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Euro Tax Flash from KPMG's EU Tax Centre

Advocate General's Opinion in the Eqiom and Enka case (previously referred to as the Holcim case)

Freedom of establishment - Free movement of capital - Parent-Subsidiary Directive - Withholding tax on dividends paid abroad - Prevention of tax evasion - Burden of proof

On January 19, 2017 Advocate General (AG) Kokott of the Court of Justice of the European Union (CJEU) issued her opinion in the Eqiom and Enka case (C-6/16), referred by the French Conseil d'État. The case concerned the circumstances in which a Member State may refuse - on grounds of preventing tax evasion or abuse - an exemption from withholding tax that would normally be granted on the distribution of dividends by a resident subsidiary to its non-resident parent company by virtue of the Parent-Subsidiary Directive.

Background

The French tax authorities refused to exempt dividends distributed by a French resident company to its Luxembourg parent company which was, in turn, indirectly controlled by a company resident in Switzerland. This refusal was based on a French provision which attempts to avoid 'directive shopping' by requiring the taxpayer parent - if it is controlled by non-EU residents – to prove that the principal purpose behind the structure is not to take advantage of the exemption. The questions referred to the CJEU addressed in particular whether the French rules were compatible with, on the one hand, Article 1(2) of the Parent-Subsidiary Directive which allows the withholding tax exemption to be refused on the grounds of preventing fraud or abuse and, on the other, the EU fundamental freedoms.

The AG's opinion

The AG concluded, *inter alia*, that in light of the principle of legal certainty, Article 1(2) of the Parent-Subsidiary Directive must be interpreted strictly, as it is an exception not the rule. The national provision at issue sets an initial presumption of abuse, which approach is beyond what is required to prevent tax evasion. The mere reference in the French rules to direct or indirect control by shareholders in third States cannot be regarded as an indication of tax evasion, for the simple reason that it cannot be said in general that the tax treatment of profit distributions to companies outside the EU is more favorable in the Member State of the parent company or the grandparent company than it is in France.

The AG therefore concluded that the refusal to grant an exemption from withholding tax based on a general presumption that this will involve tax evasion is not permissible under the Directive as it precludes a test of the objective and verifiable facts. The AG highlighted that when applying the disputed provision, proof of non-fiscal grounds is automatically imposed on the tax payer without the administration being obliged to provide sufficient indications of tax evasion.

The AG reached a similar conclusion regarding the fundamental freedoms, but added that the French rules were in any event not compatible since they only required a tax benefit motive without also requiring a wholly artificial arrangement that does not reflect economic reality.

EU Tax Centre comment

Although the disputed French tax rules have since been amended, this case could still be relevant for the current rules deriving from the transposition of the general anti-abuse clause of the amended EU Parent Subsidiary Directive. It should also be noted that France, Denmark, Italy, Spain and the European Commission all submitted written pleadings, while Germany took part in the hearing. This illustrates the potential significance of this case for tax provisions and administrative practice in other Member States. The decision of the CJEU − if it follows the AG's Opinion – should therefore be carefully considered in those jurisdictions.

Should you have any questions, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.

Robert van der Jagt
Chairman, KPMG's EU Tax Centre and
Partner, Meijburg & Co

Barry Larking
Director EU Tax Services, KPMG's EU Tax Centre and
Director, Meijburg & Co

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