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Exemption of Inbound Dividends from Non-Corporate Taxes under the EU Parent-Subsidiary Directive – Opinion Statement ECJ-TF 4/2025 on the Decision of the CJEU of 1 August 2025 in *Banca Mediolanum* (Joined Cases C-92/24 to C-94/24)

In this CFE Opinion Statement, submitted to the EU Institutions in November 2025, the CFE ECJ Task Force comments on the CJEU's decision of 1 August 2025 in *Banca Mediolanum* (Joined Cases C-92/24 to C-94/24) concerning the application of the exemption method under article 4(1)(a) of the EU Parent-Subsidiary Directive (2011/96) (PSD) to a non-corporation tax, specifically the Italian regional tax on production activities (IRAP). Deviating from Advocate General Kokott's Opinion and her proposed analysis of tax comparability, the Court concluded, based on a textual, contextual and teleological interpretation, that *ratione materiae* the exemption under article 4(1)(a) of the PSD applies to any tax that includes qualified dividends in its tax base. This is irrespective of the fact that article 2 of the PSD defines its *ratione personae* by reference to specifically listed domestic corporate taxes, of which the IRAP is not one.

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1. Background, Facts and Issues

Proposed in 1969,[1] adopted in 1990[2] and recast in 2011,[3] the EU Parent-Subsidiary Directive (2011/96) (PSD) still forms one of the cornerstones of the European Union's company tax framework. The PSD prohibits source taxation of qualifying outbound dividends (article 5) and allows the Member States of the recipient company to choose how to provide relief from economic double taxation: either by exempting inbound dividends (article 4(1)(a))[4] or by granting an indirect credit for the underlying corporate tax (article 4(1)(b)). Apart from abusive arrangements (article 1(2) to (4)), the Directive applies to cross-border profit distributions (article 1) between companies of the Member States (article 2), which are specifically defined by reference to their legal form (Annex I(A)), tax residence and the fact of being subject to a listed corporate tax (Annex I(B)). It also requires a qualified holding of at least 10% (article 3(1)). Essentially, therefore, the PSD provides for a minimum standard of harmonization for the prevention of juridical and economic double taxation of qualifying cross-border dividends within the European Union. It also grants Member States certain options, importantly the option to foresee a minimum holding period (article 3(2)(b))[5] and the option to disallow the deduction of management expenses to the extent of a lump-sum amount of 5% of the dividends (article 4(3)),[6]

1. Commission Proposal COM(69)6, [1969] ABl C 39/7, and – English translation – ET Suppl. No. 7 (July 1969).
2. Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [1990] OJ L 225/6.
3. 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 (recast), [2011] OJ L 345/8, as last amended by Directive 2014/86/EU, [2014] OJ L 219/40 and Directive (EU) 2015/121, [2015] OJ L 21/1.
4. Changes to article 4(1)(a) were made in the 2014 amendment (Directive 2014/86/EU, [2014] OJ L 219/40) to prevent double non-taxation in respect of mismatches.
5. *See*, on the minimum holding requirement, CJEU, 17 October 1996, *Denkavit, VITIC, Voormeer*, C-283/94, C-291/94 and C-292/94, ECLI:EU:C:1996:387.
6. *See*, e.g. CJEU, 18 September 2003, *Bosal*, C-168/01, ECLI:EU:C:2003:479, paras. 21-26; CJEU, 22 December 2008, *Les Vergers du Vieux Tauves*,

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which is generally implemented by limiting the relief[7] to 95% of the dividends received. Member States, however, must not make the benefits of the PSD "subject to conditions other than those laid down in that directive".[8]

Over the past decade, the PSD has received considerable attention from the CJEU, adding interpretative clarity on some of the Directive's core provisions:

- The exemption method under article 4(1)(a) of the PSD is sufficiently clear to have direct effect to the benefit of taxpayers, once the Member State has chosen between exemption and indirect credit (*Cobelfret* (C-138/07),[9] *KBC Bank* (Case C-439/07),[10] *John Cockerill* (Case C-135/24)).[11]
- The obligation to "refrain from taxing such profits" under article 4(1)(a) of the PSD means that exempt dividends must not have any negative impact on the taxpayer's overall tax position, e.g. with regard to a loss carry-forward or other tax attributes (*Cobelfret*, *KBC Bank*, *Brussels Securities* (Case C-389/18),[12] *Allianz Benelux* (Case C-295/21),[13] *John Cockerill*).
- The obligation to exempt inbound dividends also extends to the taxation of dividends when they are redistributed by a parent company to its shareholders (and not only situations in which a parent company receives profits distributed by its subsidiary), such that it bars certain distribution-triggered "fairness taxes" or additional contributions levied on the (re)distributing company (*X* (Case C-68/15),[14] *AFEP* (Case C-365/16),[15] *Schneider Electric* (Case C-556/20)).[16]
- The PSD does not apply to fictitious "payments", such as a deemed payment on a long-term debt claim (*Viva Telecom Bulgaria* (Case C-257/20)).[17]
- The Court has also had some opportunity to clarify the Directive's anti-abuse provisions (*Eqiom* (Case C-6/16),[18] *Deister and Juhler* (Joined Cases C-504/16 and C-613/16),[19] *GS* (Case C-440/17),[20] *T Danmark and Y Denmark* (Joined Cases C-116/16 and C-117/17)[21] and *Nordcurrent* (Case 228/24).[22]

The CJEU's decision at issue in this Opinion Statement, *Banca Mediolanum* (Joined Cases C-92/24, C-93/24 and C-94/24),[23] made it clear that the obligation of the parent company's state to exempt inbound dividends under article 4(1)(a) of the PSD extends to non-corporate taxes, specifically the Italian regional tax on production activities (IRAP).

Moreover, currently pending cases on the PSD concern the abuse-based denial of an exemption from withholding taxation under article 5 of the PSD in respect of a transfer of dividends in a chain (*Neo Group* (Case C-203/25)[24] and the question of whether the indirect credit method under article 4(1)(b) of the PSD requires a credit carry-forward (*Beteiligungsgesellschaft* (Case C-546/25)).[25]

The facts and legal issues in *Banca Mediolanum* are straightforward: in the tax years 2014 and 2015, Banca Mediolanum, an Italian-resident bank received dividends from its qualified EU subsidiaries. The bank treated those dividends as 95% exempt for corporate tax[26] purposes. (Italy employs the exemption method under article 4(1)(a) of the PSD and has exercised the option under article 4(3) of the PSD to disallow expenses at a flat rate of 5% of the dividends received).[27] As a financial intermediary, however, Banca Mediolanum was also subject to the Italian regional tax on production activities (*imposta regionale sulle attività produttive*, IRAP) and Italian law[28] required Banca Mediolanum to include 50% of the dividends, including those from its qualified EU subsidiaries, in the basis for IRAP assessment, which the bank did. Subsequently, Banca Mediolanum applied for

C-48/07, EU:C:2008:758, para. 43; and CJEU, 26 October 2017, *Argenta Spaarbank*, C-39/16, EU:C:2017:813.

7. Regarding the applicability of article 4(3) of the PSD to both exemptions and indirect credits, *see* CJEU, 3 April 2008, *Banque Fédérative du Crédit Mutuel*, C-27/07, EU:C:2008:195, para. 45; and CJEU, 4 June 2009, *KBC Bank*, C-439/07 and C-499/07, EU:C:2009:339, para. 52.
8. *See*, e.g. CJEU, 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, para. 34 and CJEU, 13 March 2025, *John Cockerill*, C-135/24, EU:C:2025:176, 31.
9. CJEU, 12 February 2009, *Cobelfret*, C-138/07, EU:C:2009:82.
10. CJEU, 4 June 2009, *KBC Bank*, C-439/07, EU:C:2009:339.
11. C-135/24, *John Cockerill*, para. 53.
12. CJEU, 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132.
13. CJEU, 20 October 2022, *Allianz Benelux*, C-295/21, EU:C:2022:812.
14. CJEU, 17 May 2017, *X*, C-68/15, EU:C:2017:379.
15. CJEU, 17 May 2017, *AFEP*, C-365/16, EU:C:2017:378.
16. CJEU, 12 May 2022, *Schneider Electric*, C-556/20, EU:C:2022:378.
17. CJEU, 24 February 2022, *Viva Telecom Bulgaria*, C-257/20, EU:C:2022:125.
18. CJEU, 7 September 2017, *Eqiom*, C-6/16, ECLI:EU:C:2017:641; *see also* CFE ECJ Task Force, "Opinion Statement ECJ-TF 2/2018 on the CJEU decision of 7 September 2017 in Case C-6/16, *Eqiom*, concerning the compatibility of the French anti-abuse rule regarding outbound dividends with the Parent-Subsidiary Directive and fundamental freedoms", *European Taxation* 58, no. 10 (2018): 471, https://doi.org/10.59403/g80dgf.
19. CJEU, 20 December 2017, *Deister Holding AG and Juhler Holding A/S*, C-504/16 and C-613/16, EU:C:2017:1009.
20. CJEU, 14 June 2018, *GS*, C-440/17, EU:C:2018:437.
21. CJEU, 26 February 2019, *T Danmark and Y Denmark*, C-116/16 and C-117/17, EU:C:2019:135; *see also* CFE ECJ Task Force, "Opinion Statement ECJ-TF 2/2019 on the CJEU 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", *European Taxation* 59, no. 10: 487, https://doi.org/10.59403/3ggxtef.
22. CJEU, 3 April 2025, *Nordcurrent Group*, C-228/24, EU:C:2025:239; *see also* CFE ECJ Task Force, "Nordcurrent Group: Interpretation of the Anti-abuse Provision in the Parent Subsidiary Directive – Opinion Statement ECJ-TF 2/2025 on the decision of the CJEU of 3 April 2025 in Case C-228/24, *Nordcurrent group UAB*", *European Taxation* 65, no. 7 (2025), https://doi.org/10.59403/v6y668.
23. CJEU, 1 August 2025, *Banca Mediolanum*, C-92/24, C-93/24 and C-94/24, EU:C:2025:599.
24. Pending Case C-203/25, *Neo Group*.
25. Pending Case C-546/25, *Beteiligungsgesellschaft*; for the reference *see* DE: BFH, 26 March 2025, I R 6/22.
26. The Italian corporation tax (*imposta sur reddito delle società*, IRES) is a tax referred to in Part B of Annex I to the PSD.
27. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 29; Opinion AG Kokott, 27 March 2025, *Banca Mediolanum*, C-92/24, C-93/24 and C-94/24, EU:C:2025:223, para. 30.
28. Legislative Decree No 446 introducing a regional tax on production activities, revising personal income tax brackets, rates and deductions, and introducing a regional supplement to that tax, as well as reorganizing the provisions governing local taxation, GURI No 298 of 23 December 1997, Ordinary Supplement No 252.

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a reimbursement of that proportion[29] of IRAP, claiming that such inclusion contravenes EU law. The tax authorities rejected that application, arguing that the PSD was "intended to apply only to income tax, and not also to IRAP".[30] Referring to *AFEP* (Case C-365/16)[31] and *X*,[32] the Italian *Corte di giustizia tributaria di secondo grado della Lombardia* (Tax Court of Second Instance, Lombardy) had doubts whether the PSD's exemption of qualified inbound dividend extends to the IRAP and referred the following question to the CJEU:[33]

> Is the claim made by the Italian Republic, contained in Article 6(1) of Legislative Decree [No 446/1997, as amended], to subject to IRAP 50[%] of dividends received by financial intermediaries resident in Italy, which are classified as parent companies for the purposes of [Directive 2011/96], and distributed by companies resident in other Member States …, which are classified as subsidiaries within the meaning of that directive, without authorising the parent companies to deduct from IRAP the fraction of corporation tax relating to those profits paid by the subsidiaries, not incompatible with the prohibition on subjecting profits received by parent companies resident in one Member State from subsidiaries resident in other Member States to taxation at a percentage rate exceeding 5[%] of the amount referred to in Article 4 of that directive?

In her Opinion in *Banca Mediolanum*,[34] Advocate General Kokott approached this question from the perspective of a multi-tax jurisdiction, in which the dividends received could be directly or indirectly not only subject to corporate taxation but also to other types of taxes. For example, they could be subject to a wealth tax directly, or to a real estate transfer tax indirectly, if profits (including dividends) are used to acquire immovable property.[35] This raises the question of whether article 4(1)(a) of the PSD applies "only to direct double taxation resulting from the taxation of profits by means of corporation tax (or a comparable tax) or also to indirect double taxation resulting from another tax (in the present case, IRAP) that partially includes such dividends in its basis of assessment".[36] According to Advocate General Kokott, this issue was not decided in *AFEP*,[37] as that case concerned an additional corporate tax on the (re)distribution of dividends, not a different tax as such.[38] To draw the line, Advocate General Kokott suggested that article 4(1)(a) of the PSD would only prohibit taxation "by means of an additional tax such as IRAP, in so far as that tax is to be regarded as either a corporation tax or another tax that is comparable to a corporation tax". While her Opinion provided some guidance (suggesting that the IRAP would not be a comparable tax),[39] the determination of comparability should be left to the domestic court.[40] The CJEU, however, took quite a different approach, essentially concluding that *ratione materiae* the exemption system under the PSD concerns any tax that includes qualified dividends in its basis of assessment, regardless of whether the overall tax is strictly comparable to or a substitute for a corporate tax.[41]

2. The Judgment of the CJEU

Before addressing the case in substance, the Court found the reference in need of clarification, probably in light of the referring court's credit-like language ("without authorising the parent companies to deduct from IRAP the fraction of corporation tax relating to those profits paid by the subsidiaries"). The CJEU first reiterated that Member States have the choice between exemption (article 4(1)(a) of the PSD) and an indirect credit (article 4(1)(b) of the PSD),[42] but that, where a Member State has chosen one system, "the provision relating to the other system is not relevant".[43] Moreover, under article 4(3) of the PSD, Member States may fix non-deductible management costs relating to the holding as a lump-sum not exceeding 5% of the profits distributed.[44] That said, it was clear to the CJEU that Italy applied the exemption method under article 4(1)(a) of the PSD and appropriately levied a corporate tax on 5% of qualifying dividends (article 4(3) of the PSD), but that it also included 50% of those dividends in the basis of assessment for IRAP purposes, irrespective of their origin.[45] The CJEU hence interpreted the referring Italian court as asking:[46]

> whether Article 4 of Directive 2011/96 must be interpreted as precluding national legislation pursuant to which a Member State that has opted for the exemption system may levy tax on more than 5% of the amount of the dividends which the financial intermediaries resident in that Member State receive, as parent companies within the meaning of that directive, from their subsidiaries resident in other Member States, including where that is done by way of a tax which is not a tax on corporate income, but which includes in its basis of assessment those dividends or a fraction thereof.

29. It is not entirely clear what proportion of IRAP was claimed as a refund: The description of the facts in AG Kokott's Opinion (Opinion AG Kokott, 27 March 2025, C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, EU:C:2025:223, paras. 23-24) as well as in the Court's decision (C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, 9, para. 17) could suggest that Banca Mediolanum claimed a full refund of the IRAP insofar as it related to qualified cross-border dividends, whereas the referring court's description highlights the bank's position as arguing that article 4(1)(a) of the PSD "precludes dividends distributed by subsidiaries to parent companies from being taxed at more than 5 per cent of their amount", which seems to suggest a refund claim for what was taxed under the IRAP in excess of this 5%. *See* for that discussion sec. 3.
30. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 18.
31. CJEU, 17 May 2017, *AFEP*, C-365/16, EU:C:2017:378.
32. C-68/15, *X*.
33. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 25.
34. Opinion AG Kokott, C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*.
35. Ibid, para. 4.
36. Ibid, para. 29.
37. C-365/16, *AFEP*.
38. Opinion AG Kokott, C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 50.
39. Ibid, paras. 53-66, noting, however, that based on various criteria, such as the calculation of the tax base and the applicable tax rates for different sectors, the IRAP "is of a different legal nature or character from corporation tax, which is why it probably does not substitute for it, or supplement it in part, and is therefore probably not comparable to it".
40. Opinion AG Kokott, C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 67.
41. *See* sec. 2.
42. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 27, referring to C-135/24, *John Cockerill*, paras. 27-28.
43. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 27, referring to C-389/18, *Brussels Securities*, para. 32 and C-556/20, *Schneider Electric*, para. 63.
44. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 28, referring to C-365/16, *AFEP*, para. 23 and C-68/15, *X*, para. 72.
45. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 29.
46. Ibid, para. 30.

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The CJEU then entered into the required three-prong analysis of the wording, context and telos of article 4(1)(a) of the PSD[47] and also noted that a clear and precise wording of a provision is the outer limit of interpretation.[48]

(1) According to its wording, article 4(1)(a) of the PSD requires that a Member State "must refrain from taxing" qualified inbound dividends. Following its judgment on the French additional taxation of redistributed dividends in *AFAP* (Case C-365/16),[49] the Court noted that article 4(1)(a) of the PSD's prohibition is not limited to a particular tax[50] and hence applies to "any tax which includes in its basis of assessment" such dividends.[51]

(2) Contextually, article 2 of the PSD specifically defines which companies fall within the Directive's scope, inter alia, by requiring that a company be subject to one of the taxes listed in Annex I(B) (article 2(a)(iii) of the PSD). This list contains "the national taxes to which those companies are normally subject";[52] for Italy, it covers only the regular corporate tax (*imposta sul reddito delle società*, IRES), but not the IRAP. Article 2 of the PSD, however, must be understood as only defining the scope of the Directive *ratione personae*, while it is, "by contrast", "not relevant in determining the scope *ratione materiae*".[53] Hence, the fact that the IRAP is not a listed tax does not mean that it is excluded from the PSD's material scope.

(3) Teleologically, the Directive's objective to eliminate economic double taxation of distributed profits (once at the level of the subsidiary and then at the level of the parent company)[54] leads to the conclusion that the exemption system applies to any tax in the parent's State that "includes in its basis of assessment even a part of those profits, whatever the nature of that tax".[55]

Consequently, the IRAP's inclusion of 50% of the dividends in its basis of assessment was found incompatible with article 4(1)(a) of the PSD.[56] The Court also rejected the Italian government's argument that such preferential treatment of qualified cross-border dividends (exemption under article 4(1)(a) and (3) of the PSD) in comparison with domestic dividends (50% IRAP inclusion) may give rise to reverse discrimination in breach of the principle of equal treatment. The Court merely noted that this is a purely Italian situation and that it would hence be "for the referring court to determine whether there is discrimination prohibited by national law and, where relevant, establish how that discrimination should be removed".[57]

The Court therefore held in paragraph 47 that:

> Article 4 [PSD] must be interpreted as precluding national legislation pursuant to which a Member State that has opted for the exemption system may levy tax on more than 5% of the amount of the dividends which the financial intermediaries resident in that Member State receive, as parent companies within the meaning of that directive, from their subsidiaries resident in other Member States, including where that is done by way of a tax which is not a tax on corporate income, but which includes in its basis of assessment those dividends or a fraction thereof.

3. Comments

The CJEU's judgment in *Banca Mediolanum* provides a clear outcome based on a textual, contextual and teleological interpretation of article 4(1)(a) of the PSD:[58] The obligation to exempt qualified cross-border dividends applies to all corporate and non-corporate taxes that include such dividends in their tax base. Essentially, the criterion of inclusion in the tax base operates as a "shortcut" for establishing the comparability of taxes, as suggested by Advocate General Kokott in her Opinion.[59] Arguably, therefore, the Court means a "direct" inclusion of the dividend as such into a tax base, which does not extend to subsequent charges (such as consumption, wealth, or transfer taxes), once the character of the dividend has changed into the recipient's wealth.

Consequently, the CJEU's judgment in *Banca Mediolanum* invalidates the more general argument that non-corporate taxes would never be affected by the PSD. This can have broad consequences: For example, the German legislature assumed[60] that the PSD would not be relevant for the purposes of the German trade tax (*Gewerbesteuer*), which includes qualified cross-border dividends in its base (§ 8 No. 5 of the Trade Tax Act)[61] and only grants an exemption for them if a 15% holding threshold is met (§ 9 No. 7 of the Trade Tax Act).Following *Banca Mediolanum*, it seems clear that this is not in line with EU law for shareholdings between 10% (article 3 of the PSD) and 15%. In any event, the position that the German trade tax would not be impacted by the EU company tax directives was already puzzling in light of the 2011 case of *Scheuten Solar Energy*, wherein the German first instance tax court,[62] as

47. Ibid, para. 31, referring to CJEU, 17 November 1983, *Merck*, 292/82, EU:C:1983:335, para. 12 and CJEU, 25 February 2025, *BSH Hausgeräte*, C-339/22, EU:C:2025:108, para. 27.
48. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 31 (stating that "where the meaning of a provision of EU law is absolutely plain from its very wording, the Court cannot depart from that interpretation"); *see also* CJEU, 25 January 2022, *Vysočina Wind*, C-181/20, EU:C:2022:51, para. 39 and CJEU, 13 October 2022, *Gmina Wieliszew*, C-698/20, EU:C:2022:787, para. 83.
49. C-365/16, *AFEP*.
50. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 33, referring to C-365/16, *AFEP*, paras. 5 and 33.
51. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 35.
52. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 37, referring to CJEU, 8 June 2000, *Epson Europe*, C-375/98, EU:C:2000:302, para. 22.
53. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 38.
54. *See* for that objective C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 40, referring to C-556/20, *Schneider Electric*, para. 45 and C-135/24, *John Cockerill*, para. 33.
55. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 41.
56. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, paras. 42-44.
57. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, paras. 45-46, referring to CJEU, 5 April 2004, *Mosconi and Ordine degli Ingegneri di Verona e Provincia*, C-3/02, EU:C:2004:224, para. 53 and CJEU, 2 April 2020, *PF and Others*, C-830/18, EU:C:2020:275, para. 35.
58. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, paras. 32-41.
59. *See* sec. 1.
60. *See* the German legislative materials in BT-Drucksache 19/13436, 136 ("*Ein Zwang, die Vorgaben der Mutter-Tochter-Richtlinie auch für gewerbesteuerliche Zwecke zu beachten, besteht nicht*").
61. DE: Trade Tax Act [*Gewerbesteuergesetz*, GewStG].
62. DE: Finanzgericht Münster, 22 February 2008, 9 K 5143/06 G.

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well as the referring *Bundesfinanzhof*[63] straightforwardly assumed that the limitations of the EU Interest and Royalties Directive (2003/49) also apply to that tax; neither Advocate General Sharpston[64] nor the CJEU[65] explicitly addressed that issue (because it was not asked), nor did either argue that it would be otherwise in obiter dictum.

The Court also mentioned article 4(3) of the PSD but only gave implicit guidance for its interpretation. That provision reads:

> Each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company.
>
> Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5% of the profits distributed by the subsidiary.

On its face, article 4(3) of the PSD references three seemingly distinct categories: First, "losses resulting from the distribution of the profits", i.e. the distribution-related depreciation of the shareholding;[66] second, "charges relating to the holding", e.g. interest expenses in connection with the holding;[67] and, third, "management costs relating to the holding", the deduction of which can be denied at a flat rate of 5% of the dividend.[68] It is, however, unclear if the latter two categories (but not depreciation of the shareholding) coincide, so that it would be mutually exclusive for Member States to disallow the actual expenses relating to the holding, on the one hand, and additionally apply the flat rate of a maximum of 5% of the dividend, on the other. The Court in *Banca Mediolanum* seems to share the understanding that "charges relating to the holding" and "management costs relating to the holding" refer to the same expenses, as it notes that Italy levies a corporate tax "on 5% of the amount of the dividends"[69] and concludes that a state may not "levy tax on more than 5% of the amount of the dividends"[70] (i.e. on the gross amount). This resonates with *Bosal* and *Keller Holding*, wherein the Court already found that interest expenses relating to the holding are "management costs" that fall within the 5% flat rate.[71] It therefore seems that the Court deprives the potentially limiting criterion of "management" in the expression "management costs" of any separate meaning. Therefore, in essence, Member States can choose between a denial of deduction of actual expenses and the 5% flat-rate exclusion; they cannot have both. It can be noted that – in parallel to and consistent with capital gains – the PSD is silent on the treatment of the write-down of the shareholding in the subsidiary due to factors unrelated to a distribution, i.e. where the depreciation in the value in the holding in the subsidiary does not result "from the distribution of the profits".

Advocate General Kokott's Opinion, as well as the CJEU's judgment, leave some uncertainty as to the precise impact and breadth of the exemption under article 4(1)(a) of the PSD. Both could be read as implying that once a state taxes 5% of qualified dividends under its corporate tax (or a substitute tax),[72] the taxing right is "consumed" and no further charge (not even on 5% of the dividends) would be allowed under any other tax.[73] Such a reading would essentially mean that taxation of 5% of the dividends under the corporate tax would reach the ceiling allowed for by article 4 of the PSD, and that Italy could not tax any of the dividends (not even 5% of them) under the IRAP, an understanding which certainly finds support in the CJEU's wording[74] and would put a limitation on the Member States' ability to spread the tax base (including dividends) over multiple taxes. A different reading would be that it is up to a state's sovereignty to levy multiple taxes with different bases and rates and that, if article 4(1)(a) of the PSD applies, it merely limits the inclusion of qualified cross-border dividends in the corporate or non-corporate tax base: If multiple taxes take the dividends into account in the assessment base, each has to comply with the tax of up to 5% as per article 4(1)(a) and (3) of the PSD separately. This latter understanding was adopted by the Italian legislature,[75] which provides for a 95% exemption from the IRAP for intra-EU dividends (in addition to taxing 5% under the corporate tax).

The Court's finding in *Banca Mediolanum* also raised the question of "reverse discrimination" ("*discriminations à rebours*", "*Inländerdiskriminierung*"), as 95% of qualified cross-border dividends had to be exempt from the IRAP, whereas 50% of the domestic dividends remained included in the IRAP's tax base. The corresponding argument by the Italian government that this outcome gives "rise to reverse discrimination to the detriment of a parent

63. DE: Bundesfinanzhof, 27 May 2009, I R 30/08.
64. Opinion of AG Sharpston, 12 May 2011, *Scheuten Solar Technology*, C-397/09, EU:C:2011:292.
65. CJEU, 21 July 2011, *Scheuten Solar Technology*, C-397/09, EU:C:2011:499.
66. CJEU, 22 December 2008, *Les Vergers du Vieux Tauves*, C-48/07, EU:C:2008:758, para. 43; *see also* Doc. 7384/90 FISC 61 (9 July 1990), 6 ("*Der Rat und die Kommission kommen überein, dass unter „Minderwerten, die sich aus der Ausschüttung ihrer Gewinne ergeben", die Wertminderungen der von der Muttergesellschaft gehaltenen Anteile an der Tochtergesellschaft nach einer Ausschüttung der Gewinne aus den Rücklagen der Tochtergesellschaft an die Muttergesellschaft zu verstehen sind*").
67. C-168/01, *Bosal*, paras. 21-26; C-39/16, *Argenta Spaarbank*.
68. CJEU, 3 April 2008, *Banque Fédérative du Crédit Mutuel*, C-27/07, EU:C:2008:195, paras. 41-48.
69. C-93/24 and C-94/24, *Banca Mediolanum*, paras. 28-29, referring to C-365/16, *AFEP*, para. 23 and C-68/15, *X*, para. 72; *see also* in this direction C-556/20, *Schneider Electric*, para. 42.
70. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 47.
71. C-168/01, *Bosal*, paras. 21-26; CJEU, 23 February 2006, *Keller Holding*, C-471/04, EU:C:2006:143, para. 45.
72. *See* article 2(a)(iii) PSD (defining "company of a Member State" by, inter alia, requiring that it "is subject to one of the taxes listed in Annex I, Part B, without the possibility of an option or of being exempt, or to any other tax which may be substituted for any of those taxes").
73. *See* Opinion AG Kokott, C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 30 ("Since it is undisputed that Italy has correctly transposed the Parent-Subsidiary Directive with respect to corporation tax (those dividends are taxed only at a rate of 5%), it therefore follows that the dividend income would be subject to taxation that would then exceed the maximum amount of 5% provided for in Article 4(3) of the Parent-Subsidiary Directive."); C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 44 ("In those circumstances, it must be stated that the exemption system precludes national legislation that allows for dividends which a parent company receives from its subsidiaries resident in other Member States to be included in the basis of assessment for a tax, such as IRAP, in addition to the inclusion of 5% of the amount of those dividends in the basis of assessment for a corporation tax, such as IRES").
74. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 44.
75. In the Italian Draft 2026 Budget Law of 22 Oct. 2025.

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company resident in Italy which receives dividends from its Italian subsidiaries, in alleged breach of the principle of equal treatment", was rejected by the CJEU. It noted that, "the situation thus referred to by that government is purely internal to the Italian Republic".[76] Moreover, "the principle of equal treatment enshrined in EU law cannot be relied on in a purely domestic situation. In such a situation, it is for the referring court to determine whether there is discrimination prohibited by national law and, where relevant, establish how that discrimination should be removed".[77] Indeed, the question of whether such reverse discrimination is prohibited depends on each Member State's constitutional law.

With regard to reverse discrimination in an EU context more generally, it can be noted that the European Court of Human Rights (ECtHR) addressed this issue for the first time recently[78] in *Albertine de Galbert Defforey et al.* (No. 45443/21)[79] accepting such disadvantageous treatment of domestic transactions in the context of the Merger Directive (2009/133).[80] That case concerned reverse discrimination with regard to the alienation of shares received in the course of a merger: In that case, French domestic tax law essentially backdated the alienation of the shares received through an exchange of shares in a merger back to the time of such merger (and denied a partial exemption of capital gains that was introduced later in time), whereas – as confirmed by the CJEU in *AQ and DN* (C-662/18),[81] upon the request of the *Conseil d'Etat*[82] – in respect of a cross-border merger covered by the Merger Directive (2009/133), the actual time of alienation is relevant (and a partial exemption is to be granted). The *Conseil d'Etat* subsequently referred[83] the question of reverse discrimination to the French *Conseil Constitutionnel*, which, however, did not share these concerns, as domestic law and EU law pursue different goals.[84] This case was eventually brought before the ECtHR in *Albertine de Galbert Defforey et al*, but the ECtHR likewise did not find a violation of the prohibition of discrimination under article 14 of the European Convention on Human Rights in connection with the right to property under article 1(1) of Protocol No. 1, essentially deferring to the wide discretion enjoyed by the domestic tax legislature. Hence, the reverse discrimination persisted.

4. The Statement

CFE Tax Advisors Europe welcomes the CJEU's judgment in *Banca Mediolanum*, which clarifies that article 4(1)(a) of the PSD exempts qualified cross-border dividends not only from corporate taxes, but also from non-corporate taxes that include such dividends in their tax base. Member States that have opted for the exemption system are, as a consequence, not permitted to include more than 5% of such dividends in the bases of assessment for corporate and non-corporate tax purposes.

76. C-92/24, C-93/24 and C-94/24, *Banca Mediolanum*, para. 45.
77. Ibid, para. 46, referring to C-3/02, *Mosconi and Ordine degli Ingegneri di Verona e Provincia*, para. 53 and C-830/18, *PF*, para. 35.
78. ECHR, 22 May 2025, No. 45443/21 (*Albertine de Galbert Defforey*), No. 45483/21 (*Marc Simoncini*) and No. 8701/23 (*Philippe Jaubert*), para. 98.
79. Ibid.
80. 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, [2009] OJ L 310/34.
81. CJEU, 18 September 2019, *AQ und DN*, C-662/18 and C-672/18, EU:C:2019:750.
82. FR: *Conseil d'État*, 12 October 2018, N° 423118, FR:CECHR:2018:423118.20181012 (in C-662/18, *AQ*) and FR: *Conseil d'État*, 12 October 2018, N° 423044, FR:CECHR:2018:423044.20181012 (in C-672/18, *DN*).
83. *See* FR: *Conseil d'État*, 19 December 2019, N° 423118, FR:CECHR:2019:423118.20191219 and FR: Conseil d'État, 19 December 2019, N° 423044, FR:CECHR:2019:423044.20191219.
84. *See* FR: *Conseil Constitutionnel*, 3 April 2020, No. 2019-832/833 QPC, FR:CC:2020:2019.832.QPC; *see also* the subsequent decisions by the *Conseil d'État*, 1 July 2020, N° 423118, FR:CECHS:2020:423118.20200701 and FR: *Conseil d'État*, 1 July 2020, N° 423044, FR:CECHS:2020:423044.20200701.

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