The substance game: Interpretation of anti-abuse rule contained in Parent-Subsidiary Directive

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On 3 April 2025, the Court of Justice of the European Union (ECJ) issued its decision in *Nordcurrent group* (Case C-228/24), following the request for a preliminary ruling by a Tax Disputes Commission under the Government of the Republic of Lithuania. In the decision, the ECJ sheds light on the interpretation of the anti-abuse rule contained in the Parent-Subsidiary Directive (2011/96). This note provides a taster of the decision. Please note that this is not a detailed case summary. For a more nuanced case summary including the details of the reasoning of the ECJ, *see* the ECJ Case Law IBFD collection.

1. What is this case about?

In 2018 and 2019, Nordcurrent group UAB (Nordcurrent), a company that makes and distributes video games, received dividends from its UK-based subsidiary. Nordcurrent did not pay any corporation tax on these dividends, as it used the benefit of a tax exemption under the Parent-Subsidiary Directive (2011/96).

The Lithuanian tax authorities argued that the UK subsidiary was a non-genuine arrangement, saying it did not have enough staff, with the director juggling seven other companies as the only employee of the subsidiary. They also pointed out that the subsidiary did not have its own office or any physical assets in the United Kingdom.

Nordcurrent disagreed, insisting that the subsidiary was legitimate. Nordcurrent explained that the subsidiary was set up in 2009 and closed down in 2021. Nordcurrent said that in 2018 and 2019 they could not sell games directly from Lithuania. They also argued that the subsidiary did not need a physical office or more staff because of the nature of their business, and that the director was enough to handle standard agreements.

2. What did the ECJ say?

Question 1: *If a Member State denies a parent company a tax exemption on dividends under the Parent-Subsidiary Directive (2011/96), on the grounds that the subsidiary is a non-genuine arrangement – and the Member State does that even if the subsidiary is not a mere conduit company and carries out real business activities – is this action consistent with the anti-abuse rule under the Directive?*

ECJ answer: Yes, this is consistent with the Directive.

Why?: The ECJ first looked at the wording of the anti-abuse rule in the Directive, saying that it does not suggest that the rule only applies to specific situations or types of arrangements. Instead, its wording takes a broad view. The ECJ also noted that one cannot assume from the existing case law that the anti-abuse rule only applies to arrangements involving conduit companies; the case law actually notes that this is just one of the examples. The

ECJ concluded that denying the tax exemption generally fits with the anti-abuse rule of the Directive, but now the referring court has to figure out if the elements of an abusive practice are present in this case.

Question 2: *Can the Member State only assess the situation on the dividend payment dates to decide if a subsidiary in another Member State is in a non-genuine arrangement and not take into account the genuine activity of the subsidiary before that?*

ECJ answer: No, it cannot.

Why?: The ECJ pointed out that one cannot ignore the circumstances at the time the arrangement was created or before the specific step in question (like the dividend payments in this case) when trying to establish abuse. The tax authorities have to consider all relevant facts and circumstances to determine if there are any steps that are not genuine.

Question 3: *Is simply classifying the subsidiary as non-genuine enough to conclude that the parent company obtained a tax advantage that goes against the purpose of the Directive?*

ECJ answer: No, it is not enough.

Why?: The ECJ said that for the Directive's benefits to be denied, two things need to happen: first, there has to be a non-genuine arrangement, and second, the main purpose (or one of the main purposes) of this arrangement has to be getting a tax advantage. The ECJ mentioned that this mix of objective circumstances and subjective elements fits with its previous rulings. Therefore, just recognizing the subsidiary as a non-genuine arrangement is not enough to deny the parent company the tax exemption.

Also, the ECJ discussed the meaning of the "tax advantage". Is it equal to the tax exemption under the Directive or is its meaning broader? The ECJ decided that its meaning is broader – to illustrate, Nordcurrent has paid *more* tax by having its subsidiary *in the United Kingdom*, as the UK corporation tax was higher than Lithuanian – and the ECJ ruled that this should be also taken into account when determining if the main purpose (or one of the main purposes) of this arrangement was to get a tax advantage.

3. Conclusion

In conclusion, the ECJ's analysis shows that with regard to the anti-abuse rule of the Parent-Subsidiary Directive (2011/96), a Member State can deny a parent company a tax exemption on dividends received from its subsidiary in another Member State if the subsidiary is a non-genuine arrangement, even if it is not just an intermediate company and even if it does real business activity. But this only applies if there are elements of abusive practice.

However, this decision cannot be based just on the situation at the time of the dividend payment. The tax authorities have to look at the subsidiary's genuine activity before the dividend payments too. In addition, just classifying the subsidiary as non-genuine is not enough to say the parent company got a tax advantage that goes against the Directive's purpose.

In this decision, the ECJ puts limits on how freely tax authorities can apply the anti-abuse rule of the Parent-Subsidiary Directive (2011/96), insisting on evidence and comprehensive approach when evaluating a specific arrangement. One can therefore ask: After this decision, who's really calling the shots in the substance game – companies or tax authorities?

IBFD references:

- EU tax law developments are reported on the daily IBFD Tax News Service page.
- For IBFD summaries of ECJ judgments, see the ECJ Case Law IBFD collection.
- F. Debelva & J. Luts, The General Anti-Abuse Rule of the Parent-Subsidiary Directive, 55 Eur. Taxn. 6 (2015), Journal Articles & Opinion Pieces IBFD.