



## Euro Tax Flash

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# Euro Tax Flash from KPMG's EU Tax Centre



## CJEU decision in the Pensioenfonds Metaal en Techniek case

Free movement of capital – Taxation of income of pension funds – Yield taxation  
– Withholding Tax – Comparability - Net Taxation

On June 2, 2016 the Court of Justice of the European Union issued its decision in the *Pensioenfonds Metaal en Techniek v Skatteverket* case ([C-252/14](#)). The Court concluded that Article 63 of the TFEU does not preclude the Swedish legislation in question, whereby resident and non-resident pension funds are subject to different systems of taxation. It does however preclude non-resident funds from being prevented from taking into account professional expenses linked directly with the receipt of dividends, if such deductions are allowed in the tax base of resident funds.

### Background

In the case of Swedish resident pension funds (and life assurance companies), a notional yield is calculated on the net assets of the fund, and the deemed yield is taxed at 15%. A Dutch resident pension fund by contrast is taxed at a flat rate of 15% of the gross dividend. The stated aim of the Swedish Government is to ensure that the yield tax levied on resident pension funds is neutral from the point of view of the form of investment and relative to economic conditions. The Swedish Supreme Administrative Court referred the question whether the Swedish rules infringed Article 63, concerning the free movement of capital, to the CJEU.

## The CJEU decision

The Court first observed that non-resident pension funds subject to withholding tax could potentially be subject to a heavier tax burden than resident-funds, and that this difference in treatment may deter such non-resident pension funds from making investments in Sweden. In this respect, the Court recalled that a potentially less favorable treatment of dividends during one tax year cannot be compensated by their potentially more favorable treatment during other tax years and that this assessment must be made for each year individually.

The Court further underlined that for this difference in treatment not to constitute discrimination or a restriction on the free movement of capital, the treatment must concern situations not objectively comparable or be justified by an overriding reason in the public interest.

With respect to comparability, the Court considered it crucial to examine the objective of the yield tax system i.e. neutrality from the point of view of investment form and changing economic conditions, when considering the situations of resident and non-resident shareholders. The tax regime applicable to domestic pension funds aims at ensuring neutral taxation and presupposes that the latter are taxed on their worldwide assets. On the contrary, such taxation is not possible with respect to non-resident funds, as, based on the applicable tax treaty, Sweden only retains taxing rights on income sourced in Sweden. As the objective of neutrality cannot be achieved in this case, the Court concluded that a non-resident pension fund is not in a situation comparable to that of a resident pension fund. As a consequence, the difference in treatment and potentially higher tax burden of non-resident pension funds do not constitute an infringement on the free movement of capital.

Referencing the *Miljoen* case (C-10/14, C-14/14 and C-17/14), the Court did however also conclude that, even if the application of two different taxation methods was justified by the difference in situation of these two categories of taxpayers, the free movement of capital nevertheless precludes non-resident pension funds from being prevented from taking into account any professional expenses directly linked to the receipt of dividends, if resident pension funds are allowed to take them into account. This would be up to the national court to decide.

## EU Tax Centre comment

This decision and its conclusion largely follows the AG's opinion (see [ETF 257](#)), finding that the two situations are non-comparable. Although it is settled case law that one should look at the purpose of the legislation when determining comparability, the conclusions drawn by the Court in this case may give rise to a number of questions and entail the risk of restricting the effectiveness of the fundamental freedoms, by accepting prima facie discriminatory legislation as soon as its purpose cannot be easily applied to non-residents. It is not clear why the outcome of this case should be different than that of the *Miljoen* case.

Despite a negative outcome on the comparability analysis, the reminder by the Court of the net taxation principles held in the *Miljoen* case should be seen as a rather positive conclusion as regards net taxation claims. Nevertheless, many questions remain as to if and how this possibility for non-resident pension funds to take into account directly related expenses could work in practice in this context, in particular as the Swedish yield tax legislation takes a balance sheet approach.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



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