

CJEU Rules On The Application Of The General Anti Abuse Provision Of The Parent Subsidiary Directive

The Court of Justice of the EU (CJEU) in the case *Nordcurrent* ([C-228/24](#)) has interpreted the general anti abuse provision (GAAR) of the Parent Subsidiary Directive (Council Directive 2011/96/EU of 30 November 2011 – the PSD).

This case represents the first time the CJEU has addressed the application of the GAAR concerning a domestic participation exemption under the PSD. Until now, CJEU jurisprudence has predominantly concentrated on the applicability of the PSD's exemption from withholding tax.

Background and facts

Nordcurrent Group UAB ('Nordcurrent LT') is a Lithuanian tax resident entity with its main business operations being focused on the creation and distribution of electronic games. During 2009 and due to certain restrictions relating to the sale and distribution of video games in Lithuania, Nordcurrent incorporated a subsidiary in the United Kingdom ('UK Subsidiary'). The UK subsidiary thus acted as an intermediary between Nordcurrent and advertising and game distribution platforms until Nordcurrent was able to conclude by itself direct agreements with such platforms. During 2017 the UK Subsidiary's operations were partially transferred to Nordcurrent while during 2018 all risks related to the creation, financing and advertising of the games were transferred to Nordcurrent. The UK subsidiary was ultimately wound up during 2021.

Prior to it being wound up, the UK Subsidiary made two distributions of dividends to Nordcurrent during 2018 and 2019 for which Nordcurrent applied the Lithuanian participation exemption (that served as an implementation of the PSD). At the time the dividends were distributed, the UK was still a member of the EU. The Lithuanian tax authorities did not agree with the local participation exemption rules applying on the aforesaid dividend distributions on the basis that the UK subsidiary formed part of a non-genuine arrangement and therefore sought to tax the relevant dividends. The case was submitted to the Tax Disputes Commission under the Government of Lithuania ('TD Commission'), which subsequently chose to suspend the proceedings and refer the following questions to the CJEU that in essence read as follows:

- a) Is the denial of the PSD benefits limited to instances where the distributing entity is merely an intermediary or can the denial of PSD benefits extend to other cases as well (e.g. cases where the distributing entity distributes profits which were generated from its own activities)?
- b) If the answer to the previous question is yes, in assessing whether an arrangement is "genuine" or not, should the approach to such assessment be static (i.e. looking at the facts and circumstances only at the time of the distribution) or dynamic (taking an overall assessment of all facts and circumstances of the arrangement)?
- c) Does the fact that an arrangement is deemed as "non-genuine" automatically lead to the conclusion that a tax benefit was obtained which is contrary to the PSD?

CJEU's judgment

With respect to the above questions the CJEU reached the following conclusions:

- **On the application of the PSD to intermediary/conduit entities:** Per the CJEU what is important for the application of the GAAR is whether or not the arrangement (or series of arrangements) was put in place with its main or one of its main purposes being the obtainment of a tax advantage contrary to the object and purpose of the PSD. The CJEU highlighted that there is nothing in the text of the PSD which limits its application to arrangements of a specific type (such as intermediary or conduit arrangements). Per the CJEU, this is also evident from the dicta of the CJEU in *T Danmark* and *Y Danmark*, *C-116/16* and *C-117/16* where, in accordance with the CJEU, a conduit entity is merely an example and not the only instance that the anti-abuse provisions can apply.

- **On the timing of assessment of the arrangement:** The CJEU clarified that an overall assessment of the arrangement will need to be undertaken and thus such assessment cannot be limited solely at the time of distribution. The CJEU indicated that this interpretation is supported by the text and preamble to the PSD.
- **On whether the fact that an arrangement is “not-genuine” is enough for the denial of PSD benefits:** The CJEU indicated that it is not adequate that the arrangement is not genuine; it must also be put in place with its main purpose or one of its main purposes to obtain a tax advantage which defeats the object and purpose of the PSD. With respect to the definition of a “tax advantage” for the purposes of the PSD, the CJEU has assumed an “overall tax effect” position with respect to the determination of the existence of a tax advantage: per the CJEU, the advantage of the exemption of dividends cannot be taken into account in isolation. Therefore, when assessing abuse, one must look at the overall tax effect of the arrangement in question (such as for example in the case at hand that the profits were taxed in the UK at a higher rate than the one that would have been imposed in Lithuania had the profits been taxed there).

Takeaway

This is the first time that the CJEU rules on the application of the GAAR of the PSD with respect to the application of the participation exemption. Taxpayers should carefully assess the application of the participation exemption regimes within the EU, considering the guidance from the CJEU, which offers insights on conducting such an assessment. This involves the dynamic assessment of an arrangement and an evaluation of its overall tax effect as part of determining whether abuse is present.

Let's talk

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