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Case C-389/18, *Brussels Securities*

The CJEU issued a decision clarifying the application of Article 4(1) of the Parent-Subsidiary Directive

On 19 December 2019, the Court of Justice of the European Union (hereafter "**CJEU**") issued its judgment in the case C-389/18, *Brussels Securities*, concerning the interpretation of Article 4 of the Parent Subsidiary Directive (Directive 90/435/EEC, as applicable at the time of the case, now re-casted in Directive 2011/96/EU; hereafter "**PSD**"), which contains a general obligation for the State of residence of the parent company to refrain from taxing the dividends paid to the latter company by its foreign subsidiary.

In particular, the referring court asked the CJEU to clarify whether Belgian law, as amended following the *Cobelfret* decision of 12 February 2009 (case C-138/07), was in line with Article 4 PSD. Under Belgian rules, dividends received by the parent company were first added to its taxable income and, subsequently, an amount corresponding to 95% of those dividends was deducted. In the case of insufficient profits, *i.e.* where dividends exceeded the taxable income, any surplus (so called "**DTI**") could be carried forward with no time limits and deducted against the taxable income of the subsequent years. The DTI so carried forward, however, had to be deducted before other deductible items, in particular, (i) the deduction for risk capital (so called "**DRC**"), which could carried forward for a maximum of 7 tax periods, and (ii) tax losses, which could be carried forward indefinitely.

The CJEU upheld that Belgian law breached Article 4 PSD. According to the Court, the combination of the carrying forward of DTI, the order of deductions and the time-limit on the carrying forward of DRC could result in the loss of a tax advantage for the parent company, namely the deduction of DRC. This could, in fact, lead to an increase of the effective corporate tax rate in subsequent years. The CJEU noted that such increase in the effective tax rate would not take place in the absence of dividends from non-resident subsidiaries or in the case such dividends were excluded from the parent company's tax base. Belgian rules were not fiscally neutral with regard to the receipt of dividends paid by foreign subsidiaries and therefore the Court found a violation of Article 4(1) PSD.

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