

Selected aspects of international dividend taxation within the case-law of the Court of Justice of the European Union

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Abstract: *The aim of the paper was to identify rules of the international dividend taxation embodied by the CJEU in its case-law. With respect to the extensiveness of the issue, the authors only focused on the rules for dividends received covering the application of tax exemption in combination with withholding tax as derived by the CJEU in relation to fundamental freedoms grounded under Article 49 and Article 63 of the Treaty on the Functioning of the European Union. The subject of the research in the final stage covered in total ten judgements dealing with the issue as stated above. Based on the text of the respective judgements, it is possible to conclude, to a certain degree of generalization that if entities are in comparable situations, equal treatment regarding nationally-sourced dividends and foreign-sourced dividends must be ensured in a number of aspects.*

Keywords: *case-law, European Court of Justice, dividends, international taxation*

JEL codes: F23, H24, H25, K34

1 Introduction

Dividends can be seen as an instrument through which foreign investors pay out their profits from their foreign direct investments. It is not only this factor that makes the dividend taxation issue a very interesting phenomenon – both in terms of theory and practice. A significant number of studies, expert articles as well as books dealing with (not necessarily exclusively) international dividend taxation demonstrate the amplitude of the respective issue and the possibility of different views to the matter. One of several common attributes of the dividends is the fact that their taxation (understood as international taxation) is regulated not only at the level of international law, but also EU law. In addition to the provisions of EU secondary law, also the general rules of EU primary law affect the international taxation of the above stated income (see, for example, Englmaier (2010)). The case-law of the Court of Justice of the European Union (referred to as the European Court of Justice before the Lisbon Treaty came into force) inherently must play and plays a part in this respect. Even without deeper knowledge, it is possible to come to a conclusion that the role of the Court of Justice of the European Union, resp. the European Court of Justice (hereinafter the CJEU) is not inconsiderable based on the great generality of provisions of EU law as well as on the fact that the regulation of direct taxes in Member States shows a high degree of variability (Široký, 2013). This conclusion as to the variability is valid also for the system of internal double taxation in Member States as demonstrated by Široký and Valentová (2013).

2 Methodology and Data

In the context of the above outlined significance of the case-law of the CJEU, the aim of this paper is to identify rules of the international dividend taxation embodied by the CJEU in its case-law. With respect to the extensiveness of the issue, the authors only focus on the rules for dividends received covering the application of tax exemption in combination with withholding tax as derived by the CJEU in relation to fundamental freedoms grounded under Article 49 and Article 63 of the Treaty on the Functioning of the European Union

(hereinafter the TFEU). These fundamental freedoms were formerly regulated by Articles 43 and 56 of the Treaty establishing the European Community (hereinafter the TEEC). The first freedom lays down the *freedom of establishment*; the second one lays down the *free movement of capital*.

The rules for the international taxation of dividends received, dealing with the application of tax exemption in combination with withholding tax derived by the CJEU, were the subject of the research. Selected judgements of the CJEU were the object of the research; the study of written documents was then the collection data technique. The content analysis of the text and text comparison was the method of research.

The official EU portal (Eur-lex) was the source of the analysed CJEU judgements. Judgements in preliminary ruling procedure published in the register of the *case-law* after 2010, published before 14 March 2017, were the basic set from which a short-list was subsequently made. The databases of judgements thus acquired were then categorized into two main categories: case-law dealing with tax issues, and other case-law. The next step was filtering the case-law to three groups, i.e., the case-law relating to the *right of establishment*, *free movement of capital* and others. The final step was the selection of the case-law relating to *dividend taxation in the context of the right of establishment* and *dividend taxation in the context of the free movement of capital*.

3 Results and Discussion

From the total number of 6046 judgements in preliminary ruling procedure, there were 580 judgements regarding restrictions on the freedom of establishment pursuant to Article 49 of the TFEU (formerly Article 43 of the TEEC) and 127 judgements addressing the free movement of capital pursuant to Article 63 of the TFEU (formerly Article 56 and Article 58 of the TEEC). From the total number of judgements dealing with the right of establishment, 81 judgements (i.e., approximately 14 %) were addressing issues associated with taxation, of which 17 judgements were actually dealing with the international dividend taxation. As for the judgements relating to the free movement of capital, 91 judgements (i.e., approximately 70 %) were about taxation, of which 27 judgements were addressing the dividend taxation issue. The subject of the research in the final stage covered in total ten judgements dealing with the international taxation of dividends received in the context of tax exemption in combination with withholding tax. The basic summary is provided in the following table 1.

Table 1 Summary of the analyzed judgements

	No.	Cases and the country whose legislation was the subject of the dispute
Right of Establishment	2	C-375/12 (France); C-247/08 (Germany) C-176/15 (Belgium)
Free Movement of Capital	7	C-47/12; C-168/11 (Germany) C-10/14, C-14/14, C-17/14; C-194/06; C-35/98 (Netherlands) C-436/08; C-437/08 (Austria)
Both Rights assessed	1	C-222/04 (Italy)

Source: Own elaboration.

Conclusions from the above-specified CJEU judgements are provided in the text below.

As for the C-222/04 case, the CJEU considered whether the single internal market functioning had been disrupted under the legal regulation providing for that dividends distributed to public limited liability companies are subject to withholding tax whereas dividends due to public authorities are exempted from withholding tax. Referring to the fact that it concerns the State aid, the CJEU came to the conclusion that the free movement of capital had not been disrupted. (Eur-lex, 2017a) The CJEU took an opposite view in the C-194/06 case where dividends paid by the collective investment undertaking were taxed with withholding tax at the source, and such withholding tax was returned at the request

of the undertaking (dividend recipient) if it concerned nationally-sourced dividends and these rules were not applied in relation to dividends received from another Member State or a third country. Even though the legislation enshrined tax compensation for such cases, there was a maximum limit established not covering the paid withholding tax by far. (Eur-lex, 2017b)

As for the C-436/08 and C-437/08 joined cases, the CJEU considered the situation where the national legislation provided for that nationally-sourced dividends were exempted from withholding tax, however dividends received by a company-resident from a third party were subject to a corporation tax in the State of the dividend recipient if no comprehensive agreement for mutual assistance with regard to administrative matters in the recovery of claims relating to taxes was entered into between the Member State and the third country. In this regard, the CJEU concluded that the free movement of capital is breached because, to extend the exemption from withholding tax, only an agreement for mutual assistance with regard to administrative matters needs to be entered into between the Member State and the third country (i.e., it may not be complete but must allow to verify information provided by the taxpayer established in the third country). However, the CJEU also stated that, should the national legislation or a convention for the avoidance of double taxation allow to offset the paid foreign tax relating to dividends in third countries against the corporation tax due in the recipient's country, the free movement of capital is not restricted. (Eur-lex, 2017c)

As for the C-47/12 case, the CJEU considered the legislation where dividends paid within the State of residence were subject to withholding tax and such withholding tax could be set off against the overall tax liability of the recipient (parent company). In addition, if the recipient (parent company) reached losses, the applied imputation method resulted in the tax paid by the company (resident) that made the distribution being fully or partially refunded to the recipient (parent company). However, if dividends were paid from another Member State or a third country, they were exempted from taxation in the State of the recipient under applicable conventions for the avoidance of double taxation. But this exemption allowed neither partial or full refund of withholding tax where the parent company (recipient) had reached losses. The Court of Justice held that the entities were not in equivalent situations and, thus, the free movement of capital under Article 63 of the TFEU was not restricted. (Eur-lex, 2017d) As for the C-247/08 case, the CJEU came to the conclusion that, should the exemption provided for in the national legislation result from Directive on common system of taxation of parent companies and subsidiaries of different Member States, it only applies to legal forms specified in Annex to this Directive (Judgement of the Court of Justice of the European Union, the C-247/08 case). (Eur-lex, 2017e) However, on the other hand, the CJEU stated in the C-303/07 case that, should national legislation also provide for an exemption other than the one resulting from the Directive, it also must apply to legal forms unknown in national laws. (Eur-lex, 2017f) As for the C-35/98 case, the CJEU stated that, should the national legislation provide for an exemption for dividends paid and received within one State, but withholding tax for dividends received from another Member State on the grounds of the fact that the parent company paying national dividends is subject to corporation tax in the respective State, the free movement of capital is breached, too. The thing is that a parent company established in another Member State is also subject to corporation tax in this State, and, thus, this argument justifying the difference in treatment cannot be accepted. (Eur-lex, 2017g)

With regard to the taxation of dividends received, the Court of Justice of the European Union addressed in the C-168/11 case the taxation of dividends where the recipient is a natural person. The national legislation allowed a natural person (resident) to set off the tax paid in the State of source against his/her tax liability (ordinary credit method), however, the global income was not decreased by the tax relief. However, the taxpayer with nationally-sourced dividends could decrease his/her "global income" by the respective tax relief. (Eur-lex, 2017h) A similar issue was dealt with by the CJEU in the C-10/14, C-14/14 and C-17/14 joined cases. Dividends paid both to tax residents and non-residents were subject to withholding tax. However, such withholding tax was a final tax for the tax

non-residents, but the tax residents had the option to set off or refund this withholding tax. (Eur-lex, 2017i) The CJEU concluded in these cases relating to natural persons that the single internal market functioning had been disrupted.

The CJEU also came to the same conclusion in the C-375/12 case where the national legislation disrupted the free movement of capital in the event of natural persons with regard to the limitation of the amount of tax to be set off. The recipient (natural person) could only set off the tax from dividends in the State of source against his/her national tax liability up to a certain percentage of the income achieved during the year. Where such a percentage limit was exceeded, the tax paid in the State of source was only taken into account partially or not at all. (Eur-lex, 2017j)

As for the C-176/15 case, the CJEU stated in its judgement that, "*Articles 63 TFEU and 65 TFEU, read in conjunction with Article 4 TEU, must be interpreted as not precluding a Member State from not extending, in a situation such as that at issue in the main proceedings, the benefit of the advantageous treatment accorded to a resident shareholder as a result of a bilateral double taxation convention concluded between that Member State and a third State – by which tax deducted at source by the third State is allowed unconditionally as a credit against tax payable in the shareholder's Member State of residence – to a resident shareholder in receipt of dividends from a Member State with which that Member State of residence has concluded a bilateral double taxation convention under which the granting of such a set-off is subject to compliance with additional conditions provided for by national law.*" (Eur-lex, 2017k)

In the context of the EU, there was a task assigned to the CJEU to interpret EU (formerly Community) law. The truth is that the CJEU's judgements themselves are *de facto* only binding for the parties to a dispute. However, their wider impact cannot be overlooked. The CJEU is a court that, in addition to decisions regarding the substance of the case, also pays special attention to the extensive justification of why some rule is or is not in compliance with EU (formerly Community) law. However, with respect to the persistent divergence in legislations of all 28 Member States of the EU, the unwillingness of the Member States to submit to the harmonised legislation in direct taxation and legislative development in the EU, which now responds to the OECD BEPS project quite rapidly, it can be assumed that there will be new challenges in assessing the compliance of national legislations with fundamental freedoms awaiting for the CJEU. Undoubtedly, the basic boundaries have already been established by the CJEU.

Conclusions

The aim of this document was to identify the rules of the international dividend taxation embodied by the CJEU in its case-law. Attention was paid to the rules for the dividends received in the context of the application of tax exemption in combination with withholding tax in relation to fundamental freedoms as per Article 49 of the TFEU (*Right of Establishment*) and Article 63 of the TFEU (*Free Movement of Capital*). In total 10 judgements of the CJEU were analysed within the research. The content analysis of the text and text comparison was the method of research. Based on the text of the respective judgements, it can be concluded that the CJEU set logical rules in regard of above stated issue. The principle of equality maintenance in comparable situations, while respecting the rules of the single internal market, still remains the supporting idea in its judgements. Thus, it is possible to conclude, to a certain degree of generalization: if entities are in comparable situations, equal treatment regarding nationally-sourced dividends and foreign-sourced dividends must be ensured in a number of aspects.

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References

- Englmair, V. E. (2010). The Relevance of the Fundamental Freedoms for Direct Taxation. In: Lang, M. et al, eds., *Introduction to European Tax Law on Direct Taxation*. Wien: Linde, pp. 13-39, 2010.
- EUR-LEX (2017a). *Judgement of the Court of Justice of the European Union of 10. January 2006 Case C-222/04 Ministero dell'Economia e delle Finanze against Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato a Cassa di Risparmio di San Miniato SpA*. Eur-Retrieved from: <http://Eur-lex.europa.eu/legal-content/CS/TXT/?qid=1489512231454&uri=CELEX:62004CJ0222>.
- EUR-LEX (2017b). *Judgement of the Court of Justice of the European Union of 20 May 2008 Case C-194/06 Hoge Raad der Nederlanden Staatssecretaris van Financiën v. Orange European Smallcap Fund N. V.* Retrieved from: <http://Eur-lex.europa.eu/legal-content/CS/TXT/?qid=1503956522219&uri=CELEX:62006CA0194>.
- EUR-LEX (2017c). *Judgement of the Court of Justice of the European Union of 10. February 2011 Case C-436/08 a C-437/08 Haribo Lakritzen Hans Riegel BetriebsgmbH and Österreichische Salinen AG proti Finanzamt Linz*. Retrieved from: <http://Eur-lex.europa.eu/legal-content/CS/TXT/?qid=1489512231454&uri=CELEX:62008CJ0436>.
- EUR-LEX (2017d). *Judgement of the Court of Justice of the European Union of 11 September 2014 Case C-47/12 Kronos International Inc. v. Finanzamt Leverkusen*. Retrieved from: <http://Eur-lex.europa.eu/legal-content/CS/TXT/?qid=1489512231454&uri=CELEX:62012CJ0047>.
- EUR-LEX (2017e). *Judgement of the Court of Justice of the European Union of 1 October 2009 Case C-247/08 Gaz de France - Berliner Investissement SA against Bundeszentralamt für Steuern* Retrieved from: <http://Eur-lex.europa.eu/legal-content/CS/TXT/?qid=1489512231454&uri=CELEX:62008CJ0247>.
- EUR-LEX (2017f). *Judgement of the Court of Justice of the European Union of 18 June 2009 Case C-303/07 Aberdeen Property Fininvest Alpha Oy*. Retrieved from: <http://Eur-lex.europa.eu/legal-content/CS/TXT/?qid=1489512231454&uri=CELEX:62007CJ0303>.
- EUR-LEX (2017g). *Judgement of the Court of Justice of the European Union of 6 June 2000 Case C-35/98 Staatssecretaris van Financiën against B.G.M. Verkooijen*. Retrieved from: <http://Eur-lex.europa.eu/legal-content/CS/TXT/?qid=1489512231454&uri=CELEX:61998CJ0035>.
- EUR-LEX (2017h). *Judgement of the Court of Justice of the European Union of 28 February 2013 Case C-168/11 Manfred Beker a Christa Beker against Finanzamt Heilbronn*. Retrieved from: <http://Eur-lex.europa.eu/legal-content/CS/TXT/?qid=1489512231454&uri=CELEX:62011CJ0168>.
- EUR-LEX (2017i). *Judgement of the Court of Justice of the European Union of 17 September 2015 Case C-10/14, 14/14, 17/14 J.B.G.T. Miljoen and other v. Staatssecretaris van Financiën*. Retrieved from: <http://Eur-lex.europa.eu/legal-content/CS/TXT/?qid=1489512231454&uri=CELEX:62014CJ0010>.
- EUR-LEX (2017j). *Judgement of the Court of Justice of the European Union of 13 March 2014 Case C-375/12 Belgische Stat Margaretha Bouanich v. Direction départementale des finances publiques de la Drôme*. Retrieved from: <http://Eur-lex.europa.eu/legal-content/CS/TXT/?qid=1483319434572&uri=CELEX:62012CA0375>.
- EUR-LEX (2017k). *Judgement of the Court of Justice of the European Union of 30 June 2016 Case C-176/15 Guy Riskin and Geneviève Timmermans v. État belge*. Retrieved from: <http://Eur-lex.europa.eu/legal-content/CS/TXT/?qid=1489512231454&uri=CELEX:62015CJ0176>.
- Široký, J., Valentová, I. (2013). Evaluation of the Systems of Internal Double Taxation in the EU Countries from the Perspective of Corporate Shareholders. In: Wolters Kluwer Česká republika: *Theoretical and Practical Aspects of Public Finance 2013: proceedings of the 18th international conference*. Praque: Wolters Kluwer, pp. 209-219.
- Široký, J. (2013). *Daně v Evropské unii*. [Taxes in European Union]. Praha: Linde.