



# Euro Tax Flash from KPMG's EU Tax Centre



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## **CJEU decision in the Deister Holding Case on German Anti-Treaty Shopping Provisions**

[Dividend Withholding Taxes – Parent-Subsidiary Directive – Anti-Treaty Shopping Provisions – Freedom of establishment](#)

On December 20, 2017, the CJEU rendered its decision in the joined cases Deister Holding ([C-504/16](#)) and Juhler Holding ([C-613/16](#)) concerning the German Anti-Treaty shopping provisions. The cases were dealt with jointly as they both concern foreign parent companies that are exposed to the negative effects of the German Anti-Treaty Shopping rule as it relates to dividends received from German subsidiaries. The CJEU ruled that the German provisions in question constitute an infringement of the EU freedom of establishment.

### **Background**

Both cases concern non-resident holding companies receiving dividends from a German subsidiary. The Deister Holding case concerns a Dutch company holding a 26.5 percent participation in a German operating company. The Dutch company is itself wholly-owned by a taxpayer resident in Germany. The Juhler Holding case differs from the Deister Holding case insofar as the holding company of the German wholly-owned subsidiary is located in Denmark, whereas the shareholder of the group is a private investor who is a tax resident of Singapore.

Both cases have in common that the holding company received a profit distribution from the German subsidiary, on which dividend withholding tax was levied. Referring to the Parent-Subsidiary Directive, both companies afterwards sought a refund of the tax withheld. In both cases, the German tax authorities denied the request on the basis of the German Anti-Treaty Shopping rules. According to the rules in force at the time (2007 and 2011), special requirements covering the functionality and substance of foreign parent companies had to be complied with before a company was eligible for a dividend withholding tax relief in respect of the dividends received from a German subsidiary, in situations where a shareholder of the parent company would not personally qualify for the relief if the dividend had been received

directly. The tax authorities argued that the documents and information provided were not sufficient for them not to apply the rule in question.

The holding companies challenged the assessments, arguing that the German provisions are not in line with the Parent-Subsidiary Directive and are contrary to the EU freedom of establishment, as such requirements do not apply to resident parent companies.

### The CJEU Decision

The Court firstly concluded that both cases fall within the scope of the Parent-Subsidiary Directive, which in principle prohibits the levying of withholding taxes on profit distributions paid to foreign parent companies. According to Article 1(2) of the Parent-Subsidiary Directive, Member States are only allowed to deviate from that rule to prevent tax evasion and abuse. According to the Court, measures that prevent tax evasion and abuse within the meaning of the Directive must be narrowly interpreted. Therefore, only provisions whose specific objective is to prevent artificial structures deviating from economic reality and targeting unjustified tax advantages fall within the scope of the exception in the Directive. The Court concluded that the German rules in question, which generally exclude a special group of taxpayers from the application of the Parent-Subsidiary Directive, create a general and irrefutable presumption of abuse and therefore go beyond what is necessary to prevent tax evasion and abuse. In this respect, the Court emphasized that a group's special shareholding structure does not in itself indicate the existence of a wholly artificial arrangement. Consequently, the Court ruled that the disputed German provisions are not in line with the Parent-Subsidiary Directive.

As regards the existence of a restriction to the fundamental freedoms, the Court noted that the freedom of establishment is applicable to the cases at hand. Observing that it is only where a resident subsidiary distributes profits to a non-resident parent company that the withholding tax exemption is subject to certain conditions, the Court went on to conclude, in line with settled case law, that this difference in treatment is liable to deter a non-resident parent company from exercising an economic activity in Germany and therefore constitutes a restriction to the EU freedom of establishment. It concluded that such a restriction cannot be justified by either the objective of combating tax evasion and avoidance or by safeguarding the balanced allocation of the power to tax.

### EU Tax Centre comment

The outcome of the CJEU decision of the two joined cases is not surprising, as it reflects settled case law concerning the Parent-Subsidiary Directive and the freedom of establishment. The German rules in question had already been amended in 2012, in response to an infringement procedure launched by the European Commission. Although the procedure was closed in September 2012, it remains to be seen whether the amended provisions can be considered as compatible with EU law.

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