

CJEU rules on application of Parent-Subsidiary Directive to Gibraltar

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Executive summary

On 2 April 2020, the Court of Justice of the European Union (CJEU) issued its preliminary ruling in the case *GVC Services (Bulgaria) EOOD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' - Sofia* ([Case C-458/18](#)). The case considered the application of the European Union (EU) Parent-Subsidiary Directive (PSD) (Council Directive 2011/96/EU) to Gibraltar companies.

In its judgment, the CJEU held that companies incorporated in Gibraltar and subject to Gibraltar's corporation tax should not be considered as covered by the EU PSD. Accordingly, EU Member States are not required to extend the dividend withholding tax exemption to Gibraltar parent companies, based on the provisions of the directive.

Detailed discussion

Background

The PSD was first issued on 23 July 1990 and after being amended several times, a revised version was adopted in 2003. The PSD was designed to eliminate tax obstacles for profit distributions between parent companies and subsidiaries based in different Member States. The Directive therefore gives a tax exemption for dividends and other profit distributions paid by subsidiary companies to their parent companies.

In the relevant case, GVC Services is a Bulgarian company that provides IT services. GVC Services is wholly owned by a company resident in Gibraltar (PGB limited). GVC Services distributed dividends to its parent company in Gibraltar and did not withhold tax considering that this distribution was within the scope of the PSD. However, the Bulgarian tax authorities disagreed with this treatment and issued a tax assessment notice.

GVC Services brought an action before the Bulgarian courts. On 12 July 2018, the Sofia Administrative Court referred the matter to the CJEU for a preliminary ruling.

CJEU judgment

Following the Advocate General Hogan's [opinion](#) issued in October 2019, the CJEU has held that the PSD does not apply to companies incorporated in Gibraltar. The PSD applies to a "company of a Member State" which means any company that: (i) takes one of the forms listed in Annex I, Part A; (ii) according to the tax laws of a Member State is considered to be resident in that Member State for tax purposes and under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Union; and (iii) is subject to one of the taxes listed in Annex I, Part B.

The CJEU 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 the PSD. Gibraltar is not included in the exhaustive list both of the companies (Annex I, Part A) and of the taxes (Annex I, Part B) to which the PSD applies. In the *Gaz de France - Berliner Investissement* case (C247/08), the Court expressly rejected the possibility of extending the scope of the PSD by analogy to other forms of companies other than those listed in its Annex I, Part A for reasons of legal certainty. Also, under the observations made by the United Kingdom (UK) Government, a Gibraltar-incorporated company is not regarded as being incorporated under UK law, nor is a Gibraltar company considered to be subject to UK corporate income tax.

Since the Gibraltar parent company does not fall within the scope of the PSD, Bulgaria is not required to extend the dividend withholding tax exemption to Gibraltar parent companies, based on the provisions of the directive.

As it was not proposed by the referring court, the CJEU did not rule on whether the refusal of the withholding tax exemption breaches the fundamental freedoms under the Treaty on the Functioning of the European Union (TFEU) and left it for the Bulgarian courts to decide whether the domestic withholding tax is in line with primary EU law. In its opinion of October 2019, the Advocate General Hogan commented on the existence of discrimination and concluded that the refusal to exempt dividends paid by subsidiaries established in a Member State to their parent companies incorporated in Gibraltar from withholding tax cannot be stated by way of a general rule such as has apparently happened in the case at issue. On the contrary, such a refusal can only be the result of the application of an anti-abuse measure to the circumstances of an individual case.

Implications

This preliminary ruling of the CJEU did not come as a surprise; while there had been uncertainty on the position of Gibraltar and Gibraltar companies under the tax directives of the EU, it was generally accepted in academia and practice that Gibraltar companies fall outside the scope of the PSD. Currently, however, it should be noted that Gibraltar will have a new relationship with the EU as a result of the Brexit and new issues may arise accordingly.

Businesses with companies resident in other jurisdictions with a special relationship with the EU (for example, Andorra, Aland island, Madeira, Monaco, etc.) should assess the impact of this judgment on their structures. However, such assessment needs to be made on a case-by-case basis as each EU territory may have its own regime and relationship with the EU.

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