



## EU Tax Centre

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### AG opinion in the SCA Group Holding joined cases

Freedom of establishment – loss relief – balanced allocation of taxing rights - double use of losses - coherence

On February 27, 2014, Attorney-General Kokott (AG) of the Court of Justice of the European Union (CJEU) issued her opinion in the SCA Group Holding joined cases (C-39/13, C-40/13, and C-41/13). The AG concluded that Dutch legislation that denies tax consolidation (fiscal unity) between on the one hand a Dutch parent and its Dutch sub-sub subsidiary and on the other hand two Dutch sister subsidiaries, on the grounds that, in the first case, the subsidiary, and in the second case, the parent company is not resident in the Netherlands, is in breach of the freedom of establishment. The CJEU now has to decide the case.

### Background

The case concerns two basic situations. The first involves a Dutch parent with an indirectly held Dutch subsidiary (sub-sub subsidiary) whereby the sub-sub subsidiary was held by a German subsidiary of the Dutch parent. The second involves a German parent holding three Dutch (sister) subsidiaries. In both cases the Dutch companies had applied to form a fiscal unity (a kind of group consolidation) for corporate tax purposes and in both cases this had been rejected. In the first case this was because the intermediate (subsidiary) company was resident in Germany, and in the second case because the parent company was resident in Germany. In both cases a fiscal unity would have been possible between all the companies involved if they had all been resident in the Netherlands.

The Amsterdam Court of Appeals referred a number of questions to the CJEU, in relation to whether the Dutch rules infringed the EU freedom of establishment. For these purposes a key question was whether it was relevant that a fiscal unity would not have been possible under Dutch law only between a (Dutch) parent and its indirectly held (Dutch) subsidiaries, i.e. without including intermediate (Dutch) subsidiaries, nor only as between two or more (Dutch) subsidiaries of a (Dutch) parent company, i.e. without including the parent company. A related question was whether it was relevant that a fiscal unity would have been possible between a Dutch parent and its German subsidiary insofar as the latter had set up a Dutch permanent establishment rather than a Dutch subsidiary.

### The AG's opinion

According to the AG, a Dutch parent with a non-Dutch subsidiary was treated worse than a Dutch parent with a Dutch subsidiary because, in the latter case, a fiscal unity could be formed between the Dutch parent and its Dutch *sub*-subsidiary. For these purposes the AG did not consider it relevant that, even in the case of a Dutch parent with a Dutch subsidiary, a fiscal unity between the Dutch parent and its Dutch sub-subsidiary was only possible if the Dutch subsidiary was also included in the fiscal unity. This conclusion was not affected by the X-Holding case (C-337/08) in which the CJEU held that a non-Dutch subsidiary could be excluded from a fiscal unity with its Dutch parent. The AG also took the view that the Dutch legislation also restricted the German subsidiary's freedom of establishment in view of the fact that a fiscal unity would have been possible if the latter had set up a Dutch permanent establishment instead of a subsidiary.

The AG applied a similar analysis to the case of the three Dutch sister subsidiaries: the German parent was disadvantaged over a Dutch parent at least to the extent that the Dutch subsidiaries could otherwise be included in a fiscal unity.

The AG considered but rejected a number of possible justifications for the above restrictions. As regards the justification based on the double use of losses, the AG's starting position was that this could not form an independent justification. But even if it could the AG considered that the Dutch rules were not an appropriate way of preventing this. The AG accepted the possibility that double use of losses might interfere with the coherence of the Dutch tax system but in that case considered that less far-reaching solutions could be found than an outright refusal to allow a fiscal unity.

### EU Tax Centre Comment

The AG's opinion 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. KPMG in the Netherlands is litigating one of the cases in this joined procedure and can provide support for similar cases where necessary.

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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