CJEU Danish cases on beneficial ownership and treaty abuse – case overview

May 2019

INTRODUCTION

On February 26, 2019, the Court of Justice of the European Union (CJEU) issued its landmark judgements in six cases which deal with the application of the EC Parent-Subsidiary Directive and the EC Interest and Royalty Directive. The majority (5 out of 6) of the cases involved Luxembourg or Cyprus holding and financing companies. Effectively the Luxembourg and Cyprus holding companies formed part of a pooled investment group collecting funds from generally non-EU investors.

The cases (two joint dividend cases C-116/16 & C-117/16 and four joint interest cases C-115/16, C-118/16, C-119/16 & C-299/16) revolve around Danish operational companies owned by a parent company in another EU Member State (Luxembourg, Cyprus and Sweden). Subsequently, these EU parent companies were all owned by companies resident outside the EU. In respect of the dividend and interest payments, the Danish companies claimed exemptions of withholding tax based on the EC Parent-Subsidiary Directive and/or the EC Interest and Royalty Directive.

The claim was challenged (or the request was denied) by the Danish Tax Authorities (DTA), stating that the recipients in the EU were not the beneficial owners of the interest or dividend payments. The case ended up in the Danish High Court, which then referred questions to the CJEU. The CJEU ultimately agreed with the DTA. The CJEU clarified in this respect that it was not its duty to assess the facts in the main proceedings. However, when giving a preliminary ruling, the CJEU may, if appropriate, specify indicia in order to guide the national court in the assessment of the cases that it has to decide.

This part of the CJEU decisions, is (very) interesting observing the facts that a number of indications are presented that could lead to the conclusion that there is an abuse of law. Both CJEU decisions provide the opportunity to perform a "sanity check" and to identify potential red flags. We also expect that tax authorities, as a corollary to the Danish cases, will adhere (more) attention to the intention to obtain a (tax) advantage in close cooperation with an arrangement or a set of arrangements involving companies with limited economic substance. The CJEU decisions may ultimately serve as a benchmark to determine abuse of law.

In recent weeks we have analysed the joint CJEU decisions (C-116/16 & C-117/16 and C-115/16, C-118/16, C-119/16 & C-299/16) as well as the conclusions of Advocate General Kokott in the six cases to understand the facts of the main proceedings and the corresponding indications. In the subsequent pages we have clarified the facts of the main proceedings in some detail. We note that we have used sections of the conclusions of Advocate General Kokott. We also note that the structure of the groups concerned are particularly detailed and complex. To serve the purpose of this blog we have chosen to indicate only the key items. As a result the presented overviews should be regarded as high-level overview.

INDICIA PRESENTED BY THE CJEU

In paras 96 – 120 of C-116/16 & C-117/16 as well as paras 123 – 145 of C-115/16, C-118/16, C-119/16 & C-299/16 the following indicia have been presented by the CJEU that could lead for the referring court to establish abuse of law. We have chosen to present the indicia referred to in the dividend case (C-116/16 & C-116/17) as the indicia in both cases are more or less similar, with the exception of para 129 of the interest cases.

Indicia presented			
Para no.	**Indicia as cited from CJEU cases**	**Summary**	**Relevant case**
No. 100 / 127	A group of companies may be regarded as being an artificial arrangement where it is not set up for reasons that reflect economic reality, its structure is purely one of form and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law. That is so inter alia where, on account of a conduit entity interposed in the structure of the group between the company that pays dividends and the company in the group which is their beneficial owner, payment of tax on the dividends is avoided.	Not set up for reasons that reflect economic reality & principal objective or one of its principal objectives is to obtain a tax advantage.	C-116/16, C-117/16, C-115/16, C-119/16 and C-299/16.
No. 101 / 128	Thus, it is an indication of the existence of an arrangement intended to obtain improper entitlement to the exemption provided for in Article 5 of Directive 90/435 that all or almost all of the aforesaid dividends are, very soon after their receipt, passed on by the company that has received them to entities which do not fulfil the conditions for the application of Directive 90/435, either because they are not established in any Member State, or because they are not incorporated in one of the forms covered by the directive, or because they are not subject to one of the taxes listed in Article 2(c) of the directive, or because they do not have the status of 'parent company' and do not meet the conditions laid down in Article 3 of the directive.	Channelling dividends / interest payments very soon after their receipt to entities which do not fulfil the conditions for a reduction of taxation of dividends / interest at source.	C-117/16 (Y Netherlands to Y Denmark vis-à-vis Y Cyprus vis-à-vis Y Bermuda within a two-months period).
No. 129	The conditions for the application of Directive 2003/49 are not met by entities resident for tax purposes outside the European Union, such as the companies at issue in Cases C-119/16 and C-299/16 or the investment funds at issue in Cases C-115/16 and C-299/16. In those cases, if the interest had been paid directly by the Danish debtor undertaking to the recipient entities which, according to the Ministry of Taxation, were its beneficial owners, the Kingdom of Denmark could have levied withholding tax.	Ultimate beneficial owners are entities resident for tax purposes outside the European Union.	C-115/16, C-119/16 and C-299/16.
No. 103 / 130	Likewise, the artificiality of an arrangement is capable of being borne out by the fact that the relevant group of companies is structured in such a way that the company which receives the dividends paid by the debtor company must itself pass those dividends on to a third company which does not fulfil the conditions for the application of Directive 90/435, with the consequence that it makes only an insignificant taxable profit when it acts as a conduit company in order to enable the flow of funds from the debtor company to the entity which is the beneficial owner of the sums paid.	Insignificant taxable profit (at the level of the interposed entity) & obligation to pass on dividends and interest amounts to a third company.	C-115/16, C-118/16 and C-119/16.

Para no.	Indicia as cited from CJEU cases	Summary	Relevant case
No. 104 / 131	The fact that a company acts as a conduit company may be established where its sole activity is the receipt of dividends and their transmission to the beneficial owner or to other conduit companies. The absence of actual economic activity must, in the light of the specific features of the economic activity in question, be inferred from an analysis of all the relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to expenditure actually incurred, to the staff that it employs and to the premises and equipment that it has.	Sole activity is the receipt of dividends and / or interest absence of actual economic activity must be considered in the light of the specific features of the economic activity in question.	C-115/16, C-118/16 and C-119/16.
No. 105 / 132	Indications of an artificial arrangement may also be constituted by the various contracts existing between the companies involved in the financial transactions at issue, giving rise to intragroup flows of funds, by the way in which the transactions are financed, by the valuation of the intermediary companies' equity and by the conduit companies' inability to have economic use of the dividends received. In this connection, such indications are capable of being constituted not only by a contractual or legal obligation of the parent company receiving the dividends to pass them on to a third party but also by the fact that, 'in substance', as the referring court states, that company, without being bound by such a contractual or legal obligation, does not have the right to use and enjoy those dividends.	Contracts existing between the companies involved. To be considered valuation of the intermediary companies' equity and by the conduit companies' inability to have economic use of the dividends / interest receives.	C-115/16 (and the use of PECs at the level of N Luxembourg 1), C-118/16 and C-119/16.
No. 106 / 133	Moreover, such indications may be reinforced by the simultaneity or closeness in time of, on the one hand, the entry into force of major new tax legislation, such as the Danish legislation at issue in the main actions or the United States legislation referred to in paragraph 51 above, and, on the other hand, the setting up of complex financial transactions and the grant of intragroup loans.	Indications may be reinforced by the simultaneity or closeness in time of major new tax legislation.	C-299/16 and C-117/16 (and the introduction of the American Job Creation Act of 2004).
No. 107 / 134	The referring court is also unsure, in essence, whether there can be an abuse of rights where the beneficial owner of dividends transferred by conduit companies is ultimately a company whose seat is in a third State with which the source Member State has concluded a tax convention under which no tax would have been withheld on the dividends if they had been paid directly to the company having its seat in that third State.	DTAA with a third State with which the source Member State has concluded a DTAA under which no tax would have been withheld.	C-119/16, C Danmark 1, C Cayman Islands effectively paid a dividend of EUR 140 million to the parent company, C USA, which is resident in the United States.

DOES SUBSTANCE MATTER?

It should be noted that typically substance requirements, such as personnel expenses or the availability of office space have not been emphasized in both court cases. As a general remark we note that it makes sense and referencing to the conclusions of the Advocate-General that the EC Parent-Subsidiary Directive does not contain any substantive criteria. The EC Parent-Subsidiary Directive is 'only' related to 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. In light of the fact that holding companies in particular (may) engage per se in little activity, the requirements for satisfying any substance criteria are (or should be) relatively minor. If the company has been validly incorporated, can actually be reached at its registered office and has tangible and human resources at its disposal on site to achieve its objective, it typically cannot be seen as an arrangement that does not reflect economic reality. In addition dividend rights ultimately follow from the company's status as parent company under company law, which can only be enjoyed in its own name.

To a certain extent this reasoning also applies to financing income. In for instance C-115/16 N Luxembourg 1 reference was made to the somewhat strange distribution of costs (low rents, low staff costs, high consultancy fees), which may be due to the fact that small office space and few employees are required to manage a single loan. The fact that the activity consists only in the management of assets and the income results only from such management does not mean that a wholly artificial arrangement exists which does not reflect economic reality. We expect that it may ultimately be difficult for tax authorities to argue based on actual substance to suggest that a business exists only on paper.

We however expect that it would be different if, for example, the considerable expenses of a conduit company (as the Luxembourg company in C-115/16 N Luxembourg 1) were not to be met out of the interest income and the interest had to be passed on alone and in full. It might also be different if the refinancing interest rate and the interest rate received were identical, or the interpolated company incurred no costs of its own to be paid out of its interest income. It would also be somewhat different if the default risk of the Danish-registered company (N Luxembourg 1) were borne solely by the capital investment companies, because in that case the loan claim of the Luxembourg company against the capital investment companies would also lapse. In the below Section we have nevertheless itemized the presented substance in the main proceedings.

Substance specified

Case no.	Substance specified
C-115/16 N Luxembourg 1	In the period from 2006 to 2008, C Luxembourg and A Luxembourg Holding reported further six-figure yearly operating expenditure (i.e. in addition to interest expenditure). The expenditure included salaries, rents, office running costs and consultancy fees. In 2007 and 2008, both companies employed an average of one or two part-time employees. They are registered at the same address, which is also used by companies with a direct connection to one of the capital investment companies. Apart from its shareholding in N Danmark 1, C Luxembourg's only other asset is its claim pursuant to the PECs.
C-118/16 -X Denmark A/S	Not specified in respect of X Sweden, X Sweden Holding, or X S.C.A.
C-119/16 -C Danmark 1	C Sverige II and C Sverige I had no employees. They had identical addresses to the office address of another Swedish company (C Sverige III), which did not include any separate office premises for C Sverige II or C Sverige I. Any post for C Sverige II and C Sverige I was opened by C Sverige III's three employees. C Sverige II and C Sverige I did not have separate telephone numbers. The rent was paid by C Sverige III. No internal invoices were issued between the companies for any wages or administrative costs, and C Sverige II and C Sverige I had not concluded a tenancy agreement and did not bear any costs for the use of the premises. In addition C Sverige II and C Sverige I carried out no activities other than holding shares in the subordinate company, and in the years 2004 to 2006 they had no turnover or employees. In case of both C Sverige II and C Sverige I the business consisted of relatively few, substantial accounting transactions, consisting mostly of interest entries. The director of C Sverige III was also the director of C Sverige II and C Sverige I, had access to the companies' bank accounts and was also responsible for the companies' production of annual reports and filing of tax returns.

Case no.	Substance specified
C-116/16 - T Danmark	Not specified in the court case.
C-117/16 - Y Denmark	Y Cyprus had no staff and apparently no office premises of its own either. As a result, the company does not incur costs for either staff or premises. Also, the remuneration paid to the members of the management board suggests little activity on their part. Furthermore, asset management activities clearly generated no income of its own for the company. This all appears to be artificial. A natural person would have ceased trading long ago under such circumstances.
C-299/16 Z Denmark	Limited information is specified in the presented facts. The annual financial statements of Z Luxembourg for 2006 and 2007 showed that the company's activities consisted solely of the investment in Z Denmark. The annual financial statements show that in 2006 the company had a negative result amounting to EUR 23.588 and in 2007 a positive result amounting to EUR 15.587. The item 'Tax on Profits' showed an amount of EUR 3.733 for one year (presumably 2007).

FACTS OF THE MAIN PROCEEDINGS

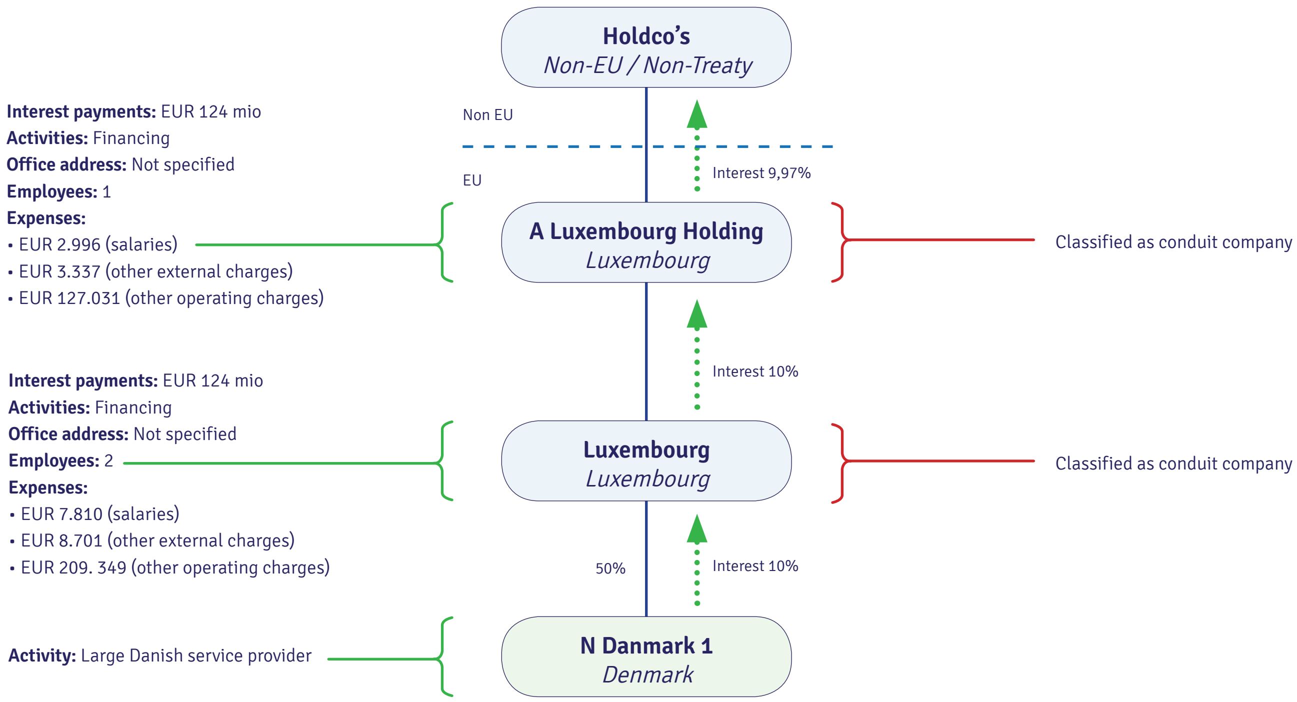
C-115/16, N Luxembourg 1

A number of capital investment companies resident in a third country incorporated several companies in Luxembourg and Denmark with a view to acquire T Danmark (a large Danish service provider). The acquisition of T Danmark was financed in part by loans granted by the capital investment companies. Those loans were granted as a particular type of corporate bond, namely Preferred Equity Certificates (PECs) issued by (ultimately following several transactions) C Luxembourg. A PEC is a financial instrument which is broadly similar to an interest-bearing corporate bond and the purchasers therefore become the lenders to the PEC issuer. Interest on the PECs was paid/credited to the capital investment companies from the date of issue (21 December 2005) to the summer of 2008. C Luxembourg ultimately used the money borrowed from the third-country capital investment companies to acquire approximately 80% of the share capital of T Danmark.

C Luxembourg and A Luxembourg have unlimited tax liability in Luxembourg. The interest on the PECs is paid by N Luxembourg 1 to C Luxembourg, which uses these interest payments to service its interest payments to A Luxembourg Holding, which in turn uses the payments to service its interest payments to the capital investment companies. Between 2006 and the summer of 2008, the interest rate payable by N Danmark 1 to C Luxembourg was 10%, whereas the interest rate payable by C Luxembourg to A Luxembourg Holding was 9.96875%. The interest rate payable by A Luxembourg Holding to the capital investment companies was also 9.96875%. This changed on 9 July 2008, when the interest rate payable by C Luxembourg rose to 10% (the same interest rate as that payable to it by N Danmark 1), whereas the interest rate payable by A Luxembourg Holding to the capital investment companies remained at 9.96875%. From a tax perspective the interest payments to investors are tax-deductible as operating expenditure in Luxembourg observing the PECs. In that regard, Luxembourg taxed the difference between the interest paid from Denmark (10%) and the interest paid to the capital investment companies in the third countries (9.96875%).

In the period from 2006 to 2008, C Luxembourg and A Luxembourg Holding reported further six-figure yearly operating expenditure (i.e. in addition to interest expenditure). That expenditure included salaries, rents, office running costs and consultancy fees. In 2007 and 2008, both companies employed an average of one or two part-time employees. They are registered at the same address, which is also used by companies with a direct connection to one of the capital investment companies. Apart from its shareholding in N Danmark 1, C Luxembourg's only other asset is its claim pursuant to the PECs. None of the capital investment companies is resident in an EU Member State or in a State with which Denmark has concluded a DTAA. In 2011, the DTA issued N Luxembourg 1 with an assessment notice for taxes at source for the 2006 to 2008 tax years totalling 925.764.961 Danish crowns (DKK). The SKAT took the view that neither of the Luxembourg companies (C Luxembourg and A Luxembourg Holding) was the 'beneficial owner' of the interest and that they were simply acting as conduit companies. The interest was channelled from the Danish side of the group, via the two Luxembourg companies, to the capital investment companies. The DTA therefore found that taxes at source should have been withheld on the interest paid and that, since it was not withheld, the claimant was liable for the taxes at source. N Luxembourg 1 lodged an appeal which ultimately resulted in the present court case.

Hereafter the (simplified) group structure as well as the relevant facts are provided.



C-118/16, X Denmark A/S

X S.C.A. is the group's ultimate parent company. Due to its nature as a general investment firm, X S.C.A. was entitled to be registered as a 'société d'investissement en capital à risque' (SICAR). This means that the company is exempt from income tax on earnings originating from the company's investments in securities (i.e. dividends and capital growth). A SICAR is also exempt from the rules on compulsory tax retention upon distribution of dividends. X S.C.A. holds 100% of shares in X Sweden Holding AB (X Sweden Holding). X S.C.A. was not engaged in any business operations other than ownership of and a loan to X Sweden Holding.

X Sweden Holding, in turn, holds 97.5% of shares in a Swedish company (X Sweden), which for its part holds 100% of shares in X Denmark A/S. The sole activity of X Sweden Holding consists in being the holding company of X Sweden. On 27 December 2006, X Sweden Holding took out a loan from its parent company, X S.C.A. The company's interest expenses in connection with that loan for the fiscal years 2007, 2008 and 2009 were deducted from the company's taxable income. In the fiscal years 2007-2009 — in accordance with the specific Swedish rules on adjusting earnings for tax purposes within a group, X Sweden made intra-group transfers to its parent company, X Sweden Holding. The intra-group transfers are tax deductible for the company making the payment and taxable for the recipient company. In 2007, 2008 and 2009 interest income accounted for 98.1%, 97.8% and 98%, respectively, of X Sweden's overall income.

Under a loan agreement of 27 December 2006 X Denmark received a loan for EUR 501 million from its parent company, X Sweden. X Denmark did not retain any taxes at source for the annual interest credits for 2007, 2008 and 2009, given that X Denmark considered the lender X Sweden to be the 'beneficial owner' of the interest. In its tax returns, X Denmark deducted the interest from its taxable income. In early 2007, X Sweden, in turn, took on responsibilities in connection with product registration with public authorities and various administrative duties in connection with clinical trials. From then on the company employed around 10 employees.

In its decision of 13 December 2010 the DTA ruled that neither X Sweden, X Sweden Holding, or X S.C.A. could be deemed to be the 'beneficial owner' of the interest under the EC Interest and Royalties Directive and the relevant double taxation convention. Instead, the DTA ruled that the owners of X S.C.A. were the 'beneficial owners' of the interest. An appeal was brought against the DTA's decision which ultimately ended up in the present court case. Interesting in this case is that the actual investors had their seat in certain third countries (regularly on certain smaller islands such as the Cayman Islands, Bermuda, or on Jersey). This may, according to the Advocate-General, indicate an unusual overall approach, the economic reason for which does not become immediately apparent. The capital investment companies could also be established in other States, in particular given that they are to be considered as transparent for tax purposes in any event. To that extent, the overall arrangement might qualify as an abusive arrangement, more due to the 'establishment' of the capital investment companies in particular third countries than to the 'interpolation' of Luxembourg and Swedish companies

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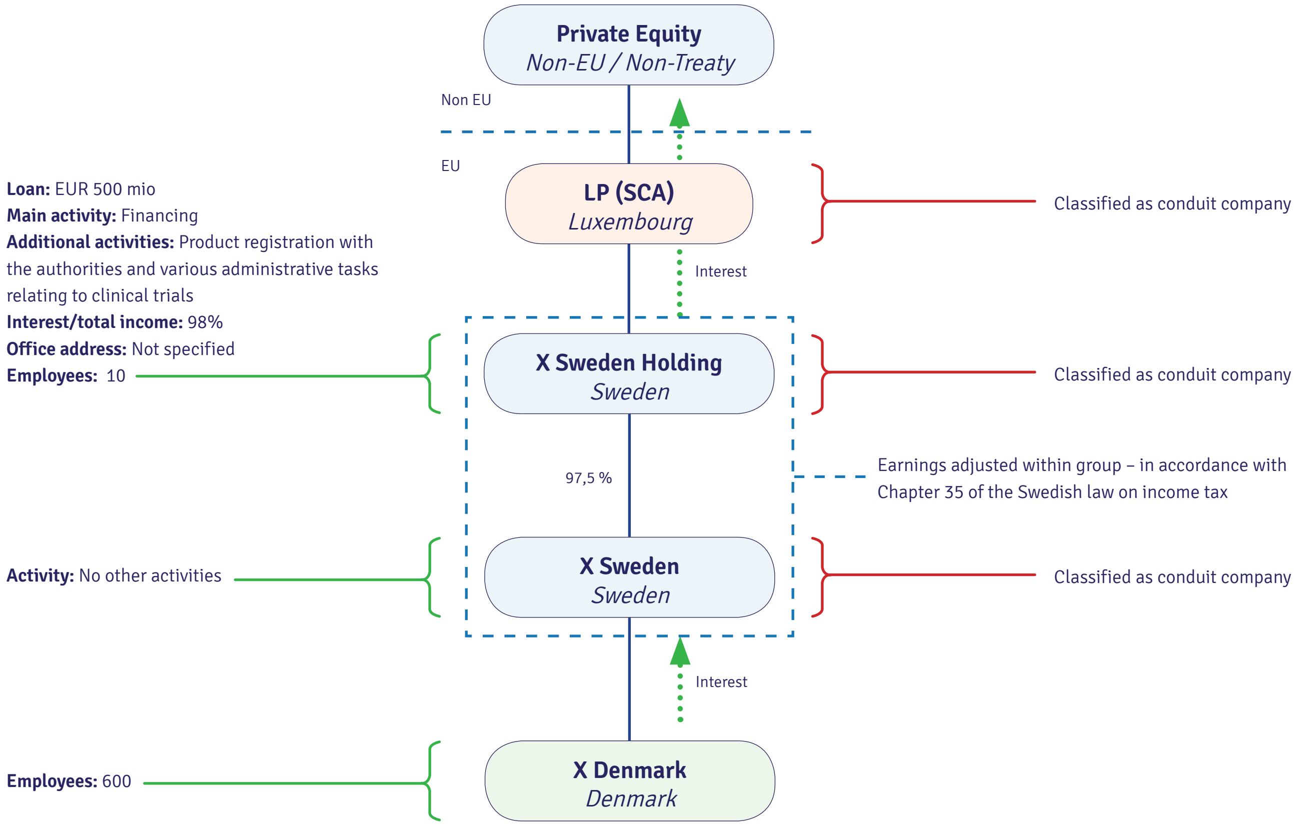


C-119/16, C Danmark I

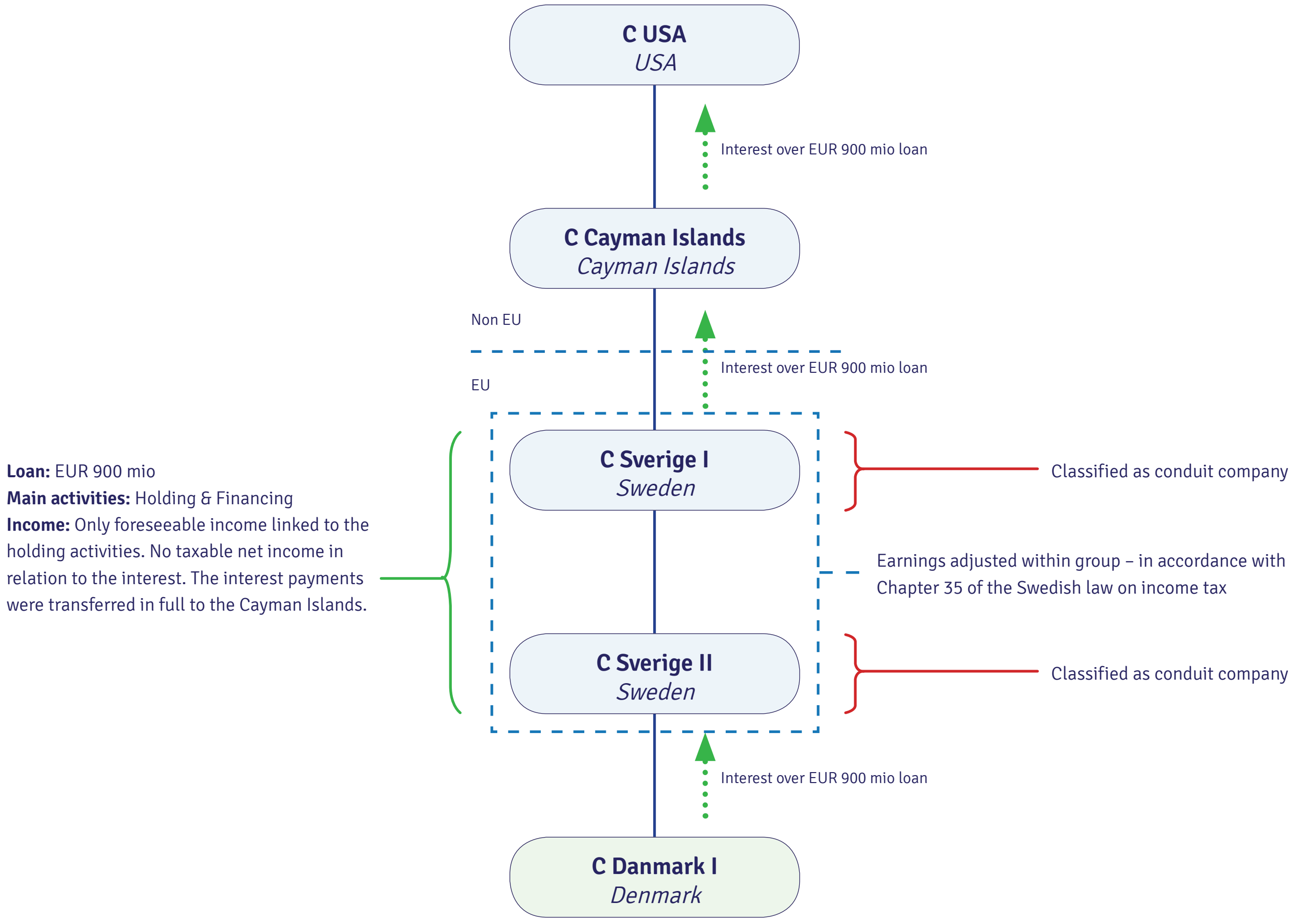
C Cayman Islands holds 100% of the shares in a Swedish holding company (C Sverige I), which holds 100% of another Swedish holding company (C Sverige II), which in turn holds 100% of the shares in C Danmark I. The holding structure involved two loans of EUR 75 million and EUR 825 million respectively between C Cayman Islands and C Sverige I as well as two loans of EUR 75 million and EUR 825 million respectively between C Sverige II and C Danmark I. The loan agreements between C Cayman Islands and C Sverige I were concluded on completely identical terms as those concluded between C Sverige II and C Danmark I. Since under the then-prevailing Swedish tax law there was no taxable net income to be taxed in Sweden and no taxes at source were levied on the outbound interest either, the interest paid by C Danmark I was ultimately 'passed on' to C Cayman Islands via the Swedish companies.

Since under the then-prevailing Swedish tax law there was no taxable net income to be taxed in Sweden and no taxes at source were levied on the outbound interest either, the interest paid by C Danmark I was ultimately 'passed on' without reduction to C Cayman Islands via the Swedish companies. I.e. interest payments were taxed as business income of the Swedish company in Sweden. In addition interest payments of C Sverige I to its investor (C Cayman Islands) were, in turn, recognised as business expenses in Sweden. In the context of the Swedish group taxation provisions the interest payments and income were set-off. Sweden thereby taxed the difference between the interest paid from Denmark and the interest paid to C Cayman Islands in the third countries. Given that both were equally high, no taxable yield remained.
The Swedish Tax Authorities (STA) have provided the DTA with various pieces of information about C Sverige II and C Sverige I, which showed that neither company had any employees. They had identical addresses to the office address of another Swedish company (C Sverige III), which did not include any separate office premises for C Sverige II or C Sverige I. Any post for C Sverige II and C Sverige I was opened by C Sverige III's three employees. C Sverige II and C Sverige I did not have separate telephone numbers. The rent was paid by C Sverige III. No internal invoices were issued between the companies

for any wages or administrative costs, and C Sverige II and C Sverige I had not concluded a tenancy agreement and did not bear any costs for the use of the premises. In addition C Sverige II and C Sverige I carried out no activities other than holding shares in the subordinate company, and in the years 2004 to 2006 they had no turnover or employees. In the case of both C Sverige II and C Sverige I the business consisted of relatively few, substantial accounting transactions, consisting mostly of interest entries. The director of C Sverige III was also the director of C Sverige II and C Sverige I, had access to the companies' bank accounts and was also responsible for the companies' production of annual reports and filing of tax returns.

C Danmark I stated that C Cayman Islands paid a dividend of EUR 140 million to the parent company, C USA, which is resident in the United States. The DTA disputes this. Under the DTAA Denmark-US taxes at source were not levied on interest in Denmark if the beneficial owner is resident in the US, which the ultimate parent company C USA indisputably is. On 30 October 2009 the DTA adopted a decision that neither C Sverige II nor C Sverige I were to be regarded as the 'beneficial owner' of interest from C Danmark I under the EC Interest and Royalties Directive and the Nordic Double Taxation Convention, which ultimately ended up in the present court case.

Hereafter the (simplified) group structure as well as the relevant facts are provided.



C-299/16, Z Denmark

Z Denmark is a Danish industrial company, 66% of whose shares were acquired by a capital investment company, A Fund, in August 2005. In connection with the acquisition — on 27 September 2005 — A Fund provided a loan to Z Denmark at an interest rate of 9%. A Fund consists of five capital investment companies, four of which are organized as tax-transparent (under Danish tax law) limited partnerships on Jersey. There are approximately 70 direct investors in the four transparent investment companies, including pension funds, financial institutions, fund of funds, investment funds and firms, ordinary companies and private individuals.

In 2006, Denmark decided to introduce taxation at source for outbound interest payments. On 28 April 2006, A Fund established Z Luxembourg in Luxembourg and transferred the debt claim against Z Denmark to that company. In connection with the transfer, A Fund also granted a loan to Z Luxembourg at an interest rate of 9.875%. By agreement of 21 June 2006, A Fund transferred its shares in Z Denmark to Z Luxembourg. According to the information provided by the referring court, the annual financial statements of Z Luxembourg for 2007 and 2006 showed that the company's activities consisted solely of the investment in Z Denmark.

According to the information provided by the referring court, the annual financial statements of Z Luxembourg for 2007 and 2006 showed that the company's activities consisted solely of the investment in Z Denmark. The annual financial statements show that in 2006 the company had a negative result amounting to EUR 23.588 and in 2007 a positive result amounting to EUR 15.587. The item 'Tax on Profits' showed an amount of EUR 3.733 for one year (presumably 2007). The annual financial statements show that in 2006 the company had a negative result amounting to EUR 23.588 and in 2007 a positive result amounting to EUR 15.587. The item 'Tax on Profits' showed an amount of EUR 3.733 for one year (presumably 2007). In its decision of 10 December 2010, the DTA did not regard Z Luxembourg as "beneficial owner" of the interest for the purposes of the EC Interest and Royalties Directive and the DTAA Denmark-Luxembourg.

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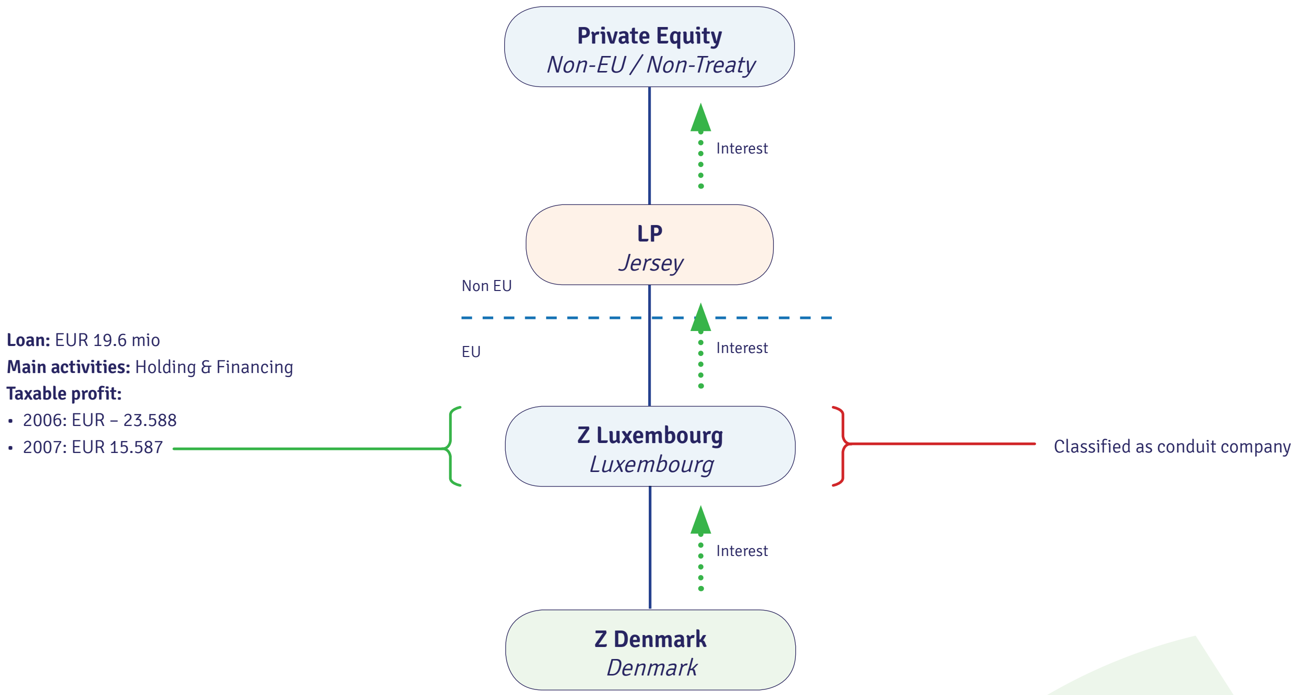

C-116/16, T Danmark

T Danmark is a Danish company of which over 50% of the shares are held by N Luxembourg 2. N Luxembourg 2 is a Luxembourg-resident company. According to a certificate of residence issued by the Luxembourg Tax Authorities (LTA) in 2011, N Luxembourg 2 is a company resident in Luxembourg, which has its effective management there, and falls within the scope of the EC Parent-Subsidiary Directive. The certificate was issued by the LTA at the request of the DTA. T Danmark submitted an application to the DTA for a binding answer in order to ascertain whether the dividends that it was distributing to N Luxembourg were exempt under Danish law. In its request for a binding ruling, T Danmark stated that it was considering distributing dividends to N Luxembourg 2 in the third quarter of 2011 in an amount of 6 billion DKK, which was the equivalent of EUR 805 million. As N Luxembourg 2 is an independent entity with its own management and decision-making powers, the ruling request stated that it could not be predicted with certainty if and when the management of N Luxembourg 2 would adopt a decision disposing of the dividends received from T Danmark.

The DTA took the view that a binding ruling could not be given, if it was not clear how N Luxembourg 2 intended to dispose of the dividends received from T Danmark. T Danmark informed the DTA that it should presume, for the purpose of giving a binding ruling, that the lion's share of the dividends of N Luxembourg 2 would be channelled via the capital investment companies concerned to their shareholders as dividends. A small portion of the dividends (probably between 3% and 5%) would be used to cover operational costs of N Luxembourg 2 or allocated to a reserve for future costs. T Danmark further presumed that the dividends distributed to N Luxembourg 2 (as dividends and/or interest and/or debt repayments) would be channeled via the capital investment companies concerned to their shareholders, but did not know how that would be done or how it would be presented for tax purposes. The ruling request was denied by the DTA. T Danmark lodged an appeal with the highest tax authority in Denmark, which had a different opinion. The DTA took legal proceedings against that decision, which resulted in the present CJEU case.

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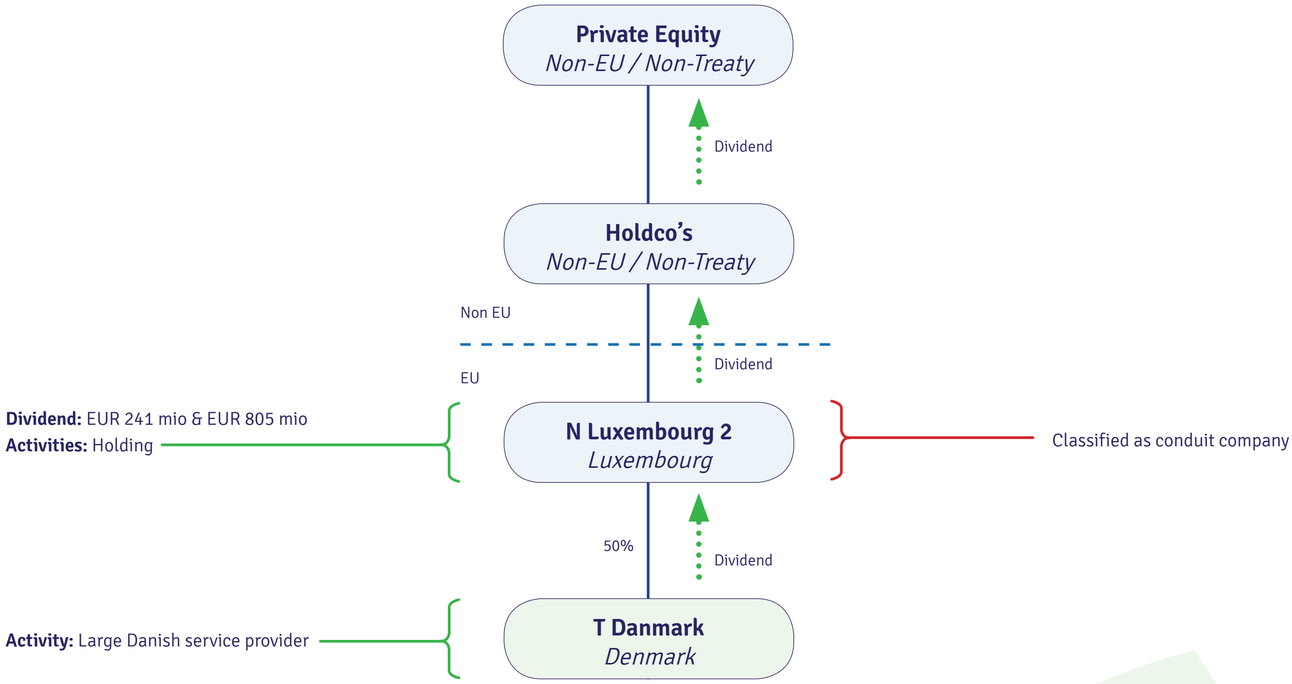


C-117/16, Y Denmark

The parent company at the top of the Y Group, Y Inc., USA (hereinafter Y USA) is a company listed in the USA. Y Denmark is an indirect subsidiary of Y USA. Y Denmark has around 20 employees on an ongoing basis and provides sales and support services. Y Denmark also functions as a holding company for the European branch of Y Group, for example, for Y Netherlands.

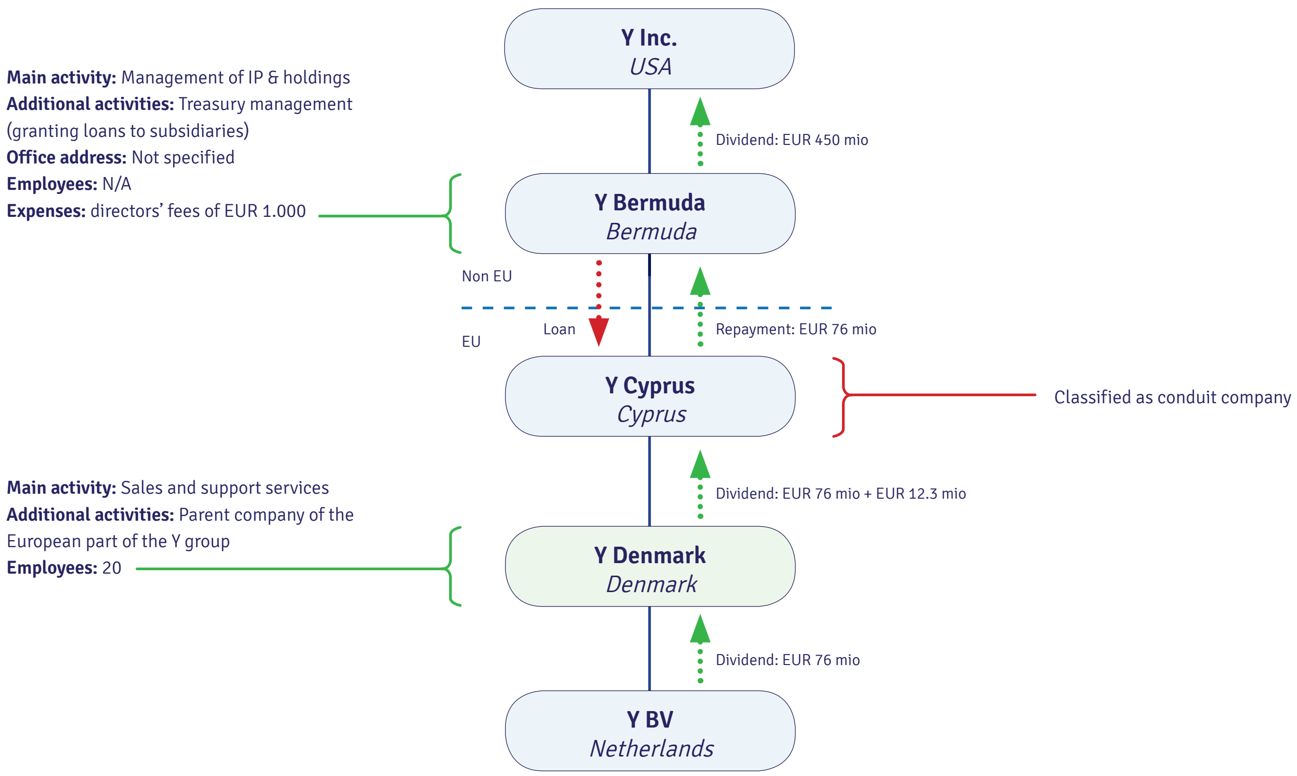
The starting point of the facts was the American Job Creation Act of 2004. US companies were granted the facility to repatriate dividends from foreign subsidiaries on very favourable tax terms, provided that they undertook in return to appropriate those dividends in the US for particular purposes, such as research and development. On that basis, Y USA decided to repatriate a substantial dividend from Y Bermuda (its wholly-owned subsidiary) for the 2005/2006 fiscal year (1 May 2005 to 28 April 2006). The dividend, to be created in part through dividend distributions by various subsidiaries to Y Bermuda, was 550 million US dollars (USD). Part of this amount had to be distributed from Y Netherlands to Y Denmark and vis-à-vis to Y USA (via Y Cyprus and Y Bermuda).

It should be noted that prior to distributing the dividends, Y Cyprus was inserted between Y Bermuda and Y Denmark. Y Cyprus acts as a holding company with certain treasury activities (loans to subsidiaries). The company, which has no staff, has the same address as a management company. It follows from the annual reports in the financial statements for 2005/2006 and 2006/2007 that the primary business of Y Cyprus is to act as a holding company and that its management board members were paid remunerations of USD 571 and USD 915. According to the financial statements, USD 0 in taxes were paid, because the company did not have positive taxable income.

On 26 September 2005, Y Netherlands decided to distribute a dividend of EUR 76 million to Y Denmark for the 2004/2005 fiscal year. On 28 September 2005, Y Denmark's general meeting approved a proposed dividend distribution to Y Cyprus for that fiscal year, which was also EUR 76 million. The dividend was paid to Y Denmark on 25 October 2005. On 27 October 2005, the dividend of equal amount was paid by Y Denmark to Y Cyprus, which passed it on to Y Bermuda on 28 October 2005 to repay the loan which it had contracted in connection with its acquisition of Y Denmark.

By notice dated 17 September 2010, the DTA found that Y Denmark should have retained the withholding tax on the dividends distributed to its parent company Y Cyprus in 2005 and was liable for the withholding tax. That notice was appealed, which ultimately resulted in the present CJEU case.

Hereafter the (simplified) group structure as well as the relevant facts are provided.



ABOUT NOVIOTAX

NovioTax is a Dutch research-oriented tax consultancy firm with offices in Amsterdam and Nijmegen. Our employees are members of the Dutch Association of Tax Advisers (NOB) and the International Fiscal Association (IFA), have many years of experience and some are much sought-after guest speakers on tax policy and other topics that fall within their field of expertise. We typically serve midsized and large MNE clients, coordinate discussions with the DTA and closely cooperate with international law and tax law firms.

DISCLAIMER

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