When Are Domestic Anti-Avoidance Rules in Breach of Primary and Secondary EU Law? – Comments Based on Recent ECJ Decisions

Based on the ECJ decisions in Eqiom SAS (Case C-6/16), as well as Joined Cases Deister Holding (Case C-504/16) and Juhler Holding (Case C-613/16), the authors discuss the interplay between Member States’ domestic anti-avoidance rules, the Parent-Subsidiary Directive and the basic freedoms. In addition, the article contains a discussion on the degree to which the EU prohibition of abuse can be invoked even in the absence of national anti-avoidance measures.

1. Introduction

The purpose of this article is to comment on the decision of the Court of Justice of the European Union (ECJ) in Eqiom SAS (Case C-6/16),1 which was issued on 7 September 2017, as well as in Joined Cases Deister Holding (Case C-504/16) and Juhler Holding (Case C-613/16);2 issued on 20 December 2017. The cases are interesting, as they shed light on the interplay between Member States’ domestic anti-avoidance rules, the Parent-Subsidiary Directive and the basic freedoms found in the Treaty on the Functioning of the European Union (TFEU).3

In Eqiom SAS, the ECJ had to give a preliminary ruling on the compatibility of a French anti-avoidance rule with both the Parent-Subsidiary Directive and the TFEU.4 The French anti-avoidance rule denied an exemption from withholding taxes on dividends received by a legal person controlled directly or indirectly by one or more residents of non-EU Member States, unless this legal person could provide proof that the principal purpose, or one of the principal purposes of the group structure, was not to take advantage of the exemption.

Likewise, the Deister/Juhler cases concerned a German anti-avoidance rule aimed at mitigating the avoidance of withholding tax through the use of intermediary holding companies. The rule precluded entitlement to an exemption or refund in situations in which the non-resident parent company’s shareholders would not have been entitled to the exemption or refund had they received the dividends directly, provided that at least one out of three more specific conditions were fulfilled. The ECJ, also in this regard, had to consider whether the German anti-avoidance rule was in line with the Parent-Subsidiary Directive (2011/96) and the TFEU.

The decisions were eagerly awaited, as it was hoped that they could provide clarity on a number of issues concerning the relationship between domestic anti-avoidance rules, the Parent-Subsidiary Directive (2011/96) and primary EU law.5 This article discusses the extent to which the decision answers these questions and pin-points a number of questions that remain unanswered. Initially, a brief introduction is given of the general anti-abuse rule contained in the Parent-Subsidiary Directive and its historical development (section 2.). This is followed by a description of the facts of the cases and the ECJ’s decisions (section 3.). Subsequently, the findings of the ECJ are discussed and put into perspective (section 4.).


The matter before the ECJ in Eqiom SAS was whether or not the French rule in article 119b(2) of the French General Tax Code6 was in line with the then applicable Parent-Subsidiary Directive (2011/96). The former article 1(2) of the Parent-Subsidiary Directive allowed Member States some discretionary power, through domestic or treaty-based provisions, to deny benefits under the Directive to counteract fraudulent or abusive measures.

Footnotes:

2. DE: ECJ, 20 Dec. 2017, Joined Cases C-504/16 and C-613/16, Deister Holding and Juhler Holding, ECJ Case Law IBFD.
5. Concerning the Eqiom (C-6/16) case, see C. Brokelind, Anti-Directive Shopping on Outbound Dividends in Light of the Pending Decision in Holcim France (Case C-6/16), 56 Eur. Taxn. 9 (2016), Journals IBFD.
abusive behaviour. Article 1(2), at the time, stated that: “This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse”.

The provision thereby allowed Member States to introduce rules into their domestic legislation to counter abusive behaviour with regard to dividend distributions to non-resident taxpayers. The provision arguably reflects the general principle of EU law that any abuse of rights was – and is – prohibited.

In 2014, the wording of the provision was amended to specifically refer to tax evasion, tax fraud and abuse. Soon after, however, it was agreed to introduce a binding general anti-abuse rule (GAAR) into the Directive. Accordingly, the current Parent-Subsidiary Directive (2011/96) states the following in article 1 (paragraphs 2-3):

2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

In the preamble to the amending Directive, it was stated that the national anti-abuse rules adopted by Member States had different levels of severity and were designed to reflect the specificities of each Member State’s tax system. Moreover, some Member States did not have any domestic or treaty-based provisions for the prevention of abuse. Therefore, the inclusion of a common minimum anti-abuse rule was considered very helpful to prevent abuse of the Directive and to ensure greater consistency in its application in different Member States. In addition, the Preamble noted that the application of anti-abuse rules should be proportionate and should serve the specific purpose of tackling an arrangement or a series of arrangements that are not genuine, i.e. do not reflect economic reality.

The new anti-abuse provision has similarities with the principal purposes test prescribed by the OECD. It should be borne in mind, however, that the ECJ will have the final word when it comes to the interpretation of the provision, and that the ECJ will probably not (directly) include OECD sources when it comes to the interpretation of the new anti-abuse provision in the Directive. Moreover, it should be reiterated that the principle of proportionality must be followed when applying anti-avoidance provisions. Accordingly, an anti-abuse provision must be suited to its objective and may not restrict the benefits based on EU law more than what is necessary to achieve that objective.

3. Recent ECJ Case Law

3.1. Introductory remarks

Below, the facts and decisions in the cases are presented. First, the Eqiom case will be briefly addressed. Subsequently, the Deister/Juhler cases will explained more thoroughly. The reason for first dealing with Eqiom is that the ECJ, in the Deister/Juhler cases, extensively refers to its earlier decision in Eqiom.

3.2. Eqiom

The main dispute was the scope of the Parent-Subsidiary Directive (2011/96) in France concerning a dividend distribution from a French subsidiary (Eqiom, formerly Holcim France, successor in law to Euro Stockage) to a Luxembourg parent company (Enka) as illustrated in Diagram 1. Enka was owned by a Cypriot company (Waverley Star Investments Ltd.), which again was owned by a Swiss company (Campsores Holding SA).

In 2005 and 2006, dividend distributions were made from Eqiom to Enka in Luxembourg. Following an audit, the French tax authorities imposed a withholding tax on the dividend distributions, as the tax exemption in France did not apply where the distributed dividends were received by a legal person (Enka) controlled directly or indirectly by one or more residents of states that were not members of the European Union (Campsores Holding SA), unless the taxpayer (Enka) provided proof that the principal purpose or one of the principal purposes of the chain of interests was not to take advantage of the tax exemption.

It was not contested that the companies at issue were covered by the Parent-Subsidiary Directive (2011/96) and that the distributed dividends should be considered within the scope of application of article 5(1) of that Directive. Instead, the question was whether or not the denial of the tax exemption could be accepted based on the then applicable article 1(2) of the Directive.

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8. See also AG Opinion in Eqiom SAS (C-6/16), para. 24.


11. For a more elaborate discussion, see J. Bundgaard in Den evige adfærd – omgivelser og misbrug i skatteretten p. 239 et seq. (J. Bundgaard et al. eds., Ex Tuto 2015).

12. See, for example, UK: ECJ, 16 July 1998, Case C-264/96, Imperial Chemical Industries (ICI) v. Kenneth Hall Colmer (Her Majesty’s Inspector of Taxes), ECJ Case Law IBFD, Secalso M. Helmenen, EU Tax Law – Direct Taxation sec. 3.1.4. (IBFD 2017), Online Books IBFD.

13. As mentioned, the decision in Eqiom has already been addressed by Romaneli, supra n. 4. Moreover, in the Deister/Juhler cases the ECJ elaborates more extensively on the concept of abuse with regard to holding companies.

14. Art. 119a (2) GTC.

15. Eqiom SAS (C-6/16), para. 19.
As article 1(2) of the Directive does not provide for exhaustive harmonization – because the provision solely recognizes the Member States’ power to apply domestic or treaty-based provisions required for the prevention of fraud and abuse – the matter needed to be assessed in light of the Directive, as well as the relevant provisions of primary EU law.16

Concerning compatibility with the Directive, the ECJ stated that although article 1(2) reflects the general principle of EU law that no one may benefit from an abuse of rights, the provision must nevertheless, in so far as it constitutes a derogation from the tax rules established by that Directive, be interpreted strictly. Therefore, the power conferred on the Member States by article 1(2) could not be given an interpretation going beyond the actual terms of that provision.17

Therefore, according to the ECJ, article 1(2) only permits domestic or treaty-based provisions required for the prevention of fraud and abuse.18 In this context, the ECJ noted that in order for national legislation to be regarded as seeking to prevent tax evasion and abuse, its specific objective must be to prevent conduct involving the creation of wholly artificial arrangements that do not reflect economic reality, the purpose of which is to unduly obtain a tax advantage.19 As a consequence, the ECJ stated that in order to determine whether an operation pursues an objective of fraud and abuse, the competent national authorities may not confine themselves to applying pre-determined general criteria, but must specifically examine the operation at issue in its entirety. The imposition of a general tax measure automatically excluding certain categories of taxpayers from the tax advantage, without the tax authorities being obliged to provide even prima facie evidence of fraud and abuse would go further than what is necessary to prevent fraud and abuse.20

Against this background, the ECJ concluded that the French rule in question, which was not specifically designed to exclude purely artificial arrangements from the exemption, had introduced a general presumption of fraud and abuse that undermined the objective that was being pursued by the Directive. This is because the French rule subjected the exemption from withholding tax of profits distributed by a resident subsidiary to its non-resident parent company to the condition that the parent company establish that the principal purpose or one of the principal purposes of the corporate structure was not to take advantage of that exemption, without the tax authorities being required to provide even prima facie evidence of fraud and abuse.21 In other words, the conclusion was that article 1(2) must be interpreted as excluding national tax legislation, such as the French rule in question, that subjects the granting of the tax advantage to the condition that the parent company establish that the principal purpose or one of the principal purposes of the corporate structure was not to take advantage of that exemption.22 As such, the question regarding the Parent-Subsidiary Directive was solved on the basis of the principle of proportionality. This leaves the companies without any guidance as to the application of the anti-abuse rule with regard to holding companies.

The ECJ then addressed the question of which basic freedom might apply to the French rule. It initially stated that the purpose of the legislation concerned should be taken into consideration. In this regard, the ECJ reiterated that national legislation that is intended to apply only to those shareholdings that enable the holder to exert a definite influence over a company’s decisions falls within the freedom of establishment, whereas shareholdings acquired solely with the intention of making a financial investment must be examined exclusively in the light of the free movement of capital.23

In the case at hand it was apparent that the French anti-avoidance rule was applicable to companies holding at least 20% of the capital of their subsidiaries and, therefore, did not necessarily imply that the company holding those shares should exercise a definite influence. Against this background, the ECJ stated that it would be necessary

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16. Id., at paras. 15-18.
17. Id., at paras. 26-27. Reference was made to UK: ECJ, 25 Sept. 2003, Case C-58/01, Oce Van der Grinten NV v. Commissioners of Inland Revenue, ECJ Case Law IBFD.
18. Id., at paras. 28-29.
19. Id., at para. 30. Reference was made to UK: ECJ, 12 Sept. 2006, Case C-196/04, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, ECJ Case Law IBFD and BE: ECJ, 5 July 2012, Case C-318/10, Société d’investissement pour l’agriculture tropicale SA (SIAT) v. État belge, ECJ Case Law IBFD.
20. Eqiom SAS (C-6/16), para. 32. Reference was made to LU: ECJ, 8 Mar. 2017, Case C-14/16, Euro Park Service, ECJ Case Law IBFD.
21. Id., at para. 36.
22. Id., at para. 38.
23. Id., at paras. 40-41. Reference was made to FR: ECJ, 15 Sept. 2011, Case C-310/09, Ministre du Budget, des Comptes publics et de la Fonction publique v. Accor SA, ECJ Case Law IBFD.
to take the facts of the given case into account in order to determine which basic freedom is applicable.\textsuperscript{24} As Enka held the entire capital of its French subsidiary, it was determined that the French anti-avoidance rule should be examined in light of the freedom of establishment.\textsuperscript{25}

The ECJ then proceeded to examine whether the French rule constituted an impediment to the freedom of establishment. In this connection, the ECJ zeroed in on the fact that it was solely in circumstances in which a resident subsidiary distributed profits to a non-resident parent company, which directly or indirectly was controlled by one or more residents of third states, that the exemption from withholding tax was subject to the condition that the parent company establish that the principal purpose or one of the principal purposes of the corporate structure was not to take advantage of that exemption. By contrast, where such a subsidiary distributed profits to a resident parent company, directly or indirectly controlled by one or more residents of third states, the resident parent company could benefit from that exemption without being subject to such a condition. In this context, the ECJ found that such a difference in treatment was likely to dissuade a non-resident parent company from exercising an activity in France through a subsidiary established in that Member State. Accordingly, the difference in treatment constituted an impediment to the freedom of establishment.\textsuperscript{26}

Finally, the ECJ assessed whether the French rule could be justified by overriding reasons in the public interest. France had argued that the rule could be justified both on the basis of the objective of combating fraud and tax evasion, and by the need to safeguard a balanced allocation of taxation powers between the Member States. The ECJ stated that the objectives of combating fraud and tax evasion and of seeking to safeguard a balanced allocation of taxation powers are connected, and that these justifications were capable of justifying a restriction.\textsuperscript{27} The ECJ then continued by stating that the objective of combating fraud and tax evasion, whether it is relied on under article 1(2) of the Parent-Subsidiary Directive (2011/96) or as a justification for an exception to primary law, has the same scope. Therefore, the ECJ’s findings concerning the compatibility of the French rule with the Parent-Subsidiary Directive should also apply with regard to the assessment concerning the freedom of establishment.\textsuperscript{28} Accordingly, the objectives invoked by France could not justify an impediment to the freedom of establishment.\textsuperscript{29}

In conclusion, the answer to the questions referred was that article 1(2) of the Parent-Subsidiary Directive and article 49 of the TFEU should be interpreted as precluding domestic tax legislation, such as the French rule, that subjects the granting of the tax advantage provided for by article 5(1) of the Directive to the condition that the parent company establish that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of that exemption.\textsuperscript{30}

\section*{3.3. Deister Holding (Case C-504/16) and Juhr Holding (Case C-613/16)}

These joined cases concerned a German anti-avoidance provision that essentially aims to limit access to a withholding tax exemption on dividend payments to foreign shareholders. Accordingly, under paragraph 50d(3) of the Income Tax Act,\textsuperscript{31} there is no entitlement to an exemption or refund where, first, the non-resident parent company’s shareholders would not have been entitled to the exemption or a refund had they received those dividends directly, and, second, one of the following three conditions is satisfied, namely: (i) there are no economic or other substantive reasons for the involvement of the non-resident parent company; (ii) the non-resident parent company does not earn more than 10% of its entire gross income for the financial year in question from its own economic activity (there being no such activity, inter alia, if the company earns its gross income from the management of assets); or (iii) the non-resident parent company does not take part in general economic commerce with a business establishment suitably equipped for its business purpose.

Moreover, it was explicitly stated in the provision that the circumstances of the foreign company shall be the sole decisive factor; organizational, economic or other substantive features of undertakings that are affiliated with the foreign company shall not be considered. Thus, a foreign company should not be considered to have its own economic activity if it earns its gross income from the management of assets or assigns its main business activities to third parties.\textsuperscript{32}

The joined cases concerned two situations in which taxpayers were denied an exemption from withholding tax on dividends. The facts are simple and clearly stated in the ECJ decision.

Deister Holding was the successor in title to Traxx, which had its registered office in the Netherlands. Traxx principally had holdings in several companies established in various states and financed those companies, inter alia, by making loans to the companies of the group in question. From 2005, Traxx had a holding amounting to at least...
26.5% of the capital of Deister Electronik GmbH. From March 2007, Traxx had a rented office in the Netherlands and had two employees there in 2007 and 2008. Traxx’s sole shareholder, Mr Stobbe, was resident in Germany.

On 19 November 2007, Deister Electronik paid dividends to Traxx, on which Deister Electronik withheld the tax on income from capital tax and the solidarity surcharge and remitted the amounts to the tax authorities. On 16 May 2008, Traxx applied for an exemption from the tax and surcharge in respect of that distribution of dividends. Following decisions in which the tax authority rejected that application and the complaint made against the rejection, Deister Holding brought an action against those decisions before the Cologne Finance Court (Finanzgericht Köln) on the ground that the relevant legislation was incompatible with the freedom of establishment and the Parent-Subsidiary Directive (2011/96).32

Juhler Holding, a holding company, had its registered office in Denmark. Juhler Services Limited, a company incorporated under Cypriot law, held 100% of the capital of Juhler Holding. Juhler Services Limited’s sole shareholder was a natural person resident in Singapore.

Juhler Holding had holdings in more than 25 subsidiaries, some of which also had their registered office in Denmark, the Member State in which it was established. The group in question supplied one third of the volume of the personnel procurement services in Denmark. Since 2003, Juhler Holding has held 100% of the capital of Temp-team Personnel GmbH, a company established in Germany. Juhler Holding had, in addition, a property portfolio, and the company exercised financial control within the group so as to optimize the group’s interest costs. Juhler Holding was also responsible for supervising and monitoring the performance of the individual subsidiaries and had a phone line and an email address. Juhler Holding was listed as a contact partner on the group’s homepage. Juhler Holding did not, however, have its own offices. If necessary, it would use the premises, as well as the other facilities and staff, of other companies within the group. Lastly, Juhler Holding’s chief executive was also on the boards of various companies in the group.

In 2011, Juhler Holding received dividends from Temp-team Personnel. Since those dividends were subject to withholding tax and the solidarity surcharge, Juhler Holding applied for those taxes to be refunded. Following a decision of the tax authorities rejecting the application and an administrative appeal against this decision, Juhler Holding brought an action before the Cologne Finance Court on the grounds that the relevant legislation in the main proceedings was incompatible with the freedom of establishment and the Parent-Subsidiary Directive (2011/96).33

In essence, the referring court asked the ECJ whether article 1(2), in conjunction with article 5(1) of the Parent-Subsidiary Directive (2011/96) and article 49 of the TFEU must be interpreted as precluding a domestic anti-avoidance rule such as the one prescribed in paragraph 50d(3) of the Income Tax Act.34

As in Egiom, the ECJ initially stated that article 1(2) of the Parent-Subsidiary Directive (2011/96) does not provide for exhaustive harmonization. Consequently, the issue at hand could be assessed in light of primary EU law as well.35

The ECJ went on to interpret article 1(2) of the Parent-Subsidiary Directive (2011/96). In this regard, the ECJ stated

32. Id., at paras. 16-19.
33. Id., at paras. 20-23.
34. Id., at paras. 34 and 44.
35. Id., at para. 45.
that given that the Directive is intended to streamline the
tax arrangements governing cross-border cooperation
within the European Union, the Member States cannot
unilaterally introduce restrictive measures and subject
the right to exemption from withholding tax under
article 5(1). Moreover, it was reiterated that the provision
must be subject to a strict interpretation.36

In addition, the ECJ found that the Member States may,
in any event, exercise the option provided for in article
1(2) only whilst observing the general principles of EU
law and, more specifically, the principle of proportionality.
The ECJ then referred to its previous statement that in
order for national legislation to be regarded as seeking to
prevent tax evasion and abuses, its specific objective must
be to prevent conduct involving the creation of wholly
artificial arrangements that do not reflect economic
reality, the purpose of which is to obtain a tax advantage
unduly.37

On the basis of this, the ECJ stated that a general pre-
sumption of fraud and abuse cannot justify either a fiscal
measure that compromises the objectives of a Directive
or a fiscal measure that prejudices the enjoyment of a
fundamental freedom guaranteed by the treaties. Thus,
in order to determine whether an operation pursues an
objective of fraud and abuse, the tax authorities may not
confine themselves to applying predetermined general
criteria but must carry out an individual examination of
the whole operation at issue. The imposition of a general
tax measure automatically excluding certain categories of
taxable persons from the tax advantage, without the tax
authorities being required to provide even prima facie evi-
dence of fraud and abuse, would go further than is neces-
sary for preventing fraud and abuse.38

With regard to the provision at hand, the ECJ stated that
the legislation at issue was not specifically designed to
exclude from the benefit of a tax advantage wholly arti-
ficial arrangements the purpose of which was to unduly
obtain that advantage, but covers, in general, any situ-
tion in which persons – who would not have been enti-
tled to such an exemption had they received the dividends
directly – have holdings in a non-resident parent company.
The mere fact that such persons have such holdings does
not, in itself, indicate the existence of a wholly artificial
arrangement that does not reflect economic reality and
the purpose of which is to unduly obtain a tax advantage.39

The ECJ then remarked that it cannot be inferred from
any provision of the Parent-Subsidiary Directive (2011/96)
that the tax treatment of persons with holdings in parent
companies resident in the European Union or the origin of
such persons affects in any way the right of those compa-
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36. Id., at paras. 32 and 59.
37. Id., at para. 60.
38. Id., at paras. 61-62.
39. Id., at paras. 64-65.
40. Id., at para. 66.

41. Id., at paras. 69-71.
42. Id., at para. 75.
of taxation powers between the Member States could not justify an impediment to the freedom of establishment.\textsuperscript{43}

4. Implications of the Decisions


Obviously, the ECJ decisions in \textit{Eqiom} and \textit{Deister/Juhler} will have repercussions with regard to the applicability of the French and German anti-avoidance rules assessed in the decisions, as article 1(2) of the Parent-Subsidiary Directive (2011/96) and article 49 of the TFEU should be interpreted as precluding the use of the French and German rules. The decisions may also have repercussions for other Member States that have anti-avoidance rules in place that are structured similarly to the French and German provisions. Accordingly, if a national anti-avoidance rule contains an objective presumption of abuse – for example, due to the fact that the indirect shareholder is resident outside the European Union/European Economic Area – and then only subsequently allows the taxpayer to rebut the assumption, the national rule may not be considered to be in line with the Parent-Subsidiary Directive (2011/96) and the freedom of establishment.\textsuperscript{44}

This finding is not particularly surprising and is aligned with previous ECJ case law, for example \textit{Leur-Bloem} (Case C-28/95).\textsuperscript{45}

Moreover, the statements made by the ECJ in \textit{Deister/Juhler} may imply that the criteria applied under the German anti-avoidance rule – even if part of a concrete assessment that is rebuttable – cannot lead to a conclusion that the structure at hand necessarily would constitute abuse.

Thus, in the authors’ view, the court’s decisions in \textit{Eqiom} and \textit{Deister/Juhler} confirm at least five things: (i) article 1(2) of the Parent-Subsidiary Directive (2011/96) reflects the general EU law principle that abuse of rights is prohibited.\textsuperscript{46} (ii) the burden of proof in a potential abusive situation cannot be solely placed on the taxpayer; (iii) the definition of abuse from \textit{Cadbury Schweppes} still stands; (iv) this definition of abuse also applies with regard to the Parent-Subsidiary Directive (2011/96), and (v) the mere establishment of a holding company in another Member State in most cases should not, in itself, constitute abuse.

Moreover, it seems relevant to consider whether the new GAAR, inserted into the Parent-Subsidiary Directive in 2015, is in line with the requirements set forth by the ECJ in \textit{Eqiom} and \textit{Deister/Juhler}.\textsuperscript{47} The new GAAR is a “common minimum anti abuse rule” that is intended to supplement, without replacing, the Member States’ domestic and treaty-based provisions to prevent tax evasion, tax fraud, or abuse.\textsuperscript{48} The Preamble to the Amending Directive (2015/121)\textsuperscript{49} states that the application of anti-abuse rules should be proportionate and should serve the specific purpose of tackling an arrangement or a series of arrangements that are not genuine, i.e. do not reflect economic reality.\textsuperscript{50} In addition, it is explained that when Member States’ tax administrations are assessing whether an arrangement or a series of arrangements is abusive, they should undertake an objective analysis of all relevant facts and circumstances.\textsuperscript{51}

Based on the wording of the most recent GAAR in article 1(2)-3) of the Parent-Subsidiary, as well as the statements made in the Preamble, there does not seem to be any basis for concluding that the GAAR, as such, does not fulfill the requirements set forth by the ECJ in \textit{Eqiom} and \textit{Deister/Juhler}. Accordingly, the GAAR in the Directive does not seem to provide that tax authorities can presume, without being required to carry out an individual examination of the whole operation at issue, that fraud or abuse exists. In other words, the GAAR is not a generally applicable objective rule. A final assessment, however, has to be based on the Member States’ actual implementation and application of the new GAAR, as this may vary from Member State to Member State because the GAAR in the Directive is a minimum standard allowing for differences.\textsuperscript{52}

Finally, it should be noted that the same conclusions and considerations must apply with regard to the new GAAR found in article 6 of the Anti-Tax Avoidance Directive (2016/1164) (ATAD),\textsuperscript{53} as the GAAR in the final version

\textsuperscript{43} Id. at para. 97-99.

\textsuperscript{44} Apparently, that may be the case regarding a Spanish anti-avoidance rule similar to the French rule contested in \textit{Eqiom SAS} (C-6/16). See A. de la Cueva González-Cotera & C. Morlán Burgasé, \textit{Spain - Corporate Taxation} sec. 7.3.4.1., Country Analyses IBFD.

\textsuperscript{45} NL: ECJ, 17 July 1997, Case C-28/95, \textit{A. Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2}, ECJ Case Law IBFD.

\textsuperscript{46} This was also reiterated by the ECJ in para. 60 of the very recent decision in BE: ECJ, 26 Oct. 2017, \textit{A. Leur-Bloem v. Belastingdienst/Ondernemingen Amsterdam 2}, Case C-26/17, and A. Nørgaard Laursen, \textit{Belastingdienst/Ondernemingen Amsterdam 2} supra n. 10, at recitals 6 and 7.

\textsuperscript{47} If the practice of EU Member States turns out to demonstrate that the burden of proof of abuse under the GAAR is satisfied merely by stating that the taxpayer has obtained a certain tax benefit arising from a certain structure, etc., this may be problematic in light of \textit{Eqiom SAS} (C-6/16) and the principle of proportionality. Such an administrative practice is reflected in Denmark in the first case regarding the interpretation of the new art. 1(2) of the Parent-Subsidiary Directive (2011/96). See DK: Skattemelding, 28 Mar. 2017, SKM 2017 333 SR. J. Bundgaard et al. \textit{Kommenter til den første afgørelse om den danske omgåelsesklausul}, Skat Udland 228 (2017), and A. Nørgaard Laursen, \textit{Mellem brug og misbrug Hvordan GAAR grænsen – nogle kritiske bemærkninger til SKM2017 333}, SR-Skat 315 et seq. (2017) for commentary.

\textsuperscript{48} Note from General Secretariat of the Council, 11 Dec. 2014, 16753/14.


\textsuperscript{52} If the practice of EU Member States turns out to demonstrate that the burden of proof of abuse under the GAAR is satisfied merely by stating that the taxpayer has obtained a certain tax benefit arising from a certain structure, etc., this may be problematic in light of \textit{Eqiom SAS} (C-6/16) and the principle of proportionality. Such an administrative practice is reflected in Denmark in the first case regarding the interpretation of the new art. 1(2) of the Parent-Subsidiary Directive (2011/96). See DK: Skattemelding, 28 Mar. 2017, SKM 2017 333 SR. J. Bundgaard et al. \textit{Kommenter til den første afgørelse om den danske omgåelsesklausul}, Skat Udland 228 (2017), and A. Nørgaard Laursen, \textit{Mellem brug og misbrug Hvordan GAAR grænsen – nogle kritiske bemærkninger til SKM2017 333}, SR-Skat 315 et seq. (2017) for commentary.

of the ATAD applies similar wording to that found in the Parent-Subsidiary Directive (2011/96).

4.2. The beneficial ownership cases

In a number of pending Danish cases, concerning the issue of beneficial ownership, preliminary questions have been referred to the ECJ. The cases deal with several questions concerning the proper interpretation under the Parent-Subsidiary Directive (2011/93), the Interest and Royalties Directive (2003/49) and primary EU law.

It is beyond the scope of this article to address all questions related to these cases on beneficial ownership. A remark should, however, be made concerning one of the questions, namely whether a Member State’s reliance on article 1(2) of the old version of the Parent-Subsidiary Directive presupposes that the Member State in question has adopted a specific domestic provision implementing article 1(2) of the Directive, or that domestic law contains general provisions or principles on fraud, abuse and tax evasion that can be interpreted in accordance with article 1(2). The old version of article 1(2) was not implemented under Danish law in the income years at issue in these cases, and the question is, therefore, whether the Danish court-developed principle of substance-over-form and the doctrine of “rightful recipient” may prevent a foreign holding company from benefitting from the Parent-Subsidiary Directive (2011/96).

According to the Danish National Tax Tribunal, this should not be the case, and during the proceedings before the referring Danish High Court, the Danish government and the taxpayers actually agreed that the Danish principle of substance-over-form and the doctrine of “rightful recipient” could not capture beneficial ownership issues. In any event, paragraphs 26-29 of Eqiom may provide some interesting guidance on this matter because the ECJ, as mentioned previously, has stated that article 1(2) must be interpreted strictly. Therefore, the provision only permits domestic or agreement-based provisions required for the prevention of fraud or abuse, which entails that the specific objective must be to prevent conduct involving the creation of wholly artificial arrangements that do not reflect economic reality.

The fact that article 1(2) must be interpreted strictly was also reiterated by the ECJ in Deister/Juhler. Moreover, the ECJ, interestingly, added that it cannot be inferred from any provision of the Parent-Subsidiary Directive (2011/96) that the tax treatment of persons with holdings in parent companies resident in the European Union or the origin of such persons affects in any way the right of those companies to rely on tax advantages provided for by that Directive.

In the authors’ view, these statements in Eqiom and Deister/Juhler confirm that there is very limited scope, if any, for invoking national court-developed anti-avoidance principles in beneficial ownership cases. Another issue that emerges in connection with this discussion is whether the Member States can invoke the EU principle of prohibition of abuse even in the absence of national measures, giving effect to the principle.

Looking to the decision in Kofoed (Case C-532/05), this does not seem to be the case. Kofoed dealt with the fact that Denmark had not implemented the optional anti-avoidance provision of the Merger Directive (90/434), which was in force at the time (90/434). In the case, the ECJ initially stated that the anti-avoidance provision “reflects the general Community law principle that abuse of rights is prohibited. Individuals must not improperly or fraudulently take advantage of provisions of Community law”.

However, the ECJ found that the anti-avoidance provision in the Directive could not be applied in the absence of a specific implementation provision. Pursuant to articles 10 and 243 of the EC Treaty, the addressee of a directive is the Member State, not the taxpayers, and consequently a directive cannot, on its own, create obligations for taxpayers. The same, according to the ECJ, can be inferred from the EU principle of legal certainty.

A traditional reading of Kofoed suggests that even though implementation of an anti-avoidance provision can be accomplished by interpreting a domestic judicial anti-avoidance doctrine (for example, the substance-over-form or fraus legis doctrines) in accordance with EU law, it must be possible to point to such a doctrine in the national jurisprudence. The anti-avoidance principle cannot, on its own, create obligations for taxpayers.

This reading was nevertheless challenged in a subsequent decision, Italmoda [Joined Cases C-131/13, C-163/13 and


55. DK. ECJ. Pending Cases C-115/16, C-116/16 and C-117/16. N Luxembourg I, T Denmark, Y Denmark. It is expected that Advocate General Kokott will deliver her Opinion in the cases on 1 Mar. 2018.


57. For additional coverage of the Danish cases on beneficial ownership, see, for example, J. Bundgaard, Danish Case Law Developments on Beneficial Ownership, Tax Notes Intl. 63 et seq. (2012) and H. Severin Hansen, L. Esbjerg Christensen & A. Endicott Pedersen, Danish “Beneficial Owner” Cases – A Status Report, 67 Bull. Intl. Taxn. 4/5 (2013), Journals IBFD.

58. See, for example, the decision of the National Tax Tribunal in DK: National Tax Tribunal, 16 Dec. 2011, SKM2012 26L5R. The authors’ view, these statements in Eqiom and Deister/Juhler confirm that there is very limited scope, if any, for invoking national court-developed anti-avoidance principles in beneficial ownership cases. Another issue that emerges in connection with this discussion is whether the Member States can invoke the EU principle of prohibition of abuse even in the absence of national measures, giving effect to the principle.

59. In fact, the Danish doctrines, according to case law, did not disregard holding companies as recipients of dividends and interest payments.

60. DK. ECJ. 5 July 2007, Case C-321/05, Hans Markus Kofoed v. Skatteministeriet. ECJ Case Law IBFD.


63. Kofoed (C-321/05), para. 41.

64. Id., at para. 42.

C-164/13) concerning the Sixth VAT Directive (77/388).\(^{66}\) In accordance with *Kofoed*, the Netherlands government argued that the prevention of fraud applied as a general principle of law in applying national provisions transposing this Directive.\(^{67}\) The ECJ – also in accordance with *Kofoed* – sent the case back to the referring court to make this assessment. Surprisingly, however, the ECJ subsequently stated that even if national law contains no such rules, it nevertheless cannot be inferred that the national authorities and courts are not entitled to refuse a benefit derived from a right laid down in the Sixth VAT Directive in the event of fraud.\(^{68}\)

*Kofoed* and *Italmoda* were difficult to reconcile. Even though *Italmoda* concerned a situation in which there was proof of fraud, it seemed that the ECJ deliberately kept the door open to the possibility of applying the principle of prohibition of abuse even in the absence of national measures, also giving effect to the principle in situations in which there is no proof of fraud.

The final answer arrived with the *Cussens* (Case C-251/16) decision.\(^{69}\) In this case, the ECJ was asked to answer whether: “the principle that abusive practices are prohibited must be interpreted as being capable, regardless of a national measure giving effect to it in the domestic legal order, of being applied directly in order to refuse to exempt sales of immovable goods”\(^{70}\).

The ECJ answered this question in the affirmative, citing *Italmoda* and stating that the findings in that case related to both cases of fraud and to situations involving abusive practices.\(^{70}\) Somewhat surprisingly, the ECJ also stated that *Kofoed*:

> did concern the application of the conditions for application of the principle that abusive practices are prohibited, but on the conditions for application of a specific provision contained in a directive and enabling the Member States to refuse the exemption provided for by that directive where the transaction concerned has tax evasion or tax avoidance as its principal objective or as one of its principal objectives.

*Kofoed*, therefore, did not, as such, concern the application of the general principle that abusive practices are prohibited.\(^{71}\)

The *Cussens* case may impact beneficial ownership cases. If the ECJ finds that abusive practices are, in fact, applied in those cases, it seems that these practices may be disregarded for tax purposes even in the absence of a domestic anti-abuse provision or doctrine being applicable, as the prohibition of abuse can be invoked regardless by the tax authorities. The tax authorities should, however, still be able to prove that the corporate structure in place constitutes an abusive practice.

### 4.3. Open issues

One might have hoped that the decision in *Eqiom* would have made it clear whether or not the mere establishment of a holding company in another Member State, in itself, could constitute abuse in the eyes of the ECJ, as a holding company – due to the nature of its business – must be considered to have no economic reality.

Previous case law from the ECJ suggests that this should not be the case.\(^{72}\) In *Eqiom*, however, the question does not appear to have been addressed directly, even though the ECJ seemed to have been provided with a good opportunity to do so. Instead, the ECJ found the French anti-avoidance rule to be in breach of EU law simply because it was based on a general presumption of fraud and abuse that the taxpayer had to rebut without the tax authorities being required to provide even prima facie evidence. Accordingly, a final answer to this question was not given. In the authors’ view, however, it still seems reasonable to conclude that the ECJ’s statements in *Eqiom* should not give reason to revise the prevailing opinion, i.e. that the mere establishment of a holding company in another Member State should not, in itself, constitute abuse.\(^{73}\)

This argument finds additional support in the *Deister/ Juhler* decision, wherein the ECJ elaborated a bit more on the existing abuse doctrine as exemplified by *Cadbury Schweppes* (wholly artificial arrangement that does not reflect economic reality), by adding factors including the organizational, economic or other substantive features of the group of companies, to which the parent company belongs, and the structures and strategies of that group. It should not be forgotten, however, that the statement from the ECJ does not offer clear guidance on how to actually make the assessment. Thus, it may still be hard to assess

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\(^{67}\) *Italmoda* (C-131/13, C-163/13 and C-164/13), para. 31.

\(^{68}\) Id., para. 54.


\(^{70}\) Id., at paras. 33-34.

\(^{71}\) Id., at para. 38.

\(^{72}\) DE: ECJ, 29 Mar. 2007, Case C-347/04, Rewe Zentralfinanz EGV v. Finanzamt Köln-Mitte, para. 52, ECJ Case Law IBFD. See, for example, Bundgaard, supra n. 57, at 72. Referring to Rewe Zentralfinanz EGV (C-347/04), para. 52. It has been argued that the establishment of a company in another Member State should not be considered abusive. Moreover, it is far from obvious that the *Cadbury Schweppes* case should be interpreted as expansive enough to include within its scope other areas of business – from a finance company to a holding company. See also M. Evers & A. de Graaf, *Limiting Benefit Shopping: Use and Abuse of EU Law*, 18 EC Tax Rev. 6, 296 (2009). See also F. Robert & D. Toifl, *The Substance Requirement and the Future of Domestic Anti-Avoidance Rules within the Internal Market*, 51 Eur. Taxn. 11 (2011), Journals IBFD, who conclude that the test should include a significant time span. This was doubted by the European Commission in: Communication from the Commission to the Council, The European Parliament and the European Economic and Social Committee, The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries, COM(2007) 785, 5 (10 Dec. 2007). See also E. Pirc, *Abuse of EU Holding Companies: Fundamental Freedoms, EC Parent-Subsidiary Directive and the French Constitution – Part 1*, 49 Eur. Taxn. 10, 474 (2009), Journals IBFD.

\(^{73}\) In the literature, it has been argued that it is important that taxpayers not be prevented from using intermediate holding companies in other Member States, as it is an important aspect of the internal market that Member States are able to compete with each other. See H.T.P.M. van den Hurk, *Proposed Amended Parent-Subsidiary Directive Reveals the European Commission’s Lack of Vision*, 68 Bull. Intl. Taxn. 9 (2014), Journals IBFD.
whether the use of an intermediary holding company in a concrete situation should be considered abusive.

5. Final Remarks

The decisions of the ECJ in *Eqiom* and *Deister/Juhler* are interesting, as they shed light on the interplay between Member States’ domestic anti-avoidance rules, the Parent-Subsidiary Directive (2011/96) and the basic freedoms found in the TFEU. Above all, it has been argued that the decisions confirm that (i) article 1(2) of the Parent-Subsidiary Directive reflects the general EU law principle that abuse of rights is prohibited; (ii) the burden of proof in a potential abusive situation cannot solely be placed on the taxpayer, (iii) the definition of abuse in *Cadbury Schweppes* still stands, (iv) this definition of abuse also applies with regard to the Parent-Subsidiary Directive and (v) the mere establishment of a holding company in another Member State in most cases should not, in itself, constitute abuse.

Moreover, it was argued that the decisions do not strengthen the line of argumentation put forward by the Danish government in the pending ECJ cases on beneficial ownership, as the ECJ has made it clear that article 1(2) must be interpreted strictly. In this connection, this article discussed the degree to which the EU-principle of prohibition of abuse can be invoked even in the absence of domestic anti-avoidance measures. In this regard, it was concluded that recent case law clearly indicates that such application must be accepted for EU law purposes.