

Taxation of outbound dividend and interest payments to foreign pension institutions: Commission refers Germany to the Court of justice

The European Commission has decided to refer Germany to the Court of justice of the European Union over its legislation leading to discriminatory taxation of foreign pension institutions.

In Germany, dividends paid by German companies to German "*Pensionskassen*" are either subject to a reduced withholding tax rate, or the "*Pensionskasse*" can benefit from a partial refund of the withholding tax paid. However, similar institutions established elsewhere in the EU and the European Economic Area cannot benefit from this reduced rate or partial refund.

For another category of German pension institution, the "*Pensionsfonds*", the dividends received are taken into account in the annual tax assessment procedure. Therefore, they are taxed on a net basis at the general corporate tax rate of 15 %. However, dividends paid from Germany to similar foreign institutions are subject to a final withholding tax of 25 % on the gross dividend, without the possibility of deducting any costs.

The same rules apply to interest payments paid to "*Pensionskassen*" and "*Pensionsfonds*". Therefore, the taxation of interest paid to similar foreign pension institutions is also addressed subject to the referral to the Court of justice.

If a Member State levies a higher tax on dividends or interest paid to foreign pension funds, these funds might be dissuaded from investing in companies in that Member State. Equally, companies established in that Member State might have difficulty attracting capital from foreign pension funds. The higher taxation of foreign pension funds may thus result in a restriction of the free movement of capital, as protected by Article 63 TFEU and Article 40 EEA. The Commission is not aware of any justification for such restrictions.

Background:

The incriminated provisions are paragraphs paragraph 5(1), 5(2)(1), the fifth sentence of paragraph 8b(8), paragraph 23, paragraph 31 (1), paragraph 32(1)(1) and paragraph 32(1)(2) of the Corporation Tax Act (KStG) and paragraph 36 (2) no.2, paragraph 43(1)(1), paragraph 43(1)(1)(1), paragraph 43a, paragraph 43a(1), paragraph 43(1)(1)(7), paragraph 43(1)(7), paragraph 44a(4)(1), paragraph 44a(8), paragraph 44a(9), paragraph 49(1)(5) and paragraph 50d of the Income Tax Act (EStG).

The referral to the Court of justice is the last step in the infringement procedure based on Article 258 TFEU after a letter of formal notice and a reasoned opinion has been sent.

The Commission's case reference number is 2006/4098.

For the press releases issued on infringement procedures in the taxation or customs area see:

http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/index_en.htm

For the latest general information on infringement measures against Member States see:

http://ec.europa.eu/community_law/infringements/infringements_en.htm