

M&A Structures after the EU Court of Justice “Danish Judgments”

By **Roberto M. Cagnazzo**

The decision of the EU Court of Justice (ECJ) in cases C-116/16 and C-117/16 has provided important clarifications on the abuse of law and the notion of beneficial owner.

The question concerns the withholding tax on dividends paid by a Danish company to its shareholder in Cyprus, by the latter to its shareholder in Bermuda (by way of interest on financing) and

finally to its US parent company. This decision is important because it highlights the extent to which a multinational group can go so far as to create corporate structures designed to reduce the withholding tax on intercompany dividend distributions.

The Court, considering that the abuse of law is a principle of general application in the EU law, states that taxpayers may not make abusive use of the EU law. In front of

abusive practices, the EU countries must deny the exemption of the withholding tax on profits distributed by a subsidiary to its parent company (Directive 90/435) even in lack of domestic or conventional provisions providing for such denial.

The criteria to check the existence of an abusive construction are the following:

- the presence of an “objective” element showing that the objective pursued by the law has not been achieved despite formal compliance with the EU law, and
- the presence of a “subjective” element showing the will to obtain the advantage deriving from the EU law by artificially creating the necessary conditions to obtain it.

Evidence of abuse of law may include the use of intermediary companies without economic reason or the purely formal nature of the group structure, financial construction and financing. As a result of this change in the ECJ view, non-residents investors interested in carrying out in Italy a M&A transaction will have to carefully examine the use of an EU holding or sub-holding company in order not to lose the benefit of the withholding tax exemption on profits distributed by the Italian subsidiary to its European parent company.

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Studio Tributario Cagnazzo is a “boutique” firm mainly focused on providing integrated tax advice and assistance all over Italy to corporations, banks, multinational groups, and high-net-worth individuals on a wide range of domestic and international tax and corporate issues. The firm provides its domestic and international clients with specialist knowledge for strategic advice to resolve

any tax and legal issue on a local or global scale ranging from corporate tax issues to extraordinary financial transactions, such as domestic and cross-border reorganisations, IPOs, takeover bids, and M&A.

Roberto M. Cagnazzo, Founder and Partner, is a Chartered Accountant and Statutory Auditor with considerable expertise in domestic and international taxation acquired as Head of Tax in some of the leading listed Italian multinational groups and as Professor of Tax Law and International Tax Law at the University of Turin.

