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Nordcurrent Group: Interpretation of the Anti-Abuse Provision in the EU Parent-Subsidiary Directive – Opinion Statement ECJ-TF 1/2025 on the CJEU Decision of 3 April 2025 in *Nordcurrent Group UAB* (Case C-228/24)

In this CFE Opinion Statement, submitted to the EU Institutions in May 2025, the CFE ECJ Task Force comments on the CJEU's decision of 3 September 2024 in *Nordcurrent Group UAB* (Case C-228/24), in which the Court concluded that the notion of abuse requires both an objective element – namely the existence of a non-genuine arrangement – and a subjective element – namely the intention to obtain a tax advantage that defeats the object or purpose of the Directive. Further, in deciding whether an arrangement is a non-genuine arrangement, all facts and circumstances have to be taken into account, employing a wide time horizon. Regarding the tax advantage, it does not suffice to take a look at the participation exemption in isolation. The overall tax burden of the investment has to be taken into consideration.

1. Introduction

This is an Opinion Statement prepared by the CFE ECJ Task Force on *Nordcurrent Group UAB* (Case C-228/24), in respect of which the Court of Justice of the European Union (Sixth Chamber) delivered its decision on 3 April 2025.[1]

The decision clarifies the CJEU's understanding of the notion of abuse in tax law. It follows up on its anti-abuse jurisprudence, for instance the *Danish cases* (Joined Cases C-116/16 and C-117/16),[2] *Cadbury Schweppes* (Case C-196/04),[3] *Eqiom SAS* (Case C-6/16)[4] and *Deister Holding AG and Juhler Holding A/S* (Joined Cases C-504/16 and C-613/16).[5] The CJEU held that the notion of abuse requires both an objective element – namely the existence of a non-genuine arrangement – and a subjective element – the intention to obtain a tax advantage that defeats the object or purpose of the EU Parent-Subsidiary Directive (2011/96) (PSD).[6] For the existence of a non-genuine arrangement and of the tax advantage, all facts and circumstances have to be taken into account. It is not sufficient to analyse the situation at the moment the dividends are distributed. To the contrary, a wider time horizon has to be used. Regarding the tax advantage, it does not suffice to take a look at the participation exemption in isolation. The overall tax burden of the investment has to be taken into consideration.

This Opinion Statement seeks to explain and analyse the CJEU's reasoning with regard to the existence of a non-genuine arrangement and the subjective element of the intention to obtain a tax advantage that defeats the object or purpose of the PSD.

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1. CJEU, 3 Apr. 2025, *Nordcurrent Group UAB*, C-228/24, ECLI:EU:C:2025:239.
2. CJEU, 26 Feb. 2019, *T Danmark and Y Denmark*, C-116/16 and C-117/16, ECLI:EU:C:2019:135.
3. CJEU, 12 Sept. 2006, *Cadbury Schweppes*, C-196/04, ECLI:EU:C:2006:544.
4. CJEU, 7 Sept. 2017, *Eqiom and Enka*, C-6/16, ECLI:EU:C:2017:641.
5. CJEU, 20 Dec. 2017, *Deister Holding AG and Juhler Holding A/S*, C-504/16 and C-613/16, ECLI:EU:C:2017:1009.
6. Council 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 345/8 (2011). While art. 1(2) of the PSD uses the phrase "object or purpose of this Directive", the CJEU sometimes employs "object and purpose" (*see* paras. 44 and 55) and sometimes "object or purpose" (*see* paras. 22, 46 and 48).

2. Background, Facts and Issues

The *Nordcurrent* case deals, for the first time, with the issue of the circumstances under which the Member State of a parent company is entitled to deny the participation exemption under article 4(1)(a) of the PSD in the event of abuse. The CJEU decision clarifies the interpretation of the anti-abuse provision contained in article 1(2) and (3) of the PSD, which was introduced by the 2015 amendment.

Nordcurrent group UAB (*Nordcurrent*) is a company resident in Lithuania. Its commercial activity consists in the development and distribution of video games. In 2009, it set up a subsidiary in the United Kingdom (UK subsidiary) for the sale and distribution of video games due to restrictions on the sale of its video games directly via app stores from Lithuania. In 2017 and 2018, the organization of the activities was changed and the functions and risks were transferred back from the UK subsidiary to *Nordcurrent*. At the end of 2019, the UK subsidiary did not carry out any further game distribution and advertising activities. It was decided to wind it down.

Nordcurrent applied the participation exemption based on article 4(1)(a) of the PSD to the dividends received from the UK subsidiary. Following an audit for the years 2018 and 2019, the Lithuanian tax authorities denied the participation exemption in respect of the dividends received and concluded that *Nordcurrent* should have paid corporation tax of more than EUR 3 million with regard to the dividends received. The tax administration argued that the UK subsidiary lacked substance during the years 2018 and 2019. According to the tax authorities, the subsidiary could be characterized as a non-genuine arrangement not having been put into place for valid commercial reasons. The subsidiary only had one employee – the director – who, at the same time, managed seven other companies and did not have its own place of business nor any tangible assets in the United Kingdom. The tax administration asserted that 97,110 other undertakings were also registered at the same address as the subsidiary.

Nordcurrent challenged the decision of the tax authorities before the Tax Disputes Commission (a court in Lithuania).[7] It argued that the UK subsidiary constituted a necessary intermediary, as, in the years 2018 and 2019, *Nordcurrent* did not have any opportunity to sell its games directly from Lithuania. Due to the mode of distribution of video games, the UK subsidiary did not need any physical premises in the United Kingdom. As only standard agreements for the distribution of the video games or the purchase of advertising were concluded by the UK subsidiary, it did not require any staff in addition to the director.

The Lithuanian court referred the case to the CJEU, asking it three questions concerning the interpretation of article 1(2) and (3) of the PSD.[8] With its first question, the Court wanted to know whether the benefits of the participation exemption can be denied on the basis of the anti-abuse provision even if the subsidiary is not a conduit company and the profits distributed were generated by activities carried out under the subsidiary's name. Here, the Lithuanian Court referred to the decision in the *Danish cases*,[9] where the CJEU had to deal with conduit entities. For the Lithuanian Court, it was unclear whether the findings in the *Danish cases* could be transferred to non-conduit entities.

With its second question, the Lithuanian Court asked whether only the facts and circumstances at the time of the dividend distribution are relevant for the characterization of an arrangement in the sense of article 1(2) of the PSD. As the establishment of the UK subsidiary was justified by commercial reasons, and only over time the functions and risks were relocated to the parent entity in Lithuania, the time horizon was relevant for the characterization of abuse.

With its third question, the Lithuanian Court wanted to know whether it is sufficient to recognize the subsidiary as an arrangement in order to apply the anti-abuse provision or whether an additional requirement must be fulfilled, namely that the taxpayer intended to obtain a tax advantage that defeats the object or purpose of the PSD. Furthermore, the Court inquired whether the participation exemption in article 4(1)(a) should be regarded as the tax advantage obtained or whether the entire tax burden should be taken into account. This question was of relevance, as the corporate tax burden of the subsidiary in the United Kingdom (tax rate of 24%) would have been higher than the hypothetical tax burden in Lithuania (15%) of the parent company *Nordcurrent*, had it obtained the profits directly.

3. The Decision of the Court of Justice

Concerning the first question, the CJEU held that a subsidiary may constitute a non-genuine arrangement even it is not a conduit company.[10] The application of the anti-abuse provision is not limited to conduit companies. The CJEU came to this conclusion by analysing the wording, scheme and objectives of article 1(2) and (3) of the PSD.[11] According to these provisions, an arrangement, or a series of arrangements, is to be regarded as not genuine to the extent that it is not put into place for valid commercial reasons that reflect economic reality. The CJEU started its analysis with the wording of the anti-abuse provision. The wording does not suggest that the provision is applicable only to specific situations or types of arrangements.[12]

The scheme and objectives of the PSD also speak in favour of a broad interpretation, irrespective of the circumstances in which the alleged abuse occurs. In the

7. Regarding the recognition of the Tax Dispute Commission as a court allowed to make a referral, in the sense of the Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), art. 267, *see* CJEU, 21 Oct. 2010, *Nidera Handelscompagnie BV v. Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos*, C-385/09, ECLI:EU:C:2010:627.

8. C-228/24, *Nordcurrent Group UAB*, para. 19.
9. C-116/16 and C-117/16, *T Danmark and Y Denmark*.
10. C-228/24, *Nordcurrent Group UAB*, para. 31.
11. Id., para. 23.
12. Id., para. 25.

Danish cases decision, the CJEU applied the anti-abuse provision to arrangements involving conduit companies. This does not, however, prevent the application of the anti-abuse provision to cases where no conduit companies are involved. Also, in the *Danish cases* decision, the CJEU held that the situation of a conduit company is just one example of the principle of the provision of abuse, which is indicated in the decision by the phrase "inter alia".

Concerning the second question, the CJEU decided that, in assessing whether an arrangement can be regarded as non-genuine, all facts and circumstances, including the history of the arrangement, have to be taken into account. A determination of abuse necessitates a comprehensive examination of all pertinent facts and circumstances surrounding each step of the arrangements. It is not sufficient to only look at the facts at the time of the distribution of the dividends.

The wording of article 1(2) of the PSD puts particular emphasis on the time when the arrangement was put in place.[13] The second subparagraph of article 1(2), however, makes it clear that an arrangement may consist of more than one step or part. It cannot be ruled out that an arrangement that was initially put into place for valid commercial reasons will have to be regarded as non-genuine from a certain point onwards because it was maintained despite a change of circumstances. As a consequence, circumstances that happened after the formation of the arrangement may be taken into account as well in assessing whether or not a part of the arrangement is genuine.[14]

Where an arrangement consists of more than one step, all relevant facts and circumstances must be taken into account in order to establish that there are one or more steps that are not genuine. The assessment cannot be limited to the time of the payment of the dividends.[15]

With regard to the third question, the CJEU held that the qualification of the UK subsidiary as a non-genuine arrangement is not sufficient to deny the participation exemption. Article 1(2) of the PSD contains two conditions, namely (i) the existence of a non-genuine arrangement and (ii) the intention to obtain a tax advantage that defeats the object or purpose of the PSD.[16] The purpose to obtain a tax advantage must be taken into account as a separate factor in the classification of abuse. In the absence of a tax advantage, even a non-genuine arrangement cannot be qualified as abusive.

The meaning of a tax advantage is not defined in the PSD.[17] The wording of the anti-abuse provision in article 1(2) and (3) of the PSD speaks in favour of a broad interpretation. The tax advantage should not be assessed in isolation, but all facts and circumstances should be taken into consideration, which means that the overall tax effect resulting from the formation of the arrangement is relevant to the question of whether the taxpayer wanted to obtain a tax advantage.

As a result, in assessing whether the taxpayer wanted to obtain a tax advantage it is not sufficient to look at the participation exemption in isolation; it is also relevant to find out whether the taxpayer did obtain an overall tax advantage by setting up the subsidiary in a particular Member State. This evaluation requires a comparison between the actual arrangement and a situation in which the arrangement had not been put into place and the investment had been done in a different way. Given that the corporate tax rate in the United Kingdom, where the subsidiary is located, is higher than in Lithuania where the parent is located, the whole arrangement would have led to a higher tax burden. This speaks against a tax saving purpose of the whole arrangement.

4. Comments

The *Nordcurrent* decision sheds light on the scope of the anti-abuse provision contained in article 1(2) and (3) of the PSD. It builds on the Court's findings in the *Danish cases*, wherein the CJEU addressed a denial of the withholding tax exemption under article 5 of the PSD in the context of conduit companies. In *Nordcurrent*, the CJEU further emphasizes that the participation exemption under article 4(1)(a) of the PSD may also be refused in cases of abuse. The decision clarifies that the anti-abuse provision is not confined to scenarios involving conduit companies. The findings in this decision will be relevant to the interpretation of other anti-abuse provisions in EU tax law, in particular article 6 of the EU Anti-Tax Avoidance Directive (2016/1164),[18] article 5(1) of the EU Interest and Royalties Directive (2003/49)[19] and article 15(1)(a) of the EU Merger Directive (2009/133).[20] It might also have relevance to the interpretation of the discretion to counter abuse under article 1(4) of the PSD and article 5(2) of the Interest and Royalties Directive. It remains to be seen what impact the decision will have on the interpretation of domestic anti-abuse provisions and on the interpretation of the principal purpose test in article 29(9) of the OECD Model (2017).[21] However, in this respect, the courts will have to take the different legal context into account.

The decision supports the position of the taxpayer. First, tax administrations cannot deny the benefits of the Directive based on a lack of a genuine activity at a specific time or stage of an investment and disregard relevant facts and circumstances that arose at different moments in time.

13. Id., para. 33.
14. Id., para. 37.
15. Id., para. 41.
16. Id., para. 45.
17. Id., para. 50.
18. 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).
19. Council Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Companies of Different Member States, OJ L157 (2003).
20. 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 L310 (2009).
21. OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)* (OECD, 2019).

The CJEU has made it clear that a holistic approach and a broader time horizon has to be taken into account in making the assessment. One way to understand the distinction made by the CJEU is to distinguish between different steps of the arrangement, e.g. the setting up of the subsidiary, the activity of the subsidiary and the distribution of the dividends. In principle, if the dividend distribution can be linked to profits produced by a genuine activity, the benefit of article 4 of the PSD should be granted. If, however, the dividends were distributed at a time when the subsidiary can be regarded as a genuine arrangement but, at the time of the generation of the profits, it was not yet genuine (or no longer genuine) then the benefits of article 4 of the PSD may be denied (subject to the intention to obtain a tax advantage). This would also lead to a proportional approach: if part of the profits is generated by a genuine activity, then the participation exemption should also only be granted in part. Unlike an all-or-nothing approach, such a compartmentalization approach is also implied by the wording of article 1(3) of the PSD ("to the extent that") and the required proportionality under the preamble to the PSD.[22]

Second, the anti-abuse provision can only apply if all conditions are met. A non-genuine arrangement is not sufficient. In addition, the taxpayer must have the intention to obtain a tax advantage that defeats the object or purpose of the Directive. Conceptionally, the tax advantage under article 1(2) of the PSD is not the same as the isolated tax benefit granted by article 4(1)(a) of the PSD (the participation exemption) but the overall tax effect of the whole arrangement. This allows the taxpayer to show that the arrangement, as a whole, did not lead to an overall tax benefit. This constitutes a welcome clarification after the decision in the *Danish cases*.[23]

It remains to be seen whether the Court's analysis of an overall tax advantage would have been the same had the home country of the parent company chosen the indirect credit method under article 4(1)(b) of the PSD and the tax burden in the home country of the parent had been higher than the tax burden in the subsidiary country. In this situation, the establishment of a subsidiary in a low-tax country would not lead to a tax benefit with regard to the absolute amount of taxes to be paid after the distribution of the dividend, as there would be a residual tax in the country of the parent. The lower tax in the country of the subsidiary could, however, lead to a tax benefit for the time until the dividends are actually distributed. While the *Nordcurrent* decision only concerned the participation exemption under article 4(1)(a) of the PSD, it is also relevant in the context of withholding tax under article 5 of the PSD. With regard to the withholding tax reduction in article 5, an overall tax advantage might also be absent if withholding taxes can be credited by a tax treaty (or national law) in the country of the parent. It remains open whether, in calculating the overall tax effect, only corporate taxes, or other taxes as well, have to be taken into account.

It should be noted that the Commission stated, in 2015, 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".[24] No one addressed this statement during the proceedings. It remains unclear what the meaning and effect of the statement are. The CJEU, however, clearly stated that the participation exemption under article 4(1)(a) of the PSD can be affected by the anti-abuse provision in article 1(2) of the PSD.

The PSD does not harmonize the concepts of "income attribution" and "equity investments", etc. So, the Directive accepts different approaches amongst Member States. Hence, some countries might find it surprising that the Lithuanian tax authorities did not directly attribute the income to the parent company. If the UK subsidiary lacked economic substance in the years 2018 and 2019, and major activities took place at the level of the Lithuanian parent, then the income could have been directly attributed to the parent company. In this scenario, the question of a denial of the participation exemption would not have come up.

5. The Statement

The CFE welcomes the CJEU's decision for its clarification of the interpretation of the anti-abuse provision of article 1(2) and (3) of the PSD. The decision complements the findings in the *Danish cases* decisions.

The decision shows that abuse cannot be assumed without a subjective element, namely the intention to obtain a tax advantage that defeats the object or purpose of the Directive. The application of the anti-abuse provision requires both the existence of a non-genuine arrangement and the intention to obtain a tax advantage. In addition, the decision clarifies that all facts and circumstances have to be taken into account in verifying a non-genuine arrangement and a tax advantage that defeats the object or purpose of the Directive.

22. *See* recital 6 of the preamble to the PSD.
23. CFE ECJ Task Force, "Opinion Statement ECJ-TF 2/2019 on the ECJ Decisions of 26 February 2019 in Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg I et al*, and Cases C-116/16 and C-117/17, *T Danmark et al*, Concerning the "Beneficial Ownership" Requirement and the Anti-Abuse Principle in the Company Tax Directives", *Eur. Taxn.* 59, no. 10 (2019): 500, https://doi.org/10.59403/3ggxtef.
24. *See* Council of the European Union, Draft Minutes of 10 February 2015, 5547/15 ADD 1.