not exceed 10 % of the issued assets, and the holding of the units in a single fund may not exceed 25 % (Article 56.2 of



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the UCITS IV Directive and Chapter 5, Section 19 IFA). Other limits apply with regard to issues guaranteed by certain public bodies.

There are also limits in order to reduce the risk exposure to one counterparty or to companies in the same group when investments in different types of assets are combined (Article 52.5 of the UCITS IV Directive and Chapter 5, Sections 21 and 22 IFA).

The fund may make investments in derivative instruments if the exposure to the underlying assets does not exceed the limits that are prescribed for investments in such assets. However, the fund's combined exposures related to derivative instruments may not exceed the total value of the fund's portfolio (Article 51 of the UCITS IV Directive and Chapter 5, Section 13 IFA). Certain other limits apply to OTC derivatives (Article 52 of the UCITS IV Directive and Chapter 5, Section 14 IFA).

Specific provisions apply for feeder funds. Such a fund is allowed to invest 85 % or more of its value in a master fund (Article 58.1 of the UCITS IV Directive and Chapter 5 a, Section 1 IFA).

Special funds

As far as special funds are concerned, the Swedish Financial Supervisory Authority assesses whether the fund has an acceptable spread of risk (Chapter 6, Section 2 IFA). The preparatory work to IFA states that the yield of the portfolio is primarily dependent on how the value of the various securities has fluctuated in relation to each other, rather than on their number, therefore these fluctuations should be the basis for the provisions. The requirement for risk spreading should not be considered to be fulfilled if the fund's development is, more or less, dependent on the development of one or a few assets. The composition of the portfolio should decide if the requirement for risk spreading has been fulfilled (prop. 2002/03:150 p. 237 et seq.).

3.4.13 Repurchase or redemption of the units upon demand

UCITS funds

The units in a UCITS fund shall, on demand of the holders, be repurchased or redeemed using the fund's assets (Articles 1.2 and 84 of the UCITS IV Directive and Chapter 1, Section 1, paragraph 1, point 25 and Chapter 4, Section 13 IFA). It is an important principle that the unit holders can terminate their savings in the fund at any time (prop. 2002/03:150 p. 255).



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Special funds

For special funds, it is possible to limit the opportunities for demanding redemption. However, a special fund must be open for redemption of units at least once a year (Chapter 6, Section 1 IFA). The periods when units can be redeemed must be stated in advance in the fund rules (prop. 2002/03:150 p. 255).

4 ASSESSMENT

4.1 Same assessment of foreign collective investment undertakings in the Income Tax Act, the Investment Savings Account Act and the Coupon Tax Act

The Swedish Tax Agency is of the opinion that the same assessment should be made of foreign collective investment undertakings irrespective of whether the issue concerns the term "investment funds" in the context of the Income Tax Act (ITA) and the Investment Savings Account Act (ISAA), or whether it concerns exemption from tax liability in the Coupon Tax Act (CTA). The new legislation is a coherent package where the tax liability for investment funds is abolished, flat-rate income is introduced for unit holders and the liability to Coupon Tax is abolished for foreign collective investment undertakings. Both the flat-rate income on holdings in foreign collective investment undertakings and the abolished Coupon Tax liability are connected to the abolished tax liability for Swedish investment funds.

As far as the flat-rate income is concerned, the Swedish Tax Agency is of the opinion that the legislator has not intended to extend the tax liability to include such funds that cannot be sold in the Swedish market because they are not equivalent to Swedish investment funds. Regarding the abolished tax liability to Coupon Tax, the Swedish Tax Agency is also of the opinion the legislator has not intended to extend the tax exemption to such funds that cannot be sold in the Swedish market because they are not equivalent to Swedish investment funds. The EUF Treaty will probably not make it necessary to extend the tax exemption to funds that are not comparable to Swedish funds. Regarding ISAA, the Swedish Tax Agency is of the opinion that the legislator has not intended to tax the account holder on flat-rate income on other types of funds compared to fund owners who have chosen not to deposit their funds in an investment savings account.

It is therefore, in all three cases, a matter of finding foreign equivalents to the Swedish investment funds. The Swedish Tax Agency considers, with regard to both ITA, ISAA and CTA, that an assessment in accordance with IFA shall form the basis for what is to be considered a foreign equivalent to a Swedish fund.

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This implies that irrespective of whether the regulations in ITA, ISAA or CTA are to be applied, the assessment of the foreign collective investment undertaking will be the same. Section 4.3 provides an overview of the factors that form the basis for the assessment. Regarding CTA, it is also a requirement that the undertaking must be established in certain countries (see section 4.5).

4.2 The legal form of the fund

Swedish investment funds are contractual funds. The legal relationship between the owners (fund unit holders) and the manager (management company) is regulated through the provision in IFA and the fund rules. The question is therefore if other foreign funds than contractual funds can be equivalent to a Swedish investment fund.

The definition in IFA of what constitutes a foreign collective investment undertaking states that it is a foreign undertaking (Chapter 1, Section 1, paragraph 1, point 8 IFA). The expression "undertaking" usually refers to all forms of enterprises.

The UCITS IV Directive states that UCITS can be formed on a contractual basis, in accordance with trust legislation or company law. Funds constituted in accordance with company law differ in their construction from Swedish limited companies in that they have a variable share capital. They are considered to function essentially like a Swedish investment fund (prop. 2011/12:1 p. 396). Trust funds are also considered to have major similarities with contractual funds (SOU 2002:56 pp. 211 and 504). All these types of UCITS can operate within the whole of the EEA and, in reality, they function in the same way.

The Supreme Administrative Court has considered that funds constituted in accordance with company law and established in accordance with legislation based on the UCITS Directive shall be considered to be investment funds such as those referred to in ITA (RÅ 2006 ref. 38).

If they function in the same way, it would contravene EU law to treat funds in different ways depending on their legal form. The Swedish Tax Agency considers that there is no reason to treat undertakings differently on the basis of whether they are established within or outside of the EEA. The Swedish Tax Agency therefore considers that both contractual funds, trust funds and funds based on company law can be foreign equivalents to Swedish investment funds, if all other conditions are fulfilled. This applies irrespective of whether the undertaking is established within or outside of the EEA and irrespective of whether or not it falls within the scope of the UCITS IV Directive. However, one precondition is that the tax legislation in the undertaking's home state does not provide that the



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income received by the undertaking is taxed in the hands of its owners. This can, for example, be the case when the undertaking is a transparent partnership, a civil law partnership or seen as a form of joint ownership. A special assessment then has to be made of how the undertaking and its income should be treated within the applicable legislation.

4.3 Criteria for foreign collective investment undertakings

4.3.1 Five criteria

The Swedish Tax Agency considers that a foreign collective investment undertaking must fall within the scope of the definition in Chapter 1, Section 1, paragraph 1, point 8 IFA, in order to constitute a foreign investment fund. Then a number of criteria have to be met.

1. The undertaking shall be authorised in its home state to conduct operations.
2. Its sole purpose shall be to make collective investments in such assets as are set forth in Chapter 5, Section 1, paragraph 2 or in Chapter 6, Section 2, paragraph 2 IFA.
3. It shall use capital raised from the public or from a specifically identified and limited group of investors.
4. The principle of risk spreading shall be applied.
5. The units shall at the demand of the holders be repurchased or redeemed using the undertaking's assets.

Each one of these criteria is described more in detail in section 4.3.2 - 4.3.6. Furthermore, the Swedish Tax Agency considers that there are several other conditions that can be derived from IFA and that must be fulfilled in order for a foreign collective investment undertaking to be considered equivalent to a Swedish investment fund. This is described in section 4.3.7.

4.3.2 Authorisation

The foreign collective investment undertaking shall be authorised in its home state for operation (see section 3.4.9). The Swedish Tax Agency considers that the authorisation shall be given by a public authority or a body appointed by a public authority.

A decisive factor for assuring the effective protection of the investments is that there is a supervision and a possibility of control and intervention by an authority in the home state of the undertaking. This is also a fundamental requirement that characterises both the UCITS IV Directive and IFA. UCITS funds may be sold freely within the EEA since the Directive requires that the authority in the home

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state exercises supervision of the fund's operation in order for authorisation to be granted. The Swedish Financial Supervisory Authority exercises supervision of Swedish investment funds, foreign managers, funds and undertakings that operate in Sweden. The Swedish Tax Agency considers that the requirement that a foreign collective investment undertaking shall be authorised to operate in its home state implies that it shall be supervised in its home state by an authority that can control and intervene when necessary. The Agency considers that, in order for the foreign collective investment undertaking to be considered equivalent to a Swedish investment fund, this should be done in a manner that meets the requirements in the UCITS IV Directive (see section 3.4.6).

4.3.3 Collective investments in certain assets

The sole purpose of the foreign collective investment undertaking shall be to make collective investments in such assets as are set forth in Chapter 5, Section 1, paragraph 2 or in Chapter 6, Section 2, paragraph 2 IFA (see section 3.4.10).

The only difference that can be distinguished in the legislative text, as far as the investment provisions for Swedish UCITS funds and special funds are concerned, is that special funds may invest in derivative instruments with certain other underlying assets. Other deviations require authorisation from the Swedish Financial Supervisory Authority. The preliminary work to IFA provides a rather vague description of what deviations are possible. There are no regulations, guidelines or instructions regarding what criteria that form the basis for the Swedish Financial Supervisory Authority's assessment of deviations that can be authorised.

The Swedish Tax Agency considers that a foreign collective investment undertaking, in order to be seen as a foreign equivalent, can only make investments in the same types of assets as a Swedish investment fund. This means, for example, that it is not permitted to invest in immovable property and commodities (cf. RÅ 2003 notes 67 and 160). A foreign collective investment undertaking may be considered to be equivalent to a Swedish investment fund as long as it only invests in such assets as are stated in Chapter 5, Section 1, paragraph 2 or Chapter 6, Section 2, paragraph 2 IFA. If a foreign collective investment undertaking deviates from these investment provisions, which in Sweden requires the authorisation of the Swedish Financial Supervisory Authority, then the Swedish Tax Agency considers that it can be deemed equivalent to a Swedish investment fund, but an assessment of these deviations must be made together with the criterion for risk spreading (for further details, see section 4.3.5).



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4.3.4 Capital shall be raised from the public or from a specifically identified and limited group of investors

The foreign collective investment undertaking shall be open to the public or to a specifically identified and limited group of investors (see section 3.4.11). The Swedish Tax Agency considers that a foreign undertaking can be comparable to a Swedish investment fund even if it is not open to the public. However, the group of investors should not be too limited. It is not possible to provide more detailed guidelines; guidance can be sought from the preliminary work to IFA (prop. 2002/03:150 p. 254).

4.3.5 The spreading of risks

A foreign collective investment undertaking shall apply the principle of risk spreading (see section 3.4.12).

The UCITS IV Directive and Chapter 5 of IFA contain detailed provisions regarding the size of the fund's value that may be held in a certain asset and the size of the holding that is allowed in a certain type of asset. As far as special funds are concerned, the Swedish Financial Supervisory Authority assesses whether the fund has an acceptable spreading of risk. In the preliminary work to IFA there is a rather vague description of when the risk spreading requirement is fulfilled. There are no regulations, guidelines or instructions regarding what criteria that form the basis for the Swedish Financial Supervisory Authority's assessment of how the fund's portfolio should be composed.

The Swedish Tax Agency is of the opinion that a foreign collective investment undertaking may be considered equivalent to a Swedish investment fund when it has a risk spreading that corresponds with the provisions of the UCITS IV Directive and Chapter 5 IFA. If the undertaking deviates from these provisions, a combined assessment must be made of the different assets in which the fund has invested and the size of its holding in any individual company, etc.

4.3.6 Repurchase or redemption of the units upon demand

The units shall, at the demand of the holders, be repurchased or redeemed using the fund's assets (see section 3.4.13). For special funds, it is possible to limit the opportunities for demanding redemption. However, a special fund must be open for redemption of units at least once a year and the periods when units can be redeemed are to be stated in advance in the fund rules.

The Swedish Tax Agency considers that a foreign collective investment undertaking may be considered equivalent to a Swedish investment fund if it is



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open for redemption of units at least once a year, under the condition that the periods when units can be redeemed are stated in advance in the fund rules.

4.3.7 Other conditions

One aim of the fund legislation is the protection of unit holders (see, for example, Recital 3 of the UCITS IV Directive and prop. 2002/03:150 p. 125). Both the UCITS IV Directive and IFA are formed, inter alia, with this purpose in mind. The Swedish Tax Agency considers that the conditions mentioned below, that are stated in the Directive and in IFA, are so fundamental that they must be fulfilled in order for a foreign collective investment undertaking to be considered equivalent to a Swedish investment fund, even if they are not specifically mentioned in Chapter 1, Section 1, paragraph 1, point 8 IFA. These conditions apply both to Swedish UCITS funds and special funds.

If the undertaking is not constituted in accordance with company law, its assets shall be managed by an authorised fund management company. Irrespective of legal form, the undertaking's assets shall be entrusted to a separate depositary. See section 3.4.4.

There shall be fund rules that regulate the relationship between unit holders, the undertaking and the management company (see section 3.4.7).

Each undertaking shall publish a prospectus/information brochure, an annual report for each financial year and a half-yearly report for the first six months of the financial year (see section 3.4.7).

4.3.8 What foreign collective investment undertakings are equivalent to a Swedish investment fund?

As presented in section 4.1, the Swedish Tax Agency is of the opinion that it is an assessment in accordance with IFA that shall form the basis for what constitutes a foreign equivalent to a Swedish investment fund. IFA contains provisions for both UCITS funds and special funds, where the regulation of UCITS funds is based on the EU's UCITS IV Directive. These provisions are extensive and complex. Whilst the regulations are quite thorough as far as UCITS funds are concerned, guidance is mostly lacking with regard to the deviations that are permitted for special funds. It is therefore not possible to provide any specific guidelines with regard to the criteria that characterise a foreign equivalent to a Swedish investment fund. Instead, the following overall criteria may provide some guidance.



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The Swedish Tax Agency considers that all funds that are authorised subject to the UCITS IV Directive are foreign investment funds.

The same applies to those foreign collective investment undertakings that don't fall within the scope of the UCITS IV Directive but are authorised for sale in Sweden according to a permission granted by the Swedish Financial Supervisory Authority.

The Swedish Tax Agency considers that foreign collective investment undertakings that don't fall within the scope of the UCITS IV Directive but, upon comparison, meet the conditions of the Directive, constitute foreign investment funds if they are authorised and adequately supervised in their home state. This applies irrespective of whether the undertaking is established in a state within or outside the EEA.

Foreign collective investment undertakings that do not fulfil the conditions of the UCITS IV Directive may be considered to be foreign investment funds if they are authorised and adequately supervised in their home state and if they do not deviate from the Directive to a greater extent than an equivalent Swedish special fund would do. This applies irrespective of whether the undertaking is established in a state within or outside the EEA. The Swedish Tax Agency considers that the undertaking can be open to a limited group of investors (see section 4.3.4) but it must be open for redemption at least once a year. As far as instructions regarding the investments and the spreading of risk are concerned, an overall assessment of these two criteria must be made.

The undertaking's legal form is of no significance (see section 4.2).

As far as the exemption from liability to Coupon Tax is concerned, the conditions in section 4.5. must also be fulfilled.

4.4 Coupon Tax – limitation to certain countries

One condition for a foreign collective investment undertaking to be exempt from liability to Coupon Tax is that it is established in

- a state within the European Economic Area,
- a state with which Sweden has entered into a tax treaty that has an article on the exchange of information, or
- a state with which Sweden has entered into an agreement regarding the exchange of information in tax matters.