# EUROPEAN LAW/EUROPEAN TAX LAW

PART IV

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# Content

- Influence of European Law on National Tax Law
  - Influence of the Fundamental Freedoms
    - Free movement of goods
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    - Freedom to provide services
    - Free movement of capital

# IMPACT OF THE EUROPEAN FUNDAMENTAL FREEDOMS ON NATIONAL TAXATION

# Impact of the European fundamental freedoms on national taxation

- The fundamental freedoms enshrined in the TFEU (Art. 26 (2) TFEU) have acquired great significance for national tax law
- They prohibit differentiations that lead to disadvantages for nationals or taxpayers of EU member states compared to nationals (so-called prohibitions of discrimination and restrictions)
- The differentiation does not necessarily have to be linked to nationality; so-called indirect (hidden) discrimination is also sufficient. Such indirect discrimination exists if the differentiation typically leads to a disadvantage of EU/EEA foreigners
- In addition, the fundamental freedoms also give rise to prohibitions on restrictions. According to these, no member state may prevent or impede the realization of the fundamental freedoms in another EU member state. This also protects nationals who want to do business in another EU member state.
- A fundamental freedom is restricted if a tax law measure in question makes the exercise of this freedom less attractive for the taxpayer or is likely to deter the taxpayer from exercising the fundamental freedom

# Impact of the European fundamental freedoms on national taxation

- Examination scheme: Is a national tax norm compatible with a fundamental freedom?

I. Scope of protection of the fundamental freedom

1. Material scope of protection

a. Existence of an objectively protected activity; if applicable, delimitation of the fundamental freedoms among each other;

b. No range exception

2. Personal scope of protection (beneficiary): Existence of a cross-border situation

II. Infringement of the scope of protection

1. action (in part also omission in breach of duty) of an obligated party: Member States, Union institutions, intermediary powers, partly real private persons)

2. existence of discrimination

a. Open discrimination: discrimination on the basis of nationality (always inadmissible).

b. Hidden discrimination: regulation typically makes a cross-border situation worse off than a purely national situation

3.. Existence of a restriction on market access or market activities by means of a non-discriminatory measure: measures which, while having an indiscriminate effect, make the enjoyment of a fundamental freedom substantially more difficult or impossible.

# Impact of the European fundamental freedoms on national taxation

- Examination scheme: Is a national tax norm compatible with a fundamental freedom?

III. Justification of the intervention

1. written (contractual) justification grounds (barriers): apply to any intervention

2. unwritten grounds for justification (barriers)

a. Overriding reasons in the general interest (Cassis formula, Gebhard formula): apply for sovereign restrictions through nondiscriminatory measures

b. Union fundamental rights: apply to sovereign and partly also to private interventions

c. Factual reasons for interventions by private parties (direct third-party effect)

3. barriers-barriers

a. Fundamental Union Rights

b. Proportionality principle

# FREE MOVEMENT OF GOODS

# Free movement of goods

- Scope of protection

➢ According to Art. 28(2) TFEU, the scope of application of the free movement of goods is opened if there are goods: = tangible objects that have a market price and can be the subject of commercial transactions

➢ Customs Union: According to Art. 28(1) TFEU, the European Union shall comprise a customs union. This is composed of two elements: The prohibition of the levying of customs duties and comparable charges and the introduction of a common customs tariff vis-à-vis non-member states

➢ Prohibition of internal tariffs, Art. 30 TFEU: Customs duties on imports and exports or charges having equivalent effect are prohibited between Member States

# Free movement of goods

- Scope of protection

➢ Prohibition of quantitative restrictions on imports and measures having equivalent effect, Art. 34 TFEU:

- Quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States
- Art. 34 TFEU promotes the internal market by prohibiting all measures that impede the free movement of goods between Member States
- In distinction to the prohibition of customs duties, Art. 34 TFEU covers non-tariff barriers to trade
- Art. 34 TFEU prohibits discrimination against foreign goods compared to domestic goods

# Free movement of goods

- Interventions

➢ Restrictions: Article 34 TFEU identifies several sovereign measures that may constitute an impermissible restriction on fundamental freedoms: Quantitative restrictions on the import and export of goods and measures having equivalent effect

➢ Measures having equivalent effect:

- European Court of Justice defined the concept of a measure having equivalent effect in its Dassonville decision of 1974
- "measure which is capable of hindering, directly or indirectly, actually or potentially, the free movement of trade between Member States"
- But: Keck decision of 1993: measure is *not* a violation of Article 34 TFEU, as it did not affect the cross-border movement of goods, but only the domestic distribution of goods

# Free movement of goods

- Justification

➢ Existence of a justification

- Article 36 TFEU contains some justification grounds
- According to this, a justification on grounds of public morality, public policy and public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property may be considered

➢ Proportionality

- According to the case law of the European Court of Justice, for a restriction on the free movement of goods to be justified, it must comply with the principle of proportionality
- This requires that the measure is suitable to achieve a legitimate purpose
- In addition, the measure must be necessary: This is the case if there is no milder means that is equally suitable to achieve the purpose

# Free movement of goods

- **Case Study** - Case 1 - Freedom of goods - simplified according to ECJ, RS C-124/81 "Commission v. United Kingdom"

➢ Facts

- In Member State M, there is a legal regulation according to which milk may only be sold if it has been heated to ultra-high temperatures and packaged in M. The milk is not allowed to be sold in other Member States.
- The responsible representatives of M are of the opinion that there is no infringement of the free movement of goods, since every Member State can sell its milk in M. The milk is sold in M only if it has been heated to an ultra-high temperature. The fact that all companies not located in M actually refrain from doing so because of the high costs involved cannot be blamed on M.
- What is your opinion?

# Free movement of goods

- **Case Study -** Case 1 - Freedom of goods - simplified according to ECJ, RS C-124/81 "Commission v. United Kingdom"

➢ **Solution**

○ **(1) Scope of protection**

– According to Art. 28(2) TFEU, the scope of application of the free movement of goods is opened if there are goods. The concept of goods is not defined by the TFEU. According to the case law of the European Court of Justice, it is a tangible object that has a market price and can be the subject of commercial transactions. This is easily the case with milk.

○ **(2) Intervention**

– Quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States

– Art. 34 TFEU promotes the internal market by prohibiting all measures that impede the free movement of goods between Member States

– The European Court of Justice defined the concept of a measure having equivalent effect in its Dassonville ruling of 1974, which covers measures that are capable of hindering, directly or indirectly, actually or potentially, the free movement of trade between Member States (ECJ, Judgment of July 11, 1974, 8/74, ECR 1974, p. 837 (Dassonville)).

– Due to the obvious significant obstruction of the movement of goods, there is an intervention here

# Free movement of goods

- Case Study - Case 1 - Freedom of goods - simplified according to ECJ, RS C-124/81 "Commission v. United Kingdom"

➢ Solution

○ (3) Justification

– In the opinion of the ECJ, there is no justification for the intervention

– In particular, it cannot be assumed without concrete evidence that product safety (Article 36 TFEU) is not given in the case of heating and filling in other Member States.

– The measure is therefore in any case not proportionate.

– Consequently, the UK regulations violate the free movement of goods and may not be applied in EU/EEA related cases.

# FREE MOVEMENT OF EMPLOYEES

# Free movement of employees

- Scope of protection

➢ Employee within the meaning of 45 TFEU: The concept of employee must be defined under Union law and interpreted broadly

➢ Accordingly, an employee is a natural person who is a national of a Member State, is bound by instructions, i.e. dependent, performs services of a certain economic value for another and receives remuneration in return

➢ However, according to the area exception of Art. 45(4) TFEU, employees of the public administration who directly exercise sovereign authority are not covered. This includes judges, police officers or the military, but not teachers or professors

➢ The scope of application is also extended by Art. 45(3) TFEU to include job applications and residence for application purposes

- Cross-border situation: A cross-border situation is required; purely domestic situations are not covered

# Free movement of employees

- Justification

➢ Interference is justified if there is an exception under Article 45(3) TFEU, i.e. if the state measure serves the stated interests such as health or public order and safety, and the interference is proportionate

➢ Furthermore, the ECJ allows compelling reasons of general interest as justification (Cassis case law)

➢ It must be a measure that applies indiscriminately (i.e. equally valid for nationals and foreigners) and is proportionate

# Free movement of employees

- Case Study - Case 3 - Free movement of employees - simplified according to ECJ, Case C-279/93 - "Schumacker")

➢ Facts

- S lived in Belgium with his wife and two children.
- S's wife was unemployed and had no income.
- S was an employee. He worked in Germany. S's employer withheld wage tax in accordance with tax class I - as provided for all persons with limited tax liability under the Income Tax Act at the time. Furthermore, the wage tax deduction had a final final settlement effect. An assessment or an annual wage tax equalization was not possible.
- Consequently, S did not benefit from the splitting tariff despite his marital status. S believes that this regulation cannot be compatible with fundamental freedoms. What do you think?

# Free movement of employees

- Case Study - Case 3 - Free movement of employees - simplified according to ECJ, Case C-279/93 - "Schumacker")

➢ Solution

- In this case, the free movement of employees is affected
- However, it is problematic whether a discrimination exists. There is no open discrimination, as it is not directly linked to nationality
- However, there could be hidden discrimination due to the link to residence.
- In this case, however, the circumstances would also have to be comparable.
- As a rule, this is not the case for non-resident taxpayers and resident taxpayers.
- The personal circumstances do not have to be taken into account in every state in which only parts of the livelihood are earned, as this would otherwise lead to multiple consideration

# Free movement of employees

- Case Study - Case 3 - Free movement of employees - simplified according to ECJ, Case C-279/93 - "Schumacker")

➢ Solution

- Rather, it is generally the responsibility of the state of residence to take into account the tax aspects that could be assigned to the subjective net principle. Accordingly, there would be no discrimination due to the lack of comparability of the circumstances.
- However, it is important to note the special situation of S. He only earns income that is taxed in Germany.
- Therefore, his personal circumstances cannot be taken into account in his country of residence. Due to this special feature, comparability is to be assumed here

# Free movement of employees

- Case Study - Case 3 - Free movement of employees - simplified according to ECJ, Case C-279/93 - "Schumacker")

➢ Solution

- It is not possible to justify the discrimination
- In particular, difficulties in determining the amount of income in the state of residence can be solved within the framework of administrative assistance.
- A justification based on the coherence of the tax rules must also be rejected, since it is not possible for the state of residence to take this into account.
- The German legislator reacted to this decision by introducing unlimited tax liability upon application as well as a supplementary regulation to enable spousal assessment while granting the "splitting tariff", Sec. 1 (3) and Sec. 1a EStG
- The utilization of these regulations is linked, among other things, to compliance with certain income limits.

# FREEDOM OF ESTABLISHMENT

# Freedom of establishment

- Scope of protection

- The freedom of establishment guaranteed in Article 49 TFEU guarantees every national of an EU Member State the right to establish himself or herself in another Member State in order to take up and pursue a self-employed activity and to set up and manage businesses, in particular partnerships and corporations

- Furthermore, the right to establish agencies, branches and subsidiaries in a Member State is guaranteed if the person concerned is established in another Member State

- The ECJ defines establishment as the actual pursuit of an economic activity by means of a fixed establishment in another Member State for an "indefinite period" (ECJ, judgment of 25.7.1991 - Case C-221/89 "Factortame and others," [1991] ECR I p. 3905, para. 20)

- The criterion of permanence distinguishes the freedom of establishment from the freedom to provide services

- Examples of "fixed establishments" are offices, stores, production plants and practices

# Freedom of establishment

- Scope of protection

➢ Since freedom of establishment also protects the formation and management of corporations, a distinction must be drawn between it and the free movement of capital

➢ In this respect, the freedom of establishment supersedes the free movement of capital

➢ The significance of this distinction lies, on the one hand, in the fact that only the freedom of movement of capital, but not the freedom of establishment, covers third-country situations.

➢ Secondly, only in the case of the free movement of capital the provision of Art. 64 TFEU on the exclusion of certain old is cases applicable

# Freedom of establishment

- Scope of protection

➢ With regard to this delimitation, the ECJ has developed a two-step test (ECJ, judgment of 13.11.2012 - Case C-35/11 "Test Claiments in the FII Group Litigation"; ECJ, judgment of 11.9.2014 - Case C-47/12 "Kronos"):

o In the first step of the examination, two groups of cases are to be distinguished:

– Regulations that are only applicable to shareholdings that allow a certain influence on decisions in the company are to be measured exclusively against the freedom of establishment. Regulations on portfolio holdings fall within the scope of the free movement of capital.

– A portfolio holding in this sense exists in any case if the shareholding amounts to less than 10% of the company's capital (ECJ, judgment of 11.9.2014 - Case C-47/12 "Kronos“)

o In the second test step, the following distinction must be made for the concrete application of standards: If the regulations in question are applicable irrespective of the size of the shareholding, the focus must be on the individual case in the case of intra-Union situations. The freedom of establishment is to be applied here if, in the specific case, there is a shareholding that allows a definite influence on the decisions of the company. In contrast, the free movement of capital is to be applied to third-country situations (ECJ, judgment of July 19, 2012 - Case C-31/11 "Scheunemann“)

# Freedom of establishment

- Justification
- If there is an infringement of the freedom of establishment, it must be examined whether the impairment can be justified
- In this sense, Art. 52 (1) TFEU expressly designates reasons (so-called barriers) of public order, security or health as suitable grounds for justification
- ECJ generally rejects comparability for residents and non-residents with regard to the personal and family circumstances of a taxpayer (ECJ, judgment of February 14, 1995 - Case C-279/93 "Schumacker")

# Freedom of establishment

- Justification

➢ Coherence of the tax system can be considered as a compelling reason of general interest. In this constellation, there must be a direct connection between the tax advantage and the compensation of this advantage by a certain tax burden (ECJ, judgment of 7.9.2004 - Case C-319/02 "Manninen")

➢ Prevention of tax evasion and the effectiveness of tax supervision (ECJ, judgment of 20.2.1979 - C-120/78 "Cassis de Dijon" [1979] ECR 649 para. 8; ECJ, judgment of 27.9.2007 - Case C-184/05 "Twoh International BV"; ECJ, judgment of 10.4.2014 - Case C-190/12 "Emerging Markets")

➢ Preservation of the division of taxation powers between the Member States in the area of direct taxation (cf. in this respect ECJ, judgment of 13.12.2005 - Case C-446/03 "Marks & Spencer", para. 38 et seq.)

➢ Prevention of abuse and tax avoidance (ECJ, judgment of 16.7.1998 - Case C-264/96; ECJ, judgment of 12.9.2006 - Case C-196/04 "Cadbury Schweppes")

➢ Fairness of trade (ECJ, judgment of 30.9.2003 - Case C-167/01 "Inspire Art", para. 132)

# Freedom of establishment

- Case Study - Freedom of establishment - simplified according to ECJ, Case C-208/00, "Überseering"

➢ Facts

- The U-BV (BV = Dutch corporate form, similar to a German GmbH) founded in the Netherlands is sold to a shareholder in Germany. This shareholder also takes over the entire management and administrative activities, also from Germany. The U-BV concludes a purchase agreement for a plot of land in Germany. Due to a defect, the U-BV brings an action against the seller before the competent German civil court. The court considers whether the action is inadmissible. The background to this is that the necessary capacity to sue depends on legal capacity. According to the domicile theory applicable in Germany, the law of the country in which the actual administrative headquarters is located applies when assessing the legal capacity of a company. German law would therefore apply to the case to be decided. Under German law, however, there is no BV. A new formation (for example as a GmbH) would be required under German law. Thus, the U-BV would not have legal capacity and therefore would not be subject to legal proceedings. The action would be inadmissible. Is this compatible with the freedom of establishment?

# Freedom of establishment

- Case Study - Freedom of establishment - simplified according to ECJ, Case C-208/00, "Überseering"

➢ Solution

- The U-BV can also invoke the freedom of establishment (Art. 49 TFEU) as a company (Art. 54 TFEU)
- A Member State cannot deny legal capacity to a company that has been validly formed in another Member State merely because it transfers its administrative seat to the former Member State.
- There is an unjustified infringement of the freedom of establishment

# FREEDOM TO PROVIDE SERVICES

# Freedom to provide services

- Protected area

➢ Article 57 sentence 1 TFEU: "services within the meaning of the Treaties“

➢ The following wording ("insofar as they are not subject to the provisions on the free movement of goods and capital and on the free movement of persons"), which is restrictive in terms of its wording, clarifies the catch-all function of the freedom to provide services, but this is not to be understood in the sense of a general subordination, but rather in the sense of the intention of the most complete possible protection by the entirety of the fundamental freedoms

➢ An important indication of the often difficult distinction between the freedom to provide services and the freedom of establishment in individual cases is the existence of a permanent establishment

➢ The distinction between self-employment and dependence on instructions is of central importance for the - sometimes no less difficult - demarcation from the freedom of movement for employees

# Freedom to provide services

- Protected area

➢ Article 57 TFEU lists industrial activities

- (a), commercial activities
- (b), craft activities
- (c) and professional activities

➢ The transnational aspect (necessary for claiming the protection of the freedom to provide services) can lie in the border crossing of the service provider, the recipient, both or even just the service itself

➢ The provision of Art. 62 TFEU clarifies that, among other things, Art. 54 TFEU also applies to the area of the freedom to provide services, which means that companies established in accordance with the provisions of an EU Member State and having their registered office, central administration or principal place of business within the EU also enjoy the protection of the fundamental freedom

# Freedom to provide services

- Interventions

➢ The freedom to provide services offers protection against both (open and hidden) discrimination and other restrictions

➢ In the area of tax law, deduction restrictions for the costs of using services with a foreign connection can conflict with the freedom to provide services,

- e.g., a trade tax addition rule that regularly only covers assets rented abroad (ECJ, ruling of 26.10.1999 - Case C-294/97 "Eurowings AG")
- or a regulation that prohibits the tax deduction of insurance payments for voluntary pension provision only because they are made to an insurance provider based in another Member State (ECJ, Judgment of 3.10.2002 - Case C-136/00 "Danner")

# Freedom to provide services

- Justification

➢ As with the other fundamental freedoms, an impairment may be justified under certain circumstances if there is a justification and the measure to be assessed complies with the concept of proportionality

➢ The written justification grounds of Article 52 TFEU also claim validity for the freedom to provide services due to the provision of Article 62 TFEU, whereby the listed grounds of public order, security and health must not be equated with the concepts of national law

➢ Rather, a narrow understanding of the terms is to be assumed in each case, which does justice to the specific function under European law of an exceptional provision restricting the freedom to provide services

# Freedom to provide services

- Case Study - Freedom to provide services - simplified according to ECJ C-136/00, "Danner")

➢ Facts:

➢ A provision of the national tax law of Member State M stipulates that contributions to a voluntary old-age insurance scheme, which are normally taken into account for tax purposes (subject to further conditions), may not be deducted if the payment is made to an insurer domiciled abroad. Mr. S is a medical doctor and initially worked in Member State D for a long time. There, he had taken out voluntary old-age insurance with a local provider. A few years ago, he moved to State M and continued to practice medicine there. The insurance continued to exist and S continued to pay into it. Based on the aforementioned regulation, the tax administration does not allow a deduction for the corresponding insurance contributions. According to the State of M, the regulation is necessary because in the case of foreign providers it is not possible to check whether the insurance contracts meet the other requirements for deductibility. Furthermore, it cannot be sufficiently ensured that the (in any case foreseen) subsequent taxation of the payout takes place, since it is not possible to oblige a foreign insurer in the same way as domestic insurers to notify the tax authorities of all payouts. Please sssess whether the regulations in State M are in conformity with Union law.

# Freedom to provide services

- Case Study - Freedom to provide services - simplified according to ECJ C-136/00, "Danner")

➢ Solution:

- The freedom to provide services is relevant in this case
- Although the prevention of tax evasion and the guarantee of tax supervision measures are generally recognized by the ECJ as overriding reasons in the general interest, these can be sufficiently ensured in this case (as in many cases in which Member States invoke these justifications) by requesting information from the taxpayer and by means of administrative assistance requests to the respective country of domicile of the insurer.
- Thus, it would be possible to request the insurance contracts from the taxpayer and, on the basis of this, to check whether the other conditions for deductibility are met.
- Furthermore, the tax authorities of M have knowledge of the existence of the contracts through the requested deduction, so that an unnoticed unlawful untaxed payment can be prevented.
- The prohibition of deductions thus violates Art. 56 TFEU

# FREE MOVEMENT OF CAPITAL

# Free movement of capital

- Protected area and interventions

- Art. 63 et seq. TFEU contain the freedom of capital movements and payments (Art. 63 (1) and (2) TFEU, respectively), both within the European Union and vis-à-vis third countries

- The Treaties do not contain general definitions of the terms capital movements and payments

- The ECJ defines the movement of capital as the transfer of value in the form of capital in kind and money, the primary purpose of which is the investment of the amounts transferred and not the remuneration of services (ECJ, judgment of 31.1.1984 - Cases C-286/82 and C-26/83 "Luisi and Carbone" [1984] ECR pp. 377 marginal no. 21).

- For further specification, the Capital Movements Directive contains a non-exhaustive list of transactions falling within the scope of the free movement of capital (Directive 88/361/EEC of 24 June 1988, Annex I, Official Journal EU No. L 178 p. 8): real estate transactions, shareholdings in companies, acquisition and disposal of equity securities, transfer payments in connection with the performance of insurance contracts and securities transactions, gifts and inheritances

# Free movement of capital

- Protected area and interventions

- The free movement of capital protects against all cross-border direct and indirect, actual and potential obstacles, restrictions or prohibitions to the inflow, outflow or flow of capital

- Like the other fundamental freedoms, however, the free movement of capital is to be understood as a prohibition of restrictions.

- Thus, all restrictions on the movement of capital or payments are prohibited, both between the Member States and in relation to third countries, and are thus to be regarded as infringements of the free movement of capital

- An infringement of the scope of protection by direct taxes of an EU Member State occurs if two groups of taxpayers are treated differently due to their different residency in a comparable tax situation

# Free movement of capital

- Protected area and interventions

➢ The standstill clause in Art. 64 (1) TFEU

- contains a restriction of the scope of protection
- Accordingly, Art. 63 TFEU does not affect the application to third countries of restrictions existing on December 31, 1993 (for Bulgaria, Estonia and Hungary, the relevant date is December 31, 1999, and for Croatia, December 31, 2002) in connection with direct investments, including investments in real estate, with establishment, the provision of financial services
- If the conditions of Article 64 (1) TFEU are fulfilled, the restrictions on the free movement of capital do not apply
- This also applies if a corresponding regulation is subsequently amended.
- However, the amendment must not affect the essence of the provision (on a narrow interpretation ECJ, judgment of 20.9.2018 - Case C-685/16 "EV"; ECJ, judgment of 12.12.2006 - Case C-446/04 "Test Claimants in the FII Group Litigation")

# Free movement of capital

- Justification

➢ Restrictions on the free movement of capital can be justified on the basis of Art. 64-66 TFEU

➢ Particular importance is attached here to Art. 65 (1) TFEU, according to which, on the one hand, the right of Member States to apply the relevant provisions of their tax law that treat taxpayers with different places of residence or investment differently remains unaffected (lit. a).

➢ Such differences in treatment are thus only compatible with the free movement of capital if they concern situations that are not comparable with each other or are justified by an overriding reason in the general interest.

➢ Secondly, Member States may take indispensable measures to prevent infringements of national laws and regulations, in particular in the field of tax law and the supervision of financial institutions

# Free movement of capital

- Justification

➢ If there is an infringement of the free movement of capital, this may also be justified by immanent barriers

➢ According to the case law of the ECJ, the restriction of a fundamental freedom may be justified by national measures that impede the exercise of fundamental freedoms

➢ The condition is that these are not applied in a discriminatory manner, are justified on imperative grounds of general interest and comply with the principle of proportionality (ECJ, judgment of 30.11.1995 - Case C-55/94 "Gebhard"; ECJ, decision of 10.9.2020 - Cases C-41/20 to C-43/20 "Walloon Region", juris, para. 50)

# Free movement of capital

- Case Study - Case 6 - Free movement of capital - simplified according to ECJ, Case C-319/02, "Manninen")

➢ Facts:

➢ S lives in Member State M1. S owns shares in a company resident in Member State M2. This company distributes part of its profits as dividends. The profits of the company are subject to corporate income tax in M2. S has to pay tax on the dividends received in M1 as capital income under income tax. In this context, a provision of the Income Tax Act of M1 provides that the shareholders receive a percentage of the dividends received in each case as a tax credit. The aim is to prevent a double burden of corporate income tax and income tax. However, this provision does not apply if the company is not located in M1 and accordingly does not pay corporate income tax there. S therefore receives no credit. He feels that the regulation violates his fundamental freedoms. The government of M1 argues that a credit for corporate income tax not paid in M1 would lead to large losses. Furthermore, a targeted relief would not be possible due to the lack of knowledge of the prior tax burden abroad. In addition, the regulation is necessary to maintain the coherence of the tax system. What do you think?

# Free movement of capital

- Case Study - Case 6 - Free movement of capital - simplified according to ECJ, Case C-319/02, "Manninen")

➢ Solution:

- The freedom of movement of capital is affected (Art. 63 (1) TFEU)
- There is a restriction because the shareholder of a stock corporation not domiciled in Germany is disadvantaged in the tax treatment of the dividend receipt compared to a shareholder of a domestic company

# Free movement of capital

- Case Study - Case 6 - Free movement of capital - simplified according to ECJ, Case C-319/02, "Manninen")

➢ Solution:

○ Justification

– The provision of Art. 65 (1) (a) TFEU, according to which provisions of tax law may differentiate according to different place of residence or place of investment, is in turn restricted by Art. 65 (3) TFEU to the effect that there must be no arbitrary discrimination or disguised restriction on the free movement of capital

– The comparability of the situations is given, since in both cases there is a risk of double taxation with corporation tax and income tax

– The decisive factor for the comparability of S's situation is not the Member State to which the corporation tax has been paid, but the fact that S faces the same risk of double taxation as a shareholder of a domestic company.

– Therefore, as a result, a compelling general interest must also be required here. The mere reduction of tax revenues in M1 is not such a general interest. The argument that it is more difficult to determine the previous tax burden in another Member State is also unconvincing, since in this respect both recourse to the taxpayer and administrative assistance is possible. Thus, a targeted relief is possible. Also, the coherence of the tax system in M1 would be preserved if the tax credit is calculated taking into account the actual previous tax burden.

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