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EUROPEAN

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f [PIROLAPENNUTOZEI & ASSOCIATI](#)
t [@STUDIO_PIROLA](#)
in [PIROLA PENNUTO ZEI & ASSOCIATI](#)

EU COURT OF JUSTICE

1.1	3
[Request for a preliminary ruling from the <i>Østre Landsret</i> (High Court of Eastern Denmark)]. Opinion of advocate general <i>Juliane Kokott</i> . Case C-115/16 N. <i>Luxembourg 1 v Skatteministeriet</i>	
1.2	3
[Request for a preliminary ruling from the <i>Østre Landsret</i> (High Court of Eastern Denmark)]. Opinion of advocate general <i>Juliane Kokott</i> . Case C-116/16 <i>Skatteministeriet v T Danmark</i>	
1.3	3
[Request for a preliminary ruling from the <i>Østre Landsret</i> (High Court of Eastern Denmark)]. Opinion of advocate general <i>Juliane Kokott</i> . Case C-117/16 <i>Skatteministeriet v Y Denmark Aps</i>	
1.4	4
[Request for a preliminary ruling from the <i>Østre Landsret</i> (High Court of Eastern Denmark)]. Opinion of advocate general <i>Juliane Kokott</i> . Case C-118/16 <i>X Denmark /S v Skatteministeriet</i>	
1.5	4
[Request for a preliminary ruling from the <i>Østre Landsret</i> (High Court of Eastern Denmark)]. Opinion of advocate general <i>Juliane Kokott</i> . Case C-119/16 <i>C Danmark I v Skatteministeriet</i>	
1.6	4
[Request for a preliminary ruling from the <i>Vestre Landsret</i> (High Court of Weastern Denmark)]. Opinion of advocate general <i>Juliane Kokott</i> . Case C-299/16 <i>Z Denmark v Skatteministeriet</i>	

EU COURT OF JUSTICE

1.1

[Request for a preliminary ruling from the *Østre Landsret* (High Court of Eastern Denmark)] «Request for a preliminary ruling – Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (Interest and Royalties Directive) – Concept of beneficial owner – Acting in one’s own name on behalf of a third party – Effect of the commentaries on the OECD Model Tax Convention on the interpretation of an EU Directive – Abuse of possible fiscal arrangements – Criteria for abuse through avoidance of tax at source – Abuse by taking advantage of a lack of information exchange systems between the States – Direct application of a non-transposed provision of a directive – Interpretation of national principles on the prevention of abuse in conformity with EU law». Opinion of advocate general *Juliane Kokott*. Case C-115/16 N. *Luxembourg 1 v Skatteministeriet*

1.2

[Request for a preliminary ruling from the *Østre Landsret* (High Court of Eastern Denmark)] «Request for a preliminary ruling – Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Parent-Subsidiary Directive) – Need for a beneficial owner of dividend payments – Abuse of possible tax arrangements – Criteria for abuse through avoidance of withholding tax – Effect of the commentaries on the OECD Model Tax Convention on the interpretation of an EU Directive – Direct application of a non-transposed provision of a directive – Interpretation of national provisions for the prevention of abuse in conformity with EU law». Opinion of advocate general *Juliane Kokott*. Case C-116/16 *Skatteministeriet v T Danmark*

1.3

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– *Interpretation of national provisions for the prevention of abuse in conformity with EU law*». Opinion of advocate general *Juliane Kokott*. Case C-117/16 *Skatteministeriet v Y Denmark Aps*

1.4

[Request for a preliminary ruling from the *Østre Landsret* (High Court of Eastern Denmark)] «*Request for a preliminary ruling – Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (Interest and Royalties Directive) – Concept of beneficial owner – Acting in one’s own name on behalf of a third party – Effect of the commentaries on the OECD Model Tax Convention on the interpretation of an EU Directive – Abuse of possible fiscal arrangements – Criteria for abuse through avoidance of tax at source – Abuse by taking advantage of a lack of information exchange systems between the States – Application of Directive 2003/49 to payments to a Luxembourg S.C.A, SICAR – Direct application of a non-transposed provision of a directive – Interpretation of national principles on the prevention of abuse in conformity with EU law*». Opinion of advocate general *Juliane Kokott*. Case C-118/16 *X Denmark /S v Skatteministeriet*

1.5

[Request for a preliminary ruling from the *Østre Landsret* (High Court of Eastern Denmark)] «*Request for a preliminary ruling – Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (Interest and Royalties Directive) – Concept of beneficial owner – Acting in one’s own name on behalf of a third party – Effect of the commentaries on the OECD Model Tax Convention on the interpretation of an EU Directive – Abuse of possible fiscal arrangements – Criteria for abuse through avoidance of tax at source – Abuse by taking advantage of a lack of information exchange systems between the States – Direct application of a non-transposed provision of a directive – Interpretation of national principles on the prevention of abuse in conformity with EU law*». Opinion of advocate general *Juliane Kokott*. Case C-119/16 *C Danmark I v Skatteministeriet*

1.6

[Request for a preliminary ruling from the *Vestre Landsret* (High Court of Weastern Denmark)]. «*Request for a preliminary ruling – Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (Interest and*

*Royalties Directive) – Concept of beneficial owner – Acting in one’s own name on behalf of a third party – Effect of the commentaries on the OECD Model Tax Convention on the interpretation of an EU Directive – Abuse of possible fiscal arrangements – Criteria for abuse through avoidance of tax at source – Abuse by taking advantage of a lack of information exchange systems between the States – Direct application of a non-transposed provision of a directive – Interpretation of national principles on the prevention of abuse in conformity with EU law». Opinion of advocate general *Juliane Kokott*. Case C-299/16 Z *Denmark v Skatteministeriet**

The EU Court of Justice Advocate General *Juliane Kokott*, with cases from C-115/16 to C-119/16 and in case C-299/16 intervened on the notion of beneficial owner within the scope of EU Directives and of the OECD Model Tax Convention and related Commentaries.

Beneficial owner and EU Directives (Interest and Royalties Directive and Parent-Subsidiary Directive)

It is observed that, Article 5 of the Parent-Subsidiary Directive lays down a general principle prohibiting withholding tax on profits distributed by a subsidiary resident in one Member State to a parent company resident in another Member State. By prohibiting Member States from imposing withholding tax on the profits distributed by a resident subsidiary to its non-resident parent company, Article 5(1) of the Parent-Subsidiary Directive limits the powers of the Member States to tax profits distributed by companies that are resident in their territory to companies resident in another Member State. Therefore, the Member States cannot unilaterally adopt restrictive measures and make the entitlement to exemption from withholding tax provided for in Article 5(1) contingent upon various requirements.

Therefore, such entitlement to exemption from withholding tax “*does not depend on the owners of the parent company being resident or on the dividends payer disclosing how the dividends recipient will use the dividends*”. It is irrelevant, for the purpose of Parent- Subsidiary Directive, whether the dividends recipient is also the ‘*beneficial owner*’ of the dividends or suchlike. The decisive question is whether the dividends payer was charged corporation tax and the dividends recipient also has to pay corporation tax on the dividends. Therefore, according to the Opinion of the Advocate General, it makes perfect sense that (unlike the Interest and Royalties Directive), the Parent-Subsidiary Directive is ‘only’ predicated on the distribution of profits by a subsidiary to its parent company (which must have a certain minimum

holding). Unlike interest payments, dividends do not, as a rule, represent operating expenditure which may be set against profit; therefore, it makes sense that, according to its wording, the Parent-Subsidiary Directive does not contain any further substantive criteria, such as drawing of dividends in one's own name and on one's own account or suchlike.

Interpretation of EU Directives and OECD Model Tax Convention against double taxation (and related Commentaries)

As far as the interpretation of the Directives are concerned, it is specified that the Model Tax Conventions (OECD Model Tax Conventions), are not legally binding, multilateral conventions under international law; they are the unilateral acts of an international organisation in the form of recommendations to its Member countries. Even the OECD does not consider these recommendations to be binding; rather, the member countries must consider whether their implementation is opportune (see Rule 18 lit. b of the OECD Rules: "*Recommendations of the Organisation, made by the Council in accordance with Articles 5, 6 and 7 of the Convention, shall be submitted to the Members for consideration in order that they may, if they consider it opportune, provide for their implementation*"). This applies *a fortiori* to the Commentaries published by the OECD, which ultimately only contain legal opinions.

However, in light of settled case-law, it is not inappropriate for the Member States to derive guidance for the balanced allocation of their fiscal competence from international practice, as reflected in the Model Tax Conventions. The same applies to guidance from any prevailing international legal opinion, which may be reflected in the Commentaries on the OECD Model Tax Conventions (see for example, judgements *Lidl Belgium*, *Test Claimants in the Thin Cap Group Litigation*, *Gilly*, *van Hilten-van der Heijden*, *Berlioz Investment Fund*).

Nonetheless, according to the Advocate General, the Commentaries on the OECD Model Tax Conventions cannot have a direct effect on the interpretation of an EU Directive, even if the terms used are identical.

Prevention of abusive practices

The Advocate General has held on various occasions that for a restriction of freedom of establishment to be justified on grounds of the prevention of abusive practices, the specific objective of such a restriction

must be to prevent conduct involving the creation of wholly artificial arrangements¹ which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory. As the Court has also since held on various occasions (see judgements *Newey*, *J.J. Komen en Zonen Beheer Heerhugowaard*, *Tanoarch*, *Ampliscientifica and Amplifin*, *Cussens and a.*, *WebMindLicenses*; similarly, within the scope of the Mergers Directive, *FOGGIA-Sociedade Gestora de Participações Sociais*), it suffices if the arrangement is put in place not with the sole aim, but with the essential aim, of obtaining a tax advantage. According to the case-law of the Court, the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favorable legislation does not, in itself, constitute abuse.

Furthermore, where the taxable person has a choice between two possibilities, he is not obliged to choose the one which involves paying the higher amount of tax but, on the contrary, may choose to structure his business so as to limit his tax liability (see Judgement *WebMindLicenses* and above mentioned *Weald Leasing*).

¹ Nor does the fact that the dividends recipient passes its profits on to its shareholders lead to the assumption of an artificial arrangement.

EUROPEAN TAX NEWSLETTER | FEBRUARY 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 28 FEBRUARY 2018.
THIS NEWSLETTER IS INTENDED AS A SUMMARY OF KEY DEVELOPMENTS AND HIGHLIGHTS MATTERS OF GENERAL INTEREST,
AND THEREFORE SHOULD NOT BE USED AS A BASIS FOR DECISION-MAKING.
FOR FURTHER DETAILS AND INFORMATION, PLEASE CONTACT YOUR RELATED PARTNER OR SEND AN EMAIL TO UFFICIOSTUDI@STUDIOPIROLA.COM