



Parent-Subsidiary Directive not applicable to Gibraltar companies

On 2 April 2020, the European Court of Justice (“**ECJ**”) ([case C-458-18](#)) ruled that a company incorporated in Gibraltar and subject to Gibraltar corporation tax cannot be considered to be a “company of a Member State” within the meaning of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (“**Parent-Subsidiary Directive**”).

The case concerned the distribution of dividends during the period July 2011 to April 2016 by a Bulgarian company to its parent company established in Gibraltar. The Bulgarian tax authorities refused to exempt such dividends from withholding tax, considering that the Gibraltar company did not meet the conditions of Article 2 of the Parent-Subsidiary Directive (this directive gives an exhaustive definition of its scope, and does not expressly include Gibraltar companies subject to corporation tax in Gibraltar).

The question ultimately brought before the ECJ was whether the phrases “companies incorporated under the law of the United Kingdom” and “corporation tax in the United Kingdom” should be interpreted as designating companies incorporated in Gibraltar subject to corporation tax in Gibraltar for the purposes of the Parent-Subsidiary Directive.

Citing the opinion from the General Advocate, for reasons of legal certainty, the ECJ considered that the scope of the Parent-Subsidiary Directive cannot be extended by analogy to companies other than those included in the exhaustive list (Part A of Annex I to the directive).

As regards the United Kingdom, the Parent-Subsidiary Directive applies only to “companies incorporated under the law of the United Kingdom” and subject to “corporation tax in the United Kingdom”. Gibraltar constitutes a European territory and the United Kingdom (a Member State for the period under reference) is responsible for its external relations. According to the Government of the United Kingdom, companies formed in accordance with its national law do not include companies incorporated in Gibraltar. In addition, tax levied in Gibraltar does not constitute “corporation tax in the United Kingdom”.

The ECJ concluded by deciding that the concepts “companies incorporated under the law of the United Kingdom” and “corporation tax in the United Kingdom” within the Parent-Subsidiary Directive (Article 2(a)(i) and (iii) read in conjunction with Part A and Part B of Annex I) do not cover companies incorporated in Gibraltar which are subject to corporation tax there.

The ECJ specified that this conclusion is without prejudice to the obligation to comply with Articles 49 and 63 TFEU and to ascertain whether the taxation of profits distributed by a Bulgarian subsidiary to its parent company established in Gibraltar constitutes a(n unjustified) restriction with regard to the right of establishment or the free movement of capital enjoyed by companies incorporated in Gibraltar.

The ECJ decision contrasts with the previous interpretation adopted by many EU Member States and by the EU Commission. Its actual consequences in Luxembourg and abroad will have to be monitored in due course.

How can we help?

The Tax Law partners and your usual contacts at Arendt & Medernach are at your disposal to further assess and advise on the impact of this ECJ case on your operations with Gibraltar companies.



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