Schriftenreihe zum Internationalen Steuerrecht

The OECD-Model-Convention and its Update 2014

Schriftenreihe IStR Band 90

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1. Auflage 2015

Linde Verlag Wien 2015

Verlag C.H. Beck im Internet:
www.beck.de
ISBN 978 3 7073 3088 5

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schnell und portofrei erhältlich bei beck-shop.de DIE FACHBUCHHANDLUNG

The Definition of Dividends, Interest, Royalties and Capital Gains

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I. Introduction

This chapter examines the amendments to the Commentary on the OECD Model Tax Convention resulting from the 2014 update with respect to the definition of dividends, interest and capital gains. Concerning the definition of dividends, under article 10(3) of the OECD Model, the new Commentary deals with proceeds from the redemption of shares and comes to the conclusion that they may be taxed as dividends or capital gains, depending on the classification under the national law of the state in which the distributing company is resident. The classification conflicts inevitably arising from this approach are "resolved" by requiring the state of residence of the shareholder to provide relief for double taxation, which literally means a binding of the residence state to the classification of the source state.

In addition, the new Commentary deals with the taxation of bonds under the definition of interest pursuant to article 11(3) of the OECD Model. In this respect, the Commentary indicates what constitutes interest yielded by a loan security. Furthermore, the Commentary also deals with the classification of income that is generated when bonds are sold before maturity, as some states tax the seller on interest that has been accrued up to the time of alienation of the bond. Again, according to the Commentary, potential conflicts of classification between the two contracting states should be resolved by the means mentioned before, namely by binding the residence state to the classification of the source state.

Finally, the Commentary addresses the issue of changes in the definition of capital gains due to an amendment of an income tax treaty. In this respect, an amendment of a provision similar to the provisions in article 13 of the OECD Model often leads to a change to the taxation rights over the respective assets from one contracting state to the other. Hence, after the amendment of the respective income tax treaty, one contracting state may be prohibited from taxing capital gains on hidden reserves which have been accumulated over a long period of time. Therefore, the Commentary deals with the effects on the taxation rights on certain items of income after an amendment of a specific income tax treaty. These issues will be analysed, after briefly presenting the relevant amendments to the Commentary.

II. Amendments made to the new Model Tax Convention and Commentary

With respect to the definition of dividends, interest and capital gains, there are no changes to the OECD Model itself. Rather, the amendments to articles 10 and 11 of the OECD Model relate only to the concept of beneficial ownership, which are dealt with under a separate chapter in this book. Therefore, this chapter will ad-

dress only the amendments to the Commentary on the definitions of dividends, interest and capital gains. The following replacement of paragraph 28 will be implemented in the Commentary on Article 10(3) of the OECD Model:

> Payments regarded as dividends may include not only distributions of profits decided by annual general meetings of shareholders, but also other benefits in money or money's worth, such as bonus shares, bonuses, profits on a liquidation **or redemption of shares (see paragraph 31 of the Commentary on Article 13)** and disguised distributions of profits. The reliefs provided in the Article apply so long as the State of which the paying company is a resident taxes such benefits as dividends. It is immaterial whether any such benefits are paid out of current profits made by the company or are derived, for example, from reserves, i.e. profits of previous financial years. Normally, distributions by a company which have the effect of reducing the membership rights, for instance, payments constituting a reimbursement of capital in any form whatever, are not regarded as dividends.

In this paragraph, without providing much reasoning, the Commentary has included redemptions of shares in the definition of "dividends" under article 10(3) of the OECD Model. Therefore, one must analyse whether this amendment is merely declaratory or whether redemptions of shares must be treated differently under income tax treaties that have already been concluded.

Regarding the definition of "interest" in article 11(3) of the OECD Model, the Commentary will be changed in two paragraphs. First, paragraph 20 is replaced by the following wording:

> As regards, more particularly, **government securities, and bonds and debentures**, the text specifies that **premiums or prizes attaching thereto constitute interest**. Generally speaking, what constitutes interest yielded by a loan security, and may properly be taxed as such in the State of source, is all that the institution issuing the loan pays over and above the amount paid by the subscriber, that is to say, the interest accruing plus any premium paid at redemption or at issue. It follows that when a bond or debenture has been issued at a premium, the excess of the amount paid by the subscriber over that repaid to him may constitute negative interest which should be deducted from the stated interest in determining the interest that is taxable. On the other hand, the **definition of interest does not cover any profit or loss that cannot be attributed to a difference between what the issuer received and paid** (e.g. a profit or loss, not representing accrued interest or original issue discount or premium, which a holder of such a security such as a bond or debenture realises by the sale thereof to another person or by the repayment of the principal of a security that he has acquired from a previous holder for an amount that is different from the amount received by the issuer of the security) does not enter into the concept of interest. Such profit or loss may, depending on the case, constitute either a business profit or a loss, a capital gain or a loss, or income falling under Article 21.

In addition, a new paragraph 20.1 has been introduced with the following wording:

> The amount that the seller of a bond will receive will typically include the interest that has accrued, but has not yet become payable, at the time of the sale of the bond. In most

> cases, the State of source will not attempt to tax such accrued interest at the time of the alienation and will only tax the acquirer of the bond or debenture on the full amount of the interest subsequently paid (it is generally assumed that in such a case, the price that the acquirer pays for the bond takes account of the future tax liability of the acquirer on the interest accrued for the benefit of the seller at the time of the alienation). In certain circumstances, **however, some States tax the seller of a bond on interest that has accrued at the time of the alienation** (e.g. when a bond is sold to a tax-exempt entity). Such accrued interest is **covered by the definition of interest and may therefore be taxed by the State of source**. In that case, that State should not again tax the same amount in the hands of the acquirer of the bond when the interest subsequently becomes payable.

As a result, the second area of interest will be the treatment of bonds under international tax law, which gives rise to two questions. First, one must analyse which payments from the issuer of a bond to the subscriber can be regarded as interest under article 11(3) of the OECD Model. Second, one must consider whether income generated from the sale of a bond before maturity constitutes a capital gain or interest under treaty law.

Finally, paragraph 3 of the Commentary on Article 13 of the OECD Model will have the following content:

> The Article does not deal with the above-mentioned questions. It is left to the domestic law of each Contracting State to decide whether capital gains should be taxed and, if they are taxable, how they are to be taxed. The Article can in no way be construed as giving a State the right to tax capital gains if such right is not provided for in its domestic law. [rest of the paragraph is moved to new paragraph 3.1].

In addition, this paragraph is complemented by paragraph 3.1, which has the following wording:

> The Article does not specify to what kind of tax it applies. It is understood that the Article must apply to all kinds of taxes levied by a Contracting State on capital gains. The wording of Article 2 is large enough to achieve this aim and to include also special taxes on capital gains. Also, **where the Article allows a Contracting State to tax a capital gain, this right applies to the entire gain and not only to the part thereof that has accrued after the entry into force of a treaty** (subject to contrary provisions that could be agreed to during bilateral negotiations), even in the case of a new treaty that replaces a previous one that did not allow such taxation.

As a result, one must analyse the effects that income tax treaties have on the taxation rights of contracting states, in the case where the taxation rights on certain items of income change due to an amendment of a specific treaty provision.

Furthermore, paragraph 24 of the Commentary on Article 13 is replaced by the following:

> Paragraph 2 deals with movable property forming part of the business property of a permanent establishment of an enterprise. The term "movable property" means all

> property other than immovable property which is dealt with in paragraph 1. It includes also incorporeal property, such as goodwill, licences, **emissions permits** etc. Gains from the alienation of such assets may be taxed in the State in which the permanent establishment is situated, which corresponds to the rules for business profits (Article 7).

Even though this amendment would give rise to very interesting questions regarding the definition of capital gains, a discussion thereof is beyond the scope of this chapter, as another chapter in this book deals exclusively with the taxation of emission permits under international tax law. The last amendment concerns paragraph 31, which is replaced by the following:

> If shares are alienated by a shareholder to the issuing company in connection with the **liquidation of the issuing such company or the redemption of shares or reduction of its paid-up capital** of that company, the difference between the selling price proceeds obtained by the shareholder and the par value of the shares may be treated in the State of which the company is a resident as a distribution of accumulated profits and **not as a capital gain**. The Article does not prevent the State of residence of the company from taxing such distributions at the rates provided for in Article 10: such taxation is permitted because such difference is covered by the definition of the term "dividends" contained in paragraph 3 of Article 10 and interpreted in paragraph 28 of the Commentary relating thereto, to the extent that the domestic law of that State treats that difference as income from shares. **As explained in paragraphs 32.1 to 32.7 of the Commentary on Articles 23 A and 23 B, where the State of the issuing company treats the difference as a dividend, the State of residence of the shareholder is required to provide relief of double taxation even though such a difference constitutes a capital gain under its own domestic law. The same interpretation may apply if bonds or debentures are redeemed by the debtor at a price which is higher than the par value or the value at which the bonds or debentures have been issued**; in such a case, the difference may represent interest and, therefore, be subjected to a limited tax in the State of source of the interest in accordance with Article 11 (see also paragraphs 20 and 21 of the Commentary on Article 11).

This paragraph again refers to the taxation of liquidation proceeds, redemptions of shares and redemptions of bonds, and explicitly deals with the elimination of double taxation in cases of classification conflicts. Therefore, this paragraph will be analysed with the amendments to Commentary on Article 10(3) of the OECD Model.

III. Redemptions of shares

A. The definition of dividends under article 10(3) of the OECD-MC

The taxation of dividends is regulated under a separate allocation rule, namely article 10 of the OECD Model. This article contains a definition of the term "dividend" for treaty purposes in article 10(3) of the OECD Model, which is – according to the prevailing opinion – relevant for the whole treaty and binding on both

contracting states.[1] In interpreting this provision, the wording can be divided into three categories that are considered to be dividends for treaty purposes:[2]

- income from shares, "jouissance" shares or "jouissance" rights, mining shares or founders' shares;
- other rights, not being debt-claims, participating in profits; and
- income from other corporate rights which is subject to the same tax treatment as income from shares under the laws of the state of which the company making the distribution is a resident.

Concerning the interpretation of this provision, the special feature of the dividend definition is the last part, which contains a reference to the national law of the state of which the company making the distribution is a resident.[3] On this basis, one could argue that the reference to national law covers the whole provision.[4] However, such an interpretation would render broad parts of the definition of dividends meaningless, as simply the national law of the residence state of the distributing company would always decide whether a dividend exists for treaty purposes. In addition, various classification conflicts would be the inevitable consequence.[5] Therefore – with the exception of the last part of the definition – under article 3(2) of the OECD Model, an autonomous interpretation of the treaty provisions should prevail over the decisiveness of the domestic law of the contracting states.[6] In this respect, already the wording of the provision reveals that the decisive criterion un-

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1 E.g. K. Daxkobler & E. Pamperl, *Der Dividendenbegriff im OECD-Musterabkommen*, Steuer und Wirtschaft International (SWI) (2011), at 474; W. Tischbirek, in *Doppelbesteuerungsabkommen* (*DBA*) (K. Vogel & M. Lehner eds., 5th edition, Beck 2008), Art. 10, para. 184 (with further references).

2 E.g. F. Wassermeyer, *Doppelbesteuerung* (*DBA*) (F. Wassermeyer, M. Lang & J. Schuch eds., 2nd edition, Linde 2010) Art. 10, para. 92; R. Portner, in *DBA* (H. Becker, H.-D. Höppner, S. Grotherr & H.-K. Kroppen eds., Beck 2005), Art. 10, para. 150; H. Schaumburg, *Internationales Steuerrecht* (3rd edition, Beck 2011), para. 16.329; B. Riegler & K. Salomon, *Der Dividenden- und der Zinsbegriff nach den Doppelbesteuerungsabkommen der Bundesrepublik Deutschland*, Der Betrieb (DB) (1991), at 2205; R. Thunshirn, *Einlagenrückzahlung im Internationalen Steuerrecht*, SWI (1996), at 437, 440f; S. Kirchmayr, *Besteuerung von Beteiligungserträgen* (Linde 2004), at 317; Tischbirek, *supra* n. 1, Art. 10, para. 185; J. Avery Jones et al., *The Definition of Dividends and Interest in the OECD Model: Something Lost in Translation?*, 1 World Tax J. 1 (2009), at 5, 6.

3 E.g. Tischbirek, *supra* n. 1, Art. 10, para. 184.

4 Wassermeyer, *supra* n. 2, Art. 10, para. 92 („In practice there is the tendency to interpret not only the third group of the definition in accordance with the national law of the source state, but the whole provision") (authors' translation). *See also* Schaumburg, *supra* n. 2, para. 16.330; G. Burmester, *Überlegungen zur Auflösung von Schweizer Zwischengesellschaften*, Recht der Internationalen Wirtschaft (RIW) (1987), at 298 et seq.; D. Piltz, *Liquidation ausländischer Kapitalgesellschaften in den Doppelbesteuerungsabkommen*, Deutsches Steuerrecht (DStR) (1989), at 133 et seq.

5 C. Staringer, *Liquidation, Kapitalrückzahlung und Aktienrückkauf im Recht der Doppelbesteuerungsabkommen*, in *Praxis des Internationalen Steuerrechts: Festschrift für Helmut Loukota* (H. Jirousek & M. Lang eds., Linde 2005), at 483, 500 et seq.; J. Bauer & J. Schuch, *Die Überlegungen des OECD-Steuerausschusses zur Lösung von Qualifikationskonflikten*, in *Personengesellschaften im Recht der Doppelbesteuerungsabkommen* (W. Gassner, M. Lang & E. Lechner eds., Linde 2000), at 27, 30 et seq.

6 M. Lang, *Art. 3 (2) OECD-MA und die Auslegung von Doppelbesteuerungsabkommen*, Internationale Wirtschafts-Briefe (IWB) (2011), at 281, 287 (with additional references); M. Lang, *Introduction to the Law of Double Taxation Conventions* (2nd edition, Linde/IBFD 2013), paras. 117 et seq.; M. Lang, *Hybride Finanzierungen im Internationalen Steuerrecht* (Orac 1991), at 25; Wassermeyer, *supra* n. 2, Art. 10, Rz 91a f.

der this definition is the existence of a "corporate right".[7] As the last part of the provision speaks of "other corporate rights", one can conclude that also the explicitly mentioned dividend income types must originate from a corporate right.[8] This is emphasized by a systematic interpretation. It would be highly questionable why the reference to the national law of the distributing company should cover all parts of the definition, if it is explicitly set forth only for the last part.[9]

As a consequence, the prevailing opinion in the literature views the reference to national law as being relevant only for determining whether a certain payment falls within the scope of the last group of article 10(3) of the OECD Model, and only insofar as the term "corporate rights" is not affected.[10] Only under the last part of article 10(3) of the OECD Model, is the classification of the payment as a dividend due to the national law of the source state binding on the state of the recipient.[11] The simple reason behind this reference in the third group is that the enormous differences between the various national provisions in this area cannot be adequately taken into account by an overarching definition.[12]

In contrast, for the first two parts of the dividend definition under article 10(3) of the OECD Model, the existence of a corporate right is the decisive criterion[13] which must be interpreted in an autonomous way.[14] Therefore, the term "company" as defined in article 3(1)(b) of the OECD Model is decisive for falling under the definition of dividends in article 10(3) of the OECD Model, which requires a "body corporate or any entity that is treated as a body corporate for tax

7 J. Schuch, *Beteiligungen im Recht der Doppelbesteuerungsabkommen*, in *Beteiligungen in Rechnungswesen und Besteuerung* (R. Bertl, E. Eberhartinger, A. Egger, W. Gassner, M. Lang, C. Nowotny, C. Riegler, J. Schuch, C. Staringer eds., Linde 2004), at 181, 184; M. Lang & J. Schuch, *Doppelbesteuerungsabkommen Deutschland/Österreich* (Beck 1997), Art. 10a, paras. 62 ff; H.-J. Aigner, *Die verdeckte Gewinnausschüttung im DBA-Recht*, IStR (2003), at 154, 156; S. Kirchmayr, *Dividendenstripping im internationalen Steuerrecht*, in *Festschrift für Loukota*, *supra* n. 5, at 195, 207; M. Lang & C. Strasser, *Die Auslegung von Quellenstaatsregelungen in Doppelbesteuerungsabkommen* (Linde 2005), at 131 et seq.; F.M. Giuliani, *Article 10(3) of the OECD Model and Borderline Cases of Corporate Distributions*, 56 Bull. Intl. Fiscal Doc. 1 (2002), at 11, 14; E. Eberhartinger & M.A. Six, *Taxation of Cross-Border Hybrid Finance: A Legal Analysis*, 37 Intertax 1 (2009), at 4, 9; H. Pijl, *Interest from Hybrid Debts in Tax Treaties*, 65 Bull. Intl. Taxn. 9 (2011), at 482, 490 et seq.; M.A. Six, *Hybrid Finance and Double Taxation Treaties*, 63 Bull. Intl. Taxn. 1 (2009), at 22, 23.

8 For detail, *see* Lang, *Hybride Finanzierungen*, *supra* n. 6, at 90 ff.

9 Daxkobler & Pamperl, *supra* n. 1, at 474, 478.

10 E.g. Lang, *Hybride Finanzierungen*, *supra* n. 6, at 119 f; M.A. Six, *Hybride Finanzierung im Internationalen Steuerrecht – am Beispiel von Genussrechten* (Linde 2008) (with additional references at footnote 504); M. Helminen, *The International Tax Law Concept of Dividend* (Wolters Kluwer 2010), at 64, 175; Daxkobler & Pamperl, *supra* n. 1, at 474, 477 et seq.; Wassermeyer, *supra* n. 2, Art. 10, para. 92; Staringer, in *Festschrift für Loukota*, *supra* n. 5, at 483, 491; Tischbirek, *supra* n. 1, Art. 10, para. 184.

11 Wassermeyer, *supra* n. 2, Art. 10, para. 119; Daxkobler & Pamperl, *supra* n. 1, at 474, 477.

12 Staringer, in *Festschrift für Loukota*, *supra* n. 5, 483, 492; Tischbirek, *supra* n. 1, Art. 10, para. 199.

13 *See* references cited at *supra* n. 7.

14 Daxkobler & Pamperl, *supra* n. 1, at 474, 476 et seq.; Lang, *Hybride Finanzierungen*, *supra* n. 6, 90; Six, *Hybride Finanzierung*, *supra* n. 8, at 108; Helminen, *supra* n. 10, 175 et seq.; Tischbirek, *supra* n. 1, Art. 10, paras. 188 et seq.

purposes".[15] This means that the establishment of a taxable entity is crucial for falling under the definition of articles 3(1)(b) and 10(3) of the OECD Model.[16] In addition, the term "right" in the sense of a share in the foreign company must be distinguished from a claim against the company, which mainly requires that the participation in the foreign entity (i) not become smaller because of a distribution of profits and (ii) contains a certain amount of entrepreneurial risk.[17]

In conclusion, article 10(3) of the OECD Model contains an autonomous definition of the term "dividend" in the first two parts of the definition.[18] Only the last part of the definition relates to the law of the state where the distributing company is resident in order to establish an equality of other corporate rights of this particular state with "ordinary" corporate rights.[19] However, such other corporate rights may be relevant only if the respective payment does not fall within the first two parts of the definition.[20] In this respect, an autonomous interpretation of article 10(3) of the OECD Model leads to the outcome that income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, are always covered by the definition of dividends for treaty purposes, if they stem from a "corporate right".[21]

B. Redemptions of shares

Concerning the redemption of shares, the new Commentary on the OECD Model states in paragraph 28:

> Payments regarded as dividends may include not only distributions of profits decided by annual general meetings of shareholders, but also other benefits in money or money's worth, such as bonus shares, bonuses, profits on a liquidation **or redemption of shares (see paragraph 31 of the Commentary on Article 13)** and disguised distributions of profits. **The reliefs provided in the Article apply so long as the State of which the paying company is a resident taxes such benefits as dividends**.

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15 Schuch, in *Beteiligungen*, *supra* n. 7, at 183, 184. On the term „company" under article 3(1)(b) of the OECD Model, *see also* Lang, *Hybride Finanzierungen*, *supra* n. 6, at 112 et seq.; C. Marchgraber, *Der Begriff „Gesellschaft" im Recht der Doppelbesteuerungsabkommen*, SWI (2011), at 336 et seq.

16 **DE**: BFH, 20 Aug. 2008, I R 39/07; **DE**: BFH, 20 Aug. 2008, I R 34/08; **DE**: BFH, 6 June 2012, I R 51/11; E. Pinetz, E. Schaffer, M. Sedlacek & A. Zeiler, *BFH-Rechtsprechungsübersicht Teil 1*, ecolex (2014), at 78, 79 et seq.

17 Schuch, in *Beteiligungen*, *supra* n. 7, at 183, 185. For the limitation, *see also* references at infra n. 66. *See also* S.-E. Bärsch, *The Definition of Dividends and Interest Contained in the OECD Model, Actual Tax Treaties and the German Model*, 42 Intertax 6 & 7 (2014), at 433, 435; J. Bundgaard & K. Joo Dyppel, *Profit-Participating Loans in International Tax Law*, 38 Intertax 12 (2010), at 643, 659.

18 Staringer, in *Festschrift für Loukota*, *supra* n. 5, at 483, 492; Lang, *Hybride Finanzierungen*, *supra* n. 6, at 119 f; Tischbirek, *supra* n. 1, Art. 10, para. 184.

19 Staringer, in *Festschrift für Loukota*, *supra* n. 5, at 483, 491.

20 Schuch, in *Beteiligungen*, *supra* n. 7, at 183, 186.

21 *See* references cited at *supra* n. 7.

According to these assertions, the Commentary assumes that a redemption of shares falls under the last group of article 10(3) of the OECD Model, and thus the tax treatment of the state in which the paying company is resident, is decisive for the classification under treaty law. Classification conflicts arising due to the reference to the national law of one contracting state should be resolved under the method article by binding the state of residence of the shareholders to the classification by the residence state of the distributing company.[22]

Regarding the treatment of redemptions of shares under international tax law, the first question that arises concerns what is actually covered by this term. As the domestic laws of various jurisdictions contain many different approaches under company as well as under tax law for the redemptions of shares,[23] it is doubtful whether all forms of redemptions of shares can be subsumed under the same allocation rule. These doubts are confirmed by the necessary limitation on article 13 of the OECD Model, under which alienations of shares must be subsumed. In this respect, there is a need to distinguish between two situations.[24] First, in a narrow Anglo-Saxon understanding, the share is transferred back to the issuing entity and hereby ceases to exist. From an economic perspective, this is quite similar to liquidation of the foreign entity.[25] Second, redemptions of shares could also be understood in a broader sense, such that shares are transferred back to the entity and are available for sale to another person. This operation is quite similar to a buyback of shares by the company. These very different situations will be analysed separately below.

22 OECD, *2014 Update to the OECD Model Tax Convention* (15 July 2014), para. 57. According to the updated OECD Commentary on Article 13, paragraph 31: „[w]here the State of the issuing company treats the difference as a dividend, the State of residence of the shareholder is required to provide relief of double taxation even though such a difference constitutes a capital gain under its own domestic law".

23 E.g. D. Krüger, *Seminar E: Erwerb eigener Aktien durch die Gesellschaft*, IStR (2002), at 552; A. Kroniger, *Liquidation einer ausländischen Gesellschaft als Alternative zur Dividendenausschüttung – Gestaltungsmöglichkeiten bei Unternehmenstransaktionen in den USA (Election I.R.C. § 338(h)(10))*, IStR (2003), at 729 et seq.; P. Ritzer-Angerer, *Zur Abgrenzung von Ausschüttungen und Kapitalrückzahlungen – Besteuerung von Aktienrückkäufen in den USA und Deutschland*, IStR (2005), at 318; W. Neyer & A. Gürzenich-Schmidt, *Liquidation einer ausländischen Kapitalgesellschaft: Deutsche Besteuerung unbeschränkt steuerpflichtiger Anteilseigner*, IStR (2005), at 295, 298 et seq.; I. Hofbauer, H. Loukota & M. Stefaner, *Tagungsbericht zum IFA-Kongress 2002 in Oslo*, Österreichische Steuerzeitung (ÖStZ) (2002), at 612, 615 et seq.; M. Tanzer, *Der Rückerwerb eigener Aktien – Rechtsgrundlagen und steuerrechtliche Auswirkungen*, in *Festschrift Krejci* (E. Bernat, E. Böhler & A. Weilinger eds., Verlag Österreich 2001), at 1713, 1722 et seq.; R. Betten, *Share Buy-backs by Listed Companies from Individual Minority Shareholders*, 38 Eur. Taxn. 11/12 (1998), at 363; G. Toifl, *Acquisition of Own Shares by a Listed Company in Austria*, 38 Eur. Taxn. 11/12 (1998), at 367.

24 Staringer, in *Festschrift für Loukota*, *supra* n. 5, at 483, 497 et seq.

25 *See also* the wording of the new Commentary on Article 13, para. 31: „If shares are alienated by a shareholder to the issuing company in connection with the *liquidation of the issuing such company or the redemption of shares or reduction of its paid-up capital* of that company, the difference between the selling price proceeds obtained by the shareholder and the par value of the shares may be treated in the State of which the company is a resident as a distribution of accumulated profits and not as a capital gain" (emphasis added). OECD, 2014 Update, *supra* n. 22, para. 57.