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EUROOPA ÜHENDUSTE KOHUS  
ΔΙΚΑΣΤΗΡΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ  
COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES  
COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES  
CÚIRT BHREITHIÚNAIS NA gCÓMHPHOBAL EORPACH  
CORTE DI GIUSTIZIA DELLE COMUNITÀ EUROPEE  
EIROPAS KOPIENU TIESA



3ENDRIJŲ TEISINGUMO TEISMAS  
KÖZÖSSÉGEK BÍRÓSÁGA  
IL-QORTI TAL-ĠUSTIZZJA TAL-KOMUNITAJIET EWROPEJ  
HOF VAN JUSTITIE VAN DE EUROPESE GEMEENSCHAPPEN  
TRYBUNAŁ SPRAWIEDLIWOŚCI WSPÓLNOT EUROPEJSKICH  
TRIBUNAL DE JUSTIÇA DAS COMUNIDADES EUROPEIAS  
SÚDNY DVOR EURÓPSKÝCH SPOLOČENSTEV  
SODIŠČE EVROPSKIH SKUPNOSTI  
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EUROPEISKA GEMENSKAPERNAS DOMSTOL

Press and Information

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Advocate General's Opinion in Case C-196/04

*Cadbury Schweppes plc, Cadbury Schweppes Overseas Limited v Commissioners of Inland Revenue*

**IN THE OPINION OF ADVOCATE GENERAL LÉGER THE UNITED KINGDOM LEGISLATION ON 'CONTROLLED FOREIGN COMPANIES' IS COMPATIBLE WITH COMMUNITY LAW IF IT APPLIES ONLY TO WHOLLY ARTIFICIAL ARRANGEMENTS INTENDED TO CIRCUMVENT NATIONAL LAW**

In order to counteract tax avoidance, the United Kingdom legislation on 'controlled foreign companies' (CFCs) <sup>1</sup> provides for the inclusion in the tax base of a United Kingdom resident parent company the profits made by a controlled subsidiary <sup>2</sup> established in another Member State, even though they were not received by the parent company. That legislation is designed to apply when the profits made by the CFC are subject to much lower taxation than that in effect in the United Kingdom. The legislation provides for a number of exceptions to its application.

Cadbury Schweppes plc (Cadbury), a United Kingdom resident company, is the parent company of a group of companies consisting of subsidiaries at the head of which is Cadbury Schweppes Overseas Limited (CSO). The group thus includes two subsidiaries wholly owned indirectly by Cadbury, Cadbury Schweppes Treasury Services (CSTS) and Cadbury Schweppes Treasury International (CSTI), established in the International Financial Services Centre in Dublin, Ireland, their business being to raise finance and to provide that finance to subsidiaries in the Cadbury group.

<sup>1</sup> That legislation is contained in sections 747 to 756 and Schedules 24 to 26 of the Income and Corporation Taxes Act 1988.

<sup>2</sup> In which the parent company owns a holding of more than 50%, under the version applicable at the material time.

Cadbury incorporated CSTS and CSTI as indirect subsidiaries with fiscal residence in Ireland solely in order that intra-group lending treasury activities could benefit from the regime of the International Financial Services Centre Dublin for group treasury companies in Ireland. Given the rate of tax applicable to companies incorporated in the Centre, the United Kingdom tax authorities claimed from CSO corporation tax in the sum of GBP 8 638 633.54 on the profits of CSTI for the financial year ending December 1996.

Cadbury and CSO appealed against that tax notice to the Special Commissioners (United Kingdom), contending that the United Kingdom legislation on CFCs was contrary to the rules of the Treaty on freedom of movement. The national court referred questions to the Court for a preliminary ruling in that regard.

### *Abuse of freedom of establishment*

First, Advocate General Léger states that, in his view, **the establishment by a parent company of a subsidiary in another Member State for the purpose of enjoying the more favourable tax regime in that other State does not constitute, in itself, an abuse of freedom of establishment.** He notes that freedom of establishment is designed to allow the genuine and actual pursuit of an economic activity in the host State and that where that objective is fulfilled, the reasons for which the Community national or company concerned wished to exercise that freedom cannot call into question the protection they derive from the Treaty.

### *Hindrance to freedom of establishment*

Advocate General Léger goes on to state that **that United Kingdom legislation is disadvantageous to the parent company to which it applies** compared to, on the one hand, a resident company which has established its subsidiary in the United Kingdom and, on the other, a resident company which has established such a subsidiary in a Member State which does not have a sufficiently favourable tax regime to fall within its scope of application. In the first case, the resident company is never taxed on the profits of its domestic subsidiary. In the second case, the resident company is not taxed on the profits of its foreign subsidiary as they arise. It cannot be taxed until those profits are paid to it in the form of dividends.

He considers that that differentiated tax treatment is **such as to deter a resident company from exercising its right of establishment in a very low-tax Member State.**

### *Justification relating to counteraction of tax avoidance*

Finally, the Advocate General notes that the counteraction of tax avoidance is among the overriding reasons in the public interest which can justify a hindrance to the exercise of the fundamental freedoms. However, the actual finding of such a justification has been confined by the case-law within rather strict limits. Accordingly, a hindrance to one of the freedoms can be justified on the ground of counteraction of tax avoidance only if the legislation in question is specifically designed to exclude from a tax advantage wholly artificial arrangements intended to circumvent national law. The Advocate General explains that, in order to be capable of being justified, national legislation must not merely refer to a given situation in general terms but must enable the national court to refuse, case by case, the

benefit of Community law to certain taxpayers or certain companies which have made use of an artificial arrangement for the purpose of avoiding tax.

The Advocate General states, in that respect, that the legislation at issue is designed to counteract the diversion of profits made by a United Kingdom tax resident company by establishing a subsidiary in a low-tax country and carrying out intragroup transactions whose main purpose is to transfer those profits to that subsidiary. By adding the profits made by the CFC to the parent company's tax base, the legislation in question is suitable for guaranteeing fulfilment of the purpose for which it was adopted.

However, **according to the Advocate General it is important that the presumption set up by the law may in fact be rebutted** and that the application of that law may therefore be limited to wholly artificial arrangements the purpose of which is to circumvent national tax law. It must be possible for the taxpayer to provide proof in accordance with the rules of evidence under national law, provided that the effectiveness of Community law is not thereby undermined.

The Advocate General proposes the following three factors, which should be determined cumulatively, as criteria relevant to absence of wholly artificial arrangements: first, the degree of physical presence of the subsidiary in the host State, secondly, the genuine nature of the activity provided by the subsidiary and, finally, the economic value of that activity to the parent company and the entire group.

**In the present case, it is for the national court**, which has the task of determining the compatibility with Community law of its national law on CFCs, **to assess whether that legislation may be given an interpretation which makes it possible to limit its application to artificial arrangements intended to circumvent national tax law.**

**IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.**

*Unofficial document for media use, not binding on the Court of Justice.*

*Languages available: ES EN FR DE IT*

*The full text of the Opinion may be found on the Court's internet site  
<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-196/04>*

*It can usually be consulted after midday (CET) on the day of delivery.*

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