

Opinion Statement ECJ-TF 2/2018 on the ECJ Decision of 7 September 2017 in *Egiom* (Case C-6/16), Concerning the Compatibility of the French Anti-Abuse Rule Regarding Outbound Dividends with the EU Parent-Subsidiary Directive (2011/96) and the Fundamental Freedoms

This CFE Opinion Statement, submitted to the European Institutions in May 2018, addresses the ECJ's decision in *Egiom* (Case C-6/16), which concerns the EU law compatibility of the French anti-abuse rule regarding outbound dividends.

1. Introduction

This is an Opinion Statement prepared by the CFE ECJ Task Force on *Egiom* (Case C-6/16), in respect of which the Sixth Chamber of the Court of Justice of the European Union (ECJ) delivered its decision on 7 September 2017.¹ In general terms, the ECJ followed the reasoning of Advocate General Kokott, who delivered her Opinion on 19 January 2017.²

The case concerns the EU law compatibility of the French anti-abuse rule regarding outbound dividends, which puts the burden of proof on the taxpayer to demonstrate that a scheme is not abusive in situations in which a French company distributes dividends to an EU parent that is itself owned (directly or indirectly) by a parent company located in a third country. The issue was whether such legislation is contrary to article 1(2) of the Parent-Subsidiary Directive (90/435) (the Directive)³ (prior to being amended

in 2015)⁴ and/or the freedom of establishment (article 49 of the Treaty on the Functioning of the European Union (TFEU) (2007)).⁵ The Court, employing a narrow interpretation of article 1(2) of the Directive, rejecting a general presumption of fraud and abuse, and noting that the mere fact that a company residing in the European Union is directly or indirectly controlled by residents of third states does not imply a purely artificial arrangement, eventually found that the French rule at issue in *Egiom* was not in line with article 1(2) of the Directive. Moreover, the French rule violated the freedom of establishment, with the Court explicitly noting that "the objective of combating fraud and tax evasion, whether it is relied on under Article 1(2) of the Parent-Subsidiary Directive or as justification for an exception to primary law, has the same scope".

Similar issues were subsequently addressed by the ECJ in its decisions in *Deister and Juhler* (Joined Cases C-504/16 and C-613/16)⁶ concerning the German anti-abuse rules for outbound dividends, in which the Court not only followed its reasoning in *Egiom* but also gave substantive guidance as to the interpretation of the anti-abuse standard under EU law.

2. Background and Issues

Egiom is a French resident company, wholly owned by Enka, a company governed by Luxembourg law. Enka is almost fully owned by a company resident in Cyprus, which is itself controlled by a company established in Switzerland. In 2005 and 2006, *Egiom* distributed dividends to Enka.

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1. FR: ECJ, 7 Sept. 2017, Case C-6/16, *Egiom SAS, formerly Holcim France SAS, Enka SA v. Ministre des Finances et des comptes publics*, ECLI:EU:C:2017:641, ECJ Case Law IBFD.

2. FR: Opinion of Advocate General Kokott, 19 Jan. 2017, Case C-6/16, *Egiom SAS, formerly Holcim France SAS, Enka SA v. Ministre des Finances et des Comptes publics*, ECLI:EU:C:2017:34, ECJ Case Law IBFD.

3. Council Directive 90/435/EEC on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States, OJ L 225 (1990), EU Law IBFD. Currently, Council Directive 2011/96/EU of 30 November 2011 on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States, OJ L 345/8 (2011), EU Law IBFD.

4. Council Directive 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 21/1 (2015), EU Law IBFD.

5. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD [TFEU].

6. DE: ECJ, 20 Dec. 2017, Joined Cases C-504/16 and C-613/16, *Deister Holding and Juhler Holding*, ECLI:EU:C:2017:1009, ECJ Case Law IBFD.

Article 119 ter of the French tax code (CGI)⁷ generally exempts withholding tax on dividends paid to the parent company under conditions similar to those of the Directive. However, the third paragraph of article 119 ter of the CGI, in the version applicable to the facts of the case, denies the withholding tax exemption, i.e. the tax advantage provided for by article 5(1) of the Directive, where the distributed dividends are received by a legal person controlled directly or indirectly by one or more residents of states that are not members of the European Union, unless the parent company establishes that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of the withholding tax exemption.

The French tax authorities argued that the third paragraph of article 119 ter of the CGI, i.e. the anti-abuse rule, was applicable to Eqiom. The company complained before French courts but both the first-tier tribunal and the Court of Appeal dismissed its plea. Finally, Eqiom appealed to the French Supreme Administrative Court (*Conseil d'Etat*), raising questions on the compatibility of the French anti-abuse rule with both the Directive and the fundamental freedoms. The French Supreme Court referred several questions to the ECJ for a preliminary ruling:

(1) If the national legislation of a Member State uses in domestic law the option offered by article 1(2) of Directive 90/435, is there scope for review of the measures or agreements adopted in order to give effect to that option under EU primary law?

(2) Must the provisions of article 1(2) of that Directive, which confer upon Member States broad discretion to determine which provisions are “required for the prevention of fraud or abuse”, be interpreted as precluding a Member State from adopting a mechanism aimed at excluding from the benefit of the exemption the dividends distributed to a legal person controlled directly or indirectly by one or more residents of States that are not members of the Union, unless that legal person provides proof that the principal purpose or one of the principal purposes of the chain of interests is not to benefit from the exemption?

(3) (a) If the compatibility with EU law of the “anti-abuse” mechanism mentioned above should have to be assessed having regard to the provisions of the Treaty too, must it be examined, having regard to the purpose of the legislation at issue, in the light of the provisions of article 49 TFEU, even though the company receiving the dividend distribution is controlled directly or indirectly, as a result of a chain of interests which has among its principal purposes the benefit of the exemption, by one or more residents of third States that may not avail themselves of freedom of establishment?

(b) If the answer to the preceding question is not affirmative, must that compatibility be examined in the light of the provisions of article 63 TFEU?

(4) Must the provisions cited above be interpreted as precluding national legislation from excluding from the exemption from withholding tax the dividends paid by a company in one Member State to a company established in another Member State, if those dividends are received by a legal person controlled directly or indirectly by one or more residents of States that are not members of the European Union, unless that legal person establishes that the principal purpose or one of the principal purposes of that chain of interests is not to benefit from the exemption?

7. FR: General Tax Code (*Code général des impôts*), National Legislation IBFD.

3. The Decision of the ECJ

Following, in general terms, the reasoning of Advocate General Kokott, the Court examined whether, first, article 1(2) of the Directive, according to which the Directive “shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse”, and, secondly, articles 49 or 63 of the TFEU, must be interpreted as precluding the French anti-abuse rule at issue. Before addressing these issues, the Court noted that “according to settled case-law, any national measure in an area which has been the subject of exhaustive harmonisation at the level of the European Union must be assessed in the light of the provisions of that harmonising measure, and not in the light of the provisions of primary law”.⁸ However, such “shielding effect” from scrutiny in light of the fundamental freedoms was quickly rejected by the Court, as article 1(2) of the Directive only provides for a possibility for the Member States to apply domestic or agreement-based provisions required for the prevention of fraud and abuse. As such, it cannot be considered as an exhaustive harmonization measure and therefore the domestic legislation should be tested both against the Directive and the fundamental freedoms.⁹

It was uncontested that the case at issue is covered by the Directive. In analysing the compatibility of the French provision with article 1(2) of the Directive, the Court first referred to some fundamentals of the Directive, especially its purpose, which is to eliminate any disadvantage to cooperation between companies of different Member States as compared with cooperation between companies of the same Member State, thus instituting tax neutrality within the Internal Market by abolishing withholding taxation so as to avoid double taxation.¹⁰ The Court also recalled that a Member State cannot unilaterally introduce restrictive measures and conditions that would reduce the availability of the advantage.¹¹

Regarding article 1(2) of the Directive, the Court stated that it is to be regarded as an exception to the rules of the Directive – reflecting the general principle that precludes a situation from benefiting from EU law when it entails abusive or fraudulent ends – so must be interpreted strictly.¹² The power granted to the Member States to introduce “anti-abuse” provisions cannot “be given an interpretation going beyond the actual terms” of article 1(2) of the Directive.¹³ As this provision only permits the application of domestic or agreement-based provisions “required” for that purpose,¹⁴ it is necessary to verify whether the French provision respects this requirement of necessity.

8. *Eqiom* (C-6/16), para. 15, referring to LU: ECJ, 8 Mar. 2017, Case C-14/16, *Euro Park Service*, para. 19, EU:C:2017:177, ECJ Case Law IBFD.

9. Id., paras. 16-18.

10. Id., para. 19-23.

11. Id., para. 24, referring, *inter alia*, to BE: ECJ, 4 June 2009, Joined Cases C-439/07 and C-499/07, *Belgische Staat v. KBC Bank NV and Beleggen, Risicokapitaal, Beheer NV v. Belgische Staat*, para. 38, EU:C:2009:339, ECJ Case Law IBFD.

12. *Eqiom* (C-6/16), para. 26.

13. Id., para. 27, referring to UK: ECJ, 25 Sept. 2003, Case C-58/01, *Océ Van der Grinden NV v. Commissioners of Inland Revenue*, para. 86, EU:C:2003:495, ECJ Case Law IBFD.

14. *Eqiom* (C-6/16), para. 28.

In doing so, the Court relied on the interpretation well known from its case law in the area of the fundamental freedoms,¹⁵ recalling that the specific objective of the domestic provision must be to prevent conduct involving the creation of wholly artificial arrangements that do not reflect economic reality, the purpose of which is to unduly obtain a tax advantage. As such, a general presumption of fraud and abuse cannot justify either a fiscal measure that compromises the objectives of a directive, or a fiscal measure that prejudices the enjoyment of a fundamental freedom guaranteed by the treaties.¹⁶ As a consequence, a domestic provision providing predetermined general criteria should be set aside. An anti-abuse rule should provide for a case-by-case analysis. As the Court already stated recently, a “general tax measure automatically excluding certain categories of taxpayers from the tax advantage, without the tax authorities being obliged to provide even *prima facie* evidence of fraud and abuse, would go further than is necessary for preventing fraud and abuse”.¹⁷

The provision under scrutiny applies automatically when the EU parent is held directly or indirectly by a parent located in a third country, i.e. the French rule “is not specifically designed to exclude from the benefit of a tax advantage purely artificial arrangements designed to unduly benefit from that advantage, but covers, in general, any situation where a company directly or indirectly controlled by residents of third States has its registered office, for any reason whatsoever, outside France”.¹⁸ However, such control by a third country resident does not, in itself, indicate the existence of a purely artificial arrangement that does not reflect economic reality the purpose of which is to unduly obtain a tax advantage.¹⁹ The general presumption of fraud and abuse that leads to the reversal of the burden of proof without the tax authorities having to provide “even *prima facie* evidence” of the fraud and abuse undermines the objective of elimination of double taxation set by the Directive.²⁰ This conclusion is also not “undermined by the fact that the parent company at issue is directly or indirectly controlled by one or more residents of third States”, because no provision of the Directive indicates that “the origin of the shareholders of companies resident in the European Union affects the right of those companies to rely on tax advantages provided for by that directive”²¹

With regard to article 1(2) of the Directive, the Court therefore concluded:²²

In the light of the above considerations, it must be held that Article 1(2) of the Parent-Subsidiary Directive must be interpreted as precluding national tax legislation, such as that at issue in the main proceedings, which subjects the grant of the tax advan-

tage provided for by Article 5(1) of that directive – namely, the exemption from withholding tax of profits distributed by a resident subsidiary to a non-resident parent company, where that parent company is directly or indirectly controlled by one or more residents of third States – to the condition that that parent company establish that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of that exemption.

In a second step, the Court scrutinized the issue in light of the fundamental freedoms and held that, specifically, the freedom of establishment (article 49 of the TFEU) applies to the case at hand (and not the free movement of capital under article 63 of the TFEU). While the French rules applied to shareholdings of at least 20% (at the time), no information on the purpose of the law was available to the Court, i.e. whether it is only to apply to situations in which the shareholder exercises a definite influence over its subsidiary. However, being an EU (and not a third-country) situation, one must determine the applicable freedom based on the specific facts of the case.²³ As the case involves a 100% shareholder relationship, it falls within the freedom of establishment.²⁴ The fact that the shareholder of the EU parent is located in a third country does not deprive the EU parent from relying on the freedom of establishment provision “as the origin of the shareholders is irrelevant since the status of being a European Union company is based, under article 54 of the TFEU, on the location of the corporate seat and the legal order where the company is incorporated, not on the nationality of its shareholders”.²⁵ As it was not disputed that the company is established in the European Union, the freedom of establishment applied.

Applying the freedom of establishment, the relevant difference in treatment consists in the fact that the additional burden of proof only exists in cross-border situations:²⁶

[I]t is solely where a resident subsidiary distributes profits to a non-resident parent company, which is directly or indirectly controlled by one or more residents of third States, that the exemption from withholding tax is subject to the condition that that parent company establish that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of that exemption. By contrast, where such a subsidiary distributes profits to a resident parent company, also directly or indirectly controlled by one or more residents of third States, that resident parent company may benefit from that exemption without being subject to such a condition.

Those situations are comparable when, as in the case at hand, the Member State exercises its jurisdiction over the dividends – sourced in that Member State – received by a non-resident taxpayer.²⁷ With regard to a potential justification of that difference in treatment of comparable situations, the Court employed the same approach as it has in rejecting the application of the anti-abuse provision of

15. See UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, para. 40, EU:C:2012:415, ECJ Case Law IBFD.
16. *Eqiom* (C-6/16), paras. 31-32.
17. Id., para. 32, referring to *Euro Park Service* (C-14/16), paras. 55 and 56.
18. Id., para. 33.
19. Id., paras. 34-35.
20. Id., para. 36.
21. Id., para. 37.
22. Id., para. 38.

23. See also, for this determination, CFE ECJ Task Force, *Opinion Statement ECJ-TF 1/2017 on the Decision of the Court of Justice of the European Union in SECIL (Case C-464/14) Concerning the Free Movement of Capital and Third Countries*, 57 Eur. Taxn. 4 (2017), Journals IBFD.
24. *Eqiom* (C-6/16), paras. 39-51.
25. Id., paras. 47-48.
26. Id., para. 55.
27. Id., paras. 57-58.

article 1(2) of the Directive.²⁸ The French rules therefore also violated the freedom of establishment, with the Court explicitly noting that:²⁹

the objective of combating fraud and tax evasion, whether it is relied on under Article 1(2) of the Parent-Subsidiary Directive or as justification for an exception to primary law, has the same scope. Therefore, the findings [with regard to article 1(2) of the Directive] also apply with regard to that freedom.

The Court concluded as follows:³⁰

In the light of the foregoing considerations, the answer to the questions referred is that Article 1(2) of the Parent-Subsidiary Directive, first, and Article 49 TFEU, secondly, must be interpreted as precluding national tax legislation, such as that at issue in the main proceedings, which subjects the grant of the tax advantage provided for by Article 5(1) of that directive – namely, the exemption from withholding tax of profits distributed by a resident subsidiary to a non-resident parent company, where that parent company is directly or indirectly controlled by one or more residents of third States – to the condition that that parent company establish that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of that exemption.

4. Comments

4.1. The “shielding effect” of secondary EU law from scrutiny under the fundamental freedoms

Repeating in *Eqiom* what the Court had already stated in *Euro Park Service* (Case C-14/16), any national measure in an area that has been the subject of exhaustive harmonization at the level of the European Union must be assessed in light of the provisions of that harmonizing measure, and not in light of the provisions of primary law, specifically the fundamental freedoms.³¹ In this respect, secondary EU law would “shield” domestic implementing legislation from scrutiny under the freedoms. That approach, however, leads to some uncertainties: First, one may wonder if the exhaustive harmonization test applies with respect (i) to a sphere or area of law (for example, tax law or corporate tax law), (ii) to a directive as a whole (for example, the Directive or the Anti-Tax Avoidance Directive (2016/1164) (ATAD))³² or (iii) if it would be sufficient for a single provision of a directive to oblige the Member States to act in a specific way without allowing for any choice. The latter approach seems to have been

taken by the Court in *Eqiom*³³ and also, for example, subsequently in *Deister and Juhler*,³⁴ wherein the Court focused on whether a specific provision of the Directive, i.e. article 1(2) of the Directive, leads to such harmonization and not whether the domain as a whole (being tax law or, at least, the treatment of specific operations such as EU cross-border dividend distributions) leads to such. Similarly, in the *Euro Park Service* case, the Court also referred to a specific provision of the Merger Directive (2009/133)³⁵ possibly leading to such harmonization in respect of testing a national provision.³⁶

The key element to be taken into account in determining whether the harmonization brought about by one or more provisions of a directive is exhaustive in nature appears to be whether a directive, or one of its provisions, prescribes a particular behaviour on the part of Member States without leaving any option to them.³⁷ The Court’s case law in non-tax cases confirms this interpretation.³⁸ To do this, “the Court must interpret those provisions taking into account not only their wording but also the context in which they occur and the objectives of the rules of which they form part”.³⁹ Where, therefore, a directive “does not set out minimum requirements ..., but rather exhaustive rules”, “Member States are therefore not entitled to adopt more stringent requirements”.⁴⁰ Conversely, harmonization is not exhaustive if a directive provides that “Member States may introduce or maintain, in the area covered by the directive, more stringent provisions to ensure a higher level of consumer protection” (provided, of course, that power is exercised with due regard for the TFEU).⁴¹

Based on these considerations, the Court in *Eqiom* noted that article 1(2) of the Directive does not provide for exhaustive harmonization of anti-abuse rules. This is “clear from the wording of that provision”,⁴² states the Court, which “recognises solely the Member States’ power to apply domestic or agreement-based provisions required for the prevention of fraud and abuse”.⁴³ In other words, as the Directive was referring to, *inter alia*, a domestic anti-

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28. Id., paras. 57-65.
 29. Id., para. 64.
 30. Id., para. 66.
 31. *Euro Park Service* (C-14/16), para. 19; *see also*, e.g., FI: ECJ, 12 Nov. 2015, Case C-198/14, *Valev Visnapuu v. Kihlakunnansyyttäjä (Helsinki) and Suomen valtio – Tullihallitus*, para. 40, EU:C:2015:751, ECJ Case Law IBFD and UK: ECJ, 19 Oct. 2017, Case C-573/16, *Air Berlin plc v. Commissioners for Her Majesty’s Revenue & Customs*, para. 27, EU:C:2017:772.
 32. Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1 (2016), EU Law IBFD. *See, e.g.*, *Air Berlin* (C-573/16), wherein the Court noted “that both Directive 69/335 and Directive 2008/7, which repealed and replaced it, provided for complete harmonisation of the cases in which the Member States may levy indirect taxes on the raising of capital” and that, “where a matter is harmonised at EU level, national measures relating thereto must be assessed in the light of the provisions of that harmonising measure and not of those of the FEU Treaty”.

33. *Eqiom* (C-6/16), para. 15, finding it “necessary to determine first of all whether Article 1(2) of the Parent-Subsidiary Directive provides for such harmonisation”.
 34. *Deister Holding and Juhler Holding* (C-504/16 and C-613/16), paras. 45-46.
 35. Council Directive 2009/133/EC of 19 October 2009 on the Common System of Taxation Applicable to Mergers, Divisions, Partial Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States and to the Transfer of the Registered Office of an SE or SCE between Member States (Codified Version), OJ L 310 (2009), EU Law IBFD.
 36. *Euro Park Service* (C-14/16), paras. 19 and 25.
 37. *Valev Visnapuu* (C-198/14), para. 41.
 38. *See, for instance*, SE: ECJ, 22 June 2017, Case C- 549/15, *E.On Biofor Sverige v. Statens energimyndighet*, EU:C:2017:490.
 39. *Valev Visnapuu* (C-198/14), para. 42, referring to IT: ECJ, 16 July 2015, Case C-95/14, *Unione Nazionale Industria Conciaria (UNIC) and Unione Nazionale dei Consumatori di Prodotti in Pelle, Materie Conci-anti, Accessori e Componenti (Uni.co.pel) v. FS Retail and Others*, para. 35, EU:C:2015:492.
 40. *UNIC* (C-95/14), para. 37.
 41. BE: ECJ, 16 Dec. 2008, Case C-205/07, *Lodewijk Gysbrechts and Santurel Inter BVBA*, para. 34, EU:C:2008:730.
 42. *Eqiom* (C-6/16), para. 16.
 43. Id., para. 17.

abuse provision, it was obvious that the provisions did not exhaustively harmonize the respective area. This position was clearly confirmed in *Deister and Juhler*.⁴⁴

However, if a directive is to have such a “shielding effect”, it is that directive and its validity that has to be measured against primary EU law. Indeed, in *HSBC Holding plc* (Case C-569/07)⁴⁵ and *Air Berlin* (Case C-573/16),⁴⁶ the Court, after having considered that the legislation was implementing a directive that had harmonized exhaustively the area of indirect taxes on the raising of capital, analysed the compatibility of domestic tax law with the Directive and refused to analyse it with the Treaty. However, it is then not the domestic rule that should be tested against fundamental freedoms but the provision of the Directive itself. Indeed, the restriction is not attributable to a Member State but to the EU institutions that have adopted the Directive: primary law also binds EU institutions when they adopt secondary legislation, which has to comply, notably, with the fundamental freedoms. For instance, the Court has held that “the prohibition on restrictions on freedom to provide services applies not only to national measures but also to measures adopted by the European Union institutions”.⁴⁷ It is, however, debatable whether or not the Court applies the same standard of primary EU law scrutiny to domestic measures, on the one hand, and Union legislation, on the other. While some decisions apply rather strict scrutiny also for secondary EU law measures,⁴⁸ the Court’s general approach is to accept more easily the proportionality of a restriction that is applicable in the whole European Union.⁴⁹ Indeed, tax measures based on an action by the Union institutions in light of the goals of the Union and (unanimously) accepted by all Member States certainly pose less risk with regard to the kind of national protectionism the fundamental freedoms aim to mitigate. For instance, in the recent Grand Chamber decision in *Rzecznik Praw Obywatelskich* (Case C-390/15), concerning the compatibility of the VAT

Directive (2006/112)⁵⁰ with the Charter of Fundamental Rights, the Court stated that:⁵¹

52. Where a difference in treatment between two comparable situations is found, the principle of equal treatment is not infringed in so far as that difference is duly justified [...].
53. That is the case, according to settled case-law of the Court, where the difference in treatment relates to a legally permitted objective pursued by the measure having the effect of giving rise to such a difference and is proportionate to that objective [...].
54. In that respect, it is understood that, when the EU legislature adopts a tax measure, it is called upon to make political, economic and social choices, and to rank divergent interests or to undertake complex assessments. Consequently, it should, in that context, be accorded a broad discretion, so that judicial review of compliance with the conditions set out in the previous paragraph of this judgment must be limited to review as to manifest error [...].

4.2. Substantive aspects of *Egiom* and further clarifications in *Deister and Juhler*

It must be stressed that, in *Egiom*, the French domestic rule was held to be incompatible with both the Directive and the freedom of establishment for the sole reason that the burden of proof was automatically reversed where the distributed dividends were received by a legal person controlled directly or indirectly by one or more residents of states that are not members of the European Union, as under French law the tax authorities did not have to provide “even *prima facie* evidence” of the fraud and abuse.⁵² In other words, the Court objected to the mere reversal of the burden of proof based on a general criterion – a “general presumption of fraud and abuse” – set by domestic law, which is considered to exceed what is necessary to attain the objective of combatting abuse and fraud. As the Court noted, mere control by a third country resident does not, in itself, indicate the existence of a purely artificial arrangement that does not reflect economic reality and the purpose of which is to unduly obtain a tax advantage.⁵³

This is in line with previous case law. For example, *Euro Park Service* concerned domestic legislation that required an advance agreement for all cross-border mergers (but not for domestic ones), necessitating that the taxpayer show that the operation concerned was justified based on commercial reasons and “that it does not have as its principal objective, or as one of its principal objectives, tax evasion or tax avoidance and that its terms make it possible for the capital gains deferred for tax purposes to be taxed in the future”.⁵⁴ The Court found this requirement to violate both article 49 of the TFEU and article 11(1) (a) of the Merger Directive (90/434).⁵⁵ Similarly, in *SIAT*

44. *Deister Holding and Juhler Holding* (C-504/16 and C-613/16), paras. 45-46.
45. UK: ECJ, 1 Oct. 2009, Case C-569/07, *HSBC Holdings plc and Vidacos Nominees Ltd v. The Commissioners of Her Majesty's Revenue & Customs*, EU:C:2009:594.
46. *Air Berlin* (C-573/16), paras. 26-27.
47. See, e.g., AT: ECJ, 26 Oct. 2010, Case C-97/09, *Ingrid Schmelz v. Finanzamt Waldviertel*, para. 50, EU:C:2010:632.
48. See, e.g., NL: ECJ, 5 May 1982, Case 15/81, *Gaston Schul Douane Expediteur BV v. Inspecteur der Invoerrechten en Accijnzen, Roosendaal*, para. 42, EU:C:1982:135, a VAT case wherein the Court stated that “the requirements of Article 95 of the Treaty are of a mandatory nature and do not allow derogation by any measure adopted by an institution of the Community”. Likewise, “[a]s a matter of principle, the scope of a provision of primary law cannot be interpreted in the light of provisions of secondary law that the institutions may have adopted for its implementation. On the contrary, when it is necessary to interpret a provision of secondary law, it is the secondary law which must be interpreted, as far as possible, in a manner which renders it consistent with the provisions of primary law” (EE: ECJ, 2 Oct. 2009, Case T-324/05, *Republic of Estonia v. European Commission*, para. 208, EU:T:2009:381).
49. See, for example, UK: ECJ, 10 Dec. 2002, Case C-491/01, *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.*, para. 123, EU:C:2002:741 and SE: ECJ, 17 Oct. 2013, Case C-203/12, *Billerud Karlsborg AB and Billerud Skärblacka AB v. Naturvårdsverket*, para. 35, EU:C:2013:664.

50. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347 (2006), EU Law IBFD.
51. PL: ECJ, 7 Mar. 2017, Case C-390/15, *Rzecznik Praw Obywatelskich (RPO)*, paras. 52-54, EU:C:2017:174, ECJ Case Law IBFD.
52. *Egiom* (C-6/16), para. 36.
53. Id., paras. 34-35.
54. *Euro Park Service* (C-14/16), para. 70.
55. Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and

(Case C-318/10), Belgian legislation on the deductibility of expenses paid to certain low or untaxed foreign (but not domestic) service providers put the burden of proof on the domestic taxpayer by requiring proof that such payments related to genuine and proper transactions and did not exceed the normal limits. Advocate General Cruz Villalón concluded that such a reversal of the burden of proof was too general but that some criteria, such as the existence of a relationship of interdependence between the service providers and the buyer could have led to accepting the measure as proportionate.⁵⁶ The Court did not take a position on this point since it considered that the rule, being insufficiently clear, precise and predictable, infringed the principle of legal certainty.⁵⁷

Shortly after the decision in *Eqiom*, the Court in *Deister and Juhler*⁵⁸ had to deal with the German anti-abuse rule of section 50d(3) of the German Income Tax Act,⁵⁹ which was supposedly intended to implement article 1(2) of the Directive. The German legislation provided for an irrebuttable presumption of abuse (and consequently no relief from withholding taxation of cross-border outbound dividends) that was based on (foreign) ownership of the parent company and a failure to meet one of three objective tests, i.e. economic and substantive reasons for the involvement of that company, a 10% gross income threshold relating to own economic activity and partaking in general economic commerce. More precisely, section 50d(3) of the German Income Tax Act contained the following conditions:⁶⁰

A foreign company has no entitlement to complete or partial relief under subparagraphs 1 or 2 to the extent that persons have holdings in it who would not be entitled to the refund or exemption if they earned the income directly, and

- (1) there are no economic or other substantial reasons for the involvement of the foreign company or
- (2) the foreign company does not earn more than 10% of its entire gross income for the financial year in question from its own economic activity or
- (3) the foreign company does not take part in general economic commerce with a business establishment suitably equipped for its business purpose.

Moreover, “organisational, economic or other substantive features of undertakings that are affiliated with the foreign company” were irrelevant in the assessment of the abusive nature of the scheme. Finally, a foreign company would not be considered as having an economic activity “if it earns its gross income from the management of assets or assigns its main business activities to third parties”.

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exchanges of shares concerning companies of different Member States, OJ L 225, p. 1 (1990).

56. BE: Opinion of Advocate General Cruz Villalón, 29 Sept. 2011, Case C-318/10, *Société d'investissement pour l'agriculture tropicale SA (SIAT) v. État belge*, para. 72, EU:C:2011:624, ECJ Case Law IBFD.

57. SIAT (C-318/10).

58. *Deister Holding and Juhler Holding* (C-504/16 and C-613/16).

59. DE: Income Tax Act (*Einkommensteuergesetz*), National Legislation IBFD. *Deister Holding and Juhler Holding* (C-504/16 and C-613/16) concerned German legislation that was implemented by DE: Annual Tax Act (*Jahressteuergesetz*) 2007. The question of compatibility of the more recent version of § 50d(3) of the German Income Tax Act (as amended by the Annual Tax Act 2012) with EU law is currently pending before the Court as DE: Pending Case C-440/17, GS (referred by the Tax Court of Cologne, 17 May 2017, 2 K 773/16).

60. See for this translation of the German rule, *Deister Holding and Juhler Holding* (C-504/16 and C-613/16), para. 14.

In *Deister and Juhler*, the Court found that such a rule violated articles 1(2) and 5(1) of the Directive and also gave indications as to the substantive criteria of the abuse standard under EU law.⁶¹ First, foreign ownership of the parent company does not indicate the existence of a wholly artificial arrangement. Second, the objective tests amount to a general (and irrebuttable) presumption of fraud or abuse. Such irrebuttable presumptions are disproportionate. Third, the conditions of those tests (cumulatively and alternatively) do not by themselves imply the existence of fraud or abuse leading to the disproportionality of the rule.⁶² The Court also clarified that the Directive does not establish any requirements with regard to the nature of economic activities of qualified companies or the amount of turnover resulting from those companies’ own economic activity; moreover, “[t]he fact that the economic activity of a non-resident parent company consists in the management of its subsidiaries’ assets or that the income of that company results only from such management cannot per se indicate the existence of a wholly artificial arrangement which does not reflect economic reality”.⁶³ Finally, the German legislation also failed the Directive’s standard because it did not provide for an overall assessment, on a case-by-case basis, of the relevant situation, based on factors including the organizational, economic or other substantive features of the group of companies to which the parent company in question belongs and the structures and strategies of that group.⁶⁴ As a result, just as the French law did in *Eqiom*, the German rules violated the freedom of establishment.⁶⁵

It might finally be noted that the Court in *Eqiom* considered whether or not the freedom of establishment (article 49 of the TFEU) or the free movement of capital (article 63 of the TFEU) should apply.⁶⁶ As the French provisions did not generally apply only to shareholdings that gave a shareholder a definite influence, the Court could merely refer to the factual circumstance that *Eqiom* was a wholly-owned subsidiary and, as such, it was “necessary to answer the questions referred in the light of freedom of establishment”.⁶⁷ The authors will not further comment on this “definite influence” requirement, as the ECJ Task Force recently delivered its detailed comments on SECIL⁶⁸ and the delimitation of the fundamental freedoms specifically with regard to third-country situations.⁶⁹

61. It is in reaction to the substantive criteria that, in a circular dated 4 Apr. 2018, Federal Tax Gazette (BStBl) I 2018, p. 589, the German Federal Ministry of Finance decreed that § 50d(3) of the German Income Tax Act (as implemented by the *Jahressteuergesetz* 2007) is no longer to be applied in cases covered by the Directive. Notwithstanding the fact that the pending case, GS (C-440/17), addresses § 50d(3) of the German Income Tax Act (as amended by the *Jahressteuergesetz* 2012), this newer and currently applicable version of the provision will be applied in due consideration of the substantive criteria.

62. *Deister Holding and Juhler Holding* (C-504/16 and C-613/16), paras. 64-71.

63. Id., paras. 72-73.

64. Id., para. 74.

65. Id., para. 97.

66. *Eqiom* (C-6/16), paras. 39-51. For a parallel discussion, see *Deister Holding and Juhler Holding* (C-504/16 and C-613/16), paras. 76-85.

67. *Eqiom* (C-6/16), para. 51.

68. PT: ECJ, 24 Nov. 2016, Case C-464/14, SECIL – Companhia Geral de Cal e Cimento SA v. Fazenda Pública, EU:C:2016:896, ECJ Case Law IBFD.

69. See CFE ECJ Task Force, *supra* n. 23.

5. Outlook: New Article 1 of the Parent-Subsidiary Directive

Egiom and *Deister and Juhler* both concerned the anti-abuse reservation in the original text of the Directive: According to its original article 1(2), “[t]his Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse”.⁷⁰ Addressing both the Member State of the subsidiary and of the parent company, that clause makes reference to domestic and tax treaty rules that are “required” for the “prevention of fraud or abuse”. It was also clear from that provision’s wording that whilst Member States may have taken such measures, they were not compelled to do so.

The Directive, however, was the first (and so far only)⁷¹ company tax directive to undergo an overhaul of its anti-abuse provision. Following the EU’s Action Plan to strengthen the fight against tax fraud and tax evasion and its call for a review of anti-abuse provisions in EU legislation,⁷² the Commission proposed amending the Directive to introduce a mandatory minimum standard to counter abusive transactions, and the Council adopted the provision in 2014.⁷³ Currently, therefore, article 1 contains a *mandatory* minimum anti-abuse standard in paragraphs 2 and 3,⁷⁴ while the previous *optional* anti-abuse

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- 70. The notion of “fraud” (and similarly “tax evasion”) likely only has a declarative meaning, as, in any event, the benefits of a directive will not be available in instances of illegal activity.
- 71. The new anti-abuse provision in the Directive will, however, be taken into consideration by the Council “in its future work on a possible anti-abuse provision to be included in [the IRD]”. See Annex II to the political agreement in Dok. 16435/14 FISC 221 ECOFIN 1157 (5 Dec. 2014).
- 72. See Action 15 in European Commission, Communication from the Commission to the Parliament and the Council, An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final (6 Dec. 2012).

73. See Council Directive (EU) 2015/121.

74. The Member States had to implement the new requirement into their domestic laws by 31 Dec. 2015 and some Member States have done so through specific rules. Conversely, however, if Member States have not implemented the requirement into domestic law, the traditional perspective is that the obligation imposed by the Directive does not have direct effect, i.e. it requires implementation into domestic law (art. 288(3) TFEU). This is because “direct effect” does not operate against individuals or companies, i.e. a Member State may not invoke a provision of a Directive against an individual or a company, the necessary implementation of which in national law has not yet taken place (see generally, e.g., UK: ECJ, 26 Feb. 1986, Case 152/84, *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, EU:C:1986:84), a perspective that the Court has also embraced with regard to the anti-abuse reservation in art. 15 of the Merger Directive (see DK: ECJ, 5 July 2007, Case C-321/05, *Hans Markus Kofod v. Skatteministeriet*, EU:C:2007:408, para. 42, ECJ Case Law IBFD). There also is not yet clear guidance from the Court that this necessity of implementation of anti-abuse rules in the company tax directives is obsolete based on a general principle of EU law that abusive practices are prohibited (see, however, for the area of VAT: IE: ECJ, 22 Nov. 2017, Case C-251/16, *Edward Cussens and Others v. T. G. Brosman*, paras. 25-44, EU:C:2017:881), but Advocate General Kokott recently rejected the idea that non-implemented anti-avoidance provisions of company tax directives can be applied directly by Member States (see DK: Opinions of Advocate General Kokott, 1 Mar. 2018, Cases C-115/16, *N Luxembourg I*, EU:C:2018:143, paras. 98-113; C-116/16, *T Denmark*, EU:C:2018:144, paras. 94-109; C-117/16; *Y Denmark*, EU:C:2018:145, paras. 94-109; C-118/16, *X Denmark*, EU:C:2018:146, paras. 108-123; C-119/16, *C Denmark I*, EU:C:2018:147, paras. 96-111 and C-299/16, *Z Denmark*, EU:C:2018:148, paras. 98-113). In any event, the obligation to interpret national law in accordance with EU law (e.g. an existing domestic GAAR) also exists where the result prescribed is not favourable to the

reservation was slightly reworded and moved to paragraph 4.⁷⁵

- 2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.
An arrangement may comprise more than one step or part.
- 3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
- 4. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse.

Article 1(2) and (3) aim to guarantee that the application of anti-abuse rules is proportionate and serves the specific purpose of tackling an arrangement or a series of arrangements that are not genuine, i.e. that do not reflect economic reality.⁷⁶ From a policy perspective, the provision’s aim was to: “make it obligatory for Member States to adopt the common anti-abuse rule” (in light of the diverging approaches and the fact that some Member States do not have any domestic or agreement-based provisions for the prevention of abuse), to achieve a common standard for anti-abuse provisions against abuse of the Directive that “will ensure clarity and certainty for all taxpayers and tax administrations” and to guarantee “an equal application of the EU directive without possibilities for “directive-shopping” (i.e. to prevent companies from investing through intermediaries in Member States where the anti-abuse provision is less stringent or where there is no rule).⁷⁷ Nevertheless, a number of uncertainties arise with regard to each of its tests, i.e. the requirement that:

- the main purpose or one of the main purposes of the arrangement be to obtain a tax advantage (“main purpose test”);
- the tax advantage defeat the object or purpose of the Directive (“object or purpose of the Directive test”); and
- the arrangement not be genuine having regard to all relevant facts and circumstances (“genuineness test”), i.e. that there are no valid commercial reasons that reflect economic reality for the arrangement (“commercial reasons test”).

The general framework and each individual component of article 1(2) and (3) have been intensely discussed in the lit-

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individual or company, so that an interpretative inverse vertical direct effect may be created (see, e.g., *Kofod* (C-321/05), para. 45).

75. It is, however, disputed which domestic anti-abuse provisions would be permissible under art. 1(4) of the Directive and whether those could be more far-reaching than art. 1(2) of the Directive (so that the latter provision would indeed only be a minimum standard) or whether they could only be limited to other, e.g., more specific situations (e.g. targeted anti-abuse rules for certain transactions).

76. Recital 6 of the Preamble to Council Directive (EU) 2015/121.

77. See the explanation in the Commission’s Proposal for a Council Directive amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries in different Member States, COM(2013) 814 final (25 Nov. 2013).

erature and opinions vary widely,⁷⁸ also with regard to the remaining leeway for Member States to enact anti-abuse provisions and potential conflicts between article 1(2) and (3) of the Directive and domestic implementing rules with the fundamental freedoms, for example, where the application results in discriminatory withholding taxation of cross-border dividends. The wording of article 1(2) and (3) takes clear inspiration from the Court's case law (but arguably also deviates from it) and the Commission's recommendation on aggressive tax planning,⁷⁹ but leaves ample room for interpretation. Since it is nearly identical to article 6 of the Anti-Tax Avoidance Directive (2016/1164) and has certain similarities to the recently introduced "principal purpose test" (PPT) of article 29 of the OECD Model (2017),⁸⁰ interpretative guidelines might be derived from the interpretation and application of those provisions. However, while article 29 of the OECD Model seems to focus on the perspective of the state ("benefit"), article 1(2) of the Directive arguably targets only situations in which the taxpayer obtains an overall "tax advantage", taking into account the tax position in all relevant Member States (for example, if the "benefit" of a lower withholding tax in one Member State would be offset by a lower tax credit in the other Member State). Conversely, a "tax advantage" is not obtained if the "genuine" arrangement, for example, direct ownership, would have triggered the same (low) tax burden in the source state.⁸¹

Certainly, the main (but not only⁸²) focus of that provision – as evidenced by the decisions in *Eqiom* and *Deister and Juhler* – is the perspective of the subsidiary's state of residence and its claim to tax outbound dividends,⁸³ i.e. the phenomenon of "directive shopping". Such "directive shopping" includes the interposition of a qualified EU company to trigger the application of the Directive with the aim of eliminating withholding taxation of dividends that indirectly benefit non-qualified persons (for example, individuals, non-qualified EU parent companies or third-country parent companies). However, the mere fact that the ultimate shareholder is not a qualified

company does not make an arrangement "not genuine" or "artificial".⁸⁴ Indeed, the ECJ in *Cadbury Schweppes* has relied on an evaluation of objective factors, in particular, evidence of physical existence in terms of premises, staff and equipment, that reflect economic reality, i.e. an actual establishment carrying on genuine economic activities and not a mere "letterbox" or "front" subsidiary.⁸⁵ The Commission, moreover, noted that "[o]bjective factors for determining whether there is adequate substance include such verifiable criteria as the effective place of management and tangible presence of the establishment as well as the real commercial risk assumed by it", but likewise admitted that "it is not altogether certain how those criteria may apply in respect of, for example, intra-group financial services and holding companies, whose activities generally do not require significant physical presence".⁸⁶ Also, the mere existence of "substance" (for example, office space, employees) in itself is likely not sufficient to exclude abuse if it does not bear a relation to the income in question.⁸⁷ It will eventually be up to the Court to undertake this complicated line-drawing, and it is hoped that the criteria established in *Eqiom* and *Deister and Juhler* will also inform the Court's case law with regard to the interpretation of the new wording of article 1(2) of the Directive, and that further clarifications will be made by the Court in the pending "beneficial ownership" cases.⁸⁸

6. The Statement

The CFE welcomes the *Eqiom* decision. In an international context where the fight against tax avoidance and aggressive tax planning is intensifying, it is important to preserve the fundamental principles of a balanced tax system: Free choice of the least taxed route, legal certainty, respect for principles concerning burden of proof, etc. In this respect, the Court appears to be the guardian of these rights. In line with its previous decisions and upholding the fundamental ideas of the Internal Market, the ECJ in *Eqiom* and *Deister and Juhler* clearly confirms that Member States may neither employ general presumptions of abuse nor define any tax planning or structuring as abusive in light of secondary EU law or the fundamental freedoms.

78. For a comprehensive discussion on GAARs under EU law, see A. Garcia Prats et al., *EU Report*, in *Seeking anti-avoidance measures of general nature and scope – GAAR and other rules* (IFA Cahiers vol. 103a, IBFD 2018), Online Books IBFD, which was prepared within the framework of the ECJ Task Force.

79. Commission Recommendation of 6 December 2012 on aggressive tax planning, C(2012) 8806 final.

80. *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Models IBFD.

81. See AG Opinion in *Eqiom* (C-6/16), para. 26, footnote 14, wherein a holding of a French subsidiary not through an interposed EU company but rather directly by the Swiss parent would likewise not have triggered withholding tax because of art. 15 of the EU-Swiss-Agreement, OJ L 385, p. 30 (2004) (now art. 9 of the Council Decision (EU) 2015/2400 of 8 December 2015 on the conclusion, on behalf of the European Union, of the Amending Protocol to the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ L 333, p. 12 (2015)).

82. The Commission, however, might have taken a narrower perspective when it confirmed "that the proposed amendments to Article 1, paragraph 2 of the Parent Subsidiary directive are not intended to affect national participation exemption systems in so far as these are compatible with the Treaty provisions". See Annex III to the political agreement in Dok. 16435/14 FISC 221 ECOFIN 1157 (5 Dec. 2014).

83. See also Example I in the Commission's MEMO/15/4609 (23 Nov. 2013).

84. See *Eqiom* (C-6/16), paras. 37 and 48-49.

85. See *Cadbury Schweppes* (C-196/04), para. 68.

86. Commission Communication, The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries, COM(2007) 785 (10 Dec. 2012), p. 4.

87. See in that direction the Council Resolution of 8 June 2010 on coordination of the Controlled Foreign Corporation (CFC) and thin capitalisation rules within the European Union, OJ C 156, p. 1 (2010), noting as one potential indicator that suggests that profits may have been artificially diverted to a CFC that "there is no proportionate correlation between the activities apparently carried on by the CFC and the extent to which it physically exists in terms of premises, staff and equipment". See also AG Opinion in *Eqiom* (C-6/16), para. 26, noting that "even where there is a physical presence, one might conclude, in light of the financial and staffing set-up, that the arrangement is artificial. In this regard, what appears to be relevant is, for instance, the actual authority of the company organs to take decisions, to what extent the company is endowed with own financial means and whether any commercial risk exists".

88. See AG Opinions in *N Luxembourg 1* (C-115/16); *TDanmark* (C-116/16); *Y Denmark* (C-117/16); *X Denmark* (C-118/16); *C Danmark I* (C-119/16); and *Z Denmark* (C-299/16).