



# NEWS INTERNATIONAL

E-MAIL NEWSLETTER  
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Dear Sir/Madam,

It often seems like an endless race between taxpayers, the legislator and the tax authorities: Permissibly taking advantage of the existing tax legislation through legal structuring. In December 2017, the taxpayers celebrated a stage win in this regard when the European Court of Justice ruled that the German Anti-Treaty-Shopping-Rule contained in section 50d para. 3 German Income Tax Act (ITA) violates EU-law (C-504/16 Deister Holding and C-613/16 Juhler Holding A/S). The German tax authorities now have followed suit and commented in a letter of the German Federal Ministry of Finance (BMF) as of 4 April 2018 on the application of aforesaid ECJ-judgments.

What is it about? By implementing specific legal structures, a Taxpayer can make use of the regulations in Double Tax Treaties providing for a reduction of withholding taxes on specific income (dividends, interest income, license fees), so-called "Treaty Shopping". In this regard, a structure often used in groups of companies within the meaning of the parent subsidiary-directive is to "redirect" dividends through interposed foreign corporations. The German legislator always tried putting an end to such structures, particularly by means of the provision in section 50d para. 3 ITA.

According to the new BMF circular, section 50d para. 3 ITA in its version in force until 2011 must not be applied anymore. In addition, the BMF stated that the principles set out in the ECJ-judgments are also to be applied to the current version of section 50d para. 3 ITA being in force since 2012. However, privileged under this "EU-compliant interpretation" of section 50d para. 3 ITA are only cross border dividends within the EU.

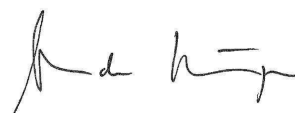
Moreover, the new interpretation of section 50d para. 3 ITA shall not apply to license and interest income. Privileged are only dividends falling within the scope of the parent subsidiary-directive of the EU. Concerning the privileged dividends, the BMF, in general, adheres to the requirements of section 50d ITA, however, has adjusted these to meet the requirements of the ECJ-judgments:

- ▶ The **participation in general economic transactions** can now also be fulfilled in case of a mere administration of assets. In certain cases, however, it is necessary that the foreign corporation, in fact, exercises its shareholder rights.
- ▶ The appropriate **commercially organized business operation** does not necessarily imply the foreign corporation employs management and other staff any more.
- ▶ The requirements of section 50d para. 3 ITA shall no longer be examined by means of the circumstances of the foreign corporation only. Rather, it is possible to refer to the **structure of the group of companies** in total.

Overall, the BMF circular is a step in the right direction. However, there still are doubts whether section 50d para. 3 ITA is consistent with EU-regulations. In addition, important questions how to interpret section 50d para. 3 ITA remain open. If you want to remain ahead in this matter, do not hesitate to contact us. We look forward to advising you.

Best regards

Dividends paid to companies in non-EU countries (also in the EEA-states Island, Norway, Liechtenstein), further on, fall within the scope of section 50d para. 3 ITA without limitation.



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## The author

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After studying and carrying out his traineeship in Berlin, Alexander Krüger started his career as an attorney in 2002 with an international law firm in Frankfurt/Main. In 2005 he also completed the examination for German Tax advisor.

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