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OPINION STATEMENT

Nordcurrent Group: Interpretation of the Anti-abuse Provision in the Parent Subsidiary Directive
Opinion Statement ECJ-TF 1/2025 on the decision of the CJEU of 03 September 2024 in Case C-228/24, *Nordcurrent group UAB*

Prepared by the CFE ECJ Task Force
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This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on the *Nordcurrent group UAB* case (hereinafter: the "*Nordcurrent Case*"), in which the Court of Justice of the EU (Sixth Chamber) delivered its decision on 03 April 2025.[2]

The judgment clarifies the CJEU's understanding of the notion of abuse in tax law. It follows up on its anti-abuse jurisprudence, for instance in the Danish cases[3], Cadbury Schweppes[4], Eqiom SAS[5], and Deister Holding AG and Juhler Holding A/S[6]. The CJEU holds 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 which defeats the object or purpose of the directive.[7] 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 taken into account. 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 which defeats the object or purpose of the directive.

I. Background, Facts, and Issues

1. The *Nordcurrent* case deals for the first time with the issue of under which circumstances the Member State of a parent company is entitled to deny the participation exemption under Art. 4(1) lit a of the Parent Subsidiary Directive (Council Directive 2011/96/EU of 30 November 2011 as amended by Council Directive (EU) 2015/121 of 27 January 2015 hereafter PSD) in case of abuse. The judgment of the CJEU clarifies the interpretation of the anti-abuse provision contained in Art. 1(2) and (3) of the PSD, which were introduced by the 2015 amendment.

2. *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 the video games because of restrictions to sell its video games directly via app stores from Lithuania. In 2017 and 2018, the organisation 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.

3. *Nordcurrent* applied the participation exemption based on Art. 4(1) lit a PSD to the dividends received from the UK subsidiary. Following an audit for the years 2018 and 2019, the Lithuanian tax administration denied

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[2] ECJ, 03 April 2025, Case C-228/24, Nordcurrent Group UAB, Case Law IBFD.

[3] ECJ, 26 February 2019, C-116/16 and C-117/16, T Danmark and Y Denmark, Case Law IBFD.

[4] ECJ, 12 September 2006, C-196/04, Cadbury Schweppes, Case Law IBFD.

[5] ECJ, 7 September 2017, C-6/16, Eqiom and Enka, Case Law IBFD.

[6] ECJ, 20 December 2017, C-504/16 and C-613/16, Case Law IBFD.

[7] While Art. 1(2) PSD uses the terms "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).

the participation exemption to the dividends received and concluded that *Nordcurrent* should have paid corporation tax of more than 3 million Euros with regard to the dividends received. The tax administration argued the UK subsidiary lacked substance during the years 2018 and 2019. According to the tax administration, the subsidiary could be characterised 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 also 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.

4. *Nordcurrent* challenged the decision of the tax administration before the Tax Disputes Commission (a court in Lithuania[8]). 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 UK. 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.

5. The Lithuanian court referred the case to the CJEU and asked the CJEU three questions concerning the interpretation of Art. 1(2) and (3) PSD.[9] 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 judgment in the Danish cases[10] where the CJEU had to deal with conduit entities. For the Lithuanian Court it was unclear whether the findings in the Danish cases judgment can be transferred to non-conduit entities.

6. 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 Art. 1(2). 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.

7. 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 Art. 4(1) lit 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 UK (tax rate of 24%) was higher than the hypothetical tax burden in Lithuania (15%) of the parent company *Nordcurrent*, had it obtained the profits directly.

II. The Judgment of the Court of Justice

8. Concerning the first question, the CJEU held that a subsidiary may constitute a non-genuine arrangement even it is not a conduit company.[11] The application of the anti-abuse provision is not limited to conduit companies. The CJEU came to this conclusion by analysing the wording and the scheme and objectives of

[8] For the recognition of the Tax Dispute Commission as a court allowed to make a referral in the sense of Art. 267 TFEU see ECJ, 21 October 2010, Case C-385/09, xxx, Case Law IBFD.

[9] ECJ, 03 April 2025, Case C-228/24, Nordcurrent Group UAB, para 19, Case Law IBFD.

[10] ECJ, 26 February 2019, C-116/16 and C-117/16, T Danmark and Y Denmark, Case Law IBFD.

[11] ECJ, 03 April 2025, Case C-228/24, Nordcurrent Group UAB, para 31, Case Law IBFD.

Art. 1(2) and (3) PSD.[12] According to these provisions, an arrangement or a series of arrangements are to be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which 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.[13]

9. The scheme and objectives of the PSD also speak in favour of a broad interpretation irrespective of the circumstances in which the abuse occurs. In the Danish cases judgment, the CJEU applied the anti-abuse provision to arrangements involving conduit companies. However, this does not prevent the application of the anti-abuse provision to cases where no conduit companies are involved. Also, in the Danish cases judgment 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 judgment by the words "inter alia".

10. Concerning the second question, the CJEU decided that for the assessment of 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 take a look at the facts at the time of the distribution of the dividends.

11. The wording of Art. 1(2) puts a particular emphasis on the time when the arrangement was put in place.[14] However, the second subparagraph of Art. 1(2) makes clear that an arrangement may consist of more than one step or part. It cannot be ruled out that an arrangement which was initially put into place for valid commercial reasons has to be regarded as non-genuine from a certain point onwards because it was maintained despite a change of circumstances. As a consequence, circumstances which happened after the formation of the arrangement may be taken into account as well, in order to assess whether a part of the arrangement is genuine or not.[15]

12. 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 which are not genuine. The assessment cannot be limited to the time of the payment of the dividends.[16]

13. 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 refuse the participation exemption. Art. 1(2) contains two conditions, namely (1) the existence of a non-genuine arrangement and (2) the intention to obtain a tax advantage that defeats the object or purpose of the PSD.[17] The purpose to obtain a tax advantage must be taken into account as a separate factor for the classification of abuse. In the absence of a tax advantage, even a non-genuine arrangement cannot be qualified as abusive.

14. The meaning of a tax advantage is not defined in the PSD.[18] The wording of the anti-abuse provision in Art. 1(2) and 1(3) 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 for the question whether the taxpayer wanted to obtain a tax advantage.

15. As a result, for the assessment of whether the taxpayer wanted to obtain a tax advantage it is not sufficient to look at the participation exemption in isolation, but it is also relevant to find out whether the taxpayer

[12] Ibid., para 23.
[13] Ibid., para 25.
[14] Ibid., para 33.
[15] Ibid., para 37.
[16] Ibid., para 41.
[17] Ibid., para 45.
[18] Ibid., para 50.

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 the situation where the arrangement would not have been put into place and the investment would have been done in a different way. If the corporate tax rate in the UK where the subsidiary is located was higher than in Lithuania where the parent is located, then the whole arrangement would lead to a higher tax burden. This would speak against a tax saving purpose of the whole arrangement.

III. Comments

16. The *Nordcurrent* judgment sheds light on the scope of the anti-abuse provision contained in Art. 1(2) and (3) PSD. It builds on the Court's findings in the Danish cases, where the CJEU addressed the denial of the withholding tax exemption under Art. 5 in the context of conduit companies. In *Nordcurrent*, the CJEU further emphasizes that the participation exemption under Art. 4(1) lit. a PSD may also be refused in cases of abuse. The judgment clarifies that the anti-abuse provision is not confined to scenarios involving conduit companies. The findings in this judgment will be relevant for the interpretation of other anti-abuse provisions in EU tax law, in particular Art. 6 Anti-Tax Avoidance Directive, Art. 5(1) Interest and Royalties Directive and Art. 15(1) lit a Merger Directive. It might also have relevance for the interpretation of the discretion to counter abuse under Art. 1(4) PSD and Art. 5(2) Interest and Royalties Directive. It remains to be seen what impact the judgment will have on the interpretation of domestic anti-abuse provisions and on the interpretation of the principal purpose test in Art. 29(9) OECD Model Convention. However, here the courts will have to take the different legal context into account.

17. The judgment 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 which happened at different moments in time. The CJEU has made it clear that a holistic approach and a broader time horizon has to be taken into account for 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 Art. 4 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 not genuine any longer) then the benefits of Art. 4 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 genuine activity, then the participation exemption should also only be granted in part. Unlike an all-or-nothing approach, such a compartmentalisation approach is also implied by the wording of Art. 1(3) PSD ("to the extent that") and the required proportionality under the preamble of the PSD.[19]

18. 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 Art. 1(2) PSD is not the same as the isolated tax benefit granted by Art. 4(1) lit a 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. That constitutes a welcome clarification after the judgment in the Danish cases.[20]

19. It remains to be seen whether the Court's analysis of an overall tax advantage would be the same if the home country of the parent company had chosen the indirect credit method under Art. 4(1) lit b PSD and

[19] See recital 6 of the preamble.

[20] 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, ET 2019, 487 (500).

the tax burden in the home country of the parent was 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 will be a residual tax in the country of the parent. However, the lower tax in the country of the subsidiary could lead to a tax benefit for the time until the dividends are actually distributed. While the *Nordcurrent* judgment only concerned the participation exemption under Art. 4(1) lit a PSD it is also relevant in the context of withholding tax under Art. 5 PSD. With regard to the withholding tax exemption in Art. 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 for the calculation of the overall tax effect only corporate taxes or other taxes also have to be taken into account.

20. 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."[21] Nobody addressed this statement during the proceedings. It remains unclear what the meaning and effect of the statement are. However, the CJEU clearly stated that the participation exemption under Art. 4(1) lit a PSD can be affected by the anti-abuse provision in Art. 1(2) PSD.

21. The PSD does not harmonize the concepts of income attribution and of equity investments etc. So, the directive accepts different approaches of the 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 case the question of a denial of the participation exemption would not have come up.

IV. The Statement

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

23. The judgment 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 judgment clarifies that all facts and circumstances have to be taken into account for the verification of a non-genuine arrangement and of a tax advantage that defeats the object or purpose of the Directive.

[21] See Council of the European Union, Draft Minutes of 10 February 2015, 5547/15 ADD 1.