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Same game, different form?

Corporate restructurings as a form of dividend stripping and the EU anti-abuse framework

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Preface

My thesis reflects my genuine interest in the measures adopted within EU legislation to address tax avoidance. Alongside this, I became increasingly interested in the legal dynamics surrounding dividend taxation and corporate restructurings within multinational groups. As a Dutch law student, the Dutch anti-dividend stripping provisions offered a natural and compelling starting point, grounding the broader EU analysis in a domestic framework I felt closely connected to. This thesis aims to contribute to the understanding of how the EU anti-abuse framework applies to structural dividend stripping through intra-group reorganisations, and where the boundaries of "acceptable" tax planning end and abuse begins. My engagement in writing this thesis lasted from March 2026 to May 2026.

I would like to express my sincere gratitude to my supervisor, Alexander Tale, for his guidance, constructive feedback, and continued support throughout the writing of this thesis. His expertise in tax law and his thoughtful engagement with my work have been invaluable.

I would also like to thank Joakim Zander, Mariya Senyk, Sigrid Hemels, and Axel Hilling for their well-structured and engaging courses throughout this master's programme, which provided me with a solid foundation in EU and international tax law and shaped the thinking behind this thesis.

In addition, I would like to thank my family, classmates, and friends for their unwavering support and encouragement throughout this time. Their faith in my abilities has meant more than I can express.

Thank you all for your continuous support.

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Abstract

This thesis examines whether the transfer of a company containing accumulated retained earnings to a shareholder benefiting from a more favourable dividend tax regime can constitute a form of structural dividend stripping under EU law. Unlike traditional dividend stripping arrangements, such as cum-ex and cum-cum transactions, these structures rely on intra-group corporate restructurings through which legal entitlement to future dividend distributions is shifted to a more favourably taxed entity while the economic interest within the group remains substantially unchanged.

Through a legal analysis of the PSD, the general EU principle prohibiting abuse of law, relevant CJEU case law and Dutch anti-dividend stripping legislation, this thesis evaluates whether such restructurings may fall within the scope of Article 1(2) PSD. Particular attention is given to the distinction between genuine and non-genuine arrangements, the objective and subjective elements of abuse, and the temporal assessment of abusive structures.

It is argued that structural dividend stripping may arise where a restructuring interposes a more favourably taxed intermediary without a corresponding transfer of economic ownership and where the intermediary lacks a genuine holding function characterised by real governance, independent risk-bearing, and autonomous dividend discretion. Although the legal form differs from traditional cum-cum structures, the underlying economic logic remains comparable.

The thesis further demonstrates that the proportionality principle embedded in the "to the extent" formulation of Article 1(2) PSD limits the denial of Directive benefits to the abusive element of the arrangement. As a result, only distributions attributable to retained earnings accumulated prior to the restructuring may justify the denial of withholding tax relief. Finally, the thesis assesses the compatibility of the 2024 Dutch reversal of the burden of proof with the CJEU's prohibition on general presumptions of abuse and concludes that significant uncertainty remains regarding the permissible scope of national anti-abuse measures under EU law.

Abbreviations

ATAD Anti-Tax Avoidance Directive (Council Directive (EU) 2016/1164)

BV Besloten Vennootschap (Dutch private limited liability company)

CJEU Court of Justice of the European Union

ECJ European Court of Justice

EU European Union

GAAR General Anti-Abuse Rule

IRD Interest and Royalties Directive (Council Directive 2003/49/EC)

MD Merger Directive (Council Directive 2009/133/EC)

OECD Organisation for Economic Co-operation and Development

PSD Parent-Subsidiary Directive (Council Directive 2011/96/EU)

SAAR Special Anti-Abuse Rule

SAS Société par Actions Simplifiée (French simplified joint-stock company)

TFEU Treaty on the Functioning of the European Union

VAT Value Added Tax

Wet DB Wet op de dividendbelasting 1965 (Dividend Tax Act 1965)

Wet Vpb Wet op de vennootschapsbelasting 1969 (Corporate Income Tax Act 1969)

WHT Withholding Tax

1 Introduction

1.1 Background

Dividend arbitrage is a commonly used strategy among traders to hedge the value difference between shares cum- (with) and ex- (without) dividend, through the use of put options. This practice, also known as dividend stripping, occurs worldwide and takes many forms.[1] The cum-ex scheme, an aggressive form of dividend arbitrage, gained widespread attention after being uncovered in Germany in 2012, although the practice allegedly dates back to 2001.[2] Investigations by a collaboration of European media outlets, led by the German group Correctiv, revealed that the scheme was not limited to Germany but operated across several European countries, including Denmark, Belgium, Austria, Switzerland, and Norway.[3] Alongside cum-ex transactions, similar cum-cum schemes were also widely used throughout Europe.[4] Between 2000 and 2020, Germany and France alone lost nearly €62 billion due to cum-cum fraud.[5] Conservative estimates indicate that potential tax revenue losses resulting from cum-cum transactions in ten countries between 2000 and 2020 amount to approximately €141 billion.[6] These estimates are based solely on dividend payments made by firms listed in the leading stock indices of the respective countries, despite the fact that, in principle, all dividends paid to foreign shareholders could be subject to cum-cum transactions.

After discovering the nature and scope of these dividend arbitrage (cum-ex/cum-cum) scandals, Germany changed its law in 2012 from then on preventing cum-ex schemes, and in 2017 it ruled that cum-cum schemes would no longer be allowed either, because these schemes have the sole aim of avoiding dividend tax.[7] However, according to the media collective, comparable schemes were deployed and are still being deployed in many other EU countries.[8] Against this background, attention has increasingly shifted from market-based dividend arbitrage transactions to forms of structural dividend stripping implemented through intra-group reorganizations within multinational enterprises. Unlike traditional cum-ex and cum-cum schemes, these structures do not rely on short-term trading strategies around dividend dates, but on the long-term reorganization of corporate group structures to obtain

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1 European Parliament, 'The Cum-Ex Files: Information Document' (26 November 2018) <https://www.europarl.europa.eu/cmsdata/158435/2018-11-26%20-%20Information%20paper%20on%20Cum-ex%20-%20Cum-cum.pdf> accessed 12 May 2026, 1.

2 Ibid.

3 CORRECTIV, 'About Us' <https://correctiv.org/ueber-uns/> accessed 12 May 2026.

4 European Parliament (n 1) 1.

5 Christoph Spengel, 'Estimation of the Tax Revenue Loss Caused by Cum/Cum Transactions: Update 2021' (University of Mannheim, 14 October 2021) <https://www.bwl.uni-mannheim.de/media/Lehrstuehle/bwl/Spengel/Dokumente/Medien/Steuerschaden_Cum-Cum_update.pdf> accessed 12 May 2026, 3.

6 Ibid.

7 European Parliament (n 1) 3.

8 Ibid.

withholding tax advantages.[9] Typically, the structure involves the interposition of a genuine holding company between existing group entities. A parent company resident in a non-treaty jurisdiction may transfer its shares in an operating subsidiary to a newly established or existing holding company located in a jurisdiction benefiting from the PSD or a favourable double tax treaty. By inserting this intermediary holding company, the corporate group seeks to reduce or eliminate withholding taxes on future dividend distributions, often achieving a 0% withholding tax rate that would otherwise not have been available.[10]

This raises the question whether such restructurings, regardless of whether they are considered genuine or non-genuine arrangements, may fall within the scope of anti-dividend stripping provisions or the GAAR under the PSD.[11] In the Netherlands, this issue was addressed by the Dutch tax authorities, who clarified that even in the absence of an artificial arrangement, the dividend stripping provisions may still apply to sustainable intra-group reorganizations, depending on the facts and circumstances of the case.[12]

A restructuring may become comparable to dividend stripping where the transfer of shares primarily serves to obtain withholding tax advantages rather than reflecting a genuine economic reorganization. However, in practice, a grey area exists between genuinely business-driven restructurings and arrangements with predominantly tax-driven motives, creating significant uncertainty regarding the circumstances under which anti-dividend stripping provisions and anti-abuse rules should apply.

1.2 Purpose and research question

This thesis examines whether the transfer of a company containing substantial accumulated retained earnings to a shareholder benefiting from a more favourable dividend tax regime can be regarded as a form of structural dividend stripping under EU law. Such restructurings may enable pre-existing profit reserves to be distributed under the PSD's withholding tax exemption, a regime that would not have been available prior to the restructuring, while leaving the underlying economic interest within the group substantially unchanged.

The analysis focuses on whether the current legal framework, in particular the general anti-abuse rule in Article 1(2) PSD as interpreted through the case law of the CJEU in *Emsland-Stärke*, *Cadbury Schweppes*, the *Danish beneficial ownership* cases, and *Nordcurrent*, is capable of addressing such structures. Following the reasoning in *Nordcurrent*, the analysis cannot be limited solely to the moment of dividend distribution, but must take into account the broader factual context, including the formation, purpose, duration, and possible reversal of the restructuring.

[9] B Schulz, 'The Cum-Ex Case: A Look at Germany' (2021) 15(1) ACTA VŠFS <http://dx.doi.org/10.37355/acta-2021/1-03> accessed 12 May 2026, 51.

[10] O.C.R. Marres, 'Dividendstripping bij reorganisaties' (2023) 23 NTFR 867.

[11] 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 (recast) [2011] OJ L345/8 (Parent-Subsidiary Directive or PSD), art 1(2).

[12] Kennisgroep dividendbelasting en bronbelasting, 'KG:024:2023:4 Kunstmatige constructie, duurzame reorganisatie en dividendstripping' (9 March 2023, updated 28 March 2023); art 4(3)(c) Wet op de dividendbelasting 1965 (Wet DB 1965).

The absence of a rigid temporal threshold under EU law raises important questions regarding the distinction between genuine business-driven reorganizations and arrangements predominantly designed to obtain withholding tax advantages. As a result, uncertainty remains regarding the circumstances under which such restructurings may become comparable to dividend stripping and whether existing anti-abuse rules provide sufficient legal certainty for taxpayers and tax authorities alike.

In light of the foregoing, the central research question of this thesis is as follows:

To what extent can the transfer of a company with accumulated retained earnings to a shareholder subject to a more favourable dividend tax regime be considered comparable to dividend stripping, and what are the tax implications for profit reserves accumulated prior to the restructuring?

1.3 Delimitations

This thesis is limited to the analysis of EU tax law, with particular focus on the PSD, and the relevant case law of the CJEU concerning abuse, beneficial ownership, and the denial of Directive benefits.

Although other EU tax instruments, including the IRD, the ATAD, and the Merger Directive, also contain anti-abuse provisions, they are referred to only insofar as relevant to the broader development of the EU abuse doctrine.

Furthermore, this thesis does not provide a comprehensive analysis of international tax treaty law. In particular, Article 10 OECD falls outside the primary scope of the research. Treaty law is discussed only where necessary to address the consequences of denying Directive benefits. The focus therefore remains on the autonomous EU law framework governing abusive dividend structures within the scope of the PSD.

The scenarios examined in section 5.4.2 are illustrative rather than exhaustive. Corporate groups can restructure in countless ways, and the factual possibilities are as varied as the commercial imagination of the groups that devise them, no analysis could capture every possible variant, nor would it be useful to attempt to do so. The analysis is therefore necessarily selective, chosen to map the spectrum from clearly non-abusive to clearly abusive arrangements.

In addition, exit taxation is not examined as an independent subject of analysis. Although exit taxes may become relevant in certain restructurings involving the transfer of assets, residence, or taxing jurisdiction, the present research focuses specifically on dividend withholding taxation, anti-dividend stripping provisions, and the treatment of retained earnings accumulated prior to a restructuring. Accordingly, the tax consequences associated with exit taxation fall outside the scope of this thesis.

Finally, domestic law is not analysed from a comparative perspective. Dutch law is used primarily as an illustrative case study, particularly in relation to anti-dividend stripping rules and the treatment of intra-group restructurings. No systematic comparison is made between the anti-abuse regimes of different Member States.

1.4 Method and materials

This thesis adopts a doctrinal legal research method. It analyses EU tax law, Dutch dividend tax legislation, and relevant CJEU case law to assess whether intra-group restructurings involving retained earnings can be treated as structural dividend stripping under existing anti-abuse frameworks. The analysis focuses on the PSD, the EU general principle prohibiting abuse of law, and Dutch anti-dividend stripping provisions. Particular attention is given to case law on abuse, beneficial ownership, and withholding tax exemptions, including *Emsland-Stärke*, *Cadbury Schweppes*, the *Danish* cases, and *Nordcurrent*.

Secondary sources, including academic literature and policy documents, are used to support doctrinal interpretation and to situate the legal analysis within broader debates on dividend taxation and anti-abuse rules. Dutch parliamentary materials are used to clarify how anti-dividend stripping rules are applied in practice, particularly in relation to intra-group restructurings.

1.5 Outline

Chapter 2 establishes the conceptual foundation by examining the mechanics of dividend stripping, from cum-ex and cum-cum transactions to intra-group reorganisations, and introduces the Dutch anti-dividend stripping framework as a domestic illustration.

Chapter 3 sets out the EU anti-abuse framework applicable to the analysis. It examines the general EU principle prohibiting abuse of law, the development and function of GAARs in EU tax law, and the purpose and scope of the PSD. Particular attention is given to the mandatory anti-abuse rule in Article 1(2) PSD and its three cumulative conditions; the tax-avoidance purpose test, the requirement that the arrangement defeats the object or purpose of the Directive, and the non-genuineness requirement.

Chapter 4 traces the development of the EU abuse doctrine through the case law of the CJEU, from *Emsland-Stärke* and *Cadbury Schweppes* through the *Danish beneficial ownership* cases to *Nordcurrent*, with particular attention to the assessment of economic substance and the temporal dimension of the abuse analysis.

Chapter 5 applies the framework to the central scenario: an intra-group transfer of a subsidiary with accumulated retained earnings followed by a dividend distribution. It assesses the comparability to dividend stripping and analysis the objective and subjective elements of abuse across a range of factual scenarios, examining the role of timing, commercial rationale, and the durability of the restructuring.

Chapter 6 examines the consequences of a finding of abuse, focusing on the proportionality constraints governing the denial of Directive benefits and the treatment of profit reserves accumulated prior to the restructuring.

Chapter 7 answers the central research question and identifies the residual areas of legal uncertainty that the current EU framework does not resolve.

2 From traditional dividend stripping to structural stripping

2.1 Introduction

The previous chapter introduced the research question and placed the phenomenon of structural dividend stripping in its broader context. Before the legal framework can be applied, it is necessary to understand what dividend stripping is and how it operates. This chapter establishes the conceptual foundation of the analysis by examining the mechanics and defining characteristics of cum-ex and cum-cum transactions, and by explaining how the same economic outcome, a formal change in dividend entitlement without a corresponding change in economic ownership, may be replicated through intra-group reorganisations.

2.2 Understanding the phenomenon of dividend stripping

2.2.1 Definition of dividends

Dividends are defined as the sum of money paid by a company to its shareholders when that company generates profits.[13] Legally, they represent the proceeds derived from the ownership of shares, profit-sharing certificates, or certain capital contributions and loans. For tax purposes, dividends are understood as everything distributed by a company to its current shareholders.[14]

In most countries, they are subject to a WHT, which is deducted at the source by the distributing company.[15] The application of a WHT is typically justified by the necessity to ensure the collection of taxes on mobile assets, which might otherwise easily escape taxation.[16]

The taxation of dividends also serves to allocate taxing rights between different jurisdictions in cross-border situations.[17] According to Article 10 OECD, dividends paid by a resident company of one state to a resident of another state may be taxed in both states, though the source state's taxing right is usually limited.[18] To prevent international double taxation, where a single dividend is taxed twice, foreign shareholders are often permitted to claim a reimbursement, credit, or reduction of the tax withheld at the source.[19]

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[13] OECD, *Dividend Tax Fraud: Raising Awareness of Dividend Stripping Schemes* (OECD Publishing 2023) 9.

[14] OECD, *Model Tax Convention on Income and on Capital: Commentary on Article 10* (OECD Publishing 2019) paras 24-25, 28.

[15] OECD (n 13) 9.

[16] Elisa Casi-Eberhard and others, 'The Big Short (Interest): Closing the Loopholes in the Dividend-Withholding Tax' (NHH Dept of Business and Management Science Discussion Paper No 2022/7, 22 February 2022) 7.

[17] M Helminen, *EU Tax Law - Direct Taxation: 2024 Edition* (IBFD 2024) s 2.3.4.

[18] OECD (n 14) paras 5-9.

[19] OECD (n 13) 10.

2.2.2 The concept and mechanics of dividend stripping

Where jurisdictions differentiate dividend withholding tax according to an investor's residence or tax status, incentives arise for shareholders to "borrow" a more favourable tax position from another investor.[20] One method is the interposition of a holding company, a "conduit company", with favourable tax attributes between the distributing company and the ultimate economic owner of the dividend.[21] Although such conduit structures are well known and generally addressed through anti-abuse doctrines, the same economic outcome is increasingly achieved through derivatives, securities lending, and comparable financial arrangements that transfer the tax benefit connected to the dividend.[22] While these so-called dividend stripping transactions are increasingly addressed in a growing number of jurisdictions, a recent OECD (2023) report suggests that awareness of dividend stripping remains limited and, in some places, entirely absent.[23]

A genuine construction is characterised by a situation in which the transfer of legal ownership is accompanied by a substantive change in economic ownership.[24] In such cases, the buyer assumes the full market risks and rewards associated with the shares, including exposure to price fluctuations, without any pre-arranged agreement to return the shares or their economic benefits to the seller.[25] The arrangement reflects a sustainable transfer of ownership, whereby the seller genuinely ceases to hold the asset and the buyer fully assumes the associated risks and rewards, such as potential capital losses and market volatility.[26]

In contrast, dividend stripping is characterised by a misalignment between legal form and underlying economic substance.[27] A first defining feature is the temporary alienation of shares.[28] In typical cases, shares are transferred shortly before the dividend record date and reacquired shortly thereafter.[29] This timing ensures that the dividend is legally attributed to a different taxpayer without altering the long-term investment position.

Closely connected to this is the retention of economic interest by the original owner.[30] Although legal title is transferred, the original shareholder preserves exposure to the underlying shares through hedging instruments such as securities

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[20] M Scherleitner and J Sihvonen, 'Addressing Dividend Stripping Arrangements: A Discussion of Different Policy Options' (2026) 18 World Tax J, ch 1.

[21] Ibid.

[22] Ibid.

[23] OECD (n 13) 7-8.

[24] IBFD, 'Dividend Stripping and Anti-Dividend Stripping Approaches in Selected Countries' (Report for the Ministry of Finance of the Netherlands, 2 May 2025) 21-22.

[25] Ibid 11.

[26] OECD (n 13); Kennisgroep dividendbelasting en bronbelasting (n 12); MM Kors, 'Wat is (er mis met) dividendstripping?' (2024) 8 Tijdschrift voor Formeel Belastingrecht.

[27] IBFD (n 24) 20.

[28] Scherleitner and Sihvonen (n 20) ch 2.

[29] Elisa Casi and others, 'Dividend Withholding Tax Arbitrage Across Europe: Revenue and Welfare Effects of Vulnerabilities in the Tax Code' (Working Paper, 10 November 2021) 7.

[30] OECD (n 13) 9; Staatssecretaris van Financiën, 'Rapportage dividendstripping', Kamerstukken II 2024/25, 32 140, nr 263.

lending, repurchase agreements, or options.[31] As a result, the transfer does not represent a genuine change in ownership, but rather a formal reallocation of legal entitlement.

A further essential element is the exploitation of tax asymmetries between different categories of taxpayers. Dividend stripping is fundamentally driven by disparities in tax treatment between taxpayers.[32] Dividend withholding tax often constitutes a final levy for non-residents, while for residents or privileged entities it functions as a creditable or refundable prepayment.[33] This asymmetry enables a reallocation of dividend income to a "more entitled" party capable of reclaiming or offsetting the tax, effectively stripping the source state's tax claim.[34]

Finally, dividend stripping is inherently characterised by its composite nature. It rarely consists of a single, isolated transaction, but rather of a coordinated set of interrelated steps, a "composite of transactions", each of which may appear legally permissible when viewed in isolation.[35] However, when assessed as a whole, these transactions produce a tax outcome that conflicts with the purpose and intent of the law.[36]

2.3 Different forms of dividend stripping

2.3.1 Cum-Ex and Cum-Cum transactions

Taxation treaties usually provide that foreign dividends are subject to tax in the country of residence of the shareholder, as articulated in Article 10 OECD.[37] In practice, however, the jurisdiction where the distributing company is located often levies a dividend WHT at the source.[38] To mitigate international double taxation, foreign shareholders are generally permitted to claim a reimbursement or reduction of this tax in the source country or seek a tax credit in their own country of residence.[39]

Cum-ex strategies are aggressive maneuvers designed to exploit this legal framework by creating opacity over the ownership of shares during the narrow window between the ex-dividend date (the date shares trade without dividend rights) and the record date (the date the company identifies the rightful recipient of the

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[31] B BV v Inspecteur der Belastingdienst ECLI:NL:RBNHO:2023:6241 (Gerechtshof Amsterdam), para 45; MM Kors, 'Dividendstripping revealed (deel 2): de objectieve voorwaarden en het bewijs daarvan' (2025) 1 Tijdschrift voor Formeel Belastingrecht, s 2.1.1.

[32] IBFD (n 24) 37.

[33] Joined Cases C-10/14, C-14/14 and C-17/14 *Miljoen, X and Société Générale SA v Staatssecretaris van Financiën* ECLI:EU:C:2015:564, paras 43, 61; MM Kors, 'Dividendstripping revealed (deel 1): wat is (er mis met) dividendstripping?' (2024) Tijdschrift voor Formeel Belastingrecht 43, s 2.1.

[34] Ibid.

[35] Opinion of AG Wattel, Parket bij de Hoge Raad, 20 February 2026, ECLI:NL:PHR:2026:184, case no 25/01615; art 25(2) Wet op de vennootschapsbelasting 1969 (Wet VPB 1969); art 4(7) Wet DB 1965; OECD (n 13).

[36] Joined Cases C-116/16 and C-117/16 *Skatteministeriet v T Danmark and Y Denmark ApS* ECLI:EU:C:2019:135, para 114.

[37] OECD Model Tax Convention on Income and on Capital (OECD Publishing 2017, updated 2019) art 10.

[38] OECD (n 13) 10.

[39] Ibid.

yield).[40] These schemes rely on the settlement lag inherent in modern stock exchanges, typically a two-day window, between the conclusion of a trade and the actual delivery of the shares.[41]

The primary objective of a cum-ex scheme is to generate multiple tax refund claims for a single dividend payment that was only taxed once at the source.[42] This typically requires a coordinated "composite of transactions" involving at least three market participants: Firstly, Investor A, the original foreign shareholder who owns the shares. Secondly, Investor B, a short-seller who sells the shares "cum-dividend" to Investor C just before the ex-date without owning them at the time of the trade. And lastly Investor C, the buyer who purchases the shares "cum-dividend".[43]

Because the transaction is settled after the record date, Investor A receives the actual dividend (minus the withheld tax) and a corresponding tax certificate to claim a refund.[44] Simultaneously, because Investor C purchased "cum-dividend," the settlement system treats them as if they were entitled to the dividend, often issuing a "dividend-replacement payment" or "market claim".[45] This allows Investor C to also request a tax withholding certificate, falsely portraying them as a shareholder who has suffered a tax deduction.[46]

By executing these rapid circular trades, perpetrators create a confusing image for tax authorities, suggesting that multiple parties were the "beneficial owner" at the critical moment of distribution. In reality, only one reimbursement is legally grounded, while the others are fraudulent claims financed by the national treasury.[47] Courts in several jurisdictions, have ruled that these maneuvers constitute serious criminal tax evasion, as they lack any discernible economic purpose other than the extraction of unjustified tax reimbursements.[48]

Unlike the more aggressive cum-ex strategies that seek multiple tax refunds, cum-cum transactions are primarily designed to reduce or minimize definitive WHT liabilities.[49] These schemes exploit the tax asymmetries between different categories of shareholders.[50] Cum-cum strategies are often structured in a way that an investor lends or sells their shares to a borrower or buyer domiciled in a foreign jurisdiction that applies a lower dividend tax rate.[51] A "less entitled" shareholder, typically a foreign investor who faces a high, non-recoverable withholding tax (often up to 30%), transfers the legal title of their shares to a "more entitled" party in a domestic or more favorable jurisdiction shortly before the record date.[52] The "more entitled"

[40] Ibid.
[41] Casi and others (n 29) 8-9; Richard S Collier, *Banking on Failure: Cum-Ex and Why and How Banks Game the System* (OUP 2021) ch 1, 23-24.
[42] OECD (n 13) 10-11.
[43] Collier (n 41) ch 1, 30-32.
[44] Ibid.
[45] Collier (n 41) ch 1, 31-37.
[46] IBFD (n 24) 7, n 2.
[47] Ibid.
[48] Ibid 9.
[49] OECD (n 13) 12.
[50] Scherleitner and Sihvonen (n 20) ch 2.
[51] Ibid.
[52] Ibid ch 1; Kors (n 33).

recipient (the borrower or buyer) holds the shares on the record date, receives the dividend, and applies their right to a full tax credit, exemption, or refund.[53] Shortly after the distribution, the shares are returned to the original owner.

The buyer receives the dividend and transfers it back to the original shareholder, minus the dividend tax and an agreed fee. The purpose of cum-cum strategies is to reduce the dividend tax burden, with the resulting tax benefit shared between the participants in the arrangement.[54]

2.4 Intra-group reorganizations from a Dutch perspective

The Dutch parliamentary materials on the anti-dividend stripping provisions of the Dividend Tax Act 1965 are particularly relevant because they expressly address whether intra-group reorganisations may constitute dividend stripping and thereby provide a domestic illustration of the broader EU anti-abuse framework examined in this thesis.[55]

The starting point under Dutch law is that intra-group reorganisations are not automatically excluded from the scope of the anti-dividend stripping provisions.[56] The State Secretary acknowledged that such reorganisations may constitute dividend stripping depending on the circumstances, while emphasising that genuine commercially motivated restructurings should not be hindered.[57] The assessment therefore depends on all relevant facts and circumstances, in particular the timing between the restructuring and the dividend distribution, the nature of the distribution, and the durability of the restructuring.[58]

The mere fact that a reorganisation took place while a company held accumulated retained earnings does not mean that every subsequent distribution is tainted.[59] As Marres has observed, each individual dividend distribution must be assessed separately to determine whether it is connected to the reorganisation; only in exceptional cases, typically an excessive distribution made within a short period after the restructuring, will that connection be demonstrable.[60]

The State Secretary translated these criteria into a practical guideline. Where a durable, non-tax-driven reorganisation coincides with an ordinary dividend distribution, defined as a distribution not exceeding twice the average of the preceding three calendar years, no dividend stripping is deemed to exist, regardless of the time elapsed between the restructuring and the distribution.[61] Where the

[53] Ibid.

[54] MM Kors, 'De objectieve voorwaarden en het bewijs daarvan (Dividendstripping revealed deel 2)' (2025) 1 Tijdschrift voor Formeel Belastingrecht 24; OECD (n 13) 12.

[55] Art 4(1) and 4(3)(c) Wet DB 1965; Kennisgroep dividendbelasting en bronbelasting (n 12); Kamerstukken I 2001/02, 27896 en 28246, nr 117b, 1-2; nr 117d, 1-2.

[56] Kennisgroep dividendbelasting en bronbelasting (n 12)

[57] Ibid.

[58] Ibid.

[59] Ibid.

[60] Marres (n 10).

[61] Kennisgroep dividendbelasting en bronbelasting (n 12); Besluit van 29 november 2022, nr 2022-25322, Stcrt 2022, 32364 (NTFR 2023/370), onderdeel 4.3.

reorganisation is combined with a distribution of a different character, such as a super dividend, the timing between the restructuring and the distribution becomes a relevant additional factor. [62]

The application of the Dutch anti-dividend stripping rules requires establishing to whom the dividend indirectly accrues through the consideration provided by the formal recipient, whether that party has retained the economic interest in the shares, and whether that party is in a more favourable dividend withholding tax position.[63]

[62] Kennisgroep dividendbelasting en bronbelasting (n 12); Kamerstukken I 2001/02, 27896 en 28246, nr 117b, 1-2; nr 117d, 1-2.
[63] Marres (n 10).

3 EU anti-abuse law and the PSD

3.1 Introduction

Chapter 2 established the economic mechanics of dividend stripping and its structural variant through intra-group restructurings. This chapter sets out the legal framework for the anti-abuse analysis. Section 3.2 introduces the concept of tax avoidance. Section 3.3 examines the general EU principle prohibiting abuse of law, followed by Section 3.3.1, which addresses GAARs in EU law and provides a comparative overview of the anti-abuse provisions in ATAD, the IRD, the Merger Directive, and the PSD. Section 3.4 then examines the PSD in detail. Section 3.5 addresses the legal consequences of a finding of abuse and the denial of PSD-benefits.

3.2 The concept of tax avoidance

Tax avoidance is characterised by arrangements, entered into prior to the arising of a tax liability, that have as their sole or predominant purpose the reduction of the tax burden rather than the pursuit of genuine economic activity.[64] The character of a given arrangement is assessed in light of the economic and factual circumstances and the purpose of the applicable tax rules. On this basis, tax avoidance may be divided into “acceptable’ and “unacceptable’ forms, distinguishing between arrangements that merely use the law to its best advantage in order to minimise tax liability and those that were not envisaged by the legislature when the rules were adopted.[65] In the latter case, the arrangement is considered to go against the object and purpose of the law.[66]

3.3 The general principle prohibiting abuse of EU law

A foundational principle of EU law holds that its provisions cannot be relied upon for abusive or fraudulent ends.[67] This means that any tax benefit conferred by EU law must be denied where it arises from an abusive arrangement, even if domestic law does not include an express provision allowing such denial.[68] The prohibition of abusive practices applies where obtaining a tax advantage constitutes the essential aim of the arrangement.[69]

[64] C Alves Alvarrenga, ‘Preventing Tax Avoidance: Is There Convergence in the Way Countries Counter Tax Avoidance?’ (2013) 67 Bulletin for International Taxation, n 5.

[65] Ibid.

[66] Ibid.

[67] Case C-39/16 *Argenta Spaarbank NV v Belgische Staat* ECLI:EU:C:2017:813, para 60; Case C-6/16 *Eqiom SAS (formerly Holcim France SAS) and Enka SA v Ministre des Finances et des Comptes publics* ECLI:EU:C:2017:641, para 26; Joined Cases C-116/16 and C-117/16 *T Danmark and Y Denmark ApS* ECLI:EU:C:2019:135, para 90.

[68] Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16 *N Luxembourg 1 and others v Skatteministeriet* ECLI:EU:C:2019:134, paras 105, 111, 122; *T Danmark* (n 36) paras 83, 95.

[69] *N Luxembourg 1* (n 68) para 107; *T Danmark* (n 36) para 79.

3.3.1 GAARs in EU law

The general aim of GAARs is to fill the gaps in the tax systems, to prevent abuse and tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions, so-called SAARs.[70] This is typically achieved by giving tax authorities the power to deny tax benefits or impose an increased tax liability where an arrangement is so artificial or contrived that it is explicable only by the pursuit of a tax advantage.[71]

The ATAD, the IRD, the Merger Directive and the PSD each contain anti-abuse provisions intended to prevent taxpayers from invoking the benefits of EU tax law in wholly artificial or abusive situations.[72] Although these provisions pursue a common objective, they differ in their legal character and the level of discretion granted to Member States. A brief comparison is therefore necessary before turning to the PSD, which is the focus of this chapter.

3.3.1.1 Anti-Tax Avoidance Directive

Article 6 of the ATAD establishes a mandatory minimum-standard GAAR applicable to the calculation of corporate tax liability across all Member States, based on the main purpose test.[73] It requires Member States to ignore arrangements or series of arrangements that are deemed "not genuine".[74] An arrangement is regarded as non-genuine if it is not put into place for valid commercial reasons that reflect economic reality.[75] An arrangement is ignored if it was put in place for the main purpose, or one of the main purposes, of obtaining a tax advantage that defeats the object or purpose of the applicable tax law.[76] The main consequence of ignoring an arrangement or a series of arrangements is calculating the tax liability in accordance with national law. [77]

3.3.1.2 Interest-Royalty Directive

According to Article 5(2) of the IRD, Member States may withdraw the benefits of the directive or refuse to apply the directive in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse.[78] The IRD is thus optional in character: Member States may deny benefits, but are not obliged to do so.[79] Notably, the IRD applies a "principal motive" test and

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[70] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1 (Anti-Tax Avoidance Directive or ATAD), recital 11.

[71] Cihat Öner, 'Comparative Analysis of the General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Effective Tool to Tackle Tax Avoidance?' (2020) 29(1) EC Tax Review 38.

[72] PSD (n 11) arts 1(2)-(4), 4(1)(a); ATAD (n 70) art 6; Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers [2009] OJ L310/34 (Merger Directive), art 15; Council Directive 2003/49/EC of 3 June 2003 on interest and royalties payments made between associated companies [2003] OJ L157/49 (Interest and Royalties Directive or IRD), art 5.

[73] ATAD (n 70) art 6; Öner (n 71) 42.

[74] Ibid art 6(1).

[75] Ibid art 6(2).

[76] Ibid art 6(1); Öner (n 71) 48.

[77] ATAD (n 70) art 6(3).

[78] IRD (n 72) art 5(2).

[79] Öner (n 71) 40.

covers the broadest range of conduct, tax evasion, tax avoidance, and abuse, yet provides no definition of these terms and no presumption as to when the test is satisfied, leaving substantial interpretive uncertainty for national authorities.[80]

3.3.1.3 Merger Directive

The Directive contains its anti-abuse clause in Article 15(1)(a), which likewise confers a discretionary power: a Member State may refuse to apply or withdraw the benefits of the directive where an operation has tax evasion or tax avoidance as its "principal objective or one of its principal objectives".[81] Unlike the IRD, the Merger Directive provides a rebuttable legal presumption: where an operation is not carried out for valid commercial reasons, such as the restructuring or rationalisation of the activities of the companies involved, this may be taken as an indication that tax evasion or avoidance was the principal objective.[82]

The CJEU confirmed in *Kofoed* and *Foggia* that the anti-abuse provision of the Merger Directive reflects the general EU principle prohibiting abuse of rights, and may only apply where the avoidance motive is predominant.[83] The Merger Directive thus offers somewhat greater operational guidance than the IRD, but remains permissive rather than mandatory.

Unlike the optional clauses in the Merger Directive and the IRD, and unlike ATAD which sets a minimum floor, the anti-abuse provision of the PSD is fully mandatory and uniform in application. Article 1(2) PSD, provides that Member States shall not grant the benefits of the Directive in cases of abuse, leaving no discretion once the conditions are met.[84] The provision was introduced to establish a common minimum anti-abuse standard across all Member States, preventing directive shopping and ensuring consistent application throughout the EU.[85]

The mandatory denial of benefits under Article 1(2) PSD presupposes that those benefits have first been invoked. The question therefore arises as to what benefits the PSD confers and in what circumstances they apply, a question addressed in the following section.

[80] Ibid 40-41

[81] Merger Directive (n 72) art 15(1)(a).

[82] Ibid; Öner (n 71) 41.

[83] Case C-321/05 *Hans Markus Kofoed v Skatteministeriet* ECLI:EU:C:2007:408, para 38; Case C-126/10 *Foggia - Sociedade Gestora de Participações Sociais SA v Secretário de Estado dos Assuntos Fiscais* ECLI:EU:C:2011:718, paras 35, 50.

[84] PSD (n 11) art 1(2), as amended by Council Directive (EU) 2015/121 of 27 January 2015 [2015] OJ L21/1.

[85] Commission, 'Proposal for a Council Directive amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States' COM(2013) 814 final, preamble para 5.

3.4 The Parent-Subsidiary Directive

3.4.1 The purpose and scope

Within the EU, the taxation of cross-border dividends is primarily governed by PSD. [86] The Directive was introduced to eliminate tax obstacles to profit distributions between associated companies located in different Member States, ensuring that cross-border cooperation within corporate groups is not placed at a disadvantage compared to purely domestic situations.[87] To that end, it establishes a common system for intra-group profit distributions aimed at eliminating both juridical and economic double taxation and preventing distortions arising from multiple layers of taxation[88] Although the Directive does not define the term "profit distribution," it is generally understood to encompass a broader concept than formal dividends alone and may therefore include hidden or disguised profit distributions. [89]

To eliminate juridical double taxation, the PSD prohibits Member States from levying withholding taxes on qualifying profit distributions made by a subsidiary company to its parent company in another Member State.[90] In addition, the Directive seeks to eliminate economic double taxation at the level of the parent company by requiring Member States either to exempt the received profits from corporate income tax or to grant a tax credit for the underlying tax paid by the subsidiary. [91] The availability of these benefits is conditional upon satisfaction of the personal and material scope of the Directive. The personal scope is defined by Article 2 and Annex I, requiring that both the parent and subsidiary take a qualifying legal form, are tax resident in a Member State, and are subject to corporate income tax without exemption.[92] The minimum participation threshold is set at 10% of the capital of the subsidiary.[93] The material scope is limited to cross-border intra-group profit distributions within the EU, covering both the withholding tax exemption at source and the relief from economic double taxation at the level of the parent; purely domestic situations and arrangements involving entities resident outside the EU fall outside the Directive's scope.[94]

Where these conditions are satisfied and the Directive's benefits are invoked, their availability is subject to a mandatory anti-abuse clause.[95] Article 1(2) of the PSD provides that Member States "shall not grant the benefits of this Directive in case of abuse". Abuse is defined as "an arrangement or a series of arrangements which, having been put into place for the (i) *main purpose or one of the main purposes of*

[86] PSD (n 11).

[87] PSD (n 11) preamble, para 4; *T Danmark* (n 36) para 78.

[88] PSD (n 11) preamble, paras 3, 4, 6; Case C-294/99 *Athinaïki Zythopoiïa AE v Elliniko Dimosio* ECLI:EU:C:2001:505, para 25; Case C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* ECLI:EU:C:2006:774, para 103; Case C-379/05 *Amurta SGPS v Inspecteur van de Belastingdienst* ECLI:EU:C:2007:655, para 18.

[89] Helminen (n 17) s 3.1.2.6.

[90] PSD (n 11) art 5.

[91] Ibid art 4.

[92] Ibid art 2(1); Helminen (n 17) s 3.1.2.3.

[93] PSD (n 11) arts 2-3; Helminen (n 17) s 3.1.2.5.

[94] Helminen (n 17) s 3.1.2.1; Case C-295/21 *Allianz Benelux SA v État belge* ECLI:EU:C:2022:964, para 23; Joined Cases C-439/07 and C-499/07 *KBC Bank NV v Belgische Staat* ECLI:EU:C:2009:339, paras 57, 63.

[95] PSD (n 11) arts 1(2)-(3).

obtaining a tax advantage that (ii) *defeats the object or purpose* of this Directive, (ii) *are not genuine* having regard to all relevant facts and circumstances”.[96] Both a subjective test (tax avoidance by an artificial arrangement is intended) and an objective test (object and purpose of the PSD are defeated) must be met.[97] Artificiality is mentioned as a separate element (“are not genuine”).[98] An arrangement or 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.[99] The term “arrangement” is not expressly defined. The final sentence of Article 1(2) merely clarifies that an arrangement may consist of multiple steps or parts.[100]

Each of these constituent elements is examined in turn in the following sections.

3.4.2 Main purpose or one of the main purposes of obtaining a tax advantage

The subjective test is met where obtaining a tax advantage constitutes the main purpose or one of the main purposes of the arrangement.[101] The term tax advantage is undefined. However, the requirement that the tax advantage defeats the object or purpose of the PSD suggests that it must be linked to the benefits of the PSD.[102] The wording of Article 1(2) PSD further indicates that an arrangement may pursue more than one “main purpose” and that the subjective test is met if at least one of these main purposes is tax avoidance.[103] The avoidance motive must be at least predominant; the provision cannot apply to arrangements where a tax motive is merely incidental to genuine commercial objectives. [104] This means that a taxpayer who restructures for genuine commercial reasons but who also simultaneously pursues a tax advantage cannot escape the anti-abuse rule merely by pointing to the commercial rationale. The commercial rationale must be independently sufficient to justify the arrangement, such that obtaining a tax advantage is not one of its main purposes. A fundamental difficulty with the subjective element of the abuse test is that the internal motivations of taxpayers are not directly observable.

The CJEU has therefore held that the subjective element must be inferred from objective circumstances. In the *Danish* cases, the Court identified these objective

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[96] Ibid art 1(2), as amended by Council Directive (EU) 2015/121 (n 84) 1.

[97] Filip Debelva and Joris Luts, ‘The General Anti-Abuse Rule of the Parent-Subsidiary Directive’ (2015) 55(6) European Taxation 223; D Weber, ‘The New Common Minimum Anti-Abuse Rule in the EU Parent-Subsidiary Directive’ (2016) 44(2) Intertax 113; Helminen (n 17) ch 3; Romero JS Tavares and Bret N Bogenschneider, ‘The New De Minimis Anti-Abuse Rule in the Parent-Subsidiary Directive’ (2015) 43(8-9) Intertax 484; OCR Marres and IM de Groot, ‘The General Anti-Abuse Clause in the EU Parent-Subsidiary Directive’ in D Weber (ed), *EU Law and the Building of Global Supranational Tax Law: EU BEPS and State Aid* (IBFD 2017) ch 10, 225.

[98] Marres and de Groot (n 97) s 10.4.3; Öner (n 71) 45.

[99] PSD (n 11) art 1(3).

[100] S Douma and others, *Terra/Wattel European Tax Law: Volume 1 General Topics and Direct Taxation* (9th edn, Wolters Kluwer 2025) s 16.8.2.

[101] Ibid s 16.8.3.

[102] Case C-228/24 *Nordcurrent Group UAB v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos* ECLI:EU:C:2025:239, para 53.

[103] *Terra/Wattel* (n 100) s 16.8.3.

[104] *Kofoed* (n 83) para 38; *Foggia* (n 83) paras 35, 50.

indicators from which the subjective element of abuse may be inferred.[105] These indicia will be accessed in the next chapter under Section 4.4.

3.4.3 Defeating object or purpose

Not every tax motive is contrary to the object and purpose of the PSD.[106] The Directive's object is to eliminate double taxation on intra-EU profit distributions and to create a level playing field between groups operating across Member States and those operating within a single Member State.[107] A tax consideration that is consistent with that object, such as a parent company's preference to establish a subsidiary in another Member State because the PSD-system for avoiding double taxation applies there, does not defeat the Directive's purpose and therefore does not satisfy the objective element of the abuse test.[108] This differs from situations in which a letterbox or conduit company is established in a Member State to extend PSD benefits to companies resident in third countries, a practice known as directive shopping.[109]

This may occur where a non-EU enterprise invests in Member State A through an intermediate holding company established in Member State B for the main purpose of avoiding dividend withholding taxation in Member State A.[110] If the structure, particularly the intermediate holding company, is artificial, this arrangement would be considerd abusive.[111] A second form of directive shopping consists of the interposition of an artificial intermediate holding company with a view to routing third-country profits into the EU tax-free, by taking advantage of a more favourable participation exemption available in another Member State.[112] By way of illustration, where Company A, resident in Member State A, routes its investment in a third-country company through an artificial intermediate holding company in Member State B solely to access a more favourable participation exemption under Article 4(1)(a) PSD that would not otherwise have been available, the arrangement may constitute an abuse of the Directive.[113]

3.4.4 Artificiality

Under the GAAR of the PSD, tax benefits are withheld from arrangements or series of arrangements that are deemed "not genuine", that is, arrangements that are "not put into place for valid commercial reasons which reflect economic reality'.[114] The term "commercial reasons" appears intended to exclude other tax motives, such as the mere presence of a favourable tax regime in the Member State where a holding company is resident.[115] Beyond the requirement to have regard to "all relevant facts

[105] *T Danmark* (n 36) paras 99-114.
[106] *Terra/Wattel* (n 100) s 16.8.4.
[107] Marres and de Groot (n 97) s 10.4.2.
[108] Ibid s 10.3.2; Debelva and Luts (n 97) s 2.2.
[109] *Terra/Wattel* (n 100) s 16.8.4.
[110] Ibid.
[111] Ibid.
[112] Ibid.
[113] Ibid; PSD (n 11) art 4(1)(a).
[114] PSD (n 11) arts 1(2)-(3).
[115] *Terra/Wattel* (n 100) s 16.8.5.

and circumstances", the Directive provides limited guidance on how the genuineness assessment is to be conducted in practice.[116] Article 1(3) PSD provides that an arrangement is not genuine "to the extent that {…}".[117] This means that an arrangement may be partly genuine and partly artificial. Certain elements of it may reflect commercial purposes, while other elements, particular steps, or isolated features, may be artificial. It follows, first, that the genuineness of the subsidiaries involved does not of itself insulate the arrangement from challenge.[118] Even where both the transferor and transferee subsidiary are genuine operating entities, a specific step within the arrangement, the transfer of shares or the subsequent dividend distribution, may nonetheless be treated as non-genuine if that step lacks valid commercial reasons reflecting economic reality.[119] Recital 8 of the PSD Preamble makes this explicit. It describes a scenario in which a multinational uses an company within a Member State, that is, a genuine operating entity, but that company's activities are irrelevant to the holding of the subsidiary's shares, and the transfer of the shares was primarily motivated by the desire to obtain PSD benefits.[120] Marres and De Groot note that the example from the preamble will be meant for the situations where a multinational interposes a genuinely active company in an EU Member State whose activities are, however, entirely unrelated to the holding of the subsidiary's shares, and those shares were transferred to this company mainly with the view to obtaining the advantages of the PSD.[121] According to them a certain link must exist between the activities of the company and the holding of the shares. According to Weber, the existence of such a link may itself be sufficient to confer economic reality on the holding, thereby precluding a finding that the arrangement is non-genuine on that basis.[122]

In the second place, the "to the extent" formulation suggests that the consequences of a finding of partial artificiality should be proportionate to the extent of the artificiality.[123] This point will be addressed in more detail in Chapter 6, in the context of the treatment of pre-restructuring retained earnings and the proportionality of a denial of benefits. For present purposes, it is sufficient to note that the objective analysis under Article 1(3) PSD must be conducted with precision, examining not merely the arrangement as a whole but each step or element of it.

3.5 Refusing the benefits of the Directive

The denial of PSD benefits is governed by the cumulative structure of Article 1(2) PSD. A Member State is required to refuse the Directive's benefits only where all three conditions are satisfied simultaneously: the arrangement must have been put in place for the main purpose, or one of the main purposes, of obtaining a tax advantage; that tax advantage must defeat the object or purpose of the Directive; and the

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[116] Ibid.

[117] Ibid.

[118] OCR Marres and IM de Groot, 'De algemene antimisbruikbepaling in de moeder-dochterrichtlijn (deel 1)' (2015) WFR 2015/7106, 893.

[119] Weber (n 97) 120-121.

[120] Ibid; PSD (n 11) preamble, recital 8; *Terra/Wattel* (n 100) s 16.8.4.

[121] Marres and de Groot (n 118) 893.

[122] Weber (n 97) 121..

[123] Ibid 126.

arrangement must be non-genuine in the sense of lacking valid commercial reasons reflecting economic reality.[124] Due to the cumulative structure, a finding that an arrangement lacks valid commercial reasons does not, by itself, authorise a denial of benefits if no tax advantage defeating the object of the Directive can be identified. Equally, the presence of a tax advantage does not trigger the GAAR where the arrangement is genuine in the sense of reflecting economic reality.[125]

In addition to Article 1(2), Article 3(2) permits Member States to deny directive benefits where the required parent-subsidiary holding relationship is not maintained, by either company, for an uninterrupted period of at least two years.[126]

Where the conditions of Article 1(2) PSD are satisfied, the legal consequence is that the Member State of the subsidiary is entitled to levy withholding tax on the dividend distribution as if the Directive did not apply.[127] The most appropriate way to give effect to this is to ignore the abusive arrangement, thereby re-establishing the situation that would have prevailed in its absence.[128]

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[124] PSD (n 11) art 1(2).
[125] Weber (n 97) 127.
[126] PSD (n 11) art 3(2).
[127] Ibid art 1(2); Weber (n 97) 127.
[128] Case C-103/09 *Revenue and Customs Commissioners v Weald Leasing Ltd* ECLI:EU:C:2010:804, paras 50-51.

4 CJEU case law on abuse and beneficial ownership

4.1 Introduction

The previous chapter set out the anti-abuse framework under the PSD, articulating the three cumulative conditions that must be satisfied before a Member State may deny the benefits of the Directive. This chapter traces the evolution of that doctrine from *Emsland-Stärke* and *Cadbury Schweppes* through the *Danish beneficial ownership* cases to *Nordcurrent*, with particular attention to the objective and subjective elements of abuse and the temporal dimension of the assessment.

4.2 Emsland-Stärke and the concept of abuse

The first reference by the CJEU to abuse and abusive practices in EU law emerged in the case *Van Binsbergen*, where the Court accepted that Member States could justify restrictive measures aimed at preventing the abusive exercise of fundamental freedoms.[129] In *Daily Mail*, it was held that the freedom of establishment does not grant a company the right to transfer its central management and control to another Member State while retaining its legal identity under the law of the state of incorporation.[130] Later, in the case *Centros*, the Court clarified that the mere fact that a company is established in a Member State with more favourable company law rules does not, in itself, constitute an abuse of the freedom of establishment. A decisive step in the development of the EU abuse doctrine was taken in *Emsland Stärke*.[131] In this case, the ECJ established that the concept of abuse consists of two elements: (i) an objective element; and (ii) a subjective element. The abuse test is based on the premise that compliance with the formal conditions of an EU provision does not preclude a finding of abuse where the arrangement undermines the object and purpose of the rule.[132] A finding of abuse further requires evidence that the taxpayer intentionally and artificially created the conditions necessary to obtain an advantage under EU law.[133] For the first time, criteria were laid down for determining the existence of "abuse" for the purposes of EU law.[134] The *Halifax* case extended the abuse doctrine to the field of VAT.[135] Unlike *Emsland-Stärke*, however, the judgment did not expressly refer to a separate "subjective element" of abuse.[136] Arguably, a possible reading of *Halifax* suggests that objective factors alone may

[129] Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* ECLI:EU:C:1974:131, para 13; Koen Lenaerts, 'The Concept of "Abuse of Law" in the Case Law of the European Court of Justice on Direct Taxation' (2015) 22(3) Maastricht Journal of European and Comparative Law 329, 331.

[130] Case 81/87 *R v HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* ECLI:EU:C:1988:456, para 25.

[131] Case C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* ECLI:EU:C:2000:695.

[132] Ibid paras. 52-53.

[133] Ibid.

[134] Lenaerts (n 129) 333.

[135] Case C-255/02 *Halifax plc and others v Commissioners of Customs & Excise* ECLI:EU:C:2006:121, paras 69-70.

[136] Lenaerts (n 129) 335.

suffice to establish an abusive practice.[137] The judgment subsequently raised the broader question whether the concept of abuse of law was equally applicable in the field of direct taxation.

4.3 Cadbury Schweppes, Eqiom, Deister and Juhler Holding

In *Cadbury Schweppes*, the Court reaffirmed that the exercise of fundamental freedoms cannot be restricted merely because a taxpayer seeks to benefit from a more favourable tax regime in another Member State.[138] Neither the reduction of tax revenue nor the establishment of a subsidiary in a low-tax jurisdiction, in itself, justifies restrictive national measures or a presumption of tax avoidance.[139] The Court nevertheless accepted that restrictions on freedom of establishment may be justified where they target "wholly artificial arrangements" designed to circumvent national tax legislation.[140] In defining such arrangements, the Court adopted a substance-based approach centred on economic reality, requiring that the establishment correspond to the pursuit of genuine economic activities.[141] The assessment must therefore be based on objective factors, including the existence of premises, staff and equipment.[142]

Accordingly, *Cadbury Schweppes* established that the pursuit of a tax advantage is not inherently abusive under EU law, but becomes relevant only insofar as the arrangement does not reflect genuine economic activity.[143]

In the cases *Eqiom*, *Juhler Holding and Deister Holding*, the CJEU reaffirmed that Member States cannot introduce general presumptions of fraud or abuse.[144] Such presumptions, which automatically deny benefits if certain criteria are met, are deemed to go beyond what is necessary to prevent abusive conduct and undermine the PSD's objective of ensuring tax neutrality for profit distributions.[145] To be compatible with EU law, national anti-abuse rules must specifically target "wholly artificial arrangements" that do not reflect economic reality and are put in place primarily to obtain an undue tax advantage.[146] The Court noted that an arrangement is not non-genuine simply because a parent company acts as a holding company or manages its subsidiaries' assets, as the Directive applies regardless of the nature of the company's economic activity.[147] The ECJ held that tax authorities must bear the

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[137] Ibid 336.

[138] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* ECLI:EU:C:1999:126, para 27; Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* ECLI:EU:C:2006:544, para 36.

[139] *Centros* (n 138) para 27; *Cadbury Schweppes* (n 138) para 37.

[140] *Cadbury Schweppes* (n 138) para 55.

[141] Ibid para 66.

[142] Ibid para 67.

[143] Ibid paras 35, 65.

[144] Case C-28/95 *A Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* ECLI:EU:C:1997:369, para 41; Joined Cases C-504/16 and C-613/16 *Deister Holding AG and Juhler Holding A/S v Bundeszentralamt für Steuern* ECLI:EU:C:2017:1009, para 64.

[145] Claudia Sanò, 'Allocation of the Burden of Proof Under the Anti-Abuse Rule of the PSD According to the Most Recent ECJ Case Law' (2018) 27(5) EC Tax Review 247.

[146] Ibid 267.

[147] *Deister Holding and Juhler Holding*, (n 144) para 73.

initial or "prima facie" burden of proof regarding the existence of fraud or abuse.[148] They cannot shift this burden entirely to the taxpayer by requiring the taxpayer to prove at the outset that their structure is not abusive. It should be noted that, effective January 1, 2024, the Netherlands has implemented a significant legislative shift in this burden of proof by requiring the dividend recipient, rather than the tax inspector, to make plausible that they are the genuine ultimate beneficiary.[149]

4.4 The Danish beneficial ownership cases

In the *Danish* cases the Court specified indicia that can be used as guidance for the assessment of abuse.[150] They are provided as framework for weighing the tax benefits against other business reasons in order to demonstrate the "intention" of the taxpayer. An artificial arrangement is, inter alia, present where tax on dividends is avoided on account of a conduit entity interposed in the structure.[151] This may be the case where the sole activity of the entity is the receipt of dividends and their transmission to the beneficial owner or to other conduit companies.[152] The absence of actual economic activity must be inferred from an analysis of all the relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to expenditure actually incurred, to the staff that it employs and its premises and equipment.[153] The Court refers to situations where all or almost all of the dividends are, very soon after their receipt, passed on by the recipient company to entities which do not fulfil the conditions for the application of the PSD. Other indications of an artificial arrangement may be "the various contracts existing between the companies involved in the financial transactions at issue, giving rise to intragroup flows of funds, by the way in which the transactions are financed, by the valuation of the intermediary companies' equity and by the conduit companies' inability to have economic use of the dividends received."[154] It is important to note that not only contractual or legal obligations of the parent company must be taken into account but also the fact that, "in substance", the parent company does not have the right to use and enjoy those dividends.[155]

The *Danish* cases established that the prohibition of abuse of law is a general, self-executing principle of EU law. This means that Member States must refuse the benefits of EU law provisions, even in the absence of specific domestic transposition.[156] The doctrine must be understood as seeking to prevent the deriving of benefits that may be in formal compliance with a rule but in pursuit of ends beyond the objectives of that rule.

[148] Sanò (n 145) 279; Case C-318/10 *Société d'investissement pour l'agriculture tropicale SA (SIAT) v État belge* ECLI:EU:C:2012:415, para 55; Case C-282/12 *Fazenda Pública v Itelcar - Automóveis de Aluguer Lda* ECLI:EU:C:2013:629.

[149] Wet van 20 december 2023 tot wijziging van enkele belastingwetten en enige andere wetten (Overige fiscale maatregelen 2024), Stb 2023, 501; art 25(2) Wet VPB 1969; Kamerstukken II 2023/24, 36 420, nr 3, 25.

[150] *T Danmark* (n 36) paras 99-114.

[151] *Nordcurrent Group* (n 102) para 28.

[152] *T Danmark* (n 36) para 104.

[153] Ibid.

[154] Ibid para 105

[155] Ibid.

[156] *T Danmark* (n 36) para 91; *N Luxembourg 1* (n 68) para 119.

The Court emphasized that allowing arrangements with the sole aim of benefiting from a tax advantage resulting from the application of directives would undermine economic cohesion and the effective functioning of the internal market by distorting competition. In other words, the arrangements may not be wholly artificial, but even some amount of valid business reasons is not necessarily enough to refute a finding of abuse.[157] While the Court has reaffirmed that a taxpayer's pursuit of the most favorable tax regime does not create a general presumption of fraud or abuse, taxpayers remain barred from enjoying rights under EU law where the transaction in question is purely artificial from an economic perspective and designed to circumvent national legislation.

While the *Danish* beneficial ownership and Deister and Juhler cases established that tax authorities must provide prima facie evidence of abuse based on specific indicia of artificiality, they did not clarify the temporal dimension for this assessment the indicia of what constitues abuse are emphasized, but not when, in which timeframe, abuse should be accessed. This is accessed in *Nordcurrent*, where the Court was required to determine whether the abuse analysis should be limited to the moment the tax advantage is claimed or instead assessed in light of the broader evolution and commercial history of the arrangement. [158]

4.5 Nordcurrent Group UAB and the temporal assessment of abuse

The recent judgment in the case *Nordcurrent* represents an important further development of the EU abuse doctrine, particularly with regard to the temporal assessment of abuse.[159] The first issue addressed by the Court was whether the anti-abuse provision in the PSD applies to situations where a subsidiary is not a mere conduit company and generates profits through activities carried out in its own name.[160] The Court clarified that while previous case-law, such as the *Danish cases*, often dealt with conduit entities used to avoid tax on dividends, the situation of a conduit company is merely one example of the application of the principle of the prohibition of abuse.[161] The anti-abuse provision adopts an overall perspective aimed at identifying the potential non-genuine nature of an arrangement based on all relevant facts and circumstances, characterized by a lack of valid commercial reasons reflecting economic reality.[162] Therefore, the Court ruled that the anti-abuse provision does not preclude a national practice from denying a tax exemption to a parent company on the grounds that a subsidiary is a non-genuine arrangement, even if that subsidiary is not a conduit company and generated profits under its own name,

[157] *T Danmark* (n 36) para 79; *N Luxembourg 1* (n 68) para 107.

[158] *Nordcurrent Group* (n 102).

[159] G Kofler and others, 'Nordcurrent Group: Interpretation of the Anti-Abuse Provision in the EU Parent-Subsidiary Directive - Opinion Statement ECJ-TF 1/2025 on the CJEU Decision of 3 April 2025 in Nordcurrent Group UAB (Case C-228/24)' (2025) 65(7) European Taxation 304.

[160] PSD (n 11) arts 1(2)-(3).

[161] *Nordcurrent Group* (n 102) paras 28-31.

[162] Ibid para 25.

provided the specific constituent elements of an abusive practice are indeed present.[163]

Regarding the temporal aspect of the anti-abuse analysis, the Court states that, where an arrangement consists of more than one step, "all relevant facts and circumstances must be taken into account in order to establish that there are one or more steps which are not genuine".[164] The relevant facts and circumstances are therefore not "confined to the situation existing as at the date of the step of the arrangement in question", but instead require a broader assessment of the arrangement and its development over time. In the *Nordcurrent* case itself, this meant that the abuse analysis could not be limited solely to the circumstances existing at the moment the dividends were distributed. [165] Instead, a determination of abuse necessitates a comprehensive and objective examination of all pertinent facts and circumstances surrounding each step of the arrangement, requiring national authorities to employ a wider time horizon to evaluate the evolution of the structure and its history.[166] While Article 1(2) of the PSD emphasizes the "putting into place" of an arrangement, its second subparagraph specifies that such arrangements may comprise multiple steps or parts, a concept further supported by Recital 8 of the PSD, which allows for single steps to be evaluated as non-genuine on a stand-alone basis. [167] It cannot be ruled out that an arrangement that was initially put into place for valid commercial reasons will have to be regarded as non-genuine from a certain point onwards because it was maintained despite a change of circumstances.[168] As a consequence, circumstances that happened subsequent to the formation of the arrangement may be taken into account in assessing whether or not a part of the arrangement is genuine.[169]

In addition to broadening the temporal assessment of abuse, the Court also refined the distinction between the objective and subjective elements of the anti-abuse test. The classification of a subsidiary as a "non-genuine arrangement" is not, on its own, sufficient to conclude that a parent company obtained a tax advantage that defeats the object and purpose of the PSD.[170] The CJEU clarified that Article 1(2) and (3) establishes two distinct and cumulative conditions that must be satisfied to deny tax benefits: first, the existence of a non-genuine arrangement (the objective element) and, second, that the arrangement was put into place for the main purpose of obtaining a tax advantage that defeats the directive's objective (the subjective element).[171] Consequently, merely establishing that an arrangement lacks valid commercial reasons reflecting economic reality, which defines a non-genuine arrangement, does not automatically satisfy the second requirement regarding the intention to obtain an improper advantage.[172]

[163] Ibid para 31.
[164] Ibid para 41.
[165] Ibid.
[166] Kofler and others (n 159) 304.
[167] Ibid paras 33-35; PSD (n 11) preamble, recital 8.
[168] Ibid para 36.
[169] Ibid para 37.
[170] Ibid para 46.
[171] Ibid paras 45-47
[172] Ibid paras 45-48.

Furthermore, the Court held that the concept of a "tax advantage" should not be assessed in isolation but requires a comprehensive analysis of the overall tax effect resulting from the arrangement across the Member States involved. [173] In *Nordcurrent,* the fact that the profits earned by the UK subsidiary were subject to a corporation tax rate (24%) higher than the rate that would have applied in Lithuania (15%) was deemed a highly relevant factor.[174] The Court reasoned that an arrangement resulting in a higher overall tax burden rather than a tax saving might indicate the absence of a purpose to obtain a tax advantage that defeats the objective of the directive.[175] Therefore, national authorities must evaluate the subjective intention of the taxpayer as a separate factor, taking into accoount the entire tax context rather than just the participation exemption itself.[176]

[173] Kofler and others (n 159) 304.
[174] *Nordcurrent Group* (n 102) para 54.
[175] Ibid paras 51-54; Kofler and others (n 159) 304.
[176] Ibid Kofler and others (n 159) 304.

5 Corporate restructurings as structural dividend stripping

5.1 Introduction

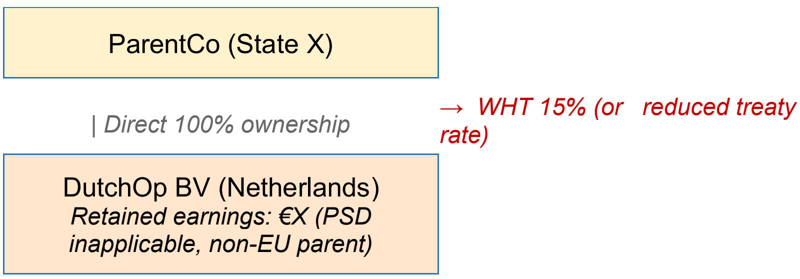
The previous chapter traced the development of the EU abuse doctrine through the case law of the CJEU, establishing how the objective and subjective elements of abuse must be assessed and how the temporal dimension of that assessment was clarified in *Nordcurrent*. The present chapter applies that framework to the scenario of an intra-group transfer of a subsidiary with accumulated retained earnings, followed by a dividend distribution. Section 5.2 describes the structure. Section 5.3 establishes its comparability to traditional dividend stripping. Section 5.4.2 tests the framework across a range of factual scenarios.

5.2 The structure under analysis

5.2.1 Pre-restructuring position

Before the restructuring, the corporate group has a straightforward two-tier structure. ParentCo, resident in State X (a non-EU jurisdiction), holds 100% of the shares in DutchOp BV, a Dutch resident company that has accumulated substantial retained earnings through genuine commercial activities. Those earnings have been subject to Dutch corporate income tax. Any dividend from DutchOp BV to ParentCo falls entirely outside the scope of the PSD because ParentCo is not an EU-resident entity within the meaning of Article 2 and Annex I of the PSD.[177] Accordingly, any such distribution is subject to Dutch WHT at the statutory rate of 15% under Article 1(1) of the Wet DB, subject to reduction under any applicable double tax treaty between the Netherlands and State X.[178]

Figure 1 - Pre-restructuring position



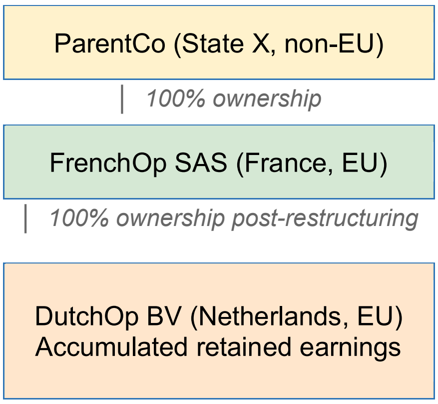
[177] PSD (n 11) art 2; Annex I to PSD.

[178] Art 1(1) Wet DB 1965.

5.2.2 The post-restructuring position

ParentCo transfers 100% of the shares in DutchOp BV to FrenchOp SAS, an existing French operational subsidiary. FrenchOp SAS is not a newly incorporated letterbox entity: it has genuine commercial and management activities in France, real staff, premises, equipment, and an independent management that exercises actual decision-making authority over its French operations. After the transfer, DutchOp BV is held 100% by FrenchOp SAS, which in turn is held 100% by ParentCo. This interposition produces a single legal consequence at the holding level: future dividend distributions by DutchOp BV will now be made to a French company resident in an EU Member State, potentially entitled to invoke the WHT exemption under Article 5 PSD, provided the structural conditions of Article 3 PSD, minimum 10% participation and, following the provisional exemption framework, a possible holding period, are satisfied.[179]

Figure 2 Post-restructuring position



The analysis that follows is premised on a specific and deliberately chosen assumption, that both FrenchOp SAS and DutchOp BV are genuine operating entities with real commercial substance. FrenchOp SAS is not a conduit or letterbox company. This assumption is chosen because a pure conduit structure, an entity established solely to channel dividends to a non-entitled ultimate owner with no genuine economic activity, is almost certainly abusive under classic dividend stripping structures and the *Danish cases* and *Nordcurrent*, and would present little analytical difficulty.[180] The harder and more practically significant question, addressed here, is whether the interposition of a genuinely active EU subsidiary can nonetheless be abusive in respect of a specific set of transactions, namely the distribution of prerestructuring retained earnings.

5.3 Comparability to dividend stripping

The intra-group reorganisation shares all characteristics of cum-cum transactions, but in modified form. In a classic cum-cum scheme, "temporary" means days or

[179] PSD (n 11) art 3(2)(b).

[180] *Cadbury Schweppes* (n 138) para 68; Weber (n 97) 127.

weeks. In the structural variant, it may mean months or years. However, if the shares are retransferred to ParentCo after the retained earnings have been distributed, Scenario 4 below, the alienation is functionally temporary regardless of its legal duration. Even without a formal retransfer, if the restructuring was planned and executed specifically to enable the distribution of pre-existing profits under the PSD exemption and thereafter serves no continuing commercial purpose, temporariness is present in economic substance. In a cum-cum transaction, the original holder retains economic interest through derivative instruments.[181] In the restructuring, ParentCo retains 100% economic exposure through its continued 100% ownership of FrenchOp SAS. The legal form differs, direct ownership rather than a derivative hedge, but the economic substance is identical. ParentCo's position is entirely unaffected by the interposition.[182] Classic cum-cum exploits the asymmetry between a foreign investor (for whom WHT is a final levy) and a domestic investor (for whom WHT is creditable).[183] The structural variant exploits the asymmetry between a non-EU parent (outside the PSD, subject to WHT at 15% or treaty rate) and an EU intermediate holding company (inside the PSD, potentially entitled to 0% WHT). The mechanism is the same, a more "entitled" party is interposed to capture the benefit.[184] In cum-cum, the composite is share lending, together with the dividend receipt and share return.[185] Here it is share transfer, followed by a dividend distribution and a (optionally) share retransfer. Each step is individually lawful. The composite may produce a result, exemption from Dutch WHT on pre-existing profits accrued while the shares were held by a non-EU entity, that the PSD was not designed to produce.[186]

The structural variant departs from the traditional cum-cum transactions in that the reallocation of dividend entitlement is achieved through a durable change in corporate ownership rather than financial instruments, and the time horizon may be indefinite rather than days. The Dutch State Secretary explicitly acknowledged this in parliamentary preparatory materials, noting that intra-group reorganisations are not automatically excluded from the anti-dividend stripping provisions and must be assessed on the basis of all relevant facts and circumstances, with particular attention to the timing, the character of the dividend, and the durability of the restructuring.[187]

5.4 The restructuring as potential abuse under the PSD GAAR

5.4.1 Analysis of abuse under Article 1(2) PSD

Member States shall not grant the benefits of the Directive to an arrangement or series of arrangements that (i) have the main purpose or one of the main purposes of

[181] OECD (n 13).

[182] B BV v Inspecteur der Belastingdienst ECLI:NL:GHAMS:2025:811 (Gerechtshof Amsterdam, 20 March 2025); Kamerstukken II 2000/01, 27 896, nr 3 (MvT) 8; Financieel Expertise Centrum (FEC), "Kennisdocument dividendstripping extern' (20 August 2021) 11, 23.

[183] OECD (n 13).

[184] *Kors (n 33)*

[185] OECD (n 13).

[186] PSD (n 11) art 1(2).

[187] Kamerstukken I 2001/02, 27896 en 28246, nr 117b, 1-2.

obtaining a tax advantage (ii) that defeats the object or purpose of the Directive, and (iii) are not genuine, having regard to all relevant facts and circumstances. Article 1(3) PSD defines non-genuineness as the extent to which the arrangement is not put into place for valid commercial reasons reflecting economic reality. Whether the three cumulative conditions are satisfied depends on the specific factual configuration. The following scenarios apply the framework above to a range of cases, varying from arrangements that are less likely to be regarded as abusive to arrangements in which indications of abuse become increasingly pronounced, including several intermediate cases where the classification remains uncertain.

5.4.2 Sub-scenario analysis

Each scenario is assessed against the three cumulative conditions of Article 1(2) PSD, the *Danish* cases indicia, the *Nordcurrent* temporal analysis, and the Dutch domestic anti-stripping framework.[188]

5.4.2.1 Scenario A: Genuine restructuring followed by regular dividend

FrenchOp SAS acquires DutchOp BV as part of a genuine European operational reorganisation, for example, consolidating regional management under a single EU sub-holding structure to produce operational synergies. The restructuring is documented, developed over a period of time, and reflects a commercial rationale that would have been undertaken regardless of the dividend tax position. After the transfer, DutchOp operates normally and distributes dividends at amounts and intervals consistent with its historical policy.

None of the three cumulative conditions of Article 1(2) PSD are satisfied.[189] On the objective element, FrenchOp has assumed genuine economic ownership of DutchOp. It acquired the shares at full market value including the retained earnings, bears the risk of impairment, and exercises genuine governance over the subsidiary. No step of the arrangement lacks valid commercial reasons reflecting economic reality. On the subjective element, the group's awareness that future dividends would benefit from the PSD WHT exemption does not make that advantage a main purpose of the restructuring if the commercial rationale is independently sufficient, as the CJEU confirmed in *Foggia*, incidental tax awareness does not satisfy the predominance requirement.[190] On the defeating-of-object element, the WHT exemption on ordinary dividend distributions between genuinely integrated EU group companies is precisely what the PSD is designed to provide; no abuse of that purpose is present. Under the Dutch framework, the State Secretary's guideline confirms that a durable, commercially motivated reorganisation combined with an ordinary dividend distribution, defined as not exceeding twice the three-year historical average, does not constitute dividend stripping regardless of timing.[191]

[188] PSD (n 11) art 1(2); *T Danmark* (n 36) paras 99-114; Kofler and others (n 159) 304; Kamerstukken I 2001/02, 27896 en 28246, nr 117b, 1-2.

[189] PSD (n 11) art 1(2).

[190] *Foggia* (n 83) para 35.

[191] Kennisgroep dividendbelasting en bronbelasting (n 12); Kamerstukken I 2001/02, 27896 en 28246, nr 117b, 1-2.

PSD benefits should not be denied.

5.4.2.2 Scenario B: Genuine restructuring, a larger distribution of pre-restructuring Accumulated Profits

Scenario B concerns a restructuring that is commercially genuine, but in which the first dividend distribution after the transfer, made approximately two years later, represents a catch-up distribution of accumulated reserves built up before FrenchOp became DutchOp's shareholder, amounting to three to four times the historical annual average.

On the objective element, the "to the extent that" formulation in Article 1(3) PSD requires a step-specific assessment.[192] The restructuring itself is genuine and FrenchOp exercises a real holding function in relation to DutchOp. However, the present distribution raises a distinct issue, as it involves the extraction of retained earnings that had accumulated prior to FrenchOp's acquisition of the shareholding. The pre-restructuring retained earnings were generated when DutchOp was owned by a non-EU entity to which the PSD did not apply, and their distribution under the exemption does not retroactively bring them within the Directive's intended scope. As Marres has noted, each distribution must be assessed separately; only an excessive distribution made within a short period after the restructuring will typically demonstrate the required connection, and a three-to-four-times catch-up distribution specifically clearing pre-existing reserves falls within that category.[193]

On the subjective element, the temporal pattern, a genuine restructuring followed by a disproportionately large first distribution specifically of pre-restructuring profits, is precisely the indicator the *Danish* cases identify as probative of tax-motivated purpose.[194] Following *Nordcurrent*, the authority must examine the full history of the arrangement: the two-year gap between transfer and distribution reduces but does not eliminate the inference of pre-arrangement, particularly if the WHT saving on pre-existing earnings was modelled as part of the restructuring decision.[195] On the defeating-of-object element, the extraction of pre-restructuring profits under a WHT exemption that was unavailable before the restructuring is the precise form of directive shopping Article 1(2) was introduced to prevent.[196]

Under the Dutch framework, the distribution exceeds the twice-the-historical-average threshold, engaging the additional scrutiny under the State Secretary's guidelines, and the 2024 burden-of-proof reversal under Article 4(7) Wet DB and Article 25(2) Wet Vpb requires FrenchOp to demonstrate genuine beneficial ownership of this specific distribution.[197]

[192] PSD (n 11) arts 1(2)-(3); *Eqiom* (n 67) para 26; Case C-58/01 *Océ van der Grinten NV v Commissioners of Inland Revenue* ECLI:EU:C:2003:495, para 86; *Deister Holding* (n 144) para 59; Case C-440/17 *GS v Finanzamt Neuss* ECLI:EU:C:2018:790, para 42; Case C-264/96 *Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer* ECLI:EU:C:1998:370; Weber (n 97) 120, 126.

[193] Marres (n 10).

[194] *T Danmark* (n 36), annotation by Bruno da Silva, H&I 2019/253.

[195] *Nordcurrent Group* (n 102), annotation by Claudio Cipollini, H&I 2025.

[196] PSD (n 11) art 1(2).

[197] Kennisgroep dividendbelasting en bronbelasting (n 12); Marres (n 10).

Where the GAAR conditions are satisfied, the denial must be proportionate.[198] The "to the extent" formulation permits only a targeted denial limited to the pre-restructuring retained earnings component; post-restructuring profits generated during FrenchOp's genuine ownership remain PSD-exempt.[199]

5.4.2.3 Scenario C: Super-dividend shortly after transfer, no retransfer

DutchOp is transferred to FrenchOp. Within weeks or a few months, DutchOp declares a super-dividend representing substantially all of its accumulated retained earnings, €50 million in a company with a historical annual dividend of €2-3 million.The super-dividend is paid to FrenchOp and rapidly passed upstream to ParentCo. No retransfer of shares occurs.

On the objective element, even conceding that FrenchOp is a genuine operating company, the specific step of this distribution lacks valid commercial reasons reflecting economic reality. The distribution of substantially all accumulated retained earnings within weeks of an acquisition is inconsistent with a genuine commercial relationship between a new parent and its newly acquired subsidiary. No commercial rationale could explain the necessity of extracting all accumulated earnings immediately, unless the purpose was precisely to extract them under the PSD exemption.[200]

The *Danish* cases indicia are satisfied in compelling form.[201] The dividends are passed through very soon after receipt to an entity (ParentCo) that does not qualify for PSD benefits. The amount vastly exceeds the company's historical dividend record, indicating that it does not represent normal income from FrenchOp's ongoing ownership of DutchOp. If the acquisition was financed by an intragroup loan from ParentCo, the economic equivalence of the super-dividend and the loan repayment makes the pass-through indicator even more powerful.[202]

In assessing the subjective element, the absence of a credible non-tax justification for the immediate extraction of accumulated earnings, particularly when viewed alongside the restructuring itself, strongly suggests a primary tax avoidance motive. Following the reasoning in *Nordcurrent*, the assessment cannot be confined solely to the moment of distribution, since the Court expressly held that "all relevant facts and circumstances must be taken into account" across the full history of the arrangement.[203] The transfer of DutchOp is followed almost immediately by a super-dividend far exceeding its historical distribution pattern, which is then rapidly passed upstream to ParentCo.[204] Following *Nordcurrent*, these surrounding circumstances may be taken into account in assessing the subjective element of abuse.

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[198] Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, para 35; Case C-196/04*, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue,* para 47; Case C-112/14, *Commission v. UK*, paras 23-24.

[199] Weber (n 97) 120, 126.

[200] Ibid 114.

[201] T *Danmark* (n 36) para 81.

[202] Jakub Jankowski, 'The Implementation of "Danish Cases" Across the European Union (EU): is This the Slow Decline of Shell Entities?' (2025) 34(6) EC Tax Review 231.

[203] *Nordcurrent Group* (n 102) para 41.

[204] Kennisgroep dividendbelasting en bronbelasting (n 12).

The PSD is not designed to enable a one-time extraction of profits accumulated over years outside the PSD's scope, through an EU intermediary that acquires shares for that specific purpose.[205] The use of FrenchOp as the formal dividend recipient for this transaction is precisely the "directive shopping" that Article 1(2) was introduced to prevent.[206] Under the Dutch framework, the super-dividend exceeds the twice-the-historical-average threshold by an order of magnitude, and under Article 4(7) Wet DB as amended in 2024 FrenchOp cannot discharge the burden of demonstrating genuine beneficial ownership on these facts.[207]

A full denial of PSD benefits is the most defensible outcome. The question remains whether FrenchOp can fall back on the reduced NL-FR treaty rate of 5% rather than the full 15% domestic rate.[208] This depends on whether the PPT under the MLI independently denies the treaty benefit and whether FrenchOp qualifies as beneficial owner for treaty purposes. [209] This remains outside the scope of this analysis.

5.4.2.4 Scenario D: Super-dividend with subsequent retransfer of DutchOp

All facts of Scenario C apply. In addition, after the super-dividend has been distributed to FrenchOp and passed upstream to ParentCo, the shares in DutchOp BV are retransferred from FrenchOp back to ParentCo (or to another non-EU group entity). The restructuring is entirely reversed once its tax purpose has been achieved. The retransfer is analytically decisive. It eliminates any remaining possibility that the restructuring served a genuine commercial purpose, no real operational reorganisation integrating DutchOp into the FrenchOp sub-group is reversed within months of completion. It also confirms the temporary alienation element that characterises cum-cum stripping. The only difference from a traditional cum-cum transaction is that the lending period was longer and implemented through a corporate transfer rather than a securities lending agreement.[210] The economic logic is identical, exploitation of the tax asymmetry, preservation of economic interest by the original owner, and return of the shares once the dividend has been captured.[211]

All three cumulative conditions of Article 1(2) PSD are satisfied.[212] On the objective element, the four-step sequence: (i) transfer; (ii) super-dividend; (iii) pass-through; and (iv) retransfer, lacks any commercial rationale; no element of the arrangement reflects valid commercial reasons reflecting economic reality within the meaning of Article 1(3) PSD. On the subjective element, the retransfer is a strong indicator of the predominantly tax-driven nature of the arrangement. Following *Nordcurrent*, the authority must assess the full temporal sequence from planning to retransfer as a single composite arrangement, and no genuinely motivated restructuring is reversed

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205 Debelva and Luts (n 97).
206 Scherleitner and Sihvonen (n 20).
207 Kennisgroep dividendbelasting en bronbelasting (n 12); Kamerstukken I 2001/02, 27896 en 28246, nr 117b, 1-2.
208 Debelva and Luts (n 97).
209 Scherleitner and Sihvonen (n 20).
210 Kors (n 53); OECD (n 13).
211 Ibid.
212 PSD (n 11) art 1(2).

immediately upon completion of a specific distribution.[213] On the defeating-of-object element, the analysis is identical to Scenario C.

Under the Dutch framework, the position is the same as in Scenario C and, if anything, stronger: the retransfer arrangement is precisely the paradigm case of structural dividend stripping that the State Secretary identified in parliamentary preparatory materials.[214]

A full denial of PSD benefits is indicated. This scenario maps most closely onto the traditional cum-cum template and represents the clearest case of structural dividend stripping in the spectrum.

5.4.2.5 Scenario E: Long holding period, no retransfer, super-dividend in Year 5

FrenchOp acquires DutchOp and holds it genuinely for five years, exercising real oversight and governance. After five years, DutchOp declares a super-dividend representing substantially all retained earnings, both pre- and post-restructuring. No retransfer occurs.

The *Nordcurrent* framework imposes no temporal cut-off. The Court stated that circumstances arising subsequent to the formation of the arrangement may be taken into account, and that the assessment must consider the "evolution of the structure and its history".[215] However, the five-year gap between restructuring and super-dividend significantly attenuates the inference of connection. The outcome turns on two sub-variants.

In Sub-variant E1, FrenchOp received ordinary annual dividends from DutchOp in years 1-4 and declares a larger-than-usual distribution in year 5. The nexus between the restructuring and the year-5 distribution is too weak to satisfy any of the three cumulative conditions: five years of genuine ownership with consistent dividend distributions is incompatible with a finding that the restructuring was designed to extract pre-existing profits. No denial.

In Sub-variant E2, no dividends were paid in years 1-4 and the year-5 distribution clears all accumulated earnings since inception. Here the analysis is more nuanced. On the objective element, the "to the extent" formulation requires a component-by-component assessment: post-restructuring profits generated during FrenchOp's genuine ownership remain PSD-exempt, but where DutchOp's accounts separately identify the pre-restructuring reserves and the distribution specifically draws on that portion, a targeted denial of the pre-restructuring component remains conceptually available.[216] On the subjective element, the inference of pre-arrangement is weakened by the passage of time but may be revived if internal documentation shows the decision not to distribute in years 1-4 was strategically made to accumulate a

[213] *Nordcurrent Group* (n 102), annotation by Cipollini (n 196).

[214] Kennisgroep dividendbelasting en bronbelasting (n 12); Kamerstukken I 2001/02, 27896 en 28246, nr 117b, p 1-2.

[215] *Nordcurrent Group* (n 102) para 36, 41; João Félix Pinto Nogueira and others, 'Nordcurrent Group: Interpretation of the Anti-Abuse Provision in the Parent-Subsidiary Directive - Opinion Statement ECJ-TF 2/2025 on the Decision of the CJEU of 3 April 2025 in Case C-228/24, Nordcurrent Group UAB' (CFE Europe Tax Advisers, 27 August 2025) https://ssrn.com/abstract=5409026 accessed 12 May 2026.

[216] PSD (n 11) art 1(3).

single large extraction. In practice, however, the evidential burden on the tax authority after five years of genuine multi-tier operations is very substantial, and the Dutch parliamentary guidance acknowledges that the nexus is only demonstrable in exceptional cases, typically an excessive distribution made within a short period after the restructuring.[217]

Targeted partial denial limited to the pre-restructuring component is therefore available in Sub-variant E2 only if the nexus is established through concrete internal documentation. The practical ability to demonstrate abuse diminishes as the holding period extends.

5.4.2.6 Scenario F: Mixed motive restructuring

The restructuring has a genuine but modest commercial rationale, some operational synergies exist, but they are not sufficient on their own to have driven the restructuring. The group was also aware of the WHT benefit and this was a significant driver of the decision. After eighteen months, DutchOp distributes approximately 2.5 times its historical annual average, larger than normal, but not a complete liquidation of retained earnings. This is the analytically contested middle ground, and the outcome of all three cumulative conditions is genuinely uncertain.

On the objective element, the restructuring reflects some valid commercial reasons, but whether those reasons are sufficient to explain it independently, as required by *Foggia*, is precisely what is in dispute.[218] On the subjective element, the core difficulty is that Article 1(2) PSD is satisfied if the tax advantage is one of the main purposes, but the CJEU interpreted the analogous Merger Directive provision in *Foggia* and *Kofoed* as requiring the avoidance motive to be predominant.[219] Whether Article 1(2) PSD sets a lower threshold or whether the Court will apply the same predominance standard across instruments remains unsettled. On the defeating-of-object element, *Nordcurrent* requires the tax advantage to be assessed by looking at the overall tax effect across all Member States involved.[220] If the Dutch WHT that would have applied on a direct distribution from DutchOp to ParentCo under the NL-State X treaty was already low, and if FrenchOp pays French corporate tax on the dividend received, the group's overall tax burden may not actually be reduced by the restructuring. In that case, no tax advantage defeating the object of the Directive is present, and this condition fails.[221]

The outcome of Scenario F cannot be determined with certainty under the current framework. It depends on the strength of the commercial rationale, the overall tax consequences of the restructuring, the extent to which the distribution relates to pre-restructuring retained earnings, and the compatibility of the Dutch 2024 burden-of-proof reversal with EU law. Scenario F therefore illustrates the grey area that the

[217] Kamerstukken I 2001/02, 27896 en 28246, nr 117b, 1-2.
[218] *Foggia* (n 83) para 35.
[219] *Kofoed* (n 83) para 38; *Foggia* (n 83) para 35.
[220] Nogueira and others (n 214).
[221] *Nordcurrent Group (n 102).*

existing anti-abuse framework does not resolve with sufficient legal certainty, and which lies at the core of the present research question.

6 Treatment of retained earnings and consequences of denial of benefits

6.1 Introduction

The previous chapter applied the EU anti-abuse framework to the scenario of an intra-group transfer of a subsidiary with accumulated retained earnings, identifying the conditions, including the nature and timing of the dividend distribution, the genuineness of the holding function, and the temporal evolution of the arrangement, under which such a restructuring satisfies the three cumulative conditions of Article 1(2) PSD. This chapter examines what follows from a positive finding of abuse: the denial of the withholding tax exemption under Article 5 PSD, the proportionality constraints that govern the scope of that denial, and the specific treatment of profit reserves accumulated prior to the restructuring.

6.2 Denial of the benefits of the Directive

Member States will thus be obliged to deny the benefits of the PSD once the conditions of the GAAR are fulfilled; they have no discretion in this regard Member States will thus be obliged to deny the benefits of the PSD once the conditions of the GAAR are fulfilled; they have no discretion in this regard.[222]

The benefits at stake are twofold: exemption from withholding tax in the Member State of the subsidiary under Article 5 PSD, and elimination of double taxation (by way of exemption or credit) in the Member State of the parent under Article 4 PSD.[223] A literal reading suggests that both benefits must be denied whenever an arrangement falls within the anti-abuse rule, which risks giving rise to international juridical and economic multiple taxation, an outcome that itself raises proportionality concerns.[224]

The consequence of denial is not, however, that the arrangement is treated as void or that the tax position is reconstructed in some other manner. The legal structure of the arrangement remains intact; only its fiscal treatment is affected.[225] This distinction matters, because it limits the scope of what national tax authorities may do in response to a finding of abuse under the PSD.

The source state, in the example the Netherlands, is entitled to levy dividend withholding tax on the distribution made by DutchOp BV to FrenchOp SAS, as if the PSD did not apply.[226] The rate at which withholding tax is levied following a denial of PSD benefits depends on the applicable domestic law and any relevant

[222] PSD (n 11) art 1(2).
[223] Ibid arts 4-5.
[224] Debelva and Luts (n 97).
[225] Weber (n 97) 105.
[226] PSD (n 11) art 5.

double tax treaty between the Netherlands and State X (FrenchOp SAS's Member State). Under Dutch domestic law, the statutory withholding tax rate is 15% under Article 1(1) of the Dividend Tax Act 1965.[227] Whether a reduced treaty rate applies will depend on the specific treaty in force between the Netherlands and France, and on whether FrenchOp SAS qualifies as the beneficial owner of the dividend for treaty purposes.[228]

6.3 Limits on the scope of denial

6.3.1 The proportionality principle in EU anti-abuse law

National measures implementing EU anti-abuse provisions must comply with the proportionality principle and thus may not go beyond what is necessary to prevent the abusive exploitation of EU law.[229] The CJEU established this in *Cadbury Schweppes*, holding that CFC legislation was compatible with the freedom of establishment only insofar as it targeted wholly artificial arrangements, and not genuine economic activity.[230] The same limitation governs the application of the anti-abuse rule in Article 1(2) PSD.[231] This has two principal implications in the present context. First, where only specific steps in an arrangement are artificial, denial must be tailored to those elements rather than applied to the arrangement as a whole, a requirement reflected in the "to the extent" formulation of Article 1(3) PSD.[232] Second, even where the entire arrangement is abusive, the resulting fiscal burden must not exceed what would have been levied absent the abusive structure. Any excess would amount to a punitive sanction, which EU law does not authorise as a response to abuse.[233]

This proportionality requirement is particularly relevant in cases of Directive shopping. Terra and Wattel distinguish in this respect between outbound and inbound profit transfers. In outbound structures, an artificial intermediate holding company established in a Member State is used to channel profits tax-free to an ultimate parent resident in a third country.[234] In such cases, the abusive advantage lies primarily in the withholding tax exemption provided by Article 5 PSD. The proportionate response is therefore the denial of that exemption alone. It would be disproportionate also to deny the participation exemption at the level of the intermediate holding company itself, since that would exceed what is necessary to counteract the abuse.[235]

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[227] Art 1(1) Wet op de dividendbelasting 1965 (Wet DB 1965)

[228] *Terra/Wattel* (n 100) s 16.8.6.

[229] Debelva and Luts (n 97) 233.

[230] *Cadbury Schweppes* (n 138) paras 55, 66.

[231] PSD (n 11) art 1(2).

[232] Ibid art 1(3).

[233] C Hofman, 'Enkele kanttekeningen bij het toetskader'' in *Het systeem van sanctionering van fiscale fraude* (FM nr 166, Wolters Kluwer 2021) para 7.2.2.5; *Emsland-Stärke* (n 131) para 56; Case C-131/13 *Staatssecretaris van Financiën v Schoenimport 'Italmoda' Mariano Previti vof* ECLI:EU:C:2014:2455, para 61.

[234] *Terra/Wattel* (n 100) s 16.8.6.

[235] Ibid.

For inbound profit transfers, where artificial structures are used to funnel third country dividends into the EU tax-free, the proportionate response is instead denial of the participation exemption in the Member State of the intermediate holding company, rather than imposing source withholding tax on redistribution.[236]

In both scenarios, the anti-abuse denial must be targeted and no broader than what is necessary to counteract the specific abuse identified.

6.3.2 Proportionality and pre-restructuring retained earnings

Retained earnings represent the accumulated net income a company has chosen to keep rather than distribute to shareholders as dividends.[237] They reflect the total undistributed profits that remain invested in a company over time, growing with profitable operations and declining when dividends exceed net income or losses occur.[238] Pre-restructuring earnings are the profits a company generates before undergoing a significant reorganization of its operations, debt, or corporate structure, reflecting performance under the old business model. Post-restructuring earnings are the profits generated after the reorganization is complete. The most defensible approach, consistent with the proportionality principle, is a targeted denial of benefits limited to the portion of the dividend that corresponds to the pre-restructuring retained earnings. Under this approach, the withholding tax exemption in Article 5 PSD is denied only in respect of the profits that existed before the restructuring and that are treated as the abusive element of the arrangement.[239] Dividends attributable to profits generated after the restructuring, that is, profits that arose during the period in which FrenchOp SAS was the lawful shareholder of DutchOp BV and performed genuine commercial and holding functions, are not abusive in character and should therefore not be subjected to withholding tax merely because an earlier distribution was found to be abusive.

This position is supported by the "to the extent" language of Article 1(3) PSD and by the CJEU's general approach to proportionality in the anti-abuse field.[240] It is also consistent with the Dutch State Secretary of Finance's recognition, in parliamentary preparatory materials, that a super dividend of pre-existing retained earnings represents a categorically different form of value extraction than an ordinary dividend of current profits.[241] A denial of benefits that treats the two categories identically, applying the withholding tax exemption or withholding it without regard to the origin of the profits distributed, would not be proportionate and would risk overreaching the purpose of the anti-abuse provision.

[236] Ibid.

[237] Izzuka Tatyana Borisovna, 'Shareholders' Equity Consists of Share Capital and Retained Earnings' БАЛКАНСКО НАУЧНО ОБОЗРЕНИЕ (2020) 81.

[238] Borisovna (n 235) 81.

[239] PSD (n 11) arts 1(2), 5.

[240] Ibid art 1(3); Weber (n 97) 120, 126.

[241] Kamerstukken I 2001/02, 27896 en 28246, nr 117b, 1-2.

6.4 Interaction with Dutch domestic anti-dividend stripping law

As discussed in Chapter 5, the Netherlands substantially amended its domestic anti-dividend stripping rules with effect from 1 January 2024 through amendments to Articles 25(2) and 25(3) Wet VPB 1969 and Article 4(7) Wet DB 1965.[242] These provisions impose a reversal of the burden of proof on dividend recipients, requiring them to demonstrate that they are the genuine ultimate beneficiary of the dividend for amounts exceeding EUR 1,000, and extend the anti-stripping analysis to intra-group transactions that were previously treated as outside the scope of the provision.[243]

The interaction between these domestic provisions and the PSD anti-abuse rule raises important questions of legal characterisation and compatibility. Where a dividend distribution by DutchOp BV to FrenchOp SAS falls within the scope of both the PSD GAAR in Article 1(2) PSD and the Dutch domestic anti-stripping provision, the question arises which legal basis governs the denial of benefits and whether the two regimes may produce different outcomes.[244]

As Sanò observes, the CJEU's case law increasingly requires that tax authorities bear at least an initial burden of proof concerning the existence of abuse.[245] In *Deister Holding* and *Juhler Holding*, the Court held that Member States may not rely on general presumptions of abuse that automatically exclude taxpayers from directive benefits without the tax authorities providing even prima facie evidence of fraud or abuse.[246] According to Sanò, the Court's more recent jurisprudence reflects a stricter approach towards national presumptions that effectively shift the burden of proof entirely onto taxpayers.[247]

This creates tension with the Dutch amendments. Although the Dutch rules do not formally deny taxpayers the opportunity to rebut allegations of abuse, the practical effect of the amended legislation is that taxpayers claiming dividend withholding tax relief above EUR 1,000 must themselves establish beneficial ownership from the outset.[248] As Sanò notes, even rebuttable presumptions may infringe the proportionality principle where tax authorities are effectively relieved from conducting a thorough investigation into the taxpayer's overall situation.[249]

At the same time, Sanò does not argue that all presumptions are necessarily incompatible with EU law.[250] Rather, her analysis suggests that limited presumptions may remain permissible where the tax authorities continue to bear the initial burden of presenting objective indicia of abuse and where the anti-abuse assessment takes

[242] Articles 25(2)-(3) Wet VPB 1969; art 4(7) Wet DB 1965; *Vakstudie Vennootschapsbelasting*, art 25 Wet VPB 1969, aant 3.4, 'Wijziging bewijslastverdeling en nadere invulling "samenstel van transacties"' (2024).

[243] Marres (n 10); Vakstudie Vennootschapsbelasting (n 240).

[244] Brief van de Staatssecretaris van Financiën, "Rapportage dividendstripping" (27 juni 2025) Kamerstukken II 2024/25, 32 140, nr 263.

[245] Claudia Sanò, 'Allocation of the Burden of Proof Under the Anti-Abuse Rule of the Parent-Subsidiary Directive According to the Most Recent ECJ Case Law' (2018) 27(5) *EC Tax Review* 247, 273-274.

[246] *Deister Holding and Juhler Holding* (n 144) para 73.

[247] Sanò (n 243) 275.

[248] Ibid 276.

[249] Ibid 274, 276.

[250] Ibid 277.

account of the taxpayer's overall factual and economic situation.[251] The compatibility of the Dutch anti-dividend stripping rules with EU law may therefore ultimately depend on how the Dutch tax authorities and courts apply the amended provisions in practice. If the rules are applied as an automatic evidentiary reversal based solely on predetermined statutory criteria, they may risk constituting an impermissible general presumption of abuse under PSD case law. By contrast, if the Dutch tax authorities are still required to provide prima facie indications of artificiality before shifting the evidentiary burden to the taxpayer, the rules may be more defensible under the proportionality principle.

A further distinction concerns the consequences of a denial of benefits. Under Dutch domestic anti-dividend stripping law, the consequence is the denial of the withholding tax credit or exemption, resulting in taxation at the full domestic withholding tax rate of 15%.[252] Under the PSD GAAR, the consequence is likewise the loss of the directive exemption.[253] Whether a finding of abuse under the PSD also precludes access to treaty benefits remains a separate and highly debated question that falls beyond the scope of this chapter. [254]

[251] Ibid 279.

[252] Art 5 Wet DB 1965.

[253] PSD (n 11) arts 1(2)–(3).

[254] *Terra/Wattel* (n 100) s 16.8.6

7 Conclusion

Having examined the final substantive aspect of this research, it is now appropriate to reflect on the findings and answer the research question set out in the Introduction:

To what extent can the transfer of a company with accumulated retained earnings to a shareholder subject to a more favourable dividend tax regime be considered comparable to dividend stripping, and what are the tax implications for profit reserves accumulated prior to the restructuring?

The answer to the first part of the research question is affirmative in principle, but conditional in application. An intra-group restructuring may constitute structural dividend stripping where it involves a formal transfer of dividend entitlement without a corresponding shift in economic ownership and is designed to interpose a more favourably taxed intermediary between the source state and the ultimate beneficiary. Although the legal form differs from traditional cum-cum arrangements, the economic logic is substantially the same.

Whether such a restructuring falls within Article 1(2) PSD depends on the cumulative requirements of the GAAR. The decisive issue is whether the intermediary performs a genuine holding function characterised by real governance, independent risk-bearing, and autonomous dividend discretion in relation to the transferred subsidiary. Mere operational substance elsewhere in the group is insufficient. The *Danish* cases further confirm that the existence of commercial motives does not preclude a finding of abuse where obtaining a tax advantage constitutes one of the principal purposes of the arrangement.

A restructuring is mostly comparable to dividend stripping where retained earnings accumulated prior to the restructuring are distributed shortly thereafter through a super dividend that is rapidly passed to the non-EU parent, particularly where the structure subsequently ceases to function as a genuine holding arrangement. By contrast, where the restructuring is supported by independently sufficient commercial reasons and produces lasting governance changes, the withholding tax advantage remains incidental, and the arrangement is protected by the taxpayer's freedom to choose the most favourable tax regime.

As regards the second part of the research question, the tax treatment of pre-restructuring profit reserves is governed by the proportionality principle embedded in the "to the extent" formulation of Article 1(2) PSD. A denial of Directive benefits must therefore be limited to the abusive element of the arrangement, namely the distribution of profits accumulated before the restructuring. Extending the denial to post-restructuring earnings would exceed what is necessary and is therefore impermissible under EU law.

The current EU anti-abuse framework is capable, in principle, of addressing structural dividend stripping. Structural dividend stripping through corporate reorganisations unfolds over longer timeframes than traditional cum-cum schemes, making the abuse assessment inherently fact-sensitive and difficult to predict ex ante. The Netherlands has sought to address this through the reversal of the burden of proof, but its compatibility with the CJEU's prohibition on general presumptions of abuse remains unresolved. Until further guidance is provided by the CJEU, the balance between effective anti-abuse enforcement and legal certainty will continue to depend heavily on the circumstances of individual cases.

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