MAISTO E ASSOCIATI

EU TAX ALERT 2019/08

Case C-641/17, *College Pension Plan*

The CJEU rules on the discriminatory tax treatment of dividends received by non-EU pension funds

On 13 November 2019, the Court of Justice of the European Union ("CJEU") issued its judgment in the case C-641/17, *College Pension Plan*, concerning the source taxation applicable in Germany to dividends paid to Canadian pension funds.

College Pension Plan ("CPP") was a Canadian pension fund that held shareholdings lower than 1% in German resident companies. CPP received dividends from those companies, which were subject to a 15% withholding tax. CPP argued that such withholding tax was discriminatory and hindering the free movement of capital, as German pension funds were *de facto* subject to a more favorable taxation with regard to dividends received from German companies.

In particular, German pension funds were subject to a 25% withholding tax, which, however, could be credited against the 15% German corporate tax, the excess being refundable.
In addition, German pension funds had to book a technical reserve for an amount corresponding to almost the entire value of the dividends. The amount so booked was deductible for corporate tax purposes, so that resident pension funds paid no or very low taxes on those dividends.

The CJEU held that the application of the withholding tax to foreign pension funds entailed a discriminatory treatment and therefore violated the free movement of capital, insofar as the foreign pension funds and the domestic pension funds are in comparable situations. In this respect, the Court found that, under German tax law, there is a direct link between the receipt of the dividends and the creation of the technical reserve, which entails a deduction for the amount booked as such. It concluded that as long as the foreign pension funds earmark the dividends received to increase the technical reserve, those foreign funds are comparable to German funds. According to the CJEU, it is for the domestic court to assess if such condition is met.

The Court also ruled that the discrimination was not covered by the grand-fathering rule provided by Article 64(1) TFEU under which restrictions on certain movements of capital between Member States and third countries are not forbidden if those restrictions were already in force on 31 December 1993. According to the CJEU, although the rules imposing the application of the withholding tax were already in force on 31 December 1993, Article 64(1) did not apply to the case at stake since the rules granting the *de facto* exemption to German pension funds were introduced after 31 December 1993. Moreover, according to the Court, the dividends received by CPP were not covered by Article 64(1) since (i) shareholdings representing less than 1% of the capital of the issuer do not qualify as "direct investments" and (ii) investment in shares made by a pension fund do not amount to the "provision of financial services".

For further information: **Maisto e Associati**

Milan
Piazza F. Meda 5
20121
T: +39.02.776931

Rome
Piazza d'Aracoeli 1
00186
T: +39.06.45441410

London
2, Throgmorton Avenue
EC2N 2DG
T: +44.207.3740299