V

*(Announcements)*

COURT PROCEEDINGS

# COURT OF JUSTICE

**Judgment of the Court (Third Chamber) of 10 February 2011 (references for a preliminary ruling from the Unabhängiger Finanzsenat, Außenstelle Linz (Austria)) — Haribo Lakritzen Hans Riegel BetriebsgmbH (C-436/08), Österreichische Salinen AG (C-437/08) v Finanzamt Linz**

**(Joined Cases C-436/08 and C-437/08)** [1]

***(Free movement of capital — Corporation tax — Exemption of nationally-sourced dividends — Exemption of foreign-sourced dividends only if certain conditions are complied with — Application of an imputation system to non-exempt foreign-sourced dividends — Proof required as to the foreign tax creditable)***

(2011/C 103/02)

*Language of the case: German*

**Referring court**

Unabhängiger Finanzsenat, Außenstelle Linz

**Parties to the main proceedings**

*Applicants:* Haribo Lakritzen Hans Riegel BetriebsgmbH (C-436/08), Österreichische Salinen AG (C-437/08)

*Defendant:* Finanzamt Linz

**Re:**

References for a preliminary ruling — Unabhängiger Finanzsenat — Interpretation of Community law — National legislation under which nationally-sourced dividends are subject to an exemption system, whereas that system applies to foreign-sourced dividends only where the threshold of a 25 % holding is reached — Administrative and judicial practice providing, in response to Community law requirements, for the application of an imputation system to foreign-sourced dividends from a holding below the 25 % threshold

**Operative part of the judgment**

1. *Article 63 TFEU must be interpreted as precluding legislation of a Member State under which portfolio dividends from holdings in resident companies are exempt from corporation tax and portfolio dividends from companies established in non-member States party to the Agreement on the European Economic Area of 2 May 1992 are so exempt only if a comprehensive agreement for mutual assistance with regard to administrative matters and enforcement exists between the Member State and non-member State concerned, since only the existence of an agreement for mutual assistance with regard to administrative matters proves necessary for the purpose of attaining the objectives of the legislation in question.*

2. *Article 63 TFEU must be interpreted as not precluding legislation of a Member State under which portfolio dividends which a resident company receives from another resident company are exempt from corporation tax whilst portfolio dividends which a resident company receives from a company established in another Member State or in a non-member State party to the Agreement on the European Economic Area of 2 May 1992 are subject to that tax, provided, however, that the tax paid in the State in which the last-mentioned company is resident is credited against the tax payable in the Member State of the recipient company and the administrative burdens imposed on the recipient company in order to qualify for such a credit are not excessive. Information demanded by the national tax authority from the company receiving dividends that relates to the tax that has actually been charged on the profits of the company distributing dividends in the State in which the latter is resident is an intrinsic part of the very operation of the imputation method and cannot be regarded as an excessive administrative burden.*

3. *Article 63 TFEU must be interpreted as precluding national legislation which, in order to prevent economic double taxation, exempts portfolio dividends received by a resident company and distributed by another resident company from corporation tax and which, for dividends distributed by a company established in a non-member State other than a State party to the Agreement on the European Economic Area of 2 May 1992, provides neither for exemption of the dividends nor for a system under which a credit is granted for the tax that the company making the distribution pays in the State in which it is resident.*

4. *Article 63 TFEU does not preclude the practice of a national tax authority which, for dividends from certain non-member States, applies the imputation method where the holding of the recipient company in the capital of the company making the distribution is below a certain threshold and the exemption method above that*

*threshold, whilst it systematically applies the exemption method for nationally-sourced dividends, provided, however, that the mechanisms in question designed to prevent or mitigate distributed profits being liable to a series of charges to tax lead to equivalent results. The fact that the national tax authority demands information from the company receiving dividends relating to the tax that has actually been charged on the profits of the company distributing them in the non-member State in which the latter is resident is an intrinsic part of the very operation of the imputation method and does not affect, as such, the equivalence between the exemption and imputation methods.*

5. *Article 63 TFEU must be interpreted as:*

— *precluding national legislation which grants resident companies the possibility of carrying losses suffered in a tax year forward to subsequent tax years and which prevents the economic double taxation of dividends by applying the exemption method to nationally-sourced dividends, whereas it applies the imputation method to dividends distributed by companies established in another Member State or in a non-member State, in so far as, when the imputation method is applied, such legislation does not allow the credit for the corporation tax paid in the State where the company distributing dividends is established to be carried forward to the following tax years if the recipient company has recorded an operating loss for the tax year in which it received the foreign-sourced dividends, and*

— *not obliging a Member State to provide, in its tax legislation, that a credit is to be granted for the withholding tax levied on dividends in another Member State or in a non-member State in order to prevent the juridical double taxation — resulting from the parallel exercise by the States concerned of their respective powers of taxation — of the dividends received by a company established in the first Member State.*

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([1]) OJ C 19, 24.1.2009.

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**Judgment of the Court (First Chamber) of 17 February 2011 (reference for a preliminary ruling from the Stockholms tingsrätt — Sweden) — Konkurrensverket v TeliaSonera AB**

**(Case C-52/09)** ([1])

***(Preliminary ruling — Article 102 TFEU — Abuse of dominant position — Prices applied by telecommunications operator — ADSL input services — Broadband connection services to end users — Margin squeeze on competitors)***

(2011/C 103/03)

*Language of the case: Swedish*

**Referring court**

Stockholms tingsrätt

**Parties to the main proceedings**

*Applicant:* Konkurrensverket

*Defendant:* TeliaSonera Sverige AB

*Intervening party:* Tele2 Sverige AB

**Re:**

Reference for a preliminary ruling — Stockholms tingsrätt — Interpretation of Article 82 EC — Margin squeeze — Prices applied by a telecommunications operator which formerly held a historical monopoly for ADSL access — Spread between the prices invoiced by the operator to intermediate operators for the wholesale supply of ADSL access and the tariffs applied by the operator to consumers for ADSL access not sufficient to cover the additional costs borne by the operator itself for the supply of those retail services

**Operative part of the judgment**

*In the absence of any objective justification, the fact that a vertically integrated undertaking, holding a dominant position on the wholesale market in asymmetric digital subscriber line input services, applies a pricing practice of such a kind that the spread between the prices applied on that market and those applied in the retail market for broadband connection services to end users is not sufficient to cover the specific costs which that undertaking must incur in order to gain access to that retail market may constitute an abuse within the meaning of Article 102 TFEU.*

*When assessing whether such a practice is abusive, all of the circumstances of each individual case should be taken into consideration. In particular:*

— *as a general rule, primarily the prices and costs of the undertaking concerned on the retail services market should be taken into consideration. Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of competitors on the same market be examined, and*

— *it is necessary to demonstrate that, taking particular account of whether the wholesale product is indispensable, that practice produces an anti-competitive effect, at least potentially, on the retail market, and that the practice is not in any way economically justified.*

*The following factors are, as a general rule, not relevant to such an assessment:*

— *the absence of any regulatory obligation on the undertaking concerned to supply asymmetric digital subscriber line input services on the wholesale market in which it holds a dominant position;*

— *the degree of dominance held by that undertaking in that market;*

— *the fact that that undertaking does not also hold a dominant position in the retail market for broadband connection services to end users;*