

Euro Tax Flash
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Euro Tax Flash from KPMG's EU Tax Centre



AG opinion in the Groupe Steria case

Freedom of establishment – Parent-Subsidiary Directive – Group taxation – 5% non-deductible charges - balanced allocation of taxing rights - coherence

On June 11, 2015, Attorney-General Kokott (AG) of the Court of Justice of the European Union (CJEU) issued her opinion in the Groupe Steria case ([C-386/14](#)). The AG concluded that the French rules that allow a French parent company a full exemption in respect of dividends received from domestic subsidiaries under a group taxation regime, but effectively tax 5% of dividends received from shareholdings in EU subsidiaries, is in breach of the freedom of establishment. The CJEU now has to decide the case.

Background

Under the French participation exemption regime, dividends distributed by a subsidiary to a parent company are in principle tax exempt at the level of the latter, to the exclusion of a fixed amount of 5% representing the charges incurred in relation to the holding in the subsidiary. However, the French group taxation regime allows the deduction of this fixed 5% add-back if both the parent company and the subsidiary are jointly taxed and part of a single tax group.

The Administrative Court of Appeal of Versailles referred the question whether the French rules infringed the EU freedom of establishment to the CJEU.

The AG's opinion

According to the AG, a French parent with a non-French subsidiary is treated worse than a French parent with a French subsidiary, since it is only possible for a French parent company to receive 100% tax exempt dividends in the case of holdings in domestic companies. On the contrary, profits distributed by non-resident companies, under the same conditions, will only be 95% tax exempt. This is due to the fact that the group taxation regime is not open to the foreign subsidiaries, effectively disallowing the French parent from claiming the benefit of the tax deduction of the 5% add-back. The AG concludes that this difference in treatment constitutes a restriction to the freedom of establishment.

She further considers but rejects a number of possible justifications. First, the AG dismisses the argument that the Parent-Subsidiary Directive allows Member States to deny the deduction of any charges relating to the holding of a foreign subsidiary up to 5% of the dividends distributed by the latter. Indeed, it is established case law that such a prohibition may only be applied in a manner that is not contrary to the fundamental freedoms. Second, the AG distinguishes the case from that of X-Holding ([C-337/08](#)) and concludes that no justification can be found in the preservation of the allocation of taxing powers between Member States, since the disputed provision relates to charges incurred solely by the French parent company and no other fiscal jurisdiction is involved. Third, the AG analyses whether the different treatment can be justified on the basis of the coherence of the French tax system. For these purposes there must be a direct link between the disputed tax advantage and a corresponding tax levy. Since there is no corresponding tax levy, either as regards the neutralization of transactions internal to the group or on an overall basis, the AG concludes that this justification also does not apply.

EU Tax Centre Comment

The AG's opinion is entirely in line with the EU Commission's position and is largely based on previous decisions of the CJEU and to that extent seems uncontroversial. The CJEU generally follows the opinions of an AG, but of course the outcome is never certain until that time.

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor.

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