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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) (2007).[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 pinpoints 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.).

2. The Anti-Abuse Rule of the Parent-Subsidiary Directive (2011/96)

The matter before the ECJ in *Eqiom SAS* was whether or not the French rule in article 119b(2) of the French General Tax Code[6] was in line with the then applicable article 1(2) of the 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

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1. FR: ECJ, 7 Sept. 2017, Case C-6/16, *Eqiom SAS, formerly Holcim France SAS, Enka SA v. Ministre des Finances et des comptes publics*, ECJ Case Law IBFD.
2. DE: ECJ, 20 Dec. 2017, Joined Cases C-504/16 and C-613/16, *Deister Holding* and *Juhler Holding*, ECJ Case Law IBFD.
3. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD.
4. *See also* L. Romanelli, *The French Anti-Abuse Rule Implementing the EU Parent-Subsidiary Directive (90/435) is Contrary to EU Law*, 58 Eur. Taxn. 1 (2018), Journals 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.
6. FR: General Tax Code (*Code général des impôts*, GTC), National Legislation IBFD.

abusive behaviour. Article 1(2), at the time, stated that:[7] "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.[8]

In 2014, the wording of the provision was amended to specifically refer to tax evasion, tax fraud and *abuse*.[9] Soon after, however, it was agreed to introduce a binding general anti-abuse rule (GAAR) into the Directive.[10] 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-avoidance 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-avoidance 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.[11] Moreover, it should be reiterated that the principle of proportionality must be followed when applying anti-avoidance provisions. Accordingly, an anti-avoidance 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.[12]

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.[13] 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*

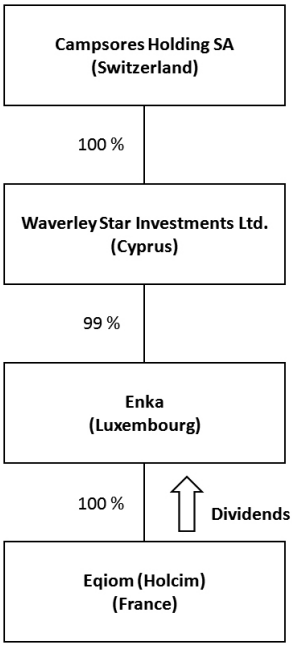
The main dispute was the scope of the Parent-Subsidiary Directive (2011/96) in France concerning a dividend distribution from a French subsidiary (Eqiom, formerly Holcim France, successor in law to Euro Stockage) to a Luxembourg parent company (Enka) as illustrated in Diagram 1. Enka was owned by a Cypriot 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.[14]

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.[15] 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.

7. *See* Council Directive 2011/96/EU of 30 November 2011 on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States, OJ L 345/8 (2011), EU Law IBFD [hereinafter Parent-Subsidiary Directive (2011/96)], which was a recast of Council Directive 2003/123/EC of 22 December 2003 Amending Directive 90/435/EEC on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States, OJ L 007 (2004), EU Law IBFD.
8. *See also* AG Opinion in *Eqiom SAS* (C-6/16), para. 24.
9. *See* Council Directive 2014/86/EU of 8 July 2014 Amending Directive 2011/96/EU on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States, OJ L 219 (2014), EU Law IBFD.
10. *See* Council Directive 2015/121 of 27 January 2015 Amending Directive 2011/96/EU on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States, OJ L 21/1 (2015), EU Law IBFD [hereinafter Council Directive 2015/121].
11. For a more elaborate discussion, *see* J. Bundgaard in *Den evige udfordring – omgåelse 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. *See also* M. Helminen, *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 Romanelli, *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.

Diagram 1 – Ownership structure: Eqiom SAS (Case C-6/16)



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 or 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 predetermined 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 precluding 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 chain of interests is 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

16. Id., at paras. 15-18.
17. Id., at para. 26-27. Reference was made to UK: ECJ, 25 Sept. 2003, Case C-58/01, *Océ 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.[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.[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.[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.[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. Accordingly, the objectives invoked by France could not justify an impediment to the freedom of establishment.[28]

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.[29]

3.3. *Deister Holding* (Case C-504/16) and *Juhler 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,[30] 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.[31]

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

24. *Eqiom SAS* (C-6/16), paras. 42-44. Reference was made to NL: ECJ, 13 Apr. 2000, Case C-251/98, *C. Baars v. Inspecteur der Belastingdienst Particulieren/Ondernemingen Gorinchem*, ECJ Case Law IBFD and UK: ECJ, 13 Nov. 2012, Case C-35/11, *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, Commissioners for her Majesty's Revenue & Customs*, ECJ Case Law IBFD.
25. *Eqiom SAS* (C-6/16), para. 46. In this connection, the ECJ found it necessary to point out that the fact that a parent company residing in another Member State is directly or indirectly controlled by one or more residents of third states does not deprive that company of the right to rely on the freedom of establishment.
26. *Eqiom SAS* (C-6/16), paras. 55-56. In para. 60, the ECJ explained that since France had chosen to exercise its tax jurisdiction over the profits distributed by the resident subsidiary to the non-resident parent company, it should be concluded that that non-resident parent company was in a situation comparable to that of a resident parent company.
27. *Eqiom SAS* (C-6/16), para. 63. Reference was made to DE: ECJ, 17 Dec. 2015, Case C-388/14, *Timac Agro Deutschland GmbH v. Finanzamt Sankt Augustin*, ECJ Case Law IBFD and *Euro Park Service* (C-14/16).
28. *Eqiom SAS* (C-6/16), paras. 64-65.
29. Id., at para. 66.
30. DE: Income Tax Act (*Einkommensteuergesetz*, EstG), National Legislation IBFD.
31. *Eqiom SAS* (C-6/16), para. 14.

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 Personal 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 Personal. 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

Diagram 2 – Ownership structure: Deister Holding (Case C-504/16)

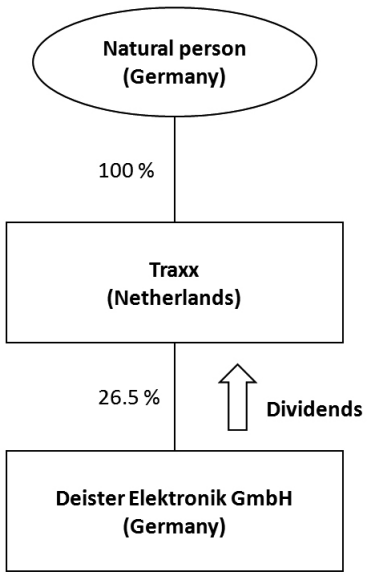
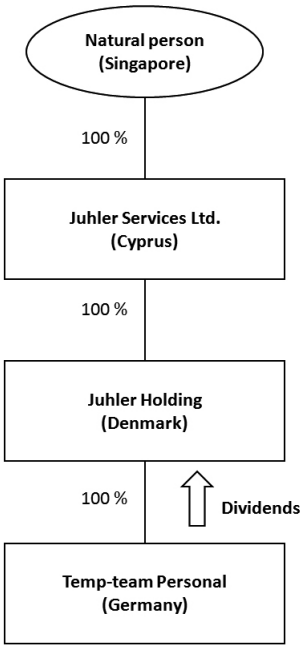


Diagram 3 – Ownership structure: Juhler Holding (Case C-613/16)



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 *Eqiom*, 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 presumption 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 evidence of fraud and abuse, would go further than is necessary 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 artificial arrangements the purpose of which was to unduly obtain that advantage, but covers, in general, any situation in which persons – who would not have been entitled 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 companies to rely on tax advantages provided for by that Directive.[40]

With regard to the lack of fulfilment, under German legislation, of either of the above three requirements, the ECJ noted, first, that, by subjecting the granting of that exemption to such a requirement, without the tax authorities being required to provide prima facie evidence of the absence of economic reasons or of fraud or abuse, the legislation introduces a general presumption of fraud or abuse and thus undermines the objective pursued by the Directive, in particular article 5(1) thereof, to prevent double taxation of dividends distributed by a resident subsidiary to its non-resident parent company by the Member State of that subsidiary's residence. Second, in so far as the legislation, presuming one of the conditions laid down by it is satisfied, does not allow a non-resident parent company to provide evidence demonstrating the existence of economic reasons, it sets up an irrebuttable presumption of fraud or abuse. Third, those conditions, whether taken individually or as a whole, cannot per se imply the existence of fraud or abuse.[41]

In this regard, the ECJ also stated that the Directive does not contain any requirement as to the nature of the economic activity of companies falling within its scope or the amount of turnover resulting from those companies' own economic activity. This statement was further elaborated on in paragraph 73 of the decision:

> The fact that the economic activity of a non-resident parent company consists in the management of its subsidiaries' assets or that the income of that company results only from such management cannot per se indicate the existence of a wholly artificial arrangement which does not reflect economic reality. In that context, the fact that the management of assets is not considered to constitute an economic activity for the purposes of value-added tax is irrelevant, since the tax at issue in the main proceedings and value-added tax are governed by distinct legal regimes, each pursuing difference [sic] objectives.

In paragraph 74 the ECJ went on to say:

> In addition, contrary to what the legislation at issue in the main proceedings provides, the finding of such an arrangement requires that, on a case-by-case basis, an overall assessment of the relevant situation be conducted, based on factors including the organisational, economic or other substantial features of the group of companies to which the parent company in question belongs and the structures and strategies of that group.

Thus, based on the above, the ECJ concluded that article 1(2), in conjunction with article 5(1) of the Parent-Subsidiary Directive (2011/96), must be interpreted as precluding national tax legislation such as the German anti-avoidance rule at issue.[42]

Moreover, like in the *Eqiom* decision, the ECJ ultimately concluded that the objective of combating tax evasion and avoidance, 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 findings set out with regard to the Directive also applied with regard to the freedom of establishment. Accordingly, the objective of combating tax evasion and avoidance and that of safeguarding a balanced allocation

36. Id., at paras. 52 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.[43]

4. Implications of the Decisions

4.1. Domestic GAARs and the new GAARs of the Parent-Subsidiary Directive (2011/96) and the Anti-Tax Avoidance Directive (2016/1164)

Obviously, the ECJ decisions in *Eqiom* and *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.[44] This finding is not particularly surprising and is aligned with previous ECJ case law, for example *Leur-Bloem* (Case C-28/95).[45]

Moreover, the statements made by the ECJ in *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 *Eqiom* and *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,[46] (ii) the burden of proof in a potential abusive situation cannot be solely placed on the taxpayer, (iii) the definition of abuse from *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 *Eqiom* and *Deister/Juhler*.[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.[48] The Preamble to the Amending Directive (2015/121)[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.[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.[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 fulfil the requirements set forth by the ECJ in *Eqiom* and *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.[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),[53] as the GAAR in the final version

43. Id., at para. 97-99.
44. Apparently, that may be the case regarding a Spanish anti-avoidance rule similar to the French rule contested in *Eqiom SAS* (C-6/16). *See* Á. de la Cueva González-Cotera & C. Morlán Burgasé, *Spain - Corporate Taxation* sec. 7.3.4.1., Country Analyses IBFD.
45. NL: ECJ, 17 July 1997, Case C-28/95, *A. Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, ECJ Case Law IBFD.
46. This was also reiterated by the ECJ in para. 60 of the very recent decision in BE: ECJ, 26 Oct. 2017, Case C-39/16, *Argenta Spaarbank NV v. Belgische Staat Argenta Spaarbank NV*.
47. *See* sec. 2.
48. Note from General Secretariat of the Council, 11 Dec. 2014, 16753/14.
49. Council Directive 2015/121, *supra* n. 10.
50. *See* F. Debelva & J. Luts, *The General Anti-Abuse Rule of the Parent-Subsidiary Directive*, 55 Eur. Taxn. 6 (2015), Journals IBFD, who argue that the use of the term "reflect economic reality" clearly stems from the "wholly artificial arrangement standard" and that guidance in respect of interpreting and applying the anti-abuse rule may be found in the existing ECJ case law on anti-abuse measures. For more on the GAAR in the Parent-Subsidiary Directive, *see also* D. Weber, *The New Common Minimum Anti-Abuse Rule in the EU Parent-Subsidiary Directive: Background, Impact, Applicability and Effect*, 44 Intertax 2, 98-129 (2016) and C. Brokelind, *Legal Issues in Respect of the Changes to the Parent-Subsidiary Directive as a Follow-Up of the BEPS Project*, 43 Intertax 12, 816-824 (2015).
51. *See* the preamble to Council Directive 2015/121, *supra* n. 10, at recitals 6 and 7.
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 *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: *Skatterådet*, 28 Mar. 2017, SKM 2017.333 SR, J. Bundgaard et al., *Kommentarer til den første afgørelse om den danske omgåelsesklausul*, Skat Udland 228 (2017), and A. Nørgaard Laursen, *Mellem brug og misbrug: Hvor GAAR grænsen – nogle kritiske bemærkninger til SKM2017.333. SR*, SR-Skat 315 et seq. (2017) for commentary.
53. Council Directive 2016/1164 of 12 July 2016 Laying down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, OJ L 193/1 (2016), EU Law IBFD.

of the ATAD applies similar wording to that found in the Parent-Subsidiary Directive (2011/96).[54]

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.[55] The cases deal with several questions concerning the proper interpretation under the Parent-Subsidiary Directive (2011/93), the Interest and Royalties Directive (2003/49)[56] and primary EU law.

It is beyond the scope of this article to address all questions related to these cases on beneficial ownership.[57] 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 benefiting from the Parent-Subsidiary Directive (2011/96).

According to the Danish National Tax Tribunal, this should not be the case,[58] 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.[59]

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),[60] 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),[61] 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,[62] the addressee of a directive is the Member State, not the taxpayers, and consequently a directive cannot, on its own, create obligations for taxpayers.[63] The same, according to the ECJ, can be inferred from the EU-principle of legal certainty.[64]

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.[65] 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

54. Id., at art. 6. In the original proposal, the ATAD GAAR was worded differently. *See* art. 7 of the Proposal for a Council Directive of 28 January 2016, COM(2016) 26 final, EU Law IBFD. However, during the negotiations, the GAAR was aligned with that of the Parent-Subsidiary Directive (2011/96). For a critical view on the compatibility of the ATAD GAAR with the fundamental freedoms, *see* G. Bizioli, *Taking EU Fundamental Freedoms Seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market?*, 26 EC Tax Rev. 3, 167-175 (2017).
55. DK: ECJ, Pending Cases C-115/16, C-116/16 and C-117/16, *N Luxembourg 1, T Denmark, Y Denmark*. It is expected that Advocate General Kokott will deliver her Opinion in the cases on 1 Mar. 2018.
56. Council Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments Made between Companies of Different Member States, OJ L157 (2003), EU Law IBFD.
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, SKM2012.26.LSR.
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.
61. Council Directive 90/434/EEC of 23 July 1990 on the Common System of Taxation Applicable to Mergers, Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States, EU Law IBFD.
62. Treaty Establishing the European Community, 25 Mar. 1957, EU Law IBFD (now art. 288 TFEU).
63. *Kofoed* (C-321/05), para. 41.
64. Id., at para. 42.
65. *See* B. Terra & P. Wattel, *European Tax Law* p. 644 (6th ed., Wolters Kluwer 2012).

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".

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

66. Sixth Council Directive 77/388/EEC of 17 May 1977 on the Harmonization of the Laws of the Member States Relating to Turnover Taxes – Common System of Value Added Tax: Uniform Basis of Assessment, EU Law IBFD. *See* NL: ECJ, 18 Dec. 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Staatssecretaris van Financiën v. Schoenimport 'Italmoda' Mariano Previti vof et al.*, ECLI:EU:C:2014:2455, ECJ Case Law IBFD.
67. *Italmoda* (C-131/13, C-163/13 and C-164/13), para. 51.
68. Id., at para. 54.
69. IE: ECJ, 23 Nov. 2017, Case C-251/16, *Edward Cussens et al. v. T.G. Brosnan*, ECLI:EU:C:2017:881, ECJ Case Law IBFD.
70. Id., at paras. 33-34.
71. Id., at para. 38.
72. DE: ECJ, 29 Mar. 2007, Case C-347/04, *Rewe Zentralfinanz eG v. Finanzamt Köln-Mitte*, para. 52, ECJ Case Law IBFD. *See*, for example, Bundgaard, *supra* n. 57, at 72. Referring to *Rewe Zentralfinanz eG* (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* E. Robert & D. Tof, *The Substance Requirement and the Future of Domestic Anti-Abuse 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. Picq, *"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, is 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.