



Euro Tax Flash from KPMG's EU Tax Centre



[Background](#)

[The CJEU decision](#)

[EU Tax Centre comment](#)

CJEU decision on German participation exemption regime

Germany – Free Movement of Capital - Third Country - Dividends – Participation Exemption – Standstill Clause

On September 20, 2018, the Court of Justice of the European Union (CJEU) rendered judgment in the EV v Finanzamt Lippstadt case ([C-685/16](#)) concerning the compatibility of the German participation exemption regime applicable to dividends originating in third countries with the free movement of capital. The Court concluded that the German legislation is contrary to the free movement of capital.

Background

In 2008 and 2009, a German subsidiary of the EV group received dividends from its wholly-owned subsidiary resident in Australia. The dividends distributed by the Australian company had previously been received from a sub-subsidiary resident in the Philippines.

The German tax authorities considered that the dividends received by the German company did not fulfill all the conditions foreseen by the German participation exemption regime applicable to dividends received from subsidiaries resident in third countries and denied the exemption.

The German company appealed this decision, arguing that the requirements applicable to nationally-sourced dividends were less strict and that such difference in treatment between domestic and certain cross-border dividend distributions constituted a restriction on the free movement of capital.

The CJEU decision

The CJEU first examined which freedom was applicable here: the free movement of capital or the freedom of establishment. Referring in this respect to its previous case law, the Court noted that the German provisions in question do not apply exclusively to situations in which the parent company exercises decisive influence over the company paying the dividends and therefore must be assessed in the light of the free movement of capital. Nevertheless, the Court also highlighted that neither the freedom of establishment nor the free movement of capital would apply if the dividends had been allocated to the non-resident permanent establishment of a German parent company.

The Court then examined whether the legislation at issue in the main proceedings provided for dividends distributed by a resident company and dividends distributed by a non-resident company (outside the EU) to be treated differently. As the German legislation subjects the tax deductibility of dividends paid by non-resident subsidiaries to stricter conditions than those applying to dividends paid by resident companies, the CJEU concluded that the latter constitutes a restriction on the free movement of capital.

Regarding the standstill clause, the Court concluded that the German legislation applies to direct investments and that both its material and personal scope have been significantly modified since 1993. Hence, the restriction on the free movement of capital in the case at hand is not covered by such derogation, as provided for by Article 64 of the Treaty on the Functioning of the EU.

The Court then examined whether the restriction may be justified in this case. Referring to settled case law, the CJEU noted that a German company receiving dividends paid by resident companies in the same Member State are, in the light of the German legislation at issue, in a situation comparable to those which receive dividends from non-resident companies. The Court then turned to assessing whether such a restriction may be justified by overriding reasons in the public interest and concluded that the need to prevent abuse and tax evasion does not apply here, as the German legislation introduces an irrefutable presumption of abuse.

The Court thus concluded that the German legislation creates a restriction of the free movement of capital, as it provides for stricter requirements for exempt dividends received from a non-resident company, than those applicable when the paying company is a German resident.

EU Tax Centre comment

The CJEU decision is broadly in line with the Opinion issued by its Advocate General (see [ETF 354](#)) and its previous case law on the taxation of outbound dividends. The Court once again confirmed the conditions applicable to the general prohibition of restrictions on the free movement of capital with third countries and shed some light on the application of the standstill clause.

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



Robert van der Jagt

Chairman, KPMG's EU Tax Centre and
Partner,
Meijburg & Co

kpmg.com/socialmedia



[Privacy](#) | [Legal](#)

You have received this message from KPMG's EU Tax Centre. If you wish to unsubscribe, please send an Email to eutax@kpmg.com.

If you have any questions, please send an email to eutax@kpmg.com

You have received this message from KPMG International Cooperative in collaboration with the EU Tax Centre. Its content should be viewed only as a general guide and should not be relied on without consulting your local KPMG tax adviser for the specific application of a country's tax rules to your own situation. The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

To unsubscribe from the Euro Tax Flash mailing list, please e-mail KPMG's EU Tax Centre mailbox (eutax@kpmg.com) with "Unsubscribe Euro Tax Flash" as the subject line. For non-KPMG parties – please indicate in the message field your name, company and country, as well as the name of your local KPMG contact.

KPMG's EU Tax Centre, Laan van Langerhuize 9, 1186 DS Amstelveen, Netherlands

© 2018 KPMG International Cooperative ("KPMG International"), a Swiss entity. Member firms of the KPMG network of independent firms are affiliated with KPMG International. KPMG International provides no client services. No member firm has any authority to obligate or bind KPMG International or any other member firm vis-à-vis third parties, nor does KPMG International have any such authority to obligate or bind any member firm. All rights reserved. The KPMG name and logo are registered trademarks or trademarks of KPMG International.