By PwC Deutschland | 23 May 2025

ECJ: Application of the General Anti Abuse Provision of the Parent Subsidiary Directive

Following a request for a preliminary ruling from the Tax Disputes Commission of the Republic of Lithuania, the European Court of Justice has commented in some detail on the general anti abuse provision (GAAR) of the Parent Subsidiary Directive (PSD).

Background

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. The UK subsidiary thus acted as an intermediary between Nordcurrent and advertising and game distribution platforms until Nordcurrent was able to conclude direct agreements with such platforms by itself. 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.

Decision

With respect to the questions referred, the ECJ reached the following conclusions:

Application of the PSD to intermediary/conduit entities: Itt is important for the application of the GAAR whether or not the arrangement (or series of arrangements) was put in place with its main or one of its main purposes being to obtain a tax advantage contrary to the object and purpose of the PSD. The ECJ 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).

Timing of assessment of the arrangement: The ECJ clarified that an overall assessment of the arrangement will need to be undertaken and thus such assessment cannot be limited solely to the time of distribution. The court indicated that this interpretation is supported by the text and preamble of the PSD.

The ECJ also 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 ECJ has assumed an "overall tax effect" position with respect to the determination of the existence of a tax advantage: The advantage of the exemption of dividends cannot be considered 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).

Source:

ECJ judgment of 3 April 2025 **C-591/13** '*Nordcurrent group' UAB*.

The above text is taken from the PwC EUDTG Newsalert - 22 May 2025, which will shortly be published on the **website of the EU Direct Tax Group**.

Keywords

Parent/Subsidiary Directive