LOYENS & LOEFF

LAW & TAX

Interpretation and application of the general anti-abuse rule of the Parent-Subsidiary Directive

EU Member States and Switzerland

© Loyens & Loeff N.V. 2020

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or in an automated database or disclosed in any form or by any means (electronic, mechanical, photocopy, recording or otherwise) without the prior written permission of Loyens & Loeff N.V.

Insofar as it is permitted, pursuant to Section 16b, 16c and 16d of the Dutch Copyright Act 1912 (Auteurswet 1912) in conjunction with the Decree of 20 February 1991, Dutch Bulletin of Acts and Decrees 1991/41 to make private copies of (parts of) this publication, the compensation stipulated by law must be remitted to Stichting de Thuiskopie (the Dutch Private copy Foundation, PO Box 3060, 2130 KB Hoofddorp, the Netherlands).

Insofar as it is permitted, pursuant to Section 16h and 16l of the Dutch Copyright Act 1912 in conjunction with the Decree of 8 January 2003, Dutch Bulletin of Acts and Decrees 2003/8 to make copies of parts of this publication, the compensation stipulated by law must be remitted to Stichting Reprorecht (the Dutch Reprographic Reproduction Rights Foundation, PO Box 3060, 2130 KB Hoofddorp, the Netherlands).

For reproductions of one or more parts of this publication in anthologies, readers or other compilations (Section 16 of the Dutch Copyright Act 1912), please contact the publisher.

This publication does not constitute tax or legal advice and the contents thereof may not be relied upon. Each person should seek advice based on his or her particular circumstances. Although this publication was composed with the greatest possible diligence, Loyens & Loeff N.V., the contributing firms and any individuals involved cannot accept liability or responsibility for the results of any actions taken on the basis of this publication without their cooperation, including any errors or omissions. The contributions to this book contain personal views of the authors and therefore do not reflect the opinion of Loyens & Loeff N.V.

Introduction

We are pleased to present this publication on the interpretation and application of the General Anti-Avoidance Rule (GAAR) of the Parent-Subsidiary Directive (PSD). This publication follows our previous publication that provided an overview of the measures to prevent abuse of tax treaties and EU Directives in selected countries.

The specific focus on the PSD GAAR in this publication was essentially motivated by two reasons. First, it has now been approximately five years since the PSD GAAR was included in the PSD and therefore, it might be expected that legislative developments have occurred since then and that in the meantime, some countries have developed internal guidance, administrative practice or case law concerning the interpretation. Second, in the past few years, ground-breaking decisions have been made by the Court of Justice of the European Union (ECJ/CJEU or the Court) that may impact the interpretation and application of the PSD GAAR. In particular, the Court's judgments in *Eqiom* (C-6/16, of 7 September 2017), *Juhler Holding and Deister Holding cases* (Joined cases C-504/16 and C-603/16 of 20 December 2017), and the *Danish* cases (Joined cases C-115/16, *N Luxembourg 1*; C-118/16, *X Denmark*; C-119/16 *C Danmark 1*; C-299/16 *Z Denmark* of 26 February 2019) may influence the interpretation of the PSD GAAR. Furthermore, the international tax developments should also be taken into account with the large-scale inclusion of a principal purpose test (PPT) in tax treaties via the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). Also here, it may be expected that countries would follow a similar interpretation for both the PPT and the PSD GAAR.

In accordance with this, this publication aims at providing a practical tool on how the PSD GAAR is currently being interpreted and applied in the selected countries, taking into account the latest legislative developments, the existing or pending relevant domestic court decisions, practical guidance, rulings or any sort of administrative guidance on the interpretation and application of the PSD GAAR. It also considers how the Court's case law may be influencing the interpretation and application of such provision.

Considering the current and (future) relevance of this topic, we hope that you will find this publication useful and that it will find a permanent place on your desk. This publication is intended as a tool for an initial overview of the most relevant tax aspects and developments on the interpretation and application of the PSD GAAR and should not be used as a substitute for obtaining local tax advice.

The jurisdictions included in this publication reflect all the countries that currently apply the PSD regime. The selected countries are included in alphabetical order. The information contained in this publication reflects laws that are in effect as per 1 September 2020, unless otherwise mentioned.

With respect to the selected jurisdictions in which Loyens & Loeff has offices with a domestic tax practice (Belgium, Luxembourg, the Netherlands and Switzerland), those offices have provided the information contained herein. With respect to the other selected jurisdictions, we obtained the information from the firms listed below. We gratefully acknowledge the contributions of the aforementioned local tax experts and the firms listed below. Additional information may be obtained by contacting one of the Loyens & Loeff offices at the addresses shown on page 110 or one of the contributing firms via their website as shown below or the contact person listed on page 103.

Loyens & Loeff Amsterdam

Peter Adriaansen, Margriet Lukkien, Bruno da Silva and Anne Molleman

Austria, Croatia and Slovenia	LeitnerLeitner
Bulgaria	DGKV
Cyprus	Elias Neocleous & Co. LLC
France	Darrois Villey Maillot Brochier
Germany	Flick Gocke Schaumburg
Czech Republic	Havel & Partners
Denmark	Kromann Reumert
Estonia, Latvia and Lithuania	Sorainen
Finland	Krogerus
Greece	Iason Skouzos & Partners
Hungary	Jalsovszky
Ireland	Matheson
Italy	Maisto e Associati
Malta	Francis J. Vassallo & Associates Limited
Poland	MDDP
Portugal and Spain	Cuatrecasas
Romania	Nestor Nestor Diculescu Kingston Petersen
Slovakia	PRK Partners
Sweden	Mannheimer Swartling
United Kingdom	Macfarlanes

Abbreviations

ATAD1	Anti-Tax Avoidance Directive 1 (Directive 2016/1164/EU)
ATAD2	Anti-Tax Avoidance Directive 2 (Directive 2017/952/EU)
ATAD	Anti-Tax Avoidance Directives 1 and 2 (Directive 2016/1164/EU amended by Directive 2017/952/EU)
CIT	Corporate Income Tax
CITA	Corporate Income Tax Act
CFC	Controlled Foreign Company
CJEU	Court of Justice of the European Union
EC	European Community
ECJ	European Court of Justice
EU	European Union
GAAR	General anti-abuse rule
IRD	Interest and Royalty Directive (Directive 2003/49/EC)
MD	Merger Directive (Directive 2009/133/EC)
MLI	Multilateral Convention to Implement Tax Treaty related matters
PSD	Parent-Subsidiary Directive (Directive 2011/96/EU)
PSD GAAR	Parent-Subsidiary Directive GAAR (Directive 2015/121/EU)
PITA	Personal Income Tax Act
PPT	Principal Purpose Test
SAAR	Specific anti-avoidance rule
TA	Tax Authorities / Tax Administration
WHT	Withholding tax

Table of contents

1. Implementation of the PSD GAAR

Austria, Belgium, Bulgaria, Croatia and Cyprus 7
France, Germany, Czech Republic, Denmark and Estonia 11
Finland, Greece, Hungary, Ireland and Italy 14
Latvia, Lithuania, Luxembourg, Malta and the Netherlands 17
Poland, Portugal, Romania, Slovakia and Slovenia 19
Spain, Sweden, Switzerland and the United Kingdom 21

2. Legislative developments that may lead to amendments to the existing legislation in the near future

Austria, Belgium, Bulgaria, Croatia and Cyprus 23
France, Germany, Czech Republic, Denmark and Estonia 25
Finland, Greece, Hungary, Ireland and Italy 28
Latvia, Lithuania, Luxembourg, Malta and the Netherlands 30
Poland, Portugal, Romania, Slovakia and Slovenia 32
Spain, Sweden, Switzerland and the United Kingdom 36

3. Relevant court decisions

Austria, Belgium, Bulgaria, Croatia and Cyprus 39
France, Germany, Czech Republic, Denmark and Estonia 40
Finland, Greece, Hungary, Ireland and Italy 44
Latvia, Lithuania, Luxembourg, Malta and the Netherlands 47
Poland, Portugal, Romania, Slovakia and Slovenia 49
Spain, Sweden, Switzerland and the United Kingdom 51

4. Relevant *pending* court cases / otherwise preliminary references to the CJEU

Austria, Belgium, Bulgaria, Croatia and Cyprus 54
France, Germany, Czech Republic, Denmark and Estonia 56
Finland, Greece, Hungary, Ireland and Italy 57
Latvia, Lithuania, Luxembourg, Malta and the Netherlands 58
Poland, Portugal, Romania, Slovakia and Slovenia 61
Spain, Sweden, Switzerland and the United Kingdom 63

5. Position papers, rulings or administrative guidance issued

Austria, Belgium, Bulgaria, Croatia and Cyprus 64
France, Germany, Czech Republic, Denmark and Estonia 66
Finland, Greece, Hungary, Ireland and Italy 70
Latvia, Lithuania, Luxembourg, Malta and the Netherlands 73
Poland, Portugal, Romania, Slovakia and Slovenia 75
Spain, Sweden, Switzerland and the United Kingdom 76

6. Impact following recent CJEU case law, and more in particular the Danish cases regarding beneficial ownership rendered by the CJEU on 26 February 2019

Austria, Belgium, Bulgaria, Croatia and Cyprus 78
France, Germany, Czech Republic, Denmark and Estonia 80
Finland, Greece, Hungary, Ireland and Italy 85
Latvia, Lithuania, Luxembourg, Malta and the Netherlands 90
Poland, Portugal, Romania, Slovakia and Slovenia 92
Spain, Sweden, Switzerland and the United Kingdom 95

7. Audits being carried out

Austria, Belgium, Bulgaria, Croatia and Cyprus 97
France, Germany, Czech Republic, Denmark and Estonia 98
Finland, Greece, Hungary, Ireland and Italy 99
Latvia, Lithuania, Luxembourg, Malta and the Netherlands 100
Poland, Portugal, Romania, Slovakia and Slovenia 101
Spain, Sweden, Switzerland and the United Kingdom 102

Overview contact details contributing firms 103

Our offices 110

1. Implementation of the PSD GAAR

Austria, Belgium, Bulgaria, Croatia and Cyprus

Austria

Unlike in other countries, the PSD GAAR in Austria has not been specifically implemented. The existing national rules implementing the PSD which refer to the Austrian GAAR (section 22 of the Austrian Federal Fiscal Code) has been regarded as sufficient by the Austrian legislature.

According to section 94 of the Austrian Income Tax Act, a WHT relief at source is only granted if there is no suspected abuse according to section 22 of the Austrian Federal Fiscal Code and no hidden profit distribution. Further details for suspected abusive cases were implemented in a regulation of the Austrian Ministry of Finance. In such suspected abusive cases, the WHT relief at source is denied. Whether the case is regarded as abusive is determined in a refund procedure. A refund is only granted if the case is not abusive according section 22 of the Austrian Federal Fiscal Code.

Belgium

On 1 January 2016, Belgium implemented the PSD GAAR in its Income Tax Code. According to the PSD GAAR as implemented in Belgium, no dividend WHT exemption (as laid down in the Royal Decree to the Income Tax Code) and no participation exemption is available if abuse is present. Since capital gains on shares realised are only tax exempt if the dividends received would benefit from a participation exemption, the PSD GAAR indirectly equally applies to these capital gains. As confirmed in Parliamentary history and a circular letter, the PSD GAAR applies to both outbound and inbound dividends.

Pursuant to the PSD GAAR as implemented in Belgium, abuse is present if the Belgian TA can prove that the dividend distribution is related to a legal act or of acts as a whole which (i) is artificial because it lacks valid business reasons which reflect economic reality (substance test) and (ii) has been construed with the main purpose or one of the main purposes to obtain the dividend received deduction on this income, a WHT exemption or to obtain another benefit of the PSD in another Member State of the EU (subjective component).

Bulgaria

The motives to a bill for amendments of the Bulgarian CITA (adopted on 25/11/2015 and promulgated in issue 95/2015 from 8/12/2015) of the State Gazette recognized that the PSD GAAR introduced an obligation for EU Member States to apply a minimum general rule for counterfeiting abuse in respect to distribution of profits. According to the motives in said bill however, the tax evasion rule under art.16 of the Bulgarian CITA was considered to have much broader scope than the PSD GAAR. On such grounds, it was concluded that implementation of the PSD GAAR in Bulgarian tax law was not necessary.

Art.16 of the Bulgarian CITA states that where one or more transactions, inter alia between unrelated parties, were concluded under terms, the fulfilment of which leads to tax evasion, the taxable base shall be determined ignoring said transactions, certain terms thereof or the legal form thereof, but taking into consideration the taxable base resulting from effecting of a customary transaction of the relevant type at arm's length prices and intended to achieve the same economic result but which does not lead to tax evasion. The rule also explicitly lists as tax evasion:

Croatia

Croatian CIT Law includes GAAR provisions. Concretely, art. 5 stipulates that the rights provided by the provisions of respective Law, particularly those related to the reductions of the tax base, exceptions, tax exemption and WHT exemption, or reduction of the tax liability, shall not be used by the taxpayer for arrangements or a series of arrangements, if it is determined that the taxpayer had started them in order to realise, as the main purpose or one of the main purposes, the mentioned benefits, and as such, considering all the relevant facts and circumstances, they are not authentic. An arrangement is defined as any business transaction, activity, scheme, agreement, obligation or event, and it can consist of several measures or parts. An arrangement or a series of arrangements shall be considered inauthentic insofar as it has not been started for valid commercial reasons reflecting the economic reality, in other words, if it has been started for tax fraud or tax evasion.

Croatian CIT Law includes a list of potential situations that might imply such non-authentic arrangements:

Cyprus

Cyprus has never applied WHT and, consequently, the amendments included in the PSD did not have a direct effect in Cyprus.

As a result of the GAARs, Cyprus has already incorporated the anti-avoidance provisions of the PSD GAAR into domestic law (effective as from 1 January 2016), giving the Cypriot TA power to disregard artificial or fictitious transactions and to withhold the corporate tax exemption on dividends received by companies in Cyprus from elsewhere in the EU if the dividend is treated as a tax-deductible expense in the accounts of company paying it (so-called *'hybrid mismatches'*); such dividends will, instead, be taxed as normal business income at 12.5%.

back to table of contents

Austria	Belgium	Bulgaria	Croatia	Cyprus
	The Belgian law that implements this Directive deviates somewhat from the EU SAAR since it does not refer to the requirement that the arrangement should defeat the object and purpose of the Directive (objective component). The Belgian anti-abuse provision therefore seems to be broader. However, in a circular letter issued by the Belgian TA, this objective component was added as a separate condition.	1. any substantial excess of the quantities of raw and prime materials used as production inputs and other production costs over the customary quantities and costs for the activity carried out by the person, where any such excess is not due to objective reasons; 2. any contracts of loan for use or other gratuitous provision for use of tangible and intangible benefits; 3. any borrowing or lending at interest diverging from the arm's length rate of interest as applicable at the time of conclusion of the transaction, including in the cases of interest-free loans or other temporary gratuitous financial assistance, as well as the write-off of debts or repayment of debts not related to the activity for own account; 4. accrual of any remunerations or compensations for any services, which have not actually been performed. Where a transaction conceals another transaction, the tax liability shall be assessed under the terms of the concealed transaction.	a) the legal characteristics of the particular measures that make up the arrangement are inconsistent with the legal content of the arrangement as a whole; b) the arrangement or series of arrangements are carried out in a manner that would not otherwise be used in reasonable business conduct; c) an arrangement or series of arrangements include elements which have the effect of mutual setoffs or cancelations; d) the transactions performed are circular; e) the arrangement or series of arrangements give rise to significant tax benefits, but this is not reflected in the business risks incurred by the taxpayer or in its cash flows; f) an arrangement or series of arrangements created in the course of a group reorganization process that results in the transfer of expenses from the members of the company to the subsidiaries for which economic benefits for the company charged with those expenses cannot be substantiated.	

back to table of contents

Austria	Belgium	Bulgaria	Croatia	Cyprus
		By way of comparison, the following differences could be highlighted between the PSD GAAR and the rule under art.16 of the Bulgarian CITA. While the PSD GAAR targets only non-genuine arrangement(s) with the purpose of obtaining a tax advantage, the Bulgarian GAAR targets arrangements the implementation of which results in tax avoidance without a requirement for the purpose of the arrangements to be a tax advantage. Unlike the PSD GAAR, the rule under art.16 of the Bulgarian CITA also stipulates explicit specific cases that are considered as tax avoidance (as listed above under items 1-4), as well as an additional rule for concealed transactions.	Next to the GAAR provisions, Croatian CIT Law implemented the PSD GAAR by incorporating that the PSD provisions are not applicable if it is apparent that dividend or profit share payment has tax fraud or tax evasion as the main purpose or one of the main purposes. In addition, as Croatia applies participation exemption (i.e. non-taxation of dividend income), Croatian CIT Law also specifically defines the tax and legal status of the dividends and shares in profit by stating that: a) the payer of which is a profit taxpayer pursuant to the provisions of the Law, or a payer of an equivalent tax type, and b) the payer of which is an organisation with the legal form comparable to a limited liability company, company or another person whose legal form and accounting and taxation method is comparable to profit taxpayers pursuant to the Croatian Law; and c) that are not a tax-deductible expenditure or deductible for the payer.	

back to table of contents

Austria	Belgium	Bulgaria	Croatia	Cyprus
			When dividend and profit share revenues are generated from EU Member States, the conditions above are considered to be fulfilled if the payer is: a) a payer of one of the taxes for which the common taxation system is applied, valid for parent companies and associated companies in different EU Member States, pursuant to the list in the Annex which is an integral part of the Profit Tax Ordinance adopted by the Minister of Finance, and b) a company having one of the forms for which the common taxation system is applied, valid for parent companies and associated companies in different EU Member States, pursuant to the list in the Annex which is an integral part of the Profit Tax Ordinance adopted by the Minister of Finance, and c) a resident of an EU Member State pursuant to the law in that State and is not applied to non-residents outside of the EU, pursuant to international agreements for the avoidance of double taxation, concluded with non-Member States.	

1. Implementation of the PSD GAAR

France, Germany, Czech Republic, Denmark and Estonia

France	Germany	Czech Republic	Denmark	Estonia
The French amending Finance Law for 2015 has transposed the PSD GAAR within (i) art. 145-6-k of the French Tax Code (dealing with the French domestic participation exemption regime), and (ii) art. 119 *ter* of the French Tax Code (which transposed the EU PSD). This GAAR became effective as from 1 January 2016. However, art. 145-6-k of the French Tax Code was repealed and replaced as of 1 January 2019 by a GAAR applicable to corporate income tax and provided for in art. 205 A of the French Tax Code. This new article implemented in French law the provisions of art. 6 of ATAD1, and provides for a much broader scope than art. 145-6-K did as it applies to corporate income tax in general (*i.e.* including capital gains) and not only to dividends that fall within the participation exemption regime. Under art. 119 *ter* of the French Tax Code, dividends paid by a French company to its EU parent company (which must be the beneficial owner of the dividends) would not be eligible for the WHT exemption provided by the PSD if (i) such dividends are received as part of an arrangement or a series of arrangements put into place for the main purpose, or principal,	The GAAR provided by art. 1(2), (3) of the PSD GAAR has not been explicitly implemented in Germany. Neither the Federal government nor the Federal Ministry of Finance have published any official statement in this respect. It seems that, at least implicitly, the view has been taken that the domestic legislation which already existed at the time when PSD GAAR was passed did already meet the standard of this new GAAR. With regard to the obligations flowing from art. 5 of the PSD, i.e. the exemption of profit distributions made by subsidiaries resident in Germany from *'WHT'*, the relevant domestic provision is the anti-abuse rule in section 50d(3) of the PITA, which is considered as *lex specialis* in relation to the GAAR under section 42 of the General Tax Code. With respect to the obligations under art. 4(1)(a) of the PSD (for which Germany has opted in section 8b(1) of the German CITA, i.e. the exemption of profit distributions received by parent companies resident in Germany, no such *lex specialis* exists, so that abusive behaviour would have to be tackled on the basis of section 42 General Tax Code.	This has been subject to some discussions in CZ. The PSD GAAR was not specifically implemented in the CZ Income Tax Act, the legislature claiming that the anti-abuse principles had existed anyway based on the CZ (case) law (abuse of law doctrine coined by the CZ Supreme Administrative Court, largely inspired by the ECJ/CJEU, and substance over form rule expressly stipulated in the CZ Tax Procedure Code), i.e. even before the PSD GAAR was adopted.	Since 1 January 2015, the PSD GAAR has been implemented in Danish law by way of section 3 in the Danish Tax Assessment Act (i.e. the Danish GAAR). From 1 January 2015 to 31 December 2018, the wording of section 3 closely resembled the general anti-tax avoidance rules in the PSD the IRD, and the Merger Directive. However, as of 1 January 2019, the rule has been given a more general scope of applicability and thus, the wording has been amended slightly. In summarized form, the Danish GAAR, as it is currently worded, entails that an arrangement (or series of arrangements), which is (a) not entered into for commercial reasons reflecting the underlying economic reality, and (b) implemented for the primary purpose of obtaining, or one of the primary purposes of which is to obtain, a tax benefit which is against the purpose and intent of the Danish tax laws, should be disregarded for the purpose of calculating the Danish CIT (including WHT such as dividend WHT, etc.).	The PSD GAAR was first included in the Estonian national law on 1 November 2016. The respective clause was incorporated in the Income Tax Act. In general, the provision included in the national law followed the wording of the Directive. According to the provision, tax exemption shall not apply to a transaction or chain of transactions which are not genuine because its main purpose, or one of its main purposes, is to obtain a tax advantage. The respective provision was in force until 31 December 2018. With effect from 1 January 2019, Estonia has adopted the GAAR set out in ATAD1 in national legislation. The respective clause was added to the Income Tax Act. According to the provision, in the case of income tax, no account shall be taken of a transaction or chain of transactions the principal purpose of which, or one of the principal purposes, is to obtain a tax advantage which is contrary to the content or purpose of the applicable tax law or international agreement and which does not actually have regard to all the relevant circumstances.

back to table of contents

France	Germany	Czech Republic	Denmark	Estonia
of obtaining the benefit of such exemption, (ii) and, based on all relevant facts and circumstance, it appears that such arrangements are not genuine. In this respect, an arrangement (or series of arrangements) would not be genuine if not put into place for valid commercial reasons that reflect the economic reality. This article applies to outbound dividends and not to those falling within the domestic participation exemption regime. Before the transposition of the EU PSD GAAR into French law by the French amending Finance Law for 2015[1], art. 119 *ter* of the French Tax Code (already) provided for an anti-abuse provision where the EU parent company was controlled by non-EU residents. Such provision required EU parent companies controlled, directly or indirectly, by non-EU shareholders to justify that the ownership structure did not have as its main objective, or one of its main objectives, to obtain a WHT exemption in France. On 7 December 2017, the CJEU ruled in the *Eqiom* judgment (formerly Holcim)[2] that this GAAR was incompatible with EU law.			Accordingly, the provision also provides for the denial of benefits pursuant to the PSD if such benefits are the result of an arrangement not entered into for commercial reasons and with a purpose of obtaining a tax benefit.	With the adoption of the ATAD GAAR, the previously added provision of PSD GAAR became invalid. In so far as the wording of the above-mentioned provisions largely overlap and the scope of the provision subsequently added is wider, there was essentially no need for specific provision. Nevertheless, the principle foreseen in the PSD GAAR, is still valid in Estonia.

1 Article 29 of the French amending Finance Law for 2015 (#2015-1786) dated December 29, 2015.

2 CJEU, 7 Sept. 2017, Case C-6/16, Eqiom SAS (formerly Holcim France SAS) *Enka SA v. Ministre des Finances et des Comptes publics*,

back to table of contents

France	Germany	Czech Republic	Denmark	Estonia
The CJEU followed Advocate General Kokott's Opinion whereby by subjecting the exemption to such demonstration without the French TA being required to provide even *prima facie* evidence of fraud and abuse, this GAAR introduced a general presumption of fraud and abuse and undermined the objective pursued by the PSD. In other words, a GAAR that excluded categories of taxpayers from the WHT exemption in respect of dividend distributions provided by the PSD on the basis of general criteria and without the burden of proof being on the national TA went beyond the provisions of the PSD and therefore, was contrary to EU law. The French supreme administrative court followed the position of the CJEU[3]. By a decision dated 29 December 2015, the French Constitutional Council confirmed the current GAAR (transposed in art. 119 *ter* of the French Tax Code) complied with the French Constitution[4]. In a nutshell, the French PSD GAAR (set forth in Article 119 *ter* of the French Tax Code) only applies to outbound dividends whereas the GAAR introduced for CIT purposes (set forth in Article 205 A of the French Tax Code) also applies to inbound dividends and capital gains.				

3 CE, 25 October 2017, #366268 and 374836, Sté Cameron France & Sté Hlcom France and Sté Enka.

4 Cons. Const, 29 December 2015, #2015-726, DC.

back to table of contents

1. Implementation of the PSD GAAR

Finland, Greece, Hungary, Ireland and Italy

Finland

Finland implemented the PSD GAAR by including two new provisions in the Finnish Business Income Tax Act. The provisions, effective as of 1 January 2016, are fully in line with the wording in the PSD.

The Finnish PSD GAAR applies to dividends received from both Finnish resident and non-Finnish resident entities, but it does not apply to capital gains. In brief, the Finnish PSD GAAR holds that the benefits of the PSD regime are not granted (i.e. dividend is not exempted from tax) in the following circumstances:

1. an arrangement or a series of arrangements
2. having been put into place for the main purposes or one of the main purposes of
3. obtaining a tax advantage that defeats the object or the purpose of the PSD regime
4. is not genuine having regard to all relevant facts and circumstances.

According to the Finnish PSD GAAR, an arrangement or a series of arrangements is regarded as not genuine to the extent it is not put into place for valid commercial reasons which reflect economic reality.

Greece

Under the provisions of para. 2 of art. 8 of law 4378/2016, which is added as para. 40 to art. 72 of law 4172/2013 (Income Tax Code) and is in force from 1 January 2016 onwards, the PSD GAAR was incorporated in domestic law; the general rule adopted, that is the prohibition of tax abuse with respect to the PSD, concerning the common tax regime applicable to the parent and subsidiary companies of different Member States, adopted as counterbalance of aggressive tax planning practices and of prevention of the PSD abuse.

Specifically, the tax advantages of the exemption of intra-group dividends, interest and royalties (par. 1 and 2 of art. 48 and par. 1 of art. 63 Greek Income Tax Code) are not provided in an arrangement or a series of arrangements which, having been implemented for the main purpose or for one of the main purposes of obtaining a tax advantage preventing the object or the purpose of the current provision, are not genuine in relation to all the relevant facts and circumstances. An arrangement may include more than one stage or part.

Hungary

Hungary's WHT regime is not based on the PSD. According to domestic regulations Hungary does not levy WHT on dividends (and interest or royalties) paid to foreign entities irrespective of the location of the recipient or the degree of ownership.

Similarly, the participation exemption for dividends received by Hungarian entities is also not based on the PSD, as Hungary exempts all dividends received except for dividends from CFCs.

Therefore, so far, Hungary has not specifically implemented the PSD GAAR. However, Hungarian domestic legislation already contained GAARs which are in line with the new ATAD1 regulation having a similar GAAR wording as the PSD GAAR. In addition, likewise the PSD GAAR rules, the CITA's *'dividend'* definition provides that the received dividend shall not be considered as (tax exempt) dividend in the case the contributing party deducts the respective amount from its tax base as expenditure.

Ireland

The PSD has been implemented in Ireland in section 831 of the Taxes Consolidation Act 1997. Section 831 of the Taxes Consolidation Act was amended following the introduction of the PSD GAAR to include a wider-reaching anti-avoidance provision which provides that the PSD shall not apply to an arrangement where:

a. the main purpose (or one of the main purposes) of the arrangement is to obtain a tax advantage that defeats the purpose of the PSD; and
b. the arrangement is not genuine having regard to all the facts and circumstances.

The legislation provides that *'an arrangement or series of arrangements shall be regarded as not genuine to the extent that it is not put in place for valid commercial reasons which reflect economic reality'*.

Italy

Law 7 July 2016 no. 122 (European Law 2015-2016) implemented the PSD GAAR in Italy.

The implementation relies on a reference to the domestic GAAR provided for in in art. 10-bis of Law 27 July 2000, No. 212 (i.e. the Italian GAAR), which therefore applies as well in the context of the PSD.

Under the Italian GAAR an abuse of law may arise where all of the following conditions are present:

(i) one or more arrangements/transactions lack of "economic substance",
(ii) such arrangements/transactions, even if formally complying with the relevant tax rules, actually lead an "undue tax benefit" and
(iii) the "undue tax benefit" constitutes an essential effect of those arrangements/transactions.

Arrangements/transactions are deemed to lack of economic substance when they do not produce significant effects apart from tax advantages; a tax advantage is undue when its accrual defeats the object and purpose of the tax provisions or the principles of the tax system.

back to table of contents

Finland	Greece	Hungary	Ireland	Italy
No changes were made in respect of the Finnish dividend WHT exemption based on the PSD.	As for the application of this provision, an arrangement or a series of arrangements shall be deemed as non-genuine provided that it is not applicable for valid commercial reasons reflecting the current economic reality.			The GAAR recognizes the taxpayer's freedom to choose between different tax regimes and between different arrangements/transactions that bear different tax burdens, so long as these tax advantages are not undue. Arrangements/transactions that meet conditions under i), ii) and iii) above are not deemed to be abusive if they are justified by non-marginal sound non-tax reasons. Under the Italian GAAR, the Italian TA may disregard the abusive transactions for tax purposes. In particular, they may deny the tax benefits deriving from the application of the abused tax provisions and apply instead the tax regimes stemming from the avoided tax rules and principles. The Italian GAAR requires compliance with strict procedural requirements. In particular, the Italian TA are obliged to enter into a discussion with the taxpayer before issuing any tax assessment, so that the taxpayer may illustrate the non-tax that justify the arrangements/transactions challenged by the Italian TA.

back to table of contents

Finland	Greece	Hungary	Ireland	Italy
				The Italian TA must give evidence of the lack of economic substance and prove that undue tax benefits were essentially obtained from the arrangements/transactions. If the Italian TA fail to comply with the above procedural requirements or with the burden of proof, the tax assessment is regarded as invalid or void. It is further provided that the tax courts cannot apply the GAAR ex officio. Taxpayers may file an advance tax ruling application to ascertain whether the Italian TA consider that certain transactions constitute an abuse of law. The Italian GAAR applies to distributions made as from 1 January 2016. The introduction of the Italian GAAR has replaced the previously applicable anti-avoidance provision, contained in art. Art. 27-bis (5) of Presidential Decree No. 600/1973. Under such provision, parent companies, which were directly or indirectly controlled by one or more persons not resident of EU States, could benefit from the PSD WHT exemption on condition that they proved that they did not hold the participation in the Italian subsidiary for the exclusive or main purpose of benefitting from the regime at stake.

back to table of contents

1. Implementation of the PSD GAAR

Latvia, Lithuania, Luxembourg, Malta and the Netherlands

Latvia

As of 1 January 2018, a new CIT law entered into force, in which Latvia has implemented the PSD GAAR. The respective anti-avoidance provision states that the exemption from CIT for incoming dividends may be denied if the main goal of incorporation, existence of a company or a respective transaction is the use of the exemption. Thus, the dividend participation exemption shall not be granted if any of the involved parties is considered artificial.

In addition, as of 1 January 2013, Latvia has introduced local GAAR under which the Latvian TA should analyse the taxpayer's transactions not only based on their legal form, but also on the economic substance.

The participation exemption applies only if the dividends have not been deducted from the taxable income of the company distributing the dividends.

Lithuania

As of 26 March 2016, the PSD GAAR provisions were incorporated in the Lithuanian Law on CIT to combat the abuse and aggressive tax planning. According to these provisions, participation exemption intended for inbound and outbound cross-border dividends is not applicable for the structure or several structures if the main purpose, or one of the main purposes, for them is to obtain a tax advantage, which contradicts the object and the purpose of the PSD. If, after the assessment of the facts and circumstances of the specific situations, the Lithuanian TA discover that business structure or structures are not used for valid commercial reasons, reflecting the economic reality, they are considered to be artificial and the tax-free dividend exemption does not apply. The Lithuanian TA provide an official commentary on how this provision should be interpreted and applied in practice and lists exemplary criteria and circumstances which are taken into account when assessing whether the arrangement is artificial.

Luxembourg

Luxembourg incorporated the PSD GAAR in the provisions of the Luxembourg income tax law implementing the PSD exemption (i.e. in relation to dividend WHT exemption and in relation to dividends received or capital gains realized), effective as from 1 January 2016.

The Luxembourg PSD GAAR only applies to outbound and inbound dividends, but it does not apply to capital gains.

In addition, the PSD GAAR does not apply to the domestic participation exemption (on inbound/outbound dividends, liquidation distributions and capital gains). In the case the Luxembourg PSD regime is deemed not applicable because of the PSD GAAR, the taxpayer can still rely on the domestic exemption regime. In such case, the Luxembourg's GAAR, as analysed below may still apply.

Malta

Prior to the introduction of the PSD GAAR, Malta income tax law namely, art. 51 (2) (b) of the Income Tax Act Chapter 123 of the Laws of Malta already contemplated a general anti-abuse provision (as set out below) which is very similar to the ATAD1 GAAR and is of general application to income tax law in Malta. As from 20 November 2015, the Republic of Malta implemented the PSD as a result of which, an additional specific anti-abuse provision, mirroring the GAAR, was introduced namely that *'where, in the opinion of the Commissioner, a series of transactions is effected with the sole or main purpose of reducing the amount of tax payable in terms of this Act by any person by reason of the operation of this provision, such a person shall be assessable as if this provision did not apply and, for the purpose of this provision, a series of transactions shall mean any two or more corresponding or circular transactions carried out by the same person, either directly or indirectly, as the case may be'*.

Netherlands

As from 1 January 2016, the Netherlands implemented the PSD GAAR in its non-resident CIT rules by rewording these rules to bring them in line with the PSD GAAR. In this manner, the Netherlands levies in abusive situations Dutch non-resident CIT from corporate shareholders not tax resident in the Netherlands with a substantial interest in a Dutch tax resident entity. At the same time, the anti-abuse rules in relation to the entities set up as a Dutch cooperative were amended. In addition, as from 1 January 2018, the PSD GAAR has been implemented in the Dutch dividend WHT rules. The Dutch implementation of the PSD GAAR covers dividends distributed by and capital gains realized on shares in Dutch tax resident entities. The Netherlands did not implement the PSD GAAR for purposes of the participation exemption, as included in the resident CIT rules, in relation to dividends and capital gains realized by Dutch tax resident entities on shareholdings in entities based in and outside the Netherlands.

back to table of contents

Latvia	Lithuania	Luxembourg	Malta	Netherlands
			As regards the ATAD, art. 51 (2) (A) of the Income Tax Act was already in force prior to the introduction of the GAAR contemplated in ATAD, which has been implemented via art. 6 of ATAD Implementation Regulations, Subsidiary Legislation 123.187 of the Laws of Malta, (i.e. ATAD GAAR) to the introduction of the PSD. Such article contemplates a GAAR whereby the Commissioner for revenue may determine to further tax the taxpayer where *'any scheme which reduces the amount of tax payable by any person is artificial or fictitious'*. As reiterated by various local Maltese tax practitioners, the ATAD GAAR as contemplated in the said regulations is quasi indistinguishable from the Income Tax Act GAAR mentioned above. From the above, it would appear that there is no substantial difference between the ATAD GAAR and the GAAR rule contemplated in art. 51 (2) (A) of the Income Tax Act in practice and that Malta's laws were in line with EU's train of thought before the introduction of the ATAD provisions.	In brief, the PSD GAAR holds that there is no abuse and hence, in principle, no taxation under the Dutch non-resident CIT rules and the dividend WHT rules if: (i) The shares in the Dutch entity are not held with the main purpose, or one of the main purposes, to avoid taxation due by another individual or entity (the Principal Purpose Test, i.e. the PPT); and/or (ii) The holding of the shares in the Dutch entity is not part of an artificial arrangement or transaction (or a series of artificial arrangements or composite of transactions), which will be the case if there are valid business reasons reflecting economic reality (the Business Reasons Test).

1. Implementation of the PSD GAAR

Poland, Portugal, Romania, Slovakia and Slovenia

Poland

Poland implemented the PSD GAAR to the Polish CITA provisions via amendments that entered into force on 31 December 2015, and are applicable in principle to the income derived as from 1 January 2016. The Polish PSD GAAR rules (in Poland treated as SAAR) relate to cross-border and domestic inbound and outbound dividends as well as to other revenues from shares in legal persons' profits.

Regarding the payments in respect of which the Polish companies acts as tax remitters, the exemption (besides the dividends) applies in general only to:

- dividends; and
- the amounts intended for the increase of the share capital of a company (constituting e.g. profits or amounts allocated on share on share premium) and to the undistributed profits in a company under transformation.

On the other hand, in relation to the Polish taxpayers earning the revenues from non-Polish subsidiaries the exemption is broader and covers all revenues actually obtained from shares in participation in profits of legal persons (except for liquidation proceeds).

Portugal

Portugal included the PSD GAAR in its provisions governing the participation exemption regime (for inbound dividends) and the domestic dividend withholding exemption regime (for outbound dividends, effective as from March 2016.

No similar provision has been foreseen in respect of the participation exemption regime applicable to capital gains derived by Portuguese companies with the sale of shareholdings in foreign entities.

Under the PSD GAAR (as transposed into the Portuguese tax law), neither of the referred regimes should be applicable in the case of arrangements or series of arrangements comprising one or more steps and which, having been put in place for the main purpose or as one of its main purposes of obtaining a tax advantage that thwarts the goal of avoiding double taxation, are not genuine having regard to all relevant facts and circumstances. For this purpose, an arrangement or a series of arrangements should be regarded as not genuine to the extent that they are not put into place for valid commercial reasons that reflect economic reality.

Romania

Starting from 1 January 2016, the Romanian Fiscal Code now includes the PSD GAAR. This rule was implemented exactly as formulated in the Directive.

The PSD GAAR applies to dividends paid/received by Romanian entities to/from companies resident in other EU member states. It does not apply to the participation exemption applicable to dividends payable between Romanian entities.

Slovakia

The PSD GAAR has been implemented into the Slovak Income Tax Act as from 1 January 2016, as a literal transposition of the wording in the PSD. The PSD GAAR in the Slovak law, thus, reads that

(1) If the taxpayer receives a profit distribution based on a measure or multiple measures which cannot be considered as real for the purposes hereof considering all related facts and circumstances and the main purpose, or one of the main purposes thereof is to gain advantage for the taxpayer in conflict with the subject-matter or purpose of this Act, such profit distribution shall become subject to tax. The measure under the first sentence may consist of several measures, or parts thereof.

(2) For the purposes hereof, the measure under subsection 1 shall not be deemed real to the extent it is not taken based on proper business reasons corresponding to the economic reality.

Slovenia

The GAAR in the PSD GAAR was implemented in the Slovenian CITA in 2015, and can be found under art. 24(6) and art. 71(6) CITA (in which the former refers to WHT and the latter to income tax benefits). However, neither of the two articles present a copy paste operation with respect to the PSD GAAR, but rather they fit into the pre-existing domestic general system of the *'substance over form'* principle. The cornerstone of the aforementioned principle is art. 74 of the Slovenian Tax Procedure Act, which sets out four basic anti-abuse premises:

(i) If a certain act leads to economic consequences, even if it constitutes a violation of a law, which prohibits or imposes a certain action, it shall not affect taxation.

(ii) If a legal transaction is not valid or becomes invalid, this shall not affect taxation, if the economic consequences of the invalidated legal transaction arise and persist regardless of its invalidity, unless otherwise provided by taxation legislation.

(iii) If a fictitious legal transaction conceals another legal transaction, the taxation shall take account of the concealed legal transaction.

back to table of contents

Poland	Portugal	Romania	Slovakia	Slovenia
Under the provisions of PSD GAAR in its current wording (binding from 1 January 2019), it is considered that the CIT / WHT exemption should not apply provided that the use of the exemption was: 1) contrary, in given circumstances, to the subject or intention of the provisions; 2) the main or one of the main purposes of effecting a transaction or other act or many transactions or other acts, whereas the mode of action was artificial. The mode of action is not artificial if, based on the existing circumstances, it shall be assumed that the subject acting in a reasonable manner and guided by lawful objectives would apply this mode of action predominantly for justified economic reasons. The reasons referred to in the first sentence do not include a goal of enjoying the exemption set out in the provisions of the exemption contrary to the subject or intention of those provisions. It should be noted that the current wording of the PSD GAAR provisions differs from the original form of the regulation as at the moment of the implementation (point 2 below).			Nevertheless, the application of the PSD GAAR in the Slovak context is rather peculiar, because under the Slovak Income Tax Act, dividends (both inbound and outbound) distributed to legal entities are not subject to income tax, unless (i) they are considered a tax-deductible expense of the distributing taxpayer (this is never the case with Slovak companies), or (ii) they are distributed to or by a taxpayer of a non-cooperative jurisdiction (no EU Member State is currently deemed a non-cooperative jurisdiction and such situation seems rather unlikely). In practice, that means that there is no space for the application of the PSD or the PSD GAAR as intercompany distributions of profits are not subject to tax in Slovakia as a deliberate choice of the national legislature.	(iv) The avoidance or misuse of other regulations shall not be used to circumvent regulations on taxation. In the event of establishing avoidance or misuse, it shall be deemed that a tax liability has arisen that would arise by taking into account relations arising from economic events. The wording and the underlying basic principles have to be kept in mind when assessing art. 24(6) and 71(6) CITA, since the first part of sentence of that article is a direct referral to art. 74 Tax Procedure Act: *'The benefits under this article are not granted to taxpayers in circumstances described under art. 74 of TPA (…).' The second part of the sentence directly corresponds to the wording of art. 1 of the PSD GAAR: '(…) or for an arrangement or series of arrangements in which the main or one of the main purposes is to obtain tax benefits, wherein the non-recognition of the benefits may refer to only one step or part of the arrangement.'* Therefore, under the wording of art. 24(6) and 71(6) CITA a denial of the benefits under the PSD, may be based either by reason of one of the rules under art. 74 Tax Procedure Act or by way of a disingenuous arrangement.

1. Implementation of the PSD GAAR

Spain, Sweden, Switzerland and the the United Kingdom

Spain	Sweden	Switzerland	United Kingdom
Spain did not amend its legislation because of the implementation of PSD GAAR. Apparently, this is explained by the fact that the Spanish General Tax Act includes a GAAR able to tackle the artificial arrangements covered by the PSD GAAR. Unlike other directives, the European Commission has not started any infringement procedures due to failure to implement the PSD GAAR. As explained below, Spanish legislation also includes a SAAR in art. 14.1.h) of the Non-Resident Income Tax Act, aimed at tackling the PSD shopping cases. However, to the extent this rule had existed long before the PSD GAAR was enacted, and it only applies under specific circumstances, it is reasonable to conclude that it is grounded on the general capacity of EU Member States to include domestic provisions required for the prevention of tax evasion, tax fraud or abuse (art. 1.4 of the PSD), and it is not the implementation of the PSD GAAR as such.	The Swedish WHT Act contains an anti-avoidance provision applicable to WHT. Under this provision, WHT may be imposed on a person that holds Swedish shares under such circumstances that another party is thereby afforded an undue relief from WHT. If the provision applies, WHT at a rate of 30% can thus be imposed on a person who normally should not be subject to WHT or on a person who normally is subject to a reduced rate. Whether or not the anti-avoidance provision of the Swedish WHT Act is applicable must always be analysed on a case by case basis depending on the specific circumstances of each individual case. The anti-avoidance provision of the Swedish WHT Act existed prior to the PSD and the Swedish legislature stated that the existing provision fulfilled the requirements of the PSD GAAR and thus, did not need to be amended to implement the PSD GAAR. However, a specific rule was introduced in the Swedish WHT Act stating that the existing anti-avoidance provision in the Swedish WHT Act overrules any exemptions from WHT stated in the Swedish WHT Act (for example, exemptions based on the PSD regime).	Given that Switzerland is not an EU Member State, the GAAR in the PSD is not applicable to Switzerland. However, the Swiss Federal Supreme Court has through the years, developed a general principle of anti-abuse rule, applicable to all Swiss taxes. According to these rules, Swiss TA may tax the taxpayer's legal structure based on its economic substance, in certain situations. Switzerland has ratified the MLI and will apply the principle purposes test MLI PPT. However, this concept is not new to Swiss tax law and practice, as the Swiss Federal Supreme Court has recognized that every Swiss Double Tax Agreement contains an implicit anti-abuse rule which is conceptually similar to the MLI PPT.	The PSD has much less impact on payments made by UK companies than it does in most other Member States. This is because the UK does not impose a dividend WHT under its domestic law, so there is no WHT to which the PSD could apply. It follows that it is similarly academic, from the perspective of a UK company paying a dividend to its parent company, whether the conditions of a GAAR would be met in relation to dividend payments. For comparison, the UK does have a GAAR under its domestic law which applies to most UK taxes. This legislation was set out, following the recommendation of the Aaronson Report published in November 2011, in the Finance Act 2013. The threshold for the UK domestic GAAR to apply is likely higher than the GAAR in the PSD, because, as well as a purpose test, the UK GAAR will apply only if the course of action adopted by the taxpayer cannot reasonably be regarded as a reasonable course of action in the context of the relevant provisions (known as a *'double reasonableness'* test).

Spain	Sweden	Switzerland	United Kingdom
	Thus, if both an exemption and the anti-avoidance provision is applicable, the anti-avoidance provision should be given priority and WHT will be imposed on the dividend. In addition to the anti-avoidance provision in the Swedish WHT Act, there is a Swedish GAAR in the Tax Avoidance Act (1995:757). This GAAR has, subject to some amendments, existed since 1980 and thus, there is very extensive case law related to it. The GAAR is not applicable to WHT (i.e. Swedish companies giving dividends). However, the GAAR might be relevant to consider as regards a Swedish corporation receiving tax exempt dividends, if the arrangement is set up to entail a substantial tax benefit.		

2. Legislative developments that may lead to amendments to the existing legislation in the near future

Austria, Belgium, Bulgaria, Croatia and Cyprus

Austria	Belgium	Bulgaria	Croatia	Cyprus
Austria has implemented an anti-abuse rule in section 22 of the Austrian Federal Fiscal Code, serving as a typical GAAR. Its latest amendment valid as from 1 January 2019, complements the GAAR with an in-depth clarification for the definition of abuse to be in accordance with art. 6 of ATAD1 as well as consistent case law. Further, in the context of the application of the PSD regime, a relevant legislative development took place within the Austrian CITA (section 10a of the Austrian CITA). Applicable as from 1 January 2019, income from subsidiaries based in low tax jurisdictions is taxable in Austria by applying a CFC rule.	In addition to the PSD GAAR, Belgium is availed of a GAAR. The GAAR was amended in 2012 and is inspired by the Court's case law prohibiting abusive practices. The Belgian legislature, therefore, considered that this GAAR already meets the requirements of the ATAD and no further amendments were needed. The question remains nonetheless whether the Belgian GAAR is entirely in line with the ATAD. It is, however, expected that the Belgian GAAR will be interpreted in accordance with the ATAD and future CJEU case law on this topic. Pursuant to art. 344, §1 Income Tax Code, the Belgian TA can disregard a legal act or a series of legal acts if they demonstrate that fiscal abuse has been committed. The notion of *'fiscal abuse'* has an objective and a subjective component. The objective component is present if the taxpayer either (i) avoids the application of a provision of the Income Tax Code or its Decree of execution in a way that is incompatible with the provision's objectives or (ii) claims that the application of a provision of the Income Tax Code or its Decree of execution confers a tax benefit that is incompatible with the provision's objectives.	There are no other relevant legislative developments in Bulgaria in respect of the PSD GAAR, which may lead to amendments to the existing legislation in the near future.	There are no relevant legislative developments in Croatia in the context of the PSD regime.	On 5 April 2019 the House of Representatives approved legislation implementing the ATAD in Cyprus with the aim of improving the resilience of the internal market against cross-border tax avoidance practices. The provisions relating to interest deductibility, CFC rules and the GAARs came into effect on 1 January 2019, while the provisions relating to exit taxation and countering hybrid mismatches are applied retrospectively as of 1 January 2020 following the Official publication in the Official Gazette on 3 July 2020 of the relevant implementing legislation. Transactions which are not carried out for valid commercial reasons will give rise to tax liability, which will be calculated in accordance with income tax law. Cyprus already incorporates within its tax legislation numerous anti-abuse rules such as the recently amended Article 33 of the Income Tax Law. It is expected that relevant articles within the legislation will be amended and enhanced to provide greater and specific powers to the Inland Revenue director to disregard non-genuine arrangements which have no valid commercial reason that reflect economic reality. The GAAR will apply only to corporate transactions.

back to table of contents

Austria	Belgium	Bulgaria	Croatia	Cyprus
	The subjective component refers to the fact that the essential objective behind the taxpayer's choice of legal act(s) was to obtain a tax benefit. If an abuse of tax law has been established, the taxpayer must prove that there were underlying reasons for his or her act(s), other than to avoid paying income tax. In the event that the taxpayer cannot provide this counterproof, the Belgian TA must correct the taxpayer's taxable base. In doing so, the transaction will be subject to tax, in accordance with the objectives of the law, as if the abuse had not taken place. The GAAR is a last resort for the Belgian TA. The PSD GAAR, therefore, thus prevails over the GAAR. Although it can be expected that both GAAR's will be interpreted in a similar manner, their effects may be different. Following the signing and ratification of the MLI by Belgium, the MLI PPT will be included in most of the Belgian tax treaties. Although no guidance is available, it is expected that Belgium will interpret the MLI PPT in the same way as the GAAR and PSD GAAR.			On 22 January 2020, the MLI, together with the positions of Cyprus and an explanatory statement, were published in the Official Gazette of the Republic. Cyprus approved the minimum actions as prescribed by the MLI to include Action 7 (Treaty Abuse). Art. 7 contains a general anti-abuse rule based on the PPT. It also contains an option to supplement the PPT with a simplified limitation on benefits (LOB) provision. The majority of signatories to the MLI, including Cyprus, have opted for the PPT clause only. Cyprus has not made any notification as regards the adoption of the LOB provision. The PPT effectively acts to deny treaty benefits if it is determined that the principal purpose of an arrangement, or transaction, was to obtain the treaty benefit. Persons to whom a treaty benefit is denied under the PPT may still be able to claim a treaty benefit if they can establish that obtaining the benefit would be in line with the object and purpose of a specific treaty provision (objective test). Cyprus has chosen to apply art. 7(4) of the MLI, in cases where the competent authority determines that such benefits would have been granted in the absence of the transaction or arrangement.

back to table of contents

2. Legislative developments that may lead to amendments to the existing legislation in the near future

France, Germany, Czech Republic, Denmark and Estonia

France	Germany	Czech Republic	Denmark	Estonia
Prior to the application of the PSD regime, GAAR provisions existed earlier in French law (laid down in art. L.64 of the Tax Procedure Code, art. 209 B of the French Tax Code, and former art. 119 ter of the French Tax Code as mentioned above) and were developed by long-standing case law. Where relevant, such rules have been amended in order to comply with the EU legislation. In addition, it should be noted that a new GAAR provision has recently been introduced under art. L. 64 A of the Tax Procedure Code (entering into force as from 1 January 2021 and applicable to arrangements carried out as from 1 January 2020). Pursuant to this new GAAR, the French TA will be entitled to disregard any legal arrangement which *'seeks to benefit from a literal application of legal provisions or decisions in contradiction with the objective set forth by the author of such provisions and, thus, motivated by the principal purpose of avoiding or alleviating the tax burden of the taxpayer'*. There are two main differences with the GAAR provision set forth in art. L. 64 of the Tax Procedure Code: the arrangement must be principally tax-driven (i.e. not exclusively) and sham arrangements are not targeted.	Neither the ATAD1 nor the ATAD2 have yet been transposed into German domestic law, which is why on 24 January 2020, the Commission sent a letter of formal notice to the German government. Draft legislation has been prepared by the Federal Ministry of Finance (last version of 24 March 2020), but no official legislative proposal has yet been tabled by the German government. The existing draft does not include a provision for the transformation of the GAAR provided by art. 6 of the ATAD 1. Again, there is no explicit official explanation available for this, probably because it is being assumed that section 42 General Tax Code already meets the standard of art. 6 ATAD1.	Recently (April 2019), a compulsory notification about tax-exempt income (including dividend) pay-out from CZ abroad was introduced (if exceeding CZK 100,000 (ca. EUR 3,675)). A bill proposing WHT on dividend payments to parent companies outside the Czech Republic has been proposed. However, as this rather *'populist'* proposal probably does not comply with the PSD, no impact on the legislation is expected. See also the answer to question 6.	As briefly mentioned above, the applicability of the Danish GAAR was amended with effect from 1 January 2019. Prior to this date, the rule solely denied benefits pursuant to certain EU directives. Following the amendment effected as of 1 January 2019, the Danish GAAR in principle covers all arrangements, which are not entered into for commercially valid reasons reflecting the underlying economic reality, and are implemented for the primary purpose of obtaining, or one of the primary purposes of which, is to obtain, a tax benefit which is against the purpose and intent of the Danish tax laws. The GAAR, however, is limited to corporate tax (i.e., VAT, duties and personal income tax is generally not comprised). As an exception to this, individuals may be affected by the rule if they are indirectly affected by a disregarded arrangement. For instance, if an individual is a minority shareholder in a corporate entity being disregarded under the Danish GAAR, such individual may be taxed on a basis disregarding the corporate entity.	Other than the previously described developments, there have not been any developments in Estonia regarding the application of the PSD regime. In addition, no possible amendments are expected in the near future.

France	Germany	Czech Republic	Denmark	Estonia
In addition, as mentioned above, art. 48 of the Finance Bill for 2019 transposed the GAAR within article 6 of the ATAD into French law (art. 205 A of the French Tax Code). It only applies for CIT purposes and for fiscal years commencing on or after 1 January 2019. The wording of this GAAR is similar to that of the EU PSD GAAR given that an arrangement and/or a structure would not be taken into consideration for corporate income tax purposes if: (i) such arrangements are part of an arrangement or a series of arrangements put into place for the main purpose, or principal, of obtaining the benefit of a tax advantage that defeats the object or purpose of the applicable tax law, and, (ii) based on all relevant facts and circumstance, it appears that such arrangements are not genuine. In this respect, an arrangement (or series of arrangements) would not be genuine if not put into place for valid commercial reasons that reflect the economic reality.				

back to table of contents

France	Germany	Czech Republic	Denmark	Estonia
Finally, the MLI was signed by France and entered into force as from 1 January 2019 as far as France is concerned. This results in the inclusion of an MLI PPT in tax treaties falling within the scope of the MLI. In a nutshell, the various French GAARs (with the exception of the regime set forth in art. L. 64 of the Tax Procedure Code) are based on a PPT (and not an exclusive purpose test).				

back to table of contents

2. Legislative developments that may lead to amendments to the existing legislation in the near future

Finland, Greece, Hungary, Ireland and Italy

Finland	Greece	Hungary	Ireland	Italy
Implementation of the ATAD has led to a number of legislative developments in Finland. ATAD has introduced a set of rules (GAAR, interest limitation, CFC, exit taxation and hybrid mismatch rules) which have been incorporated into Finnish tax legislation. In addition to the PSD GAAR, Finland is availed of a GAAR and a SAAR set out in the Merger Directive. It should be noted that Finland did not separately amend the GAAR based on ATAD as the existing Finnish regime was deemed sufficient and in line with ATAD. Notwithstanding the existing anti-tax avoidance regime, implementation of the PSD GAAR was deemed reasonable in order to ensure that the Finnish legislation was fully in line with the wording in the PSD. The relationship between the three anti-tax avoidance provisions is somewhat ambiguous. However, it is deemed that the PSD GAAR should be interpreted strictly due to its position as a special provision.	Art. 38 of Law 4174/2013 was amended for the purpose of compliance with Art. 6 of ATAD1. Art. 38, prior to its amendment, was a direct transfer into domestic tax law of the general anti-abuse clause of European Commission with regard to the Establishment of Aggressive Tax Planning. According to the explanatory memorandum of law, a GAAR is included in tax systems in order to prevent tax abusive practices that are not dealt by special provisions (paragraph 11 of the Directive). Therefore, the GAAR aims to fill in gaps, without affecting the application of special rules against abuses (i.e. provision of controlled foreign companies (CFC), anti-abuse rule of the PSD Directive etc). The new GAAR rule, which adopts ATAD1 and is in force from 1 January 2019 onwards, foresees that the Greek TA shall ignore any arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object, or the purpose of applicable tax law, are not genuine, having regard to all facts and circumstances.	The last amendment of the Hungarian GAAR took place upon the implementation of ATAD as of 1 January 2019 (see answer to question 1). We are not aware of developments that may lead to amendments to the existing legislation in the near future.	In addition to the PSD GAAR, Ireland also has general anti-abuse rules contained in section 811C of the Taxes Consolidation Act. These anti-abuse rules were deemed to be sufficiently robust to comply with the ATAD. It is not currently envisaged that there will be any amendments to these provisions in the near future. In relation to the PSD regime more generally, there have not been any other relevant legislative developments in Ireland in the context of its application, and there are no developments that may lead to amendments to the existing legislation in the near future.	In addition to the amendments illustrated under § 1, the European Law 2015-2016 also implemented Directive 2014/86/EU. In particular, art. 89 of the Income Tax Code (Decree 22 December 1986, n.917) was amended to ensure, for inbound distributions qualifying for the application of the PSD, the application of the 95% exemption regime to the part of those distributions that has not been deducted from the tax base of the distributing company. In addition, art. 27-bis of Presidential Decree 29 September 1973 no. 600 was also amended to ensure, for outbound distributions qualifying for the application of the PSD, the application of the WHT exemption to the part of the dividends which has not been deducted from the tax base of the distributing company. These amendments apply to profits distributed as from 1 January 2016. At present, we are not aware of any developments that may lead to further legislative developments.

Finland	Greece	Hungary	Ireland	Italy
	It should be noted that for the interpretation of the above provision, the relevant case law of the CJEU and the Commission Recommendation 2012/772/EU must, in supplement, be taken into account. Therefore, the aforementioned provision of art. 38 as amended and currently in force, is applicable in parallel with the domestic PSD GAAR.			

back to table of contents

2. Legislative developments that may lead to amendments to the existing legislation in the near future

Latvia, Lithuania, Luxembourg, Malta and the Netherlands

Latvia	Lithuania	Luxembourg	Malta	Netherlands
There are no additional relevant legislative developments in Latvia in the context of the application of the PSD regime or may lead to amendments to the existing legislation in the near future.	In addition to the PSD GAAR, Lithuania is availed of a GAAR. With effect from 1 January 2019, Lithuania transposed the GAAR provided into the ATAD to the Lithuanian Law on the CIT. This rule foresees that when calculating the CIT, an arrangement or a series of arrangements must be disregarded, if the main purpose, or one of the main purposes, of such arrangement is the obtaining of a tax advantage. An arrangement or a series of arrangements are considered as artificial if they are not put into place for valid commercial reasons, reflecting the economic reality.	In addition to the PSD GAAR, Luxembourg is availed of a GAAR. The GAAR was amended in the context of the implementation of ATAD as of 1 January 2019, whereby (i) the scope of the GAAR has been broadened, as abuse will also be possible in relation to public law; and (ii) the text emphasizes the economic rationale of a transaction. Case law based on the old Luxembourg GAAR remains relevant. Four criteria must be cumulatively fulfilled for an abuse of law to be recognized: (i) the use of legal forms and institutions of private law; (ii) a tax saving through the circumvention or reduction of the tax burden; (iii) the use of an inappropriate path (i.e. obtaining an advantage against the intention of the legislature, but at the same time taking into account the right of the taxpayer to choose the least taxed solution); and (iv) the absence of valid non-tax reasons justifying the use of the chosen path.	Malta has adopted the MLI via subsidiary legislation 123.183 of the Laws of Malta, whereby the PPT has been included in most Maltese treaties in place in order to combat the use of treaties without creating opportunities for non-taxation or reduced taxation through tax-evasion or avoidance. Otherwise, Malta has adopted various GAARs to specific exemptions contemplated within the Income Tax Act Chapter 123 of the Laws of Malta.	In addition to the PSD GAAR, the Netherlands is availed of an abuse of law doctrine as developed in long-standing case law. Because of this abuse of law doctrine, the Netherlands did not separately implement the GAAR as laid down in the ATAD as the Netherlands were of the view that the abuse of law doctrine has the same goal and scope. Hence, the implementation and interpretation of the GAAR as laid down in the ATAD is not aligned with the PSD GAAR and would not have an effect on the interpretation of the PSD GAAR. Following the signing and ratification of the MLI by the Netherlands, the MLI PPT will be included in most of the Dutch tax treaties. The Netherlands has indicated that it will, in principle, interpret the MLI PPT in the same way as the Dutch implementation of the PSD GAAR. Hence, after entry into force of the MLI PPT, tax treaty protection would be denied in cases where the PSD GAAR, as implemented in the Dutch anti-abuse rules, is applicable.

back to table of contents

Latvia	Lithuania	Luxembourg	Malta	Netherlands
		With regard to the burden of proof it is, in principle, for the Luxembourg TA to demonstrate that the constitutive elements of abuse of law are met. However, this allocation of the burden of proof cannot entail that the Luxembourg TA would have to prove the impossibility of an economic justification of the structure used. Instead, the Luxembourg TA must make the absence of an economic justification plausible. Therefore, the burden of proof shifts from the Luxembourg TA to the taxpayer as soon as the Luxembourg TA have shown, on the basis of a body of evidence, that the four conditions of abuse are likely met. The taxpayer must then establish the economic rationale for the chosen path. These economic reasons must be real and must entail a sufficient economic advantage that goes beyond the tax advantage obtained.		

2. Legislative developments that may lead to amendments to the existing legislation in the near future

Poland, Portugal, Romania, Slovakia and Slovenia

Poland	Portugal	Romania	Slovakia	Slovenia
Poland introduced several important changes related to the PSD GAAR on 1 January 2019, including amendments to the wording of the PSD GAAR provisions themselves. The first major change consisted in replacing the phrase *'conclusion of a contract or performing another act in law, or a number of interrelated acts in law'* by *'effecting a transaction or other act or many transactions or other acts'*. The wording of *'effecting a transaction'* is a concept that is significantly broader than the *'conclusion of a contract'*, as well as staying closer to the *'arrangements'* referred to in the PSD. Before 1 January 2019, application of the PSD GAAR also depended on whether obtaining an exemption had not only resulted in the elimination of double taxation of income (revenues). In other words, the application of the PSD GAAR leading to the exclusion of the tax exemption was only possible in a situation where obtaining the exemption also had other effects besides eliminating double taxation of income (revenues). The ambiguity of the provision in its previous wording made the application of the PSD GAAR very difficult in practice and its amendments has facilitated this.	In addition to the PSD GAAR, Portugal is availed of a GAAR, which was recently amended in the context of the implementation of the ATAD. Under this GAAR, arrangements or series of arrangements comprising one or more steps and which, having been put in place for the main purpose, or as one of its main purposes, of obtaining a tax advantage that thwarts the purpose or goal of the applicable legal rules, are carried out by way of abuse of the legal regimes or are otherwise not deemed to be genuine (considering all the underlying fact patterns), are disregarded for tax purposes, meaning that the intended advantages shall not apply and the taxation shall be imposed on the economic reality underlying the situation at hand, regardless of the arrangements or series of arrangements. In similar terms to the PSD GAAR, an arrangement or a series of arrangements should be regarded as not genuine to the extent that they are not put in place for valid commercial reasons that reflect economic reality.	In addition to the PSD GAAR, as of 1 January 2018, Romania implemented the general anti-abuse rule provided by the ATAD. Upon signing MLI, Romania adopted the provisions concerning the PPT.	The Slovak Income Tax Act has been in effect since 1 January 2004 (i.e. before the accession of Slovakia to the European Union) and since then, the dividend distributions have not been subject to income tax in Slovakia. Though tax on dividends distributed to individuals was re-introduced as from 1 January 2017, no tax was introduced or contemplated with respect to legal entities (the measures discussed above may be regarded more as anti-abuse and anti-tax haven measures). Only recently, a new government has been formed and its programme does not include any plans for re-introduction of tax on dividends with respect to legal entities.	As indicated above, the Slovenian system of anti-abuse rules does not present itself as a particularized system of individual rules, but rather presents a unified whole. With that perspective taken into account, it should follow that the general anti abuse rule under the ATAD implemented into CITA under art. 2a, additionally constrained the option of abuse under whichever provision, which would grant any sort of tax benefit to a tax payer under CITA. With respect to the PSD this notion has been expedited, as art. 2a specifically provides for the refusal of rights of the exemption of WHT in cases of non-genuine arrangements. Nevertheless, the rules provided under the ATAD GAAR do not substantively change the notion nor the prerequisites for abuse.

back to table of contents

Poland	Portugal	Romania	Slovakia	Slovenia
Moreover, as from 1 January 2019, the PSD GAAR provisions cannot be the subject of the application for an individual tax law ruling. At the same time, the Polish CITA introduced the provisions allowing a taxpayer or a tax remitter to obtain an opinion on the taxpayer's possibility of applying the CIT exemption on dividends paid and some other revenues from shares in profits of legal persons. This opinion, however, cannot be issued if it can be reasonably assumed that the PSD GAAR can be applied. In view of the above, in the legal status effective from 1 January 2019, the opinion on the application of the exemption may constitute an institution allowing (to a certain extent) to secure the tax consequences of payments made to non-residents using the above-mentioned exemptions. It should also be noted that as of 1 January 2019, the PSD GAAR application conditions have changed in such a way that it is currently similar to the GAAR (except for the aforementioned principles, Poland is also availed of a general anti-abuse rule – GAAR).	Finally, in respect of pending developments, one should note that Portugal has transposed the ATAD2 with respect to hybrid mismatches.			

back to table of contents

Poland	Portugal	Romania	Slovakia	Slovenia
The GAAR was included in the national tax provisions as of 15 July 2016 and pursuant to this regulation, the Polish TA are able to deny a tax benefit if, in principle, it was performed primarily in order to achieve a tax advantage in defiance in given circumstances of the object and purpose of a tax act, when the manner of acting was artificial. It should also be emphasized that the amendment to the Polish CITA of 1 January 2019 repealed the provision according to which, GAAR could not be applied if the application of PSD GAAR allowed to counteract tax avoidance. Thus, currently the use of PSD GAAR does not preclude the use of GAAR. Consequently, analogies should be expected in the PSD GAAR and GAAR interpretations and therefore, also similarities in the judgments of the administrative courts in these areas. Bearing in mind that Polish regulations provide for the possibility of obtaining from the tax authorities the so-called securing opinion (confirming that GAAR is not applicable in a given case) such opinions may, in our view, also be issued in the future in relation to the situations (exemptions) to which the PSD GAAR apply.				

back to table of contents

Poland	Portugal	Romania	Slovakia	Slovenia
Besides the PSD GAAR, the Polish CITA also contains other important specific anti-abuse regulations according to which, the tax neutrality of mergers, divisions, exchange of shares or In-kind contributions performed under certain conditions can be questioned provided that the main or one of the main purposes of these activities is tax avoidance or tax evasion. On the basis of the Polish CITA, if such activities were not carried out for well-grounded economic reasons, it shall be presumed, for the purposes of the aforementioned specific anti-abuse regulations that the main or one of the main purposes of these acts is tax avoidance or tax evasion. It is also worthy of note that when issuing a decision on the PSD GAAR, the GAAR or specific anti-abuse regulations regarding the aforementioned restructuring activities, the Polish TA at the same time impose an additional tax obligation. The amount of such additional tax liability may be set at 10% - 40% of taxable income not recognised in full or in part in the scope resulting from such decision and in some cases these amounts may be even doubled.				

back to table of contents

2. Legislative developments that may lead to amendments to the existing legislation in the near future

Spain, Sweden, Switzerland and United Kingdom

Spain	Sweden	Switzerland	United Kingdom
There are no other legislative developments in the context of the application of the PSD regime. However, two pieces of the domestic anti-abuse legislation are relevant for the application of the PSD regime. First, the current GAAR framework in the General Tax Act includes the following: (i) Proper characterization of transactions (art. 13), which establishes that tax obligations are due according to the juridical nature of the transaction, regardless of the form or name used by the parties involved or any issue that could affect its legal validity. (ii) Conflict in the application of the tax rule (art. 15), which prevents taxpayers from obtaining a tax benefit through transactions that (i) individually or jointly considered, are notoriously artificial or improper for the outcome obtained; and (ii) do not give rise to relevant legal or economic effects, apart from the tax benefit and those that the usual or proper transactions would have created.	The Swedish legislature considered the PSD regime already incorporated in the Swedish legislation through the abovementioned anti-avoidance provision together with the already existing rules for business related shares under which dividends on such shares are tax exempt. A proposal for new rules on dividend WHT was presented on 29 April 2020. The proposal includes a complete revision of the current rules which are proposed to enter into force on 1 July 2022, and apply to dividends distributed after 30 June 2022. It is, inter alia, proposed that the dividend WHT should be subject to the general anti-avoidance legislation we have in Sweden, rather than the current specific anti-avoidance provision. The legislative process is still in a relatively early stage, and considering that the proposal has been subject to criticism from interested parties, it is uncertain if the proposal will be implemented and, if so, in exactly what form the proposal will be implemented.	See answer to question 1.	No – unless the UK changes its longstanding policy in relation to dividend WHT, there is no reason why the UK would change its approach to the PSD.

Spain	Sweden	Switzerland	United Kingdom
(iii) Sham transactions (art. 16), which, according to case law, imply the creation of a feigned legal situation that conceals a different, underlying legal situation or the absence of any transactions. The application of these GAAR can give rise to penalties, except for cases challenged by way of the conflict in the application of the tax rule, and which do not correspond to black-listed transactions (currently the list only includes certain intragroup leveraged buy-out transactions). Second, the SAAR included in article 14.1.h) of the Non-Resident Income Tax Act denies the withholding exemption applicable to dividends paid to EU parent companies when they are controlled directly or indirectly by non-EU shareholders; specifically, when the majority of the voting rights in the payee of the dividends is held by individuals or companies resident outside the EU, Norway or Iceland. The initial wording of the SAAR provided three safe harbours that allowed the application of the dividend withholding exemption when any of them was met.			

back to table of contents

Spain	Sweden	Switzerland	United Kingdom
However, since 1 January 2015, the SAAR only includes one safe harbour: dividends qualify for the exemption when the EU parent company's incorporation and activity is grounded on valid economic purposes and sound business reasons. The application of this SAAR can give rise to penalties although, according to case law, those penalties have mainly been removed by the courts. We do not expect further developments on this matter, given that, in addition to comments included in question 4, according to the draft bill published, the GAAR in the ATAD will also not be expressly implemented on the same grounds as discussed above. Once the procedural formalities of the multilateral instrument are completed, the MLI PPT will be included in the majority of the tax treaties signed by Spain. However, to date, the Spanish TA have not issued any guidance on the application of the MLI PPT.			

3. Relevant court decisions

Austria, Belgium, Bulgaria, Croatia and Cyprus

Austria	Belgium	Bulgaria	Croatia	Cyprus
The Austrian Administrative Court dealt in several cases with potentially abusive cases regarding the PSD. Especially cases of (abusively) interposing vehicles for the benefit of tax relief under the PSD became more relevant recently. One case dealt with dividends distributed by an Austrian stock-listed company to its Cypriot parent company which ultimately was owned by companies situated in the Channel Islands, BVI and an investor based in Russia (VwGH 26 June 2014, Ro 2011/15/0080 and 3 April 2019, Ra 2017/15/0070). Basically, the Cypriot structure was characterized as abusive due to its lack of economic substance and insufficient reasons other than gaining tax benefits. Another case (VwGH 27 March 2019, 2018/13/0004) dealt with dividends distributed by an Austrian corporation (Aktiengesellschaft, *'AG'*) to its Luxembourg parent company as a *'mere'* holding entity, where the grandparent company has significant economic activity in Luxembourg (double-tier Luxembourg structure with Austrian shareholding). This structure was not qualified as abusive.	There are no relevant court decisions in Belgium in the context of the PSD GAAR.	There are no relevant court decisions in Bulgaria concerning the application or interpretation of the rule under art.16 of the Bulgarian CITA in the context of the PSD.	There are no relevant court decisions in Croatia in the context of the PSD GAAR.	There are no relevant court decisions in Cyprus in the context of the PSD GAAR.

3. Relevant court decisions

France, Germany, Czech Republic, Denmark and Estonia

France	Germany	Czech Republic	Denmark	Estonia
There were a few decisions regarding the application of the exemption provided by the PSD but only in the light of the former GAAR (which was deemed contrary to EU law – see question 1). According to this case law, it was somewhat difficult to qualify for the PSD when the foreign beneficiary entity has no substance. In this respect, where the EU parent company did not have sufficient substance in respect of its activity (e.g., premises, employees…) a first-tier court ruled that the French TA could validly challenge the WHT exemption on the basis of the anti-abuse provision [5]. The Nantes administrative court of appeal [6] refused to apply the WHT exemption provided by the PSD on the grounds of the former GAAR: in the case at hand, a Luxembourg parent company (which received dividends from its French subsidiary and was itself 99% held by an entity established in Jersey), did not evidence that the ownership structure did not have as its main object or as one of its main objects to take advantage of the WHT exemption.	In three cases concerning the application of section 50d(3) the German PITA to dividends distributed by German subsidiaries to their EU parent companies, the Tax Court (Finanzgericht) of Cologne referred questions to the CJEU within the framework of the preliminary ruling procedure (art. 267 TFEU). The first two references of 8 July 2016 (2 K 2995/12) and of 31 August 2016 (2 K 721/13), respectively, both concerned the version of section 50d(3) of the German PITA that was applicable during the 2007 to 2011 calendar years, and its compatibility with art. 1(2) of the original version of the PSD (90/435/EEC), as well as with the freedom of establishment (ex art. 43, 48 EC; now art. 49, 54 TFEU). The third reference of 17 May 2017 (2 K 773/16) likewise concerned the relevance of art. 1(2) of the PSD (recast version 2011/96/EU, unchanged in this respect in comparison with the original version 90/435/EEC) and of the freedom of establishment for section 50d(3) of the German PITA.	A recent case emerged where the Supreme Administrative Court confirmed the denial (made by the tax administration / confirmed by a lower court) of the WHT exemption between a parent and subsidiary based on the GAAR principles known from previous cases, i.e. not based on the PSD. The context of the case was specific in that it concerned the capital gain tax exemption available to individuals (whereas a dividend paid to an individual is subject to 15% WHT) whereby the dividend from the subsidiary to the parent company has been basically converted to a purchase price for the share in the subsidiary (i.e. giving rise to a tax-free capital gain) paid by the parent company to the individual (seller). Specifically, the Supreme Administrative Court confirmed that an abuse of law had taken place as the subsidiary was basically of no economic value for the parent (the buyer) because it was only a *'cash-box'* whereby the vast majority of this cash had been used by the parent (the buyer), after the up-streamed tax-exempt dividend payment from the subsidiary, as a repayment of the (tax-exempt) purchase price towards the individual (seller).	No Danish court decisions have yet been publicized regarding the interpretation or application of the Danish GAAR.	There is one court decision in which the Tallinn Circuit Court (II instance) has clarified the application of the respective provision of the PSD GAAR. Among other issues, it was briefly analysed whether the corresponding provision in national law could be applicable or not. In short, the court stated that the corresponding provision only applies to dividends paid after 1 November 2016. As the dividends had been paid earlier, the provision was not applicable. Instead, in this case the court applied a general anti-abuse rule which existed in the law before the adoption of the PSD GAAR. In addition, the court made a reference to the guideline issued by the Estonian TA, according to which it was not necessary to determine the real economic content of the transaction in order to apply the provision of PSD GAAR. According to the guideline, this was not necessary because the transaction would not have to be reclassified for the purpose of applying the provision.

5 TA Montreuil, 28 April 2011, #0913878, Sté Euro Stockage and, #0904736, Sté Ocotea Holdings Limited.
6 CAA of Nantes, 28 May 2015, #13NT02033.

France	Germany	Czech Republic	Denmark	Estonia
Therefore, the court held that the interposition of the Luxembourg company between the French company and the resident of a non-EU country must be viewed as an artificial arrangement the purpose of which is to avoid the tax normally due in France. In another case law, the French supreme administrative court held that the French TA were entitled to enforce the anti-abuse provision to the distributions made to a Luxembourg entity on the grounds that the effective beneficiary of such distributions was not an EU tax resident and that such distributions could not benefit from the reduced WHT provided for by the France-Luxembourg tax treaty on the grounds that the interposition of the EU entities was not justified from an economic standpoint.	However, this case concerned the version of the domestic rule which became applicable as of 2012, and which contained some amendments after the Commission had already sent Germany a reasoned opinion within the framework of an infringement procedure (art. 258 TFEU) early in 2010. The two first-mentioned references led to the CJEU´s judgment of 20 December 2017 in Joined Cases C-504/16 (*Deister Holding AG*, formerly Traxx Investments NV) and C-613/16 (*Juhler Holding A/S*). While Deister Holding concerned a dividend distribution from a German subsidiary to its 26.5% corporate shareholder (parent) resident in the Netherlands, whose sole shareholder in turn was a natural person resident in Germany; Juhler Holding concerned a dividend paid by a German subsidiary to its 100% parent corporation in Denmark whose sole shareholder was a Limited in Cyprus whose sole shareholder, in turn, was an individual resident in Singapore.	The Supreme Administrative Court reiterated that a tax advantage must not necessarily be the only purpose of transactions to be abusive. It is sufficient if the tax advantage is one of the main or prevailing purposes of the transactions. The Supreme Administrative Court also referred to some of the Court's cases, e.g. *Emsland-Starke* C-110/99 and *Halifax* C-255/02.		Other than the ruling mentioned above, there has not been any other relevant court decision on the application or interpretation of the PSD GAAR, ATAD GAAR or agreement based anti-abuse provision in the context of the PSD.

France	Germany	Czech Republic	Denmark	Estonia
	In its judgment the CJEU came to the conclusion that section 50d(3) of the German PITA (version applicable between 2007 and 2011) in several respects violated art. 1(2) in conjunction with art. 5 of the PSD and, due to a discriminatory treatment of cross-border as compared to purely domestic shareholding situations, also the parent company´s freedom of establishment. In essence, section 50d(3) of the German PITA was qualified as being disproportionate with respect to its aim of preventing tax avoidance structures. The same view was also taken by the CJEU in its order of 14 June 2018 in Case C-440/17 (GS) regarding the third reference, which concerned a dividend distributed by a German subsidiary to its (with more than 90%) main corporate shareholder in the Netherlands whose own sole shareholder was a German company. Despite the amendments made to section 50d(3) of the German PITA as of 2012, the provision was nevertheless still considered to infringe upon art. 1(2) in conjunction with art. 5 of the PSD and, in addition, upon the freedom of establishment.			

back to table of contents

France	Germany	Czech Republic	Denmark	Estonia
	No further domestic judgments by the Tax Court of Cologne followed afterwards as the German Federal Central Tax Office (Bundeszentralamt für Steuern), based on the clear judgments delivered by the CJEU, accepted the non-applicability of section 50d(3) PITA and refunded the German WHT to the non-resident parent companies concerned.			

back to table of contents

3. Relevant court decisions

Finland, Greece, Hungary, Ireland and Italy

Finland	Greece	Hungary	Ireland	Italy
There has been one Supreme Administrative Court decision in Finland regarding the application of the PSD GAAR as included in section 6a of the Finnish Business Income Tax Act. The decision concerned a question of a Finnish resident limited liability company (A Oy) holding preferred shares in another Finnish resident limited liability company (B Oy) and how the dividend distributed on the preferred shares were treated in A Oy's taxation as the economic rights of the preferred shares included debt-like characteristics. The case was addressed to the Supreme Administrative Court by the Tax Recipients' Legal Services Unit appealing against an advance decision issued by the Central Tax Board. In its appeal, the Tax Recipients' Legal Services Unit had claimed that, taking into account the special characteristics relating to the arrangement, it could be deemed to constitute tax abuse and thus either the PSD GAAR or the GAAR included in the Finnish Tax Assessment Act should be applied to the arrangement.	There is no other relevant Greek case law in the context of the PSD GAAR.	There are no relevant court decisions in Hungary in respect of the application or interpretation of the GAAR.	There are no relevant court decisions in Ireland to date in the context of the PSD GAAR.	There are no other court decisions that specifically address the application or interpretation of the Italian GAAR in the context of the PSD. There are, nonetheless, recent decisions issued by the Supreme Court, which address the avoidance of the PSD, though without making express reference to the GAAR. For a case dealing with the abuse of the Interest and Royalty Directive (which could also have an impact on the application of the Italian GAAR in the context of the PSD) see Supreme Court's decision No. 14756/2020, discussed under § 6. For instance, in its decision no. 25490/2019, the Supreme Court held that an abuse of the PSD could exist where the place of effective management of the EU parent company is situated outside the EU Member State of residence (Luxembourg, in the case at hand). Indeed, according to the Supreme Court, the concept of place of effective management not only serves as tie-breaker rule in dual residence cases, but also functions as an anti-avoidance provision.

Finland	Greece	Hungary	Ireland	Italy
The Supreme Administrative Court, however, retained the Central Tax Board's advance decision and ruled that as the arrangement did not result in tax advantages that would defeat the purpose of the Finnish tax regime, it was not required to evaluate the applicability of the two anti-tax avoidance provisions. There are no other relevant court decisions in Finland in the context of the PSD GAAR.				This conclusion, in the Court's view, is confirmed by art. 2(1)(a)(ii) of the PSD, which precludes the applicability of the Directive in cases where either the parent company, or its subsidiary, is considered to be resident for tax purposes outside the European Union under a tax treaty, as most tax treaties include in art. 4(3) a tie-breaker rule based on the place of effective management. In this respect, the Supreme Court added that, in assessing where the place of effective management is located, Italian TA are not bound by the certificates issued by the tax authorities of other EU Member States. Interestingly, in the same decision the Supreme Court also dealt with the-subject-tax requirement provided for in the Directive, clarifying that it should be interpreted as compelling an effective taxation of the dividends in the EU Member State of the parent company in order for the PSD to apply in the State of the subsidiary. The Supreme Court held that such condition was not met in the case at hand, because the dividends received by the Luxembourg parent were not taxed in Luxembourg due to the application of the domestic participation exemption regime.

back to table of contents

Finland	Greece	Hungary	Ireland	Italy
				According to the Supreme Court, the combination of the withholding exemption and the exemption in the State of parent would frustrate the objectives of the Directive since it would allegedly cause double-non taxation. This conclusion confirms previous decisions of the Supreme Court upholding the same principle (see also decision no. 32255 of 13 December 2018, also dealing with dividends paid to a Luxembourg parent company). The Supreme Court's outcome is controversial for at least two reasons. First, it ignores that the exemption is one of the two optional methods envisaged in the PSD to relieve economic double taxation. Luxembourg opted for such a method and therefore the exemption is, in the case at hand, in line with the specific requirement laid down by the Directive. Second, the Supreme Court overlooks the case law of the Court of Justice of the European Union (see decision of 8 March 2017, in case C-448/15, *Wereldhave*), which seems to take the opposite position with regard to the PSD, thus interpreting the subject-to-tax requirement as demanding the entity as whole to be exempt in order for the Directive not to apply.

back to table of contents

3. Relevant court decisions

Latvia, Lithuania, Luxembourg, Malta and the Netherlands

Latvia	Lithuania	Luxembourg	Malta	Netherlands
There are no relevant court decisions in Latvia in the context of the PSD GAAR	There are no relevant court decisions in Lithuania in the context of the PSD GAAR.	There are no relevant court decisions in Luxembourg in the context of the PSD GAAR.	There are no specific cases concerning directly the PSD GAAR, however, Maltese Courts have tried cases dealing with tax abuse, and the following principles have been established in court judgments which would similarly be applicable to a case dealing with the PSD GAAR or art. 51 (1) (b) of the Income Tax Act Chapter 123 of the Laws of Malta. (i) In cases involving allegation of tax avoidance, there is a reversion of the onus of proof to the effect that the onus of proof reverts to the Commissioner for Revenue; and (ii) That the transaction or arrangement in question must have as its sole or main purpose that of avoiding tax.	There has been one Supreme Court judgement in the Netherlands regarding the application of the anti-abuse rules as included in the Dutch non-resident CIT rules in 2012. The judgement dates from 10 January 2020. Although the PSD GAAR did not yet exist in 2012, this Supreme Court decision is nonetheless relevant as with the implementation of the PSD GAAR the Dutch non-resident CIT rules were only slightly amended. This court decision relates to the question whether a Luxembourg tax resident holding company was liable to Dutch non-resident CIT for dividends received from a Dutch BV in 2012. The case at hand concerned a Swiss tax resident individual who held an interest in a Dutch BV through, among others, a Luxembourg tax resident company without any employees or an office (LuxCo), which functioned as a cash box company as its only asset consisted of shares in a Dutch BV with a substantial amount of cash following the sale of its investments. The Dutch TA were of the view that the structure constituted abuse and as a result, the distribution was subject to Dutch non-resident CIT at the reduced applicable tax treaty rate of 2.5%.

back to table of contents

Latvia	Lithuania	Luxembourg	Malta	Netherlands
				In short, the Supreme Court ruled that holding the interest in the Dutch BV through LuxCo could indeed be qualified as abusive in this specific case with the Luxembourg tax resident cash box company. The Supreme Court ruled that the non-resident CIT rules were valid and compatible with recent case law of the CJEU. It is noted that the guidance following from this court decision can be applied to the current regime to a limited extent only, among others because the Dutch non-resident CIT rules were changed in 2016, 2018, 2019 and 2020.

3. Relevant court decisions

Poland, Portugal, Romania, Slovakia and Slovenia

Poland	Portugal	Romania	Slovakia	Slovenia
There are no relevant court decisions in Poland which would directly refer to the PSD GAAR. Although, Polish TA and administrative courts have issued many decisions, judgments and securing opinions the subject of which was connected with tax avoidance (bearing in mind other anti-abusive provisions being in force – e.g. GAAR), however, none of them related to the abuse of the provisions allowing to apply the exemptions resulting from the PSD. There are also many judgments (issued also by the Polish Supreme Administrative Court), which confirm the position of the Polish TA regarding refusal to issue tax rulings with respect to facts / future events for which the Polish TA have reasonable grounds to believe that they may be the subject of a decision based on GAAR. However, the verdicts are not substantive – they come down to confirming that the indicated facts / future events (also connected with exemptions introduced on the basis of PSD) cannot be the subject of individual tax rulings and securing opinions (point 2 above).	To date, there is no relevant Portuguese judiciary or arbitration case law concerning the application of either of the referred rules in the context of the PSD.	There are no relevant court decisions in Romania concerning the PSD GAAR.	Please see answer to question 4 for one pending court case.	While there have been no decisions of domestic courts which would have the GAAR as its central issue, the Slovenian Supreme Court has rendered a decision regarding the possibility of a WHT exemption with respect to a secondary adjustment resulting from a transfer pricing audit. The lower court held the following position (in line with the position of the Slovenian Financial Administration); that even though the transactions which were the object of the transfer pricing audit were between a Slovenian entity and a Belgian entity, the payments made were to the actual parent of the Belgian entity. However, neither the lower court nor the Slovenian Financial Administration gave any evidence that the Belgian entity was not the beneficiary (or in terms of the later judgment in the Danish cases a *'conduit')*, or that abuse was present. Therefore, the Supreme Court pointed out that as no facts of abuse were even presented by the lower court, a prima facie conclusion should not block an exemption of WHT under the PSD (with respect to the CJEU's judgments).

back to table of contents

Poland	Portugal	Romania	Slovakia	Slovenia
				Although the case cited does not present a ground-breaking discovery, it does, however, point to the distribution of both the onus proferendi and onus probandi, much the same way as those already pointed out by the CJEU in both previous and later cases.

3. Relevant court decisions

Spain, Sweden, Switzerland and the United Kingdom

Spain	Sweden	Switzerland	United Kingdom
The Spanish Supreme Court has only applied the SAAR included in art. 14.1.h) of the Non-Resident Income Tax Act twice; both cases relate to the application of the rule in force before 2015 (i.e., when three safe harbours were included). The first case, in March 2012, dealt with dividends paid to a Dutch parent company controlled by US shareholders. The Supreme Court confirmed the application of the SAAR based on the lack of clear evidence of the activities performed by the Dutch company (even though it had a significant number of employees) and rejected the justification of the previous transfer of the company from Bermuda/Ireland to the Netherlands. The second case, in January 2017, dealt with dividends paid to a Danish company controlled by a Canadian shareholder. The application of the SAAR was also accepted, grounded on the Danish company's lack of substance and the fact that its only asset was the shares in the Spanish company paying the dividends.	As far as we are aware there is only one case in which the anti-avoidance provision of the Swedish WHT Act has been applied. In this case, the Administrative Court of Appeal upheld the County Administrative Courts ruling, which stated that the anti-avoidance provision applied to a transaction where a Swedish investment bank borrowed Swedish equities for one day from a German investment bank in order to avoid Swedish WHT on a dividend payment.[8] The stock loan was outstanding for one day only and the Swedish bank had not been able to use the stock to obtain a commercial return. The dividend received on the stock did not have any tax consequences for the Swedish bank. The court therefore concluded that the stock loan, having regard to the number of shares borrowed, the time the loan was outstanding and its economic terms as compared with other transactions in the shares during the relevant period, was a transaction that considerably differed from other transactions in the shares.	See answer to question 1.	There are no directly relevant court decisions in the UK in the context of the PSD GAAR. In relation to the UK's domestic law GAAR, there have been a number of opinions published by the GAAR Advisory Panel (the *'Panel'*). The Panel's function is to approve HMRC's guidance on the GAAR and to deliver opinions. However, Panel opinions lack the binding element of case law as, even if the Panel's opinion is that arrangements are reasonable, HMRC may continue to challenge the arrangements under the GAAR. The most recent opinion was published on 7 April 2020 and declared that the entering into of tax arrangements and the carrying out of tax arrangements (constituting rewards for employees and rewards by way of loans) are not reasonable courses of action in relation to the Income Tax (Earnings and Pensions) Act 2003 and the Corporation Tax Act 2009 Part 20 Chapter 1.

8 The Sundsvall Administrative Court of Appeal's judgement dated 15 June 2007 in case no. 575-05.

Spain	Sweden	Switzerland	United Kingdom
Lower courts have also dealt with cases concerning this SAAR, confirming the Spanish TA' criteria and making taxpayers bear the burden of the proof on the application of the safe harbours; however, in these cases, normally the benefits of the tax treaty are not limited, even when the Spanish Supreme Court endorses the application of domestic GAAR to treaty provisions. The most remarkable exception to this general line of case law was a November 2010 decision of the High Court (Audiencia Nacional), which precludes the application of the SAAR based on the EU shareholders being listed companies (so it was impossible to prove the control by non-EU shareholders). The reasoning recalls the CJEU's judgment in the *Eqiom* case (C-6/16). In addition, in June 2016, the Supreme Court applied the sham doctrine in a case to recharacterize dividend recapitalization transactions carried out by Spanish companies, so that their shareholders (including those resident in other EU Member States) did not derive capital gains, but disguised dividends.	Against that background, the court held that it was up to the Swedish bank to provide an explanation for the transaction. Given the fact that the bank had not been able to demonstrate that the stock loan had any commercial or other substantial purpose other than relieving the German bank from WHT, the court thus held that the anti-avoidance provision of the Swedish WHT Act applied and that the Swedish bank could be imposed 30% WHT on the dividends paid to the German bank. The Supreme Administrative Court did not grant leave to appeal and therefore, the ruling is final.		

back to table of contents

Spain	Sweden	Switzerland	United Kingdom
The court considered that a disguised distribution of dividends is not a distribution of profits (in the sense of art. 1 of Directive 2011/96/EU) and denied the application of the withholding exemption.			

4. Relevant *pending* court cases / otherwise preliminary references to the CJEU Austria, Belgium, Bulgaria, Croatia and Cyprus

Austria	Belgium	Bulgaria	Croatia	Cyprus
There are no relevant pending court cases nor any preliminary references to the CJEU in the context of the PSD GAAR in Austria.	There are no relevant pending court cases nor any preliminary references to the CJEU in the context of the PSD GAAR in Belgium.	There are no relevant pending court cases in Bulgaria nor any preliminary references to the CJEU concerning the application or interpretation of the rule under art.16 of the Bulgarian CITA in the context of the PSD. The latest request for preliminary ruling from Bulgaria is under Case C-257/20 and refers to art.16 of the Bulgarian CITA, however not in the context of the PSD. Two of the questions referred touch on art.16 of the Bulgarian CITA. Namely, CJEU is asked whether: - the provision of art.16, para.2, item 3 of CITA (borrowing or lending at interest diverging from the arm's length rate of interest as applicable at the time of conclusion of the transaction, including in the cases of interest-free loans or other temporary gratuitous financial assistance, as well as the write-off of debts or repayment of debts not related to the activity for own account being considered as tax evasion) conflicts with the principle of proportionality enshrined in Article 5(4) and Article 12(b) of the Treaty on European Union and the right to an effective remedy and to a fair trial enshrined in Article 47 of the Charter of Fundamental Rights of the European Union and	There are no relevant pending court cases nor any preliminary references to the CJEU in the context of the PSD GAAR in Croatia.	There are no relevant pending court cases nor any preliminary references to the CJEU in the context of the PSD GAAR in Cyprus.

back to table of contents

Austria	Belgium	Bulgaria	Croatia	Cyprus
		- art. 16, para.1 and 2, point 3, and Article 195(1) of the CITA on the taxation at source of fictitious interest income on an interest-free loan granted to a resident company by a company in another Member State, which is the borrower's sole shareholder conflict with Article 3(1)(h) to (j), Article 5(1)(a) and (b), Article 7(1) and Article 8 of Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital. Another request for a preliminary ruling in respect to PSD (Directive 2011/96/EU) was responded by the CJEU on 2 April 2020 in case *GVC Services* (C-458/18). It, however, did not refer to the PSD GAAR, but to the question should Article 2(a)(i) of, in conjunction with Annex I, Part A(ab), to Directive 2011/96/EU be interpreted as meaning that the expression *'companies incorporated under the law of the United Kingdom'* also covers companies incorporated in Gibraltar. The CJEU concluded that a company incorporated in Gibraltar and subject to Gibraltar corporation tax cannot be considered to be a *'company of a Member State'* within the meaning of that directive.		

4. Relevant *pending* court cases / otherwise preliminary references to the CJEU

France, Germany, Czech Republic, Denmark and Estonia

France	Germany	Czech Republic	Denmark	Estonia
In a recent decision dated 5 June 2020[9], the French supreme administrative court referred to the Danish cases regarding beneficial ownership rendered by the CJEU on 26 February 2019 to confirm the non-application of the WHT exemption provided by the PSD. In this decision, the court clearly indicated that the exemption provided by the PSD requires to be viewed as the beneficial owner of the dividend. Moreover, the court mentioned the following extract from the Danish case, i.e. the PSD mechanisms (in particular Article 5) are *'intended for situations in which, if they were not applied, the exercise by the Member States of their powers of taxation might lead to the profits distributed by the subsidiary to its parent company being subject to double taxation […] Such mechanisms are not, on the other hand, intended to apply when the beneficial owner of the dividends is a company resident for tax purposes outside the European Union since, in such a case, exemption of those dividends from withholding tax in the Member State from which they are paid could well result in them not actually being taxed in the European Union.'*	There are no cases pending in Germany regarding the question of whether (and how) art. 1(2), (3) of the PSD GAAR has been or should be transposed into German law. Furthermore, we are not aware of any cases pending before German courts (or before the CJEU upon the reference of a German court) concerning the interpretation or application of a domestic or agreement-based anti-abuse provision in the context of the PSD (neither with respect to the old version of art. 1(2) before the amendment introduced by the PSD GAAR, nor concerning the current version of art. 1(4) as amended by that Directive).	There are no relevant pending court cases nor any preliminary references to the CJEU in the context of the PSD GAAR in Czech Republic.	Other than the Danish beneficial ownership cases (better described below under 6), there are no other pending court cases dealing with the PSD GAAR in Denmark.	There are no relevant pending court cases nor any preliminary references to the CJEU in the context of the PSD GAAR in Estonia.

9 CE 5 June 2020, #423809, *Société Eqiom & Société Enka*.

back to table of contents

4. Relevant *pending* court cases / otherwise preliminary references to the CJEU

Finland, Greece, Hungary, Ireland and Italy

Finland	Greece	Hungary	Ireland	Italy
There are no relevant pending court cases nor any preliminary references to the CJEU in the context of the PSD GAAR in Finland.	There are no relevant pending court cases nor any preliminary references to the CJEU in the context of the PSD GAAR in Greece.	There are no relevant pending court cases or any preliminary references to the CJEU in respect of the GAAR.	There are no relevant pending court cases in Ireland, or any preliminary references to the CJEU, concerning the application or interpretation of the PSD GAAR or any other domestic or agreement based anti-abuse provision in the context of the PSD.	There are no relevant pending court cases concerning the application or interpretation of the PSD GAAR, or any other domestic or agreement based anti-abuse provision in the context of the PSD. No preliminary references have been made.

back to table of contents

4. Relevant *pending* court cases / otherwise preliminary references to the CJEU

Latvia, Lithuania, Luxembourg, Malta and the Netherlands

Latvia	Lithuania	Luxembourg	Malta	Netherlands
There are no relevant pending court cases nor any preliminary references to the CJEU in the context of the PSD GAAR in Latvia.	There are no relevant pending court cases in Lithuania in the context of the PSD GAAR. However, in a recently updated official commentary to the Law on CIT, the Lithuanian TA gives references to the findings made by the CJEU in its judgment in the joined cases C-115/16, C-118/16, C-119/16 and C-299/16 *N Luxembourg 1 and others v Skatteministeriet*. The commentary addresses that in a situation where, on the basis of objective evidence, the TA establishes an abuse of law for tax purposes through any arrangement(s), the TA has no obligation to determine who is the ultimate / actual beneficiary for the purpose of non-application of tax benefits or the recalculation of the tax, but may require the factual recipient to prove the fact of being the beneficial owner.	There are no relevant pending court cases nor any preliminary references to the CJEU in the context of the PSD GAAR in Luxembourg.	There are no relevant pending court cases nor any preliminary references to the CJEU in the context of the PSD GAAR in the Malta.	There are two pending court cases relevant to the interpretation of the PSD GAAR in the Netherlands. Decisions were taken by the Dutch lower court on 26 June 2020 and the appeal procedures are pending. These cases concern a Dutch tax resident entity (Z BV) which was set up to hold an investment in a Dutch private equity fund for Belgian investors. Z BV in turn is held by among others two Belgian tax resident entities (A BvbA and B BvbA), which are ultimately owned by Belgian tax resident individuals. A BvbA owns 38.71% of the shares in Z BV and B BvbA owns 24.39% of the shares in Z BV. In July 2018 Z BV distributes a dividend to A BvbA and B BvbA. In dispute is the application of the Dutch domestic dividend WHT exemption, as implemented in Dutch tax legislation on the basis of the PSD. The Dutch Lower Court ruled in its cases of 26 June 2020 that the Dutch domestic dividend WHT exemption applies to B BvbA but not to A BvbA.

back to table of contents

Latvia	Lithuania	Luxembourg	Malta	Netherlands
				As the ultimate shareholders would have a higher Dutch income tax or dividend WHT burden if they had held the shares in Z BV directly, one of the main purposes for interposing the corporate shareholders A BvbA and B BvbA is presumed to be avoiding Dutch tax. This presumption can be rebutted by the shareholders if they make plausible that holding the shares is not wholly artificial. A BvbA could not provide sufficient evidence to make plausible that holding the shares is not wholly artificial as BvbA did not have sufficient other assets and activities. Further it had no office space and no personnel of its own. B BvbA however provided sufficient evidence to make plausible that holding the shares is not wholly artificial. B BvbA showed that its activities consist of conducting an active business enterprise and that it holds the shares in Z BV in that context. Hence, B BvbA is not part of a wholly artificial structure.

back to table of contents

Latvia	Lithuania	Luxembourg	Malta	Netherlands
				B BvbA owns shares in more than ten other operational companies and conducted an active management role for some of those companies (although not for Z BV). In addition, it has its own office space in Belgium and two employees in Belgium who receive a salary. B BvbA incurs management fees and fees for legal and administrative services.

4. Relevant *pending* court cases / otherwise preliminary references to the CJEU

Poland, Portugal, Romania, Slovakia and Slovenia

Poland	Portugal	Romania	Slovakia	Slovenia
There are no relevant pending court cases nor any preliminary references to the CJEU in the context of the PSD GAAR / abuse of the PSD provisions in Poland.	There are no pending Portuguese judiciary or arbitration cases concerning the application of neither of the referred rules in the context of the PSD nor of any references to the CJEU.	There are no relevant pending court cases nor any preliminary references to the CJEU concerning the PSD GAAR in Romania.	There is only one court case marginally relevant to the interpretation of anti-abuse doctrines in Slovakia. However, this case concerned alleged tax treaty abuse dating back to year 2003, when dividends were still subject to tax (if Slovakia was already EU Member State the dispute would likely not arise at all as the ultimate beneficiaries of the dividends would be able to rely on the then effective PSD). A preliminary question was submitted by the Slovak Supreme Court in this respect to the CJEU (C-113/20) and the CJEU has ruled that PSD was not applicable to the situation. In essence the case concerned a structure in which two EU based (France and Germany) shareholders of a Slovak company combined their shares (total of 49%) in a Dutch holding company and claimed the application of art. 10(3) of the Slovakia-Netherlands Tax Treaty, under which dividends distributed to such holding should be subject to tax only in the residency state (i.e. the Netherlands).	There are no relevant pending court cases in Slovenia, nor any agreement based anti-abuse provision in the context of the PSD. Moreover, there are no pending preliminary references to the CJEU.

back to table of contents

Poland	Portugal	Romania	Slovakia	Slovenia
			The Slovak TA claimed that such structure was abusive and the Slovak company was supposed to disregard the holding and withhold the tax at source as if the ultimate shareholders were recipients of the dividends and Slovakia-France and Slovakia-Germany Tax Treaties have applied instead. At the time of distribution no general anti-abuse rule (or judicial principle) has existed in Slovakia.	

4. Relevant *pending* court cases / otherwise preliminary references to the CJEU

Spain, Sweden, Switzerland and the United Kingdom

Spain	Sweden	Switzerland	United Kingdom
There are no pending court cases or any preliminary reference to the CJEU in the context of the PSD in Spain. The European Commission sent Spain a reasoned opinion (in June 2006) within the infringement procedure 2005/2245. The Commission opined that the SAAR included in article 14.1.h) of the NTIR Act *'applies automatically to all cases where a parent company resident in a Member State is owned by a company resident in a non-EU third country, without any case-by-case examination of whether an abuse is actually being committed.'* However, the procedure was closed. The Spanish courts have several times rejected requesting for a preliminary ruling, and the SAAR's new wording does not deal with who bears the burden of the proof.	We are not aware of any relevant pending court cases nor of any preliminary references to the CJEU in the context of the anti-avoidance provision in the Swedish WHT Act.	See answer to question 1.	There are no relevant pending court cases nor any preliminary references to the CJEU in the context of the Directive in the UK.

5. Position papers, rulings or administrative guidance issued

Austria, Belgium, Bulgaria, Croatia and Cyprus

Austria	Belgium	Bulgaria	Croatia	Cyprus
Administrative guidance is issued concerning the interpretation of the PSD in various so-called EAS (literally *'Express Answer Service'*) which are issued by the Austrian Ministry of Finance. More recently, for example, EAS 3414 deals with abusive structures in the case of cash box holding companies. In general, if the existence of an abusive structure cannot be excluded prima facie, the case must be assessed individually by the Austrian TA to assess the qualification for a tax relief at source (EAS 3414). In general, the Austrian TA understand the WHT relief at source in a very narrow sense and apply strong rules as to the documentary evidence.	As already referred to above, some guidance has been included in the Parliamentary history as well as in a circular letter dated 6 November 2017. With respect to the business reasons, it has been confirmed that the reference to valid business reasons is not intended to deny business reasons which are not strictly speaking commercial reasons. The purpose of the PSD GAAR is not to envisage the active management of a holding company. It is common for Belgian taxpayers to conclude a ruling with the Ruling Commission on the application of anti-abuse rules. To a certain extent, some guidance can be obtained from the published summaries of the rulings on the interpretation of the Belgian rules implementing the PSD GAAR.	There are a number of tax rulings (rather circulars, as these are not of a binding nature for the court) of the Bulgarian tax authorities concerning art.16 of the Bulgarian CITA. However, these tax circulars commenting on the implementation of art.16 of the Bulgarian CITA do not refer specifically to the PSD.	In April 2017, the Croatian TA issued an opinion questioning the application of the PSD with respect to the dividend distribution following the reorganization of the group of companies. Facts of the case were that during October 2016, an international group went through the restructuring process in which shareholder structure of varies entities within the group was changed. A question was submitted to the Croatian TA for the tax implications of the distribution of dividend by Company A in April 2017 to its shareholder ABC that holds 84% of the shares. However, the Company ABC had held these shares from October 2016 and had acquired them during the aforementioned restructuring from Company AB. Until the respective restructuring, Company AB held 99,96% of shares in ABC. Specifically, it was questioned whether due to the fact that prior to the restructuring ABC had held indirect shareholdings in A, is it possible to apply PSD during the respective dividend distribution or does it have to wait for the expiration of a 24-month holding period.	There are no circulars or rulings issued by the Cyprus Tax Department on the application or interpretation of the PSD GAAR.

back to table of contents

Austria	Belgium	Bulgaria	Croatia	Cyprus
			In its reply the Croatian TA argued that A cannot make WHT exempt distribution of dividend per PSD directive until formally the 24-month period is met. In addition, the Croatian TA argued that provisions of PSD would not be applicable in the case restructuring and the following dividend distribution would be characterized as a non-authentic arrangement from art. 5a of the CIT Law.	

5. Position papers, rulings or administrative guidance issued

France, Germany, Czech Republic, Denmark and Estonia

France	Germany	Czech Republic	Denmark	Estonia
As stated above, there are few anti-abuse provisions under French law. The French TA have issued administrative guidelines addressing all of these provisions. As regards Article 119 ter of the French Tax Code,[10] reference was made to the administrative guidelines on Article 205 A of the French Tax Code[10] as the GAAR provisions are identical for both articles. Most of these comments include the same wording as in the ATAD and clarify how to combine these provisions with the other GAAR provisions applicable under French law. Under such guidelines, *'an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances'* shall be ignored for French corporate income tax purposes in accordance with Article 205 A of the French Tax Code.	On 4 April 2018, i.e. after the CJEU´s judgment of 20 December 2017 in Joined Cases C-504/16 (Deister Holding AG, formerly Traxx Investments NV) and C-613/16 (Juhler Holding A/S), but before the CJEU´s order of 14 June 2018 in Case C-440/17 (GS), the German Federal Ministry of Finance had issued a circular letter (IV B 3 – S 2411/07/10016-14) dealing with the consequences of the first-mentioned judgment. In this circular letter, the Federal Ministry of Finance partly corrected the views it had taken with respect to the interpretation and application of section 50d(3) of the German PITA in earlier circular letters (in particular, of 24 January 2012, IV B 3 – S 2411/07/10016, which had replaced letters of 3 April 2007, IV B 1 – S 2411/07/0002, and of 21 June 2010, IV B 5 – S 2411/07/10016:005).	Please see the answer to question 6.	Since the introduction of the Danish GAAR in 2015, several administrative rulings have been published, which do provide some interpretive guidance on the provision. However, since the Danish GAAR was amended (effective 1 January 2019), only a handful of administrative rulings have been published and no court precedent exists. Therefore, there is still general uncertainty on the exact scope of the Danish GAAR. The legal guidelines of the Danish Tax Agency on the Danish GAAR primarily consist of references to administrative rulings as well as quotations from the preparatory works for the Danish GAAR, and thus do not provide a great deal of interpretative aid. Further, the legal guidelines constitute the Danish Tax Agency's interpretation of Danish tax law, and while the Danish Tax Agency will abide by them, they are in principle not binding for the taxpayers.	Generally, if a new law is adopted, an explanatory memorandum is prepared together with the draft law. The corresponding explanatory memorandum can be used as a guideline on the application and interpretation of the law. For example, an explanatory memorandum has been drawn up on the adoption of ATAD GAAR and the corresponding legislation in force. In addition, as to the PSD GAAR, as already briefly mentioned in the answer to question 3, the Estonian TA has also issued a guideline for the application of the provision of the PSD GAAR.

10 BOI-RPPM-RCM-30-30-20-10-20190703, #450.
11 BOI-IS-BASE-70-20190703.

France	Germany	Czech Republic	Denmark	Estonia
It is specified that *'an arrangement may comprise more than one step or part'*. Also, the French TA consider that the date on which the arrangement was implemented has no impact on the application of the aforementioned provisions which apply to all transactions that have an impact on the computation of companies' taxable income for fiscal years beginning on or after 1 January 2019. The French TA state that the application of the PSD GAAR is subject to the two following conditions: (i) an arrangement or series of arrangements put in place for the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law; (ii) an arrangement or series of arrangements that are not genuine (i.e. that has no economic rationale).	The circular letter of 4 April 2018 takes a rather narrow approach and deals exclusively with the interpretation and application of section 50d(3) of the German PITA to WHT relief (by way of either ex ante exemption under section 50d(2) of the German PITA or ex post refund under section 50d(1) German PITA) within the framework of the PSD (implicitly, therefore, the letter does not acknowledge any relevance of the CJEU judgment to other areas of WHT relief – not necessarily concerning dividend distributions – where section 50d(3) of the German PITA likewise applies, namely within the framework of the IRD and of bilateral double tax conventions, and also in the context of certain unilateral domestic relief rules). The circular letter states that the version of Sec. 50d(3) of the German PITA that was applicable to dividend distributions made between 2007 and 2011 will no longer be applied at all by the German TA.			

back to table of contents

France	Germany	Czech Republic	Denmark	Estonia
For instance, to illustrate the *'purpose'* of the law, the French TA highlighted that the purpose of the participation exemption regime on dividends is to promote the involvement of parent companies in the economic development of their subsidiaries for the purposes of structuring and strengthening the French economy. Amongst others, the administrative guidelines also specify that an arrangement may fall within the scope of the Articles 205 A / 119 ter of the French Tax Code even if it has several purposes (including non-tax purposes) and where an arrangement provides both economic and tax advantages, but where the economic advantage is very marginal compared to the tax advantage, the economic reason is likely to be considered invalid. In other words, when assessing the business *rationale*, if an arrangement generates both economic and tax advantages, but the economic advantage is marginal (compared to the tax advantage), the business motivation should not be viewed as relevant.	Furthermore, regarding the amended version of section 50d(3) of the German PITA as of 2012 (which has still not been further amended to date), the letter announces that, within the framework of the text provided by the 1st clause of that provision regarding the existence of *'economic or other substantial reasons for the involvement of the foreign company'* in the generation of the gross revenues earned by that company during the calendar year in which it received the relevant dividends from its German subsidiary, the limitation contained in the 2nd clause of the provision (which prohibits the taking account of *'organisational, economic or other substantial features of undertakings that are affiliated with the foreign company'*) will no longer be applied; however, the letter retains the possibility for the German TA to assume a lack of *'economic or other substantial reasons'* in the afore-mentioned sense if an *'overall evaluation of the circumstances of the individual case leads to the result that the involvement of the foreign company in essence only serves to achieve a tax advantage'*.			

back to table of contents

France	Germany	Czech Republic	Denmark	Estonia
	In addition, the letter accepts that, within the test under the 1st clause of section 50d(3) of the German PITA of whether, and to what extent, the gross revenues earned by the foreign parent company stem *'from its own economic activity'*, the limitation under the 3rd clause (which excludes *'gross income from the management of assets'* from the scope of the income derived from an *'own economic activity')* basically no longer applies; however, the letter adds the caveat that, in the case of passive shareholdings, the foreign parent company must *'effectively exercise its rights as shareholder'*.			

5. Position papers, rulings or administrative guidance issued

Finland, Greece, Hungary, Ireland and Italy

Finland	Greece	Hungary	Ireland	Italy
With the implementation of the PSD GAAR, some administrative guidance was included in the governmental proposal and the report issued by the Finance Committee of the Parliament. Further, the Finnish TA has issued guidance concerning the application and interpretation of the PSD GAAR. However, the guidance issued by the Finnish TA was largely based on the governmental proposal and CJEU case law and did not provide any new details on what is perceived as abuse or valid commercial reasons.	By virtue of Circular No POL 1181/ 2016 issued by Greek Independent Authority of Public Revenue, any case relating to abuse of the PSD (Art. 48 and 63 of the Income Tax Act) will be dealt with this rule PSD GAAR (paragraph 40 of art. 72 of Law 4172/2013) and not with the general anti-abuse rule (art. 38 of Law 4174/2013), whilst PSD GAAR is more specific. It must also be noted that this rule may apply to, apart from arrangements which are completely non-genuine, the individual stages or parts of an arrangement which are non-genuine; in that case, the other genuine stages or parts of the arrangement will not be affected. Moreover, the aforementioned Circular gives some examples of application of the domestic PSD GAAR. Domestic company A is a parent company of two companies, company B, based in an EU Member State and Company X based in a third country. Between Greece and the State where company X is established there is a Double Taxation Treaty, which provides WHT on dividends distributed by subsidiary X to its parent company A.	No relevant position papers, rulings or administrative guidance have been issued in respect of application or interpretation of the GAAR.	The Irish Revenue Commissioners publish notes for guidance on each section of Irish tax legislation. The notes for guidance on the section of tax legislation containing the PSD (section 831 Taxes Consolidation Act) was amended upon the introduction of the PSD GAAR. The notes for guidance in relation to the PSD GAAR are brief and the wording therein is very close to that of the legislation itself. There are no relevant position papers or rulings concerning the application or interpretation of the PSD GAAR or any other domestic or agreement based anti-abuse provision in the context of the PSD.	No position papers, rulings or administrative guidance have been issued concerning the application or interpretation of the PSD GAAR or any other domestic- or agreement-based anti-abuse provision in the context of the PSD.

back to table of contents

Finland	Greece	Hungary	Ireland	Italy
	A Double Taxation Treaty is also in place between States where companies B and X are established, which provides a lower rate on WHT of dividends payable by X to B. Let us assume that domestic company A transfers to Company B all of the shares it holds in company X; thus, company B now becomes the parent company of company X, and is the recipient of the dividends from company X (through B), without paying any tax, as between companies B and A the provisions of the PSD rules apply, which provide an exemption. Furthermore, this share transfer agreement provides that company A will repurchase the shares in four (4) years. In the above case, the tax authority of domestic company A should first examine whether the share transfer agreement of company X to company B is genuine.			

Finland	Greece	Hungary	Ireland	Italy
	The existence of a repurchase agreement of the shares of company X by company A is sufficient in order to consider the transaction as non-genuine; on the other hand, a lower consideration for the share transfer from company A to company B, in violation of the arm's length principle, is not sufficient in itself to consider it as a non-genuine transfer and so the provisions of para. 40 of art. 72 of Law 4172/2013 (PSD GAAR) will not apply. Furthermore, if the subsidiary company B did not distribute dividends to its domestic parent company A, then this anti-abuse rule will not apply; whilst if dividends are distributed by company B, which it had received dividends from company X, the received dividends from the domestic parent company A should not take the advantage of par. 1 of art. 48 of Law 4172/2013 (Parent-subsidiary directive rule), to the extent that they reflect dividends received from company X, and these dividends will be taxed under the general provisions.			

back to table of contents

5. Position papers, rulings or administrative guidance issued

Latvia, Lithuania, Luxembourg, Malta and the Netherlands

Latvia	Lithuania	Luxembourg	Malta	Netherlands
There are no position papers, rulings or administrative guidance issued concerning the application or interpretation of the PSD GAAR or any other domestic or agreement based anti-abuse provision in the context of the PSD in Latvia.	The Lithuanian TA provides an official commentary on how the PSD GAAR provision should be interpreted and applied in practice. It lists exemplary criteria and circumstances which shall be taken into account when assessing whether the arrangement is artificial. The latter includes cases, where: - the head or management bodies of an entity are not duly qualified for such duties; - there is a lack of employees or no employees at all to perform the declared activities of the entity; - the employees are not duly authorized to perform the agreed functions; - the experience, competencies and time spent on the performance of work functions by the employees do not comply with the nature of the entity's activities and/or the minimum requirements; - the most important decisions of the entity are not taken by the managing persons or the management bodies of that entity; - the meetings of the management board members take place outside the establishment (registration) country;	In Luxembourg, the PSD GAAR only applies to inbound and outbound dividends (and not to capital gains) as it only makes reference to the 2011 version of the Parent-Subsidiary Directive. In addition, the PSD GAAR only applies to the PSD exemption regime and exclude from its scope all other national provisions such as the domestic exemption regime or the benefits granted under tax treaties concluded by Luxembourg. No further guidance was provided by the Luxembourg legislature, courts or Luxembourg TA on the application or interpretation of the PSD GAAR.	In Malta, the PSD GAAR only applies to inbound dividends or gains arising from the disposal of a participating holding given the fact that Malta does not levy any WHT on outbound dividends. On the other hand, the PSD GAAR may be applied to combat abuse by the Commissioner for Revenue when a limited liability company in Malta itself avails itself of the participation exemption. No position papers have been issued in Malta, and the reversal of the application of participation exemption on the basis of the PSD GAAR is yet to be seen in Malta.	In the Netherlands, administrative guidance is included in Parliamentary history. With the implementation of the PSD GAAR in 2016 and the various amendments to Dutch tax law that followed, the application of the PSD GAAR has been quite extensively discussed in Dutch Parliamentary history. It is not common in the Netherlands for position papers to be published by the Dutch Ministry of Finance or the Dutch TA. Before 1 July 2019, it was very common for Dutch taxpayers to conclude a ruling with the Dutch TA on the application of the anti-abuse rules as included in the Dutch non-resident CIT or dividend WHT rules. However, with the introduction of a new ruling policy as per 1 July 2019, the conditions for concluding a ruling have become stricter. In addition, all rulings concluded with the Dutch TA as from that date are published in the form of an anonymous summary. As a consequence, we see fewer Dutch taxpayers requesting rulings.

back to table of contents

Latvia	Lithuania	Luxembourg	Malta	Netherlands
	- the entity does not perform any real active activity (e.g. there is no production); - the entity's income is only passive income; - there is no physical existence of the entity in the country of establishment (no premises, equipment, etc.) in the case they are necessary for the performance of the activity; - the entity does not have a bank account in the jurisdiction in which it is registered; - the entity has a short time of existence or is established immediately before the payment of dividends; - etc. Provided that the binding rulings issued by the Lithuanian TA on any individual cases are not publicly available, we are not aware of any precise explanations or the PSD GAAR application practices.			From the published summaries of the rulings, guidance can be obtained to a limited extent on, amongst others, the interpretation of the Dutch rules implementing the PSD GAAR.

5. Position papers, rulings or administrative guidance issued

Poland, Portugal, Romania, Slovakia and Slovenia

Poland	Portugal	Romania	Slovakia	Slovenia
On 3 November 2017, The Ministry of Finance issued the official warning letter related to abuse of the dividend exemptions applied to payments made from Poland to companies located in the EU / EEA (e.g. in Luxembourg) which act as intermediaries for the investors from the countries with low level of taxation (e.g. in Jersey). The warning focuses on structures in which the actual business operations and management decisions are not located in in the country of the holding EU / EEA company. As a result, such payment of the dividend to the intermediary or *'letter box'* entity may be considered as made with no business justification and may not lead to the application of WHT exemption for the dividends.	Neither the Portuguese Tax Authorities, the Portuguese courts or the Portuguese legislature have issued any position papers, rulings or administrative guidance concerning the application or interpretation of the referred rules in the context of the PSD.	No relevant position papers, other rulings or administrative guidance have been posted with respect to the PSD GAAR, nor are there any other domestic or agreement based anti-abuse provisions in the context of the PSD.	The information published by the Slovak TA after the PSD GAAR was implemented into Slovak Income Tax Act merely paraphrases the wording of the law and explains that it is a result of transposition of the PSD GAAR.	No relevant position papers, other rulings or administrative guidance have been posted with respect to the PSD GAAR, nor are there any other domestic or agreement based anti-abuse provisions in the context of the PSD.

back to table of contents

5. Position papers, rulings or administrative guidance issued

Spain, Sweden, Switzerland and the United Kingdom

Spain	Sweden	Switzerland	United Kingdom
The Spanish Directorate for General Taxation has issued several tax rulings on the interpretation of the SAAR included in art.14.1.h) of the Non-Resident Income Tax Act under the set of facts informed by the taxpayer requesting the ruling. Despite the interpretation of the SAAR being linked to that particular background, some guidance provided by the Spanish TA can be highlighted: - Regional platforms (i.e., holding companies that render services to their EU subsidiaries) established with relevant personnel and equipment can met the requirement of their incorporation and activity being grounded on valid economic purposes and sound business reasons. - The incorporation of holding companies in different countries, replicating the structure in each jurisdiction, can be grounded on valid economic reasons if it allows the isolation of country risks.	The anti-avoidance provision in the Swedish WHT Act was considered to fulfil the requirements stated in the PSD GAAR. There was no further guidance on the application or interpretation of the provision provided by the Swedish legislature nor was there any specific guidance from the Swedish TA in respect of the anti-avoidance provision in the Swedish WHT Act.	The dispatch of the Swiss government regarding the adoption of the MLI of 22 August 2018 mentions explicitly that the introduction of the MLI PPT brings no material change to the application of the Swiss Double Tax Agreement, as this corresponds to the existing practice of courts and Swiss TA.	There were no specific paper, rulings or guidance issues for the PSD. However, HMRC and the Panel have each published guidance on the UK's domestic law GAAR. HMRC's guidance is split into five parts dealing with Key Concepts, Examples and Procedural Aspects. This guidance has changed little from the first Panel-approved version published in April 2013. The Panel's guidance deals with matters such as submission of cases and was updated in January 2018 to include information about generic referrals.

back to table of contents

Spain	Sweden	Switzerland	United Kingdom
- The SAAR should be interpreted as not applicable where the structure does not provide any tax benefits, even if the payee of the dividends does not meet the safe harbour conditions. For example, the withholding exemption can apply even if dividends are paid to a company that lacks substance but is controlled by an EU group complying with the safe harbour. However, the Supreme Court rejected this reasoning in its March 2012 decision. - If the corporate structure existed long before non-EU shareholders acquired their interest, it could be argued that the structure is not tax-driven. - Even where the EU company receiving dividends has hired a specific and qualified number of workers, this does not preclude the application of the SAAR if the tax benefit is the only reason for the corporate structure.			

6. Impact following recent CJEU case law, and more in particular the Danish cases regarding beneficial ownership rendered by the CJEU on 26 February 2019

Austria, Belgium, Bulgaria, Croatia and Cyprus

Austria	Belgium	Bulgaria	Croatia	Cyprus
There was no specific impact from the CJEU EU GAAR case law on legislation or interpretation of the PSD GAAR in Austria. However, the two judgments mentioned show a general reluctant tendency regarding the relief from WHTs based on EC directives, especially in the case of intermediaries. As such, this tendency is also noticeable in Austria.	Although the Belgian TA did not issue guidance on the impact of the criteria provided for by the CJEU in the Danish cases on the PSD GAAR, we have recently experienced more detailed questions in relation to substance and beneficial ownership with respect to foreign holding companies during tax audits. A special task force within the Belgian TA has recently been established which focuses in particular on interest, dividends and royalties and investigates in detail the conditions for exemption of WHT. In Belgium, the concept of *'beneficial ownership'* is traditionally given a legal interpretation rather than an economic interpretation. Although the tax authorities have not yet published any further guidance in this respect, these questions show that the Belgian TA's interpretation of beneficial ownership seems to be evolving to a more economic interpretation of the concept.	There is as yet no direct reference in Bulgarian case law to the joined cases C-115/16, C-118/16, C-119/16 and C-299/16 and joined cases C-116/16 and C-117/16 respectively concerning the IRD and the PSD. The Bulgarian TA has yet not referred to said CJEU practice in their tax circulars, and no case law of the Bulgarian courts has been found to take into account the concepts discussed by the CJEU in said CJEU practice. Here it should be mentioned that Bulgarian law qualifies and taxes as dividend any amounts qualifying as hidden distribution of profit (defined as any amounts in excess of arm's length levels paid to shareholders or their related parties in any form or specific interest expenses), where the PSD exemption does not apply in these cases.	There was no impact from the CJEU EU GAAR case law on Croatian legislation or interpretation of the PSD GAAR. Beneficial ownership concept has not been defined in the Croatian legislation but has been applied by the Croatian TA in their opinions with respect to the application of double tax treaties Croatia has in effect.	There was no impact from the CJEU EU GAAR case law on Cyprus legislation or interpretation of the PSD GAAR. The concept of beneficial owner has not been defined in the Cyprus tax legislation as there is no relevant case law on the matter. However, Cyprus adopts the concept of *'beneficial ownership'* under the tax treaties and has due regard for the relevant insights on the relevance and interpretation of the term *'beneficial ownership'* provided by the CJEU on 26 February 2019 and, by extension, the implicit beneficial ownership requirement in the PSD.

back to table of contents

Austria	Belgium	Bulgaria	Croatia	Cyprus
		Further, the concept of beneficial owner is defined in the Bulgarian legislation for the purposes of the administrative procedure for application of double tax treaties where beneficial ownership is one of the conditions to be met in order for tax exemption or relief under the respective double tax treaty to be granted. The law stipulates that a foreign party could be considered as beneficial owner of the respective income should the following two conditions be cumulatively met: (i) the foreign party has the right to dispose of the income and to determine its use as well as it bears the whole or material amount of the risk, related to the activity, which the income stems from, and (ii) the foreign party does not act as conduit company (as specifically defined by law).		

back to table of contents

6. Impact following recent CJEU case law, and more in particular the Danish cases regarding beneficial ownership rendered by the CJEU on 26 February 2019

France, Germany, Czech Republic, Denmark and Estonia

France	Germany	Czech Republic	Denmark	Estonia
There has been no impact from the CJEU EU GAAR case law on France legislation or interpretation of the PSD GAAR following recent CJEU case law. However, case law based on the other GAAR provisions (repealed or still in force) should remain relevant. In addition, the concept of beneficial ownership has already been relied upon for many years by the French courts and the French TA (for example, in relation to the substance of companies receiving dividends). A change in the application of the concept of beneficial owners as currently interpreted by the French courts is not expected. However, in practice, there should be an increase of beneficial ownership discussions in cases where dividends are very quickly distributed further up the chain by the French taxpayer In this respect, even though there is no reference to the concept of beneficial ownership in a specific tax treaty, French courts consider that the beneficial ownership clause is implied and should always apply, unless otherwise provided.	To date, German legislation has not been adapted to recent CJEU case law on anti-abuse measures in the context of the PSD, neither to the judgment of 20 December 2017 in Joined Cases C-504/16 *(Deister Holding AG, formerly Traxx Investments NV)* and C-613/16 *(Juhler Holding A/S)* and the order of 14 June 2018 in Case C-440/17 *(GS)* specifically concerning section 50d(3) of the German PITA, nor to the judgments of 26 February 2019 regarding the Danish cases on beneficial ownership.	The general GAAR from the ATAD was passed in 2019 (despite the original reservations that it is no, in fact, necessary, see the answer to question 1). It does not appear that the Danish cases regarding the beneficial ownership rendered by the CJEU will have a significant impact in CZ, nor will the implementation of the general GAAR from the ATAD after all: it has been always the position of the CZ tax authorities that the GAAR and similar rules (beneficial ownership/ anti-conduit rules, anti-treaty shopping rules, whether expressly included in the respective treaty or not, etc.) have been always present in the CZ tax law (see also the answer to question 1)) and that all these international developments merely confirm what the CZ tax authorities have been maintaining from the beginning. DAC 6 notification rules (i.e. for structures beginning 6/2018) were implemented in CZ as of 1 September 2020, but the effectiveness should be postponed, due to the COVID-19 situation, generally until early 2021.	The CJEU preliminary ruling in the Danish beneficial owner cases has certainly had an impact on the administrative interpretation of the Danish GAAR, evidenced by multiple paragraphs from the rulings being quoted by the Danish Tax Agency in recent administrative tax rulings regarding the GAAR. However, as the preliminary ruling from the CJEU has not yet been finally applied by the Danish courts, the specific impact of the rulings on the Danish GAAR is currently far from clear.	There has been no impact from the CJEU case law on the application or interpretation of Estonian legislation of the PSD GAAR or ATAD GAAR. The Estonian TA have not issued additional guidance and there is no case law on the PSD or ATAD GAAR provisions.

France	Germany	Czech Republic	Denmark	Estonia
Therefore, pursuant to the concept of beneficial ownership a foreign entity can only benefit from treaty protection provided that it can be viewed as the beneficial owner of French source interest, dividends and/or capital gains (notably because it does not simply receive such income and gains to transfer them to a third party under a nominee or other kind of agreement). In this respect, the notion of beneficial ownership was used in France for the first time by the French Supreme Administrative Court in the Diebold's decision.[12] In this case, a French company paid fees to a Dutch pass through, an entity whose partners were two Dutch residents. The profits of the Dutch entity were transferred through commissions to a Swiss company. The reporting judge was of the view that the Dutch entity was not the beneficial owner as most of the Dutch entity profit was transferred to the Swiss company.		Also, the MLI has been acceded by CZ only to a very limited extent.		

12 CE 13 October 1999, n°191191, min c/ SA Diebold Courtage

back to table of contents

France	Germany	Czech Republic	Denmark	Estonia
The French Supreme Administrative Court did not follow the reporting judge's opinion and held that the Dutch entity was the effective beneficiary of the fees. notably because the French TA were not able to evidence that the fees paid by the Dutch entity (i.e. a share of 68%) were unreasonable for the services rendered by the Swiss company. It is uncertain as to whether the argument of the French Supreme Administrative Court which is to consider that the fees are not unreasonable is relevant as this criterion refers to the notion of abnormal management and a transfer pricing issue rather than to whether the Dutch entity is an interposed company. In addition, in an old decision, a first-tier jurisdiction ruled that a Dutch company was eligible to claim the benefit of the double tax treaty between France and the Netherlands even though it paid between 93% and 98% of the royalties it received to a company in the Netherlands Antilles, on the ground that the TA were unable to justify that the Netherlands company was only acting as an agent of the Netherlands Antilles company.[13]				

13 TA Lille, 18 march 1999, n° 95-5403 et 96-738, SARL Fountain Industries France

France	Germany	Czech Republic	Denmark	Estonia
It is unlikely that the same facts (ruled on today) would lead to the same results. In the Bank of Scotland case law,[14] the French Supreme Administrative Court denied the France/UK tax treaty benefit on the grounds of beneficial ownership as the sale of usufruct was a scheme that had the sole purpose of obtaining the avoir fiscal refund whereas the France / US tax treaty would not have allowed the US company to obtain such refund. The reporting judge indicated that the concept of beneficial ownership is used when an entity receives funds and transfers them to another entity under another form irrespective of the place of management of the intermediary company (i.e. whether it is located in a tax heaven or in France, subject to corporate income tax or not). Furthermore, the French Supreme Administrative Court ruled that the distribution made by a French entity to its Luxembourg parent company could not benefit from the reduced WHT provided by the France-Luxembourg tax treaty on the grounds that the Luxembourg entity could not be viewed as the beneficial owner of the dividend.[15]				

14 CE 29 December 2006, n°283314 min c/ sté Bank of Scotland
15 CE, 23 November 2016, #383838, Sté Eurotrade Juice.,

back to table of contents

France	Germany	Czech Republic	Denmark	Estonia
The Versailles Administrative Court of Appeal ruled that the beneficial owner of royalties was a company which, although it paid most of its royalties to another entity, was not subject to any binding obligations and retained its own independence and its own corporate interest (intérêt social), separate from that of its shareholders/ members.[16] More recently, the French Supreme Administrative Court[17] denied the WHT exemption provided by the PSD on the ground that a Luxembourg company (receiving some French source of dividends paid from a Swiss bank account) does not provide any document supporting that the Luxembourg company can be viewed as the beneficial owner of the dividends (e.g. bank statement establishing that the Luxembourg company was indeed the holder of the Swiss bank account opened from which the dividends were paid out).				

16 CAA Versailles, 12 mars 2019, no. 17VE01940, Sté Performing Rights Society.
17 CE 5 June 2020, #423809, Société Equiom & Société Enka

back to table of contents

6. Impact following recent CJEU case law, and more in particular the Danish cases regarding beneficial ownership rendered by the CJEU on 26 February 2019

Finland, Greece, Hungary, Ireland and Italy

Finland	Greece	Hungary	Ireland	Italy
There has been no particular impact from recent CJEU case law on the application or interpretation of the PSD GAAR. However, CJEU case law is generally deemed to play an important role in the application and interpretation of any national tax provisions based on the national implementation of EU directives.	There has been no impact from the CJEU EU GAAR case law on Greek legislation or interpretation of the PSD GAAR. No administrative guidance has been issued nor does case law exist that relates to the concepts given by the CJEU.	There has been no impact from the CJEU EU GAAR case law on Hungarian legislation or interpretation of the PSD GAAR. The Hungarian TA or the Ministry of Finance has not issued administrative guidance which would have taken into account the concepts given by the CJEU.	There has been no impact in Ireland on the application or interpretation of the PSD GAAR following recent CJEU case law.	On 10 July 2020, the Italian Supreme Court issued its decision No. 14756/2020, dealing, amongst others, with the interpretation of the beneficial owner requirement under the Interest and Royalty Directive ('IRD') and the abuse of the IRD. In that decision, the Court made abundant references to the judgment issued by the CJEU in joined cases C-115/16, C-118/16, C-119/16 and C-299/16 (the *'Danish cases'*). More specifically, the Supreme Court mentioned that, in the Danish cases, the CJEU held that the proof of an abusive practice requires both (i) objective circumstances from which it results that the objective pursued by the relevant EU legislation has not been achieved, and (ii) a subjective element consisting in the aim to obtain the relevant tax advantage by means of an artificial arrangement. Elaborating on the notion of artificial arrangement, the Court highlighted that the CJEU took the view that the artificial nature of an arrangement can be supported based on the fact that the group is structured in such a way that the company receiving the interest must pass that interest on to

back to table of contents

Finland	Greece	Hungary	Ireland	Italy
				a third party that does not fulfil the conditions for the application of the Interest and Royalty Directive, with the consequence that it only makes an insignificant taxable profit, as it acts as a conduit company between the debtor and the beneficial owner of the interest. The fact that a company acts as a conduit company can be confirmed by the fact that its sole activity is represented by the receipt of the interest and its subsequent transfer to the beneficial owner. Although this decision concerned the application of the IRD, it is expected that the Supreme Court will follow the same pattern when dealing with the possible abuse of the PSD. The Danish cases were also mentioned in some recent decisions issued by lower Courts, in particular: - decision of the Regional Court of Lombardy of 29 October 2019, n. 4235, where the Court, relying on the Danish cases, concluded that the Italian TA are only required to demonstrate the existence of an abuse but not to the identity of the beneficial owner of the profits distribution;

back to table of contents

Finland	Greece	Hungary	Ireland	Italy
				- decision of the Provincial Tax Court of Pescara of 27 February 2020, n. 27, where the Court, relying on the Danish cases, concluded that the beneficial owner requirement is not relevant for the application of the PSD and that the denial of the withholding exemption must rely more generally on the existence of an abuse of the Directive, which was not demonstrated in the case at stake. In addition, despite the lack of an express reference to the Danish cases, other recent Italian judgments were consistent with the CJEU's decisions. In particular, in decision No. 27113 of 28 December 2016, issued before the CJEU's judgments in the Danish cases, the Supreme Court confirmed in a treaty context that a foreign holding can be regarded as the beneficial owner of the dividends it receives if it is autonomous in managing the participation in the relevant subsidiaries and if it retains and reinvests the dividends received (instead of passing them on to its shareholder).

Finland	Greece	Hungary	Ireland	Italy
				The Supreme Court pointed out that the Italian TA must ascertain (and prove) the actual transfer of the income to the ultimate parent. It also clarified that the status of beneficial owner of a sub-holding cannot be denied on the assumption that, in multinational group, dividends (and other items of income) paid by the subsidiaries to the sub-holding ultimately benefit the parent at the top of the group, nor on the assumption that the sub-holding does not have a significant structure or substance, nor because the sub-holding is controlled by an entity that would not be entitled to the same benefit if the dividends were paid directly to that entity. This decision was expressly confirmed by the Supreme Court in judgment No. 14756/2020. Following this Supreme Court's decision, some lower tax courts have taken an approach more favourable to taxpayers in beneficial ownership litigation cases, expressly citing the 2016 judgment of the Supreme Court (see e.g., Tax Court of Milan, No. 4700 of November 22, 2019; Tax Court of Milan, No. 2237 of May 21, 2019; Tax Court of Milan, No. 1575 of April 8, 2019;

Finland	Greece	Hungary	Ireland	Italy
				Tax Court of Milan, No. 5500 of December 2018, 17, which confirmed Tax Court of Milan, No. 5052 of July 24, 2017; Tax Court of Milan, No. 3001 of June 28, 2018; Tax Court of Milan, No. 1185 of March 19, 2018; Tax Court of Milan, No. 4638 of July 7, 2017; Tax Court of Milan, No. 4819 of June 23, 2017).

6. Impact following recent CJEU case law, and more in particular the Danish cases regarding beneficial ownership rendered by the CJEU on 26 February 2019

Latvia, Lithuania, Luxembourg, Malta and the Netherlands

Latvia	Lithuania	Luxembourg	Malta	Netherlands
There has been no impact from the CJEU EU GAAR case law on Latvian legislation or interpretation of the PSD GAAR. The Latvian State Revenue Service has not issued administrative guidance and no case law has been issued taking into account the concepts given by the CJEU.	There has been no impact from the CJEU EU GAAR case law on Lithuania legislation or interpretation of the PSD GAAR. The Lithuanian State Tax Inspectorate has not issued any administrative guidance and no case law has been issued taking into account the concepts given by the CJEU.	There has been no impact from the CJEU EU GAAR case law on Luxembourg legislation or interpretation of the PSD GAAR. The Luxembourg TA has not issued administrative guidance and no case law has been issued taking into account the concepts given by the CJEU. The concept of beneficial owner has not been defined in the Luxembourg legislation nor in Luxembourg case law but Luxembourg actors rather refer to the concept under tax treaties. We have not yet noted a material change (compared to the *Indofood* doctrine) in the field of beneficial ownership.	There has been no impact from the CJEU EU GAAR case law on Maltese legislation or interpretation of the PSD GAAR. The Commissioner for Revenue has not issued any administrative guidance relating to the concepts on beneficial ownership established by the CJEU, although the term is referred to in some instances within tax legislation.	The Netherlands amended the provisions in the Dutch non-resident CIT and dividend WHT rules following (I) the Deister Holding/Juhler Holding judgment and (II) the Danish cases. In light of the Deister Holding/Juhler Holding judgment the rules for the Business Reasons Test, which provide that valid business reasons reflecting economic reality must be present, have been supplemented for foreign intermediate holding companies, meaning that such companies can also make plausible by other means that valid business reasons exist than just meeting the relevant substance requirements. This was amended per 1 January 2019. Subsequently, in view of the Danish cases, the relevant substance requirements that functioned as a safe harbour for certain foreign intermediate companies located in EU Member States and tax treaty countries, implying that no abuse would be considered to be present, were amended again. As from 1 January 2020, the Dutch TA has the possibility of counterproof to demonstrate that a structure is abusive, even if the relevant substance criteria have been satisfied.

back to table of contents

Latvia	Lithuania	Luxembourg	Malta	Netherlands
				In that case, the burden of proof rests on the tax inspector. If the taxpayer does not meet the *'relevant substance'* criteria, the possibility of counterproof is also still available for the taxpayer. In that case, the burden of proof falls on the taxpayer to substantiate that no abuse should be considered present. For the sake of completeness, it is noted that under the Dutch dividend stripping rules, the Dutch dividend WHT exemption would not apply on the basis that the dividend recipient is not considered to be the beneficial owner of the dividends at stake. Pursuant to the Danish cases, no material change in the Dutch interpretation of beneficial ownership has been noted. However, we do see an increase of beneficial ownership discussions in cases where dividends distributed by the Dutch taxpayer are distributed on further up the chain in a fairly short period of time.

6. Impact following recent CJEU case law, and more in particular the Danish cases regarding beneficial ownership rendered by the CJEU on 26 February 2019

Poland, Portugal, Romania, Slovakia and Slovenia

Poland	Portugal	Romania	Slovakia	Slovenia
Although the CJEU case law (including the Danish cases) regarding PSD anti-abuse provisions have not yet been reflected in the legislation nor used in the interpretation of the PSD GAAR / PSD anti-abuse provisions, it should be noted that recently (on 11 March 2020), the Lower Administrative Court in Wroclaw issued a first judgment (No. I SA/Wr 977/19) with respect to the beneficial ownership requirements regarding the dividend payments. The judgment was issued on the basis of a tax ruling case. In the application for the tax ruling, the applicant (a company acting as a tax remitter responsible for collecting WHT in connection with the dividend payment to its parent company) indicated that it is not required to verify that the entity to which the dividend is paid is its beneficial owner. In the tax ruling, the Polish TA considered it necessary to check the status of the beneficial owner of the payment recipient under the requirement of due diligence arising from the amendment to the CIT Act regulations of 1 January 2019.	While neither the Portuguese TA, the Portuguese courts or the Portuguese legislature have issued any position papers, rulings or administrative guidance concerning the application or interpretation of the referred rules in the context of the PSD in a post-Danish cases environment, it is understood that such case law may constitute a trigger towards a more resolute and effective increased degree scrutiny of economic rationale and substance of corporate structures involving Portuguese subsidiaries / parent companies.	There has been no impact from the CJEU case law on Romanian legislation or interpretation of the PSD GAAR.	No impact. The CJEU case law might be theoretically relevant to the pending court case discussed under 4.	In light of the C-116/16 and C-117/16 judgments, Slovenia has not seen any special manifestation of the ruling provided in either legislative, administrative or other bodies of regulative work. However, that is not to say that the judgment will not be followed in future cases, nor would it mean that the practice of the judicial or administrative bodies will necessarily change.

Poland	Portugal	Romania	Slovakia	Slovenia
The Court rescinded the tax ruling which was unfavourable for the applicant and confirmed that the tax remitter responsible for dividend payment is not obliged to meet conditions that do not result from the law regulations (in accordance with the direct wording of the provisions of the CIT Act, the beneficial owner requirements apply to the WHT exemption only with respect to royalties and interest) therefore, there is no obligation to verify this circumstance. The Court assessed that the position of the Polish TA contained in the tax ruling is contrary to the very structure of the dividend, because it is difficult to indicate the situation in which the entity receiving the dividend is not a shareholder in a company and as recipient of the dividend is not its owner. Nonetheless, it should be stressed that the Ministry of Finance opposes the court verdict as on 19 June 2019, it issued draft explanatory notes regarding principles of the WHT rules.				

back to table of contents

Poland	Portugal	Romania	Slovakia	Slovenia
According to the draft explanatory notes (the final version has not yet been issued) in the view of the Ministry of Finance, beneficial ownership is a term closely related to business substance and this requirement should also be important regarding the dividend payments. As it also clearly appears from the above court proceedings, such approach is also reflected in the tax rulings issued by the Polish TA.				

back to table of contents

6. Impact following recent CJEU case law, and more in particular the Danish cases regarding beneficial ownership rendered by the CJEU on 26 February 2019

Spain, Sweden, Switzerland and the United Kingdom

Spain	Sweden	Switzerland	United Kingdom
To date, the recent CJEU case law has not had an impact on the Spanish legislation in the context of the PSD. However, the Danish cases have had a major impact on a few recent decisions dated October 2019 of the Central Tax Tribunal (TEAC, which condition as court or tribunal competent to request for a preliminary ruling was rejected in the judgment of the CJEU in the *Santander* case C-274/14), dealing with the payment of Spanish-sourced dividends and interest to EU taxpayers. In these decisions, the TEAC's reasoning started by confronting the CJEU's criteria in the Danish cases with its criteria in the *Eqiom* case (C-6/16), and concluded by identifying a remarkable change in the CJUE's approach. In its view, in the Danish cases, the CJEU took a stricter approach before the protection of the *'freedom of establishment'* (sic) where non-EU shareholders use EU intermediate holding companies. The TEAC highlighted the reinforcement of the general principle of prohibition of abuse of EU law, the lack of any reference to the *Eqiom* case and the fact that the CJEU did not follow AG Kokott's Opinion.	We have not experienced any impact from the CJEU PSD GAAR case law on the anti-avoidance provision of the Swedish WHT Act.	There has been no impact from the CJEU PSD GAAR case law on Swiss legislation.	There has been no impact from the CJEU EU GAAR case law on UK legislation or interpretation of the Directive. The concept of *'beneficial owner'* was already used by HMRC (i.e. before the Danish cases) to assess claims for relief from WHT in other contexts - for example, a claim for relief from UK interest WHT under a double tax treaty. In its guidance, HMRC defines beneficial ownership as: *'the sole and unfettered right to use enjoy or dispose of'* the asset or income in question.

back to table of contents

Spain	Sweden	Switzerland	United Kingdom
The TEAC also referred to the denial of the withholding exemption when the beneficial owner is resident in a third State and shifted the burden of the proof to the taxpayer. On these grounds, the TEAC refused to allow the refund of the tax withheld on dividends paid to a Luxembourgish holding company controlled by a third State's sovereign fund, that was a permanent, multijurisdictional vehicle with various investments. In fact, the shares in the Spanish company paying the dividends amounted to around 49% of its balance sheet and part of its income.			

7. Audits being carried out

Austria, Belgium, Bulgaria, Croatia and Cyprus

Austria	Belgium	Bulgaria	Croatia	Cyprus
There are no reported audits being carried out in Austria concerning the application of the PSD GAAR.	There are no reported audits being carried out specifically on the application of the PSD GAAR or other anti-abuse provisions. However, upon tax audits, we note that the Belgian TA are increasingly raising detailed questions in relation to both substance as well as beneficial ownership.	There are no reported or identified audits based on reviewed case law being carried out in Bulgaria concerning the application of the rule of art.16 of the Bulgarian CITA specifically in the context of the PSD.	There are no reported audits being carried out in Croatia in relation to the PSD GAAR.	There are no reported audits being carried out in Cyprus in relation to the PSD GAAR.

7. Audits being carried out

France, Germany, Czech Republic, Denmark and Estonia

France	Germany	Czech Republic	Denmark	Estonia
There are no reported audits being carried out in France in relation to the PSD GAAR.	There are no reported tax audits being carried out in Germany with respect to the PSD GAAR or other domestic- or agreement-based anti-abuse provisions in the context of the PSD (neither regarding the old version of art. 1(2) before the amendment introduced by the PSD GAAR nor concerning the current version of art. 1(4) as amended by that Directive). It should be pointed out, however, that the advantages (ex ante exemption from WHT or ex post refund thereof) under the PSD, just like under bilateral double tax conventions, will only be granted by the Federal Central Tax Office upon request. Such requests are generally subject to strict scrutiny as regards the conditions for tax relief, and to requests based on the PSD the Federal Central Tax Office, following the Federal Ministry of Finance´s circular letter of 4 April 2018, will still apply the specific anti-abuse clause of section 50d(3) of the German PITA in a *'reduced'* version, while requests based on bilateral double tax conventions may be subject to the *'full'* version of that clause and, in relation to certain countries (e.g., Canada, Liechtenstein, US), also to agreement-based LoB clauses.	There are no reported tax audits being carried out in Czech Republic concerning the application of the PSD GAAR.	Generally, the Danish Tax Agency is known to take an aggressive approach to matters with fact patterns resembling the parameters of the GAAR, and several audits regarding the previous Danish GAAR (in force from 1 January 2015 to 31 December 2018) and the current Danish GAAR are pending. However, at present no relevant appeals, body rulings or court judgments have been published.	There are no reported tax audits being carried out in Estonia in relation to the PSD GAAR.

back to table of contents

7. Audits being carried out

Finland, Greece, Hungary, Ireland and Italy

Finland	Greece	Hungary	Ireland	Italy
There are no reported tax audits being carried out in Finland in relation to the PSD GAAR.	There are no reported audits being carried out in Greece concerning the application of the PSD GAAR.	There are no reported audits being carried out in Hungary concerning the application of the PSD GAAR.	There are no reported audits being carried out in Ireland concerning the application of the PSD GAAR or any other domestic or agreement based anti-abuse provision in the context of the PSD.	The Italian TA are notoriously aggressive vìs-à-vìs EU holding structures by claiming either that the EU parent is not entitled to the benefit of the PSD because granting the exemption would be an undue tax benefit under the Italian GAAR or that it does not qualify as the beneficial owner of the dividends. Such an approach is also reflected in Circular Letter No. 6/E of March 30, 2016, where the Italian TA dealt with foreign holding structures. With regard to the withholding exemption under the PSD, the Italian TA argued that the benefits deriving therefrom may be denied in the case of: - conduit companies, i.e., situations in which the recipient company has negligible substance in terms of organizational structure, premises, employees, and assets; or - conduit transactions, i.e., situations where, regardless of the business substance of the recipient company, the latter acts as conduit with regard to the specific transaction because the income that it receives from the payor is channelled to other persons through back-to-back arrangements (same – or similar – terms and conditions, amounts, and timing of the payments).

back to table of contents

7. Audits being carried out

Latvia, Lithuania, Luxembourg, Malta and the the Netherlands

Latvia	Lithuania	Luxembourg	Malta	Netherlands
There are no reported audits being carried out in Latvia in relation to the PSD GAAR.	There are no reported audits being carried out in Lithuania in relation to the PSD GAAR.	There are no reported audits being carried out in Luxembourg in relation to the PSD GAAR.	There are no reported audits being carried out in Malta in relation to the PSD GAAR.	There are no reported audits being carried out in the Netherlands concerning the application of the PSD GAAR.

back to table of contents

7. Audits being carried out

Poland, Portugal, Romania, Slovakia and Slovenia

Poland	Portugal	Romania	Slovakia	Slovenia
There are no reported audits being carried out with respect to the application of the WHT exemption in connection with the substance / beneficial ownership requirements. The Polish TA verify whether foreign companies, being shareholders of Polish companies paying the dividends or interest abroad, meet the relevant substance and beneficial owner conditions (in terms of e.g. office, personnel, equipment, place of effective management).	There are no reported audits being carried out in Portugal concerning the application of neither of the rules referred to in the context of the PSD.	There is no reporting of any such audits being carried out in Romania.	There is no reporting of any such audits being carried out in Slovakia.	There are no reported audits being carried out in Slovenia concerning either of the aspects of the PSD GAAR.

back to table of contents

7. Audits being carried out

Spain, Sweden, Switzerland and the United Kingdom

Spain	Sweden	Switzerland	United Kingdom
There are no reported audits being carried out in Spain in the context of the PSD. However, it is expected that, due to the impact of the Danish cases and the tax authorities' priority on the review of the application of anti-avoidance measures to multinational groups (as mentioned in the guidelines published by the Ministry of Finance), the number of audits in this context will increase.	We are not aware of any audits being carried out in Sweden concerning the application of the PSD GAAR or concerning any other anti-abuse provisions in the PSD context.	There are no reported audits being carried out in Switzerland concerning the application of the PSD GAAR.	There are no reported audits being carried out in the UK concerning the application of the PSD GAAR.

back to table of contents

Overview contact details contributing firms

Austria

LeitnerLeitner
Am Heumarkt 7
1030 Wien
Austria
www.leitnerleitner.com

Birgit Rohm
Tel +43 1 718 98 90 469
Fax +43 1 718 98 90 804
Email birgit.rohm@leitnerleitner.com

Florian Zeitlinger
Tel +43 1 718 98 90 463
Fax +43 1 718 98 90 804
Email florian.zeitlinger@leitnerleitner.com

Bulgaria

DGKV
10 Tsar Osvoboditel Blvd.
1000 Sofia
Bulgaria
www.dgkv.com

Viara Todorova
Tel +359 2 932 1100
Fax +359 2 980 3586
Email viara.todorova@dgkv.com

Croatia

LeitnerLeitner
HR 10000 Zagreb
Heinzelova 70
Croatia
www.leitnerleitner.com

Ante Pavić
Tel +385 1 606 44-05
Fax +385 1 606 44-11
Email ante.pavic@leitnerleitner.com

Cyprus

Elias Neocleous & Co. LLC
195 Makarios III Avenue, 1-5th
Limassol CY-3030
P.O.Box 50613
CY-3608 Limassol
Cyprus
www.neo.law

Elena Christodoulou
Tel +357 25110212
Fax +357 25110001
Email elena.christodoulou@neo.law

Elias Neocleous
Tel +357 25110110
Fax +357 25110001
Email elias.neocleous@neo.law

back to table of contents

LOYENS LOEFF

Czech Republic

Havel & Partners
Florentinum, Reception A
Na Florenci 2116/15
110 00 Prague 1
Czech Republic
www.havelpartners.cz

Josef Žaloudek
Tel +420 255 000 495
Email josef.zaloudek@havelpartners.cz

Denmark

Kromann Reumert
Sundkrogsgade 5
DK-2100 Copenhagen
Denmark
www.kromannreumert.com

Arne Møllin Ottosen
Tel +45 38 77 44 66
Fax +45 70 12 13 11
Emai: ao@kromannreumert.com

Jon Mitre Sinius-Clausen
Tel +45 38 77 42 80
Fax +45 70 12 13 11
Email jmsc@kromannreumert.com

Estonia

Sorainen
Kawe Plaza
Pärnu mnt 15
10141 Tallinn
Estonia
www.sorainen.com

Karl Einar Ilves
Tel +372 6 400 900
Email karl.ilves@sorainen.com

Kaido Künnapas
Tel +372 6 400 923
Email kaido.kunnapas@sorainen.com

Finland

Krogerus
Unioninkatu 22
00130 Helsinki
Finland
www.krogerus.com

Antti Lehtimaja
Tel +358 29 000 6373
Fax +358 29 000 6201
Email antti.lehtimaja@krogerus.com

Anna Hänninen
Tel +358 29 000 6892
Fax +358 29 000 6201
Email anna.hanninen@krogerus.com

back to table of contents

France

Darrois Villey Maillot Brochier
69 avenue Victor Hugo
75116 Paris
France
www.darroisvilley.com

Loïc Védie
Tel +33 1 45 02 19 19
Fax +33 1 45 02 49 59
Email lvedie@darroisvilley.com

Germany

Flick Gocke Schaumburg
Fritz-Schäffer-Straße 1
53113 Bonn
Germany
www.fgs.de

Axel Cordewener
Tel +49 228/9594-0
Fax +49 228/95 94-100
Email axel.cordewener@fgs.de

Michael Hendricks
Tel +49 228/95 94-637
Fax +49 228/95 94-100
Email: michael.hendricks@fgs.de

Klaus Sieker
Tel +49 69/717 03-0
Fax +49 69/717 03-100
Email klaus.sieker@fgs.de

Greece

Iason Skouzos & Partners
43, Akadimias street
Athens 106 72
Greece
www.taxlaw.gr

Theodoros Skouzos
Tel +30 210 3633243-3633858
Fax +30 210 3633461
Email tskouzos@taxlaw.gr

Hungary

Jalsovszky
MOM Park, Gellért Tower
H-1124 Budapest
Csörsz utca 41
Hungary
www.jalsovszky.com

Baráti Ákos
Tel +36 1 889 2800
Fax +36 1 886 7899
Email abarati@jalsovszky.com

back to table of contents

Ireland

Matheson
70 Sir John Rogerson's Quay
Dublin 2
Ireland
www.matheson.com

Aidan Fahy
Tel +353 1 232 2390
Fax +353 1 232 3333
Email aidan.fahy@matheson.com

John Ryan
Tel +353 1 232 2238
Fax +353 1 232 3333
Email john.ryan@matheson.com

Italy

Maisto
Piazza Filippo Meda, 5
20121 Milan
Italy
www.maisto.it

Guglielmo Maisto
Tel +39 02 776931
Fax +39 02 77693300
Email G.Maisto@maisto.it

Paolo Arginelli
Tel +39 02 776931
Fax +39 02 77693300
Email P.Arginelli@maisto.it

Latvia

Sorainen
Kr. Valdemara 21
LV-1010 Riga
Latvia
www.sorainen.com

Aija Lasmane
Tel +371 67 365 000
Email Aija.Lasmane@sorainen.com

Jānis Taukačs
Tel +371 67 365 019
Email Janis.Taukacs@sorainen.com

Lithuania

Sorainen
44A Gedimino Ave
LT-01110 Vilnius
Lithuania
www.sorainen.com

Saulė Dagilytė
Tel +370 52 685 040
Email saule.dagilyte@sorainen.com

back to table of contents

Malta

Francis J. Vassallo & Associates Limited
FJVA Business Centre, Industry Street
Zone 5, Central Business District
Qormi, CBD 5030
Malta
www.fjvassallo.com

Francis J. Vassallo
Tel +356 2299 3100
Email francis@fjvassallo.com

Poland

MDDP
Mokotowska Square
Mokotowska 49
00-542 Warszawa
Poland
www.mddp.pl

Justyna Bauta-Szostak
Tel +48 22 322 68 79
Fax +48 22 322 68 89
Email justyna.bauta-szostak@mddp.pl

Piotr Paśko
Tel +48 22 322 68 88
Fax +48 22 322 68 89
Email piotr.pasko@mddp.pl

Portugal

Cuatrecasas
Praça Marquês de Pombal, n.º 2
www.cuatrecasas.com

Diogo Ortigão Ramos
Tel +351 21 355 38 00
Fax +351 21 353 23 62
Email dortigaoramos@cuatrecasas.com

Romania

Nestor Nestor Diculescu Kingston Petersen
Strada Barbu Văcărescu nr. 201
Clădirea Globalworth Tower Et. 18
Bucharest 020276
Romania
www.nndkp.ro

Alexandru Onuță
Tel +40 21 201 1200
Email alexandru.onuta@nndkp.ro

back to table of contents

Slovakia

PRK Partners
Hurbanovo námestie 3
811 06 Bratislava
Slovakia
www.prkpartners.com

Miriam Galandová
Tel +421 232 333 232
Email miriam.galandová@prkpartners.com

Slovenia

LeitnerLeitner
Dunajska cesta 159
1000 Ljubljana
Sloveni
www.leitnerleitner.com

Blaž Pate
Tel +386 5 636 750
Fax +386 1 563 67 89
Email blaz.pate@leitnerleitner.com

Spain

Cuatrecasas
Calle Almagro, 9
28010 Madrid
Spain
www.cuatrecasas.com

Andrés Sánchez
Tel +34 915 247 104
Fax +34 915 247 124
Email andres.sanchez@cuatrecasas.com

Antonio Barba
Tel +34 915 247 105
Fax +34 915 247 124
Email antonio.barba@cuatrecasas.com

Sweden

Mannheimer Swartling Advokatbyrå AB
Norrlandsgatan 21
Box 1711
111 87 Stockholm
Sweden
www.mannheimerswartling.se

Anders Erasmie
Tel +46 8 595 063 67
Fax +46 8 595 060 01
Email anders.erasmie@msa.se

Carl Hesslin
Tel +46 8 595 064 51
Fax +46 8 595 060 01
Email carl.hesslin@msa.se

Hanna Lundblad
Tel +46 8 5950 6378
Fax +46 8 595 060 01
Email hanna.lundblad@msa.se

back to table of contents

United Kingdom

Macfarlanes
20 Cursitor Street
London EC4A 1LT
UK
www.macfarlanes.com

Gregory Price
Tel +44 (0)20 7849 2754
Fax +44 (0)20 7831 9607
Email gregory.price@macfarlanes.com

back to table of contents

LOYENS LOEFF

Our offices

Amsterdam
P.O. Box 71170
1008 BD Amsterdam
Parnassusweg 300
1081 LC Amsterdam
The Netherlands
T +31 20 578 57 85

London
15 Austin Friars
London, EC2N 2HE
United Kingdom
T +44 20 7826 30 70

Paris
1, Avenue Franklin D. Roosevelt
75008 Paris
France
T +33 1 49 53 91 25

Tokyo
21F, Shin Marunouchi Center Bldg.
1-6-2 Marunouchi
Chiyoda-ku
Tokyo 100-0005
Japan
T +81 3 32 16 73 24

Brussels
Tervurenlaan 2
1040 Brussels
Belgium
T +32 2 743 43 43

Luxembourg
18-20, rue Edward Steichen
2540 Luxembourg
T +352 46 62 30

Rotterdam
P.O. Box 2888
3000 CW Rotterdam
Blaak 31
3011 GA Rotterdam
The Netherlands
T +31 10 224 62 24

Zurich
Alfred-Escher-Strasse 50
8002 Zurich
Switzerland
T +41 43 434 67 00

Hong Kong
Unit 1502, Sun House
181 Des Voeux Road Central
Hong Kong
T +852 3763 9300

New York
555 Madison Avenue, 27th Floor
New York, NY 10022
USA
T +1 212 489 06 20

Singapore
80 Raffles Place
14-06 UOB Plaza 1
Singapore 048624
Singapore
T +65 6880 3070

back to table of contents

LOYENS & LOEFF

LOYENSLOEFF.COM

As a leading firm, Loyens & Loeff is the logical choice as a legal and tax partner if you do business in or from the Netherlands, Belgium, Luxembourg or Switzerland, our home markets. You can count on personal advice from any of our 900 advisers based in one of our offices in the Benelux and Switzerland or in key financial centres around the world. Thanks to our full-service practice, specific sector experience and thorough understanding of the market, our advisers comprehend exactly what you need.

Amsterdam, Brussels, Hong Kong, London, Luxembourg, New York, Paris, Rotterdam, Singapore, Tokyo, Zurich