Discriminatory treatment

of

Pension Funds

making real estate investments

in the European Union

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List of abbreviations used in this thesis

The following table describes the various abbreviations used throughout this thesis.

Abbreviation	Meaning
Belgian CIT	Belgian Corporate Income Tax
Belgian ITC	Belgian Income Tax Code 1992
CJEU	Court of Justice of the European Union
Danish CTA	Danish Corporation Tax Act
Dutch CIT	Dutch Corporate Income Tax
EBF	Estatuto dos Beneficios Fiscais
EC	European Commission
EEA	European Economic Area
EET	Exempt, Exempt, Taxed
EFRP	European Federation for Retirement Provision
ETT	Exempt, Taxed, Taxed
EU	European Union
French GTC	French General Tax Code
German CIT	German Corporate Income Tax
HMRC	HM Revenue & Customs
Hungarian CIT	Hungarian Corporate Income Tax
IORP Directive	Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision
IORPS	Institutions for Occupational Retirement Provision
Italian corporate income tax	Italian Corporate Income Tax
OECD	Organisation for Economic Co-operation and Development
OFP	Organisation For the Financing of Pensions

Polish CIT	Polish Corporate Income Tax
Portuguese CIT	Portuguese Corporate Income Tax
PPF	Private Pension Funds
PWC	PricewaterhouseCoopers
Slovakian ITA	Slovakian Income Tax Act
Spanish CIT	Spanish Corporate Income Tax
Swedish ITA	Swedish Income Tax Act
TEE	Taxed, Exempt, Exempt
TFEU	The Treaty on the Functioning of the European Union
The Court	Court of Justice of the European Union
VMPF	Voluntary Mutual Pension Funds

Chapter 1: *Introduction*

1.1. OUTLINE THESIS

A basic principle of the Treaty on the Functioning of the European Union (TFEU) is that residents and non-residents who are in a comparable situation have to be treated in the same manner.

During my internship at Deloitte Amsterdam, a questionnaire on the tax treatment of real estate income of domestic and foreign pension funds was sent to the Deloitte offices all over the European Union (EU) and European Economic Area (EEA). The answers to the questionnaire are presented in this thesis. The main question was whether Member States' rules on the taxation of real estate income of foreign pension providers were compatible with the TFEU.

Over the years the Court of Justice of the European Union (CJEU) has developed a set of rules to determine whether tax rules are discriminatory. The general outline of this thesis follows the decision tree of the CJEU.

- Do pension funds have access to the TFEU? (Chapter 2)
- Are domestic pension funds and foreign pension funds objectively comparable? (Chapter 3)
- Does the national legislation of the Member State constitute a restriction? (Chapter 4)
- Is there a justification for the restriction? (Chapter 5)
- Is the restriction unnecessary or disproportionate? (Chapter 6)

An overview of the results of the questionnaire is presented in chapter 6. Chapter 7 introduces the procedures and sanctions if Member States are in breach with the TFEU. Chapter 8 presents the conclusions.

1.2. PURPOSE OF THE THESIS

> *"The European Commission is determined to tackle tax discrimination against occupational pension funds of other Member States."* [1]

> *"It is a high priority for the Commission to eliminate tax discrimination in pension funds. The fourteen infringement cases that the Commission has opened so far show the Commission's determination to create a level playing field for pension investments, to the benefit of the Single Market and of all citizens with an occupational pension."* [2]

These are quotes from former Taxation and Customs Commissioner László Kovács. The European Commission (EC) attracted much attention by starting so many infringement procedures against Member States. Many Member States discriminated against foreign pension funds, exempting the interest and dividend income of domestic pension funds while taxing the interest and dividend income of foreign pension funds. After the series of infringement procedures, all Member States concerned eliminated the infringements. So far, the EC has not taken a similar horizontal approach concerning the rental income or capital gains from/on real estate of pension funds. In the White Paper on Pensions it announced that it would do so in due time. The purpose of this research is to examine which EU Member State levy higher taxes on the rental income or capital gains from/on real estate in their territory from foreign pension funds than from domestic pension funds and whether the reasoning by the CJEU in the cases concerning dividend and interest received by pension funds in other EU/EEA States can be applied to real estate income.

1.3. HISTORIC OVERVIEW

In December 2005 the European Federation for Retirement Provision (EFRP) and PricewaterhouseCoopers (PWC) lodged 26 complaints against the discriminatory taxation of dividends and interest payments to foreign pension funds.[3] In the

[1] Taxation and Customs Commissioner László Kovács, Press release of 20 December 2004, No. IP/04/1500.

[2] Taxation and Customs Commissioner László Kovács, Press release of 26 June 2008, No. IP/08/1022.

[3] Frank Engelen and Marcel Jakobsen, " The EU Direct Tax Group of PricewaterhouseCoopers and the EFRP lodge complaints with the European Commission regarding dividend and interest taxation of pension funds", Newsalert EU Direct Tax Group, 7 December 2005.

complaints the EC is asked to start infringement procedures under article 258 of the TFEU.
The EC took the complaints of pension funds seriously. On the 7th of May 2007 the EC started infringement proceedings against the Czech Republic, Denmark, Spain, Lithuania, The Netherlands, Poland, Portugal, Slovenia and Sweden.

The situation on December 2013 is shown in Table 1 below:

Table 1: The infringement procedures[4]

Member State	**Letter of formal notice**	**Reasoned opinion**	**CJEU referral**	**Closed**
Austria				18 June 2009
Belgium				
Bulgaria				
Croatia				
Cyprus				
Czech Republic	7 May 2007	26 June 2008		19 March 2009
Denmark	7 May 2007	25 October 2010		24 October 2012
Estonia	31 January 2008			18 September 2008
Finland	23 July 2007	25 June 2009	7 July 2010, case C-342/10	
France		18 March 2010	19 May 2011	30 May 2013
Germany	31 January		16 December	21 March

[4] A.H.H. Bollen-vandenboom (red.), *Pensioen en de belangrijkste toekomstvoorzieningen*, SDU, Den Haag, 2013, paragraph 8.7.

	2008		2010, C-600/10	2013
Greece				
Hungary				Changed legislation before any procedure
Ireland				
Italy	23 July 2007	26 June 2008		8 October 2009
Latvia				31 January 2008
Lithuania	7 May 2007			24 November 2010
Luxembourg				
Malta				
The Netherlands	7 May 2007			30 September 2010
Poland	7 May 2007	14 May 2009		24 January 2013
Portugal	7 May 2007	8 May 2008	27 November 2008	
Romania				
Slovakia				
Slovenia	7 May 2007			27 November 2008
Spain	7 May 2007	6 May 2008	27 November 2008	
Sweden	7 May 2007	29 October 2010		
United				

Kingdom				

To date, after the EC opened infringement cases, 14 Member States eliminated discriminatory taxation of dividends and interest received by pension funds of other EU Member States.

1.4. PENSION TAXATION SYSTEMS

In order to ascertain whether national regulations are discriminatory it is necessary to research the pension taxation system of Member States. Most Member States tax occupational pension providers according to the EET, ETT or TEE system.[5]
The EET system exempts contributions from tax, exempts investments results of pension funds but taxes the pension outpayments. Under the ETT system, the contributions are tax exempt and fund income and outpayments are taxed. The TEE system involves contributions paid out of taxed income, no tax on the investment results and no tax on the pension outpayments (TEE).[6]

The table below gives an overview of how most Member States tax occupational pension providers.

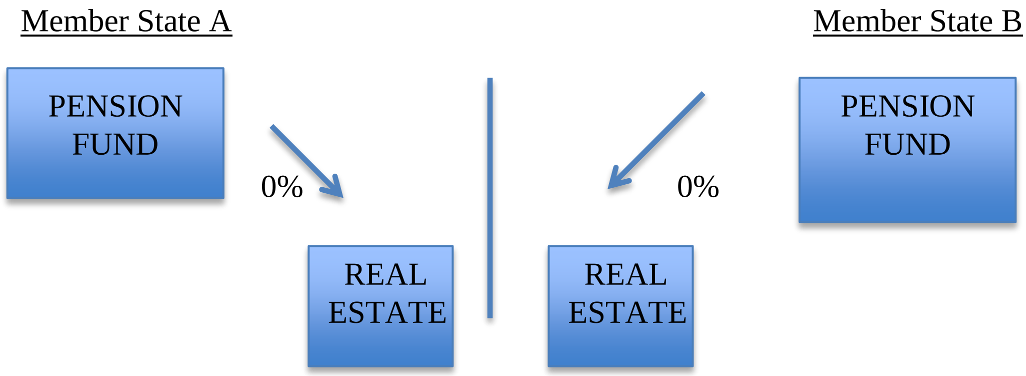
Table 1: Overview of taxation systems

	CONTRIBUTIONS	INVESTMENT RESULTS	BENEFITS
EET	EXEMPT	EXEMPT	TAX
ETT	EXEMPT	TAX	TAX
TEE	TAX	EXEMPT	EXEMPT

Table 2: Pension taxation systems across the EU-27 Member States[7]

[5] Peter Schonewille, *" Europese Commissie trekt ten strijde tegen discriminerende belasting buitenlandse pensioenfondsen",* Pensioen magazine, 2007, nr. 6/7, page 39-41.
[6] Peter Schonewille, *" Europese Commissie trekt ten strijde tegen discriminerende belasting buitenlandse pensioenfondsen",* Pensioen magazine, 2007, nr. 6/7, page 39-41.
[7] A.H.H. Bollen-Vandenboom (red.), *Pensioen en de belangrijkste toekomstvoorzieningen*, SDU, Den Haag, 2013, Chapter 8, paragraph 8.2.

Country	**EET**	**ETT**	**TEE**
Belgium		X	
Bulgaria		X	
Czech Republic	No second pillar	No second pillar	No second pillar
Denmark		X	
Germany	X		X
Estonia	X		
Greece	X		
Spain	X		
France	X		
Italy		X	
Cyprus		X	
Latvia	X		
Lithuania	X		
Ireland	X		
Luxembourg			X
Hungary			X
Malta	No second pillar	No second pillar	No second pillar
Netherlands	X		
Austria	X		
Poland			X
Portugal	X		
Romania	X		
Slovenia	X		
Slovakia	X		
Finland	X		
Sweden		X	
United Kingdom	X		



Member State A and B both apply the EET regime, which means that investment results of their own pension funds are exempt from taxation. A difference in tax treatment occurs when the investment results of domestic pension funds are exempt from taxation while the income of foreign pension funds is taxed.

According to paragraph 18 from the White Paper on Pensions: [8]

> *" The Commission will investigate whether the tax rules concerning*
> *(ii) ...*
> *(iii) cross-border investment returns of pension and life insurance providers, including their income from real estate and capital gains present discriminatory tax obstacles to crossborder mobility and cross-border investments;*
> *where necessary, it will initiate infringement procedures… "*

1.5. IORP DIRECTIVE

The IORP Directive gives rules for pension funds. Article 1 of the IORP Directive provides:

> *"This Directive lays down rules for the taking-up and pursuit of activities carried out by institutions for occupational retirement provision"* [9]

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[8] European Commission, "White paper: An Agenda for Adequate, Safe and Sustainable Pensions", Brussels 16-02-2012, COM (2012) 55 final.
[9] Article 1 Directive 2003/41/EC.

The Directive aims to ensure accessible, adequate and sustainable pensions within the Member States.[10] For this purpose the following pension providers fall under the scope of this Directive:[11]

> *"'Institution for occupational retirement provision', or 'institution', means an institution, irrespective of its legal form, operating on a funded basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity on the basis of an agreement or a contract agreed: — individually or collectively between the employer(s) and the employee(s) or their respective representatives, or — with self-employed persons, in compliance with the legislation of the home and host Member States, and which carries out activities directly arising therefrom."* [12]

The IORP directive allows cross-border activities of pension funds within the EU. It also provides a framework of IORPS and states that pension funds should have sufficient assets[13], adequate internal control[14] and proper diversification.[15] The Directive does not give any tax rules.

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[10] Directive 2003/41/EC, 3 June 2003 on the activities and supervision of the institutions for occupational retirement provision, OJL 235, 23/09/2003.
[11] Directive 2003/41/EC, 3 June 2003 on the activities and supervision of the institutions for occupational retirement provision, OJL 235, 23/09/2003.
[12] Article 6 Directive 2003/41/EC.
[13] Article 16 Directive 2003/41/EC.
[14] Article 14 Directive 2003/41/EC.
[15] Article 18 Directive 2003/41/EC.

Chapter 2: *Do pension funds have access to the TFEU?*

2.1. IMMOVABLE PROPERTY

Member States are free to allocate and define their taxing powers by treaty.[16] Most Member States find inspiration for their bilateral tax treaties in the Model Tax Convention of the Organisation for Economic Co-operation (OECD). Income from real estate is discussed in article 6 of the Model Convention. According to the first paragraph of article 6 of the OECD:

> *" Income from immovable property may be taxed in the Contracting State in which such property is situated"* [17]

While the Member States follow the OECD Model Tax Convention they may forget that exercising their taxing right on real estate held by pension funds located elsewhere in the EU or EEA may bring them in conflict with EU law.

2.2. DOES REAL ESTATE INCOME OF PENSION FUNDS FALL UNDER THE CONCEPT OF CAPITAL MOVEMENT?

Article 63 TFEU provides:

> *"1… Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."*

Article 63 prohibits all restrictions on cross-border capital movements between Member States. The article contains no definition of capital movement. The CJEU uses the Council Directive of the implementation of Article 67 to define the concept capital of movement.[18] According to the annex, investments in real estate on national

[16] Case C-336/96, *Gilly* [1998] ECR I-2793, paragraph 30.
[17] Article 6 OECD.
[18] Case C-35/98, *Staatssecretaris van Financien v B.G.M. Verkooijen* [2000] ECR I-4071.

territory by non-residents and investments in real estate abroad by residents fall under the scope of the free movement of capital.

Investments in real estate are defined by article XX of the Directive as the purchase of buildings and land and the construction of buildings by private persons for gain or personal use. The category also included right of usufruct, easements and building rights.[19] So investments in real estate fall under the free movement of capital. Pension funds thus have the right to invest in real estate without any restrictions.

2.3. DOES REAL ESTATE INCOME OF PENSION FUNDS FALL UNDER THE FREEDOM OF ESTABLISHMENT?

In most Member States pension funds have a special treatment due to their role in society. For instance, the explanatory memorandum of the Dutch Corporate Income Tax (Dutch CIT) says that the primary objective of pension funds is to provide income to people after retirement.[20] Making profit for the entity itself is not the target as the main goal is to satisfy the pension obligations by investing in assets.

While the main target of a pension fund is easy to define, it is more difficult to provide a definition of a pension fund. There are several Member States whose legislation does not provide a specific definition of an occupational pension provider. Several Member States recognize a special form of companies as a pension fund. In the United Kingdom there are no pension funds. Pension schemes in the United Kingdom are managed by trusts.

In the cases [21] *Albany International BV vs. Stichting Bedrijfspensioenfonds Textielindustrie*, *Brentjens' Handelsonderneming BV tegen Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, and *Maatschappij Drijvende Bokken BV tegen Stichting Pensioenfonds voor de Vervoer-en*

[19] Council Directive of 24 June 1988 for the implementation of Article 67 of the Treaty (88/361/EEC), Explanatory rules.

[20] Tweede Kamer, vergaderjaar 1988-1989, 21 197, nr. 3 V-N 1989/2014, 2.

[21] Case C-67/96, *Albany International BV vs. Stichting Bedrijfspensioenfonds Textielindustrie* [1999]; ECR I-5751, Case C-115/97,*Brentjens' Handelsonderneming BV tegen Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025; and Case C-219/97, *Maatschappij Drijvende Bokken BV tegen Stichting Pensioenfonds voor de Vervoer-en Havenbedrijven* [1999] ECR I-6121.

Havenbedrijven. The CJEU was asked for a preliminary ruling on the following question:

> *" Is a sectorial pension fund such as [the Fund], to which all or one or more specified groups of employees in the relevant sector are obliged to be affiliated by virtue of and in accordance with [the BPW], to be regarded as an undertaking..."* [22]

The CJEU ruled that the concept of undertaking includes every entity that deals with economic activities, despite the legal status of the entity. The concept of undertaking is one of the fundaments as the TFEU applies to all agreements between undertakings.[23] Moreover in the three cases mentioned above, the CJEU ruled that:

> *"...The Court held that a non-profit-making organization which managed an old-age insurance scheme intended to supplement a basic compulsory scheme...was an undertaking within the meaning of Article 85 et seq. of the Treaty. Optional affiliation, application of the principle of capitalization and the fact that benefits depended solely on the amount of the contributions paid by the beneficiaries and on the financial results of the investments made by the managing organization implied that that organization carried on an economic activity in competition with life assurance companies. Neither the pursuit of a social objective, nor the fact that it was non-profit-making, nor the requirements of solidarity, nor the other rules concerning, in particular, the restrictions to which the managing organization was subject in making investments altered the fact that the managing organisation was carrying on an economic activity..."* [24]

In other words, a pension provider is a company conform Article 54 TFEU. According to the CJEU the amount of benefit that is provided depends on the

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[22] Case C-219/97, *Maatschappij Drijvende Bokken BV tegen Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECR I-6121, paragraph 34.
[23] Article 101 TFEU.
[24] Case C-219/97, *Maatschappij Drijvende Bokken v. Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECR I-6121, paragraph 69.
Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, paragraph 79.
Case C-115/97, *Brentjens Handelsonderneming BV v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025, paragraph 79.

financial investment results. The fund bear financial risks and competes with insurance companies. The fact that it is non-profitmaking and copes mainly under the principal of solidarity is not enough to disqualify a pension provider as an undertaking.[25] Due to this, pension providers fall under the scope of the freedom of establishment. Even though pension providers work on the basis of non-profit, they carry out economic activities by investing in assets.

[25] ICER 2000/31, De Minister van Sociale Zaken en Werkgelegenheid, paragraph 3.3.

Chapter 3: *Are foreign pension funds and domestic pension funds in an objectively comparable position?*

The conclusion of the previous chapter is that pension funds have access to the TFEU. The second question for the the CJEU is whether resident and non-resident funds are objectively comparable. Article 65 TFEU provides that the Member States have the right to distinguish in their national regulations between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.[26] On the other hand, paragraph 3 of article 65 TFEU determines that the measures should not lead to arbitrary discrimination or a disguised restriction on the free movement of capital and payments.[27]

> *"1. The provisions of Article 63 shall be without prejudice to the right of Member States:*
>
> *(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;*
>
> *(b) … to take measures which are justified on grounds of public policy or public security.*
>
> *3. The measures … shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in article 63. "* [28]

But what are comparable situations? There is no definition of *"comparable situations"* and to require full similarity would be unreasonable.

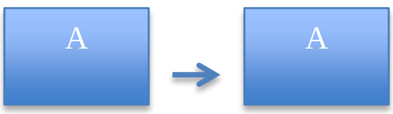
[26] Article 65 TFEU.
[27] Article 65 paragraph 3 TFEU.
[28] Article 65 TFEU.

3.1. ARE FOREIGN PENSION FUNDS OBJECTIVELY COMPARABLE TO DOMESTIC PENSION FUNDS?

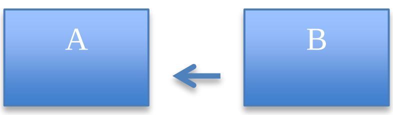
Member States could defend the higher taxation of foreign pension funds by claiming that foreign pension funds are not objectively comparable to domestic pension funds.[29] Even though there are no Court judgments concerning real estate income of pension funds, the related dividend/interest cases are good preceding. There are a series of cases concerning outbound dividends/interest, but only the most important are discussed in the next paragraphs. What applies to dividends/interest income should also apply to real estate income.

In general, there are three kinds of dividend payments: domestic, inbound and outbound.

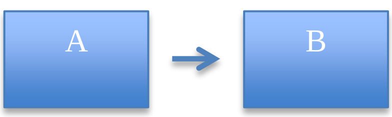
As shown below, domestic dividends are dividends paid by a company in a Member State and received by a shareholder in the same Member State.



Inbound dividends are dividends paid by a company in another Member State to a resident shareholder.



Likewise, outbound dividends are dividends that are paid by a company in the Member State to a shareholder in another Member State.[30]



[29] Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280.

3.1.1. Case C-170/05 *Denkavit*

On 14 December 2006 the Court issued a ruling on withholding tax on outbound dividends in the *Denkavit* case. The French tax system applied different rules to resident and non-resident companies.

Dividends received by a French company were exempt for 95 %. On 5 % of the dividends the French company had to pay corporate tax, at a rate of 33 %, so the effective French tax on the domestic dividend was 1,66 %. Non-resident shareholders were subject to a 25% withholding tax on their dividends. According to the tax treaty between the Netherlands and France, the withholding tax could be reduced to 5%.[31] However, under the Dutch participation exemption, the dividends were fully exempt, so the Netherlands would not give a credit for the French withholding tax. .

The Court ruled that the French system was discriminatory, because it levied more tax on outbound dividends than on domestic dividends.

According to paragraph 34 and 35 of the *Denkavit* case:

> *"… It is true that, in the context of measures laid down by a Member State in order to prevent or mitigate the imposition of a series of charges to tax on, or the double taxation of, profits distributed by a resident company, resident shareholders receiving dividends are not necessarily in a situation which is comparable to that of shareholders receiving dividends who are resident in another Member State…"* [32]

> *" … However, as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income, not only of resident shareholders, but also of non-resident shareholders, from dividends which they receive from a resident company, the situation of those non - resident shareholders becomes comparable to that of resident shareholders… "* [33]

Thus, the Court agreed that resident and non-residents shareholders receiving dividends are basically not in same position. However, once a Member State imposes

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[31] Art. 10 of the France–Netherlands tax treaty.

[32] Case C-170/05, *Denkavit France SARL v Ministre de l'Economie des Finances et de* l'Industrie [2006] ECR I-11949, paragraph 34.

[33] Case C-170/05, *Denkavit France SARL v Ministre de l'Economie des Finances et de* l'Industrie [2006] ECR I-11949, paragraph 35.

tax on dividends paid by a domestic company to non-resident companies, the situation of the non-resident becomes objectively comparable.

So, if a Member State decides to exempt resident companies from taxation, the benefit should be applicable for resident and non-resident companies that are in comparable situation. Thus if a Member States imposes tax on real estate income paid by a domestic company to non-resident companies, the situation of the non-resident becomes objectively comparable as well. The conclusion is that resident and non-resident pension funds are in a comparable situation.

Similar conclusion can be drawn from the *Amurta*[34] case, in which the Netherlands was obliged to make sure that resident and non-resident shareholders were subject to the same tax treatment as they are in a objectively comparable situation. Similarly, if this case is interpreted on taxation of real estate income, the conclusion should be similar.

3.1.3. Case C-521/07 Commission v. the Netherlands

In this case, the Commission takes the view that the Dutch legislation discriminates between companies established in the Netherlands and those established in Norway or Iceland.

Under the Dutch Legislation the exemption from the 15% withholding tax applies for companies that held at least 5% of the shareholding in a Dutch or EU company. For Norwegian companies a shareholding of at least 25% was required and for Icelandic companies the minimum share holding requirements were 10%.[35]

According to article 40 of the EEA Agreement:

> *" … Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in [European Community] Member States or [European Free Trade Association (EFTA)] States and no discrimination*

[34] Case C-379/05, *Amurta SGPS v Inspecteur van de belastingdienst* [2007] ECR I-9569.

[35] Case C-521/07, *European Commission v Netherlands* [2009] ECR 00, paragraph 9.

> *based on the nationality or on the place of residence of the parties or on the place where such capital is invested… "* [36]

As mentioned above, within the framework of the EEA Agreement no discrimination based on nationality and place of residence is accepted.
On June 2009 the Court ruled that the Netherlands failed to fulfil its obligations under Article 40 of the EEA Agreement by not exempting dividends paid by Dutch companies to companies established in the EEA area. The view is that entities such as pension funds should get similar treatment as pension funds domiciled within the EU. The national legislation o should not give rise to discrimination however, Member States should provide the necessary information to verify ones position.

3.1.6. Case C-342/10 *Commission v. Finland*

Case C-342/10, *Commission v. Finland* of 8 November 2012 is the first case on outbound dividends paid to pension funds.

Finnish resident pension funds and insurance companies are taxed on dividends payments at a rate of 19.5%. However, the Finnish tax regime allows resident pension funds and insurance companies to deduct amounts transferred to reserves from their taxable income whereas non-resident pension funds cannot.[37]The result was that the taxable basis of the Finnish pension fund decreases due to the costs and liabilities leading to a non tax-paying situation while non-resident pension funds are subject to the full withholding tax rate.

The Court stated in paragraph 37:

> *" … it is settled case-law that, in relation to expenses, such as business expenses which are directly linked to an activity which has generated taxable income in a Member State, residents and non-residents of that State are in a comparable situation, with the result that legislation of that State which denies*

[36] Article 40 EEA Agreement.
[37] Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, paragraph 4,5 & 6.

> *non-residents, in matters of taxation, the right to deduct such expenses, while, on the other hand, allowing residents to do so, risks operating mainly to the detriment of nationals of other Member States and therefore constitutes indirect discrimination on grounds of nationality…"* [38]

Finland stated that the deduction is related to the nature of the business and that there is no direct link to the dividend payment.[39] However, the Court disagreed stating that:

> *" … Thus, the direct link between expenses and taxable income results from the technique of assimilation chosen by the Finnish legislature, among other possible techniques, such as a pure and simple tax exemption, in order to take account of the specific purpose of the pension funds which is to accumulate capital, by way of investments producing, in particular, an income in the form of dividends in order to meet their future obligations under insurance contracts. Therefore that specific purpose is also that of the non-resident pension funds which pursue the same activity, the latter are in a situation objectively comparable to that of resident pension funds as regards Finnish sourced dividends…"* [40]

As mentioned above, the legislation in Finland creates a link to the amounts transferred to the reserves and specific purpose of pension funds. Thus, the Court concluded that residents and non-resident pension funds pursue the same activity and are as regards Finnish source dividends in comparable situations. This decision does not only impact non-resident pension funds but also non-resident insurance companies.

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[38] Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, paragraph 37.
[39] Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, paragraph 39.
[40] Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, paragraph 42 & 43.

3.1.7. Dutch Lower Court

In a case of 3 March 2010, the Dutch lower Court of Breda gave its judgement on the right to a refund of Dutch dividend withholding tax for a Scottish pension fund.[41] The facts were the following; a Scottish pension fund held shares in Dutch companies and received dividends. The foreign pension fund did not have legal personality and was not subject to taxation according to the legislation in Scotland.[42] The pension fund received dividends on which dividend tax of an amount equal to € 538.266,07[43] was levied. Dutch pension funds are entitled to a refund if the amount of dividend tax exceeds € 23.[44] The Scottisch pension funds applied for a refund of the dividend tax, but initially the Dutch inspector rejected the refund. Finally the Dutch inspector agreed to refund the dividend withholding tax but disagreed on paying damages for the lost interest. The inspector stated that the Scottish pension fund was not in an objectively comparable situation as the pension fund lacked legal personality. The Dutch lower Court Breda disagreed, even though the Scottish pension fund had no legal personality it is in comparable to a Dutch pension fund while it pursues similar activities.[45] An investment in the Netherlands becomes less attractive for foreign pension funds if a refund is rejected. The Dutch lower court considers the rejection as a forbidden resctriction on the free movement of capital because domestic and foreign pension funds are similar. The Dutch tax inspector appeal accepted the judgement of the Dutch Court.

3.1.8. Case C-386/04 Stauffer

Until now, there have been no cases concerning the real estate income of pension funds. In *Stauffer* the Court ruled about the corporate taxation of rental income from real estate of a foreign charitable non-profit making foundation. A non-resident charitable foundation, *Stauffer*, was established under Italian law and resident in Italy.

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[41] Rechtbank Breda, 3-3-2010, nrs. 08/4711 - 08/4713.

[42] Rechtbank Breda, 3-3-2010, nrs. 08/4711 – 08/4713, paragraph 2.1.

[43] Rechtbank Breda, 3-3-2010, nrs. 08/4711 – 08/4713, paragraph 2.2.

[44] ... "*Aan een in Nederland gevestigde rechtspersoon die niet aan de vennootschapsbelasting onderworpen is, wordt op zijn verzoek bij een door de inspecteur te nemen voor bezwaar vatbare beschikking teruggaaf verleend van in een kalenderjaar te zijnen laste ingehouden dividendbelasting, indien deze meer bedraagt dan € 23…"* , Rechtbank Breda, 3-3-2010, nrs. 08/4711 – 08/4713, paragraph 4.2.4.

[45] *" … Belanghebbende verricht dezelfde activiteiten als een binnenlands pensioenfonds met rechtspersoonlijkheid en is in zoverre feitelijk en rechtens vergelijkbaar daarmee. Niet in geschil is dat belanghebbende in het vestigingsland niet onderworpen is aan een winstbelasting. De dividendbelasting die wordt ingehouden kan belanghebbende daarom niet verrekenen…"* , Rechtbank Breda, 3-3-2010, nrs. 08/4711, paragraph 4.2.6.

Stauffer derived income from real estate in Germany. The German tax exemption from corporation tax for charities was only applicable to resident charities. Therefore, Stauffer was liable to German corporation tax on its German real estate income.[46] Stauffer objected to the German corporate taxation and claimed to be entitled to the German tax exemption as a charitable foundation.

The Court agreed that resident and non-resident charities are in a comparable situation as:

> *" … the fact remains that where a foundation recognised as having charitable status in one Member State also satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of the general public, which it is a matter for the national authorities of that other State, including its courts, to determine, the authorities of that Member State cannot deny that foundation the right to equal treatment solely on the ground that it is not established in its territory…"* [47]

However, the Court stated that the German corporation tax does not pursue charitable foundations to carry out their activities in Germany in order to be qualified as a charity.[48] Having a charity status means that the foundation satisfies promotes the interest of the general public. It should not make any difference whether it is a resident or non-resident charitable foundation that invests in a Member State. Therefore, the Court accepted that resident and non-resident charitable foundations are in a comparable position.

3.1.9. Dutch Pension fund of Unilever

As already mentioned, there is no case law or cases pending at the Court on the taxation of real estate income of pension funds. However, in a case concerning the *Dutch pension fund Unilever,* the French administrative Supreme Court ruled that the French capital gains taxation on the sale of real estate was incompatible with the

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[46] Case C-386/04, *Centro Di Musicologia Walter Stauffer v Finanzamt Munchen Fur Korperschaften* [2006] ECR I-8203, paragraph 10 & 11.

[47] Case C-386/04, *Centro Di Musicologia Walter Stauffer v Finanzamt Munchen Fur Korperschaften* [2006] ECR I-8203paragraph 40.

[48] Case C-386/04, *Centro Di Musicologia Walter Stauffer v Finanzamt Munchen Fur Korperschaften* [2006] ECR I-8203, paragraph 38.

principle of free movement of capital.[49] French pension funds are not subject to tax on real estate sourced in France, while the Dutch pension fund Stichting Unilever Progress is subject to 15% withholding tax on similar dividends. According to the French Court, there are 3 conditions for a pension fund to qualify for the tax exemption. Firstly, the pension fund must provide pension plans. Secondly the management must be non-profit making. And thirdly, the activities should mainly be non-profit.[50] The French Court considered that non-resident pension plans carry out the same activities and have the same objectives as resident pension plans. Moreover, the Paris Administrative Court of Appeal noted that there is no objective difference between French pension funds and Dutch pension funds. The tax exemption on French capital gains taxation depended on whether the organisation was non-profit making. Dutch pension funds provide pensions were also a non-profit making. This meant that Dutch pension funds were not different from French pension funds. The only difference is that the activities of a French pension fund are in the public interest of France. However, the law does not demand the activities of the funds to be in the public interest of France.[51]Therefore the French Court concluded that the treatment of resident pension funds should be extended to foreign pension funds.[52]

3.2. The objective comparability of foreign and non-resident pension funds

According to the principle of equality, *"likes should be treated alike"*. This is a restatement of the Aristotelian principle of formal equality:

> *"Things that are alike should be treated alike, while things that are unalike should be treated unlike in proportion tot their unlikeness*." [53]

In tax law, this is confirmed by the CJEU. The situations of residents and non-residents are not, as a rule, comparable.[54] It must be noted that in paragraph 37 of

[49] Cour Administrative d'Appel de Paris, No. 06PA03370, 6 December 2007, Ministre de l'Economie, des Finances et de l'Industrie v. La Fondation Stichting Unilever Pensioenfonds Progress.
[50] Slaughter and May, Pensions and Employment, Pensions Bulletin, 4th june 2009 no.9.
[51]http://www.slaughterandmay.com/media/811618/p_and_e_update_pensions_04_june_2009.pdf
[52] *Tax treatment of foreign pension* funds, European Taxation, 2009 (Volume 49), No 1.
[53] Jerome Edmund Bickenbach, *Canadian cases on the philosophy of law*, Broadview Press: 2006, page 130.
[54] Case C-279/93, *Finanzamt Koln-Altstadt v Schumacker* [1995] ECR I-225.

Marks & Spencer, the court ruled:

> *"... in tax law, the taxpayers' residence may constitute a factor that might justify national rules involving different treatment for resident and non-resident taxpayers."* [55]

Furthermore, in paragraph 18 and19 of the *Wielockx* case, the CJEU confirmed that:

> *"…In relation to direct taxes, the situations of residents and of non-residents in a given State are not generally comparable, since there are objective differences between them from the point of view of the source of the income and the possibility of taking account of their ability to pay tax or their personal and family circumstances…"* [56]
>
> *" A difference in treatment between those two categories of taxpayers cannot therefore in itself be categorized as discrimination within the meaning of the Treaty…"* [57]

The case law shows that it is necessary to examine the aim of the national provisions in order to compare the cross border situation with the internal situation in order to examine the objective comparability of resident and non-resident pension funds.[58] A difference in treatment is only compatible with the TFEU if situations are not objectively comparable. For example in paragraph 29 of *Fokus Bank*:

> *" ... A difference in treatment can only be regarded as compatible ... where situations at issue are not objectively comparable, or where it is justified by reasons of overriding public interest. In order to be justified, moreover, the difference in treatment must not exceed what is necessary in order to attain the objective of the legislation."* [59]

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[55] Case C-446/03, *Marks & Spencers* [2005] ECR 1-10837, paragraph 37.
[56] Case C-80/94, *Wielockx* [1995] ECR I-2493, paragraph 18.
[57] Case C-80/94, *Wielockx* [1995] ECR I-2493, paragraph 19.
[58] Case C-337/08, *X-Holding* [2010] ECR I-1215, paragraph 22, Case C-18/11, *Philips Electronics UK* [2011] ECR I-000, paragraph 17, Case C-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, paragraph 36.
[59] EFTA Court, E-1/04 *Fokus Bank ASA v. The Norwegian State* [2004] REC 15, paragraph 28.

The specific purpose of pension funds, according to the *Commission v. Finland* case[60], is to amass capital by investing in assets to fulfil future obligations. The primary objective of pension funds is to provide income to people after retirement. Therefore, making profit for the entity itself is not the target as the main goal is to satisfy the pension obligations. Due to their role in society, pension funds have a special treatment in the national legislation of Member States. Even though foreign pension funds have the same goal in society, they are not treated like Member States. The CJEU states in paragraph 42 and 43 of the case *Commission v. Finland*:

> *" … the specific purpose of the pension funds which is to accumulate capital, by way of investments producing, in particular, an income in the form of dividends in order to meet their future obligations under insurance contracts. "* [61]

> *" … Therefore that specific purpose is also that of the non-resident pension funds which pursue the same activity, the latter are in a situation objectively comparable to that of resident pension funds as regards Finnish sourced dividends."* [62]

Overall, this means that non-resident pension funds that invest in real estate to provide income after retirement are objectively comparable to resident pension funds. They are in the same position. A difference in treatment is only legitimate if resident and non-resident pension funds are not objectively comparable. Therefore, *likes should be treated alike*, which means that non-resident pension funds should be treated similar. Since foreign pension providers pursue the same activities and have the same purpose, this leads to the conclusion that foreign pension funds are in an objective comparable situation.

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[60] Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280.
[61] Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, paragraph 42.
[62] Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, paragraph 43.

Chapter 4: *Is there a restriction on the free movement of capital when foreign pension funds pay more tax on real estate investment results than domestic pension funds?*

4.1. The term restriction

Restrictions (measures without distinction) are prohibited if they restrict the exercise of the Treaty Freedoms. An example is the Swedish *Safir* case where the national tax measures dissuades the public to take foreign policies. In this case the Court declares that:

> *" ... Legislation... in the main proceedings contains a number of elements liable to dissuade individuals from taking out capital ... and liable to dissuade ... companies from offering their services on the Swedish market."* [63]

In short, national rules may have a restrictive effect on non-residents. Restrictions are measures that do not initiate direct or indirect discriminatory measures but hinder the exercise of the Treaty Freedoms by dissuading cross border situations. The main difference between discrimination and measures without distinction is that discriminatory measures are only justifiable by the public interests that are listed in article 65 TFEU whereas unwritten justification grounds can also justify measures without distinction.

4.2. Higher taxation of foreign pension funds

According to the Court, higher taxation of foreign pension funds is a restriction of the free movement of capital, which is protected by article 63 TFEU.

[63] Case C-118/96, *Jessica Safir* [1998] ECR I-1897, paragraph 30.

4.2.1. Case C-342/10: Commission v Finland

On the 8th of November 2012 the CJEU decided on the Finnish taxation system on outbound dividends paid to pension funds. On the 19th of July 2007 the Commission had decided to challenge the Finnish system for taxation.[64]

In Finland, resident pension funds are taxed at a rate of 19.5% on Finnish dividend payments. However, according to paragraph 4 expenses and losses are deductible for tax purposes:

> *"…Expenses and losses incurred in order to acquire or to maintain income from an economic activity are deductible for tax purposes…"* [65]

The deduction for tax purposes is only applicable for domestic pension funds. Due to the deduction such income is not taxed at all. However, foreign pension funds are subject to tax on gross amount at the rate of 19.5%.[66] Due to this, the resulting effective tax rate for Finnish pension funds is lower than 19.5% while foreign pension funds are subject to 19.5% withholding tax.

The Commission's opinion is that the difference in treatment between foreign and domestic pension funds is an obstacle to the free movement of capital. For example in paragraph 28:

> *" … the measures prohibited by Article 63(1) TFEU as restrictions on the movement of capital, include those that are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States… "* [67]

By taxing outbound dividends to foreign pension funds at a higher rate cross-border transactions are less attractive then domestic transactions.

The differential treatment places non-resident pension funds at an infringed position.

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64 Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, paragraph 8.

65 Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, paragraph 4.

66 Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, paragraph 20.

67 Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, paragraph 28.

Finland disagrees that the difference between the tax treatment of dividends paid to foreign and domestic pension funds is not contrary with the TFEU. The Member States argues that foreign pension funds are not treated differently then domestic pension funds. Finnish and foreign pension funds are taxed under the same national regulation at a rate of 19.5%. Under double taxation conventions even a lower tax rate, 15%, is applicable for foreign pension funds.[68] Furthermore, Finland states that Finnish and non-resident pension funds are not in a comparable situation. Finnish pension funds are taxed on their worldwide income while non-resident pension funds are only taxed on income from Finnish source.[69] Therefore, the deduction of costs is linked to the worldwide income of domestic pension funds and not only to dividend income. In this regard, Finland continues to state that the difference in treatment is justified by the need to ensure the coherence of the tax system. Nevertheless, the Court did not accept the argumentation of Finland. The Member State failed to demonstrate the direct link between the costs and expenses. The Court rejected the justification ground on the need to preserve the cohesion of the tax system.
Finally, the Court agreed with the Commission concluding that the difference in treatment of dividends paid to non-resident pension and Finnish pension funds is a restriction of the free movement of capital which cannot be justified.

4.2.2. Case C-493/09: Commission v Portugal

On the 23th of May 2007[70] the Commission sent a formal notice to Portugal claiming that the national tax provisions concerning the treatment of dividends and interest received by non-resident pension funds are incompatible with Article 63 TFEU. Pension funds established in Portugal agitate in conformity with the Portuguese law are exempt from corporation tax while dividend paid to non-resident pension funds in a comparable situation are subject to corporate income tax of 20%. For this reason, the dividends tax treatment is disadvantageous for non-Portuguese pension funds.
At this point, Portugal admitted that the provisions are contrary to the free movement of capital but also argues that the restrictions are justified. In the first place, the

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[68] Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, paragraph 32.
[69] Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, paragraph 45.
[70] PricewaterhouseCoopers EU Tax News, Issue 2009 – nr. 001, November – December 2008, page 10 -11.

measure was necessary to preserve the coherence of the tax system.[71] For the public interest it is necessary to prevent every risk that can financially imbalance the social system. For this argument to succeed a direct link in the second place, the provision is needed to preserve effective fiscal supervision. In fact the Portuguese tax authorities have the financial and fiscal responsibility over pension funds and therefore it is necessary to communicate directly. It is almost impossible to communicate directly with non-resident pension funds and supervise them in financial and fiscal matters if the entities are not operating or established in Portugal.
The Portuguese government argues:

> *"…direct surveillance of the funds is essential to ensure repayment of the amounts due by way of IRC. Such control would be impossible with regard to pension funds resident in another Member State and, a fortiori, to those residents in a third State party to the EEA Agreement, since the provisions of EU law on cooperation in tax matters are not applicable in this context."* [72]

However, the ECJ is not convinced by the Portuguese arguments. Non-resident pension funds are not given an equal chance to operate on Portuguese territory.[73] Due to this, investments made by a non-resident pension are less attractive by the tax rate of 20% while resident pension funds are exempted. Therefore, the Commission concludes that the Portuguese Republic failed to fulfil its obligations under article 63 TFEU.[74] It is surprising that the Commission sent a formal notice concerning the treatment of dividends and interest but only ruled on the treatment of dividends. Undoubtedly the expectation is that the Commission will rule similarly on the treatment of interest. The taxation of income of real estate from foreign pension funds dissuades them from investing in Portugal. Undeniably it results in a restriction of the free movement of capital as protected by article 63 TFEU.

[71] EU Tax Alert, Loyens & Loeff, November 2011 – edition 98.
[72] C-493/09, *Commission v Portugal* [2011] ECR I-0000, paragraph 22.
[73] C-493/09, *Commission v Portugal* [2011] ECR I-0000, paragraph 45.
[74] C-493/09, *Commission v Portugal* [2011] ECR I-0000, paragraph 52.

4.2.3. Case C-600/10: Commission v Germany

On the 22th of November 2012 the Court ruled in the case *Commission v. Germany* on the taxation of dividend distributions and interest payments of non-resident pension funds. According to the German tax regime, outbound dividends of foreign pension funds were subject to tax on the gross amount while domestic pension funds were subject to tax on the net amount.[75] German pension funds have the ability to deduct any business expenses that are connected to the dividend or interest income. The ability to deduct expenses is not applicable for non-German pension funds. The less favourable treatment was the reason for the infringement action against Germany. Despite the difference in treatment, the Court ruled the case in favour of Germany. The reasoning of the Commission was rejected because the Court found that the Commission had not provided sufficient evidence to prove its point.

[75] EU Tax Alert, Loyens & Loeff, December 2012 – edition 111.

Chapter 5: *Are there justifications for the higher taxation of pension funds established elsewhere in the EU than of domestic pension funds?*

In the previous Chapters, several court judgements concluded that non-resident pension funds and resident pension funds are objectively comparable due to their specific purpose.[76] The Court considers higher taxation of non-resident pension funds a restriction of article 63 TFEU. This chapter focuses on whether the restrictions caused by national regulations of the Member States can be jusitifed.

5.1. Justifications

According to the article 65 TFEU, Member States have the right to distinguish between taxpayers. Treating taxpayers differently does not necessarily mean that taxpayers are discriminated. On protection grounds Member States are allowed to differentiate between residents and non-resident taxpayers. The next paragraphs focus lies on the written and unwritten justification grounds. The main difference is that written justification grounds are mentioned in the article 65 TFEU while unwritten justification grounds are only found in the Case Law of CJEU.[77]

5.2. Written justification grounds

This principle is laid down in article 65 TFEU:

> *"… To apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard tot heir place of residence or with regard to the place where their capital is invested … "* [78]

Moreover, discrimination between residents and non-residents by reason of nationality or other criteria of differentiation is only allowed when it is justified.

[76] Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280, Case C-493/09, *Commission v Portugal* [2011] ECR I-0000.
[77] B.J.M. Terra & P.J. Wattel, *European Tax Law*, Deventer: Kluwer 2012, chapter 3.2.
[78] Article 65 TFEU.

Difference in treatment is only justified if the measure is meant to protect the following:[79]

1. *Public morality;*
2. *Public policy or public security;*
3. *The protection of health and life of human, animals or plants;*
4. *The protection of national treasures possessing artistic, historic or archaeological value;*
5. *The protection of industrial and commercial property;*

Written justification grounds are applicable for discriminatory measures and obstacles. It seems unlikely that the justification grounds mentioned above would be able to justify the higher taxation of foreign pension funds. The higher taxation of foreign pension funds does not lead to protection of life of humans, national treasure or industrial or commercial property, nor does it secure public morality or policy. Higher taxation seems to dissuade from pension funds from cross border investments instead of protecting the grounds that are mentioned above.

5.3. Unwritten justification grounds

The justification grounds in the TFEU presents an exhaustive list of grounds in which article 36 TFEU can be evoked. The Court started to accept unwritten justifications grounds, developed in case law, to protect grounds which is applicable for tax obstacles created on the internal market. The measure may not overreach what is necessary to attain the objective. In other words, the measure should be appropriate and proportionate in order to protect the legitimate objective.

With respect to the higher taxation of foreign pension funds, Member States have tried to justify the disputed measure with the following arguments: coherence of the tax system[80], fiscal supervision[81], balanced allocation of taxing power[82], tax fraud or tax evasion.[83]

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[79] Article 36 TFEU.
[80] Case C-204/90, *Hans Martin Bachmann* [1992] ECR I-249.

The following paragraph discusses the three main justification grounds argued by Member States regarding dividend/interest cases.

5.3.1. Coherence of the tax system

The concept of fiscal cohesion is one of the most often invoked grounds of justifications. The need to preserve the coherence of the tax system can justify restrictions. The court accepted the fiscal cohesion as a justification ground for the first time in *Bachman* concerning a German citizen.[84] The Court stated in paragraph 48 of the Bachman:

> *" … In the light of the foregoing, it must be recognized that, in the field of pensions and life assurance, provisions such as those contained in the Belgian legislation at issue are justified by the need to ensure the cohesion of the tax system of which they form part, and that such provisions are not, therefore, contrary to Article 48 of the Treaty…"* [85]

After the CJEU ruled in the *Bachman* case, the commission stated:

> *" … The Commission is of the view that the subsequent European Court judgements in the cases of Wielockx (C-80/94), Jessica Safir (C-196/98) and Danner (C-136/00) limit considerably the scope for Member States to apply different and more cumbersome tax rules to insurance/pension funds established in other EU countries…"* [86]

In the *Portugal* case[87] concerning the discriminatory treatment of pension funds Portugal claimed that the exemption was necessary to preserve the coherence of the

[81] Case 120/78, *Rewe Zentrale AG v. Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649, Case C-250/95, *Futura Participations SA and Singer* [1997] ECR I-2471, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH* [2006] ECR I-9461, Case C-282/07, *Truck Centre* [2008] ECR I-10767, Case C-371/10, *National Grid Indus BV* [2008] ECRI I-10767.
[82] B.J.M. Terra & P.J. Wattel, *European Tax Law*, Deventer: Kluwer 2012, Chapter 3.2.2.
[83] Case C-270/83, *Commission v. French Republic* [1986] ECR 273.
[84] Case C-204/90, *Hanns-Martin Bachmann v. Belgian State* [1992] ECR I-249.
[85] Case C-204/90, *Hanns-Martin Bachmann v. Belgian State* [1992] ECR I-249, paragraph 28.
[86] Brussels, 5th February 2003, IP/03/179.
[87] Case C-493/09, *Commission v Portugal* [2011] ECR I-0000.

tax system.[88] Even Finland presented the need to ensure the coherence of the tax system as a justification ground.[89] In both cases, the Court rejected the argumentation. The expectation is that Member States will justify the difference in treatment of real estate income by arguing the need to protect the fiscal coherence. However, the expectancy is that the Court will reject this argument.

5.3.2. Fiscal supervision

Another ground when the Court accepts restrictive measures is when it is almost impossible for Member States to receive information from the host Member State. To ascertain the correct worldwide income of taxpayers it is necessary to receive information. For example, in the *Rewe Zentrale* Case, the Court ruled:

> *" … Obstacles to movement within the Community… must be accepted…in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision…"* [90]

It must be noted that the Court does not easily accept this ground. In most cases the Court refers to the Directive 77/79. For instance in case *Futura* the Court ruled:

> *" … Under Directive 77/799, the competent authorities of a Member State may always request the competent authorities of another Member State to provide them with all the information enabling them to ascertain, in relation to the legislation which they have to apply, the correct amount of revenue tax payable by a taxpayer having his residence in that other Member State…"* [91]

The Court argues that Member State can also exchange information with the competent authorities. It was Portugal who argued that the difference in treatment between domestic and foreign pension funds was justified to ensure the effectiveness

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[88] KPMG's EU Tax Centre, Euro Tax Flash, Tax Advisers, October 2011.
[89] Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280.
[90] Case 120/78, *Rewe-Zentral v. Bundesmonopolverwaltung fur BranntweinI* [1979] ECR I-649, paragraph 8.
[91] Case C-250/95, *Futura Participations SA and Singer* [1997] ECR I-2471, paragraph 41.

of fiscal supervision.[92] The Court dismissed the need for effective fiscal supervision as a justification ground. A reasonable expectation is that Member states will forward this justification ground to justify unequal treatment of real estate income.

5.4. Restrictions

Restrictive measures are not compatible with the TFEU if they dissuade non-resident pension funds from cross-border investments. For example, in case *Commission v. Portugal* the Court stated:

> *" ... Measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those that are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States… "* [93]

In the case *Commission v. Finland* the Court rejected the justification grounds of the Member State. In paragraph 33 of the case *Commission v. Finland* the Court concluded that treating non-resident pension funds less favourably then domestic pension funds dissuades companies from investing on Finnish territory.

> *" ... Treating dividends paid to non-resident pension funds less favourably than dividends paid to resident pension funds is liable to deter companies established in another Member State from investing in the Republic of Finland, and thus constitutes a restriction on the free movement of capital prohibited, in principle, by Article 63 TFEU… "* [94]

There are no justifications if Member States discourage non-resident pension funds from investments. This amounts to obstacles to the free movement of capital. It does not matter whether this concerns dividend/interest or real estate income.

As mentioned above, the same argumentation is applicable for real estate income. Treating real estate income of non-resident pension funds less favourable than

[92] *C-493/09, Commission v Portugal* [2011] ECR I-0000, paragraph 46.
[93] C-493/09, *Commission v Portugal* [2011] ECR I-0000, paragraph 28.
[94] Case-342/10, *European Commission/ Republic of Finland* [2012] ECR I- [2013] STC 280 paragraph 33.

domestic pension funds dissuades non-resident pension funds from investments. Therefore, the difference in treatment constitutes a restriction on the free movement of capital.

Chapter 6: *Quick scan EU Member States*

National legislation, which implies higher taxation on real estate income from foreign pension funds than domestic pension funds, infringes Article 63 TFEU. From the Court's point of view, a Member State may not levy higher taxes from foreign pension funds then comparable resident pension funds. According to the website of DG TAXUD, the EC has not yet opened any infringement cases on discriminatory taxation of foreign pension funds in relation to real estate income.[95]

6.1. The questionnaire

The following questions were sent to Deloitte offices in every Member State of the EU and EEA:

1) What are the conditions to qualify as an occupational pension provider in your country? If your country has different types of pension providers, with different taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction.
2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC.
3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?
    i. If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.

[95] http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/by policy/index_en.htm,

ii. If they are not subject to tax, please provide the original and the English translation of the text of the legal basis for the exemption.

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein subject to tax on their income from directly held real estate (capital gains, rental income) in your country?

   i. If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.

   ii. If not, please provide the original English translation of the text of the legal basis for the exemption.

The aim of the questionnaire was to examine which Member States discrimate pension providers of other EU/EEA Member States. The Deloitte offices in the EEA Member States did not answer the questionnaire. The Replies were received for the following Member States:

1) Belgium
2) Czech Republic
3) Denmark
4) France
5) Germany
6) Hungary
7) Ireland
8) Italy
9) Poland
10) Portugal
11) Slovakia
12) Spain
13) Sweden
14) United Kingdom

The comparative matrix below presents the answers to the following questions:

1. What is the tax retirement system in your country?
2. Do pension providers in your country fall under the IORP directive?
3. Are domestic pension providers subject to tax?
4. Are foreign pension providers subject to tax?
5. What is the tax rate for domestic pension funds?
6. What is the tax of foreign pension funds?
7. Are domestic pension funds exempt from taxation?
8. Are foreign pension funds exempt from taxation?

The matrix [96] is as a tool to identify similarities and differences between the participating countries.

6.2. Results Questionnaire

COMPARATIVE MATRIX:

[96] See results questionnaire in appendix.

As the table shows, there are a number of Member States who distinguish between domestic and foreign pension providers.

	TAX SYSTEM	IORP	SUBJECT TO TAX		TARIF		EXEMPTION	
			DOMESTIC	FOREIGN	DOMESTIC	FOREIGN	DOMESTIC	FOREIGN
BELGIUM	ETT	YES	YES	YES	NO	33,9%	YES	NO
CZECH REPUBLIC	NO SECOND PILLAR	YES	YES	YES	5%	5%	NO	NO
DENMARK	ETT	YES	YES	YES	15,3%	25%	NO	NO
FRANCE	EET	NO	YES	YES	NO	NO	YES	YES
GERMANY	EET/TEE	YES	YES/NO	YES	NO/15,83%	15,83%	YES/NO	YES/NO
HUNGARY	TEE	NO	YES/NO	YES	10/19%	10/19%	YES/NO	NO
IRELAND	EET	YES						
ITALY	ETT	YES	YES	YES	11/11,5%	11/11.5%	NO	NO
POLAND	TEE	YES	YES	YES	NO	NO	YES	YES
PORTUGAL	EET	YES/NO	NO	NO	NO	10%	YES	YES
SLOVAKIA	EET	YES	YES/NO	YES	19%/NO	19%	YES/NO	NO
SPAIN	EET	YES/NO	YES	YES	0%	24,75%	NO	YES
SWEDEN	ETT	YES	YES	NO	NO	NO	NO	NO
UNITED KINGDOM	EET	YES	YES	YES	NO	20%/NO	YES	YES/NO

6.3. Analysis Questionnaire

6.3.1. Belgium

A pension fund is established in Belgium under a special form called: *“ Organisation For the Financing of Pensions”*(OFP). The OFPs are subject to Belgium corporate income tax (CIT). Even though OFPs are subject to Belgian corporate income tax of 33,99%, the taxable basis is the sum of the following items:

- *“ ... Abnormal or benevolent benefits received, which include any income that is derived from non-arm’s length transactions;*

- *Non-deductible costs other than reduction in value and capital loss on shares, which include the so-called disallowed expenses. The disallowed expenses do not include the reduction in value of capital on losses on shares;*
- *Secret commission paid, which covers all kind of payments for which the proper tax compliance has not been observed, such as payments of salary, fees, commission, etc. to beneficiaries that have not been properly identified by filling the required forms… "* [97]

Although OFPs are subject to corporate income tax, the taxable basis consists only of non-deductible costs, abnormal benefits or secret commissions. Income from real estate is not included in the taxable basis. This means that rental income or capital gains from real estate derived by OFPs is exempt from taxation. The conclusion is that an OFP is not liable to taxation on income from investments.

Furthermore, according to the reply to the questionnaire, insurance companies can also act as a pension provider. However, these companies are submitted to the normal tax rules. There is no special tax regime for insurance companies. The tax treatment of insurance companies falls outside the scope of this thesis.

The special tax regime of OFPs is also applicable to foreign pension funds. According to article 9 of chapter 2 Wet betreffende het toezicht op de instellingen voor bedrijfspensioenvoorziening:

> *" Het organisme voor de financiering van pensioenen geniet rechtspersoonlijkheid, onder de voorwaarden omschreven in dit hoofdstuk. Zijn zetel en zijn hoofdbestuur zijn in Belgie gevestigd… "* [98]

[97] R. Offermanns, B. Michel & P. Vanhaute, Belgium - Corporate Taxation sec. 11.10 Country Analyses IBFD.
Belgium in International Tax Planning (Second Revised Edition), Patrick A.A. Vanhaut, ISBN 978-90-8722-039-6 chapter 6, page 282.

[98] Wet betreffende het toezicht op de instellingen voor bedrijfspensioenvoorziening, 27 oktober 2006, article 9.

As mentioned above, pension funds can only benefit from the favourable legislation if the registered seat is in Belgium. The Belgian legislation has no restrictions as to the content of the pension plans of foreign pension funds.

> *" ... For non-Belgian pension plans there are no restrictions or conditions as to the content of the pension plans. The plan only must constitute in the host EEA country a pension plan within the meaning of the IORP Directive. There is no requirement that one or more sponsoring undertakings should be located in Belgium, nor that any of the pension plans operated by the OFP should apply to Belgian employees..."* [99]

The special OFP regime is only accessable for a foreign pension fund if it has its registered seat in Belgium. Non-resident pension funds that do not qualify as an OFP are treated as non-resident companies for the purpose of Belgian CIT. This means that foreign pension funds are subject to the income tax on non-residents. According to article 227 of the Belgian CIT:

> *"...Buitenlandse vennootschappen... zijn de verenigingen, instellingen of lichamen zonder rechtspersoonlijkheid die zijn opgericht in een rechtsvorm die vergelijkbaar is met deze van een vennootschap naar Belgisch recht; hun maatschappelijk zetel, hun voornaamste inrichting of hun zetel van bestuur of beheer niet in België hebben..."* [100]

Income and capital gains derived from real estate situated in Belgium fall under the scope of the taxation of non-residents.

There have been major changes to the withholding tax exemption. Under the Royal Decree of 20 December 2012, foreign pension funds are exempt from withholding taxes if the following conditions are met:

[99] R. Offermanns & B. Michel, *Belgium - Corporate Taxation* sec. 11.10, Country Analyses IBFD.

[100] Article 227 Belgian CIT.

- *The aim of the pension fund is exclusively to manage and invest funds collected for the purpose of legal or supplementary pensions;*
- *The pension fund is a non-profit entity that has acts on a non-commercial basis; and*
- *The pension fund is exempt from tax in its country of residence.*[101]

However, the domestic exemption is applicable for foreign pension funds but is only limited to dividends.[102] In article 160, paragraph 2 of the Belgium Income Tax Code (ITC):

> *"§ 2. Er wordt eveneens volledig afgezien van de inning van de roerende voorheffing op dividenden en op inkomsten bedoeld in artikel 90, 11° van hetzelfde Wetboek … hetzij een vennootschap, vereniging, inrichting of instelling is die haar maatschappelijke zetel, haar voornaamste inrichting of haar zetel van bestuur of beheer in België heeft, hetzij een rechtspersoon naar Belgisch publiek recht is, wanneer de verkrijger wordt geïdentificeerd als een spaarder niet-inwoner bedoeld in artikel 227, 3°, van hetzelfde Wetboek waarvan het maatschappelijk doel uitsluitend bestaat uit het beheer en het beleggen van fondsen ingezameld met het doel wettelijke of aanvullende pensioenen uit te betalen, die zich uitsluitend zonder winstoogmerk toeleggen op verrichtingen bedoeld in artikel 182, 2°, van hetzelfde Wetboek, en die in het land waarvan hij inwoner is, vrijgesteld is van inkomstenbelastingen.."*

There is no specific domestic exemption concerning income from real estate derived by investments from foreign pension funds. The above-mentioned exemption is only available for dividend payments while income from real estate is not listed in article 90 of the Belgium ITC.

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[101] R. Offermanns & B. Michel, *Belgium - Corporate Taxation* sec. 7., Country Analyses IBFD
[102] "*… As from 7 January 2013, the exemption from withholding tax laid down in section 106, §2 RD/BITC is limited to Belgian dividends received by foreign pension funds, as amended by the Royal Decree of 20 December 2012 … "*
http://www.pwc.be/en/financial-services-newsalert/2013/belgian-legislative-changes-withholding-tax.jhtml

The conclusion is that there is a difference in treatment between domestic and foreign pension funds. Domestic pension funds are subject to specific tax regime. This regime is only accessible for foreign pension funds after qualifying as an OFP and having its registered seat in Belgium. Pension funds that do not meet the requirements of an OFP are taxed as a non-resident at 33,99%. There is no separate capital gain tax in Belgium.[103] Rental income and capital gains derived by local and non-resident companies are taxable at the normal corporate tax rate.[104] There is an exemption if the company is not carrying a business enterprise or is not engaged in any profitable activities. However, this exemption applies only to withholding taxation on dividends. The result is that foreign pension funds, not having their legal seat in Belgium, are excluded from the favourable OFP tax regime. There is no exception in the national legislation that confirms that foreign pension funds are not subject to Belgium corporate tax. The conclusion is that domestic and foreign pension funds investing in real estate on Belgium territory are not treated alike. The conclusion is that real estate income of foreign pension funds are taxed while similar income of domestic pension funds are exempt.

6.3.2. Czech Republic

The law recognizes companies of a special form, " penzijni fond", as a pension fund. According to article 21 of the Czech Income Tax Act the corporate income tax rate is 19% for legal entities but a special rate of 5%[105] applies for pension funds and other special funds specified in the article:

> *" Tax Rate (§ 21):*
>
> 1. *The rate of tax with effect from 1 First January 2011 is 19% (effective 31 12th 2009, 20%) as in points 2 and 3 otherwise stated. This tax rate applies to the tax base reduced by the amounts in § 34 and § 20 paragraph 7 and 8, which is rounded down to whole.*
> 2. *The tax rate is 5%*

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[103] R. Offermanns & B. Michel, *Belgium - Corporate Taxation* sec. 1.7., Country Analyses IBFD.
[104] PWC Real Estate Going Global, Tax and legal aspects of real estate investments around the globe. http://www.pwc.fr/assets/files/pdf/2013/07/Global_real_estate/2012_belgium.pdf.
[105] T. Mkrtchyan, *Czech Republic - Corporate Taxation* sec. 1.10.1., Country Analyses IBFD.

3.

3.1. for the investment fund. 16) This tax rate applies to the tax base reduced by the amounts in § 34, which shall be rounded down to whole, and

3.2. by the mutual fund. 16) This tax rate applies to the tax base reduced by the amounts in § 34, which shall be rounded down to whole.

4. The tax rate is 5% for the pension fund or pension institutions. This tax rate applies to the tax base reduced by the amounts in § 34, which shall be rounded down to whole….

5. .... "

Furthermore, rental income and capital gans on the sale of real estate property are also subject to the special rate of 5%, due to article 22 of the Czech Income Tax Act:

" Source Revenue (§ 22):

a) The income from sources in the Czech Republic for taxpayers referred to in paragraph 3 § 2 and § 17 paragraph 4 shall be regarded

…

d) income from the sale of property located in the Czech Republic and the rights associated with them,

e) income from the use of property (parts) including flats (parts) located in the Czech Republic…"

The results of the questionnaire show that there is no difference in treatment between foreign and domestic pension funds investing in the Czech Republic. Foreign pension funds that invest in real estate are subject to the same special tax rate of 5% as Czech funds. This includes qualifying funds established in other EU Member States, Iceland and Norway.[106] The conclusion is that foreign pension funds are not discriminated in the Czech Republic.

[106] T. Mkrtchyan, Czech Republic - Corporate Taxation sec. 1.10.1., Country Analyses IBFD.

6.3.3. Denmark

Denmark has an ETT tax system, which means that the investment results of pension funds are taxed. In Denmark, pension funds and insurance companies are active as pension providers. Pension funds are subject to a pension savings yield tax of 15.3% on the yield of their investment.[107] Apparently, the yield tax will decrease to 15% from 2014.[108] Section 21 of the Danish Corporation Tax Act (CTA) provides for for companies and associations that are domiciled abroad:[109]

> *" The income tax for foreign companies and associations referred to in section 2(1) (a, b and f) shall be the percentage stated in section 17(1) on the taxable income…"* [110]

According to section 17(1) foreign pension providers are taxed at a rate of 25%.

> *" 17(1) Income tax for public limed companies and associations etc mentioned in section 1(1), no 1 to 2a, no 2d to 2i and 3a to 6, and section 3(7) shall be payable at a tax rate of 25 percent on the taxable income…"* [111]

Section 2(1) of the Danish CTA includes real estate income:

> *"h) receive capital gains from sources in Denmark…"* [112]

This means that capital gains received by domestic pension funds are taxed at a rate of 15.3% while foreign pension funds are taxed at a rate of 25%.

The other difference in treatment lies in the tax base. In Case *2006/4103*, the Commission sent Denmark a formal request to end discriminatory treatment between

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107 http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/funds-and-fund-management-survey/pages/denmark-taxation.aspx#1.1.

108 B. Wiberg et al., *Denmark - Individual Taxation* sec. 1.3.3., Country Analyses IBFD.

109 *" 2(1) Tax liability under this Act shall futhermore be incumbent on companies and associations etc specified in section 1(1) that are domiciled abroad…"*, Danish Corporation Tax Act.

110 Section 21 Danish Corporation Tax Act, *Selskabsskatteloven*, Consolidation Act no. 1376 of 7 December 2010.

111 Section 17 (1) Corporation Tax Act, *Selskabsskatteloven*, Consolidation Act no. 1376 of 7 December 2010.

112 Section 2(1) no 2h Corporation Tax Act, *Selskabsskatteloven*, Consolidation Act no. 1376 of 7 December 2010.

foreign and domestic pension funds regarding the difference in tax base. Danish pension funds were subject to a yield tax of 15% on net basis while foreign pension funds were subject to yield tax on gross basis.[113]
In 2012 the Commission decided to close the case against Denmark. However, according to the answer to the questionnaire there is still a difference in tax base in relation to real estate income:

> *" … The tax base includes all types of yield including profit or loss on real estate and a worldwide income principle is applied. The taxation is made up according to a market-to-market principle. Profit and loss on real estate is assessed according to the ordinary tax rules with the exception of depreciations on buildings and installations, which cannot be applied for pensions, yield tax purposes…Foreign pension providers are subject to Danish Corporation Tax of Danish real estate… Gains and losses on real estate are taxed on realisation basis. It is possible to depreciate on equipments, installations and buildings under certain conditions. Expenses are only deductible if they relate to real estate as such. Deductibility for interest expenses assumes that the loan relates to the purchase of the real estate, the operations and maintenance herof. "* [114]

The conclusion is that Danish law distinguishes between domestic and foreign pension funds. Investments of domestic pension funds are subject to pension saving yield tax of 15.3% while foreign pension funds are subject to a tax rate of 25%. Furthermore, domestic pension funds are taxed to a market-to-market principle[115] while foreign pension funds are taxed on a realisation basis. In other words, domestic pension funds are subject to tax on an unrealised basis while foreign pension funds are taxed on realisation.

6.3.4. France

According to the answer to the questionnaire, there is no special definition of pension providers in France. Pension providers are treated as non-profit organisations. There

[113] Brussels, 25 June 2009, IP/09/1018, Case number 2006/4103.
[114] See annex questionnaire Denmark, question 4.
[115] http://www.fisherinvestments.co.uk/pdf/Country-Supplement-For-Investors-in-Denmark.pdf

are two main entities: “caisses de retraite” and “ institutions de retraite professionelle” who provide retirement income.
In terms of the French Corporate Income tax, pension funds are not subject to corporation tax on non-profit making activities. Article 206(5) of the French General Tax Code (GTC) provides:

> *“ … Subject to the exemptions provided for in Articles 1382 and 1394, government, institutions other than scientific, education and support, as well as associations and communities not subject to corporation tax under another available, except on the one hand, foundations of public benefit and, on the other hand, endowments whose laws do not provide for the possibility to consume their capital allocation, are subject to such tax because of the economic income that is not related to their lucrative activities.… ”* [116]

As mentioned above, non-profit organisations are exempt from corporate income tax but are subject to tax on their passive income. The special tax rates are the following:

- 24% on rental, forestry or agricultural income; and
- 15% on dividends, regardless of their source, with effect from 31 December 2009; and
- 10% on specified investment income (e.g. interest on bonds issued as of 1987, debt securities, special purpose vehicles for securization).[117]

According to the reply to the questionnaire, there is no taxation on capital gain income. Domestic and foreign entities are subject to a 3% annual tax, which is based on the market value of the property. This is mentioned in article 990D of the French GTC:

> *“…Legal entities, corporations, organizations, trusts or similar institutions which, directly or through an intermediary entity, have one or more properties situated in France or are holders of real rights over such property shall pay an annual fee equal to 3% the market value of these properties or rights. For*

[116] Article 206-5 General Tax Code.
[117] E. Robert, *France - Corporate Taxation* sec. 1.10.1.3. Country Analyses IBFD.

the purposes of this Article, shall be deemed to own property or property rights in France interposed entity by any legal entity which owns, regardless of the form and amount in a corporation, organization, trust or comparable institution, other than a legal entity referred to in 1, a and b and 2 a, b and c 3 of Article 990 E, which owns the property or rights or holder of an interest in a third corporation, organization, trust or comparable institution itself owner of the property or rights or interposed in the chain of holdings. This provision applies regardless of the number of legal entities interposed…" [118]

Due to the social activity, foreign and domestic pension funds are exempt from the annual tax, which is stated, in the article 990E:

" …Or instituted to manage pension, their groups, as well as those recognized of public utility or whose management is disinterested, and the activity or funding justifies the ownership of real property or rights." [119]

Thus, pension funds that pursue a social activity are exempt from the annual tax.[120]

Pension funds pursue a social activity and therefore rental income is exempt from taxation. There is no specific legislation on the tax treatment of foreign pension funds. To get similar treatment, foreign pension funds should qualify as a non-profit organisation. After the qualification, foreign pension providers can benefit from the tax rules of a non-profit organization. Therefore the conclusion is that the law does not distinguish between resident and non-resident occupational pension providers.

[118] Article 990 D General Tax Code.
[119] Article 990 E no 6 General Tax Code.
[120] *" … pension funds and other non-profit organizations which pursue a philanthropic, social, cultural or educational activity and prove that these activities justify the ownership of the immovable property (it has often been held that Liechtenstein Anstalts do not qualify)…"*, E. Robert, *France - Corporate Taxation* sec. 5.3., Country Analyses IBFD.

6.3.5. Germany

In Germany there is a distinction between taxable and non-taxable pension schemes. The next table shows the nature of various domestic pension funds in Germany:

	Pensionskasse	Pensionfonds	Unterstutzungskasse
Definition	○ Separate legal entity, held by one or more employers with the purpose to grant old-age payments or other insurance to the employees ○ Grants legal title of the employees against the *Pensionkasse*	○ Separate legal entity, held by one or more employers with the purpose to grant old-age payments or other insurance to the employees ○ Grants legal title to the employees against the *Pensionfonds*	○ Separate legal entity, held by one or more employers with the purpose to grant old-age payments or other insurance to the employees ○ Formally without legal title for the employees against the *Unterstutzungskasse* but only against the employer
Legal Form	○ Stock Corporation ○ Mutual benefit society (*Versicherungsverein auf Gegenseitigkeit)*	○ Stock Corporation ○ Mutual pensions fund *(Pensionfondsverein auf Gegenseitigkeit)*	○ Separate legal entity (e.g. *GmbH, AG)*
Subject to insurance supervision	YES	YES	NO
Tax exemption	Entity is tax exempt	No tax exemption	Entity is tax exempt if

	if maximum insurance proceeds for employee are obeyed		maximum proceeds for employee are obeyed
Tax Rate	▪ not subject tot tax when fulfilling the requirements in the German legislation	▪ German Corporate Income Tax (CIT) at a rate of 15% plus 5.5% (15.83%)[121] solidarity Surcharge.	▪ not subject tot tax when fulfilling the requirements in the German legislation
Expense deduction for employers' contributions to entity	Yes, ▪ if fixed in articles of association ▪ if required by Insurance Control ▪ to cover losses Contributions are limited to maximum amounts if tax exemption of entity is wanted	Yes, ▪ if agreed payment obligation of employer ▪ to cover losses Payments to Pension Coverage Trust are deductible	Yes, ▪ Contributions are limited to maximum amounts if tax exemption of entity is wanted.

[121] "… *The corporate income tax rate is 15%, increased to 15.83% by the 5.5% solidarity surcharge (section 23 of the KStG)…"* A. Perdelwitz, *Germany - Corporate Taxation* sec. 7.3.3.1., Country Analyses IBFD.

Following § 2 of the German Corporate Income Tax (CIT):

“Are limited subject to corporation tax

1. *Corporations, associations and funds that have neither their management nor their registered office in Germany, with their domestic income; “*

If the real estate is not held in a German business, the rental income and capital gains is subject to a tax rate of 15%. This is mentioned in the §49 of the German CIT:

“

1) *Domestic income for the purposes of the limited tax liability (§ 1, paragraph 4)*

   …

2) *Business income (§15 to 17)*
   a. *for which a permanent establishment is maintained in Germany or a permanent representative has been appointed,*

   …

   f. the extent that they do not belong to the agreements referred to in letter a, by

   aa. Rental and lease or

   bb. Disposal are from domestic immovable property of Sachinbegriffen or rights that prove domestically or entered into a domestic public book or register, or their utilization in a permanent establishment or other device takes place, can be achieved. 2 as business income and the income from activities apply defined in this letter, which are achieved by a body corporate within the meaning of § 2 paragraph 1 of the Corporation Tax Act, which is similar to a corporation or other legal person within the meaning of § 1, paragraph 1, point 1 to 3 of the Corporation Tax Act…“ [122]

[122] § 49 of the German CIT.

In short, the subjective exemption is only applicable for non-resident pension providers if their seat and place of management is in Germany. If not, non-resident pension providers are subject to non-resident taxation at a tax rate of 15.83% conform article 23 of the German Corporate Tax Act and article 4 of the Solidaritätszuschlaggesetz 1995.[123] Germany compels non-residents to have their legal seat and place of management on its territory before granting the exemption. Section 5 of the German CIT provides tax exemptions for certain entities. However,

> *" ... The tax exemptions do not apply to foreign organizations. According to the Federal Tax Court, this does not violate the non-discrimination clauses in tax treaties or the principles of the European Union... "* [124]

There seems to be a breach of the TFEU while foreign pension funds are forced to have their legal seat and place of management on German territory. This means that foreign pension funds are not exempt from taxation.

6.3.6. Hungary

The taxation of Hungarian pension providers depends on the type of fund. The table below gives an enumeration:

	Voluntary Mutual Pension Funds (VMPF)	Private Pension Funds (PPF)	Mixed activity fund (VMPF and PPF)
Subject to tax	Yes, ▪ Taxable on business activity ▪ Subject to local business tax	No, ▪ Not allowed to carry out any business activities	Yes, ▪ Only in relation to activities that are not linked with primary

[123] BDO, *Doing Business in Germany*, December 2013, page 53. http://bdo.ee/static/DBI-Germany-2013.pdf.
[124] A. Perdelwitz, Germany - Corporate Taxation sec. 11.5., Country Analyses IBFD.

			purpose
Real estate income	Activities related to real estate are seen as part of investment activity and therefore not taxed	Not taxed	Depends on the activity

As mentioned above, the VMPF is subject to taxation on business activities that cannot be linked to the primary social purpose. The Hungarian Corporate Income Tax (CIT) mentions the VMPF in section 2(1) g:

> *" (2) The following resident persons shall be* deemed resident taxpayers:*
>
> ....
>
> *(g) foundation, public foundations, non-governmental organizations, public bodies, religious organizations (including any organizational units of such organizations vested with legal personality in the bylaws or charter document), housing cooperatives, and voluntary mutual insurance insurance of pension? funds.* "[125]

PPFs are not subject to tax since they are not listed in this section. However, VMPFs are only liable to tax on their business activities. Investments of pension reserves are not considered as business activities. Furthermore, local business tax is imposed if business activities are carried out. However, in accordance with section 3 (2) on Local Taxes, VMPFs are exempt from taxes if there are no business activities:

> *" (2) Of the taxpayers listed in Paragrapghs b) and c) of subsection (1), ... voluntary mutual insurance funds, private pension funds, ... shall be exempt from tax payment obligations for the tax year following the tax year during which they have incurred no tax liabilities as the result of business activities neither in Hungary nor elsewhere, ... Taxpayers shall furnish the tax authority*

[125] Section 2(1) g of Act LXXXI of 1996 on Corporate Tax and Dividend Tax.

with a written statement declaring whether or not the above criterion is met.”[126]

This means that the taxation of VMPFs is limited if no business activities are carried out. In 2013 the tax rate is 10% of the tax base up to HUF 500 million (1.657.275,44 Euro) and 19% for the amount surpassing that.[127] For example, section 50 (3) of the Act on Private Pensions and Private Pension funds states that:

> *“ (3) Revenues from the fund’s business activities shall not be regarded as income from business activities in respect of corporate income tax obligations and local business tax obligations.”* [128]

As described above, taxation of the funds is limited while investment activities do not fall under the taxable basis of the VMPF. This means that income derived from real estate can also be considered as investment activities. The result is that VMPs are not taxed on their real estate income just like PPFs.

After analyzing the taxation of foreign pension funds, it may be concluded that no legal provision explicitly mentions foreign pension funds as a particular type of taxpayer entity. According to section 2(4) of the Hungarian CIT foreign pension funds qualify as foreign nationals:

> “ (4) Foreign nationals shall be deemed taxpayers, as wel as non-resident entities whose head of office is located abroad:
> a) *if they carry out business operations at their branches in Hungary, provided that they are not considered resident taxpayers due to the location of their head office (hereinafter referred to as non-resident enterpreneurs)*
> *b)…*

[126] Section 3 (2) of Act C of 1990 on Local Taxes.
[127] Deloitte International Tax, Hungary Highlights 2013. http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-hungaryhighlights-2013.pdf.
[128] Section 50 (3) of the Act on Private Pensions and Private Pension funds.

c) if they obtain any income through the transfer or withdrawal of participating interest in a company with real estate holdings (hereinafter referred to as member of a company with real estate holdings). ” [129]

The term foreign person is described as follows in Section 4 (1) 27 of the Hungarian CIT:

> *“ 27. “ foreign person”* shall mean a legal person, business association lacking the legal status of a legal person, a partnership and any other organization established under foreign law; “ [130]

The tax liability of non-residents entitled as business association that carry out business activity trough a permanent establishment. For example, the Hungarian CIT describes the tax liability as follows:

> *“ a foreign person shall be regarded as having a permanent establishment in cases of utilization of any real estate property of natural resources in return for consideration, the transfer, sale and contribution in kind of any right in immovable or in natural resources (hereinafter referred to as utilization of real estate) in return for consideration.”* [131]

Foreign nationals are deemed taxpayers if:

> *"... they carry out business operations at their branches in Hungary, provided that they are not considered resident taxpayers due to the location of their head office (hereinafter referred to as non-resident entrepreneurs).”* [132]

Hence, foreign pension providers are seen as business associations under the Hungarian corporate income tax.[133] Foreign pension providers are therefore subject to corporate income tax on their total income. However, Hungarian private pension

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[129] Section 2 (4) a of Act LXXXI of 1996 on Corporate Tax and Dividend Tax.
[130] Section 4 (1) 27 of Act LXXXI of 1996 on Corporate Tax and Dividend Tax.
[131] Section 4 of Act LXXXI of 1996 on Corporate Tax and Dividend Tax.
[132] Section 2 (4) a of Act LXXXI of 1996 on Corporate Tax and Dividend Tax.
[133] Section 4 (1) 27 of Act LXXXI of 1996 on Corporate Tax and Dividend Tax:
“ foreign person” shall mean a legal person, business association lacking the legal status of a legal person, a partnership oand any other organization established under foreign law.

providers are completely exempt from corporate income tax and local business tax. The other variation, the VMPF is only subject to tax on their business activity. Any profits or gains realized on basis of pension services are exempt from taxation. Even though foreign pension funds provide pension services, they are subject to tax on their income of all their activities at a tax rate of 19%.[134] There is no specific regulation defining the taxation of foreign pension funds. The conclusion is that foreign pension providers are discriminated against vis-à-vis domestic providers.

6.3.7. Ireland

The Irish tax treatment of foreign pension funds is covered in the sections "overseas pension schemes". As per chapter 7 of the No. 5 Finance Act 2005, the principal act is amended in section 770 (1) regarding "overseas pension schemes":

> *" (II) … " overseas pension scheme" means a retirement benefits scheme, other than a state social security scheme, which is –*
>
> *a) operated or managed by an Institution for Occupational Retirement Provision as defined by Article 6(a) of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003, and*
>
> *b) established in a Member State of the European Communities, other than the State, which has given effect to that Directive in its national law,"* [135]

It is remarkable that the provision only applies to Member States of the European Communities. There is no reference to EEA countries. An IORP can also exist in the EEA. The EEA has implemented the IORP Directive. Furthermore, any scheme mentioned in section 774 of the Irish Finish Act 2005 qualifies as an "exempt approved scheme:

> *" …*
>
> *a) …*
>
> *b) any approved scheme which is an overseas pension scheme, or*

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[134] Section 19 (1) of of Act LXXXI of 1996 on Corporate Tax and Dividend Tax.

[135] http://www.irishstatutebook.ie/pdf/2005/en.act.2005.0005.pdf.

c) ...

and any scheme which is for the time being within paragraph (a), (b) or (c) is in this Chapter reffered to as an ' exempt approved scheme'." [136]

The same section mentions that income derived from investments by exempt approved pension schemes is exempt from taxation. Subsection 3 provides:

> *"3. Exemption from income tax shall, on a claim being made in that behalf, be allowed in respect of income derived from investments or deposits of a scheme if, or to such extent as the Revenue Commissioners are satisfied that, it is income from investments or deposits held for the purposes of the scheme. "* [137]

According to this provision, domestic and foreign pension providers benefit from the same tax treatment on real estate investments. It makes no difference whether the occupational pension provider is located in Ireland or elsewhere in the EU. However, there is no reference to EEA countries in the provisions above. This means that pension schemes from EEA countries are not qualified as exempt approved scheme. The legislation provides that only domestic and EU pension funds are exempt from taxation. Furthermore, for a period of 4 year, the government decided to introduce a temporary pension levy of 0.6% for domestic pension providers.[138] Thus domestic pension providers are less well treated due to the temporarily pension levy of 0.6%. On the 15th of October 2013 the Minister of Finance announced that a new pension levy at a rate of 0.15% would be introduced.[139] The conclusion is that there is no discrimination towards EU Member States however EEA Member States are excluded from the provisions that exempt pension funds from taxation.

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[136] Section 774, Taxes consolidated Act, 1997.

[137] Section 774 (3), Taxes consolidated Act, 1997.

[138] *"With effect from 2011 up to 2014, a temporary levy has been imposed at a rate of 0.6% on the market value of assets under management in pension schemes approved by the Revenue Commissioners under Irish tax legislation, except to the extent that such schemes are designed to provide retirement benefits outside Ireland,* J. Ward, *Ireland - Corporate Taxation* sec. 14.6, Country Analyses IBFD.

[139] http://www.irishlifecorporatebusiness.ie/budget-2014-pension-related-announcements.

6.3.8. Italy

Italian law does not recognize pension funds as taxpayers for Italian corporate income tax (CIT) and regional tax. Since the introduction of Legislative Decree no 124/1993, specific tax rules have been applicable for pension funds. After modification, article 17 of Legislative Decree no 252/2005 provides:

> *"1. Pension funds are subject to tax replacement of the income tax in the measured 11 percent, which is applied on the result net accrued in each tax period…"* [140]

Since the Legislative Decree no. 252/2005, pension funds of EU Member States have the possibility to operate in Italy. Article 15-ter of that Decree provides:

> *" 1. Pension funds established in the Member States European Union, which fall within the scope of Directive 2003/41/EC and which are authorized by the competent authority of the Member States of origin to the cross-border activity can gather signatures on a collective basis on the territory of the Republic… "*
> *…*
> *6. In the decree of the Ministry of Economy and Finance pursuant to Article 6, section 5 – bis, are also defined, the investment restrictions that the funds referred to in paragraph 1 must even respect to the currently active part of the core activities on the territory of the Republic…"* [141]

One of the restrictions is that, since April 28th 1993, pension funds are not allowed to own real estate directly.[142] The provisions of article 6 of Legislative Decree 124/1993 allow only indirect investments in real estate. Due to this, pension funds derive no income from immovable properties. However, a substitute tax of 0,50% is levied on pension funds that own real estate directly and were incorporated before April 28th

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[140] Article 17 of Legislative Decree no 252/2005.
C. Galli, Italy - Corporate Taxation sec. 12.2. , Country Analyses IBFD.
[141] Article 15-ter of Legislative Decree no. 252/2005.
[142] Questionnaire Italy.

1993. In the case of foreign pension funds, article 15-ter of Legislative Decree no. 28/2007, allows foreign pension funds to operate on Italian territory.[143]

As indicated, pension funds are not allowed to invest directly in real estate. Resident and non-resident pension providers are not subject to corporate income tax and regional tax. Instead of corporate income tax, a substitute tax of 11% is levied. Therefore the conclusion is that domestic and foreign pension providers are treated alike and that there is no sign of discriminatory treatment in the Italian legislation. Pension funds in Italy do not produce any immovable property income.

6.3.9. Poland

Under Polish law, there are three types of domestic pension funds. The open pension funds, the employees pension funds and the voluntary pension funds. All these types are exempt from the Polish Corporate Income Tax (CIT).[144] Under article 6, section 1, point 11 of the Polish CIT:

> *" … The following shall be tax exempt: (…) pension funds established under the regulations on the organizations and functioning of pension funds."* [145]

Since 2011, foreign pension providers are subject to the general exemption from the Polish CIT. However, the exemption to foreign pension funds is only applicable under specific conditions. On the basis of article 6, section 1, sub 11a of the Polish CIT these conditions are:

"

> a) *They are subject to a tax, in the state where their registered office is located, on the entirety of their income regardless of where it is earned;*
> b) *They conduct activity on the basis of a license granted by relevant authorities of the state where their registered office is located;*

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[143] Questionnnaire Italy.
[144] M. van Doorn-Olejnicka, *Poland - Corporate Taxation* sec. 11.5, Country Analyses IBFD.
[145] Article 6, section 1, point 11 Polish CIT.

c) *Their operation is supervised by relevant authorities of the state where their registered office is located;*
d) *They have a depositary who maintains a register of assets of these taxpayers;*
e) *Their operation consists of solely of accumulating and investing funds, designated to be paid out to participants of a pension scheme after they have reached pension age;"*

In other words, the exemption of the Polish CIT applies only if foreign pension funds meet the specific conditions while domestic Polish pension funds are generally exempt. The exemption is of general nature which includes all income earned by Polish pension funds. This includes received dividends, interest, capital gains and rental income. Income earned in Poland by a foreign pension fund, which does not qualify for the aforementioned exemption, is subject to corporate taxation. For example, what if a pension provider is allowed to make profit from sources that are not related to its main activities. Then their operation does not consist solely of accumulating investments to be paid oud to participants of a pension scheme. Pursuant to the criterita mentioned in article 6, section 1, point 11a of the Polish CIT, only the income related to accumulating savings for the purposes of providing pensions is exempt from taxation. Other related "pension" activities are subject to taxation. This indicates that a detailed case-by-case assessment is necessary in order to be subject to a tax exemption.

From this it may be concluded that the Polish legislation discriminates against foreign pension funds. The exemption from corporate income tax is only granted if foreign pension funds meet the conditions. The first condition is that foreign pension funds should be subject to tax in the country of residence, regardless of where the income is derived. Further, the financial markets and authorities must monitor the activities of the pension funds. . Furthermore, there should be a depositary that registers the assets. And at last, the sole object of the pension funds should consist solely of accumulating investments for future annuities. The legislation compels each foreign pension fund to be assessed in detail before granting exemption on all income while domestic pension funds are exempt in general. This can also raise interpretation doubts.

6.3.10. Portugal

On the basis of the reply to the questionnaire, authorised funds and insurance companies can operate as pension providers. Following the Court's judgement of *Commission v. Portugal*, C-493/09, Portugal amended its legislation. However, there are some remarkable facts such as:

- Domestic pension funds are not subject to tax. The funds are exempt from tax on any income (including rental income and real estate capital gains) and property transfer tax.[146]
- After the change in law further to the infringement case, foreign pension funds operating under Portuguese law are exempt from Portuguese corporate income tax (CIT) if a number of cumulative requirements are followed. These requirements are mentioned in article 16 of the Estatuto dos Beneficios Fiscais (EBF):

" …7

(a) [pension funds] guarantee only the payment of the retirement benefits for old age disability, death, pre-retirement or early retirement, health benefits and post-employement, and, as complementing and accessory of such benefits, attribution of subsidies related to death;

(b) [pension funds] are managed by institutions of occupational pension provision covered by the Directive no. 2003/41/EC of the European Parliamen and the Council of 3 June;

(c) The pension funds is the beneficial owner of income;

(d) In the case of dividend distributions, the corresponding shares have been held for an uninterrupted period of one year;

8 – Without prejudice to Article 98 of the Code on Corporate Income Tax, in order to apply the preceding paragraph immediately, proof must be submitted to the entity which is required to withhold tax, prior to date of the payment of income, regarding the fact that the requirements stated in paragrapghs a), b) and c) are met, by means of declaration confirmed and

[146] A.V. Vieira, Portugal - Individual Taxation sec. 13., Country Analyses IBFD.

authenticated by the respective supervision authority of the Member State of the European Union or European Economic Area. " [147]

It is remarkable that the Portuguese government requires foreign pension funds to keep shares, in case of dividend distributions, for an uninterrupted period of one year. This is a potential discrimination while no such requirement exists for national pension funds.

- Additionally, there is no equivalent exemption for property transfer tax. It seems, due to the wide wording of the legislation, that foreign pension providers are not exempt from municipal property transfer tax. According to the wording of article 16 EBF:

  "1 – Pension funds and equivalent entities, which are constituted and operate in accordance with national legislation, are exempt from corporate income tax.
  2 – Pension funds and equivalent entities, which are constituted and operate in accordance with national legislation, are exempt from municipal property transfer tax on the transfers of real estate." [148]

On the basis of the amended legislation, domestic and foreign pension providers seem to be treated differently. Foreign pension providers are obliged to follow cumulative requirements whereas domestic pension funds are not subject to tax without any requirements. Furthermore, it is not clear whether foreign pension funds are exempt from property transfer tax, whereas domestic providers are. It seems that the Portuguese legislation discriminates foreign funds vis-à-vis domestic funds by subjecting foreign pension funds to the property transfer tax, while domestic funds are exempt.

6.3.11. Slovak Republic

In Slovak Republic income tax of individuals and income tax of legal entities have a similar tax rate. The taxation of income from rental of the real estate and from the

[147] Article 16 of Estatuto dos Beneficios Fiscais (Tax Benefits Statute).
[148] Article 16 of Estatuto dos Beneficios Fiscais (Tax Benefits Statute).

capital gains from the sale of the real estate depends whether the investment is made by an agent or on own behalf. In Slovakia, pension funds take the form of a special purpose entity with legal personality or a legally separated fund without legal personality. Management companies manage pension funds without legal personality.[149] So the tax treatment depends on the form of the pension fund.[150] The following scenarios are possible:

1. The real estate is owned directly by the pension provider;
2. The real estate is owned through the investment is made by the pension provider;

In the first scenario, rental income is taxed at a rate of 19%.[151] The questionnaire defines that necessary expenses such as depreciation costs, interest, finance charges, real estate taxes and rental expenses are deductible from the taxable basis. Capital gains are considered as business or professional income and taxed at a rate of 19%. Occasional sale of real estate, which is not used in business, is considered as other income and taxed at a rate of 19%. Section 16 of the Slovakian Income Tax Act (ITA) prescribes:

> *“ …*
> *c) payments obtained from taxable parties with unlimited tax liability and from permanent establishments of taxable parties with unlimited tax liability, consisting of:*
> *…*
> *4. tenancy income or other income paid in respect of a different use of real estate or movable assets located in the territory of the Slovak Republic,*
> *5. income from the sale of real estate located in the territory of the Slovak Republic…”* [152]

[149] http://www.oecd.org/pensions/private-pensions/42575061.pdf.
[150] Income Tax Act (No. 595/2003) regulates tax aspects of the Slovak pension system.
[151] Section 15 Income Tax Act (No. 595/2003).
[152] Section 16 Income Tax Act (No. 595/2003).

For the purpose of the Slovakian ITA, the term " taxable party with unlimited tax liability" means:

> *" ...*
> *2. any legal entity, which has its registered office or its place of actual administration in the territory of the Slovak Republic; the place of actual administration shall be the place, in which management and business decisions are taken by statutory and supervisory bodies of the legal entity, even if the address of the place of actual administration is not registered in the Companies Register..."* [153]

In the second scenario, the pension fund only act as an agent. The pension fund itself has no legal personality; therefore only income itself belongs to the taxable base. The income derived from real estate is not subject to tax if the pension fund only acts as an agent for its members. This is described for example in section 16 of the Slovakian ITA:

> *" (1) The following income of taxable parties with limited tax liability shall be treated as income originating from sources in the territory of the Slovak Republic:*
> *a) from activities performed through a permanent establishment of the taxable party,*
> *b) from a dependent activity, which is performed in the territory of the Slovak Republic or aboard aircraft or ships operated by the taxable party with unlimited tax liability,*
> *c) from services, including commercial, technical or other consulting, management and mediation services, and similar services provided in the territory of the Slovak Republic, even if such services are not provided through a permanent establishment,*
> *d) income of artists, sportsmen, entertainers and their co-performers and from similar activities carried out in person or upgraded in the territory of the*

[153] Section 2 Income Tax Act (No. 595/2003).

Slovak Republic, regardless of whether the parties above earn their income directly or through a broker;…” [154]

In the section 2 of the Act, the term “ taxable party with limited tax liability” defines:

“ ... 3. any legal entity, which is not included in paragraph d) indent two above… “

There is no direct reference to real estate in the limited tax liability, which confirms that pension funds that invest indirect are not subject to tax.

Suprisingly, there is no similar exemption for foreign pension funds.

“ ... (1) As regards the tax under Sections 35, 43, and 44 above, the term ”taxpayer” (122) shall mean the individual resident abroad, or the legal entity having its registered office abroad, which has a permanent establishment in the territory of the Slovak Republic, or which employs employees in the territory of the Slovak Republic for more than 183 days, either continuously or spasmodically during any period of twelve consecutive months; the above shall not apply to the provision of services specified in Section 16 subsection 1c) above, and to foreign embassies and consulates established in the territory of the Slovak Republic…” [155]

It does not matter whether the pension funds owns the real estate directly or acts as an agent, the income is taxed at a rate of 19%. Therefore, income from rental or sale is taxed and the non-resident pension fund is obliged to file income tax return. The exemption only applies in case the pension fund is established in Slovak Republic in accordance with Slovak legislation.

It shows that there is no difference in tax rate between foreign and domestic pension funds. However, there is a difference in treatment between foreign and domestic pension providers if the real estate is owned by the pension funds as an agent.

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[154] Section 16 Income Tax Act (No. 595/2003).
[155] Section 48 Income Tax Act (No. 595/2003).

Domestic pension funds that invest indirect in real estate are not subject to tax under the Slovak ITA. The same treatment could be expected for foreign pension providers but the provision of the Slovak ITA is only applicable if the pension provider is established in Slovakia. The Slovak Republic discriminates foreign pension funds since the provisions are only applicable if the fund is incorporated in accordance with Slovak legislation. The conclusion is that foreign pension funds are always subject to tax at a rate of 19%. It makes no difference wether the investment in real esatet is made directly or as an agent.

6.3.12. Spain

In Spain corporate income tax is levied on all legal entities including pension funds. This is mentioned in article 7 of the Spanish Corporate Income Tax (CIT):

> *" 1. Will be liable to tax when they are resident in Spanish territory:*
>
> > *...*
> >
> > *e) Pension funds regulated in the revised text of the Law Regulating Plans and Pension Funds, approved by Royal Legislative Decree 1/2002 of 29 November; "* [156]

According to the Spanish legislation pension funds are subject to tax for a reduced rate of 0%.[157] For example, article 30 of the Pension Plans and Funds Act defines:

> *" ... Pension funds set up and registered as required by this Act, shall be subject to the Corporate Income Tax at zero tax rate, and therefore have right to a refund of the withholding tax supported by their income from capital..."*[158]

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[156] Article 7 Spanish Corporate Income Tax Law.
Á. de la Cueva González-Cotera & J. Rubio Hípola, Spain - Corporate Taxation sec. 1.1.4. Country Analyses IBFD.

[157] Á. de la Cueva González-Cotera & J. Rubio Hípola, Spain - Corporate Taxation sec. 1.10.1 Country Analyses IBFD.
Article 28.6 Spanish Corporate Income Tax Law.

[158] Article 30 Pension Plans and Funds Act, http://www.boe.es/buscar/doc.php?id=BOE-A-1987-13491.

According to the Spanish Corporate Income Tax Law, all the income obtained by a Spanish pension fund is subject to tax, which includes income derived from investments in real estate assets.

Non-resident pension providers without a permanent establishment are subject to income tax on non-residents according to the Spanish Income Tax on non-residents, also known as *" Impuesto sobre la Renta de No Residentes"*.[159] Non-resident companies are entities which are not incorporated under Spanish Law and do not have their legal seat in Spain. This is described in article 8 of the Spanish CIT:

> *"1. The entities if they fulfill the following requirements will be considered resident in Spanish territory:*
> *(a) had been incorporated under Spanish law.*
> *(b) They have their head office in Spanish territory.*
> *(c) They have their place of effective management in Spanish territory."*[160]

Moreover, article 9 of the same act sums the entities that are exempt from corporate income tax:

> *"*
> 1. *...*
> 2. *Be partially exempt from tax under the terms provided for in Title II of Law 49/2002 of 23 December on the taxation of non-profit entities and tax incentives for patronage, institutions and non-profit institutions profit to which that application of that title.*
> 3. *They will be partially exempt from tax under the terms provided in Chapter XV of Title VII of this Act:*
>   a. *The entities and non-profit institutions not covered above..."*[161]

[159] Á. de la Cueva González-Cotera & J. Rubio Hípola, *Spain - Corporate Taxation* sec. 7.3.1., Country Analyses IBFD.
[160] Article 8 Spanish Corporate Income Tax.
[161] Article 9 Spanish Corporate Income Tax.
Á. de la Cueva González-Cotera & J. Rubio Hípola, Spain - Corporate Taxation sec. 11.5., Country Analyses IBFD.

After the announcement of the Commission regarding infringement proceedings against Spain for discriminatory taxation of divend and interest payments, the Member State decided to change its legislation. A new subsection was introduced in the Spanish non-resident income tax law, which defines the exempt income the following;

> *" k) Dividends and shares in profits through a permanent establishment by pension funds equivalent to those covered in the consolidated text of the Act and Pension Plans approved by Royal Legislative Decree 1/2002, of 29 November, which they are resident in another member of the European Union or by permanent establishments of such institutions located in another Member State of the European Union.*
>
> *Those pension funds equivalent social welfare institutions that meet the following criteria are considered:*
>
> *With the sole object to provide a supplementary benefit upon retirement, death, disability or dependence in the same terms provided for in Article 8.6 of the Consolidated Law and regulation of pension plans.*
>
> *That corporate contributions that may be made are tax charged to a participant who is providing links, transmitting irrevocably the right to receive future benefits.*
>
> *Which have a preferential tax regime for tax deferral in respect of both contributions and company contributions made to them. This regime should be characterized by the effective taxation of all contributions and contributions as well as the profitability in its management at the time of the receipt of benefits.*
>
> *The provisions of this section shall also apply to the equivalent pension funds resident in the participating States of the European Economic Area provided that they have signed an agreement with Spain to avoid double taxation with*

information exchange clause or an exchange agreement information in tax matters. " [162]

As mentioned above, sub-section k only provides a tax exemption for dividends paid by Spanish entities to non-resident pension funds. For these purposes, there is no reference to real estate income. Meaning that non-resident pension funds investing in Spanish real estate are taxed at a general rate of 24.75%.[163]The conclusion is that Spanish legislation distinguishes between domestic and foreign pension funds investing in real estate. The tax exemption is applicable to the income derived from dividends and shares obtained by qualifying non-residents operating in Spain. Rental income and capital gains from Spanish-situs properties is taxed at a rate of 24.75%.[164]

6.3.13. Sweden

In Sweden, life insurance companies and insurance associations are considered as occupational pension providers. The Swedish Income Tax Act (ITA) defines that life insurance companies and life insurance associations are treated similarly.[165] Other occupational pension providers on the Swedish market are pension trusts. Pension trusts are exempt from taxation in Sweden.[166] According to the Swedish ITA:

> *" … The following objects are not liable to tax… pension trusts according to the Act (1967:531) of securing pension comittments…"* [167]

The result of the general exemption for domestic pension providers is that income from real estate is not taxed. The general exemption is even applicable for foreign pension providers as mentioned in chapter 39, paragraph 13b, of the Swedish ITA:

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[162] Article 14 Spanish non-resident income tax law.
Á. de la Cueva González-Cotera & J. Rubio Hípola, *Spain - Corporate Taxation* sec. 7.3.4.1., Country Analyses IBFD.

[163] Á. de la Cueva González-Cotera & J. Rubio Hípola, *Spain - Individual Taxation* sec. 7.3.1.6., Country Analyses IBFD.

[164] From 1 January 2012 until 31 December 2014 inclusive, the tax rates of 19 percent to Articles 19.2 and 25.1.f) of this Act refer rise to 21 100. Also during the period covered by the preceding paragraph, the tax rate of 24 percent under Article 25.1.a) of this Act amounts to 24.75 percent. http://www.boe.es/buscar/act.php?id=BOE-A-2004-4527.

[165] Chapter 39, paragrapah 3,Swedish Income Tax Act.

[166] E. Nilsson, Sweden - Corporate Taxation sec. 11.5., Country Analyses IBFD

[167] Chapter 7, paragraph 2, point 3 Swedish Income Tax Act.

" Non-Swedish occupational pension providers shall not reveal income related to assets and debts managed on bhelaf of an employee according to agreement about occupational pension which is comparable to an individual pension agreement. Premium payers shall not be revealed. Expenses related to such income and premium payments shall not be deducted." [168]

According to the questionnaire, there is no difference in treatment between domestic and foreign pension funds. It does not matter where the pension fund is located as the general exemption is applicable in both situations.

6.3.14. United Kingdom

Approved resident pension funds are exempt from UK corporation tax. UK registered pension schemes are exempt from tax on all investment income and capital gains, whether real estate or not. Foreign pension funds are subject to tax at 20% on net property income and are not subject to capital gains tax on UK property. If the foreign pension scheme registers with HM Revenue & Customs (HMRC) in the UK, it will also be exempt from income tax on the net property income. If not, the net property income will be taxed at a rate of 20%.
In general, if a foreign pension provider chooses not to apply, then the net property income will be taxed at a rate of 20% whereas domestic pension providers are exempt from tax on all investments income and capital gains. However, there is no discrimination while foreign pension funds only have to file a form.

6.3.4. Conclusion

The results of the questionnaire show that 7 Member States treat foreign pension funds different compared to domestic pension funds. According to the questionnaire, the Member States that risk an infringement procedure are Belgium, Denmark, Germany, Hungary, Poland, Portugal and Spain. In Belgium, domestic pension funds

[168] Questionnaire Sweden.
http://www.notisum.se/rnp/sls/lag/19991229.htm#K39P13_c.

are subject to a specific tax regime whereas foreign pension funds are only exempt from taxation if they meet the requirements and have its registered seat in Belgium. According to Danish legislation, domestic pension funds are subject to pension saving yield tax of 15.3% while income of foreign pension funds is taxed at a rate of 25%. Even the German Member State forces foreign pension funds to have their legal seat and place of management on Germany territory before granting a tax exemption.
In Hungray, foreign pension funds are taxed at a rate of 19%. The national legislation qualifies foreign pension funds as business associations and levies taxes on their total income. Domestic pension funds are fully exempt from taxation.
After the Courts judgement in 2011, Portugal amended its legislation. However, there seems to be a breach pending. Portuguese legislation exempts domestic pension funds investing in real estate from property transfer tax. Due to the wide wording, it seems as if property transfer tax is levied from foreign pension funds investing in real estate.
In Spain, domestic pension funds are subject to tax at a tax rate of 0%. The regulations provide that income obtained by a domestic pension funds is subject to the special tariff. Non-resident pension funds are only exempt from taxation on dividend income. There is no reference to real estate income, which means that foreign pension funds are taxed at a general rate of 24.75%.

Chapter 7: *Failure to comply with EU law*

As mentioned in the previous chapter, there are 7 Member States that are failing to comply EU law. When a Member State fails, the Commission takes action to induce Member States to comply with EU law. This chapter introduces the procedures and sanctions that are risked by the concerning Member States whose legislation is in breach with the TFEU.

7.1. Role of Commission

Member States are responsible for the implementation of EU law.[169] In order to ensure that the interpretation is inforced correctly, the Commission is tasked to guarden the interpretation and implementation of EU law. The supervisory role of the Commission is mentioned in article 258 TFEU:

> *"If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*
>
> *If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."*[170]

If the Commission considers that a Member State fails to fulfull an obligation an infringement procedure can be initiated.

7.2. Steps in the infringement procedure

After consideration the Commission starts with the pre litigation administrative phase.[171] This stage means that the Commission request for information, through a Letter of Formal Notice, to the Member State concerned. In this letter the Commission requests the concerning Member State to submit its observations and defend its position.[172] Each Member State is responsible for the given time limit. After this, the Commission addresses a " reasoned opinion" argumenting the infringement caused by the Member State concerned. The Commission must define a detailed statement of the reasons why the Member State has failed to fulfill its obligations. After this, the possibilities to negotiate ends. The Commission refers the case to the CJEU it believes that the Member State fails to comply. The referral to Court is also known as the litigation procedure.[173] After the referral, the

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[169] http://ec.europa.eu/eu_law/infringements/infringements_en.htm.
[170] Article 258 TFEU.
[171] http://ec.europa.eu/eu_law/infringements/infringements_en.htm.
[172] http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm#2traitement.
[173] http://ec.europa.eu/eu_law/infringements/infringements_en.htm.

7.3. Article 260 TFEU

The Commission can bring an action under the provisions of Article 260 TFEU if a Member State fails to comply with the judgement of the CJEU. If the Commission decides to refer to the Court for a second time, a penalty must be included in the referral. This is mentioned in the third paragraph of article 260 TFEU:

> *" When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances."* [174]

There are two elements in the financial penaltys, as mentioned in the Press Releases:

> "
> - *A lump sum depending on the time elapsed since the oringal Court ruling;*
> - *And a daily penalty payment for each day after a second Court ruling until the infringment ends."* [175]

It is even possible that the CJEU imposes both, a lump sum and a penalty. This is considered in *Commission v. France*.[176]For example, in paragraph 84, it is mentioned that:

> *"…It follows that, where the Court imposes a penalty payment and a lump sum simultaneously, the duration of the breach is taken into consideration as one of a number of criteria, in order to determine the appropriate level of coercion and deterrence…"* [177]

As mentioned above, it is possible to impose a penalty payment and a lump sum.

7.4. Suggestions

Any person or organisation is allowed to send a complaint to the Commission. However, the Commission has the power to launch infringement procedures on its own. The recommendation for the 7 Member States, who treat investments in real estate of foreign pension funds differently then domestic pension funds, to change their legislation immediately. Foreign pension funds are objectively comparable and should get the same tax treatment of domestic pension funds. In order to prevent financial penaltys, Belgium, Denmark, Germany, Hungary, Poland, Portugal and Spain should amend their legislation and offer foreign pension funds investing in real estate similar treatment as domestic pension funds. The Member States concerning can challenge EU legislation but it is impossible to ignore it. The annex includes

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[174] Article 260 (3) TFEU.
[175] http://europa.eu/rapid/press-release_MEMO-12-12_en.htm.
[176] Case C-304/02, *Commission v. France* [2005] ECR I-6263.
[177] Case C-304/02, *Commission v. France* [2005] ECR I-6263, paragraph 84.

concept-complaints which will be send to the Commission to open an infringement procedure against the concerning Member States.

Chapter 8: *Conclusion*

The Commission is taking all the necessary measures to prevent discrimation against pension funds. Under the TFEU there are no justifications for Member States who dissuade foreign pension funds from cross border investments in real estate. If a Member State applies an EET or an ETT system in domestic situations, the pension taxation system should be extended to pension funds located in another Member State. The structure of the legal analysis is according to the decision tree of the CJEU. Chapters 2 dealt with the question wether pension funds have access to the TFEU.
In the cross-border tax treatment of pension funds there can be a breach of the freedom of establishment and the free movement of capital. The freedom of capital prohibits all restrictions on cross-border capital movements. Even though there is no definition of capital movement; the CJEU uses the Council Directive of the implementation of Article 67 to define the concept capital of movement. Real estate income falls under the scope of article 63 TFEU, pension funds have the right to invest in real estate without any restrictions. Furthermore, a pension provider is a company conform Article 54 TFEU. The fund bear financial risks and competes with insurance companies. Therefore pension providers fall under the scope of the freedom of establishment. Even though pension providers work on the basis of non-profit, they carry out economic activities by investing in assets.
Chapter 3 considered the objective comparibilty of resident and non-resident pension funds. Member States have the right to distinguish between taxpayers that are not in the same situation. The series of Court judgment regarding interest and dividend income show that domestic and foreign pension funds are objectively comparable. Domestic and foreign pension funds pursue the same activities and should be given similar treatment. It should not matter where the pension fund has its seat, or according to which law it has been incorporated.
Chapter 4 outlines if higher taxation on real estate investments of foreign pension funds leads to a restriction on the free movement of capital. The CJEU decided in recent cases that difference in treatment discourages non-residents from investments in a Member State. Higher taxation places non-residents at an disadvantageous position. Even though most cases concern the treatment of dividend income and

interest income of foreign pension funds, the same reasoning should apply for real estate income. Chapter 5 points out whether higher taxation can be justified by Member States. Normally, direct discrimination is only justified if the provisions of the TFEU permit. The higher taxation of foreign pension funds does not lead to protection of life of humans, national treasure or industrial or commercial property, nor does it secure public morality or policy. Therefore the focus is on non-written justification grounds. The need to preserve the coherence of the tax system is an argument that is used most often by Member States to justify a disputed measure. Unfortunately for the Member States, this argument is rejected by the CJEU in cases concerning discriminatory treatment of pension funds regarding dividend income and interest income. Most likely this argument will also be rejected in cases concerning real estate income. In chapter 6 a thorough analysis has been given about the questionnaire, which was filled in for 14 Member States. The conclusion is that 7 Member States treat foreign pension funds differently. The following Member States are risking an infringement procedure: Belgium, Denmark, Germany, Hungary, Poland, Portugal and Spain. Chapter 7 briefly analysed the infringement procedure of Article 258 TFEU. There is no justification for the differentiation between domestic and foreign pension funds. The Annex contains seven complaints which will be sent to the Commission.

Appendix

Belgium

COMPLAINT

TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

CONCERNING FAILURE TO COMPLY WITH COMMUNITY LAW

1. Surname and forename of complainant:

Passy, Vandana

2. Where appropriate, represented by:

3. Nationality:

Dutch

4. Address or Registered Office:

Zaagmolen 6

5057 BE Berkel-Enschot

5. Telephone/fax/e-mail address:

+31639758168

v_passy@hotmail.com

6. Field and place(s) of activity:

International tax law

HLB van Daal & Partners Tilburg

7. Member State or public body alleged by the complainant not to have complied with Community law:
Belgium

8. Fullest possible account of facts giving rise to complaint:

Belgium exempts real estate income, rental income and capital gains of their domestic pension funds. Foreign pension funds with similar income from real estate are not exempt from the Belgium corporate income tax.

Occupational pension providers can be established in Belgium under a special form of company called OFP (organisation for the financing of pensions). Although OFPs are subject to corporate income tax, the taxable basis consists only on non-deductible costs, abnormal benefits or secret commissions. Income from real estate is not included in the taxable basis and therefore exempt from taxation.

Artikel 185bis, WIB 92 (aj. 2013)
§ 1. In afwijking van artikel 185 zijn de beleggingsvennootschappen bedoeld in de artikelen 14, 19, 24, 99, 102, 106 en 119 van de wet van 20 juli 2004 betreffende bepaalde vormen van collectief beheer van beleggingsportefeuilles, alsmede de organismen voor de financiering van pensioenen bedoeld in artikel 8 van de wet van 27 oktober 2006 betreffende het toezicht op de instellingen voor bedrijfspensioenvoorziening, slechts belastbaar op het totaal van de ontvangen abnormale of goedgunstige voordelen en van de niet als beroepskosten aftrekbare uitgaven en kosten andere dan waardeverminderingen en minderwaarden op aandelen, onverminderd evenwel het feit dat zij de in artikel 219 bedoelde bijzondere bijdrage verschuldigd zijn.
§ 2. Wat de in § 1 bedoelde vennootschappen en organismen betreft, zijn de bepalingen van de artikelen 202 tot 205 en 285 tot 289 en van artikel 123 van het koninklijk besluit tot uitvoering van het Wetboek van de inkomstenbelastingen 1992, niet van toepassing.

The special tax regime is also applicable for foreign pension funds under the following conditions:

De wet van 27 oktober 2006 betreffende het toezicht op de instellingen voor bedrijfspensioenvoorzieningen bepaalt dat:
“ Het organisme voor de financiering van pensioenen geniet rechtspersoonlijkheid, onder de voorwaarden omschreven in dit hoofdstuk. Zijn zetel en zijn hoofdbestuur zijn in Belgie gevestigd…“

The special OFP regime is only accessable foreign pension funds if its registered seat is in Belgium. Non-resident pension funds that do not qualify as an OFP are treated as non-resident companies for the purpose of Belgian Corporate Income Tax. According to article 227 of the Belgian Corporate Income Tax

“…Buitenlandse vennootschappen… zijn de verenigingen, instellingen of lichamen zonder rechtspersoonlijkheid die zijn opgericht in een rechtsvorm die vergelijkbaar is met deze van een vennootschap naar Belgisch recht; hun maatschappelijk zetel, hun voornaamste inrichting of hun zetel van bestuur of

beheer niet in België hebben…"

In article 160, paragraph 2 of the Belgium Income Tax Code:

"§ 2. Er wordt eveneens volledig afgezien van de inning van de roerende voorheffing op dividenden en op inkomsten bedoeld in artikel 90, 11° van hetzelfde Wetboek … hetzij een vennootschap, vereniging, inrichting of instelling is die haar maatschappelijke zetel, haar voornaamste inrichting of haar zetel van bestuur of beheer in België heeft, hetzij een rechtspersoon naar Belgisch publiek recht is, wanneer de verkrijger wordt geïdentificeerd als een spaarder niet-inwoner bedoeld in artikel 227, 3°, van hetzelfde Wetboek waarvan het maatschappelijk doel uitsluitend bestaat uit het beheer en het beleggen van fondsen ingezameld met het doel wettelijke of aanvullende pensioenen uit te betalen, die zich uitsluitend zonder winstoogmerk toeleggen op verrichtingen bedoeld in artikel 182, 2°, van hetzelfde Wetboek, en die in het land waarvan hij inwoner is, vrijgesteld is van inkomstenbelastingen.."

This means that the special Belgian tax regime is not applicable for foreign pension funds if the registered seat is in another Member State. This leads to a difference in treatment of objectively comparable situations.

9. As far as possible, specify the provisions of Community law (treaties, regulations, directives, decisions, etc.) which the complainant considers to have been infringed by the Member State concerned:

There is a difference in treatment of domestic pension funds and foreign pension funds investing in real estate on Belgian territory. The comparable situations are treated differently which leads to a breach of the freedom of capital movement guarded in Article 63 TFEU. The difference in treatment makes Belgium unattractive for foreign pension funds to invest in real estate. The higher taxation in real estate income makes it difficult for companies to attract capital from foreign pension funds. The taxation has a dissuasive effect on foreign pension funds which leads to disturbance of the internal market. There is no objective difference between a foreign pension fund and a domestic pension fund. The higher taxation of foreign pension funds forms a restriction of the free movement of capital of art.63 TFEU.

10. Where appropriate, mention the involvement of a Community funding scheme (with references if possible) from which the Member State concerned benefits or stands to benefit, in relation to the facts giving rise to the complaint:

n/a

11. Details of any approaches already made to the Commission's services (if possible, attach copies of correspondence):
n/a

12. Details of any approaches already made to other Community bodies or authorities (e.g. European Parliament Committee on Petitions, European Ombudsman). If possible, give the reference assigned to the complainant's approach by the body concerned:
n/a

13. Approaches already made to national authorities, whether central, regional or local (if possible, attach copies of correspondence):

13.1 Administrative approaches (e.g. complaint to the relevant national administrative authorities, whether central, regional or local, and/or to a national or regional ombudsman):
n/a

13.2 Recourse to national courts or other procedures (e.g. arbitration or conciliation). (State whether there has already been a decision or award and attach a copy if appropriate):
n/a

14. Specify any documents or evidence which may be submitted in support of the complaint, including the national measures concerned (attach copies):

15. Confidentiality (tick one box):

"I request the Commission not to disclose my identity in its contacts with the authorities of the Member State against which the complaint is made."

16. Place, date and signature of complainant/representative:

Berkel-Enschot, 3 february 2014

(Explanatory note to appear on back of complaint form)

Each Member State is responsible for the implementation of Community law (adoption of implementing measures before a specified deadline, conformity and correct application) within its own legal system. Under the Treaties, the Commission of the European Communities is responsible for ensuring that Community law is correctly applied. Consequently, where a Member State fails to comply with Community law, the Commission has powers of its own (action for non-compliance) to try to bring the infringement to an end and, if necessary, may refer the case to the Court of Justice of the European Communities. The Commission takes whatever action it deems appropriate in response to either a complaint or indications of infringements which it detects itself.

Non-compliance means failure by a Member State to fulfil its obligations under Community law, whether by action or by omission. The term State is taken to mean the Member State which infringes Community law, irrespective of the authority - central, regional or local - to which the non-compliance is attributable.

Anyone may lodge a complaint with the Commission against a Member State about any measure (law, regulation or administrative action) or practice which they consider incompatible with a provision or a principle of Community law. Complainants do not have to demonstrate a formal interest in bringing proceedings. Neither do they have to prove that they are principally and directly concerned by the infringement complained of. To be admissible, a complaint has to relate to an infringement of Community law by a Member State. It should be borne in mind that the Commission's services may decide whether or not further action should be taken on a complaint in the light of the rules and priorities laid down by the Commission for opening and pursuing infringement procedures.

Anyone who considers a measure (law, regulation or administrative action) or administrative practice to be incompatible with Community law is invited, before or at the same time as lodging a complaint with the Commission, to seek redress from the national administrative or judicial authorities (including the national or regional ombudsman and/or arbitration and conciliation procedures available). The Commission advises the prior use of such national means of redress, whether administrative, judicial or other, before lodging a complaint with the Commission, because of the advantages they may offer for complainants.

By using the means of redress available at national level, complainants should, as a rule, be able to assert their rights more directly and more personally (e.g. a court order to an administrative body, repeal of a national decision and/or damages) than they would following an infringement procedure successfully brought by the Commission which may take some time. Indeed, before referring a case to the Court of Justice, the Commission is obliged to hold a series of contacts with the Member State concerned to try to terminate the infringement.

Furthermore, any finding of an infringement by the Court of Justice has no impact on the rights of the complainant, since it does not serve to resolve individual cases. It merely obliges the Member State to comply with Community law. More specifically, any individual claims for damages would have to be brought by complainants before the national courts.

The following administrative guarantees exist for the benefit of the complainant:

(a) Once it has been registered with the Commission's Secretariat-General, any complaint found admissible will be assigned an official reference number. An acknowledgment bearing the reference number, which should be quoted in any correspondence, will immediately be sent to the complainant. However, the assignment of an official reference number to a complaint does not necessarily mean that an infringement procedure will be opened against the Member State in question.

(b) Where the Commission's services make representations to the authorities of the Member State against which the complaint has been made, they will abide by the choice made by the complainant in Section 15 of this form.

(c) The Commission will endeavour to take a decision on the substance (either to open infringement proceedings or to close the case) within twelve months of registration of the complaint with its Secretariat-General.

(d) The complainant will be notified in advance by the relevant department if it plans to propose that the Commission close the case. The Commission's services will keep the complainant informed of the course of any infringement procedure.

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Denmark

COMPLAINT

TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

CONCERNING FAILURE TO COMPLY WITH COMMUNITY LAW

1. Surname and forename of complainant:

Passy, Vandana

2. Where appropriate, represented by:

3. Nationality:

Dutch

4. Address or Registered Office:

Zaagmolen 6

5057 BE Berkel-Enschot

5. Telephone/fax/e-mail address:

+31639758168

v_passy@hotmail.com

6. Field and place(s) of activity:
International tax law
HLB van Daal & Partners Tilburg

7. Member State or public body alleged by the complainant not to have complied with Community law:
Denmark

8. Fullest possible account of facts giving rise to complaint:
In Denmark domestic pension funds are taxed at a yield tax of 15% on investment from real estate income, rental income and capital gains of their domestic pension funds. Only listed pension entities are subject to the special tax regime. Foreign pension funds with similar income from real estate are taxed at a rate of 25%.

Section 21 of the Danish Corporation Tax Act clarifies that:
"The income tax for foreign companies and associations referred to in section 2(1) (a, b and f) shall be the percentage stated in section 17(1) on the taxable income…"

The taxation of foreign pension funds is mentioned as follows in section 17 of the Danish Corporation Tax Act:
" 17(1) Income tax for public limed companies and associations etc mentioned in section 1(1), no 1 to 2a, no 2d to 2i and 3a to 6, and section 3(7) shall be payable at a tax rate of 25 percent on the taxable income…"

This inclues real estate income, which is mentioned in section 2(1) of the Danish Corporation Tax act:
"h) receive capital gains from sources in Denmark…"

This implies that the special Danish tax regime is not applicable for foreign pension funds. The result is that objectively comparable situations are treated differently.

9. As far as possible, specify the provisions of Community law (treaties, regulations, directives, decisions, etc.), which the complainant considers to have been infringed by the Member State concerned:

There is a difference in treatment of domestic pension funds and foreign pension funds investing in real estate on Danish territory. The comparable situations are treated differently which leads to a breach of the freedom of capital movement guarded in Article 63 TFEU. The difference in treatment makes Denmark unattractive for foreign pension funds to invest in real estate. The higher taxation in real estate income makes it difficult for companies to attract capital from foreign pension funds. The taxation has a dissuasive effect on foreign pension funds, which leads to disturbance of the internal market. There is no objective difference between a foreign pension fund and a domestic pension fund. The higher taxation of foreign pension funds forms a restriction of the free movement of capital of art.63 TFEU.

10. Where appropriate, mention the involvement of a Community funding scheme (with references if possible) from which the Member State concerned benefits or stands to benefit, in relation to the facts giving rise to the complaint:
n/a

11. Details of any approaches already made to the Commission's services (if possible, attach copies of correspondence):
n/a

12. Details of any approaches already made to other Community bodies or authorities (e.g. European Parliament Committee on Petitions, European Ombudsman). If possible, give the reference assigned to the complainant's approach by the body concerned:
n/a

13. Approaches already made to national authorities, whether central, regional or local (if possible, attach copies of correspondence):

13.1 Administrative approaches (e.g. complaint to the relevant national administrative authorities, whether central, regional or local, and/or to a national or regional ombudsman):
n/a

13.2 Recourse to national courts or other procedures (e.g. arbitration or conciliation). (State whether there has already been a decision or award and attach a copy if appropriate):
n/a

14. Specify any documents or evidence which may be submitted in support of the complaint, including the national measures concerned (attach copies):

15. Confidentiality (tick one box):

"I request the Commission not to disclose my identity in its contacts with the authorities of the Member State against which the complaint is made."

16. Place, date and signature of complainant/representative:

Berkel-Enschot, 3 february 2014

(Explanatory note to appear on back of complaint form)

Each Member State is responsible for the implementation of Community law (adoption of implementing measures before a specified deadline, conformity and correct application) within its own legal system. Under the Treaties, the Commission of the European Communities is responsible for ensuring that Community law is correctly applied. Consequently, where a Member State fails to comply with Community law, the Commission has powers of its own (action for non-compliance) to try to bring the infringement to an end and, if necessary, may refer the case to the Court of Justice of the European Communities. The Commission takes whatever action it deems appropriate in response to either a complaint or indications of infringements which it detects itself.

Non-compliance means failure by a Member State to fulfil its obligations under Community law, whether by action or by omission. The term State is taken to mean the Member State which infringes Community law, irrespective of the authority - central, regional or local - to which the non-compliance is attributable.

Anyone may lodge a complaint with the Commission against a Member State about any measure (law, regulation or administrative action) or practice which they consider incompatible with a provision or a principle of Community law. Complainants do not have to demonstrate a formal interest in bringing proceedings. Neither do they have to prove that they are principally and directly concerned by the infringement complained of. To be admissible, a complaint has to relate to an infringement of Community law by a Member State. It should be borne in mind that the Commission's services may decide whether or not further action should be taken on a complaint in the light of the rules and priorities laid down by the Commission for opening and pursuing infringement procedures.

Anyone who considers a measure (law, regulation or administrative action) or administrative practice to be incompatible with Community law is invited, before or at the same time as lodging a complaint with the Commission, to seek redress from the national administrative or judicial authorities (including the national or regional ombudsman and/or arbitration and conciliation procedures available). The Commission advises the prior use of such national means of redress, whether administrative, judicial or other, before lodging a complaint with the Commission, because of the advantages they may offer for complainants.

By using the means of redress available at national level, complainants should, as a rule, be able to assert their rights more directly and more personally (e.g. a court order to an administrative body, repeal of a national decision and/or damages) than they would following an infringement procedure successfully brought by the Commission which may take some time. Indeed, before referring a case to the Court of Justice, the Commission is obliged to hold a series of contacts with the Member State concerned to try to terminate the infringement.

Furthermore, any finding of an infringement by the Court of Justice has no impact on the rights of the complainant, since it does not serve to resolve individual cases. It merely obliges the Member State to comply with Community law. More specifically, any individual claims for damages would have to be brought by complainants before the national courts.

The following administrative guarantees exist for the benefit of the complainant:

(a) Once it has been registered with the Commission's Secretariat-General, any complaint found admissible will be assigned an official reference number. An acknowledgment bearing the reference number, which should be quoted in any correspondence, will immediately be sent to the complainant. However, the assignment of an official reference number to a complaint does not necessarily mean that an infringement procedure will be opened against the Member State in question.

(b) Where the Commission's services make representations to the authorities of the Member State against which the complaint has been made, they will abide by the choice made by the complainant in Section 15 of this form.

(c) The Commission will endeavour to take a decision on the substance (either to open infringement proceedings or to close the case) within twelve months of registration of the complaint with its Secretariat-General.

(d) The complainant will be notified in advance by the relevant department if it plans to propose that the Commission close the case. The Commission's services will keep the complainant informed of the course of any infringement procedure.

***

Germany

COMPLAINT

TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

CONCERNING FAILURE TO COMPLY WITH COMMUNITY LAW

1. Surname and forename of complainant:

Passy, Vandana

2. Where appropriate, represented by:

3. Nationality:

Dutch

4. Address or Registered Office:

Zaagmolen 6

5057 BE Berkel-Enschot

5. Telephone/fax/e-mail address:

+31639758168

v_passy@hotmail.com

6. Field and place(s) of activity:

International tax law

HLB van Daal & Partners Tilburg

7. Member State or public body alleged by the complainant not to have complied with Community law:
Germany

8. Fullest possible account of facts giving rise to complaint:

German pension schemes can be divided into taxable and tax exempt. Pensionfonds, the so called taxable pension schemes, are subject to German Corporate Income Tax at a rate of 15% plus 5.5% Solidarity Surcharge. The tax base is defined according to the worldwide income principle, which includes income from real estate. Tax-exempt pension schemes, also known as Pensionskasse or Unterstutzungskasse, are only exempt from taxation if requirements are met conform Section 5 Para. 1 Sent. No. 3 KStG (Corporate Income Tax Code). The tax exemption only applies if the pension provider has its domicile or management within Germany and possesses legal capacity.

Sec. 5 Para 1. Sent. No. 3 KStG defines the following:

„§5 Befreiungen

(1) Von der Körperschaftsteuer sind befreit

…

(1) Von der Körperschaftsteuer sind befreit

3. rechtsfähige Pensions-, Sterbe- und Krankenkassen, die den Personen, denen die Leistungen der Kasse zugute kommen oder zugute kommen sollen (Leistungsempfängern), einen Rechtsanspruch gewähren, und rechtsfähige Unterstützungskassen, die den Leistungsempfängern keinen Rechtsanspruch gewähren,

a) wenn sich die Kasse beschränkt

aa) auf Zugehörige oder frühere Zugehörige einzelner oder mehrerer wirtschaftlicher Geschäftsbetriebe oder

bb) auf Zugehörige oder frühere Zugehörige der Spitzenverbände der freien Wohlfahrtspflege (Arbeiterwohlfahrt-Bundesverband e.V., Deutscher Caritasverband e.V., Deutscher Paritätischer Wohlfahrtsverband e.V., Deutsches Rotes Kreuz, Diakonisches Werk - Innere Mission und Hilfswerk der Evangelischen Kirche in Deutschland sowie Zentralwohlfahrtsstelle der Juden in Deutschland e.V.) einschließlich ihrer Untergliederungen, Einrichtungen und Anstalten und sonstiger gemeinnütziger Wohlfahrtsverbände oder

cc) auf Arbeitnehmer sonstiger Körperschaften, Personenvereinigungen und Vermögensmassen im Sinne der §§ 1 und 2; den Arbeitnehmern stehen Personen, die sich in einem arbeitnehmerähnlichen Verhältnis befinden, gleich;

zu den Zugehörigen oder Arbeitnehmern rechnen jeweils auch deren Angehörige;

b) wenn sichergestellt ist, dass der Betrieb der Kasse nach dem Geschäftsplan und nach Art und Höhe der Leistungen eine soziale Einrichtung darstellt. Diese Voraussetzung ist bei Unterstützungskassen, die Leistungen von Fall zu Fall gewähren, nur gegeben, wenn sich diese Leistungen mit Ausnahme des Sterbegeldes auf Fälle der Not oder Arbeitslosigkeit beschränken;

c) wenn vorbehaltlich des § 6 die ausschließliche und unmittelbare

Verwendung des Vermögens und der Einkünfte der Kasse nach der Satzung und der tatsächlichen Geschäftsführung für die Zwecke der Kasse dauernd gesichert ist;

d) wenn bei Pensions-, Sterbe- und Krankenkassen am Schluss des Wirtschaftsjahrs, zu dem der Wert der Deckungsrückstellung versicherungsmathematisch zu berechnen ist, das nach den handelsrechtlichen Grundsätzen ordnungsmäßiger Buchführung unter Berücksichtigung des Geschäftsplans sowie der allgemeinen Versicherungsbedingungen und der fachlichen Geschäftsunterlagen im Sinne des § 5 Abs. 3 Nr. 2 Halbsatz 2 des Versicherungsaufsichtsgesetzes auszuweisende Vermögen nicht höher ist als bei einem Versicherungsverein auf Gegenseitigkeit die Verlustrücklage und bei einer Kasse anderer Rechtsform der dieser Rücklage entsprechende Teil des Vermögens. Bei der Ermittlung des Vermögens ist eine Rückstellung für Beitragsrückerstattung nur insoweit abziehbar, als den Leistungsempfängern ein Anspruch auf die Überschussbeteiligung zusteht. Übersteigt das Vermögen der Kasse den bezeichneten Betrag, so ist die Kasse nach Maßgabe des § 6 Abs. 1 bis 4 steuerpflichtig; und

e) wenn bei Unterstützungskassen am Schluss des Wirtschaftsjahrs das Vermögen ohne Berücksichtigung künftiger Versorgungsleistungen nicht höher ist als das um 25 Prozent erhöhte zulässige Kassenvermögen. Für die Ermittlung des tatsächlichen und des zulässigen Kassenvermögens gilt § 4d des Einkommensteuergesetzes. Übersteigt das Vermögen der Kasse den in Satz 1 bezeichneten Betrag, so ist die Kasse nach Maßgabe des § 6 Abs. 5 steuerpflichtig;

4.kleinere Versicherungsvereine auf Gegenseitigkeit im Sinne des § 53 des Versicherungsaufsichtsgesetzes, wenn

a) ihre Beitragseinnahmen im Durchschnitt der letzten drei Wirtschaftsjahre einschließlich des im Veranlagungszeitraum endenden Wirtschaftsjahrs die durch Rechtsverordnung festzusetzenden Jahresbeträge nicht überstiegen haben oder

b) sich ihr Geschäftsbetrieb auf die Sterbegeldversicherung beschränkt und die Versicherungsvereine nach dem Geschäftsplan sowie nach Art und

Höhe der Leistungen soziale Einrichtungen darstellen;

The special tax regime is only applicable for foreign pension funds if under the following conditions:

„§2 KStG Beschränkt Steuerpflicht

Beschränkt körperschaftsteuerpflichtig sind
1. Körperschaften, Personenvereinigungen und Vermögensmassen, die weder ihre Geschäftsleitung noch ihren Sitz im Inland haben, mit ihren inländischen Einkünften…"

„§49 EStG Beschränkt Steuerpflichtige Einkünfte

(1) Inländische Einkünfte im Sinne der beschränkten Einkommensteuerpflicht (§ 1 Absatz 4) sind

…

2. Einkünfte aus Gewerbebetrieb (§§ 15 bis 17),

a) für den im Inland eine Betriebsstätte unterhalten wird oder ein ständiger Vertreter bestellt ist,

…

f)die, soweit sie nicht zu den Einkünften im Sinne des Buchstaben a gehören, durch

aa) Vermietung und Verpachtung oder

bb) Veräußerung von inländischem unbeweglichem Vermögen, von Sachinbegriffen oder Rechten, die im Inland belegen oder in ein inländisches öffentliches Buch oder Register eingetragen sind oder deren Verwertung in einer inländischen Betriebsstätte oder anderen Einrichtung erfolgt, erzielt werden. Als Einkünfte aus Gewerbebetrieb gelten auch die Einkünfte aus Tätigkeiten im Sinne dieses Buchstabens, die von einer Körperschaft im Sinne des § 2 Nummer 1 des Körperschaftsteuergesetzes erzielt werden, die mit einer Kapitalgesellschaft oder sonstigen juristischen Person im Sinne des § 1 Absatz 1 Nummer 1 bis 3 des Körperschaftsteuergesetzes vergleichbar ist;

The special tax regime is only accessable foreign pension funds if its registered seat and place of management is in Germany. Non-resident pension funds are subject to non-resident taxation. Non-resident companies are liable to corporate income tax on income from sources in Germany. The corporate income tax rate amounts to 15.83% (this includes 15% corporate income tax *increased with 15.83% solidarity surcharge). This is defined in section 23 of the KStG.*

This means that the special German tax regime is not applicable for foreign pension funds if the registered seat and place of management is in another Member State. The rates of taxation amounts to 15.83% while domestic pension funds are exempt from taxation. This leads to a difference in treatment of objectively comparable situations.

9. As far as possible, specify the provisions of Community law (treaties, regulations, directives, decisions, etc.) which the complainant considers to have been infringed by the Member State concerned:

There is a difference in treatment of domestic pension funds and foreign pension funds investing in real estate on German territory. The comparable situations are treated differently which leads to a breach of the freedom of capital movement guarded in Article 63 TFEU. The difference in treatment makes German unattractive for foreign pension funds to invest in real estate. The subjective exemption only applies to foreign pension funds if its legal seat and place of management is located in Germany. If neither the legal seat nor place of management is in Germany the rate of corporate tax is 15.83%. The German legislation dissuades foreign pension funds from investing in real estate income. Forcing corporate bodies to have its legal seat and place of management on German territory makes has a dissuasive effect on foreign pension funds. It becomes difficult for companies to attract capital from foreign pension funds, which leads to disturbance of the internal market. There is no objective difference between a foreign pension fund and a domestic pension fund. Compelling foreign pension funds to have its legal seat and place of management on German territory forms a restriction of the free movement of capital of art.63 TFEU.

10. Where appropriate, mention the involvement of a Community funding scheme (with references if possible) from which the Member State concerned benefits or stands to benefit, in relation to the facts giving rise to the complaint:
n/a

11. Details of any approaches already made to the Commission's services (if possible, attach copies of correspondence):
n/a

12. Details of any approaches already made to other Community bodies or authorities (e.g. European Parliament Committee on Petitions, European Ombudsman). If possible, give the reference assigned to the complainant's approach by the body concerned:

n/a

13. Approaches already made to national authorities, whether central, regional or local (if possible, attach copies of correspondence):

13.1 Administrative approaches (e.g. complaint to the relevant national administrative authorities, whether central, regional or local, and/or to a national or regional ombudsman):
n/a

13.2 Recourse to national courts or other procedures (e.g. arbitration or conciliation). (State whether there has already been a decision or award and attach a copy if appropriate):
n/a

14. Specify any documents or evidence which may be submitted in support of the complaint, including the national measures concerned (attach copies):

15. Confidentiality (tick one box):

"I request the Commission not to disclose my identity in its contacts with the authorities of the Member State against which the complaint is made."

16. Place, date and signature of complainant/representative:

Berkel-Enschot, 3 february 2014

(Explanatory note to appear on back of complaint form)

Each Member State is responsible for the implementation of Community law (adoption of implementing measures before a specified deadline, conformity and correct application) within its own legal system. Under the Treaties, the Commission of the European Communities is responsible for ensuring that Community law is correctly applied. Consequently, where a Member State fails to comply with Community law, the Commission has powers of its own (action for non-compliance) to try to bring the infringement to an end and, if necessary, may refer the case to the Court of Justice of the European Communities. The Commission takes whatever action it deems appropriate in response to either a complaint or indications of infringements which it detects itself.

Non-compliance means failure by a Member State to fulfil its obligations under Community law, whether by action or by omission. The term State is taken to mean the Member State which infringes Community law, irrespective of the authority -

central, regional or local - to which the non-compliance is attributable.

Anyone may lodge a complaint with the Commission against a Member State about any measure (law, regulation or administrative action) or practice which they consider incompatible with a provision or a principle of Community law. Complainants do not have to demonstrate a formal interest in bringing proceedings. Neither do they have to prove that they are principally and directly concerned by the infringement complained of. To be admissible, a complaint has to relate to an infringement of Community law by a Member State. It should be borne in mind that the Commission's services may decide whether or not further action should be taken on a complaint in the light of the rules and priorities laid down by the Commission for opening and pursuing infringement procedures.

Anyone who considers a measure (law, regulation or administrative action) or administrative practice to be incompatible with Community law is invited, before or at the same time as lodging a complaint with the Commission, to seek redress from the national administrative or judicial authorities (including the national or regional ombudsman and/or arbitration and conciliation procedures available). The Commission advises the prior use of such national means of redress, whether administrative, judicial or other, before lodging a complaint with the Commission, because of the advantages they may offer for complainants.

By using the means of redress available at national level, complainants should, as a rule, be able to assert their rights more directly and more personally (e.g. a court order to an administrative body, repeal of a national decision and/or damages) than they would following an infringement procedure successfully brought by the Commission which may take some time. Indeed, before referring a case to the Court of Justice, the Commission is obliged to hold a series of contacts with the Member State concerned to try to terminate the infringement.

Furthermore, any finding of an infringement by the Court of Justice has no impact on the rights of the complainant, since it does not serve to resolve individual cases. It merely obliges the Member State to comply with Community law. More specifically, any individual claims for damages would have to be brought by complainants before the national courts.

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(b) Where the Commission's services make representations to the authorities of the Member State against which the complaint has been made, they will abide by the choice made by the complainant in Section 15 of this form.

(c) The Commission will endeavour to take a decision on the substance (either to open infringement proceedings or to close the case) within twelve months of registration of the complaint with its Secretariat-General.

(d) The complainant will be notified in advance by the relevant department if it plans to propose that the Commission close the case. The Commission's services will keep the complainant informed of the course of any infringement procedure.

***

Hungary

COMPLAINT

TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

CONCERNING FAILURE TO COMPLY WITH COMMUNITY LAW

1. Surname and forename of complainant:

Passy, Vandana

2. Where appropriate, represented by:

3. Nationality:

Dutch

4. Address or Registered Office:

Zaagmolen 6

5057 BE Berkel-Enschot

5. Telephone/fax/e-mail address:

+31639758168

v_passy@hotmail.com

6. Field and place(s) of activity:

International tax law

7. Member State or public body alleged by the complainant not to have complied with Community law:
Hungary

8. Fullest possible account of facts giving rise to complaint:

Hungary exempts real estate income, rental income and capital gains of its domestic pension funds. Foreign pension funds with similar income from real estate are not exempt from the Hungarian corporate income tax.

In Hungary, the taxation of pension funds varies according to the whether a pension fund qualifies as a voluntary mutual pension fund or private pension fund. The act on Corporate Income Tax lists volunatary mutual pension funds among the entities that are subject to taxation:

Section 2(2) g) of the Corporate Income Tax Act:

" 2. § (1)8 A társasági adó alanya a (2)-(4) bekezdésben meghatározott személy.

(2) Belföldi illetőségű adózó a belföldi személyek közül

…

g) az alapítvány, a közalapítvány, az egyesület, a köztestület (ideértve e szervezetek alapszabályában, illetve alapító okiratában jogi személyiséggel felruházott szervezeti egységeket is), továbbá az egyházi jogi személy,

a lakásszövetkezet és az önkéntes kölcsönös biztosító pénztár…"

In accordance with Section 2 of the Corporate Income Tax Act, private pension funds are not subject to corporate income tax. The voluntary mutual pension funds are only taxable on their business activity as described in Section 9 of the Corporate Income Tax act:

Section 9 (1) of the Corporate Income Tax Act:

" 9. § (1) Az alapítvány, a közalapítvány, az egyesület, a köztestület, az egyházi jogi személy, ha az adóév utolsó napján ilyen jogalanynak minősül, a lakásszövetkezet és az önkéntes kölcsönös biztosítópénztár, valamint a közhasznú szervezetként besorolt felsőoktatási intézmény adóalapja a vállalkozási tevékenység adózás előtti eredménye, módosítva a (2)-(5) bekezdésben foglaltakkal és figyelemmel a (6)-(9) bekezdés rendelkezéseire."

This means that any gains or profits realized on the primary activity are out of the scope of corporate taxation. Activites related to real estate are even *considered as a primary investment activity. Section 38/A of Voluntary Mutual Insurance Funds describes that income from real estate are not considered as business activity and therefore exempt from taxation:*

§ Az Öpt. a következő 38/A. §-sal egészül ki:

" 38/A. § (1) Az ingatlanokra vonatkozó adásvételi szerződés érvényességéhez a letétkezelő ellenjegyzése szükséges. A letétkezelő az adott ügyletet csak a pénztárakra vonatkozó jogszabályok szerint minősítheti, ellenjegyzése során a pénztár döntését üzleti megfontolások szempontjából nem értékeli.

(2) A pénztár a tulajdonában álló biztosítható ingatlanokra köteles teljes körű vagyonbiztosítást kötni.

(3) A pénztár a tulajdonában álló ingatlanokat kizárólag bérbeadás, továbbértékesítés, valamint fejlesztés útján hasznosíthatja.

(4) A pénztár az ingatlant vállalkozási tevékenység folytatására harmadik személy részére bérbe adhatja, azonban a pénztár maga azzal kapcsolatban a befektetési kockázaton túli kockázatot jelentő, haszonszerzésre irányuló, üzleti tevékenységet nem végezhet.

(5) Az ingatlanok bérbeadása, forgalmazása és fejlesztése (a továbbiakban: ingatlanhasznosítás) a pénztári befektetési tevékenység részét képezi. A befektetési üzletmenet kihelyezése az ingatlanok tulajdonjogával és hasznosításával kapcsolatos döntések meghozatalára nem vonatkozik, azt a pénztár kizárólag saját maga végezheti.

(6) Ha a pénztár befektetési portfóliója ingatlant is tartalmaz, ingatlanértékelőt köteles megbízni. Az ingatlan értékelésével kizárólag olyan személy bízható meg, aki büntetlen előéletű, nem áll agrár-, műszaki, gazdasági vagy jogi egyetemi, illetve főiskolai végzettséghez kötött munkakörnek megfelelő (a továbbiakban: ingatlanértékelő tevékenység gyakorlását kizáró) foglalkozástól eltiltás hatálya alatt, valamint akivel szemben nem áll fenn a 20. § (2) bekezdés a) pont ac) és ad) alpontjában meghatározott kizáró ok. Amennyiben a pénztár ingatlanfejlesztést végez, és az adott fejlesztés tervezett értéke meghaladja az ötmillió forintot, a pénztár az építési, szerelési munka szakszerűségének ellenőrzésével, illetőleg helyszíni képviselete ellátásával építési műszaki ellenőrt köteles megbízni. A műszaki ellenőr az építési műszaki ellenőri tevékenység gyakorlására vonatkozó jogszabályi előírások szerint köteles

eljárni."

No legal provision mentions foreign pension funds as a particular type of taxpayer. Foreign pension funds do not qualify for the specific regualtions governing the taxation of Hungarian voluntary mutual pension funds. For the Hungarian Corporate Income Tax, foreign pension funds qualifity as foreign nationals:

Section 2(4) of the Corporate Income Tax Act:

“ (4) Adóalany a külföldi személy, illetve az üzletvezetése helye alapján külföldi illetőségű, ha

a) belföldi telephelyen végez vállalkozási tevékenységet, feltéve, hogy az üzletvezetésének helyére tekintettel nem tekinthető belföldi illetőségű adózónak (a továbbiakban: külföldi vállalkozó);

…

c) ingatlannal rendelkező társaságban meglévő részesedésének elidegenítése vagy kivonása révén szerez jövedelmet (a továbbiakban: ingatlannal rendelkező társaság tagja).”

Section 4 (1) 27. of the Corporate Income Tax Act:

“ 27. külföldi személy: külföldi jogszabályok alapján létrejött jogi személy, jogi személyiséggel nem rendelkező társas cég, személyi egyesülés, egyéb szervezet. “

In general, foreign pension funds qualify as foreign persons. The result is that a foreign pension fund is deemed as a business association that carries out business through a permanent establishment. As mentioned under the provisions of the Hungarian Corporate Income Tax Act:

Section 4, point 33 d of the Corporate Income Tax Act:

"a külföldi személyt telephellyel rendelkezőnek kell tekinteni ingatlan és természeti erőforrás térítés ellenében történő hasznosítása, ingatlanhoz és természeti erőforráshoz kapcsolódó vagyoni értékű jog térítés ellenében történő átadása, értékesítése, apportálása (a továbbiakban: ingatlan hasznosítása)

esetén"

Section 2 (4) a) of the Corporate Income Tax

"belföldi telephelyen végez vállalkozási tevékenységet, feltéve, hogy az üzletvezetésének helyére tekintettel nem tekinthető belföldi illetőségű adózónak (a továbbiakban: külföldi vállalkozó)";

This means that the special Hungarian tax regime is not applicable for foreign pension funds. This leads to a difference in treatment of objectively comparable situations.

9. As far as possible, specify the provisions of Community law (treaties, regulations, directives, decisions, etc.) which the complainant considers to have been infringed by the Member State concerned:

There is a difference in treatment of domestic pension funds and foreign pension funds investing in real estate on Belgian territory. The comparable situations are treated differently which leads to a breach of the freedom of capital movement guarded in Article 63 TFEU. The difference in treatment makes Hungary unattractive for foreign pension funds to invest in real estate. The higher taxation in real estate income makes it difficult for companies to attract capital from foreign pension funds. The taxation has a dissuasive effect on foreign pension funds, which leads to disturbance of the internal market. There is no objective difference between a foreign pension fund and a domestic pension fund. The higher taxation of foreign pension funds forms a restriction of the free movement of capital of art.63 TFEU.

10. Where appropriate, mention the involvement of a Community funding scheme (with references if possible) from which the Member State concerned benefits or stands to benefit, in relation to the facts giving rise to the complaint:
n/a

11. Details of any approaches already made to the Commission's services (if possible, attach copies of correspondence):
n/a

12. Details of any approaches already made to other Community bodies or authorities (e.g. European Parliament Committee on Petitions, European Ombudsman). If possible, give the reference assigned to the complainant's approach by the body concerned:
n/a

13. Approaches already made to national authorities, whether central, regional or local (if possible, attach copies of correspondence):

13.1 Administrative approaches (e.g. complaint to the relevant national administrative authorities, whether central, regional or local, and/or to a national or regional ombudsman):
n/a

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n/a

14. Specify any documents or evidence which may be submitted in support of the complaint, including the national measures concerned (attach copies):

15. Confidentiality (tick one box):

"I request the Commission not to disclose my identity in its contacts with the authorities of the Member State against which the complaint is made."

16. Place, date and signature of complainant/representative:

Berkel-Enschot, 3 February 2014

(Explanatory note to appear on back of complaint form)

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***

Poland

COMPLAINT

TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

CONCERNING FAILURE TO COMPLY WITH COMMUNITY LAW

1. Surname and forename of complainant:

Passy, Vandana

2. Where appropriate, represented by:

3. Nationality:

Dutch

4. Address or Registered Office:

Zaagmolen 6

5057 BE Berkel-Enschot

5. Telephone/fax/e-mail address:

+31639758168

v_passy@hotmail.com

6. Field and place(s) of activity:

International tax law

7. Member State or public body alleged by the complainant not to have complied with Community law:
Poland

8. Fullest possible account of facts giving rise to complaint:

In Poland domestic pension funds are generally exempt from taxation. This *includes all income earned by a pension. The standard corporate income tax rate is not applicable for Polish pension funds.*

***Art 6, section 1 point 11 of the Polish Corporate Income Tax Law** describes:*
"Zwalnia się od podatku: (...) fundusze emerytalne utworzone na podstawie przepisów o organizacji i funkcjonowaniu funduszy emerytalnych."

The exemption is only applicable for foreign pension funds under specific conditions. In accordance with article 6, section 1, point 11a of the Polish corporate income tax, the conditions are the following:

Art 6, section 1 point 11a of the Polish Corporate Income Tax Law:
"Zwalnia się od podatku: (...) podatników posiadających siedzibę w innym niż Rzeczpospolita Polska państwie członkowskim Unii Europejskiej lub w innym państwie należącym do Europejskiego Obszaru Gospodarczego prowadzących program emerytalny, w zakresie dochodów związanych z gromadzeniem oszczędności na cele emerytalne, którzy spełniają łącznie następujące warunki:
a) podlegają w państwie, w którym mają siedzibę, opodatkowaniu podatkiem dochodowym od całości swoich dochodów, bez względu na miejsce ich osiągania,
b) prowadzą swoją działalność na podstawie zezwolenia właściwych władz państwa, w którym mają siedzibę,
c) ich działalność podlega nadzorowi właściwych władz państwa, w którym mają siedzibę,
d) posiadają depozytariusza prowadzącego rejestr aktywów tych podatników,
e) przedmiotem ich działalności jest wyłącznie gromadzenie środków pieniężnych i ich lokowanie, z przeznaczeniem na wypłatę uczestnikom programu emerytalnego po osiągnięciu przez nich wieku emerytalnego;

The exemption from corporate income tax to foreign pension funds incomes derived in Poland is applicable under specific conditions. Only pension funds that meet the aforementioned conditions are exempt from taxation. This implies that the general tax exemption mentioned in the Polish regulation is not applicable for foreign pension funds. The result is that objectively comparable *situations are treated differently.*

9. As far as possible, specify the provisions of Community law (treaties, regulations, directives, decisions, etc.), which the complainant considers to have been infringed by the Member State concerned:

There is a difference in treatment of domestic pension funds and foreign pension funds investing in real estate on Polish territory. The comparable situations are treated differently which leads to a breach of the freedom of capital movement guarded in Article 63 TFEU. The difference in treatment makes Poland unattractive for foreign pension funds to invest in real estate. The higher taxation in real estate income makes it difficult for companies to attract capital from foreign pension funds. The taxation has a dissuasive effect on foreign pension funds, which leads to disturbance of the internal market. Foreign pension funds have to meet specific conditions before the exemption is granted while domestic pension funds are generally exempt from taxation. There is no objective difference between a foreign pension fund and a domestic pension fund. The higher taxation of foreign pension funds forms a restriction of the free movement of capital of art.63 TFEU.

10. Where appropriate, mention the involvement of a Community funding scheme (with references if possible) from which the Member State concerned benefits or stands to benefit, in relation to the facts giving rise to the complaint:
n/a

11. Details of any approaches already made to the Commission's services (if possible, attach copies of correspondence):
n/a

12. Details of any approaches already made to other Community bodies or authorities (e.g. European Parliament Committee on Petitions, European Ombudsman). If possible, give the reference assigned to the complainant's approach by the body concerned:
n/a

13. Approaches already made to national authorities, whether central, regional or local (if possible, attach copies of correspondence):

13.1 Administrative approaches (e.g. complaint to the relevant national administrative authorities, whether central, regional or local, and/or to a national or regional ombudsman):
n/a

13.2 Recourse to national courts or other procedures (e.g. arbitration or conciliation). (State whether there has already been a decision or award and attach a copy if appropriate):

n/a

14. Specify any documents or evidence which may be submitted in support of the complaint, including the national measures concerned (attach copies):

15. Confidentiality (tick one box):

"I request the Commission not to disclose my identity in its contacts with the authorities of the Member State against which the complaint is made."

16. Place, date and signature of complainant/representative:

Berkel-Enschot, 3 February 2014

(Explanatory note to appear on back of complaint form)

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By using the means of redress available at national level, complainants should, as a rule, be able to assert their rights more directly and more personally (e.g. a court order to an administrative body, repeal of a national decision and/or damages) than they would following an infringement procedure successfully brought by the Commission which may take some time. Indeed, before referring a case to the Court of Justice, the Commission is obliged to hold a series of contacts with the Member State concerned to try to terminate the infringement.

Furthermore, any finding of an infringement by the Court of Justice has no impact on the rights of the complainant, since it does not serve to resolve individual cases. It merely obliges the Member State to comply with Community law. More specifically, any individual claims for damages would have to be brought by complainants before the national courts.

The following administrative guarantees exist for the benefit of the complainant:

(a) Once it has been registered with the Commission's Secretariat-General, any complaint found admissible will be assigned an official reference number. An acknowledgment bearing the reference number, which should be quoted in any correspondence, will immediately be sent to the complainant. However, the assignment of an official reference number to a complaint does not necessarily mean that an infringement procedure will be opened against the Member State in question.

(b) Where the Commission's services make representations to the authorities of the Member State against which the complaint has been made, they will abide by the choice made by the complainant in Section 15 of this form.

(c) The Commission will endeavour to take a decision on the substance (either to open infringement proceedings or to close the case) within twelve months of registration of the complaint with its Secretariat-General.

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Portugal

COMPLAINT

TO THE COMMISSION OF THE EUROPEAN COMMUNITIES CONCERNING FAILURE TO COMPLY WITH COMMUNITY LAW

1. Surname and forename of complainant:

Passy, Vandana

2. Where appropriate, represented by:

3. Nationality:

Dutch

4. Address or Registered Office:

Zaagmolen 6

5057 BE Berkel-Enschot

5. Telephone/fax/e-mail address:

+31639758168

v_passy@hotmail.com

6. Field and place(s) of activity:

International tax law

7. Member State or public body alleged by the complainant not to have complied with Community law:
Portugal

8. Fullest possible account of facts giving rise to complaint:

In Portugal domestic pension funds are generally exempt from taxation on any income. This includes all income earned by a pension. In addition, domestic pension funds are exempt from property transfer tax. This is mentioned in article 16 of the Fiscal Benefits Statute:

Artigo 16.º Fundos de pensões e equiparáveis

“ 1 - São isentos de IRC os rendimentos dos fundos de pensões e equiparáveis, que se constituam e operem de acordo com a legislação nacional.

2 - São isentos de imposto municipal sobre as transmissões onerosas de imóveis os fundos de pensões e equiparáveis, constituídos de acordo com a legislação *nacional…”*

According to the judgment of the CJEU in the case Commission v. Portugal C-493/09, the regulations regarding foreign pension funds were amended. Income of foreign pension funds is exempt from taxation if the following cumulative requirements are met:

Artigo 16.º Fundos de pensões e equiparáveis

“7 - São isentos de IRC os rendimentos dos fundos de pensões que se constituam, operem de acordo com a legislação e estejam estabelecidos noutro Estado membro da União Europeia ou do Espaço Económico Europeu, neste último caso desde que esse Estado membro esteja vinculado a cooperação administrativa no domínio da fiscalidade equivalente à estabelecida no âmbito da União Europeia, não imputáveis a estabelecimento estável situado em território português, desde que se verifiquem cumulativamente os seguintes requisitos:

a. *Garantam exclusivamente o pagamento de prestações de reforma por velhice ou invalidez, sobrevivência, pré-reforma ou reforma antecipada, benefícios de saúde pós-emprego e, quando complementares e acessórios destas prestações, a atribuição de subsídios por morte;*
b. *Sejam geridos por instituições de realização de planos de pensões profissionais às quais seja aplicável a Directiva n.º 2003/41/CE do Parlamento Europeu e do Conselho, de 3 de Junho de 2003;*
c. *O fundo de pensões seja o beneficiário efectivo dos rendimentos;*
d. *Tratando-se de lucros distribuídos, as correspondentes partes sociais sejam detidas, de modo ininterrupto, há pelo menos um ano.*

8 - Sem prejuízo do disposto no artigo 98.º do Código do IRC, para que seja imediatamente aplicável o disposto no número anterior, deve ser feita prova perante a entidade que se encontra obrigada a efectuar a retenção na fonte, anteriormente à data de colocação à disposição dos rendimentos, da *verificação dos requisitos previstos nas alíneas a), b) e c) mediante declaração confirmada e autenticada pelas autoridades do Estado membro da União Europeia ou do Espaço Económico Europeu a quem compete a respectiva supervisão."*

Foreign pension funds are obliged to follow cumulative requirements. The Portuguese government requires foreign pension funds to keep shares, in case of dividend distributions, for an uninterrupted period of one year. Futhermore, there seems to be no equivalent property transfer tax exemption for foreign pension funds.

The exemption from corporate income tax to foreign pension funds incomes derived in Portugal is applicable under specific conditions. Only pension funds that meet the aforementioned conditions are exempt from taxation. This implies that the general tax exemption mentioned in the Portuguese regulation is not applicable for foreign pension funds. As regards to dividend distributions, pension funds ar required to keep shares for an uninterrupted period of one year. There is no similar condition as regards to domestic pension funds. Furthermore, there seems to be no general exemption for property transfer tax which is applicable for foreign pension funds. The result is that objectively comparable situations are treated differently.

9. As far as possible, specify the provisions of Community law (treaties, regulations, directives, decisions, etc.), which the complainant considers to have been infringed by the Member State concerned:

There is a difference in treatment of domestic pension funds and foreign pension funds investing in real estate on Portuguese territory. The comparable situations are treated differently which leads to a breach of the freedom of capital movement guarded in Article 63 TFEU. The difference in treatment makes Portugal unattractive for foreign pension funds to invest in real estate. Domestic pension funds are exempt from property transfer tax. There seems to be no similar exemption for foreign pension funds. The higher taxation in real estate income makes it difficult for companies to attract capital from foreign pension funds. The taxation has a dissuasive effect on foreign pension funds, which leads to disturbance of the internal market. Foreign pension funds have to meet specific conditions before the exemption is granted while domestic pension funds are generally exempt from taxation. As regards to dividend distributions, foreign pension funds areconstituted to keep shares for an *uninterrupted period of one year. There is no objective difference between a foreign pension fund and a domestic pension fund. The higher taxation of foreign pension funds and compelling pension funds to keep shares for an uninterrupted period of one year leads to restrictions of the free movement of capital of article 63 TFEU.*

10. Where appropriate, mention the involvement of a Community funding scheme (with references if possible) from which the Member State concerned benefits or stands to benefit, in relation to the facts giving rise to the complaint:
n/a

11. Details of any approaches already made to the Commission's services (if possible, attach copies of correspondence):
n/a

12. Details of any approaches already made to other Community bodies or authorities (e.g. European Parliament Committee on Petitions, European Ombudsman). If possible, give the reference assigned to the complainant's approach by the body concerned:
n/a

13. Approaches already made to national authorities, whether central, regional or local (if possible, attach copies of correspondence):

13.1 Administrative approaches (e.g. complaint to the relevant national administrative authorities, whether central, regional or local, and/or to a national or regional ombudsman):
n/a

13.2 Recourse to national courts or other procedures (e.g. arbitration or conciliation). (State whether there has already been a decision or award and attach a copy if appropriate):
Commission v. Portugal, C-493/09

14. Specify any documents or evidence which may be submitted in support of the complaint, including the national measures concerned (attach copies):

15. Confidentiality (tick one box):

"I request the Commission not to disclose my identity in its contacts with the authorities of the Member State against which the complaint is made."

16. Place, date and signature of complainant/representative:

Berkel-Enschot, 3 February 2014

(Explanatory note to appear on back of complaint form)

Each Member State is responsible for the implementation of Community law (adoption of implementing measures before a specified deadline, conformity and correct application) within its own legal system. Under the Treaties, the Commission of the European Communities is responsible for ensuring that Community law is correctly applied. Consequently, where a Member State fails to comply with Community law, the Commission has powers of its own (action for non-compliance) to try to bring the infringement to an end and, if necessary, may refer the case to the Court of Justice of the European Communities. The Commission takes whatever action it deems appropriate in response to either a complaint or indications of infringements which it detects itself.

Non-compliance means failure by a Member State to fulfil its obligations under Community law, whether by action or by omission. The term State is taken to mean the Member State which infringes Community law, irrespective of the authority - central, regional or local - to which the non-compliance is attributable.

Anyone may lodge a complaint with the Commission against a Member State about any measure (law, regulation or administrative action) or practice which they consider incompatible with a provision or a principle of Community law. Complainants do not have to demonstrate a formal interest in bringing proceedings. Neither do they have to prove that they are principally and directly concerned by the infringement complained of. To be admissible, a complaint has to relate to an infringement of Community law by a Member State. It should be borne in mind that the Commission's services may decide whether or not further action should be taken on a complaint in the light of the rules and priorities laid down by the Commission for opening and pursuing infringement procedures.

Anyone who considers a measure (law, regulation or administrative action) or administrative practice to be incompatible with Community law is invited, before or at the same time as lodging a complaint with the Commission, to seek redress from the national administrative or judicial authorities (including the national or regional ombudsman and/or arbitration and conciliation procedures available). The Commission advises the prior use of such national means of redress, whether administrative, judicial or other, before lodging a complaint with the Commission, because of the advantages they may offer for complainants.

By using the means of redress available at national level, complainants should, as a rule, be able to assert their rights more directly and more personally (e.g. a court order to an administrative body, repeal of a national decision and/or damages) than they would following an infringement procedure successfully brought by the Commission which may take some time. Indeed, before referring a case to the Court of Justice, the Commission is obliged to hold a series of contacts with the Member State concerned to try to terminate the infringement.

Furthermore, any finding of an infringement by the Court of Justice has no impact on the rights of the complainant, since it does not serve to resolve individual cases. It merely obliges the Member State to comply with Community law. More specifically, any individual claims for damages would have to be brought by complainants before the national courts.

The following administrative guarantees exist for the benefit of the complainant:

(a) Once it has been registered with the Commission's Secretariat-General, any complaint found admissible will be assigned an official reference number. An acknowledgment bearing the reference number, which should be quoted in any correspondence, will immediately be sent to the complainant. However, the assignment of an official reference number to a complaint does not necessarily mean that an infringement procedure will be opened against the Member State in question.

(b) Where the Commission's services make representations to the authorities of the Member State against which the complaint has been made, they will abide by the choice made by the complainant in Section 15 of this form.

(c) The Commission will endeavour to take a decision on the substance (either to open infringement proceedings or to close the case) within twelve months of registration of the complaint with its Secretariat-General.

(d) The complainant will be notified in advance by the relevant department if it plans to propose that the Commission close the case. The Commission's services will keep the complainant informed of the course of any infringement procedure.

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Spain

COMPLAINT

TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

CONCERNING FAILURE TO COMPLY WITH COMMUNITY LAW

1. Surname and forename of complainant:

Passy, Vandana

2. Where appropriate, represented by:

3. Nationality:

Dutch

4. Address or Registered Office:

Zaagmolen 6

5057 BE Berkel-Enschot

5. Telephone/fax/e-mail address:

+31639758168

v_passy@hotmail.com

6. Field and place(s) of activity:

International tax law

7. Member State or public body alleged by the complainant not to have complied with Community law:
Spain

8. Fullest possible account of facts giving rise to complaint:

In Spain domestic pension funds are subject to Corporate Income Tax with a tax rate of 0%. This includes all income earned by a pension. This is in accordance with the Spanish Corporate Income Tax:

Artículo 30. Tributación de los fondos de pensiones.

" 1. Los fondos de pensiones constituidos e inscritos según lo requerido por la presente Ley, estarán sujetos al Impuesto sobre Sociedades a un tipo de gravamen cero teniendo, en consecuencia, derecho a la devolución de las retenciones que se les practiquen sobre los rendimientos del capital mobiliario."

According to article 9 of the Spanish Corporate Income Tax non-profit institutions are exempt from taxation:

Artículo 9. Exenciones.

" 1. ...

2. Estarán parcialmente exentas del impuesto, en los términos previstos en el título II de la Ley 49/2002, de 23 de diciembre, de régimen fiscal de las entidades sin fines lucrativos y de los incentivos fiscales al mecenazgo, las entidades e instituciones sin ánimo de lucro a las que sea de aplicación dicho título.

3. Estarán parcialmente exentos del impuesto en los términos previstos en el capítulo XV del título VII de esta ley:

a) Las entidades e instituciones sin ánimo de lucro no incluidas en apartado anterior.”

It seems as if foreign pension funds are exempt from taxation. However, according to the Spanish non-resident income tax law, real estate income of foreign pension funds is not exempt from taxation.

Artículo 14. Rentas exentas, TEXTO REFUNDIDO DE LA LEY DEL IMPUESTO SOBRE LA RENTA DE NO RESIDENTES

k) Los dividendos y participaciones en beneficios obtenidos sin mediación de establecimiento permanente por fondos de pensiones equivalentes a los regulados en el texto refundido de la Ley de Planes y Fondos de Pensiones aprobado por Real Decreto Legislativo 1/2002, de 29 de noviembre, que sean residentes en otro Estado miembro de la Unión Europea o por establecimientos permanentes de dichas instituciones situados en otro Estado miembro de la Unión Europea.

Se consideran fondos de pensiones equivalentes aquellas instituciones de previsión social que cumplan los siguientes requisitos:

Que tengan por objeto exclusivo proporcionar una prestación complementaria en el momento de la jubilación, fallecimiento, incapacidad o dependencia en los mismos términos previstos en el artículo 8.6 del Texto Refundido de la Ley de regulación de los planes y fondos de pensiones.

Que las contribuciones empresariales que pudieran realizarse se imputen fiscalmente al partícipe a quien se vincula la prestación, transmitiéndole de forma irrevocable el derecho a la percepción de la prestación futura.

Que cuenten con un régimen fiscal preferencial de diferimiento impositivo tanto respecto de las aportaciones como de las contribuciones empresariales realizadas a los mismos. Dicho régimen debe caracterizarse por la tributación *efectiva de todas las aportaciones y contribuciones así como de la rentabilidad obtenida en su gestión en el momento de la percepción de la prestación.*

Lo dispuesto en este apartado se aplicará igualmente a los fondos de pensiones equivalentes residentes en los Estados integrantes del Espacio Económico Europeo siempre que estos hayan suscrito con España un convenio para evitar la doble imposición internacional con cláusula de intercambio de información o un acuerdo de intercambio de información en materia tributaria."

The exemption only provides a tax exemption for dividends paid by Spanish entities to non-resident pension funds. There is no reference to real estate income which means that non-resident pension funds investing in Spanish real estate are taxed at a general rate of 24.75%. This implies that the tax rate of 0% is not applicable for all income of foreign pension funds. The result is that objectively comparable situations are treated differently.

9. As far as possible, specify the provisions of Community law (treaties, regulations, directives, decisions, etc.), which the complainant considers to have been infringed by the Member State concerned:

There is a difference in treatment of domestic pension funds and foreign pension funds investing in real estate on Spanish territory. The comparable situations are treated differently which leads to a breach of the freedom of capital movement guarded in Article 63 TFEU. The difference in treatment makes Spain unattractive for foreign pension funds to invest in real estate. The higher taxation in real estate income makes it difficult for companies to attract capital from foreign pension funds. The taxation has a dissuasive effect on foreign pension funds, which leads to disturbance of the internal market. Foreign pension funds have to meet specific conditions before the exemption is granted while domestic pension funds are generally exempt from taxation. There is no objective difference between a foreign pension fund and a domestic pension fund. The higher taxation of foreign pension funds forms a restriction of the free movement of capital of art.63 TFEU.

10. Where appropriate, mention the involvement of a Community funding scheme (with references if possible) from which the Member State concerned benefits or stands to benefit, in relation to the facts giving rise to the complaint:
n/a

11. Details of any approaches already made to the Commission's services (if possible, attach copies of correspondence):

n/a

12. Details of any approaches already made to other Community bodies or authorities (e.g. European Parliament Committee on Petitions, European Ombudsman). If possible, give the reference assigned to the complainant's approach by the body concerned:
n/a

13. Approaches already made to national authorities, whether central, regional or local (if possible, attach copies of correspondence):

13.1 Administrative approaches (e.g. complaint to the relevant national administrative authorities, whether central, regional or local, and/or to a national or regional ombudsman):
n/a

13.2 Recourse to national courts or other procedures (e.g. arbitration or conciliation). (State whether there has already been a decision or award and attach a copy if appropriate):
n/a

14. Specify any documents or evidence which may be submitted in support of the complaint, including the national measures concerned (attach copies):

15. Confidentiality (tick one box):

"I request the Commission not to disclose my identity in its contacts with the authorities of the Member State against which the complaint is made."

16. Place, date and signature of complainant/representative:

Berkel-Enschot, 3 February 2014

(Explanatory note to appear on back of complaint form)

Each Member State is responsible for the implementation of Community law (adoption of implementing measures before a specified deadline, conformity and correct application) within its own legal system. Under the Treaties, the Commission of the European Communities is responsible for ensuring that Community law is correctly applied. Consequently, where a Member State fails to comply with Community law, the Commission has powers of its own (action for non-compliance) to try to bring the infringement to an end and, if necessary, may refer the case to the

Court of Justice of the European Communities. The Commission takes whatever action it deems appropriate in response to either a complaint or indications of infringements which it detects itself.

Non-compliance means failure by a Member State to fulfil its obligations under Community law, whether by action or by omission. The term State is taken to mean the Member State which infringes Community law, irrespective of the authority - central, regional or local - to which the non-compliance is attributable.

Anyone may lodge a complaint with the Commission against a Member State about any measure (law, regulation or administrative action) or practice which they consider incompatible with a provision or a principle of Community law. Complainants do not have to demonstrate a formal interest in bringing proceedings. Neither do they have to prove that they are principally and directly concerned by the infringement complained of. To be admissible, a complaint has to relate to an infringement of Community law by a Member State. It should be borne in mind that the Commission's services may decide whether or not further action should be taken on a complaint in the light of the rules and priorities laid down by the Commission for opening and pursuing infringement procedures.

Anyone who considers a measure (law, regulation or administrative action) or administrative practice to be incompatible with Community law is invited, before or at the same time as lodging a complaint with the Commission, to seek redress from the national administrative or judicial authorities (including the national or regional ombudsman and/or arbitration and conciliation procedures available). The Commission advises the prior use of such national means of redress, whether administrative, judicial or other, before lodging a complaint with the Commission, because of the advantages they may offer for complainants.

By using the means of redress available at national level, complainants should, as a rule, be able to assert their rights more directly and more personally (e.g. a court order to an administrative body, repeal of a national decision and/or damages) than they would following an infringement procedure successfully brought by the Commission which may take some time. Indeed, before referring a case to the Court of Justice, the Commission is obliged to hold a series of contacts with the Member State concerned to try to terminate the infringement.

Furthermore, any finding of an infringement by the Court of Justice has no impact on the rights of the complainant, since it does not serve to resolve individual cases. It merely obliges the Member State to comply with Community law. More specifically, any individual claims for damages would have to be brought by complainants before the national courts.

The following administrative guarantees exist for the benefit of the complainant:

(a) Once it has been registered with the Commission's Secretariat-General, any complaint found admissible will be assigned an official reference number. An acknowledgment bearing the reference number, which should be quoted in any correspondence, will immediately be sent to the complainant. However, the assignment of an official reference number to a complaint does not necessarily mean that an infringement procedure will be opened against the Member State in question.

(b) Where the Commission's services make representations to the authorities of the Member State against which the complaint has been made, they will abide by the choice made by the complainant in Section 15 of this form.

(c) The Commission will endeavour to take a decision on the substance (either to open infringement proceedings or to close the case) within twelve months of registration of the complaint with its Secretariat-General.

(d) The complainant will be notified in advance by the relevant department if it plans to propose that the Commission close the case. The Commission's services will keep the complainant informed of the course of any infringement procedure.

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Questionnaire on the Taxation of Pension Fund Investments in Real Estate

Belgium

Questionnaire

1) What are the conditions to qualify as an occupational pension provider in your country?
   Occupational pension providers can be established in Belgium under a special form of companies called OFP (organisation for the financing of pensions). Among others, below we list some of the conditions for qualifying as an OFP in the Belgium:
   - *Legal entity in the form of special purpose company;*
   - *Legal name should contain the words OFP;*
   -
   - *Fulfillment of the requirement of credibility, liquidity, solvability and security;*
   - *Establishment and activity of the pension fund must be authorized by the FSMA based on the written request.*

   If your country has different types of pension providers, with different taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction.

   OFP have a specific tax regime. Insurance companies (which can also be pension providers) are submitted to normal corporate tax rules.

2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC.
   Yes, Directive 2003/41/EC was implemented and the OFP fall under the scope of the IORP Directive 2003/41/EC.

3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?
   NO .OFP is only taxable on non deductible expenses and received *abnormal advantages*
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein subject to tax on their income from directly held real estate (capital gains, rental income) in your country?
YES; in some cases a professional withholding tax of 33,99% must be paid on the capital gain.
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.

Text:
HOOFDSTUK I : AAN DE BELASTING ONDERWORPEN PERSONEN

Artikel 227

Aan de belasting van niet-inwoners zijn onderworpen :

2° buitenlandse vennootschappen, zomede verenigingen, instellingen of lichamen zonder rechtspersoonlijkheid die zijn opgericht in een rechtsvorm die vergelijkbaar is met de rechtsvorm van een vennootschap naar Belgisch recht en die hun maatschappelijke zetel, hun voornaamste inrichting of hun zetel van bestuur of beheer niet in België hebben ;

Artikel 270

De bedrijfsvoorheffing is verschuldigd door :

5° degenen die krachtens artikel 35 van het Wetboek der registratie-, hypotheek- en griffierechten verplicht zijn de akten of verklaringen ter registratie aan te bieden wanneer het akten of verklaringen betreft waarbij de overdracht onder bezwarende titel is vastgesteld van in België gelegen onroerende goederen of zakelijke rechten met betrekking tot die goederen door een in artikel 227, 1° of 2° , vermelde belastingplichtige ;

Czech Republic

Questionnaire

1) What are the conditions to qualify as an occupational pension provider in your country?
We understand that occupational pension providers cannot be established in the Czech Republic under the Czech law. Nevertheless, the Czech law recognizes a special form of companies called pension funds ("penzijní fond"). Among others, below we list some of the conditions for qualifying as a pension fund provider in the Czech Republic:
   - *Legal entity in the form of joint stock company;*
   - *Legal name should contain the words "pension fund" ("penzijní fond");*

- *Registered capital in the amount of at least CZK 50m (consisting of cash only and repaid before submitting the application);*
- *Fulfillment of the requirement of credibility, liquidity, profitability and security;*
- *Establishment and activity of the pension fund must be authorized by the Czech National Bank based on the written request.*

Please note that as of January 2013, in connection with the running pension reform, major part of the legislation related to the functioning of the pension funds will be changed.

If your country has different types of pension providers, with different taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction.
We are not aware of any other types of pension providers in the Czech Republic.

2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC.

   Yes, Directive 2003/41/EC was implemented and the pension providers fall under the scope of the IORP Directive 2003/41/EC, although, as already mentioned, it is not legally possible to establish the ***occupational*** *retirement fund in the Czech Republic.*

3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?

   Currently yes

   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.

   The capital gains on sale of real estate property and rental income generated by pension funds (including qualifying funds established in other EU Member States, Norway and Iceland) are subject to a special corporate income tax rate of 5% (0% planned from 1 January 2015). As these types of income are considered standard domestic business income, no withholding tax/credit/exemptions are applicable.

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein

subject to tax on their income from directly held real estate (capital gains, rental income) in your country?

Currently yes

i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.

Income from real estate located in the Czech Republic is considered Czech-sourced income. The tax treatment is the same as for domestic funds - please see the answer on the question 3 (above).

As requested please find below relevant articles of the Czech Income Taxes Act

Section 21(3): The tax rate of 5% applies on pension funds or pension insurance institution….
Sazba daně činí 5 % u penzijního fondu, nebo u instituce penzijního pojištění ....

Section 22(1): As an income sourced in the Czech Republic for taxpayers referred in Section 2(3) and Section 17(4) is considered:
...
d) income from the sale of real estate located in the Czech Republic and the rights associated with it;
e) income from the use of property (its parts), including apartments (its parts) located in the Czech Republic.

Za příjmy ze zdrojů na území České republiky se u poplatníků uvedených v § 2 odst. 3 a § 17 odst. 4 považují
...
d) příjmy z prodeje nemovitostí umístěných na území České republiky a z práv s nimi spojených,
e) příjmy z užívání nemovitostí (jejich částí) včetně bytů (jejich částí) umístěných na území České republiky

Denmark

Questionnaire

1) What are the conditions to qualify as an occupational pension provider in your country?
If your country has different types of pension providers, with different taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction.

Danish comments:
Under Danish law occupational pension providers comprise pension funds or life insurance companies set up with the sole purpose of providing labour market pension schemes and with a permission from the Danish

Financial Supervisory Authority (FSA) to conduct such business. The labour market pension schemes follow collective labour market agreements between employers' associations and labour market unions. The schemes are either sector-specific and/or education-specific.

The labour market schemes can also be set up on a voluntarily basis with a Danish employer. It is a condition that a voluntarily labour market scheme is covered with a life insurance company or a pension fund with permission from the Danish FSA to conduct such business.

2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC.

Danish comments: The abovementioned would fall under the scope of the IORP Directive. There are also other Danish pension providers which provide certain fragments of pensions savings according to Labour Market Agreements but these would not fall under the scope of the abovementioned Directive. Please note that the description provided below under 3) does not apply to such pension providers. The Danish pension savings yield tax rules are not uniform but depend e.g. on the type of pension provider and in certain situations even corporate tax rules may apply.

3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?
    i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
    ii) If they are not subject to tax, please provide the original and the English translation of the text of the legal basis for the exemption.

Danish comments: The qualifying pension providers are subject to pension savings yield tax of 15.3 % (15 % from 2014) on the yield of their investments.

The tax base includes all types of yield including profit or loss on real estate and a worldwide income principle is applied. The taxation is made up according to a mark-to-market principle. Profit and loss on real estate is assessed according to the ordinary tax rules with the exception of depreciations on buildings and installations which cannot be applied for pensions yield tax purposes.

Pension providers are considered "persons" in the context of a double tax treaty and are able to rely on treaty protection and claim relief under a double taxation treaty. An internal rule in the pension savings yield tax act also provides relief for double taxation similar to a credit relief under a double tax treaty with a maximum relief available of 15.3 %. Foreign income must be made up in accordance with a net income principle.

A special rule is in place to minimise the effect of the mandatory mark-to-market principle combined with a taxation of real estate abroad if the foreign taxation of the real estate takes place on a realisation basis.

The pension savings yield tax is paid on an annual basis with 31 May after the income year (calendar year) as the latest payment date. According to a Bill presented by the Danish Tax Minister on 1 February 2012, it will be possible to pay the tax on account as from 2013.

The full text of the Danish Pension Investment Returns Tax Act is enclosed. An extract of the relevant sections of the Act is enclosed in an English version. Furthermore, a full and extract of the relevant sections of the Danish Tax Assessment Act is enclosed in Danish and English.

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein subject to tax on their income from directly held real estate (capital gains, rental income) in your country?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
   ii) If not, please provide the original English translation of the text of the legal basis for the exemption.

Danish comments: Denmark has taxation right to real estate in the tax treaties concluded and the taxation right has been utilised in a specific internal rule applicable to real estate only (in other jurisdictions it would generally be considered whether real estate would fall under a PE rule but this is not the case under the internal Danish rules. Danish real estate provides in itself a taxable basis.)

Foreign pension providers are subject to Danish Corporation Tax of Danish real estate and profit or loss is taxed at a rate of 25 %. Gains and losses on real estate are taxed on a realisation basis. It is possible to depreciate on equipments, installations and buildings under certain conditions. Expenses are only deductible if they relate to real estate as such. Deductibility for interest expenses assumes that the loan relates to the purchase of the real estate, the operations and maintenance hereof.

The foreign pension providers must file a Danish tax return on an annual basis. The tax return is due 6 months after the end of the accounting year. Tax is payable on account in two equal instalments no later than 20 March and 20 November in the income year (payment of taxes on account)

Overpaid tax is refunded on 20 November in the calendar year following the income year in question. Underpaid tax must be paid no later than 20 November in the calendar year following the income year in question
A non-deductible variable interest rate will be levied on any underpaid taxes. A non-deductible variable interest rate will be levied on late tax payments.

The full text of the Corporation Tax Act in Danish and extract of the relevant sections in English are enclosed.

9 February 2012

Danish Pension Investment Returns Tax Act (Pensionsafkastbeskatningsloven)

Consolidation Act no 170 of 22 February 2011

Part 1

Tax liability

1(1) Pursuant to this Act, pension-eligible persons who are taxable under section 1 of the Danish Withholding Tax Act (kildeskatteloven), section 1 of the Danish Corporation Tax Act (selskabsskatteloven) or section 1 of the Danish Act on Taxable Nonstock Corporations (fondsbeskatningsloven) and who are not deemed residents of a foreign country, Greenland, or the Faroe Islands in accordance with the provisions of a double taxation treaty, see , however, section 23A(3), shall be liable to tax on the following pension schemes:

1) Pension schemes subject to part 1 of the Danish Pension Taxation Act (pensionsbeskatningsloven). Except for:

a) schemes under the Danish Labour Market Supplementary Pension Fund (ATP) subject to section 2 of the Danish Pension Taxation Act, except for the Supplementary Labour Market Pension for Disability Pensioners (Den Supplerende Arbejdsmarkedspension for Førtidspensionister);

b) schemes under the Danish Employees Capital Pension Fund (Lønmodtagernes Dyrtidsfond (LD);

c) schemes paid by the Government as a result of previous employment with a municipality subject to section 2 of the Danish Pension Taxation Act;

d) annuity schemes not entitling to bonus that has been arranged before 1 May 1982;

e) schemes permitted under section 15D of the Danish Pension Taxation Act;

f) schemes with pension funds subject to subsection (2), no 9; and

g) schemes with the Danish pension funds ”Pensionskassen af 1925 for private eksamensskoler m.v.”, ”Pensionsfonden af 1951 for danske skoler i Sydslesvig”, ”Pensionskassen af 1950 for forskellige private, kirkelige institutioner” and the early retirement fund ”Efterlønskassen for lærere i friskolen og efterskolen”.

2) Pension accounts subject to section 42 of the Danish Pension Taxation Act.

3) Private pension accounts subject to section 51 of the Danish Pension Taxation Act and similar tax-privileged private pension accounts opened prior to 2 June 1998.

4) Separate Special Pension Savings (SP) accounts with banks or pension funds, see the Danish Labour Market Supplementary Pension Scheme Act (lov om Arbejdsmarkedets Tillægspension).

5) Pension schemes with Danish insurance companies etc subject to section 50 of the Danish Pension Taxation Act.

(2) Tax liability under this Act shall further rest on:

1) Pension funds which are domiciled in Denmark and which have obtained a permit or licence from the Danish Financial Supervisory Authority (Finanstilsynet) to carry on life business or pension fund business in Denmark, and pension funds which have a permit in a country that has implemented the Council Directive on labour market pension funds' activities and supervision thereof and which carry on pension fund activities in Denmark through a permanent establishment, see section 21(b) of the Danish Supervision of Company Pension Funds Act (lov om tilsyn med firmapensionskasser).

2) Pension funds exempt from tax liability under section 3(1), no 9, of the Danish Corporation Tax Act.

3) The Danish Social Pension Fund (Den Sociale Pensionsfond).

4) The Danish Labour Market Supplementary Pension Fund.

5) The Danish Employees Capital Pension Fund.
6) Relief and aid funds approved under section 52 of the Danish Pension Taxation Act and other relief and aid funds with a pension-related object.
7) Labour market life insurance companies subject to section 307 of the Danish Financial Business Act (lov om finansiel virksomhed).
8) Life insurance companies under administration subject to sections 253 to 258 of the Danish Financial Business Act, part 8 of the Danish Supervision of Company Pension Funds Act or similar supervisory legislation in another EU country or in a country with which the EU has entered into an agreement about the financial sector with the object of managing a closed pension portfolio from a liquidated pension fund subject to no 1 or a closed life insurance portfolio from a liquidated labour market life insurance company subject to section 307 of the Danish Financial Business Act.
9) Pensions funds established prior to 28 November 2007 for which their Articles of Association stipulate that no new members may be admitted, and for which the agreed contributions are not increased after 28 November 2007. It shall be a condition that the pension fund has decided on taxation in accordance with this subsection in connection with its transition to taxation under this Act. The decision shall be binding.
10) Life insurance companies that are liable to tax under the Danish Corporation Tax Act, including life insurance companies that carry on insurance business in Denmark through a permanent establishment.
11) Insurance companies which are domiciled in Denmark or which carry on insurance business in Denmark through a permanent establishment in so far as the insurance companies mentioned have a closed life insurance portfolio from a liquidated life insurance company.
12) Life insurance companies under administration subject to sections 253 to 258 of the Danish Financial Business Act or similar supervisory legislation in another EU country or in a country with which the EU has entered into an agreement about the financial sector that administers a closed life insurance portfolio from a liquidated life insurance company subject to no 10 or 11.
13) The Special Pension Savings Scheme (Den Særlige Pensionsopsparing), see the Danish Labour Market Supplementary Pension Scheme Act.
g) The Danish pension funds "Pensionskassen af 1925 for private eksamensskoler m.v.", "Pensionsfonden af 1951 for danske skoler i Sydslesvig", "Pensionskassen af 1950 for forskellige private, kirkelige institutioner" and the early retirement fund "Efterlønskassen for lærere i friskolen og efterskolen".

Part 2

Taxable return

2(1) Tax shall be paid at the rate of 15% on the taxable return to the state.

3(1) In the determination of the tax base, all types of returns on capital shall be included:
1) schemes with banks and credit institutions specified in part 1 of the Danish Pension Taxation Act;
2) private pension accounts opened prior to 2 June 1998 as specified in section 51 of the Danish Pension Taxation Act, and similar tax-privileged private pension accounts opened prior to 2 June 1998; and
3) accounts specified in section 42 of the Danish Pension Taxation Act.

(2) Loss on claims shall not be included in the calculation if interest income on such claims or profits on such claims are not to be included in the computation of the tax base as a result of the double taxation treaty.

(3) When calculating the taxable interest on cash accounts which is added on the basis of the return on securities that are separated from other securities belonging to the bank or credit institution, the entire annual net return shall be taken into account. If a profit or loss exists on the deposit when closing the account, such difference shall be included in the computation of the tax base.

6(1) The institutes specified in section 1(2) nos 3 to 6, 9 and 14 and The Special Pension Savings Scheme under section 1(2), no 13, shall include all types of return on capital in their determination of the tax base. For the Danish Labour Market Supplementary Pension Fund, the portion of the return on capital attributable to the Supplementary Labour Market Pension for Disability Pensioners (Den Supplerende Arbejdsmarkedspension for Førtidspensionister) shall not be included in the computation of the tax base.

(2) Sections 4, 5 and 8 of the Danish Gains on Securities and Foreign Currency Act (kursgevinstloven) shall apply correspondingly.

(3) Pension funds subject to section 1(2) nos 9 and 14 shall not be liable to tax on the portion of the return on capital attributable to insurance or pension fund schemes that are subject to sections 53A or 53B of the Danish Pension Taxation Act, and insurance which is not subject to the Danish Pension Taxation Act and which is only payable in the event of illness, invalidity or death of the insured party prior to the agreed date of expiry of the insurance if such date does not come later then the first policy date after the insured party has turned 80. The tax base under subsections (1) and (2) shall be reduced by the percentage corresponding to the ratio of pension provisions for the pension schemes in question to equity and liabilities as stated in the financial statements plus any capital reduction in the income year.

(4) When calculating the reduction under subsection (3), the portion relating to savings in investment funds shall be disregarded when determining the tax base and pension provisions. If the insurance and pension fund schemes as specified in subsection (3), first sentence, are connected with investment funds, the reduction pursuant to subsection (3) hereof shall be increased by the policy holders' and pensions savers' portions of the entire tax base for each investment fund in question.

(5) Pension funds subject to section 1(2) nos 9 and 14 shall not be liable to tax on the return on capital that is attributable to insurance and pension agreements with municipalities for their public service pension obligations. The tax base shall be reduced by the percentage corresponding to the ratio of equity and liabilities of the insurance and pension agreements in question to equity and liabilities according to the financial statements plus any capital reduction in the income year. Subsection 4 shall apply correspondingly.

(6) The provisions and equity and liabilities as specified in subsections (3) to (5) shall be calculated by the end of each income year. Any state guarantee or state commitment to cover losses shall be deducted in the calculation. Furthermore, provisions for reinsurance and custody accounts taken over that are equal to provisions for reinsurance shall be disregarded.

(7) Pension funds subject to section 1(2) nos 9 and 14 shall not be liable to tax on the portion of the return on capital which is attributable to pension provisions plus a pro rata share of non-distributed bonus reserves for insurance and pension agreements effective at the end of 1982 and which are still effective at the end of the income year, however for each type of insurance or pension agreement no more than the premium reserve calculated at the end of 1982 plus distributed bonus which has not been transferred to the premium reserve, and a pro rata share of non-distributed amounts held in the bonus fund at such time except for provisions for annuity schemes not entitling to bonus arranged prior to 1 May 1982. The tax base under this section shall be reduced by a percentage corresponding to the ratio of provisions as specified in the first sentence to equity and liabilities according to the financial statements plus any capital reductions in the income year. The provisions and equity and liabilities specified in the first sentence shall be calculated by the end of each income year. Any state guarantee or state commitment to cover losses shall be deducted in the calculation. Furthermore, provisions for reinsurance and custody accounts taken over that are equal to provisions for reinsurance shall be disregarded. For members of pension funds, where the pension scheme was not based on tariffs, and where the pension payment has not yet started, the portion of the provision exempted in accordance with the first sentence shall be distributed based on the present value of the commitment to each member. The present value shall be multiplied by the ratio of the number of years the person in question has been a member of the pension fund by the end of 1982 to the number of years he/she has been a member of the pension fund when the pension payment should normally start. Instead, the pension fund may decide to distribute the provisions based on the present value of the individual member's pension commitment minus the present value of future ordinary contributions, however no less than the present value of the ordinary contributions paid for the member net risk premium.

(8) The tax base shall be reduced in accordance with subsections (3) to (5) concurrently with reducing the tax bases under subsection (7). The same provision may, however, only be used to reduce the tax base once.

7(1) The pension funds etc specified in section 1(2) nos 1, 2, 7 and 8 shall take into account all types of return on capital in determining the tax base, see , however, subsection (2).

(2) When determining the tax base, the following may be deducted:

1) amounts individually included under provisions as interest etc to cover liabilities in respect of pension schemes as specified in section 1(1);
2) amounts individually included under provisions as interest etc to pension-eligible persons whose pension schemes are subject to sections 53A and 53B of the Danish Pension Taxation Act;
3) amounts for insurance which is not subject to the Danish Pension Taxation Act and which may only be payable in the event of illness, invalidity or death of the insured party prior to the agreed date of expiry if such date does not come later than the first policy date after the insured party has turned 80;
4) amounts for insurance and pension agreements with municipalities for their public service commitments;
5) amounts for children's savings schemes subject to section 51 of the Danish Pension Taxation Act;
6) amounts for annuity schemes not entitling to bonus that have been arranged prior to 1 May 1982;
7) direct payments of the income year's return on investment to the pension-eligible persons specified in nos 1 to 6;
8) amounts provided for pension schemes subject to section 15D of the Danish Pension Taxation Act;
9) amounts provided for pension schemes subject to section 53D of the Danish Pension Taxation Act; and
10) amounts provided for pension schemes arranged by the company's foreign branch in the Faroe Islands or Greenland and whose owner is not liable to tax in accordance with section 1 of the Danish Withholding Tax Act or whose owner is liable to tax in accordance with section 1 of the Danish Withholding Tax Act, but is resident in a foreign country, in the Faroe Islands, or Greenland, under the provisions of a double taxation treaty.

(3) Sections 4, 5 and 8 of the Danish Gains on Securities and Foreign Currency Act shall apply correspondingly.

8(1) Life insurance companies and insurance companies etc as specified in section 1(2) nos 10 to 12 shall be liable to tax on non-distributed funds, interest and amounts from equity which are added to technical provisions, see subsection (4), in accordance with subsections (2) to (6).

(2) Non-distributed funds shall mean provisions for collective bonus potential, non-distributed collective special bonus provisions and accumulated value adjustment, see the Danish Financial Business Act and the Danish Executive Order on financial reports for insurance companies and cross-industry pension funds which are not liable to tax under section 4(5) or section 4A(3).

(3) For life insurance companies and insurance companies that are domiciled abroad, in Greenland, or the Faroe Islands, and which carry on insurance business in Denmark through a permanent establishment, see section 1(2) nos 10 to 12, non-distributed funds shall mean all forms of provisions etc for the benefit of the pension-eligible persons which are not included in his/her tax base under section 4 or section 4A. Life insurance companies or insurance companies as specified in section 1(2) nos 10 to 12, domiciled abroad, in Greenland, or the Faroe Islands, shall, for financial reporting purposes, separate the insurance provisions for insurance taken out in Denmark.

(4) The tax base shall be determined as the non-distributed funds calculated at the end of the income year minus the non-distributed funds calculated at the beginning of the income year. To the tax base under the first sentence shall be added interest and positive amounts from equity outside the current year’s risk result and administration result added to technical provisions that are not part of the non-distributed funds, see subsection (2), or part of the policy-holder's custody accounts, see section 4(2) or section 4A(2), no 1, second sentence. Any negative risk and administration result for technical provisions shall be added to the tax base under the second sentence. A positive administration result for a prior year may be added to the year's negative administration result, and a positive risk result for a prior year may be added to the year's negative risk result. It shall be a condition for set-off under the fourth sentence that the pension institute can document that the saved funds from either equity or non-distributed funds that are applied for off-setting against a year’s negative administration result originate from a positive administration result for technical provisions from years prior to the income year and that the saved funds from either equity or non-distributed funds applied for off-setting in a year’s negative risk result originate from a positive risk result for technical provisions from the years prior to the income year. In so far as the non-distributed funds have changed as a result of taxation under subsection (1), the change shall be disregarded when determining the tax base.

(5) Life insurance companies and insurance companies etc, as specified in section 1(2) nos 10 to 12 shall in the tax base computed under subsection (4) disregard the change in the accumulated risk and expense profits or losses for the non-distributed funds during the income year in so far as the change has occurred after the transition to taxation under this Act. Non-distributed funds transferred to taxation under sections 4 or 4A or subsection (4), third sentence, shall, however, always reduce the tax base in accordance with subsection (4).

(6) In the tax base computed in accordance with subsection (4), non-distributed funds, interest and amounts from equity that are attributable to technical provisions, see subsection (4), shall be disregarded if they relate to:

1) pension schemes subject to sections 53A and 53B of the Danish Pension Taxation Act;
2) insurance which is not subject to the Danish Pension Taxation Act and which may only be payable in the event of illness, invalidity or death of the insured party prior to the agreed date of expiry of the insurance if such date does not come later than the first policy date after the insured party has turned 80;
3) insurance and pension agreements with municipalities for their public service commitments;
4) children's savings schemes subject to section 51 of the Danish Pension Taxation Act;
5) annuity schemes not entitling to bonus that have been arranged prior to 1 May 1982;
6) pension schemes subject to section 15D of the Danish Pension Taxation Act;
7) pension schemes subject to section 53 of the Danish Pension Taxation Act; and
8) pension schemes that have been arranged in the company’s branch abroad in the Faroe Islands, or Greenland, and whose owner is not liable to tax in accordance with section 1 of the Danish Withholding Tax Act or whose owner is liable to tax in accordance with section 1 of the Danish Withholding Tax Act, but is resident in a foreign country, in the Faroe Islands or Greenland, under the provisions of a double taxation treaty.

(7) Any surrender charge that has been deducted at the determination of the tax base under sections 4 or 4A, shall, however, always augment the tax base under subsection (4).

15(1) When determining the tax base, interest income that has been payable in the income year, see, however, section 23, shall be included in accordance with section 3. When computing the tax base in accordance with sections 6 and 7, the interest income which has accrued in the income year shall be included. Any interest on tax amounts under this Act shall be allocated to the year of payment.

(2) Profit or loss from the operation of real property or other commercial activity than insurance or pension fund activity shall be calculated in accordance with the ordinary rules on taxable income of Danish tax law. The rules on tax depreciation of buildings and installations shall not apply. Gains or losses from the divestment of any other commercial activity than insurance or pension business shall be calculated in accordance with Danish tax law's ordinary rules governing taxable income, see, however, subsection (3),

(3) Gain or loss on bonds, mortgage deeds and other claims, financial contracts, investment certificates, shares in public and private limited companies, share certificates and convertible bonds as well as real property shall be calculated as the difference between the value of the asset in question at the end of the income year and the value at the beginning of the income year (the market-value principle). If the asset is acquired in the income year, any gain or loss shall be calculated as the difference between the value at the end of the income year and the acquisition price translated into cash value, see, however, subsection (6). If the asset has been realised in the income year, any gain or loss shall be calculated as the difference between the selling price translated into cash value and the value at the beginning of the income year. If the asset is acquired and sold in the same income year, any gain or loss shall be calculated as the difference between the selling price translated into cash value and the acquisition price translated into cash value, see, however, subsection (6). Section 27 of the Danish Capital Gains Tax Act (Aktieavancebeskatningsloven) shall apply to calculations under the first, second and fourth sentences. Liquidation proceeds that are distributed from public limited companies, private limited companies, unit trusts, etc in the calendar year in which the company is finally dissolved, shall be deemed the selling price. If a previously tax-exempt asset becomes taxable, such asset shall be deemed acquired at market value at the time when the tax liability arises. If a previously taxable asset becomes tax-exempt, any gain or loss shall be calculated as if the asset has been sold at market value at the time when the tax liability ceased. For assets denominated in a foreign currency, the value shall be calculated in DKK.

(4) Subsection (3) shall also apply to any gain or loss on debt.

(5) In the event of a company's cancellation of treasury shares, the market price of the cancelled treasury shares at the beginning of the year shall be excluded from the company's portfolio of the shares in question at the beginning of the income year. If shares that have been acquired in the income year are cancelled, the acquisition price of the company's entire portfolio of treasury shares acquired in the income year shall be allocated proportionately between the cancelled shares and the shares that the company keeps. Cancellation of treasury shares shall be considered to take place proportionately between shares acquired at the beginning of the income year and shares acquired during the income year.

(6) When calculating gains or losses on real property to which a grant has been made in accordance with the Danish Act on subsidised private youth housing (Lov om støttede private ungdomsboliger), the acquisition price translated into cash value net of the grant shall be applied.

(7) When calculating gains or losses on shares in public or private limited companies that have not been admitted to trading in a regulated market or through a multilateral trading facility in which a taxpayer subject to section 1(1) has invested savings in one of the savings schemes specified in section 12 or 13 of the Danish Pension Taxation Act or sections 11A, 15A and 15B, see section 11A of the said Act, the higher amount of either the acquisition price or the company's book value per share according to the most recently presented financial statements shall be applied as a basis for the taxation of the shares in public or private limited companies in accordance with subsection (3) per 15 November at the beginning of the income year and at the end of the income year when the shares are not traded on a regulated market or through a multilateral trading facility. If the shares of the company carry different rights, adjustments shall be made for this when calculating the company's book value per share in accordance with the first sentence if such different rights affect the value of the shares. The taxpayer shall, once a year and no later than 1 December in the income year in question, inform the bank about the values calculated in accordance with the first and second sentences for the purpose of taxation pursuant to this Act. If the taxpayer does not inform the bank in due time about the values in accordance with the first and second sentences, the bank shall use the acquisition price to determine market-value taxation in accordance with subsection (3). The rules in sentences 1 to 4 shall apply to shares of a limited partnership company in which a taxpayer subject to section 1(1) has invested savings in one of the savings schemes specified in section 12 or 13 of the Danish Pension Taxation Act or section 11A, 15A and 15B, see section 11A of the Danish Pension Taxation Act, of the said Act.

20(1) Tax paid in a foreign country, Greenland, or the Faroe Islands, may be deducted against tax under this Act in accordance with section 33(1) and (2) of the Danish Tax Assessment Act (ligningsloven). Pursuant to section 33(1), second sentence, all of the income taxed in Denmark shall be computed as the tax base that is equal to tax pursuant to this Act after deduction of any negative tax, see section 17 and any tax under subsection (3).

(2) A taxpayer's account may be set up for taxes under this Act on gains or losses on an asset if the gain or loss on the asset in question may be taxable in a foreign country, Greenland, or the Faroe Islands, and such gain or loss is added in under the market value principle when calculating the return. The account shall include the pro rata share of the taxpayer's tax on foreign assets that is equal to the tax on gains on the asset and which are not eligible for deduction under subsection (1). If tax to a foreign country, Greenland, or the Faroe Islands, on current increases in value, that may be eligible for deduction under subsection (1), exceeds the pro rata share of the taxpayer's tax equal to a gain on the asset, the excess amount that can be accommodated in the balance may be deducted against the taxpayer's remaining tax under this Act. The balance shall be reduced by the deducted amount. If a deductible amount cannot be accommodated in the taxpayer's other tax under this Act, the amount shall be paid in cash. If a loss has been incurred for the asset, negative tax shall be computed that is to be reduced in the balance.

(3) If tax under this Act is less than the foreign tax deduction, see subsection (1), taxpayers shall have the right to carry forward any tax paid to a foreign country, Greenland, or the Faroe Islands, that is not deductible against tax for the year, together with any negative tax under this Act. The amount eligible for carry-forward shall be is calculated in accordance with subsection (1) and shall be the smaller amount of either tax paid to a foreign country, Greenland, or the Faroe Islands, or Danish tax on the positive foreign tax base eligible for relief. The relief carry forward may only be made if documented that no relief has been granted for tax in a foreign country on the same income at company level or to the pension-eligible person.

(4) Life insurance companies liable to tax pursuant to the Danish Corporation Tax Act shall be entitled to deduct under subsection (1) any tax under section 8 if such deduction has not been made against tax under the Danish Corporation Tax Act.

The Danish Tax Assessment Act
(ligningsloven)
Consolidation Act No 1017 of 28/10/2011

33(1) Tax paid to a foreign country, to Greenland, or to the Faroe Islands, and imposed on income from sources there, either through direct imposition or through the withholding of tax, shall be eligible for deduction from those income taxes paid to the State and municipalities which are payable on income in Denmark. However, the deductible amount cannot exceed the share of total Danish tax payable on the portion of income first mentioned, depending on the ratio of the portion of income taxable in a foreign country, in Greenland, or in the Faroe Islands, to total income taxable in Denmark.

(2) If a treaty has been entered into with a foreign country, with Greenland, or with the Faroe Islands, to avoid double taxation, however, deduction shall not be allowed for any tax amount exceeding the amount that the foreign country, Greenland, or the Faroe Islands have an absolute right to receive under the treaty.

(3) When, as part of a merger, demerger, or contribution of assets, a contributing company residing in Denmark transfers assets held in a permanent establishment or real property which is located in another EU Member State to a recipient company residing in another EU Member State, Danish taxation shall be reduced at such transfer. Danish taxation shall be reduced in accordance with subsections (1) and (2) or in accordance with the provisions of the double taxation treaty entered into with the Member State in which the permanent establishment, or real property, is located, by the tax that the Member State could have imposed on profits or capital gains of the permanent establishment, or real property, at the transfer, had the merger, demerger, or contribution not been subject to Council Directive 90/434/EEC.

(4) When, as part of a merger, demerger, contribution of assets, or an exchange of shares, a contributing company that resides in a foreign country and is considered a transparent entity for purposes relating to taxation in Denmark transfers assets, equity and liabilities to a recipient company covered by the definition of a company residing in a Member State as provided in Article 3 of Council Directive 90/434/EEC, Danish taxation is reduced at such transfer. Danish taxation shall be reduced in accordance with subsections (1) and (2), or in accordance with the provisions of the double taxation treaty entered into with the relevant Member State by the tax that the Member State could have imposed on profits or capital gains of the contributing company at the transfer, had the company not been covered by the definition of a company residing in a Member State as provided in Article 3 of Council Directive 90/434/EEC.

(5) If, pursuant to section 5(7) and (8) of the Danish Corporation Tax Act (selskabsskatteloven), a company, or an association etc, are to include capital gains on assets, equity and liabilities when calculating its income, Danish tax shall be reduced in accordance with subsections (1) and (2), or in accordance with the provisions of the double taxation treaty by the tax that the foreign country concerned, Greenland, or the Faroe Islands, could have imposed on profits or capital gains of a permanent establishment, or real property, had the permanent establishment, or real property, been divested at the same time.

(6) Tax paid to a foreign country, the Faroe Islands, or Greenland, on jointly taxed companies which are not liable to pay tax under section 1 of the Danish Corporation Tax Act may only be deducted from Danish tax pursuant to subsection (1). Danish tax charged on jointly taxed, foreign companies under section 2 of the Danish Corporation Tax Act shall be included in foreign tax pursuant to the first sentence. The provisions of any double taxation treaty shall not apply. If several companies residing in the same country are jointly taxed, their respective income shall be calculated on a combined basis. The calculation of combined income according to the fourth sentence shall also include Danish companies' permanent establishments that reside in the same country and that are jointly taxed where taxation is reduced for profits earned on permanent establishments under the credit

method. Where a jointly taxed company which has suffered a loss that has been deducted from other companies' taxable income and that is not cancelled out by later years' profits decides not to make all possible deductions when calculating income earned in a foreign country, the Faroe Islands, or Greenland, the increased amount to be paid in foreign tax for the income year concerned shall not be included in the calculation pursuant to the first sentence.

(7) Subsection (1) shall not apply to earned income subject to section 33 A, section 5, or section 8 of the Danish Act on Taxation of Seamen (lov om beskatning af søfolk).

(8) Freight tax paid to a foreign country that exceeds Danish tax on income earned in the foreign country, see subsection (1), second sentence, may be carried forward for deduction from tax in subsequent income years. According to the first sentence, freight tax carried forward may only be deducted in a subsequent year in so far as freight tax plus freight tax paid for the year under review does not exceed Danish tax, which is imposed on foreign income for the year under review. Tax on gross profits earned on international shipping shall be considered freight tax.

33 F (1) When calculating the maximum reduction of Danish tax in accordance with the provisions of section 33 of the Danish Tax Assessment Act, or in accordance with the provisions of a treaty entered into with a foreign country, Greenland, or the Faroe Islands to avoid double taxation, expenses considered to relate to income earned abroad shall be deducted when calculating such income, however, see subsection (3).

(2) Expenses which are not attributable to either Danish or foreign income shall be allocated in accordance with the ratio of Danish gross income to foreign gross income, however, see subsection (3).

(3) If an exporter grants a loan to a buyer as part of a sale of goods etc on credit, interest expenses etc, as referred to in section 5(1), resulting from such sale shall not be excluded from the calculation of foreign income.

Danish Corporation Tax Act

Selskabsskatteloven
Consolidation Act no 1376 of 7 December 2010

Part I

Tax liability

1(1) Pursuant to this Act the following companies and associations etc that are domiciled in Denmark shall be liable to tax:

Registered public limited companies and private limited companies;

2) Other companies in which none of the members are personally liable for the company's obligations and which distribute profits relative to the capital contributed to the company by the members, as well as companies subject to section 2C of this Act;

2) Savings banks, co-operative savings banks, associations of co-operative savings banks under sections 89 to 96 of the Danish Financial Business Act (lov om finansiel virksomhed), as well as associations formed pursuant to section 207 of the Danish Financial Business Act.

2b) (Repealed).

2c) (Repealed).

2d) DSB.

2e) electricity companies, which for the purpose of this Act shall mean companies etc the activities of which include generation, transport, trade or provision of electricity. Tax liability shall apply regardless of the company's form of organisation. However, registered public limited companies shall be subject to no 1 hereof. If the activities referred to in the first sentence are carried out by a partnership, its partners shall be taxed under the rules of this provision, see, however, section 3(7) of this Act. Generation and use of electricity in trains, ships, aircraft or other means of transportation and generation of electricity in back-up power units in cases of failure of the usual power supply do not give rise to tax liability under this provision if the company does not otherwise engage in such activities as referred to in the first sentence.

2f) municipalities carrying on grid activities and other activities that are either subject to section 2(1) of the Danish Electricity Supply Act (elforsyningsloven) or exempted under section 2(4) of the said Act from the provisions of the Danish Electricity Supply Act (trade in electricity), see, however, section 1(1), no 1 and 2e. Tax liability shall extend to income from such activities as well as profits or losses from divestment, disposal or relinquishment of assets which are or have been associated with such activities. If the municipality generates electricity and heat in combination, tax liability shall extend to income from the generation of heat as well. Income from the generation of electricity and heat arising from the burning of waste shall, however, be exempted from tax liability;

2g) Energinet dk;

2) water supply companies subject to section 2(1) of the Danish Act on the organisation and economic conditions of the water sector (Lov om vandsektorens organisering og økonomiske forhold) and wastewater utility companies, which for the purpose of this Act shall mean companies etc processing and transporting wastewater for other parties and doing so for payment. Tax liability shall apply regardless of the form of organisation of the water supply company and the wastewater utility company. However, registered public limited companies shall be subject to no 1 hereof. If the activities referred to in the first sentence are carried out by a partnership, a limited partnership or a limited partnership company, its partners, general partner and limited partners, respectively, shall be taxed under the rules of this provision;

2i) Naviair

3) co-operative societies, which for the purpose of this Act shall mean societies the object of which shall be to promote the joint commercial interests of at least ten members by way of their participation in the society's activities as buyers, suppliers or in any similar way, the sales of which to non-members do not significantly or do not for a longer period of time exceed 25 percent of total sales, and which use such sales to their members, except for normal interest on capital paid up by members, as a basis for distributing dividend to them. Co-operative societies may be subject to the first sentence even if they hold shares in companies that do not satisfy the conditions in the first sentence;

3a) consumer co-operatives which do not fall within the meaning of no 3, the object of which is to promote the joint interests of their members by way of their participation in the activities of the consumer co-operative or its wholly-owned or partially-owned companies, provided that supplies are used in whole or in part for the members' or the member associations' private use, and provided that any distribution of dividend, apart from ordinary interest on any capital paid up by members, to members, possibly only to private members in accordance with the rules of the consumer co-operative, takes place on the basis of sales of the consumer co-operative and any selected underlying companies to the relevant members or the consumer co-operative decides, in the event of dissolution, to distribute amounts in favour of the consumer co-operative movement or for the promotion of general consumer interests subject to permission by the National Tax Board;

4) associations, the object of which is to promote its members' joint professional interests through their participation in the association's activities as buyers, suppliers or in any other similar way and which are not subject to no 2, 3 or 3a,

5) mutual insurance associations not subject to sections 294-303 of the Danish Financial Business Act unless they solely carry on health insurance activities and the customs and tax administration has decided that the insurance association in question shall be subject to no 6 as well as companies, associations etc which have been established as a result of changing a mutual insurance association after this company or association etc has transferred its insurance activities, see section 14D of the Danish Merger Taxation Act (fusionsskatteloven) and which are not subject to no 1 or no 2 or the Danish Act on Taxable Nonstock Corporations (fondsbeskatningsloven);

5a) unit trusts issuing negotiable certificates for members' contributions, except for investment companies, see section 19(2) of the Danish Capital Gains Tax Act (aktieavancebeskatningsloven), and except for distributing unit trusts, see section 16C of the Danish Tax Assessment Act (ligningsloven);

5b) funds and associations as specified in sections 214 to 216 of the Danish Financial Business Act, KommuneKredit and Dansk Eksportfinansieringsfond;

6) other associations, corporations, institutes, foundations and independent institutions, see, however, section 3, in so far as the association etc is not subject to the Danish Act on Taxable Nonstock Corporations. Tax liability shall extend only to income from commercial business as well as profits or losses from divestment, disposal or relinquishment of assets which are or have been associated with such activity.

(2) When determining the membership in the co-operative societies specified in subsection (1), no 3, group companies shall be considered one member. The decision as to whether any group companies exist shall be made in accordance with the provisions of section 4(2) Danish Capital Gains Tax. If one of the members in a co-operative society is a co-operative society subject to subsection (1), no 3, members of such co-operative society shall be included when determining the membership.

(3) The limitation specified in subsection (1), no 3, according to which sales to non-members shall not exceed 25 percent of total sales, shall be considered significantly overrun if sales to non-members in an income year exceed 35 percent of total sales. The over-run shall be considered to be for a longer period of time if sales to non-members in each of three consecutive income years exceed 25 percent. If sales to non-members again fall below 25 percent of total sales, the association shall not subject to subsection (1), no 3, until this has been the case for each of three consecutive income years. When determining sales to members and non-members, respectively, the division of sales is used that is applied to compute taxable income, see sections 15 to 16A.

(4) Income from trading or other activities, including from operation, renting and leasing out real property, shall be considered income from commercial business for the associations etc specified in subsection (1), no 6. In the event that an association etc is entitled to a share in the profit of a commercial business that is not operated by the association itself, the income arising there from shall be considered commercial income for the association etc;; this shall not, however, apply to relief and aid funds for a business' employees or former staff members and workers or their next of kin.

(5) Profit that the associations etc specified in subsection (1), no 6, gains from deliveries to members shall not be considered gained from commercial business.

(6) Companies and associations etc subject to subsection (1), nos 2 to 6, shall be considered domiciled in Denmark if management is domiciled in Denmark. This shall apply regardless of wherever the company or association etc is may be registered. The provision of sentences one and two shall, however, not apply to a company or association etc that is subject to full tax liability in a foreign country in accordance with the tax rules of such country if Denmark's double taxation treaty with the country in question implies that Denmark must grant relief on the double taxation of income from a permanent establishment in the country in question by reducing the Danish tax on such income by an amount greater than the amount paid in tax on such income in the country in question.

(7) A certificate-issuing, distributing unit trust or account-keeping unit trust shall only be subject to subsection (1), no 6, if it has at least eight members unless effective marketing is performed towards the public or a large portion thereof with a view to bringing up the number of members. Pursuant to section 4 of the Danish Gains on Securities and Foreign Currency Act, group members shall be considered one member in this respect.

(8) A certificate-issuing, distributing unit trust or account-keeping unit trust with less than eight members which does not comply with the requirements of subsection (7), shall, however, be subject to subsection (1), no 6, if any unit trust certificates are registered in the holder's name in accordance with a requirement hereof in the statutes, and if, in accordance with a requirement in those statutes, only members are admitted that are legal entities and where none of the participants in those legal entities are taxed directly of the profit on the unit trust certificate or of distribution from the unit trust in accordance with the governing rules on individuals. Certificate-issuing, distributing unit trusts and account-keeping unit trusts may not be eligible as members.

2(1) Tax liability under this Act shall furthermore be incumbent on companies and associations etc as specified in section 1(1) that are domiciled abroad in so far as they:

a) carry on commercial business with a permanent establishment in Denmark, see, however, subsection (5). Carrying on commercial business on board a ship registered in Denmark shall be considered as carrying on commercial business with a permanent establishment in Denmark if the commercial business in question, had they been carried on on shore, would be considered as carrying on commercial business with a permanent establishment in Denmark. The tax liability extends to carrying on commercial business with a permanent establishment in Denmark or participation in a commercial business with a permanent establishment in Denmark. The tax liability shall furthermore include income in the form of current payments originating from such business or from the sale of such business when the payments are not dividend, repayment of a receivable, interest or royalties. The tax liability shall also include lease-out of any such business. Construction and assembling work shall be considered a permanent establishment from day one. The tax liability shall furthermore include profit or loss from divestment, disposal or relinquishment of assets related to such business. In so far as shares are concerned, the tax liability for permanent establishments, except for companies subject to section 2A(1), shall extend to gains, losses and dividends from the company's shares when the return relates to the permanent establishment, including any gain, loss and dividend on shares included in the permanent establishment's fixed capital as well as the balance of tax losses for future recapture under section 31A.

case for each of three consecutive income years. When determining sales to members and non-members, respectively, the division of sales is used that is applied to compute taxable income, see sections 15 to 16A.

(4) Income from trading or other activities, including from operation, renting and leasing out real property, shall be considered income from commercial business for the associations etc specified in subsection (1), no 6. In the event that an association etc is entitled to a share in the profit of a commercial business that is not operated by the association itself, the income arising there from shall be considered commercial income for the association etc;; this shall not, however, apply to relief and aid funds for a business' employees or former staff members and workers or their next of kin.

(5) Profit that the associations etc specified in subsection (1), no 6, gains from deliveries to members shall not be considered gained from commercial business.

(6) Companies and associations etc subject to subsection (1), nos 2 to 6, shall be considered domiciled in Denmark if management is domiciled in Denmark. This shall apply regardless of wherever the company or association etc is may be registered. The provision of sentences one and two shall, however, not apply to a company or association etc that is subject to full tax liability in a foreign country in accordance with the tax rules of such country if Denmark's double taxation treaty with the country in question implies that Denmark must grant relief on the double taxation of income from a permanent establishment in the country in question by reducing the Danish tax on such income by an amount greater than the amount paid in tax on such income in the country in question.

(7) A certificate-issuing, distributing unit trust or account-keeping unit trust shall only be subject to subsection (1), no 6, if it has at least eight members unless effective marketing is performed towards the public or a large portion thereof with a view to bringing up the number of members. Pursuant to section 4 of the Danish Gains on Securities and Foreign Currency Act, group members shall be considered one member in this respect.

(8) A certificate-issuing, distributing unit trust or account-keeping unit trust with less than eight members which does not comply with the requirements of subsection (7), shall, however, be subject to subsection (1), no 6, if any unit trust certificates are registered in the holder's name in accordance with a requirement hereof in the statutes, and if, in accordance with a requirement in those statutes, only members are admitted that are legal entities and where none of the participants in those legal entities are taxed directly of the profit on the unit trust certificate or of distribution from the unit trust in accordance with the governing rules on individuals. Certificate-issuing, distributing unit trusts and account-keeping unit trusts may not be eligible as members.

2(1) Tax liability under this Act shall furthermore be incumbent on companies and associations etc as specified in section 1(1) that are domiciled abroad in so far as they:

a) carry on commercial business with a permanent establishment in Denmark, see, however, subsection (5). Carrying on commercial business on board a ship registered in Denmark shall be considered as carrying on commercial business with a permanent establishment in Denmark if the commercial business in question, had they been carried on on shore, would be considered as carrying on commercial business with a permanent establishment in Denmark. The tax liability extends to carrying on commercial business with a permanent establishment in Denmark or participation in a commercial business with a permanent establishment in Denmark. The tax liability shall furthermore include income in the form of current payments originating from such business or from the sale of such business when the payments are not dividend, repayment of a receivable, interest or royalties. The tax liability shall also include lease-out of any such business. Construction and assembling work shall be considered a permanent establishment from day one. The tax liability shall furthermore include profit or loss from divestment, disposal or relinquishment of assets related to such business. In so far as shares are concerned, the tax liability for permanent establishments, except for companies subject to section 2A(1), shall extend to gains, losses and dividends from the company's shares when the return relates to the permanent establishment, including any gain, loss and dividend on shares included in the permanent establishment's fixed capital as well as the balance of tax losses for future recapture under section 31A.

b) in their capacity as owner, co-owner, consumer or receiver of income receives income of a real property located in Denmark. Tax liability shall furthermore extend to profit from the disposal of real property subject to the Danish Act on Taxation of Profit from Sale of Real Property (ejendomsavancebeskatningsloven) or section 21 of the Danish Act on Amortisation and Depreciation (afskrivningsloven);

c) receive dividend subject to section 16A(1) and (2) of the Danish Tax Assessment Act, except for distributions from distributing unit trusts, see section 16C(1) of the Danish Tax Assessment Act, that only invests in claims subject to the Danish Gains on Securities and Foreign Currency Act, shares in the management company that conducts the unit trust's administration, and derivative financial instruments pursuant to the Danish Financial Supervisory Authority's rules thereon, or receive consideration subject to section 16B Danish Tax Assessment Act. Contributions to group enterprises, see section 31D, shall also be regarded as dividend if the receiver of such contributions, as parent company to the contributor, would have been liable to tax on dividend according to this provision. However, this tax liability shall not extend to dividends from subsidiary shares, see section 4A of the Danish Capital Gains Tax Act, when taxation of dividends from the subsidiary is to be waived or reduced pursuant to the provisions of Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states or pursuant to a double taxation treaty with the Faroe Islands, Greenland, or the country in which the parent company is domiciled. The tax liability shall not extend to dividend on group company shares, see section 4B of the Danish Capital Gains Tax Act, that are not subsidiary shares when the dividend-receiving group company is domiciled in a country that is a member of the EU/EEA, and dividend tax should have been waived or reduced under the provisions of Council Directive 90/435/EEC or the double taxation treaty with the country in question if the shares had been subsidiary shares. Also, the tax liability shall not extend to dividend received by members of parent companies that are included on the list of companies that are dealt with in Article 2(1)(a) of Council Directive 90/435/EEA on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states, but which are considered transparent entities for taxation purposes in Denmark. It shall be a precondition that the member is not registered in Denmark;

d) receive interest from sources in Denmark relating to an amount(s) which a company or an association etc being subject to section 1 or (a) hereof owes to legal entities as referred to in section 3(B) of the Danish Tax Control Act (also referred to as controlled debt). This, however, shall not apply to interest on claims which relate to a permanent establishment being subject to (a). The tax liability shall not apply to interest if taxation of interest is to be waived or reduced under Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different member states, or under a double taxation treaty with the Faroe Islands, Greenland, or the country in which the receiving company etc is domiciled. However, this only applies if the paying company and the receiving company are associated, as specified in this directive, for an uninterrupted period of at least one year within which the payment must be made. Tax liability shall become void if a Danish parent company etc itself has control – either directly or indirectly – over the receiving company etc, see section 31(C), for an uninterrupted period of at least one year within which the payment must be made. Tax liability shall also become void if the receiving company etc is controlled by a parent company etc which is domiciled in the Faroe Islands, Greenland, or any country having signed a double taxation treaty with Denmark if this company etc may be made subject to CFC taxation of the interest under the rules applicable in the Faroe Islands, Greenland, or any such country if the relevant conditions laid down in the said legislation have been met. In addition, tax liability shall also become void if the receiving company etc is able to prove that the foreign corporation tax on the interest represents at least three fourths of the Danish corporation tax, and that it does not pay the interest through to another foreign company etc which is liable to pay corporation tax on the interest which is less than three fourths of the Danish corporation tax;

e) receive income from Denmark that, pursuant to section 43(2)(h) of the Danish Tax Assessment Act, should be included under income taxed at source if paid to a person;

f) receive income as advisor, consultant or for other assistance for an enterprise in Denmark. It shall, however, be a condition that a person, who is or has been liable to tax under section 1, no 1 of the Danish Withholding Tax Act, takes direct or indirect part in the management of, control over or the capital in the foreign company or the foreign association etc and takes, or has at any time within the past five years prior to the cessation of full tax liability, taken, direct or indirect part in the management of, control over or the capital in the enterprise in Denmark that pays the remuneration. When deciding this matter, it shall be taken into account whether, when it regards a company etc, the person owns or has owned 25 percent or more of the share capital or has had available to him more than 50 percent of the voting power in the company. Section 4(2) of the Danish Capital Gains Tax Act shall apply correspondingly. If the paying enterprise is privately owned, it shall be taken into consideration whether the person in question owns or has owned 25 percent or more of equity or has or has had decisive influence over the enterprise. The criteria laid down for shareholders shall apply correspondingly,

g) receive royalty originating from sources in Denmark, see section 65C(4) of the Danish Withholding Tax Act. This shall, however, not apply to royalty of an exclusive right that is related to a permanent establishment subject to (a). The tax liability shall not extend to royalty subject to Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different member states. However, this shall only apply if the paying company and the receiving company are associated, as specified in this directive, for an uninterrupted period of at least one year within which the payment must be made;

h) receive capital gains from sources in Denmark on claims incurred on such terms that debt is to be repaid at a pre-fixed premium relative to the value at the time of acceptance, provided that the debtor is a company or an association etc subject to section 1 or (a), and the creditor is an affiliate of the debtor as stated in section 3B of the Danish Tax Control Act (controlled debt). The taxable capital gains are calculated as the difference between the value of the claim at the time of acceptance and the repayment amount agreed upon. If repayment is based on instalments, the calculation shall include an amount corresponding to the difference between the repayment amount less acquisition cost and the repayment amount. The provisions of (d) shall apply correspondingly for the capital gains.

(2) Pursuant to subsection 1(a), (b) and (f), the tax liability shall only extend to income from the income sources specified therein. Pursuant to subsection (1)(c), the income tax shall be 28 percent of total dividends on selling prices. However, the income tax rate on dividend or selling prices shall be 15 percent if the competent authority of the country, Greenland, or the Faroe Islands, in which the company etc is domiciled, is obliged to share information with the Danish authorities pursuant to a double taxation treaty, another international treaty or convention, or any agreement concluded departmentally for assistance in tax cases. The tax liability has been fully met by the enterprise withholding dividend tax in accordance with section 65 of the Danish Withholding Tax Act or tax payable in accordance with section 65A(1) of the Danish Withholding Tax Act. It shall be a condition for applying the third sentence that the company etc owns less than 10 percent of the share capital in the dividend-paying company. If the company etc is domiciled in a country outside the EU, it shall furthermore be a condition that, together with group parties, see section 2 of the Danish Tax Assessment Act, it owns less than 10 percent of the share capital in the dividend-paying company. The second to sixth sentences shall also extend to companies domiciled in a foreign country, Greenland, or the Faroe Islands under a double taxation treaty. Pursuant to subsection 1(d) and (h), income tax shall be 25 percent of interest and selling prices. The tax liability is fully met by the enterprise withholding interest tax pursuant to section 65 D of the Danish Withholding Tax Act. Pursuant to subsection (1)(e), the tax liability has been fully met by the tax paid in accordance with section 65B of the Danish Withholding Tax Act. The income tax shall be 25 percent of the royalty amount according to subsection (1)(g).

The tax liability is fully met by the enterprise withholding royalty tax pursuant to section 65 C of the Danish Withholding Tax Act.

(3) The parties authorised to represent in Denmark the companies and associations etc liable to limited tax, as specified in subsection 1, shall be co-responsible for the payment of tax.

(4) The provisions of subsections (1) to (3) shall apply correspondingly to companies and associations etc domiciled in Greenland or the Faroe Islands.

(5) Sales activities in the form of distance selling alone through a representative with authorisation to bind the principal, but who is not engaged as an employee by the principal, shall not mean a permanent establishment for the principal. Distance selling shall mean the representative's receipt of orders from Danish or foreign customers via phone, telex, fax, mail, EDI (Electronic Data Interchange) or similar media. It shall be a condition that not the principal or a group company etc related thereto, see section 4(2) of the Danish Capital Gains Tax Act, or a person or any next of kin to that person, who controls the principal or a group company, see section 16H(6), third to fifth sentence, or a fund or trust established by one of these companies, persons or next of kin in Denmark shall carry on commercial business related to the representative's sales.

(6) Subsections (1) to (3) shall not apply to companies specified in section 2C that are domiciled abroad, in Greenland, or on the Faroe Islands.

3 The following are exempted from tax liability:

1) The state and its institutions, see, however, section 1(1), nos 2d, 2g and 2i.

2) The regions and municipalities as well as regional and municipal enterprises and institutions, see, however, subsection (7) and section 1(1), nos 2f and 2h.

3) Recognised religious communities and churches established in support of these or the Evangelical Lutheran Church in Denmark.

4) Harbours, including airports, open to public traffic as well as gas plants and district heating stations when the access to supply from the plant or station is open to all in the area in which the plant or station is operated, in so far as the income of the harbour, plant or station, except for normal return of any contributed capital, may only be applied for the purpose of the harbour, plant or station as stipulated in the statutes. The pre-conditions of the first sentence shall have been met even if a harbour or airport is engaged in activities that fall outside their purpose if such activities are carried on in a subsidiary liable to tax.

4a) Water supply companies utility etc not subject to section 2(1) of Danish Act on the organisation and economic conditions of the water sector. It shall be a condition that supplies from the water supply companies is open to all within the area in which the water supply companies operate and that its income, except for normal return on any contributed capital, may only be applied for the purpose of the company pursuant to its statutes.

5) Schools, hospitals, government-approved convalescent homes, 24-hour care centres for children and young people, as well as government-approved residence centres for children and young people, libraries under government supervision and museums accessible to the public in so far as they are independent institutions, and their income may be used for the purpose of the institution alone. Schools etc are exempted from tax liability even if they have activities in the form of generation of electricity and heat implying that the preconditions of the first sentence have not been fulfilled. Exemption shall, however, not apply to income from generation of electricity and heat.

6) The National Building Fund (Landsbyggefonden) and housing organisations approved by local councils to carry on ordinary housing activities, in so far as the income – except for ordinary return on any contributed capital – may, according to the provisions of the statutes, only be used to promote non-profit housing or similar housing for a purpose approved by the Danish Ministry of Housing, Urban and Rural Affairs, including sale of ordinary family homes pursuant to part 5(a) of the Danish Act on Social Housing etc (lov om almene boliger

mv.) and supported private co-operative housing etc. Housing organisations shall be exempt from tax even if they are engaged in activities in the form of generation of electricity and heat which implies non-compliance with the preconditions in the first sentence. Exemption shall, however, not apply to income from generation of electricity and heat. The preconditions of the first sentence shall have been met even if the housing organisation or a department of the housing organisation is engaged in activities that fall outside the main purpose specified in the first sentence if such activities are carried on in a subsidiary liable to tax. In the event of renting for a purpose other than housing that is part of the housing organisation's main purpose or which is subject to section 6(2) of the Danish Act on Social Housing etc on 31 December 2005, it shall, however, not be a requirement that such renting takes place through a subsidiary liable to tax.

7) Danmarks Nationalbank.

8) The Danish Labour Market Supplementary Pension Fund.

9) Pension funds subject to supervision under the Danish Supervision of Company Pension Funds Act (lov om tilsyn med firmapensionskasser) or the Danish Financial Business Act. Other pension funds shall be exempt from tax liability in so far as the customs and tax administration so decides in each individual case.

10) Such associations as are exempt from tax in accordance with the Danish Act no 246 of 9 May 1917 on auctions etc of farmers associations and smallholders associations (lov nr. 246 af 9. maj 1917 om landboforeningers og husmandsforeningers auktioner m.m.), see Act no 80 of 4 March 1949. Such exemption shall, however, only extend to income from the relevant associations' ordinary activities in accordance with their statutes, and shall not include income from operating, renting or leasing out real property or any other activities.

11) The redevelopment companies specified in the Danish Act on urban renewal (lov om sanering), the statutes of which have been approved by the Danish Minister of Housing, Urban and Rural Affairs if such statutes stipulate that income except for usual return on any contributed capital may solely be used for redevelopment.

12) The Danish Labour Market Occupational Disease Insurance (Arbejdsmarkedets Erhvervssygdomssikring).

13) The Danish Employees Capital Pension Fund.

14) The Financial Stability Company (Finansiel Stabilitet A/S) as specified in the Danish Act on Financial Stability (lov om finansiel stabilitet).

15) The urban renewal companies mentioned in the Danish Act on urban renewal and housing improvement, the statutes of which have been approved by the Danish Minister of Housing, Urban and Rural Affairs if such statutes stipulate that income except for ordinary return on any contributed capital may solely be used for assisting local councils and owners in improving, planning and performing urban renewal and housing improvements in accordance with the provisions in the said Act.

16) The regional TV2 entities.

17) The Industrialisation Fund for Developing Countries (Industrialiseringsfonden for Udviklingslandene), the Investment Fund for Central and Eastern Europe (Investeringsfonden for Østlandene) and the Investment Fund for Emerging Markets (Investeringsfonden for Vækstmarkeder).

18) Labour market life insurance companies subject to section 307 of the Danish Financial Business Act.

19) Investment companies, see section 19 of the Danish Capital Gains Tax Act, except for account-keeping unit trusts, see section 2 of the Danish Act on taxation of members of account-keeping unit trusts (lov om beskatning af medlemmer af kontoførende investeringsforeninger), and except for dividend distributing unit trusts, see section 16 C(1) of the Danish Tax Assessment Act. Dividend as subject to section 16A(1) and (2) of the Danish Tax Assessment Act, that a company, which is subject to the first sentence receives from a company domiciled in Denmark, shall, however, be taxed at the rate of 15percent. The second sentence shall not extend to dividend received from a dividend-distributing unit trust, see section 16C of the Danish Tax Assessment Act, that solely invests in claims subject to the Danish Gains on Securities and Foreign Currency Act and

in derivative financial instruments subject to the rules thereon of the Danish Financial Supervisory Authority, and dividend received from a dividend-distributing unit trust, see section 16C(1) of the Danish Tax Assessment Act, or another investment company, see the first sentence, if they may not, as stipulated in the statutes, invest in shares or units in other companies domiciled in Denmark. Selling prices subject to section 16 B(1) of the Danish Tax Assessment Act from the divestment of shares or units in companies shall be taxed at the rate of 15 percent. The fourth sentence shall not extend to selling prices from the divestment of unit trust certificates with a dividend-distributing unit trust, see section 16C(1) of the Danish Tax Assessment Act, that solely invests in claims subject to the Danish Gains on Securities and Foreign Currency Act and in derivative financial instruments subject to the rules thereon of the Danish Financial Supervisory Authority, as well as selling prices from the divestment of shares in companies that may not, as stipulated in its statutes, invest in shares or units in other companies domiciled in Denmark. Irrespective of the third and fifth sentences, the unit trust, investment company or company shall be entitled to hold shares in the management company that deals with the administration of the unit trust or company.

(2) The associations etc specified in section 1(1), no 6, shall be entitled to deduct, hen preparing their statement of taxable income, any distributions made to perform on the purposes set out in the statutes that can be considered charitable or otherwise have a non-profit purpose. In the event that the association has other income than the commercial income, the non-commercial income shall be considered used for a charitable purpose or any other non-profit purpose before any portion of the taxable income shall be considered used for such purpose.

(3) Provisions that associations etc make for the safeguarding of subsequent use for a charitable purpose or any other non-profit purpose, shall equate to distributions as specified in subsection (2). The Danish Minister of Taxation shall lay down specific rules on financial reporting requirements relating to such provisions, including that the provisions shall be effectively separated from the association's other funds, and that management shall be obliged to not making the provided amount available to the association's other activities. If the amounts are used for other purposes than the charitable purposes or any other non-profit purposes, such amounts, plus 25 percent, shall be included in the computation of taxable income for the income year in which they have been used. If the other income of the association is negative, the amounts shall be taxed with addition of the tax rate applicable in the income year in question.

(4) The rules specified in subsections (2) and (3) shall also apply to the public limited companies and other companies, as specified in section 1(1), no 1 and 2, when the predominant portion of the share capital is owned by a charitable association or other non-profit association etc. Income earned by the public limited company etc in the income year shall in this respect be considered earned in the same income year by the association etc that holds the share capital, and taxes imposed on the public limited company or co-operative society shall be considered imposed on the association etc that holds the share capital.

(5) The rules of subsection (1) governing exemption from tax liability shall not apply to tax liability under section 2(1)(c), and tax liability under the Danish Hydrocarbon Tax Act (kulbrinteskatteloven) in so far as income as specified in section 4 of the said Act is concerned.

(6) An undertaking of the type specified in subsection (1), no 4, shall be exempted from tax liability regardless of the limitation specified in the provision for applying the undertaking's income not being included in its statutes if it is considered ruled out to amend such statutes. It shall be a precondition that, in the event of liquidation of the undertaking, any distribution shall not exceed the contributed capital and that the undertaking complies with the limitation for applying its income as determined in subsection (1), no 4.

(7) Municipalities liable to tax on income from carrying on commercial grid activities and other activities that are either subject to section 2(1) of the Danish Electricity Supply Act (elforsyningsloven) with respect to supply of electricity, or exempted under section 2(4) of the said Act from the provisions of the Danish Electricity Supply Act

(trade in electricity), see, however, subsection (8) and section 1(1), nos 1 and 2e. Tax liability shall, however, not extend to income from generation of electricity and heat arising from the burning of waste. If municipalities carrying on business activities under the first sentence generate electricity and heat in combination, tax liability shall extend to income from the generation of heat too. Tax liability shall also extend to profits or losses from divestment, disposal or relinquishment of assets which are or have been associated with trade in electricity. Possession of shares etc in electricity companies shall not be considered trade in electricity under the first sentence.

(8) For municipalities that want to shift to taxation under section 1(1), no 2f, from taxation under section 3(7), section 5C(2) shall apply correspondingly with respect to assets and equity and liabilities that are subject to taxation before and after the shift. The values calculated in accordance with section 35O(6) shall replace the selling prices specified in section 5C(2). Section 5D shall apply correspondingly to other assets and equity and liabilities.

(9) A company shall be entitled to shift to tax exemption under subsection (1), no 18, effective from the beginning of the income year in which such amendment of the statutes is made that cause the preconditions for tax exemption to be met, irrespective of the preconditions not having been met at the beginning of the income year. It shall be a precondition that the company does not pay dividend to its owners in the income year in question.

3A As referred to in section 1(1), the provisions of subsections (2 to 7) shall apply to public limited companies, the capital of which is fully and directly held throughout the income year by a life insurance company or a pension fund liable to pay tax under the Danish Pension Investment Returns Tax Act, at least 90 percent of whose assets on average consist of real property for the income year. Full, indirect ownership through a life insurance company or a pension fund liable to pay tax under the Danish Pension Investment Returns Tax Act, or a public limited company as mentioned in the first sentence, shall equate to full, direct ownership. A majority of taxpayers liable to pay tax under section 1(2) of the Danish Pension Investment Returns Tax Act which carries on business under a joint agreement shall be considered one company in this respect.

(2) When considering whether at least 90 percent of a public limited company's assets consist of real property, no account shall be taken of the value of shares held in another public limited company that is directly or indirectly owned in full by a life insurance company or a pension fund liable to pay tax under the Danish Pension Investment Returns Tax Act. Instead, the assets of the other public limited company shall be included.

(3) It shall be condition that the public limited company referred to in subsection (1), first sentence, shall have the same financial year as the life insurance company or the pension fund.

4 If the public limited company referred to in subsection (1), first sentence, is wholly owned by a life insurance company or a pension fund, the income earned by the public limited company during the income year shall be considered as having been earned in the same income year by the life insurance company or pension fund which is the immediate direct or indirect owner of the public limited company. If a public limited company is wholly owned by a majority of taxpayers liable to pay tax under section 1(2) of the Danish Pension Investment Returns Tax Act, see subsection (1), third sentence, a portion of income earned by the public limited company during the income year that corresponds to the average ownership interest shall be considered to have been earned by the owners during the same income year, however, see the third sentence. If an owner has decided to calculate taxable returns under section 13F, income earned by the public limited company during the income year shall be included in the owner's income pursuant to section 13F.

(5) The life insurance company or the pension fund shall be liable to pay tax, including residual tax, surcharges and interest, on income attributable under subsection (4) to the public limited company referred to in subsection (1), first sentence, however, see section 31(4) and section 31A(4), and the public limited company shall be jointly and severally liable for such tax.

(6) Any loss incurred by a public limited company referred to in subsection (1), first sentence, which remains unused upon transition to taxation under this section shall be deducted from profit earned on the public limited company's activities pursuant to section 15 of the Danish Tax Assessment Act. Such deduction shall be made

before the deduction of any loss incurred by the life insurance company, or other public limited companies, as referred to in subsection (1), first sentence, for the income year concerned.

(7) Any loss incurred by a public limited company as referred to in subsection (1), first sentence, which remains unused on transition to taxation under this section shall be deducted from profit earned by the public limited company in accordance with applicable law. Such deduction shall be made before the deduction of any loss incurred by the life insurance company, or other public limited companies, as referred to in subsection (1), first sentence, for the income year concerned.

(8) When a property company organised as a public limited company becomes liable to tax under this section, a tax liability equalling the tax base of the taxable profit that would have been earned, had the real property of the public limited company been sold at market value at the time of transition to such taxation, shall be computed. The tax base shall be computed using the tax rate applicable to the income year under section 17(1), with taxation being effected in accordance with this section. If the public limited company is owned by a pension fund that is not liable to pay tax under this Act, and if the public limited company disposes of real property as referred to in the first sentence, the tax liability shall be classified as tax payable by the public limited company for the income year concerned. If the selling price of the real property is lower than its market value upon transition to taxation under this section, the selling price shall be used to compute the tax liability. The tax liability shall cease to exist when the public limited company is no longer subject to this section, or when the property is sold.

9 The companies and associations referred to in section 1(1), nos 2f and 6, section 2(1)(a, b and f), and section 3(7) may only deduct expenses relating to sources of income, the income from which is taxable, when computing taxable income. Companies or associations etc subject to section 1(1) which are considered to reside in a foreign country, the Faroe Islands, or Greenland, under the provisions of a double taxation treaty, may only deduct expenses relating to income which can be taxed in Denmark under the treaty.

(2) The consumer co-operatives liable to pay tax under section 1(1)(i)(no 3a) shall, when computing the taxable income, be entitled to deduct dividend, additional payments or bonus which is granted to the members for the financial year in question. A condition for this shall be that the dividend etc is not tax-exempt for the members pursuant to section 16A(4),no 2 of the Danish Tax Assessment Act. It shall also be a condition in this respect that the dividend etc has been determined definitely by the consumer co-operative no later than six months after the beginning of the financial year concerned. If the dividend etc is increased after expiry of this time-limit, the amount by which the dividend for the financial year concerned has been increased cannot be deducted when computing the taxable income for the income year concerned. Further, this increase cannot be deducted when computing the taxable income for subsequent income years.

(3) The restrictions stated in subsection 2 on access to deduct dividend etc do not extend to discounts.

13 The taxable income shall not include:

1) Any premium obtained by a company when issuing shares or increasing its share capital.

2) Dividend received by the companies and associations, etc referred to in section 1(1),nos 1 to 2a, 2d to 2i, 3a to 5b, from shares or units in companies subject to section 1(1), nos 1 to 2a, 2d to 2i and 3a to 5b, or companies domiciled abroad. However, this applies only to dividend from subsidiary shares and group company shares, see sections 4A and 4B of the Danish Capital Gains Tax Act. The provision in the first sentence shall not extend to dividend where the dividend-paying company may deduct the distributed dividend unless the taxation abroad is waived or reduced pursuant to the provisions of Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member

States. The provision in the first sentence shall not extend to dividend from shares referred to in section 19 of the Danish Capital Gains Tax Act. The provision in the first sentence shall apply correspondingly if the recipient of dividend is a similar company or association etc as referred to in section 2(1)(a), and the company or association etc is domiciled in a foreign country that is a member of the EU or EEC, or in the Faroe Islands or in Greenland or in a country having a double taxation treaty with Denmark. When determining whether a company or association etc as referred to in section 2(1)(a) complies with the conditions stated in the second sentence, all shares held by the company or association etc in the dividend-distributing company shall be taken into account.

3) Amounts received by a company domiciled in Denmark, see section 1(1),nos 1, 2, 2e, 2f and 2h, as dividend on treasury shares or units. The provision shall apply correspondingly if the recipient of dividend is a similar company or association etc as referred to in section 2(1)(a), and the company or association etc is domiciled in a foreign country that is a member of the EU or EEC, or in the Faroe Islands or in Greenland or in a country having a double taxation treaty with Denmark.

(2) When computing their taxable income under the rules of subsections (3-9) or section 13F, insurance companies may deduct amounts used for tax under section 8 of the Danish Pension Investment Returns Tax Act in so far as the tax for the income year under section 8 of the said Act has reduced provisions for the income year or payments to the insured parties for the income year which corresponds to the income year under this Act, and amounts provided in respect of the obligations towards the insured parties in the form of insurance provisions and the statutory equalisation reserves within credit and surety insurance.

(3) Dividend, and profit from sale of shares and real property, which is not to be included in an insurance company's or its jointly taxed subsidiary's taxable income, and subsequently dividends that are tax-exempt pursuant to a double taxation treaty shall to the greatest possible extent be considered used for payments to the insured parties, to the provisions stated in subsection (2), first sentence, and to tax under section 8 of the Danish Pension Investment Returns Tax Act before these amounts are eliminated from the taxable income. Dividends and gains from shares in the subsidiaries subject to the joint taxation scheme and treasury shares shall not be included in the insurance company's, the parent company's, computation of the stated dividends and gains. For the income year in which shares or real property is sold, the sum of dividend and gains as computed pursuant to the first and second sentences shall be reduced by a taxable profit from the sale. A deductible loss shall be added to the sum of dividends and gains as computed under the first and second sentences when selling shares or real property in the income year in which the loss is used for set-off. A company's unused deductible loss at year-end of the last income year in which dividends and gains in the relevant company may reduce the insurance company's right to deduct shall be added when the insurance company computes the sum of dividends and gains under the first and second sentences for the subsequent income year. The fourth and fifth sentences shall apply only in so far as the loss has affected the sum of dividends and gains under the first and second sentences in the insurance company in previous income years. If all shares in a jointly taxed subsidiary are not held directly or indirectly by the insurance company, the portion of the subsidiary's tax-exempted and relief-eligible dividends and gains that corresponds to the insurance company's average ownership interest in the subsidiary's share capital in the income year shall be included.

(4) For non-life insurance companies, the reduction of the right to deduct pursuant to subsection (3) shall at a maximum represent that portion of the company's tax-exempt and relief-eligible dividends and gains which equals the amount, by which the company's payments to the insured parties, the provisions stated in subsection (2), first sentence, and other deductible operating expenses exceed the company's taxable earned premium plus 50 percent of the technical interest net of reinsurance. The computation under the first sentence shall be effected by the company keeping, from year to year, an account of the company's total tax-exempt and relief-eligible dividends as well as tax-exempt gains and corresponding losses (general ledger account) and an account of the amount by which the company's payments to the insured parties, the provisions stated in subsection (2), first sentence, and other deductible operating expenses exceed the company's taxable earned premium plus 50 percent of the technical interest net of reinsurance (operating account). If the balance of the operating account is

positive, and the general ledger account also has a positive balance, the lower of these amounts shall be applied for the purpose of the first sentence. The balance of both accounts shall be reduced by the amount applied for the purpose of the first sentence, after which the remaining balances shall be carried forward to the next income year.

(5) If an insurance company is jointly taxed with another insurance company, a combined computation of tax-exempt and relief-eligible dividends and gains shall be made under subsection (3). The computed amount shall be distributed proportionately among the insurance companies, after which the limitation of deductibility is made under subsections (3) and (4), respectively. A combined computation shall be made for life insurance companies and non-life insurance companies under the first and second sentences. Insurance companies, which when making the proportionate distribution, use another insurance company's loss shall compensate the latter insurance company for the tax base of the loss. The compensation shall have no tax consequences for the companies. If a life insurance company directly or indirectly owns a non-life insurance company with which it is jointly taxed, any tax-exempt and relief-eligible dividends and gains etc which will not be considered as used for the non-life insurance company's payments to the insured parties and to the provisions stated in subsection (2), first sentence, and deductible operating expenses shall be transferred to the life insurance company, the parent company, for purposes of limiting the deductibility in this company.

(6) If, throughout the income year, an insurance company directly or indirectly owns 25 percent or more of one or more companies not subject to joint taxation, the insurance company, the parent company, shall also include tax-exempt and relief-eligible dividends and gains of the subsidiaries when applying the rules of subsections (3) and (4). From the subsidiaries, that portion of the tax-exempt and relief-eligible dividends and gains which corresponds to the parent company's average interest held in the subsidiary's share capital in the income year shall be included. Dividends and gains relating to the parent company's shares in the subsidiaries shall not be included. In so far as, under subsections (3) and (4), tax-exempt and relief-eligible dividends and gains in subsidiaries that are insurance companies are considered as used for payments to the insured parties, to the provisions stated under subsection (2), first sentence, and to tax under section 8 of the Danish Pension Investment Returns Tax Act of these companies, they shall not be taken into account in the parent company pursuant to the first and second sentences. For permanent establishments abroad carrying on insurance business and which are not subject to international joint taxation, the fourth sentence shall apply correspondingly.

(7) If the sum of dividends and gains computed pursuant to subsections (3), (5) and (6) for a life insurance company exceeds payments, provisions and tax pursuant to section 8 of the Danish Pension Investment Returns Tax Act as referred to in subsection (3), first sentence, the excess shall be included in the company's taxable income. If the sum is negative for the life insurance company, the amount shall be deducted when computing the company's taxable income. The deduction shall be made before carryforward of any unused losses from prior income years, and may not make the company's taxable income negative. Any remaining negative sum shall be eliminated from dividends and gains as calculated pursuant to subsections (3), (5) and (6) for subsequent income years. In the event of exemption from taxation under section 3, the company shall be entitled to receive the tax base computed using the percentage stated in section 17(1) of any remaining negative sum under the fourth sentence for the last income year in which the company is liable to pay tax. The amount received shall not be liable to tax. The fifth and sixth sentences shall apply correspondingly to life insurance companies for the income year in which the company's portfolio of life insurance policies is placed under administration pursuant to sections 253 to 258 of the Danish Financial Business Act, in that, under the fourth sentence, any remaining negative sum shall, however, be added to unused deductible losses which have affected the computation of the sum for the income year in which shares or real property have been sold. These unused losses cannot subsequently be used under the rules of the Danish Capital Gains Tax Act or the Danish Act on Taxation of Profit from the Sale of Real Property.

(8) Profits from the sale of shares and real property which is used for payments to the insured parties, to provisions stated in subsection (2), first sentence, and for tax under section 8 of the Danish Pension Investment Returns Tax Act and the gains referred to in subsection (3) shall be computed as the difference between the value at the end of the income year and the value at the beginning of the income year (the market-value principle). In respect of acquisitions and divestments during the income year, the selling price and acquisition price shall be included when computing profits from the sale of shares and real property as stated in the first sentence.

(9) When making computations under subsection (3) to (8), gains on shares that are received through an account-keeping unit trust are treated as capital gains received directly.

§ 13. The taxable income shall not include:

1) Any premium obtained by a company when issuing shares or increasing its share capital.

2) Dividend received by the companies and associations, etc referred to in section 1(1),nos 1 to 2a, 2d to 2i, 3a to 5b, from shares or units in companies subject to section 1(1), nos 1 to 2a, 2d to 2i and 3a to 5b, or companies domiciled abroad. However, this applies only to dividend from subsidiary shares and group company shares, see sections 4A and 4B of the Danish Capital Gains Tax Act. The provision in the first sentence shall not extend to dividend where the dividend-paying company may deduct the distributed dividend unless the taxation abroad is waived or reduced pursuant to the provisions of Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. The provision in the first sentence shall not extend to dividend from shares referred to in section 19 of the Danish Capital Gains Tax Act. The provision in the first sentence shall apply correspondingly if the recipient of dividend is a similar company or association etc as referred to in section 2(1)(a), and the company or association etc is domiciled in a foreign country that is a member of the EU or EEC, or in the Faroe Islands or in Greenland or in a country having a double taxation treaty with Denmark. When determining whether a company or association etc as referred to in section 2(1)(a) complies with the conditions stated in the second sentence, all shares held by the company or association etc in the dividend-distributing company shall be taken into account.

3) Amounts received by a company domiciled in Denmark, see section 1(1),nos 1, 2, 2e, 2f and 2h, as dividend on treasury shares or units. The provision shall apply correspondingly if the recipient of dividend is a similar company or association etc as referred to in section 2(1)(a), and the company or association etc is domiciled in a foreign country that is a member of the EU or EEC, or in the Faroe Islands or in Greenland or in a country having a double taxation treaty with Denmark.

(2) When computing their taxable income under the rules of subsections (3-9) or section 13F, insurance companies may deduct amounts used for tax under section 8 of the Danish Pension Investment Returns Tax Act in so far as the tax for the income year under section 8 of the said Act has reduced provisions for the income year or payments to the insured parties for the income year which corresponds to the income year under this Act, and amounts provided in respect of the obligations towards the insured parties in the form of insurance provisions and the statutory equalisation reserves within credit and surety insurance.

(3) Dividend, and profit from sale of shares and real property, which is not to be included in an insurance company's or its jointly taxed subsidiary's taxable income, and subsequently dividends that are tax-exempt pursuant to a double taxation treaty shall to the greatest possible extent be considered used for payments to the insured parties, to the provisions stated in subsection (2), first sentence, and to tax under section 8 of the Danish Pension Investment Returns Tax Act before these amounts are eliminated from the taxable income. Dividends and gains from shares in the subsidiaries subject to the joint taxation scheme and treasury shares shall not be included in the insurance company's, the parent company's, computation of the stated dividends and gains. For the income year in which shares or real property is sold, the sum of dividend and gains as computed pursuant to

the first and second sentences shall be reduced by a taxable profit from the sale. A deductible loss shall be added to the sum of dividends and gains as computed under the first and second sentences when selling shares or real property in the income year in which the loss is used for set-off. A company's unused deductible loss at year-end of the last income year in which dividends and gains in the relevant company may reduce the insurance company's right to deduct shall be added when the insurance company computes the sum of dividends and gains under the first and second sentences for the subsequent income year. 4. The fourth and fifth sentence shall apply only insofar as the loss has affected the sum of dividends and gains under the first and second sentences in the insurance company in previous income years. If all shares in a jointly taxed subsidiary are not held directly or indirectly by the insurance company, the portion of the subsidiary's tax-exempted and relief-eligible dividends and gains that corresponds to the insurance company's average ownership interest in the subsidiary's share capital in the income year shall be included.

(4) For non-life insurance companies, the reduction of the right to deduct pursuant to subsection (3) shall at a maximum represent that portion of the company's tax-exempt and relief-eligible dividends and gains which equals the amount, by which the company's payments to the insured parties, the provisions stated in subsection (2), first sentence, and other deductible operating expenses exceed the company's taxable earned premium plus 50 percent of the technical interest net of reinsurance. The computation under the first sentence shall be effected by the company keeping, from year to year, an account of the company's total tax-exempt and relief-eligible dividends as well as tax-exempt gains and corresponding losses (general ledger account) and an account of the amount by which the company's payments to the insured parties, the provisions stated in subsection (2), first sentence, and other deductible operating expenses exceed the company's taxable earned premium plus 50 percent of the technical interest net of reinsurance (operating account). If the balance of the operating account is positive, and the general ledger account also has a positive balance, the lower of these amounts shall be applied for the purpose of the first sentence. The balance of both accounts shall be reduced by the amount applied for the purpose of the first sentence, after which the remaining balances shall be carried forward to the next income year.

(5) If an insurance company is jointly taxed with another insurance company, a combined computation of tax-exempt and relief-eligible dividends and gains shall be made under subsection (3). The computed amount shall be distributed proportionately among the insurance companies, after which the limitation of deductibility is made under subsections (3) and (4), respectively. A combined computation shall be made for life insurance companies and non-life insurance companies under the first and second sentences. Insurance companies, which when making the proportionate distribution, use another insurance company's loss shall compensate the latter insurance company for the tax base of the loss. The compensation shall have no tax consequences for the companies. If a life insurance company directly or indirectly owns a non-life insurance company with which it is jointly taxed, any tax-exempt and relief-eligible dividends and gains etc which will not be considered as used for the non-life insurance company's payments to the insured parties and to the provisions stated in subsection (2), first sentence, and deductible operating expenses shall be transferred to the life insurance company, the parent company, for purposes of limiting the deductibility in this company.

(6) If, throughout the income year, an insurance company directly or indirectly owns 25 percent or more of one or more companies not subject to joint taxation, the insurance company, the parent company, shall also include tax-exempt and relief-eligible dividends and gains of the subsidiaries when applying the rules of subsections (3) and (4). From the subsidiaries, that portion of the tax-exempt and relief-eligible dividends and gains which corresponds to the parent company's average interest held in the subsidiary's share capital in the income year shall be included. Dividends and gains relating to the parent company's shares in the subsidiaries shall not be included. In so far as, under subsections (3) and (4), tax-exempt and relief-eligible dividends and gains in subsidiaries that are insurance companies are considered as used for payments to the insured parties, to the provisions stated under subsection (2), first sentence, and to tax under section 8 of the Danish Pension Invest-

ment Returns Tax Act of these companies, they shall not be taken into account in the parent company pursuant to the first and second sentences. For permanent establishments abroad carrying on insurance business and which are not subject to international joint taxation, the fourth sentence shall apply correspondingly.

(7) If the sum of dividends and gains computed pursuant to subsections (3), (5) and (6) for a life insurance company exceeds payments, provisions and tax pursuant to section 8 of the Danish Pension Investment Returns Tax Act as referred to in subsection (3), first sentence, the excess shall be included in the company's taxable income. If the sum is negative for the life insurance company, the amount shall be deducted when computing the company's taxable income. The deduction shall be made before carryforward of any unused losses from prior income years, and may not make the company's taxable income negative. Any remaining negative sum shall be eliminated from dividends and gains as calculated pursuant to subsections (3), (5) and (6) for subsequent income years. In the event of exemption from taxation under section 3, the company shall be entitled to receive the tax base computed using the percentage stated in section 17(1) of any remaining negative sum under the fourth sentence for the last income year in which the company is liable to pay tax. The amount received shall not be liable to tax. 5. The fifth and sixth sentence shall apply correspondingly to life insurance companies for the income year in which the company's portfolio of life insurance policies is placed under administration pursuant to sections 253 to 258 of the Danish Financial Business Act, in that, under the fourth sentence, any remaining negative sum is added to unused deductible losses which have affected the computation of the sum for the income year in which shares or real property have been sold. These unused losses cannot subsequently be used under the rules of the Danish Capital Gains Tax Act or the Danish Act on Taxation of Profit from the Sale of Real Property.

(8) Profits from the sale of shares and real property which is used for payments to the insured parties, to provisions stated in subsection (2), first sentence, and for tax under section 8 of the Danish Pension Investment Returns Tax Act and the gains referred to in subsection (3) shall be computed as the difference between the value at the end of the income year and the value at the beginning of the income year (the market-value principle). In respect of acquisitions and divestments during the income year, the selling price and acquisition price shall be included when computing profits from the sale of shares and real property as stated in the first sentence.

(9) When making computations under subsection (3) to (8), gains on shares that are received through an account-keeping unit trust are treated as capital gains received directly.

17(1)Income tax for the public limited companies and associations etc mentioned in section 1(1), no 1 to 2a, no 2d to 2i and 3a to 6, and section 3(7) shall be payable at the rate of 25 percent on the taxable income.

(2) If, in the taxable income of one of the companies and associations etc specified in section 1(1), no 1 to 2a, 2d to 2i and 3a to 5b, dividend is included from companies that are or have been domiciled abroad, and such dividend is not subject to tax exemption under section 13(1), no 2, the dividend-receiving company's, the parent company's, tax shall be reduced by the portion equal to the ratio of the received dividend to the taxable income. The reduction shall, however, not exceed the amount that the dividend-receiving company, the subsidiary, and any lower-level subsidiary, has paid in tax on the portion of the income that serves as the basis for the dividend to the parent company. It shall be a condition that the dividend-receiving company, the parent company, at any level owns no less than 10 percent of the share capital in the dividend-distributing company, the subsidiary, at the time of such distribution. Sentences one to three shall apply correspondingly if the dividend recipient is a similar company or association etc as referred to in section 2(1)(a), and the company or association etc is domiciled in the Faroe Islands or Greenland, an EU or EEC member state or a country having a double taxation treaty with Denmark. When determining whether a company or association etc as referred to in section 2(1)(a) complies with the conditions stated in the second sentence, all shares held by the company or association etc in the dividend-distributing company shall be taken into account.

(3) If the taxable income includes dividend from companies whose shares are subject to section 19 of the Danish Capital Gains Tax Act and which are or have been domiciled abroad, and such dividend is not subject to tax exemption under section 13(1), no 2, or subsection (2) hereof, the Danish customs and tax administration shall have the right, following an application, to waive a portion of the tax on the dividend-receiving company. However, no amount shall be waived that is greater than the amount, by which the sum of the amount that the dividend-distributing company has paid in tax on the portion of the income that serves as a basis for the dividend, and the amount that the dividend-receiving company has paid in tax on the portion of the dividend that equals the income, exceeds the sum of the amounts that should have been paid in tax by the dividend-distributing and dividend-receiving company, respectively, if the dividend-distributing company should have been taxed in Denmark on the income serving as the basis for the dividend.

(4) If a treaty has been entered into with a foreign country, with Greenland, or with the Faroe Islands, to avoid double taxation, however, it shall not be allowed, when determining the amount to be waived, see subsection (3), to take into account any amount of tax exceeding the amount that the foreign country, Greenland, or the Faroe Islands, have an absolute right to receive under the treaty.

(5) For the mutual insurance associations specified in section 1(1), no 5, income from commercial business shall be included in its entirety, see section 1(4) and (5), when computing the taxable income. The remaining total income shall, however, only be taxed in so far as it exceeds DKK 1 million.

21. The income tax for the foreign companies and associations referred to in section 2(1)(a, b and f) shall be the percentage stated in section 17(1) on the taxable income. Section 17(2) and (3) shall apply correspondingly if the recipient of dividend is a similar company or association, etc as referred to in section 2(1)(a), and the company or association etc is domiciled in a foreign country that is a member of the EU or EEC, or in the Faroe Islands or in Greenland or in a country having a double taxation treaty with Denmark. Section 13(1)(no 2), sixth sentence, shall apply correspondingly.

LBK nr 170 af 22/02/2011 Gældende
(Pensionsafkastbeskatningsloven)
Offentliggørelsesdato: 05-03-2011
Skatteministeriet

§§ 1, 2, 3, 6, 7, 8, 15, 20

Senere ændringer til forskriften

- LOV nr 1561 af 21/12/2010 § 1
- LOV nr 599 af 14/06/2011 § 3
- LOV nr 1378 af 28/12/2011 § 1

Oversigt (indholdsfortegnelse)

Den fulde tekst

Bekendtgørelse af pensionsafkastbeskatningsloven

Herved bekendtgøres pensionsafkastbeskatningsloven, lov nr. 1535 af 19. december 2007, med de ændringer, der følger af lov nr. 221 af 8. april 2008, § 1 i lov nr. 1339 af 19. december 2008, § 22 i lov nr. 1344 af 19. december 2008, § 13 i lov nr. 462 af 12. juni 2009, § 4 i lov nr. 1263 af 16. december 2009, § 1 i lov nr. 1278 af 16. december 2009, § 8 i lov nr. 724 af 25. juni 2010 og § 1, nr. 1-30 og 32-35, i lov nr. 1561 af 21. december 2010[1)].

Den ændring, der følger af § 1, nr. 31 i lov nr. 1561 af 21. december 2010, har virkning fra og med den 1. juli 2011. Denne ændring er derfor ikke indarbejdet i lovteksten nedenfor, men det fremgår af noten, hvilken paragraf, der ændres ved denne lov.

Kapitel 1
Skattepligten

§ 1. Pensionsberettigede, som er skattepligtige efter kildeskattelovens § 1, selskabsskattelovens § 1 eller fondsbeskatningslovens § 1, og som ikke anses for hjemmehørende i en fremmed stat, i Grønland eller på Færøerne efter bestemmelserne i en dobbeltbeskatningsoverenskomst, jf. dog § 23 a, stk. 3 skal betale skat efter denne lov af følgende pensionsordninger:

1) Pensionsordninger omfattet af kapitel 1 i pensionsbeskatningsloven. Dette gælder dog ikke
   a) ordninger i Arbejdsmarkedets Tillægspension (ATP) omfattet af § 2 i pensionsbeskatningsloven bortset fra Den Supplerende Arbejdsmarkedspension for Førtidspensionister,
   b) ordninger i Lønmodtagernes Dyrtidsfond (LD),
   c) ordninger, som udbetales af det offentlige som følge af tidligere ansættelse i kommunernes tjeneste omfattet af § 2 i pensionsbeskatningsloven,
   d) livrenter uden ret til bonus, der er tegnet før den 1. maj 1982,
   e) ordninger godkendt efter § 15 D i pensionsbeskatningsloven,
   f) ordninger i pensionskasser omfattet af stk. 2, nr. 9, og
   g) ordninger i Pensionskassen af 1925 for private eksamensskoler m.v., Pensionsfonden af 1951 for danske skoler i Sydslesvig, Efterlønskassen for lærere i friskolen og efterskolen og Pensionskassen af 1950 for forskellige private, kirkelige institutioner.
2) Pensionskonti omfattet af § 42 i pensionsbeskatningsloven.
3) Selvpensioneringskonti omfattet af § 51 i pensionsbeskatningsloven og lignende skattebegunstigede selvpensioneringskonti, der er oprettet før den 2. juni 1998.
4) Særskilte SP-konti i penge- eller pensionsinstitutter, jf. lov om Arbejdsmarkedets Tillægspension.
5) Pensionsordninger i danske forsikringsselskaber m.v., der er omfattet af pensionsbeskatningslovens § 50.

Stk. 2. Pligt til at betale skat efter denne lov påhviler endvidere:

1) Pensionskasser, der har hjemsted her i landet, og som har Finanstilsynets tilladelse eller koncession til at drive livsforsikringsvirksomhed eller pensionskassevirksomhed her i landet, og pensionskasser, der har tilladelse i et land, som har gennemført Rådets direktiv om arbejdsmarkedsrelaterede pensionskassers aktiviteter og tilsynet hermed, og som udøver pensionskassevirksomhed her i landet gennem et fast driftssted, jf. § 21 b i lov om tilsyn med firmapensionskasser.
2) Pensionsfonde, der er undtaget fra skattepligt efter selskabsskattelovens § 3, stk. 1, nr. 9.
3) Den Sociale Pensionsfond.
4) Arbejdsmarkedets Tillægspension.

§§ 1, 2, 3, 3A, 9, 17, 21

LBK nr 1376 af 07/12/2010 Gældende
(Selskabsskatteloven)
Offentliggørelsesdato: 14-12-2010
Skatteministeriet

Senere ændringer til forskriften

- LOV nr 513 af 07/06/2006 § 2
- LOV nr 459 af 12/06/2009 § 7
- LOV nr 254 af 30/03/2011 § 8
- LOV nr 624 af 14/06/2011 § 4
- LOV nr 1381 af 28/12/2011

Oversigt (indholdsfortegnelse)

Den fulde tekst

Bekendtgørelse af lov om indkomstbeskatning af aktieselskaber m.v. (Selskabsskatteloven)[1)]

Herved bekendtgøres lov om indkomstbeskatning af aktieselskaber m.v. (Selskabsskatteloven), jf. lovbekendtgørelse nr. 1001 af 26. oktober 2009, med de ændringer, der følger af § 10 i lov nr. 1273 af 16. december 2009, § 16 i lov nr. 529 af 26. maj 2010 og § 10 i lov nr. 724 af 25. juni 2010.

De ændringer, der følger af § 2 i lov nr. 513 af 7. juni 2006, træder i kraft efter skatteministerens nærmere bestemmelse. Disse ændringer er derfor ikke indarbejdet i lovteksten nedenfor, men det fremgår af noterne, hvilke paragraffer, der ændres ved denne lov.

Den ændring, der følger af § 7 i lov nr. 459 af 12. juni 2009, har virkning fra den 1. januar 2012. Denne ændring er derfor ikke indarbejdet i lovteksten nedenfor, men det fremgår af noterne, hvilken paragraf, der ændres ved denne lov.

Afsnit I

Skattepligten

§ 1. Skattepligt i henhold til denne lov påhviler følgende selskaber og foreninger mv., der er hjemmehørende her i landet:

1) indregistrerede aktieselskaber og anpartsselskaber,
2) andre selskaber, i hvilke ingen af deltagerne hæfter personligt for selskabets forpligtelser, og som fordeler overskuddet i forhold til deltagernes i selskabet indskudte kapital, samt selskaber omfattet af § 2 C,
2a) sparekasser, andelskasser, sammenslutninger af andelskasser efter §§ 89-96 i lov om finansiel virksomhed og foreninger oprettet i henhold til § 207 i lov om finansiel virksomhed,
2b) (Ophævet).
2c) (Ophævet).
2d) DSB.
2e) elselskaber, hvorved i denne lov forstås selskaber mv., i hvis aktiviteter indgår produktion, transport, handel eller levering af elektricitet. Skattepligten gælder uanset elselskabets organisationsform. Indregistrerede aktieselskaber omfattes dog af nr. 1. Hvis aktivitet som nævnt i 1. pkt. udøves af et interessentskab, beskattes interessenterne efter reglerne i denne bestemmelse, jf. dog § 3, stk. 7. Produktion og forbrug af elektricitet i tog, skibe, luftfartøjer eller andre transportmidler og produktion af elektricitet på nødstrømsanlæg i tilfælde, hvor den normale elektricitetsforsyning svigter, medfører ikke skattepligt efter denne bestemmelse, hvis selskabet ikke i øvrigt har aktiviteter som nævnt i 1. pkt.,
2f) kommuner, der driver netvirksomhed og øvrig virksomhed, som enten er omfattet af elforsyningslovens § 2, stk. 1, eller undtaget efter § 2, stk. 4, fra elforsyningslovens bestemmelser (elnæringsvirksomhed), jf. dog § 1, stk. 1, nr. 1 og 2 e. Skattepligten omfatter indtægt ved sådan virksomhed samt fortjeneste og tab ved afhændelse, afståelse eller opgivelse af formuegoder, der har eller har haft tilknytning til sådan virksomhed. Hvis kommunen producerer elektricitet og varme i samproduktion, omfatter skattepligten tillige indtægt ved varmeproduktion. Indtægt ved produktion af elektricitet og varme ved afbrænding af affald er dog undtaget fra skattepligten,
2g) Energinet dk,

France

Questionnaire

1) What are the conditions to qualify as an occupational pension provider in your country?
French law does not provide for any specific definition of an occupational pension provider. We only have different types of entities which usually deal with the management of funds paid by an employed person or self-employed person with the aim of receiving a retirement pension.
If your country has different types of pension providers, with different taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction. The two main entities are the "caisses de retraite" and the "institutions de retraite professionnelle". The taxation of these two entities is quite similar. In brief, capital gain realized on the direct disposal of real estate property is not taxable and rental income is taxed at the rate of 24%.

2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC.
Since the French entities mentioned above are based on a pay-as-you-go system, they do not qualify as an institution for occupational retirement provision within the meaning of article 6 of the Directive 2003/41/EC and are therefore excluded from the benefit of this Directive.

3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
   ii) If they are not subject to tax, please provide the original and the English translation of the text of the legal basis for the exemption.
   Article 206, 5 of the French Tax Code provides with the taxation of rental income realized by non-profit entities at the rate of 24%. This article does not provide with any specific taxation on capital gain. Then, capital gain realized by a non-profit entity upon disposal of real estate property is not taxable.

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein subject to tax on their income from directly held real estate (capital gains, rental income) in your country?

i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.

ii) If not, please provide the original English translation of the text of the legal basis for the exemption.
The French tax law does not provide with any specific taxation for pension providers from other EU Member States including the EEA States Norway, Iceland and Liechtenstein. Therefore, if a foreign pension provider qualifies as a non-profit organisation which is the main characteristic of the French pension providers, then it could benefit from the same tax rules of a French non-profit entity. In this context, a case law dated 27 October 2008 (min. c/Fondation Stichting Unilever Pensioenfonds Progress) has confirmed the non discrimination principle between domestic and foreign non-profit entity (based in a country with which France has concluded an income tax treaty containing a non discrimination clause).

Germany

Questionnaire

1) What are the conditions to qualify as an occupational pension provider in your country? If your country has different types of pension providers, with different taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction.
Occupational pension plans in Germany can be provided through five options: (1) direct promise by the employer (Direktzusage), (2) direct insurance by the employee with support of the employer, (3) Unterstützungskasse (support funds), (4) Pensionskasse or (5) Pensionsfonds. For purposes of the questionnaire, we focus on (3) – (5).

German pension schemes can basically be divided into:
(1) taxable pension schemes (Pensionsfonds) and
(2) tax exempt pension schemes (Pensionskasse and Unterstützungskasse if they fulfil certain requirements (see below (2)). The fulfilment of tax exemption requirements need to be checked for each year and can change over time. If the requirements are not fulfilled such pension schemes are subject to tax (see also the Appendix).

(1) Taxable pensions schemes are subject regular German Corporate Income Tax (CIT) at a rate of currently 15% plus 5.5% Solidarity Surcharge on the CIT amount and Municipal Trade Tax (TT) at rates depending on the municipalities involved at rates currently ranging

between 7%-17%. The tax base includes worldwide income and also income from real estate; however, certain tax rules applicable to life insurance companies apply (e.g. non-application of German participation exemption and building of certain pension provisions for tax purposes).

(2) In contrast tax exempt pension schemes are basically not subject to tax if they fulfil the requirements of Sec. 5 Para. 1 Sent. No. 3 KStG (Corporate Income Tax Code).

The tax exemption applies if the pension scheme has its domicile or management within the Federal Republic of Germany and possesses legal capacity. Sec. 5 Para. 1 Sent. No. 3 lit. (a) –(e) delivers strict conditions for the tax exemption of a Pensionskasse, which must be fulfilled:

(1) Legal capicity of the Pensionskasse (legal form of a VVaG or AG, i.e. stock corporation),
(2) Current or former employees are granted a direct claim,
(3) Exclusive Use of the fortune and income for the purpose of the Pensionskasse needs to be ensured in its legal documentation,
(4) Limitation of the fortune under insurance provisions,
(5) Pensionskasse needs to be a "social entity" (soziale Einrichtung), i.e. (a) shareholders or their relatives must not be the majority of the beneficiaries, (b) liquidation proceeds must be distributed to the beneficiaries and their relatives or charitable entities and (c) certain limitations for the claims of the beneficiaries must not be exceeded (Sec. 2 KStDV).
(6) Certain other requirements apply to Untertützungskassen (which do not provide for a direct claim of the beneficiaries) to achieve the tax exempt status) and for small pension schemes (see German text below 3).

2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC. *According to Art. 2 of the Directive 2003/41/EC, German occupational pension schemes fall under the scope of the Directive, if they do not fall under the exemptions (e.g. direct claims from an enterprise which builds pension provisions and Unterstützungskassen, as they operate on a pay-as-you-go basis are not covered).*

3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?

i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the

English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.

ii) If they are not subject to tax, please provide the original and the English translation of the text of the legal basis for the exemption.

See above 1) – there are no special tax exemptions applicable with respect to real estate.

German text of the (subjective tax exemption):

„§ 5 Befreiungen
(1) Von der Körperschaftsteuer sind befreit
...
3. rechtsfähige Pensions-, Sterbe- und Krankenkassen, die den Personen, denen die Leistungen der Kasse zugute kommen oder zugute kommen sollen (Leistungsempfängern), einen Rechtsanspruch gewähren, und rechtsfähige Unterstützungskassen, die den Leistungsempfängern keinen Rechtsanspruch gewähren,
a) wenn sich die Kasse beschränkt aa) auf Zugehörige oder frühere Zugehörige einzelner oder mehrerer wirtschaftlicher Geschäftsbetriebe oder bb) auf Zugehörige oder frühere Zugehörige der Spitzenverbände der freien Wohlfahrtspflege (Arbeiterwohlfahrt-Bundesverband e.V., Deutscher Caritasverband e.V., Deutscher Paritätischer Wohlfahrtsverband e.V., Deutsches Rotes Kreuz, Diakonisches Werk - Innere Mission und Hilfswerk der Evangelischen Kirche in Deutschland sowie Zentralwohlfahrtsstelle der Juden in Deutschland e.V.) einschließlich ihrer Untergliederungen, Einrichtungen und Anstalten und sonstiger gemeinnütziger Wohlfahrtsverbände oder cc) auf Arbeitnehmer sonstiger Körperschaften, Personenvereinigungen und Vermögensmassen im Sinne der §§ 1 und 2; den Arbeitnehmern stehen Personen, die sich in einem arbeitnehmerähnlichen Verhältnis befinden, gleich;
zu den Zugehörigen oder Arbeitnehmern rechnen jeweils auch deren Angehörige;

b) wenn sichergestellt ist, dass der Betrieb der Kasse nach dem Geschäftsplan und nach Art und Höhe der Leistungen eine soziale Einrichtung darstellt. 2Diese Voraussetzung ist bei Unterstützungskassen, die Leistungen von Fall zu Fall gewähren, nur gegeben, wenn sich diese Leistungen mit Ausnahme des Sterbegeldes auf Fälle der Not oder Arbeitslosigkeit beschränken;

c) wenn vorbehaltlich des § 6 die ausschließliche und unmittelbare Verwendung des Vermögens und der Einkünfte der Kasse nach der Satzung und der tatsächlichen Geschäftsführung für die Zwecke der Kasse dauernd gesichert ist;

d) wenn bei Pensions-, Sterbe- und Krankenkassen am Schluss des Wirtschaftsjahrs, zu dem der Wert der Deckungsrückstellung versicherungsmathematisch zu berechnen ist, das nach den handelsrechtlichen Grundsätzen ordnungsmäßiger Buchführung unter Berücksichtigung des Geschäftsplans sowie der allgemeinen Versicherungsbedingungen und der fachlichen Geschäftsunterlagen im Sinne des § 5 Abs. 3 Nr. 2 Halbsatz 2 des Versicherungsaufsichtsgesetzes auszuweisende Vermögen nicht höher ist als bei einem Versicherungsverein auf Gegenseitigkeit die Verlustrücklage und bei einer Kasse anderer Rechtsform der dieser Rücklage entsprechende Teil des Vermögens. Bei der Ermittlung des Vermögens ist eine Rückstellung für Beitragsrückerstattung nur insoweit abziehbar, als den Leistungsempfängern ein Anspruch auf die Überschussbeteiligung zusteht. 3Übersteigt das Vermögen der Kasse den bezeichneten Betrag, so ist die Kasse nach Maßgabe des § 6 Abs. 1 bis 4 steuerpflichtig;und

e) wenn bei Unterstützungskassen am Schluss des Wirtschaftsjahrs das Vermögen ohne Berücksichtigung künftiger Versorgungsleistungen nicht höher ist als das um 25 Prozent erhöhte zulässige Kassenvermögen. 2Für die Ermittlung des tatsächlichen und des zulässigen Kassenvermögens gilt § 4d des Einkommensteuergesetzes. 3Übersteigt das Vermögen der Kasse den in Satz 1 bezeichneten Betrag, so ist die Kasse nach Maßgabe des § 6 Abs. 5 steuerpflichtig;

4. kleinere Versicherungsvereine auf Gegenseitigkeit im Sinne des § 53 des Versicherungsaufsichtsgesetzes, wenn
a) ihre Beitragseinnahmen im Durchschnitt der letzten drei Wirtschaftsjahre einschließlich des im Veranlagungszeitraum endenden Wirtschaftsjahrs die durch Rechtsverordnung festzusetzenden Jahresbeträge nicht überstiegen haben oder

b) sich ihr Geschäftsbetrieb auf die Sterbegeldversicherung beschränkt und die Versicherungsvereine nach dem Geschäftsplan sowie nach Art und Höhe der Leistungen soziale Einrichtungen darstellen;

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein subject to tax on their income from directly held real estate (capital gains, rental income) in your country?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
   ii) If not, please provide the original English translation of the text of the legal basis for the exemption.

Corporate bodies without its legal seat or place of management in Germany are subject to non-resident taxation in Germany with their German source income including rental income and capital gains from German real estate (Sec. 2 KStG, Sec. 49 Para. 1 No. 2 lit. (f) EStG. The tax rate amounts to 15% Corporate Income Tax (if the real estate is not held in a German business which is subject to German Trade Tax).

The subective tax exemption according to Sec. 5 KStG (see above) does not apply to any pension scheme without both seat and place of management in Germany.

> *"§ 2 KStG Beschränkte Steuerpflicht*
> *Beschränkt körperschaftsteuerpflichtig sind*
> 1. *Körperschaften, Personenvereinigungen und Vermögensmassen, die weder ihre Geschäftsleitung noch ihren Sitz im Inland haben, mit ihren inländischen Einkünften; ..."*
>
> *§ 49 EStG Beschränkt steuerpflichtige Einkünfte*
> *(1) Inländische Einkünfte im Sinne der beschränkten Einkommensteuerpflicht (§ 1 Absatz 4) sind*
>
> *...*
>
> *2. Einkünfte aus Gewerbebetrieb (§§ 15 bis 17),*
> *a) für den im Inland eine Betriebsstätte unterhalten wird oder ein ständigerVertreter bestellt ist,*
>
> *...*
>
> *f) die, soweit sie nicht zu den Einkünften im Sinne des Buchstaben a gehören, durch*
>
> *aa) Vermietung und Verpachtung oder*
>
> *bb) Veräußerung von inländischem unbeweglichem Vermögen, von Sachinbegriffen oder Rechten, die im Inland belegen oder in ein inländisches öffentliches Buch oder Register eingetragen sind oder deren Verwertung in einer inländischen Betriebsstätte oder anderen Einrichtung erfolgt, erzielt werden. Als Einkünfte aus Gewerbebetrieb gelten auch die Einkünfte aus Tätigkeiten im Sinne dieses Buchstabens, die von einer Körperschaft im Sinne des § 2 Nummer 1 des Körperschaftsteuergesetzes erzielt werden, die mit einer Kapitalgesellschaft oder sonstigen juristischen Person im Sinne des § 1 Absatz 1 Nummer 1 bis 3 des Körperschaftsteuergesetzes vergleichbar ist;*

Hungary

<u>Questionnaire</u>

1) What are the conditions to qualify as an occupational pension provider in your country? If your country has different types of pension providers, with different taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction.

   The Hungarian pension system is based on three pillars: state social security pension system, the so-called voluntary mutual pension funds (hereinafter referred to as VMPFs), and the private pension funds (hereinafter referred to as PPFs). The state social security system is responsible for the "old-age benefits" for everyone with an active working period. The VMPFs and the PPFs qualify as the pension funds of the private sector. These two differ in terms of the conditions of their establishment, their organization, their operation and the activities they can carry out. Also, separate legal measures govern the operation of the different pension funds.

   For the purposes of the Act on Business Associations, neither the VMPFs nor the PPFs qualify as classic business associations. Subsequently, the taxation of these entities also differs from that of the business associations. Please see point 3. of current questionnaire for further details on the taxation of Hungarian pension funds.

   We note that there is an option that a pension fund unifies the activities of both a VMPF and a PPF. These are the so-called mixed-activity funds that are obliged to carry out their VMPF- and PPF-functions separately, and account for these functions also independently from one another.

   We also note that the operation of the PPFs has been severely encumbered by central administrative provisions. Consequently, the clientele of these funds has significantly shrunken in the last two years, and they have lost almost all of their importance in Hungary.

2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC.

   The legal provisions relevant to the pension funds do not contain reference to the IORP Directive, and do not indicate any explicit pairing between the Hungarian VMPFs and PPFs and the categories listed under Article 2 of the Directive.

3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?

   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.

ii) If they are not subject to tax, please provide the original and the English translation of the text of the legal basis for the exemption.

CORPORATE INCOME TAX

The taxation of the different pension funds varies according to whether a pension fund qualifies as a VMPF or a PPF. The Act on Corporate Income Tax (hereinafter referred to as CIT Act) explicitly lists the VMPFs among the entities subject to corporate tax under Section (2) (g):

"(2) Belföldi illetőségű adózó a belföldi személyek közül
…
g) az alapítvány, a közalapítvány, az egyesület, a köztestület, az egyház (ideértve e szervezetek alapszabályában, illetve alapító okiratában jogi személyiséggel felruházott szervezeti egységeket is), a lakásszövetkezet és az önkéntes kölcsönös biztosító pénztár"

"(2) The following resident persons shall be deemed resident taxpayers:
…
g) foundations, public foundations, non-governmental organizations, public bodies, religious organizations (including any organizational units of such organizations vested with legal personality in the bylaws or charter document), housing cooperatives, and voluntary mutual insurance funds"

At the same time, the CIT Act does not list the PPF as subject to corporate tax. In accordance with a guidance issued by the Ministry of Finance of 2006, the PPFs are not subject to corporate income tax since they are not explicitly listed in the relevant section of the CIT Act.

VMPFs are taxable on their business activity. Pension services provided to members and the related investment activities are not considered as business activity, thus these fall outside the scope of corporate income taxation. The taxation of VMPFs for CIT purposes on their business activity is very much alike to that of the business associations with some minor exceptions that are governed by Section 9 of the CIT Act.

LOCAL BUSINESS TAX

Local business tax can be imposed by local municipalities on persons carrying on business activities in the territory of the given municipality. Local business tax is payable on the basis of the turnover realized from the sale of goods and provision of services reduced by certain items. For local business tax purposes, Section 3 (2)-(4) of the Act on Local Taxes provide the following statements.

"(2) Adómentes valamennyi helyi adó alól – a (3) bekezdésben foglaltakra figyelemmel – (...), az önkéntes kölcsönös biztosító pénztár, a magánnyugdíjpénztár (...).

(3) A (2) bekezdés szerinti mentesség abban az adóévben illeti meg az adóalanyt, amelyet megelőző adóévben folytatott vállalkozási tevékenységéből származó jövedelme (nyeresége) után sem bel-, sem külföldön adófizetési kötelezettsége nem keletkezett. Az építmény- és telekadóban a (2) bekezdés szerinti mentesség – az ott felsorolt adóalanyok számára – csak az alapító okiratban, alapszabályban meghatározott alaptevékenység kifejtésére szolgáló épület és telek után jár. A feltételek meglétéről az adóalany írásban köteles nyilatkozni az adóhatóságnak.

(4) Az (1)-(3) bekezdésben meghatározottak szerint adóalany a külföldi magánszemély és szervezet is feltéve, hogy adómentességét nemzetközi szerződés vagy viszonosság nem biztosítja. A viszonosság kérdésében az adópolitikáért felelős miniszter állásfoglalása az irányadó".

"(2)-(3) (...) voluntary mutual insurance funds, private pension funds, (...) shall be exempt from tax payment obligations for the tax year following the tax year during which they have incurred no tax liabilities as the result of business activities neither in Hungary nor elsewhere,(...). Taxpayers shall furnish the tax authority with a written statement declaring whether or not the above criterion is met.

(4) (...) foreign individuals and organizations shall also be regarded as taxpayers, provided that no tax exemption is granted on the basis of a treaty (international convention) or under the principle of reciprocity. As to whether reciprocity applies shall be determined by the minister in charge of taxation".

Additionally, Section 50 (3) of the Act on Private Pensions and Private Pension Funds explicitly indicates that

"(3) A pénztár gazdálkodásából származó bevétel a társasági adó és helyi iparűzési adókötelezettség tekintetében nem minősül vállalkozási bevételnek."

"(3) Revenues from the fund's business activities shall not be regarded as income from business activities in respect of corporate income tax obligations and local business tax obligations."

This provision unequivocally states that the PPFs are not subject to either corporate income tax or local business tax in relation to activities that are linked with their primary purpose (i.e. that of providing certain services for fund members). PPFs are only allowed to provide pension services to their members and to carry out investment activities for these purposes. No additional business activity can be carried out by them.

All in all, the business activity of VMPFs is subject to corporate income tax and local business tax. In this regard the taxation of the VMPFs is very similar to the taxation of business associations. However, with regard to their total activities, VMPFs are subject to limited taxation only. PPFs are not subject to CIT or LBT in Hungary in relation to the activities that are in line with their purposes of a pension fund.

THE REAL ESTATE INCOME OF VPMFS

The scope of current section is only extended to the income of VMPFs originating from real estates held as this is the only relevant area from taxation point of view. Section 38/A of on Voluntary Mutual Insurance Funds governs the handling of real estate properties of VMPFs:

"38/A. § (1) Az ingatlanokra vonatkozó adásvételi szerződés érvényességéhez a letétkezelő ellenjegyzése szükséges. A letétkezelő az adott ügyletet csak a pénztárakra vonatkozó jogszabályok szerint minősítheti, ellenjegyzése során a pénztár döntését üzleti megfontolások szempontjából nem értékeli.

(2) A pénztár a tulajdonában álló biztosítható ingatlanokra köteles teljes körű vagyonbiztosítást kötni.

(3) A pénztár a tulajdonában álló ingatlanokat kizárólag bérbeadás, továbbértékesítés, valamint fejlesztés útján hasznosíthatja. Amennyiben a pénztár a fedezeti tartalékból vásárolt ingatlant a pénztár elhelyezésére hasznosítja, akkor az ingatlan hasznosítási díjaként (hozamaként) a pénztár köteles legalább az ingatlanértékelő által meghatározott minimális bérleti díjat a működési tartalékból a fedezeti tartalékba negyedévente átvezetni.

(4) A pénztár az ingatlant vállalkozási tevékenység folytatására harmadik személy részére bérbe adhatja, azonban a pénztár maga azzal kapcsolatban a befektetési kockázaton túli kockázatot jelentő, haszonszerzésre irányuló, üzleti tevékenységet nem végezhet.

(5) Az ingatlanok bérbeadása, forgalmazása és fejlesztése (a továbbiakban: ingatlanhasznosítás) a pénztári befektetési tevékenység részét képezi. A befektetési üzletmenet kihelyezése az ingatlanok tulajdonjogával és hasznosításával kapcsolatos döntések meghozatalára nem vonatkozik, azt a pénztár kizárólag saját maga végezheti.

(6) Ha a pénztár befektetési portfóliója ingatlant is tartalmaz, ingatlanértékelőt köteles megbízni. Az ingatlan értékelésével kizárólag olyan személy bízható meg, aki büntetlen előéletű, nem áll agrár-, műszaki, gazdasági vagy jogi egyetemi, illetve főiskolai végzettséghez kötött munkakörnek megfelelő (a továbbiakban: ingatlanértékelő tevékenység gyakorlását kizáró) foglalkozástól eltiltás hatálya alatt, valamint akivel szemben nem áll fenn a 20. § (2) bekezdés a) pont ac) és ad) alpontjában meghatározott kizáró ok. Amennyiben a pénztár ingatlanfejlesztést végez, és az adott fejlesztés tervezett értéke meghaladja az ötmillió forintot, a pénztár

az építési, szerelési munka szakszerűségének ellenőrzésével, illetőleg helyszíni képviselete ellátásával építési műszaki ellenőrt köteles megbízni. A műszaki ellenőr az építési műszaki ellenőri tevékenység gyakorlására vonatkozó jogszabályi előírások szerint köteles eljárni."

"(1) Sales contracts concerning real properties shall be considered valid only if countersigned by the fund manager. The fund manager's capacity only extends to the legal aspects of transactions. The custodian is neither required nor entitled to evaluate the funds decision from the point of view of business considerations.

(2) The fund must purchase comprehensive insurance coverage for all of the (insurable) properties it owns.

(3) The fund may utilize the properties it owns only by lease, resale, or development. If the fund purchased a real estate property for its offices financed from its operating reserve, the fund shall show at least the minimum lease charge specified by the real estate appraiser under income (yield) from the property and transfer this sum from the operating reserve to the safety reserve on a quarterly basis.

(4) The fund may lease properties to third parties for business operations; however, the fund itself shall not engage in any gainful activities or in business operations if such entails any risk above and beyond the risk inherent in investment operations.

(5) The leasing, sale and development of real properties (hereinafter referred to as real estate operations) shall comprise a part of a fund's investment operations. The outsourcing of investment operations shall not involve the passing of decisions concerning ownership and the utilization of properties; such decisions must be made by the fund itself.

(6) The fund shall employ a real estate appraiser if its investment portfolio includes any real estate property. The real estate appraiser contracted shall be a person who has no prior criminal record, has not been restrained by court order from practicing the profession requiring a university or college degree in agriculture, engineering, economics or law (hereinafter referred to as restraint from exercising the real estate appraiser profession), and who is not subject to any of the disqualifying factors under Subparagraphs ac) and ad) of Paragraph a) of Subsection (2) of Section 20. If the fund is engaged in property development activities and the cost of a particular project exceeds five million forints, the fund shall employ a building inspector to supervise and monitor the quality of construction works and to function as its on-site representative. The building inspector shall proceed in accordance with the provisions of the legislation on the activities of building inspectors."

As it is described above, VMPFs are allowed to sell, re-sell, or lease real estate property both domestically and abroad to support their business purpose (i.e. that of providing services to their members). However, since *their activities related to real estate are considered as part of their investment activity which is not considered as business activity, they are effectively not taxed on their real estate income just like PPFs.*

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein subject to tax on their income from directly held real estate (capital gains, rental income) in your country?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
   ii) If not, please provide the original English translation of the text of the legal basis for the exemption.

In general, pension providers from abroad qualify as foreign persons under the provisions of the CIT Act. Pursuant to Point 33 d) of Section 4 of the CIT Act:

"a külföldi személyt telephellyel rendelkezőnek kell tekinteni ingatlan és természeti erőforrás térítés ellenében történő hasznosítása, ingatlanhoz és természeti erőforráshoz kapcsolódó vagyoni értékű jog térítés ellenében történő átadása, értékesítése, apportálása (a továbbiakban: ingatlan hasznosítása) esetén",

"a foreign person shall be regarded as having a permanent establishment in cases of the utilization of any real estate property or natural resources in return for consideration, the transfer, sale and contribution in kind of any rights in immovable or in natural resources (hereinafter referred to as utilization of real estate) in return for consideration".

Section 2 (4) a) of the CIT Act states that foreign nationals shall be deemed taxpayers:

"belföldi telephelyen végez vállalkozási tevékenységet, feltéve, hogy az üzletvezetésének helyére tekintettel nem tekinthető belföldi illetőségű adózónak (a továbbiakban: külföldi vállalkozó)";

"if they carry out business operations at their branches in Hungary, provided that they are not considered resident taxpayers due to the location of their head office (hereinafter referred to as non-resident entrepreneurs)".

Pursuant to the above two paragraphs, the pension providers from other EU/EEA member states should be taxed in Hungary in relation to the income they realize on real estate activities in Hungary. The tax liability of non-resident entrepreneurs should apply only to their income attributable to their Hungarian permanent establishments (limited tax liability).

Act LXXXI of 1996

on Corporate Tax and Dividend Tax

Determining the Corporate Tax Base

Section 6

(1) For resident taxpayers and nonresident entrepreneurs, pre-tax profit, adjusted in accordance with Sections 7, 8, 16, 18 and 28 and Chapter VII shall represent the corporate tax base.

(2) The pre-tax profit or loss for resident taxpayers and nonresident entrepreneurs, if not required to file a financial statement on the tax year before the deadline prescribed for filing the tax return for the same year, shall be assessed based on the closing accounting statement.

(3) The corporate tax base for regulated real estate investment pre-companies, regulated real estate investment companies and regulated real estate investment special purpose companies shall comprise the income defined in Section 15, and for companies with real estate holdings the income defined in Section 15/A.

(4) In the case of foundations, public foundations, non-governmental organizations, public corporations, churches, housing cooperatives, voluntary mutual insurance funds, ESOP trusts, public-benefit or priority public-benefit nonprofit business associations, institutions of higher learning registered as public-benefit organizations or priority public-benefit organizations, social cooperatives, water management associations and foreign enterprises, the provisions of Subsections (1) and (2) shall apply, with due consideration of Sections 9-14.

(5) If a taxpayer's pre-tax profit as specified in Subsection (2) or his tax base as specified in Subsection (1), whichever is higher, fails to reach the income (profit) minimum, such taxpayer shall have the option to either:

a) make a statement specified in Subsection (1) of Section 91/A of the Act on the Rules of Taxation in his tax return; or

b) apply - in accordance with the provisions of Subsections (6)-(10) and in due consideration of the provisions of the relevant international agreement - the income (profit) minimum from the operations of his foreign branch as the tax base, without the income (profit) minimum of the foreign branch.

(6) Subsection (5) shall not apply to the taxpayer:

a) during the tax year when functioning as a pre-company and the following tax year, or during the first tax year if a separate financial statement is not required for the period when functioning as a pre-company; or

b) if taxed under Paragraphs e)-h) of Subsection (2) of Section 2, or if a social cooperative, a school cooperative or if a public-benefit or priority public-benefit nonprofit business association; or

c) if having sustained any natural disaster during the current or the previous tax year, and the value of the resulting damage - or the aggregate value of multiple events, if applicable - represents at least 15 per cent of the taxpayer's annualized revenues for the previous tax year (for the taxpayers established by way of transformation, of the revenues - combined or split as appropriate for the type of transformation - of the predecessor).

(7) For the purposes of Subsection (5), income (profit) minimum means 2 per cent of the total income that includes the items specified in Subsection (9) with the deductions specified in Subsection (8).

(8) The following may be deducted from the total revenue for determining the income (profit) minimum:

a) the original cost of goods sold and the original costs of services mediated;

b) the income shown for the tax year - shown as the original cost of shares obtained in a taxpayer established by way of preferential transformation - in respect of members or shareholders of the predecessor;

c) the income shown for the tax year from the transfer of a strategic business unit in the case of the preferential transfer of assets in respect of the transferring company;

d) the amount of capital gains claimed during the tax year as earned on shares transferred under a preferential exchange of shares in respect of any member (shareholder) of the acquired company.

(9) The following shall comprise a part of the total revenue for determining the income (profit) minimum:

a) in connection with the preferential transformation or preferential exchange of shares of the predecessor, from the deductions the member or shareholder had made, the sum subtracted from the original cost of shares obtained in connection with a preferential transformation and transferred at its book value, as claimed for the tax year under any title (not to exceed the amount already claimed by virtue of the above-specified provision as deducted from the pre-tax profit in connection with the shares in question), furthermore, in the tax year of termination without succession, the part not yet claimed as an increment;

b) the receiving company, from the sum the transferring company has claimed - and substantiated - as a deduction from the total revenue, the amount depreciated in accordance with accounting regulations in connection with tangible and intangible assets received, as commensurate for the original costs of such assets, furthermore, in the tax year of termination without succession, the amount remaining.

(10) For the purposes of Subsection (6) above, 'natural disaster' shall mean acts of nature where perils covered include hail, flood, damage due to excess surface waters, frost damage, sandstorm, drought, snow-, ice- and windstorm, blizzard, earthquake, and fire whether due to natural or biological causes. Natural disaster may be verified by a deed documenting the damage (e.g. a report or assessment or a similar document made out by an insurance company, an agricultural administration body, or an emergency response body, etc.), or a report drawn up by the injured party if a document made out by an independent organization is not available. The taxpayer shall send the report he has made out, indicating the fact and the amount of damage, to the competent state tax authority within fifteen days following the time when the damage has occurred. No application for continuation may be lodged upon failure to meet this deadline.

Tax Base Deductions

Section 7

(1) The following shall be deducted from the pre-tax profit:

a) from the deferred losses of previous years an amount of the taxpayer's choice, with due consideration of the provisions of Section 17 and Chapter VII;

b) for taxpayers keeping double-entry books, the amount shown as income as a result of appropriation of the provisions for prospective obligations and for forward expenses (not including the provisions created by the Diákhitel Központ Részvénytársaság (Student Loan Center) subject to the requirements laid down in the relevant Government Decree);

c)

cs) the amount of extraordinary depreciation reversed in the tax year, except the amount of extraordinary depreciation that has been claimed in the tax base to the extent reversed according to Point 10 of Schedule No. 1, or that may be claimed in the tax base according to Point 10/a of Schedule No. 1;

d) the amounts of depreciation claimed for the tax year according to the provisions laid down in Schedules Nos. 1 and 2, furthermore, when intangible assets and tangible assets are retired from the books on any grounds - with the exception when done in connection with the preferential transfer of assets and the conditions prescribed under Subsections (13)-(15) of Section 16 are satisfied - or transferred to the current assets account, and, in respect of taxpayers keeping single-entry books, when a liability associated with an asset is cancelled or assigned in part or in full, the adjusted book value of the asset that is in excess of the value of waste and recycled materials shown under inventories, provided in all cases that the taxpayer has deducted the depreciation of such asset from the pre-tax profit according to the Accounting Act;

dz) capital gains from the sale of a notified share shown for the tax year, furthermore, in connection with notified shares, the capital gain claimed for the tax year due to the retiring of notified shares from the records shown as non-monetary, in-kind contributions in excess of the amount of expenses claimed, on condition that that the taxpayer (including any predecessor) has shown the share in question under his assets for at least one year previously, furthermore, any value readjustment claimed during the tax year in connection with the notified share in question;

dzs) at the taxpayer's discretion,

a) the amount claimed as an increase in the value of financial investments denominated in foreign currencies that is not covered by hedging, or as a loss in the value of long-term liabilities due to changes in the exchange rate as a result of the valuation as of the balance sheet date, shown under assets and liabilities,

b) when eliminating an asset (other than notified shares) from financial investments (including value adjustments), or when eliminating a liability from long-term liabilities, the amounts claimed in any previous tax year that were added to the pre-tax profit according to Subparagraph a) of Paragraph dzs) of Subsection (1) of Section 8, or if the asset is transferred only in part, the amount calculated from the loss in the book value of the asset denominated in a foreign currency in proportion to the book value shown on the last day of the previous tax year; this provision shall apply to all valuated assets and liabilities, where the exchange difference must be shown as income;

e)

f) the amount of retained earnings that is transferred into tied-up provisions during the tax year and shown as tied up on the last day of the tax year, but which exceeds neither 50 per cent of the pre-tax profit earned during the tax year, nor five hundred million forints in a tax year (hereinafter referred to as "provision for developments"), in due observation of what is laid down in Subsection (15);

g) for taxpayers, income received or due from dividends and shares:

1. during the tax year (or other taxable income of the like for enterprises keeping single-entry books), with the exception of the income received or due as dividends and shares from a controlled foreign company, in due consideration of what is contained in Point 2,
2. during the tax year, up to the amount claimed as an increment to the pre-tax profit according to Paragraph *f)* of Subsection (1) of Section 8 - as verified by the taxpayer's related tax return and the underlying records and documents - and that was not yet deducted from the pre-tax profit;

gy) the income of members (shareholders, partners):

1. shown for the tax year that is in excess of the value - determined according to Subsection (10) - of shares that are derecognized (whether in full or in part), including the liabilities shown under shareholder contributions for pre-companies, but not including shares in a controlled foreign company, if the investment in an enterprise is eliminated or reduced due to the enterprise being wound up without succession, if its subscribed capital is decreased through disinvestment, or if the enterprise is terminated by way of preferential transformation, in due consideration of what is contained in Point 2,
2. where shares in a controlled foreign company are eliminated according to Point 1, the resulting income claimed for the tax year in excess of the value of the derecognized shares under Subsection (10), up to the amount claimed as an increment to the pre-tax profit according to Paragraph *f)* of Subsection (1) of Section 8 - as verified by the taxpayer's related tax return and the underlying records and documents - and that was not yet deducted from the pre-tax profit;

h) the amount of capital gain claimed during the tax year as earned on shares transferred under a preferential exchange of shares by a member (shareholder) of an acquired company, if the taxpayer wishes to claim this allowance; where the taxpayer chooses to claim this allowance, he shall keep separate records of all shares acquired as part of the preferential exchange of shares;

i) for taxpayers participating in apprentice training in the vocational school system, 24 per cent of the prevailing minimum wage in effect on the first day of the tax year for each month, or fraction thereof, for each apprentice if the taxpayer performs the practical training of vocational school students on the basis of an apprenticeship agreement defined by law, or it shall be 12 per cent if performed under agreement with the school;

j) the social security contribution, in addition to claiming the contribution shown under expenses, paid for the apprentices specified in Paragraph i), who have successfully passed the vocational examination, if employed uninterruptedly on a continuous basis, as well as for previously unemployed persons referred to in Subsection (3), or persons released from imprisonment within 6 months from the date of release, or persons released on parole for the duration of their employment, but for not more than twelve months; taxpayers may apply this provision if they have not terminated by ordinary notice the employment of another employee working in an identical position since or within a period of six months prior to the employment of the previously unemployed person, and the previously unemployed person was not employed by the taxpayer within a period of six months prior to such employment;

k)-l)

ly)

m) the part of income claimed when retiring a partnership share or own shares and own converted investment share certificates that has been repurchased, that is in excess of the original cost of such repurchased partnership share or own stock;

n) the amount of impairment loss reversed during the tax year in connection with a receivable, furthermore, from the historical cost of a receivable, the part declared irrecoverable and the income earned at the time and in connection with the transfer, settlement or offsetting of a claim realized in the amount that is in excess of the book value of the claim, not to exceed the amount of adjustment already deducted; credit institutions and financial enterprises shall not apply this provision concerning their receivables from financial services and investment service activities, nor shall investment firms from their investment service activities;

ny)

o) from the income earned by the owners' association of condominium buildings and resort condominiums (hereinafter referred to collectively as "condominium") under one name, for which income the condominium has paid the tax according to the provisions of the Personal Income Tax Act, the share of such income claimed for the tax year by the taxpayer;

p) the sums shown under conversion difference when switching from forint to foreign currency, from foreign currency to forint, or from one foreign currency to another, and deducted from the retained earnings, in the tax year following the date when the conversion took place;

q) the amount of impairment loss of ownership shares reversed, if the taxpayer has already applied it to increase pre-tax profit, as is verified by the relevant tax return and the underlying records and documents;

r) the amount taken into account as a pre-tax profit increment factor in the tax year or during previous tax years, shown as revenues in the tax year due to the remission of a fine or the sanctions stipulated in the Act on the Rules of Taxation and the acts on social insurance;

s) 50 per cent of the amount of royalties claimed as income under pre-tax profit for the tax year, in due observation of the provisions in Subsection (14);

sz)

t) taking into consideration of what is contained in Subsections (17)-(18), the direct costs of basic research, applied research and experimental development carried out within the taxpayer's own scope of activities (not including the value of research and experimental development services provided by a resident taxpayer, by the domestic branch of a nonresident entrepreneur or - pursuant to the Personal Income Tax Act - by a private entrepreneur directly or indirectly) claimed in the tax year in which it is incurred or, at the taxpayer's discretion, if these costs are shown under the capitalized value of experimental development (intellectual property) in the tax year in which depreciation is claimed, up to the amount claimed as depreciation; these costs (charges) may not be deducted from pre-tax profit and shown under the costs of development or operating costs (charges) in the amount of any support or assistance requested from the tax authority before the balance sheet date or received during the tax year for development purposes without any obligation of repayment, or - if applicable - in the amount of income included in the pre-tax profit for the tax year under the title of grant or support;

ty) the cost of renovation of buildings and other properties protected under the national scheme of historical monuments or placed under local protection, increasing the original value of such structures, for the taxpayer of record of the tangible asset in question;

u) the amount shown under income for the tax year or that is added to the capitalized value of own performance, or shown under deductions from costs and expenses for the tax year, as determined in the course of a tax audit or self-revision (for enterprises keeping single-entry books, the amount shown under taxable income or as an increment of purchased and financially settled inventories);

v) for taxpayers employing workers with at least 50 per cent disability, the monthly wage paid to each handicapped worker, or maximum the prevailing minimum wage in effect on the first day of the tax year, provided that the average statistical number of employees does not exceed twenty persons for the tax year;

w)-x)

y) for taxpayers of the status of micro enterprises on the first day of the tax year, the sum received by - taking into consideration of what is contained in Subsections (19)-(20) - multiplying the annual average of the prevailing monthly minimum wage in effect on the first day of the tax year by any increment in the average number of employees either in comparison to the previous tax year, the last tax year of the predecessor, or to zero if there is no previous tax year, provided that the taxpayer did not employ more than five persons on average in the previous tax year and has no outstanding tax debts of record owed to the state or local tax authority on the last day of the tax year;

z) from the non-repayable financial support or grant, or assistance provided in the form of goods or services during the tax year without consideration to priority public-benefit organizations, or under long-term donation contracts with public-benefit organizations or priority public-benefit organizations for supporting their activities performed in the public interest as specified in the Act on Public-Benefit Organizations and supporting public duties that are classified as priority public service activities, or to the Magyar Kármentő Alap (*Hungarian Fund for Clean-up and Salvage*):

1. 50 per cent of the support or grant, or the book value of the goods or services if provided to a priority public-benefit organization or the Magyar Kármentő Alap,

2. 20 per cent of the support or grant, or the book value of the goods or services if provided under a long-term donation contract,

up to the amount of the pre-tax profit on the aggregate;

zs) in respect of small and medium-sized enterprises so qualified on the last day of the tax year - if wishing to claim this allowance - the payments on account claimed for the tax year in connection with new acquisitions of land and buildings, and new acquisitions of tangible assets such as technical equipment, machinery and vehicles, if such payments are made for the purpose of putting these assets into service; the costs of remodeling, expanding and converting real estate properties in order to increase their original value; as well as the value of new acquisitions of intellectual property shown in the books under intangible assets during the tax year, in due observation of the provisions of Subsections (11)-(12).

(2) Taxpayers shall have the option to apply for the tax year the provisions set out in Subparagraph *a)* of Paragraph *dzs)* of Subsection (1) of this Section and in Subparagraph *a)* of Paragraph *dzs)* of Subsection (1) of Section 8 solely for the sum recognized as the adjusted value of investments in equity securities shown under financial investments denominated in foreign currencies that is not covered by hedging, due to changes in the exchange rate as a result of the valuation as of the balance sheet date (disregarding the sums claimed as the adjustment of the value of other financial investments and long-term liabilities), provided that exercising this option shall not result in a tax base that is lower than the tax base calculated disregarding the provisions contained in Paragraph *dzs)* of Subsection (1) of this Section and in Paragraph *dzs)* of Subsection (1) of Section 8.

(3) 'Formerly unemployed person' shall mean an individual who, immediately prior to his/her employment,

a) was registered as a job-seeker for at least six months by the government employment agency, or

b) received unemployment benefits pursuant to the Job Assistance and Unemployment Benefits Act or a supplementary income allowance pursuant to the Social Administration and Social Welfare Benefits Act, or

c) has exhausted his eligibility for the benefits described in Paragraph b), however, he/she continues to cooperate with the government employment agency,

moreover, in respect of the conditions described in Paragraphs a)-c), the period during which the unemployed person has received pregnancy-maternity benefits and/or child-care allowance; the period of detention, imprisonment or confinement; and the time spent in regular or reserve military service or in civil services (the period between entering and leaving such services) shall not be taken into account.

(4)

(5)-(6)

(7) Taxpayers may reduce the pre-tax profit pursuant Paragraph *z)* of Subsection (1) only in possession of a certificate made out for tax purposes by the public-benefit organization, priority public-benefit organization or the Magyar Kármentő Alap (Hungarian Fund for Clean-up and Salvage), such certificate is to include the name of the issuer and the taxpayer, their registered offices and tax numbers, the amount of the donation and the objective supported, furthermore, in the case of a public-benefit organization or a priority public-benefit organization, the category of the public service.

(8)

(9)

(10) For the purposes of Paragraph gy) of Subsection (1), the value of a retired share shall mean:

a) the direct cost of the share - but at least the direct cost of record of the share transferred from the predecessor company to a member (shareholder, partner) created by succession, if the investment in the enterprise is eliminated or reduced due to termination of the enterprise without succession, or if its subscribed capital is decreased through disinvestment, or through transformation in respect of the member (shareholder, partner) that did not wish to participate in the successor company,

b) the book value of the share, or, by the member's (shareholder's, partner's) choice, the value of the share defined under Paragraph a) if such member wishes to participate in the successor company.

(11) The provisions set out in Paragraph zs) of Subsection (1)

a) may be applied in the tax year if the taxpayer has only had private individual members (shareholders, partners) throughout the entire year (including ESOP) apart from the taxpayer itself,

b) may not be applied in connection with the historical cost of non-operational properties and plantations, with the costs of remodeling, expanding and converting non-operational real estate properties in order to increase their original value and the value of tangible and intangible assets received in exchange within the warranty period due to lack of conformity if the taxpayer has already applied the provision of Paragraph zs) of Subsection (1) with respect to the tangible or intangible assets that have been returned.

(12) The amount referred to in Paragraph zs) of Subsection (1) shall not exceed the pre-tax profit and cannot be more than thirty million forints, whose value calculated by the tax rate referred to in Subsection (1) of Section 19 for the purposes of the provisions governing state subsidies, if the investment serves the purpose of primary agricultural production, it may be claimed as an aid provided according to Article 4 of Commission Regulation (EC) No. 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products, in all other cases it shall be treated, at the taxpayer's choice:

a) as de minimis aid received for the tax year, or

b) as aid provided under the Commission Regulation on State aid to small and medium-sized enterprises.

(13)

(14) Taxpayers shall be entitled to apply Paragraph s) of Subsection (1) at their discretion. The combined total of the amount deducted from the pre-tax profit under these provisions shall not exceed 50 per cent of the pre-tax profit.

(15) The taxpayer may not use the provision for developments defined in Paragraph f) of Subsection (1) under the title of assets received as non-monetary, in-kind contributions or assets received without compensation, nor in connection with tangible assets that cannot be depreciated or on which no depreciation allowance may be claimed, with the exception of buildings and other properties protected under the national scheme of historical monuments or placed under local protection. The taxpayer may release the aforesaid provision consistent with the cost of developments during the four-year period subsequent to the tax year in which it was created, unless the taxpayer has assessed the tax, and the default penalty applicable, on any released amount at the rate specified in Subsection (1) of Section 19 in effect for the tax year in which the provision was tied up, and pays it within thirty days of the date on which it was released. Up to the end of the fourth tax year following the year in which the provision for developments was tied up, the tax, and the default penalty applicable, on any unused portion of the provision shall be assessed, and paid, at the above-specified rate by the last day of the first month of the following tax year. The default penalty shall be charged as of the

first day immediately following the due date for filing the tax return in which the allowance was claimed until the day when the funds were released for purposes other than development, or until the last day of the period available for use, and shall be declared, together with the tax assessed, in the first corporate tax return submitted following the said date.

(16)

(17) In connection with basic research, applied research and experimental development performed jointly by a taxpayer and an institution of higher education, the Magyar Tudományos Akadémia (Hungarian Academy of Sciences) or a research institution (research facility) established by either of them or jointly (including any equivalent organization established in any Member State of the European Union or any State that is a party to the Agreement on the European Economic Area), the taxpayer may claim three times the amount referred to in and calculated according to Paragraph t) of Subsection (1) up to maximum fifty million forints, whose value calculated by the tax rate referred to in Subsection (1) of Section 19 for the purposes of the provisions governing state subsidies shall be treated as de minimis aid received for the tax year.

(18) The provisions of Paragraph t) of Subsection (1) may be applied in connection with research and experimental development services by the person to whom they were provided if the service provider declares of having provided the service without the involvement of research and experimental development services provided by a resident taxpayer or by the Hungarian branch of a nonresident entrepreneur, or by a private entrepreneur governed under the Act on Personal Income Tax.

(19) In the application of Paragraph y) of Subsection (1) of this Section and Paragraph v) of Subsection (1) of Section 8, the average number of employees shall be determined (up to two decimal places) excluding any person who, prior to the employment or during the 12-month period preceding 1 January 2004:

a) was working for a person considered affiliated to the taxpayer, whether under contract of employment or otherwise, including any relation requiring personal participation;

b) was working as a private entrepreneur considered affiliated to the taxpayer.

(20) The amount referred to in Paragraph y) of Subsection (1), calculated by the tax rate referred to in Subsection (1) of Section 19 for the purposes of the provisions governing state subsidies shall be treated as de minimis aid received for the tax year.

(21)

(22)

Tax Base Increasing Factors

Section 8

(1) Pre-tax profit shall be increased by the following:

a) for taxpayers keeping double-entry books, the costs claimed for the tax year on account of provisions (and the amounts increasing the provision) set aside for prospective obligations and forward expenses (not including other provisions of the like created by the Diákhitel Központ Részvénytársaság subject to the requirements laid down in the relevant government decree);

b) the amounts of ordinary depreciation (including lump-sum depreciation) and extraordinary depreciation for the tax year, furthermore, when intangible assets and tangible assets are retired from the books - with the exception when done in connection with the preferential transfer of assets and the conditions prescribed under Subsections (13)-(15) of Section 16 are satisfied - or transferred to the current assets account for any reason, and, in respect of taxpayers keeping single-entry books, when a liability associated with an asset is cancelled or assigned in part or in full, the adjusted book value of the asset that is in excess of the value of waste and recycled materials shown under inventories, provided in all cases that the taxpayer has deducted the depreciation of such asset from the pre-tax profit according to the Accounting Act;

c)

d) amounts claimed as costs or expenditures, and deducted from the pre-tax profit, including the depreciation allowances of tangible assets and intangible assets, which are not related to the business operations or the gainful activity, with particular regard to what is contained in Schedule No. 3;

dzs) in the event that the taxpayer

a) applies Subparagraph a) of Paragraph dzs) of Subsection (1) of Section 7, the amount claimed as a loss in the value of financial investments denominated in foreign currencies that is not covered by hedging, or as an increment in the value of long-term liabilities due to changes in the exchange rate as a result of the valuation as of the balance sheet date, shown under assets and liabilities,

b) when transferring an asset (other than notified shares) from financial investments (including value adjustments), or when transferring a liability from long-term liabilities, the amounts claimed in any previous tax year that were deducted from the pre-tax profit according to Subparagraph a) of Paragraph dzs) of Subsection (1) of Section 7, or if the asset is transferred only in part, the amount calculated from the loss in the book value of the asset denominated in a foreign currency in proportion to the book value shown on the last day of the previous tax year; this provision shall apply to all valuated assets and liabilities, where the exchange difference must be shown as an expense;

e) a fine established in a legally binding judgment, furthermore, the amount of liabilities claimed as expenditures, arising from the sanctions prescribed in the Act on the Rules of Taxation and the acts on social insurance, except when related to self-revision,

f) the amount of profit after tax shown for the last day of the tax year (financial year) of the controlled foreign company - as commensurate according the taxpayer’s direct holding in the controlled foreign company on the last day of the tax year - less any dividend paid out, provided that the taxpayer controls at least twenty-five per cent of the voting rights or the capital of the controlled foreign company, or has a dominant influence by definition of the Civil Code, and provided that private individuals regarded as resident in accordance with the Act on Personal Income Tax have no holding in the taxpayer;

g)

gy) the amount of impairment loss claimed for the tax year on receivables (with the exception of the receivables of credit institutions and financial companies and investment firms, respectively from financial services and investment service activities, and from investment service activities);

h) the debts cancelled during the tax year, if such debts are not treated as irrecoverable, except if:

1. they are cancelled to the benefit of a private individual, or

2. the taxpayer cancels the debt of a foreign person or a resident person other than a private individual, to which the taxpayer is not affiliated;

i)

j) the interests - shown under expenses or claimed as part of the cost of an asset during the tax year - on the receivables described in Paragraph a) of Subsection (5) (with the exception of receivables due from financial institutions) in an amount proportional to the part of such receivables that is in excess of three times the equity capital - described in Paragraph b) of Subsection (5);

k)

l)

m) for the taxpayer:

a) the value adjustments and any capital loss shown under expenses for the tax year in connection with the shares in a controlled foreign company, and the part of expenses resulting from the retirement of such shares for any reason, that is in excess of the income accounted, or

b) in connection with notified shares, value adjustments and capital losses claimed for the tax year under expenses, and any expenses claimed due to the retiring of shares from the records for any reason (other than settlement in connection with transformation) in excess of the amount of income claimed;

n)

o) the sums shown under conversion difference when switching from forint to foreign currency, from foreign currency to forint, or from one foreign currency to another, and added to the capital reserve in the tax year following the date when the conversion took place;

p) the amount that is shown under expenses for the tax year or deducted from the net sales revenues and income for the tax year, from capitalized value of own performance, as determined in the course of a tax audit or self-revision (for enterprises keeping single-entry books, including any reductions in purchased and financially settled inventories);

r) from the amount deducted from the pre-tax profit in accordance with Paragraph *gy)* of Subsection (1) of Section 7, subtracted from the original cost of shares obtained in connection with a preferential transformation and transferred at its book value, as claimed for the tax year under any title (not to exceed the amount already claimed by virtue of the above-specified provision as deducted from the pre-tax profit in connection with the shares in question), taking also into consideration of what is contained in Subsection (7);

s) on the basis of Paragraph z) of Subsection (1) of Section 7, the extra benefits deducted in consideration of long-term donations as described in the Act on Public-Benefit Organizations during the year(s) prior to the tax year from the pre-tax profit, in respect of which the taxpayer did not discharge his obligations assumed in the contract on the long-term donation during the tax year due to the other party being excluded from the register of public-benefit organizations or being dissolved without succession, or double this amount if the taxpayer did not perform his contractual obligations for any other reason;

t) from the amount deducted from the pre-tax profit in accordance with Paragraph *h)* of Subsection (1) of Section 7, subtracted from the original costs of shares received in connection with a preferential exchange of shares and transferred at its book value, as claimed in the tax year under any title (not to exceed the amount already claimed by virtue of the above-specified provision as deducted from the pre-tax profit in connection with the shares in question), taking also into consideration of what is contained in Subsection (7);

u) from the original cost of an asset in the course of construction or any intellectual property, double the amount deducted from the pre-tax profit in accordance with Paragraph zs) of Subsection (1) of Section 7:

ua) the tangible asset or intellectual property in question is not put into operation or used by the last day of the fourth tax year following the year in which it was deducted from the pre-tax profit, in the tax return filed for said fourth tax year, with the exception if the asset or intellectual property was not placed into operation or service in consequence of damage owing to unavoidable external causes,

ub) the tangible asset in question is put into operation under other fixtures, fittings, and vehicles before the last day of the fourth tax year following the year when deducted from the pre-tax profit, in the tax return filed for the year the asset was put into operation,

uc) the tangible asset in question is put into operation and used as a non-operational real estate property until the end of the fourth tax year following the year in which it was deducted from the pre-tax profit, or if transferred to the other fixtures, fittings, and vehicles account or to the current assets account, or - in respect of intellectual property - if transferred to the current assets account, in the tax return filed for the tax year in which it was first put into operation or transferred, unless it was transferred to the current assets account as a consequence of damage that occurred as a result of unavoidable external causes,

ud) the tangible asset or intellectual property in question is alienated (donated as as a grant or contribution, sold, conveyed without consideration, or returned if it is an asset that was received under a financial leasing agreement subject to installment or deferred payment arrangement) before the end of the fourth tax year following the year in which it was deducted from the pre-tax profit, in the tax return filed for the tax year in which it is alienated;

v) in due observation of what is contained in Subsection (6) of this Section and in Subsection (19) of Section 7, the reduction in the average number of employees multiplied by the annual average of the prevailing monthly minimum wage in effect on the first day of the previous tax year, plus 20 per cent, not to exceed the allowance claimed under Paragraph y) of Subsection (1) of Section 7 with 20 per cent added; the allowance claimed during the fourth tax year, or before, prior to the tax year when the reduction of the average number of employees was claimed, as deducted from the pre-tax profit, shall not be included in the amount of allowance claimed.

The provisions contained above shall not apply to sums claimed in connection with tangible and intangible assets returned for exchange within the warranty period, however, with respect to assets received in exchange within the warranty period the deadlines referred to in Paragraphs ua)-ud) shall be reckoned from the date of placing into operation of the assets that were returned for exchange.

(2)

(3)

(4)

(5) For the purposes of Paragraph j) of Subsection (1):

a) 'liability' shall mean the average daily balance of outstanding loans, outstanding debt securities offered privately and bills payable (with the exception of bills payable on account of suppliers' debts), and any other liability other than loans, debt securities and bills payable shown in the balance sheet that entails the payment of interest from the taxpayer's profit (with the exception of debts of credit institutions and financial companies incurred in connection with and for the purposes of financial service activities);

b) 'equity capital' shall mean the average daily balance of subscribed capital, capital reserve, retained earnings and tied-up reserves (or own funds of the like).

(6) If the average number of employees has dropped by comparison to the previous tax year for reasons of the employees taking maternity leave, leave of absence for caring for a child, their incapacity to work due to illness, entering into military service or serving time of imprisonment, or due to death, among other reasons, the provisions of Paragraph v) of Subsection (1) shall not apply in the tax year when the events took place and in the following tax year, provided that the amount referred to in Paragraph v) of Subsection (1) is less than the monthly minimum wage prevailing on the first day of the tax year.

(7) Where a holding is removed from the books in consequence of the acquisition of shares resulting from another preferential transformation or preferential exchange of shares, the taxpayer shall not be required to apply Paragraphs *r)* and *t)*. However, taxpayers are required to apply the sum deducted from the pre-tax profit on account of the previous acquisition of shares resulting from the earlier preferential transformation or preferential exchange of shares shall be deducted from the pre-tax profit in respect of the latter acquisition of shares, up to the amount not previously claimed as an increment to the pre-tax profit.

Determining the Tax Base of Foundations, Public Foundations, Non-Governmental Organizations, Public Bodies, Churches, Housing Cooperatives, Voluntary Mutual Insurance Funds and Institutions of Higher Learning Registered as Public-Benefit Organizations or Priority Public-Benefit Organizations

Section 9

(1) The tax base of foundations, public foundations, non-governmental organizations, public bodies, churches, housing cooperatives, voluntary mutual insurance funds, and institutions of higher learning registered as public-benefit organizations or priority public-benefit organizations shall be the pre-tax profit from business operations, adjusted according to the provisions of Subsections (2)-(5) with due consideration of Subsections (6)-(9).

(2) The pre-tax profit shall be reduced by the following:

a)

b) 20 per cent of the pre-tax profit of foundations, public foundations, non-governmental organizations, public bodies and institutions of higher learning registered as public-benefit or priority public-benefit organizations from business operations;

c) from the value determined on the basis of Paragraphs *a), b), cs), d), g), gy), i), j), m), n), o), r), t), u)* and *v)* of Subsection (1) of Section 7, as well as Subsections (3), (10) and (18) of Section 7, by the amount directly attributable to business operations, or in the case of an indirect relationship, by an amount corresponding to the revenues from business operations;

d)

e) for an interest representation organization of employers and employees, the part of the pre-tax profit from business operations earned during the tax year that the organization uses to cover the costs and expenses in excess of the revenues from the activities entailed by the objective designated in its charter document or bylaws during the current and the following tax year.

(3) Pre-tax profit shall be increased by the following:

a) from the value determined on the basis of Paragraphs *a), b), d), e), gy), h), j), m), p)* and *r)* of Subsection (1) of Section 8, as well as Subsection (5) of Section 8, the amount directly attributable to business operations, or in the case of an indirect relationship, by an amount corresponding to the revenues from business operations;

b) in the case of any grant or support received - for reasons other than business operations - by foundations, public foundations, non-governmental organizations, public bodies or institutions of higher learning registered as public-benefit organizations or priority public-benefit organizations:

ba) the full amount of such grant or support, if on the last day of the tax year the aforesaid bodies and organizations have any tax debts owed to the state or local tax authority,

bb) the portion of such donations calculated by the rates defined in Subsection (7), if on the last day of the tax year the public-benefit organization and priority public-benefit organization in question has no outstanding tax debts of record owed to the state or local tax authority, but its revenues from the business operations exceed the preferential rate.

(4) The provisions of Sections 16, 18 and 28 and Chapter VII shall apply with due consideration of the provisions of Subsections (2) and (3) of this Section.

(5) When determining the tax base, churches may reduce the pre-tax profit from business operations by that portion of their profit realized from such operations, which is used in the tax year to cover those costs and expenses in the following tax year on cultural, educational, instructional, higher education, social, health, child and youth welfare, sports, scientific and monument protection activities, and of the maintenance of real estate properties for the purposes of religious life, which are in excess of revenues.

(6) The tax base of foundations, public foundations, non-governmental organizations, public bodies and institutions of higher learning classified as public-benefit organization or priority public-benefit organization shall be the portion of the amount established on the basis of Subsections (1)-(4) calculated by the rates defined in Subsection (7).

(7) The preferential rate of the business operations shall be 10 per cent of total revenues in the case of public-benefit organizations, or maximum twenty million forints, and 15 per cent of total revenues in the case of priority public-benefit organizations. For the purposes of Paragraph b) of Subsection (3) and Subsection (6), the rate shall be calculated as the quotient (up to two decimal places) of the revenues from business operations realized in excess of the preferential rate of the business operations, and the total revenues from business operations.

(8) National interest representation organizations shall determine their tax base according to Subsections (1)-(7), subject to the provisions pertaining to public-benefit organizations.

(9) In respect of churches:

a) the pre-tax profit from business operations shall be calculated according to the provisions of the Act on the Freedom of Belief and Religion and the Church and those of the Act on the Finances of the Religious and Public Benefit Activities of Churches;

b) the tax base shall be established in due observation of the provisions of Subsections (1)-(7) pertaining to public-benefit organizations;

c) regarding their organizational units vested with legal personality, the tax base shall be established according to Paragraph b), or - if its business operations are defined according to the option granted in the Act on the Finances of the Religious and Public Benefit Activities of Churches - according to Subsections (1)-(5).

(10) European groupings of territorial cooperation shall establish their tax base in accordance with Subsections (1)-(7) of this Section.

Ireland

Passy, Vandana (NL – Amsterdam)

From:	McGivern, Ronan (IE – Dublin)
Sent:	dinsdag 14 februari 2012 14.04
To:	Passy, Vandana (NL – Amsterdam) Korving, Jasper (NL- Rotterdam)
CC:	Whelan, Padraic (IE – Dublin, Cosgrave, Patrick (IE – Dublin)
Subject:	FW: Sent on bhelaf of Declan Butler – Questionnaire on Real estate Income of Pension Funds

Vandana

I refer to your note below.

All employer sponsored occupational pesnion arrangements are coverd by the IORP Directive (to the extent that they are exempt approved schemes). All IORPS benefit from the same tax treatment on real estate investments in Ireland, whether they are Irish based IORPs or domiciled elsewhere in the EU. Irish based pension funds are arguably less well treated in so far as they have to bear the pension levy. The pension levy is 0.6% of the market value of an Irish pension scheme's assets, determined as the 30th of June each year. Legislation provides that the levy is due for a period of 4 years (2011 – 2014).

Please note that for Irish tax purposes the sections apply to " Overseas pension schemes". An Overseas pension scheme is defined in Irish legislation as: *" a* retirement benefits scheme, other than a state social security scheme, which is-

a. *operated or managed by an Institution for Occupational Retirement Provision as defined by ARticle 6(a) of Directive* ***2003/41/EC*** *of the European Parliament and of the Council of 3 june 2003 (OJ No L235, 23.9.2003, p.10), and*
b. *established in a Member State of the European Communities, other than the European Communities. There is no reference to EEA countries.*

I trust that this clarifies matters.

Kind regards,

Ronan

Italy

Questionnaire

1) What are the conditions to qualify as an occupational pension provider in your country?
If your country has different types of pension providers, with different

taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction.

Generally speaking, pension funds are special funds that were created to grant additional pensions to the workers, employed by both private or public sector, in other words, further amounts in respect of the ones due by public institutions (INAIL/INPS) to which the contribution payment is compulsory. Basically, joying a pension fund an employee invests voluntarily an amount, which can be fixed or not, during its working life, in order to get additional amounts during his retirement.In Italy specific statutory and tax rules applicable to pension funds (as above defined) have been introduced since 1993 with Legislative Decree 124/1993.

According to Italian legislation (Legislative Decree no. 252/05 which modified the previous Legislative Decree no. 124/1993), there are different "tools" to obtain an additional pension, more in particular an employee is allowed to join a negotiated/closed or an open fund, or to sign a PIP (which stands for "Individual Pension Insurance Plan"), which is managed through an insurance policy).

The main features can be described as follows:

- *the negotiated/closed pension funds, also called funds with defined contribution or closed-end funds, are established on the basis of agreements between trade unions and the employers in specific sectors (both public and private): the election to these funds are reserved to specific categories of workers;*
- *open funds are created and managed by banks, insurance company, asset management companies and investment firms and they do not foreseen any defined contribution, but it has been fixed the amount which will be got by the employee during his retirement;*
- *Individual Pension Insurance Plans (PIP), also called Individual Pension Scheme are tools that allow to get an additional amount during the employee retirement, but they can be joined on an individual basis regardless the sector or the category to which the employ belongs.*

Particularly, the main difference between pension funds concerns the contribution mechanism, in case of:

- *defined contribution pension fund: it is fixed the amount of contributions, which is periodic and constant, but is not sure the extent of the benefit (the risk falls on the adherent), the magnitude of the benefit will depend on the performance of the fund;*
- *pension fund with defined benefit plans: the magnitude of the benefit is fixed, but the extent of the contributions is not fixed and depend on the needs of the fund manager with regard to the aims pursued (the risk borne by the fund manager).*

Moreover in Italy, the exercise of pension fund activity is not allowed without the COVIP authorization, COVIP is the Italian public entity *aimed to control the activity and all the law requirements of the pension funds. The requirements to obtain the COVIP authorization concern mainly legal/statutory ones as the fund By-laws, the disposal of assets, the transparency in the relationship, the integrity and professionalism requirements of the Board and of the auditors.*

Having above described the main features of Italian pension funds, from a tax point of view, their tax regime has been introduced by Legislative Decree no. 124/1993 disposal, articles 14, 14-bis and 14-ter, recently modified by art. 17 of Legislative Decree no 252/2005. According to the mentioned disposals, the pension fund is not considered a tax payer for CIT and regional tax, but it is subjected to a 11% substitute tax, applicable on the net result accrued in each fiscal year by each fund.

In particular the taxable basis to which apply the 11% substitute tax of a pension fund is equal to:

- *for defined contribution pension fund the taxable basis is equal to the difference between the value of fund assets at the end of the year, increased of the substitute tax, payments to participants, and transfers to other pension schemes and the value of fund assets at the beginning of the year, increased of contributions paid, of sum received from other pension schemes and of the income already subjected to withholding or substitute tax;*
- *while for defined benefit plans it is equal to the difference between the actual value of the annuity in establishment, calculated at the end of each year, decreased by the premiums paid during the year and the actual value of the annuity at the beginning of the year.*

Moreover, please be aware that article 6 of Legislative Decree no. 124/1993 disposal does not allow to pension funds to invest directly in real estate, such disposal allows only indirect investment in real estate participating in real estate companies or in real estate funds. Given the above, pension funds incorporated starting from April 28, 1993 are not allowed to invest directly in real estate and therefore they have not any income deriving from immovable properties. On the contrary, to the pension funds which as of April 28, 1993 owned directly real estate, a 0,50% substitute tax applies on the fund capital invested in real estate. Also for accounting purposes the immovable properties are registered in a separate ledger.

On the remaining result of the fund (whose capital is not invested in immovable properties) the 11% substitutive tax already described applies.

2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC.
In Italy every pension fund as above described falls under the scope of the IORP Directive and the Italian legislation is compliant with the latter.

3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.

   ii) If they are not subject to tax, please provide the original and the English translation of the text of the legal basis for the exemption. *As indicated in previous point 1 Italian pension funds, starting from April 28, 1993, are not allowed to own directly real estate; therefore, as a general rule, Italian pensions fund do not produce any immovable properties income.*

   In the case of pension funds which before April 28, 1993 owned directly immovable properties a 0,50% substitutive tax is levied (see previous point n. 1).

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein subject to tax on their income from directly held real estate (capital gains, rental income) in your country?

   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.

   ii) If not, please provide the original English translation of the text of the legal basis for the exemption.

   Please be aware that pension providers from other EU Member States, which are compliant with Directive 2003/41/CE, are allowed to set up their business activity in Italy starting from 2007 (Legislative Decree no. 28/2007 introduced article no. 15-ter In Legislative Decree no 252/2005 giving the chance to EU pension funds to operate in Italy). The activity of such EU providers is in any case subjected to previous COVIP authorization according to article no 15-ter of the Legislative Decree no. 252/2005.

   Given the above, and in particular considering the recent Law providing with the activity in Italy performed by EU pension funds, it seems that no EU pension funds were active in Italy before April 28, 1993 and, as a *consequence, apparently no EU pension funds holding direct investment in real estate should exist.*

Poland

Questionnaire

1) What are the conditions to qualify as an occupational pension provider in your country?

We understand that an occupational pension provider is an equivalent to a Polish so-called employees' pension fund (please find below our *comments on the types of Polish pension funds). In particular, a Polish employees' pension fund should be registered by the Polish Financial Supervisory Authority. The Polish law on organization and functioning of pension funds (further referred to as "Pension Funds Law") sets out a comprehensive catalogue of conditions required to start-up / register an employees' pension fund. Should you require more detailed information in this respect, please contact us.*

If your country has different types of pension providers, with different taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction.

Under the Pension Funds Law three types of domestic pension funds may be established: a) open pension funds, b) employees' pension funds, c) voluntary pension funds. Under the Polish Corporate Income Tax Law (further referred to as "CIT Law") all these pension funds types are subject to a general exemption from Corporate Income Tax ("CIT").

2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC.

   The so-called employees' pension funds as stipulated in the Pension Funds Law fall under the scope of the IORP Directive.

3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
   ii) If they are not subject to tax, please provide the original and the English translation of the text of the legal basis for the exemption.

   Domestic (here: Polish) pension funds are subject to a general exemption from Polish CIT. Please find below an excerpt from the Polish CIT Law.

   Art 6, section 1 point 11 of the Polish CIT Law:
   "Zwalnia się od podatku: (...) fundusze emerytalne utworzone na podstawie przepisów o organizacji i funkcjonowaniu funduszy emerytalnych".

   „The following shall be tax exempt: (...) pension funds established under the regulations on the organization and functioning of pension funds"

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein subject to tax on their income from directly held real estate (capital gains, rental income) in your country?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
   ii) If not, please provide the original and the English translation of the text of the legal basis for the exemption.

Since 1st January 2011 pension funds having a registered seat in EU Member states or in EEA member states (including Norway, Island and Liechtenstein) are subject to a general exemption from CIT on Polish earned incomes related to accumulating savings for the purposes of providing pensions, assuming that these funds meet the conditions listed in the Polish CIT Law.

Please note that the mentioned provisions stipulating the exemption give raise to interpretational doubts and it is highly recommended to carry out a detailed case by case assessment if a given foreign taxpayer operating a pension scheme meets the conditions to apply the CIT exemption.

Please note also, that the considered exemption was directly implemented in the Polish CIT Law several years after Poland became an EU member state (i.e. in 2011). Thus, foreign pension funds seated in EU or EEA countries who were taxed on Polish incomes may consider filing a tax return claim based on the EU Treaties rules. Should you require more detailed information in this respect, please contact us.

Please find below an excerpt from the Polish CIT Law and the English translation.

Art 6, section 1 point 11a of the Polish CIT Law:

"Zwalnia się od podatku: (...) podatników posiadających siedzibę w innym niż Rzeczpospolita Polska państwie członkowskim Unii Europejskiej lub w innym państwie należącym do Europejskiego Obszaru Gospodarczego prowadzących program emerytalny, w zakresie dochodów związanych z gromadzeniem oszczędności na cele emerytalne, którzy spełniają łącznie następujące warunki:

a) podlegają w państwie, w którym mają siedzibę, opodatkowaniu podatkiem dochodowym od całości swoich dochodów, bez względu na miejsce ich osiągania,
b) prowadzą swoją działalność na podstawie zezwolenia właściwych władz państwa, w którym mają siedzibę,

c) ich działalność podlega nadzorowi właściwych władz państwa, w którym mają siedzibę,
d) posiadają depozytariusza prowadzącego rejestr aktywów tych podatników,
e) przedmiotem ich działalności jest wyłącznie gromadzenie środków pieniężnych i ich lokowanie, z przeznaczeniem na wypłatę uczestnikom programu emerytalnego po osiągnięciu przez nich wieku emerytalnego;

"The following shall be tax exempt: (...) taxpayers having their registered office in a EU member state other than Poland or in another state of the European Economic Area, operating a pension scheme – in respect of income related to accumulating savings for the purposes of providing pensions, that meet all of the following conditions:
a) they are subject to a tax, in the state where their registered office is located, on the entirety of their income regardless of where it is earned;
b) they conduct activity on the basis of a license granted by relevant authorities of the state where their registered office is located;
c) their operation is supervised by relevant authorities of the state where their registered office is located;
d) they have a depositary who maintains a register of assets of these taxpayers;
e) *their operation consists solely of accumulating and investing funds, designated to be paid out to participants of a pension scheme after they have reached pension age;*

Portugal

Questionnaire

1) What are the conditions to qualify as an occupational pension provider in your country?
   If your country has different types of pension providers, with different taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction.
   The occupational pension market in Portugal is relatively small, mostly as a result of the generous public pension system. However, in the course of reforms the benefits are being reduced, occupational pensions are expected to grow.

   Occupational pension provision is provided by pension funds and through direct insurance.

   Only authorised funds and licensed insurance companies may provide occupational pension benefits. Funds, fund management companies and insurance companies are authorised and supervised by the Portuguese Insurance Institute. The authorisation for pension funds is given upon a request from management entity and founding associates, accompanied by *the draft contract on the constitution of the fund and actuarial plan, among other documents.*

2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC.
Apart from public pension system, all other pension providers (i.e. pension funds and insurance companies) in Portugal fall under the scope of the Directive 2003/41/EC.

3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
   ii) If they are not subject to tax, please provide the original and the English translation of the text of the legal basis for the exemption.

Portuguese pension funds are not subject to tax in Portugal. Insurance companies are subject to tax as ordinary corporate taxpayers.

In accordance with article 16 of the Fiscal Benefits Statute authorized national pension funds are exempt from tax on any income in Portugal, including rental income or real estate capital gains. In addition, pension funds are exempt from property transfer tax, which very often represents a significant cost in real estate transfers.

The text of the legal provisions translated into English:

"1 - Pension funds and equivalent entities, which are constituted and operate in accordance with national legislation, are exempt from corporate income tax.
2 - Pension funds and equivalent entities, which are constituted and operate in accordance with national legislation, are exempt from municipal property transfer tax on the transfers of real estate."

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein subject to tax on their income from directly held real estate (capital gains, rental income) in your country?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules,

i.e. the combined effect of source taxes and taxes in the hands of the provider.

ii) If not, please provide the original English translation of the text of the legal basis for the exemption.

Following the CJ judgement in the case Commission v. Portugal C-493/09, the Statute of Fiscal Benefits was amended by the Budget Law for 2012 that took effect on 1 January 2012.

According to the amended provisions, income of the equivalent pension funds established and operating in EU/EEA is exempt in Portugal. Due to the wide wording of the rules, we believe that real property income should be exempt as well (from 2012).

However, no equivalent exemption was introduced with respect to property transfer tax, which we believe potentially still constitutes discrimination.

The text of the legal provisions translated into English:

*7 - Pension funds consituted and operating in accordance with the law, and are established in another member state of the European Union or European Economic Area, in the latter case provided that the member state is bound by an administrative cooperation in the field of taxation equivalent to that established within the European Union, are exempt from Corporate Income Tax on income not **attributable to a permanent*** establishment situated in Portuguese territory, provided that the following cumulative requirements are met:

a) [pension funds] guarantee only the payment of retirement benefits for old age or disability, death, pre-retirement or early retirement, health benefits and post-employment, and, as comlementing and accesory of such benefits, attribution of subsidies related to death;

b) [pension funds] are managed by institutions of occupational pension provision covered by the Directive no. 2003/41/EC of the European Parliament and the Council of 3 June;

c) The pension fund is the beneficial owner of income;

d) In the case of dividend distributions, the corresponding shares have been held for an uninterrupted period of one year.[DT Lisbon: this again is a potential discrimination since no such requirement exists with respect to national pension funds]

8 - Without prejudice to Article 98 of the Code on Corporate Income Tax, in order to apply the preceding paragraph immediately, proof must be submitted to the entity which is required to withhold tax, prior to date of the payment of income, regarding the fact that the requirements stated in paragraphs a), b) and c) are met, by means of a declaration confirmed and authenticated by the respective supervision authority of the Member State of the European Union or European Economic Area.

Slovakia

Questionnaire

1) What are the conditions to qualify as an occupational pension provider in your country?
   If your country has different types of pension providers, with different taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction.
   *According to the Act No. 650/2004 Coll. on Supplementary Pension Saving as amended (hereinafter referred as the "**Supplementary Pension Saving Act**") the Occupational Pension Company (hereinafter referred as the "**OPC non-Slovak company**") may carry on occupational pension security in the Slovak Republic (hereinafter referred as "**SR**") on the basis of a notification by the respective body of its home member state delivered to the National Bank of Slovakia (hereinafter referred as "**NBS**").*

   An OPC (non-Slovak company) may commence activity in SR only following the delivery of a notification as mentioned above to the respective body of its home member state, or following the nugatory expiry of the term of two months from the delivery of the notification by the respective authority of its home member state to the NBS.

   NBS may require in a notification mentioned above that an OCP non-Slovak company carrying on activity in SR:

   a) invest at least 70% of assets acquired from the contributions of an employer in shares and bonds accepted for trading on a regulated stock market,
   b) invest at most 5% of assets acquired from the contributions of an employer in shares, bonds and other financial instruments issued by a single issuer,
   c) keep assets acquired from the contributions of an employer separate from other assets.

   NBS may have also other requirements which we do not comment in this questionnaire.

2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC.

   *Please note that NBS in order to ensure consistency and legal certainty in application of certain provisions of the Supplementary Pension Savings Act in accordance with the Directive 2003/41/EC issued the methodological guideline which regulates the procedure of a **SPAMC**,* *which plans to carry on or is carrying on the activity on the territory of a Host Member State.*

3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
   ii) If they are not subject to tax, please provide the original and the English translation of the text of the legal basis for the exemption.

*Please find below the way of taxation of the income from the rental of the real estate and from the capital gains from the sale of the real estate owned by the Slovak pension provider under the Act No. 595/2003 Coll. on the Income Tax (hereinafter referred as the "**ITA**") as amended according to the possible scenarios.*

It is necessary to differ between the management company with the legal personality which may invest on its own behalf and the pension funds (which are managed by management companies) without the legal personality to which the investors are making contributions and Management Company acts only as an agent of its members.

1) The real estate is owned directly by the pension provider (Management Company), obtained outside the pension funds

a) Income from the rental of the real estate

Rental income is taxed at rate of 19%, after deductions. Generally, necessary expenses incurred to generate, ensure, and maintain rental income are deducted before arriving at the taxable income. Deductions can include depreciation costs, interest and finance charges, real estate taxes, repairs, maintenance and other types of rental expenses.

b) Capital gains

Income from the sale of real estate is taxed at a flat rate of 19%. Gains from the sale of properties used in business are considered business or professional income. Gains from the occasional sale of properties not used in business are considered as other income.

2) The real estate owned trough the investment made by pension fund

Based on the Slovak ITA the subject to tax is only the income of the PFMC and SPAMC. The pension fund has no legal personality. While managing *the pension funds, PFMC and SPAMC act only as an agent of its members. Therefore, such income will be not subject to tax under the Slovak ITA. This provision applies only to PFMC and SPAMC with the registered seat in SR.*

3) ***<u>The income from the pension funds paid out to the investors</u>***

Base on the Slovak ITA the payments from the supplementary pension insurance (third pillar) are considered as the taxable income derived from capital that are subject to tax 19%.

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein subject to tax on their income from directly held real estate (capital gains, rental income) in your country?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
   ii) If not, please provide the original English translation of the text of the legal basis for the exemption.

1) ***<u>The real estate is owned directly by the foreign pension provider (Management Company), obtained outside the pension funds</u>***

We would like to inform you that according to the Slovak ITA the income of the tax non-resident from the ***transfer, lease and other use of real estate*** *located in the territory of* ***SR is considered as the income originating from sources in the territory of SR.*** *Therefore, such income from the rental or sale of the real estate would be taxed in SR at the income tax rate of 19% and the foreign pension provider would be obliged to file the income tax return regarding such income with the Slovak Tax Authorities.*

2) ***<u>The real estate owned trough the investment made by pension fund of the foreign pension provider</u>***

As we have informed you above, based on the Slovak ITA the subject to tax is only the income of the pension providers. However, this provision applies only in case of the pension providers established in SR in accordance with the Slovak legislation. Therefore, the income from the rental or sale of the real estate made through the pension fund of the foreign pension provider would be subject to tax in the Slovak Republic at the rate of 19 %.

Spain

<u>Questionnaire</u>

1) What are the conditions to qualify as an occupational pension provider in your country?
   If your country has different types of pension providers, with different taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction.
   The Pension Plans and Funds Act establishes that funds do not have legal personality. Additionally, they have to be administrated by a managing body, together with a depositary, and under the supervision of a control commission.According to article 11.7 of Pension Plans and Funds Act, there are two kinds of funds (pension providers):

   - *Institutions for occupational retirement provisions, whose scope is limited to the development of pension plans in the employment system.*

   - *Institutions for personal provisions, whose scope is limited to the development of individual or associated system pension plans.*

   Within these types of funds, they also can be:

   - *Open funds: They can channel other funds' investments.*

   - *Closed funds: They can only channel their own pension plans' investments.*

   According to the abovementioned Act, and to the Spanish Corporate Income Tax Act, all of them are subject to the Corporate Income Tax, with a tax rate of 0%, and have the right to the refund of the withholding tax supported by income from capital.

2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC.
   - *Institutions for occupational retirement provisions: According the article 2 of the IORP Directive, they fall under its scope.*
   - *Institutions for personal provisions: They don't fall under the IORP Directive scope as far as they are not considered Institutions for occupational retirement provisions.*

3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.

ii) If they are not subject to tax, please provide the original and the English translation of the text of the legal basis for the exemption.

As it has been mentioned before, according to the article 30 of the Pension Plans and Funds Act, and to the article 28.6 of the Spanish Corporate Income Tax Act, all of these Institutions are subject to the Corporate Income Tax, with a tax rate of 0%, and have the right to a refund of the withholding tax supported by income from capital. You can find below the article's wording, either in English and Spanish.

"Los fondos de pensiones constituidos e inscritos según lo requerido por la presente Ley, estarán sujetos al Impuesto sobre Sociedades a un tipo de gravamen cero teniendo, en consecuencia, derecho a la devolución de las retenciones que se les practiquen sobre los rendimientos del capital mobiliario"

"Pension funds set up and registered as required by this Act, shall be subject to the Corporate Income Tax at a zero tax rate, and therefore have right to a refund of the withholding tax supported by their income from capital".

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein subject to tax on their income from directly held real estate (capital gains, rental income) in your country?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
   ii) If not, please provide the original English translation of the text of the legal basis for the exemption.

In May 2007, the European Commission decided to send to Spain and other countries a request for information about their rules under which dividends and interests' payments to foreign pension funds were taxed more heavily than in domestic pension funds. In the Spanish case, there was an 18% dividends withholding tax to foreign pension funds, whereas the domestic ones had a 0% tax rate.As a result, the Spanish authorities proceeded to change the domestic law by including an exemption related to dividends obtained by foreign pension funds, so that there is no discrimination anymore.

Sweden

<u>Questionnaire</u>

1) What are the conditions to qualify as an occupational pension provider in your country?
   If your country has different types of pension providers, with different taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction.

   The structure of the Swedish occupational pension market is depending of an employer's right to deduct the removal to an occupational pension plan. The regulation stipulates the following ways of deductible removals:
   - ✓ *The employer signs up a pension* ***insurance*** *on behalf of the employee (mainly provided by life insurance companies but also insurance associations),*
   - ✓ *Removal in the <u>balance sheet</u> in combination with a credit insurance or other guarantee (i.e.* ***account secure****), or*
   - ✓ *By transferring funds to a* ***pension trust****.*
   - ✓ *By transfer to non-Swedish (within the EEA) occupational pension similar to Swedish providers.*

   Institutes providing occupational pension may be considered as occupational pension providers. Occupational pension is basically defined as life insurance connected to occupation and where the insurance amount is paid out (as lump sum or periodically) when a person reaches a determined age.

   Life insurance companies and insurance associations do not reveal income from assets or debts which are managed on behalf of the pension insurance holder. Thus, such costs are not deductible.

   Pension trusts are completely exempted from taxation in Sweden.

   Life insurance companies, insurance associations, employers who make removals in balance sheet and pension trusts are liable for tax on returns from pension funds must be paid every year, i.e. a standard tax rate.

2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC.
   Insurance associations and pension trusts are covered by the IORP directive.

3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.

ii) If they are not subject to tax, please provide the original and the English translation of the text of the legal basis for the exemption.

i) Domestic pension providers are not subject to their income from real estate. There is no specific exemption for real estate but general exemptions as described above.

*ii) The Swedish Income Tax Act chapter 39, paragraph 3 regarding **life insurance companies.** According to the Swedish tax Agency **insurance associations** shall be treated same as life insurance companies regarding taxation:*

"Livförsäkringsföretag ska inte ta upp inkomster som hänför sig till tillgångar och skulder som förvaltas för försäkringstagarnas räkning eller influtna premier. Utgifter som hänför sig till sådana inkomster och premier får inte dras av."

"Life insurance companies shall not reveal income related to assets and debts managed on behalf of the policy holder or received premiums. Expenses related to such income and premiums shall not be deducted".

*The Swedish Income Tax Act chapter 7, paragraph 2 point 3 regarding **pension trusts**:*

"Helt undantagna från skattskyldighet är… pensionsstiftelser enligt lagen (1967:531) om tryggande av pensionsutfästelse m.m…"

"The following objects are not liable to tax…pension trusts according to the Act (1967:531) of securing pension commitments etc…"

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein subject to tax on their income from directly held real estate (capital gains, rental income) in your country?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
   ii) If not, please provide the original English translation of the text of the legal basis for the exemption.

i) Non-Swedish (within the EEA) pension providers are not subject to their income from real estate. There is no specific exemption for real estate but general exemptions as for domestic occupational pension providers.

*ii) The Swedish Income Tax Act chapter 39, paragraph 13b regarding **non-Swedish occupational pension providers**:*

“Utländska tjänstepensionsinstitut ska inte ta upp inkomster som hänför sig till tillgångar och skulder som förvaltas för arbetsgivares räkning enligt avtal om tjänstepension som är jämförbart med personförsäkringsavtal. Influtna premier för sådana avtal ska inte heller tas upp. Utgifter som hänför sig till sådana inkomster och premier får inte dras av. ”

”Non-Swedish occupational pension providers shall not reveal income related to assets and debts managed on behalf of an employer according to agreement about occupational pension which is comparable to an individual pension agreement. Premium payments shall not be revealed. Expenses related to such income and premium payments shall not be deducted.”

United Kingdom

<u>Questionnaire</u>

1) What are the conditions to qualify as an occupational pension provider in your country?

Pension schemes established outside the UK may register as a pension scheme with HMRC Pension Scheme Services as long as the following conditions are met:

a. The foreign pension scheme is an occupational pension scheme, or has been established as a personal/stakeholder pension scheme by a person with permission under FSMA 2000.

b. The scheme administrator is resident in the UK, or another EU and EEA member state.

An occupational pension scheme (whether UK or non-UK) is a pension scheme:

- *Established by an employer.*
- *That provides benefits to or in respect of any or all of the employees of that employer.*
- *That may or may not also provide benefits to or in respect of any other persons who are not employees of the employer concerned.*

If your country has different types of pension providers, with different taxation depending on their qualification, please briefly describe the nature of the various pension funds in your jurisdiction.

N/A – to be treated as tax exempt, pension schemes must register with HMRC.

2) Please indicate per type whether the pension providers in your country fall under the scope of the IORP Directive (Institutions for Occupational Retirement Provision), Directive 2003/41/EC.

In the UK, the government has implemented the IORP Directive through the Pensions Act 2004.

3) Are qualifying domestic pension providers subject to tax on their income from directly held (domestic and/or foreign) real estate (capital gains and rental income)?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
   ii) If they are not subject to tax, please provide the original and the English translation of the text of the legal basis for the exemption.

UK pension schemes are exempt from UK income tax on investment income, which includes property income, under s186 Finance Act 2004. The exception to this is income derived from a property investment LLP (limited liability partnership).UK pension schemes are exempt from tax on capital gains (including gains arising on the sale of property) under s271 (1A) TCGA 1992 (Taxation of Chargeable Gains Act 1992).

4) Are pension providers from other EU Member States, including the EEA (European Economic Area) States Norway, Iceland and Liechtenstein subject to tax on their income from directly held real estate (capital gains, rental income) in your country?
   i) If so, please describe the mechanism of the tax (tax rates, source tax or tax at the hands of the provider, credits for withholding taxes, full or partial exemptions.) Please provide the original and the English translation of the text of the legal bases for the taxation. It is important that the analysis shows the end result of the tax rules, i.e. the combined effect of source taxes and taxes in the hands of the provider.
   ii) If not, please provide the original English translation of the text of the legal basis for the exemption.

Non-UK resident investors (including pension funds), are generally subject to tax on UK rental income at a rate of 20% under UK tax law. There is an obligation to withhold tax that falls either on the tenant or the UK letting agent who is responsible for collecting the rents and paying them to HMRC. Where the tenant is obliged to withhold tax, the tax charge is applied to gross rents. Where the letting agent has the obligation to withhold the tax is applied to rents net of tax deductible expenses. Non-UK resident investors (including pension funds) are not subject to tax in the UK on capital gains. However, as per the answer to

(1) following the enactment of Pensions Act 2004 and Finance Act 2004, it is possible for overseas schemes to register in the UK as a pension scheme.

Accordingly, overseas pension schemes that meet the relevant criteria can register in the UK as a pension scheme.

On registration, the overseas schemes would be able to invest directly into UK real estate and benefit from the same tax exemptions available to UK pension schemes (e.g. benefit from a tax exemption on property income and gains).

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