

EUROPEAN COMMISSION REQUESTS SPAIN TO END DISCRIMINATORY TAXATION OF OUTBOUND DIVIDENDS

The Commission considers Spanish anti-abuse rule is contrary to the Parent-Subsidiary Directive

The European Commission has recently announced that it has formally requested Spain to amend an anti-abuse rule in the Non-Residents Income Tax Act, which applies to those cases in which a Spanish company pays a company resident in another Member State which is owned by a company resident outside the European Union a dividend.

The EC Parent-Subsidiary Directive requires Member States to exempt dividends paid by a subsidiary company to its parent company in another Member State from withholding taxes. Spain has implemented the provisions in the Directive, but under the Spanish legislation the exemption does not apply in those cases where the majority of the voting rights in the EU parent company is directly or indirectly held by individuals or companies not resident in any EU country, unless it can be established that the EU parent performs a business directly linked to the Spanish subsidiary's business, or its business purpose is the management of the subsidiary, or it proves that it was incorporated on sound economic reasons and not only to benefit from withholding tax exemption.

The Directive gives the States a certain discretionary power to enforce domestic or treaty-based anti-abuse provisions, in derogation from the substantive rules of the Directive. However, such measures, which restrict Treaty freedoms, must be proportionate to the objective sought, in the opinion of the Commission and must not automatically presume abuse, as stated by the European Court of Justice.

In the opinion of the Commission the Spanish rule does not comply with this condition, as it applies automatically in all cases where the parent company is owned by a company resident in a non-EU third country, without any case-by-case examination of whether an abuse is actually being committed or not.

If Spain does not amend its legislation, the Commission may refer the case to the European Court of Justice.