

Direct taxation: The European Commission formally requests the Netherlands to change its law regarding the discriminatory taxation of substantial interests held by foreign companies

The European Commission has formally requested the Netherlands to change a tax rule that taxes income from substantial interests not forming part of the business capital of companies established elsewhere in EU, respectively in the EEA/EFTA States, whereas income from substantial interests held by domestic companies is exempt, regardless of whether it forms part of their business capital. The Commission considers this rule contrary to the freedom of establishment, to the freedom of movement of capital and to the Parent-Subsidiary Directive.

On the basis of Article 17, paragraph 3, part b of the Law on the Corporation tax 1969 ("Wet Vpb 1969") foreign parent companies are taxable on their substantial interests in Dutch companies, in so far as these substantial interests do not form part of their "business capital". For domestic parent companies there is no condition that the participation is part of their business capital. On the basis of Article 2.5 of the VpB 1969 all their assets are deemed to form part of their business capital. The Commission considers this difference in treatment a discrimination in the sense of Article 63 TFEU, and in case of controlling participations of article 49 TFEU. Moreover, the Dutch legislation is contrary to the Parent Subsidiary Directive (90/435/EEC), since this Directive does not provide for a "business capital" test. Similarly, for companies resident in EEA/EFTA States the equivalent articles of the EEA Agreement are applicable. The Commission is aware that the State Secretary of Finance has informed the Dutch Parliament that Article 17 of the Wet VpB 1969 will not be applied if the Parent-Subsidiary Directive is applicable, except in cases of abuse or fraud, but such an information of Parliament without changing the law is not sufficient to implement a Directive.

Background:

The request takes the form of a reasoned opinion (the second step of the infringement procedure provided for by Article 258 of the Treaty on the Functioning of the EU (TFEU)). If there is no satisfactory reaction to the reasoned opinion within two months, the Commission may decide to refer the matter to the Court of Justice of the European Union.

The Commission's case reference number is 2007/4629.