

Intervener: Slovenský futbalový zväz

Questions referred

1. May the conduct of a national authority, which finds that a tenderer for a contract with an estimated value of EUR 3 million does not satisfy the selection criterion relating to economic and financial standing, even though a sworn statement submitted by the tenderer and a declaration provided by its bank, certify that it will be able to draw on funds under a secured loan which can be used for any purpose up to a maximum amount exceeding the value of the contract, be considered compatible with the objective of Article 47, in particular Article 47(1)(a) and (4), of Directive 2004/18/EC ⁽¹⁾ of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts?
2. Where, in a binding undertaking to grant credit, a bank operating on the banking-services market of a Member State, makes the release of funds conditional upon fulfilment of conditions for granting credit which are not specifically indicated in the loan agreement at the time of the tendering procedure, does such conduct constitute, for the purpose of Article 47(5) of Directive 2004/18, a valid reason why the tenderer cannot produce the references requested by the contracting authority, so that it is possible for the tenderer to prove its economic and financial standing by means of a sworn statement to the effect that its credit arrangement with the bank is sufficient for the purpose in question?
3. In an action for review of the decision of a national authority responsible for public tendering procedures to exclude a tenderer, may the fact that the successful tenderer has almost completed performance of the various contracts be regarded as an objective impediment precluding the national court from giving effect to the provisions of Article 47(1) and (2) of the Charter of Fundamental Rights of the European Union, in conjunction with Article 1(1) and Article 2(3), (6), (7) and (8) of Directive 89/665/EEC ⁽²⁾ of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts?

⁽¹⁾ OJ 2004 L 134, p. 114.

⁽²⁾ OJ 1989 L 395, p. 33.

Appeal brought on 11 February 2016 by Hewlett Packard Development Company LP against the judgment of the General Court (Sixth Chamber) delivered on 3 December 2015 in Case T-628/14: Hewlett Packard Development Company v EUIPO

(Case C-77/16 P)

(2016/C 270/27)

Language of the case: English

Parties

Appellant: Hewlett Packard Development Company LP (represented by: T. Raab, Rechtsanwalt, H. Lauf, Rechtsanwalt)

Other party to the proceedings: European Union Intellectual Property Office (EUIPO)

By order of 26 May 2016 the Court of Justice (Tenth Chamber) held that the appeal was inadmissible.

Request for a preliminary ruling from the Østre Landsret (Denmark) lodged on 25 February 2016 — N Luxembourg 1 v Skatteministeriet

(Case C-115/16)

(2016/C 270/28)

Language of the case: Danish

Referring court

Østre Landsret

Parties to the main proceedings

Applicant: N Luxembourg 1

Defendant: Skatteministeriet

Questions referred

1. Is Article 1(1) of Directive 2003/49/EC, ⁽¹⁾ read in conjunction with Article 1(4) thereof, to be interpreted as meaning that a company resident in a Member State that is covered by Article 3 of the Directive and, in circumstances such as those of the present case, receives interest from a subsidiary in another Member State, is the 'beneficial owner' of that interest for the purposes of the Directive?
 - 1.1. Is the concept 'beneficial owner' in Article 1(1) of Directive 2003/49/EC, read in conjunction with Article 1(4) thereof, to be interpreted in accordance with the corresponding concept in Article 11 of the OECD 1977 Model Tax Convention?
 - 1.2. If question 1.1. is answered in the affirmative, should the concept then be interpreted solely in the light of the commentary on Article 11 of the 1977 Model Tax Convention (paragraph 8), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding 'conduit companies' (paragraph 8.1, now paragraph 10.1), and the additions made in 2014 regarding 'contractual or legal obligations' (paragraph 10.2)?
 - 1.3. If the 2003 Commentaries can be incorporated into the interpretation, is it then a condition for deeming a company not to be a 'beneficial owner' for the purposes of Directive 2003/49/EC that there actually has been a channelling of funds to those persons who are deemed by the State in which the interest payer is resident to be 'the beneficial owners' of the interest in question, and — if so — is it then a further condition that the actual passing take place at a point close in time to the payment of the interest and/or take place as a payment of interest?
 - 1.3.1. Of what significance is it in that connection if equity capital is used for the loan, if the interest in question is entered on the principal ('rolled up'), if the interest recipient has subsequently made an intra-group transfer to its parent company resident in the same State with a view to adjusting earnings for tax purposes under the prevailing rules in the State in question, if the interest in question is subsequently converted into equity in the borrowing company, if the interest recipient has had a contractual or legal obligation to pass the interest to another person, and if most of the persons deemed by the State where the person paying the interest is resident to be the 'beneficial owners' of the interest are resident in other Member States or other States with which Denmark has entered into a double taxation convention, so that under the Danish taxation legislation there would not have been a basis for retaining tax at source had those persons been lenders and thereby received the interest directly?
 - 1.4. What significance does it have for the assessment of the issue whether the interest recipient must be deemed to be a 'beneficial owner' for the purposes of the Directive if the referring court, following an assessment of the facts of the case, concludes that the recipient — without having been contractually or legally bound to pass the interest received to another person — did not have the 'full' right to 'use and enjoy' the interest as referred to in the 2014 Commentaries on the 1977 Model Tax Convention?
2. Does a Member State's reliance on Article 5(1) of the Directive on the application of national provisions for the prevention of fraud or abuse, or of Article 5(2) of the Directive, presuppose that the Member State in question has adopted a specific domestic provision implementing Article 5 of the Directive, or that national law contains general provisions or principles on fraud, abuse and tax evasion that can be interpreted in accordance with Article 5?

- 2.1. If question 2 is answered in the affirmative, can Paragraph 2(2)(d) of the Law on corporation tax, which provides that the limited tax liability on interest income does not include 'interest which is tax-exempt ... under Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States', then be deemed to be a specific domestic provision as referred to in Article 5 of the Directive?
3. Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with OECD's Model Tax Convention, under which taxation of interest is contingent on whether the interest recipient is deemed to be the beneficial owner of the interest, a conventional anti-abuse provision covered by Article 5 of the Directive?
4. Is it abuse, etc. under Directive 2003/49/EC if, in the Member State where the interest payer is resident, tax deductions are allowed for interest, whilst interest in the Member State where the interest recipient is resident is not taxed?
5. Is a Member State that does not wish to recognise that a company in another Member State is the beneficial owner of interest and claims that the company in the other Member State is a so-called artificial conduit company, bound under Directive 2003/49/EC or Article 10 EC to state whom the Member State in that case deems to be the beneficial owner?
6. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49/EC concerning interest received from a company resident in another Member State (subsidiary), and the parent company of the latter Member State is deemed to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC, preclude legislation under which the latter Member State requires the company liable for retaining the tax at source (subsidiary) to pay overdue interest in the event of overdue payment of the tax at source claim at a higher rate of interest than the overdue interest rate that the Member State charges on corporation tax claims (including interest income) lodged against a company resident in the same Member State?
7. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49/EC concerning interest received from a company resident in another Member State (subsidiary), and the parent company of the latter Member State is deemed to be a taxable person with limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 (in the alternative Article 56 EC), viewed separately or as a whole, preclude legislation under which:
- (a) the latter Member State requires the person paying the interest to retain tax at source on the interest and makes that person liable to the authorities for the non-retained tax at source, where there is no such duty to retain tax at source when the interest recipient is resident in the latter Member State?
- (b) a parent company in the latter Member State would not have been required to make advance payments of corporation tax in the first two fiscal years, but would only have begun to pay corporation tax at a much later time than the due date for tax at source?

The EU Court of Justice is requested to include the answer to question 6 in its answer to question 7.

⁽¹⁾ Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.
OJ 2003 L 157, p. 49