Case C-228/24

Request for a preliminary ruling

Date lodged:

26 March 2024

Referring court:

Mokestinių ginčų komisija prie Lietuvos Respublikos Vyriausybės (Lithuania)

Date of the decision to refer:

20 February 2024

Applicant:

‘Nordcurrent group’ UAB

Defendant:

Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos

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MOKESTINIŲ GINČŲ KOMISIJA PRIE LIETUVOS RESPUBLIKOS VYRIAUSYBĖS
(Tax Disputes Commission under the Government of the Republic of Lithuania)

DECISION
ON THE COMPLAINT OF ‘NORDCURRENT GROUP’ UAB OF 13 DECEMBER 2023

[…]

The Tax Disputes Commission under the Government of the Republic of Lithuania (‘the Tax Disputes Commission’) […] [composition of the Tax Disputes Commission] has examined the complaint of the private limited liability company Nordcurrent group (‘Nordcurrent’ or ‘the Applicant’) of 13 December 2023 against decision No 69-93 of the Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos (State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania) of 22 November 2023 (‘the contested decision’). The representatives of the Applicant […] [names of the representatives

of the Applicant and of the Inspectorate] participated remotely in the sitting of the Tax Disputes Commission on 9 January 2024.

The Tax Disputes Commission finds as follows:

[…] [right to make the request to the Court of Justice under Article 267 TFEU] In its judgment of 21 October 2010 in *Nidera Handelscompagnie* (C-385/09[, EU:C:2010:627]), the Court of Justice concluded that the Tax Disputes Commission is a court or tribunal within the meaning of Article 234 EC (and therefore within the meaning of Article 267 of the Treaty on the Functioning of the European Union).

Legal basis

European Union law

1 In accordance with [the third paragraph of] Article 288 of the Treaty on the Functioning of the European Union, a directive is to be binding, as to the result to be achieved, upon each Member State to which it is addressed, but is to leave to the national authorities the choice of form and methods.

2 The objective of Directive 2011/96/EU [1] of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States ('Directive 2011/96') is to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company [(recital 3)].

3 Under [recitals 6, 7 and 8 of] Council Directive (EU) 2015/121 of 27 January 2015 ('Directive 2015/121') amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States:

'(6) The application of anti-abuse rules should be proportionate and should serve the specific purpose of tackling an arrangement or a series of arrangements which are not genuine, that is, which do not reflect economic reality.

(7) To that end, when assessing whether an arrangement or a series of arrangements are abusive, Member States' tax administrations should undertake an objective analysis of all relevant facts and circumstances.

(8) While Member States should use the anti-abuse clause to tackle arrangements which are, in their entirety, not genuine, there may also be cases where single steps or parts of an arrangement are, on a stand-alone basis, not

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02011L0096-20150217

genuine. Member States should be able to use the anti-abuse clause also to tackle those specific steps or parts, without prejudice to the remaining genuine steps or parts of the arrangement. That would maximise the effectiveness of the anti-abuse clause while guaranteeing its proportionality. The "to the extent approach" can be effective in cases where the entities concerned, as such, are genuine but where, for example, shares from which the profit distribution arises are not genuinely attributed to a taxpayer that is established in a Member State, that is, if the arrangement based on its legal form transfers the ownership of the shares but its features do not reflect economic reality'.

4 Article 1(2) and (3) of Directive 2011/96[, as amended by Directive 2015/121,] ('the anti-abuse rule in Directive 2011/96') provides:

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

An arrangement may comprise more than one step or part.

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

5 [Recitals 4 to 6] of Directive 2011/96[, as amended by Directive 2015/121,] provide: '(4) The grouping together of companies of different Member States may be necessary in order to create within the Union conditions analogous to those of an internal market and in order thus to ensure the effective functioning of such an internal market. Such operations should not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. It is therefore necessary, with respect to such grouping together of companies of different Member States, to provide for tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the internal market, to increase their productivity and to improve their competitive strength at the international level.

(5) Such grouping together may result in the formation of groups of parent companies and subsidiaries.

(6) … It was necessary to eliminate that disadvantage by the introduction of a common system in order to facilitate the grouping together of companies at Union level.'

6 Article 1 of Directive 2011/96[, as amended by Directive 2015/121,] provides:

'1. Each Member State shall apply this Directive:

(a) to distributions of profits received by companies of that Member State which come from their subsidiaries of other Member States;

…

[4. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse.]'

7 Article 6 of Directive 2011/96[, as amended by Directive 2015/121,] provides: 'The Member State of a parent company may not charge withholding tax on the profits which such a company receives from a subsidiary'.

National law

8 Article 35(1) of the Lietuvos Respublikos pelno mokesčio įstatymas (Law of the Republic of Lithuania on corporation tax; 'the Law on corporation tax') states that dividends received by a Lithuanian entity from the holding of shares, portions of the capital or other rights in foreign entities or by a permanent establishment from the holding of shares, portions of the capital or other rights in foreign entities attributed to it are to be subject to a corporation tax rate of 15 per cent, with the exception of the cases provided for in paragraphs 2 and 3 of that article.

9 According to Article 35(2) of the Law on corporation tax: 'Dividends received by a Lithuanian entity from the holding of shares, portions of the capital or other rights in foreign entities or by a permanent establishment from the holding of shares, portions of the capital or other rights in foreign entities attributed to it shall not be subject to taxation where such foreign entities are incorporated or otherwise organised in a State of the European Economic Area and the profits whereof are subject to corporation tax or a tax equivalent to corporation tax'.

10 According to Article 32(6) of the Law on corporation tax: 'The provisions of … Article 35(2) and (3) of this Chapter on the non-taxation of dividends shall not apply to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part. An arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality'.

Facts of the main proceedings and arguments of the parties

11 The Inspectorate carried out a tax inspection of Nordcurrent and concluded in the inspection report […] dated 23 May 2023 that Nordcurrent should have calculated corporation tax on the dividends of EUR 3 205 211.53 received for the

year 2018-2019 by way of set-off from Nordcurrent Ltd, its subsidiary incorporated in the United Kingdom ('the Subsidiary'), after finding that, during the period under review, the Subsidiary was in the nature of an arrangement that was not genuine and was not put into place for valid commercial reasons. According to the Inspectorate, Nordcurrent obtained a tax advantage by receiving dividends from the Subsidiary, which is characterised as an arrangement, that is to say that it infringed Article 35(2) of the Law on corporation tax and avoided the payment of corporation tax on the dividends received by means of the exemption from taxation (the tax advantage) provided for in that article. In addition, it was found that Nordcurrent had unreasonably reduced its taxable profit for 2018-2019 by classifying the EUR 728 762.81 commission paid to the United Kingdom Subsidiary for the distribution of Nordcurrent games as permissible deductions. As a result, Nordcurrent was ordered to pay EUR 586 722 in corporation tax, default interest of EUR 222 028.08 on that corporation tax and a corporation tax fine of EUR 176 017.

12 The Inspectorate noted that, although the dividends received by Nordcurrent from the Subsidiary formally fulfilled the conditions for exemption from taxation on dividends, Nordcurrent had in fact received dividends from an arrangement the existence of which was shown by the following essential elements:

– During the period under review (2018–2019), the Subsidiary did not have the human resources (except for the manager who, in addition to that company, managed 7 other companies) that were necessary in view of the high volume of games, the high number of downloads (for instance, according to the Google Play Store, one of the games was downloaded more than 100 million times and another game was downloaded more than 10 million times) and the number of licensed sales channels used (45 of the Applicant's games were distributed through 13 licensed sales channels under the Subsidiary's name);

– The Subsidiary did not carry out any real economic activity in the United Kingdom during the period under review (2018–2019) because there was no place of establishment (a large number of companies were registered at the company's registered address, namely 97 110 companies, with the address being provided by the United Kingdom's address-specific company registration service), and no available data on the company's immovable property and other fixed tangible assets, websites or email addresses that were used for the purpose of carrying out activities;

– Given the large number of games, the number of customers, the number of sales channels used and the high volumes of sales, it was evident to the Inspectorate that actually carrying out such activities also required significant human resources, such as financial staff, data analysts and other highly qualified staff with specific knowledge, including specialists in the field of information technology, and the necessary material resources such as premises, computer hardware, software, and so on, which were not available to the Subsidiary. Accordingly, it was found that during the period under review, the Subsidiary did

not actually carry out its activities in the absence of human and other resources and that the activities related to the development and distribution of games were carried out by the employees of Nordcurrent, who had access to the advertising platforms and game distribution platforms.

– During the period under review, Nordcurrent had ownership of the games developed and updated by it, which were distributed under the Subsidiary's name.

The recognition of the arrangement was also based on information obtained from the United Kingdom tax authorities (regarding the Subsidiary's human and material resources).

13 Nordcurrent disagreed with the Inspectorate's findings and initiated a tax dispute by lodging a complaint with the Tax Disputes Commission. By decision […] of 2 October 2023, the Tax Disputes Commission ordered the Inspectorate to re-examine Nordcurrent's comments on the inspection report and to adopt a new decision. After re-examining the Applicant's complaint, the Inspectorate decided, by the contested decision, to uphold the findings made and the amounts calculated in the Inspectorate's inspection report. Nordcurrent disagreed with the decision of the Inspectorate and brought a complaint before the Tax Disputes Commission.

14 The facts established in the case show that Nordcurrent's activities, since its establishment, have related to the development and subsequent distribution of casual computer games (link to the Applicant's website: https://www.nordcurrent.com). Nordcurrent Ltd was established in the United Kingdom on 1 May 2009 by two residents as the original founders and ultimate controlling shareholders of the Nordcurrent group of companies. In 2011, in order to concentrate the business units into a single group of companies involved in the development and distribution of computer games, the shares of Nordcurrent Ltd were transferred to the Applicant and thus the whole group of companies started to operate under the name of Nordcurrent. Nordcurrent held 100% of the shares in the Subsidiary until 20 December 2019, after which the shares were transferred to one of the original resident shareholders. The winding-up proceedings in respect of the Subsidiary were completed on 5 January 2021.

15 According to Nordcurrent, when it began its activities, the Subsidiary was the distributor of all games developed by the Nordcurrent group of companies as well as other independent game developers worldwide and across all platforms. In 2017, some of the Subsidiary's distribution functions were transferred to Nordcurrent, that is to say, after alignment with the Google platform, games were transferred for distribution via the Nordcurrent account; in 2018, the business model was changed, transferring all the risks of losses incurred in game development, in the financing of that development and in advertising from the Subsidiary to Nordcurrent, and as from 2018, Nordcurrent became the holder of all rights to the games, while the Subsidiary remained merely the distributor; until Nordcurrent succeeded in concluding direct agreements with Apple and the remaining computer game distribution platforms, the Subsidiary acted as an

intermediary (the Subsidiary acted as an intermediary between Nordcurrent and game distribution platforms and between Nordcurrent and game advertisers, in return for which it received a commission); as from the end of 2019, the functions relating to the distribution of games and to the purchase of advertising were no longer performed through the Subsidiary and it was decided to wind up the Subsidiary. Pursuant to the provisions of a contract dated 1 December 2018, the Applicant, after receiving sales reports from the Subsidiary on sales, advertising costs incurred and commissions payable to the Subsidiary, issued invoices to the Subsidiary and the amounts specified therein were included by Nordcurrent in the corporation tax base in Lithuania for the years 2018 and 2019.

16 Nordcurrent disagreed with the Inspectorate's finding with regard to the recognition of an arrangement and emphasised that the establishment of the Subsidiary and the activities carried out by it generated real commercial benefits for Nordcurrent and the resources of the Subsidiary were in line with the resources required for such activities. The United Kingdom Subsidiary was needed as a sales channel, that is to say, since there was no possibility of selling games from Lithuania during the relevant periods (prior to the relevant periods, there was no possibility of distributing games directly from Lithuania via Google or Apple and those circumstances were beyond the control of the Applicant). Given the nature of and changes in the activities of the Subsidiary, the physical premises were needed only initially and were not needed during the subsequent period of activity. More specifically, prior to the period 2010–2011, when the Subsidiary was distributing games on physical media, it had contracts with consignment warehouses in the United Kingdom. During the subsequent period, when electronic games started to be distributed, the Subsidiary no longer needed physical premises at all. Accordingly, the decisions and involvement of the Subsidiary's manager were sufficient for the Subsidiary to enter into standard contracts for the distribution of games (Google, Apple, and so on) and the sale of advertising, simply by acceptance. The Director of the Subsidiary fulfilled the function entrusted to her by the shareholders of managing and facilitating worldwide distribution of the games developed by the group. For that function, the Director, Ms V. T., is fully competent and capable of managing the group's sales. Moreover, there was no need for the Subsidiary to have a website when distributing only the games developed by other entities, nor was there any objective need for the manager to have a separate (different) e-mail address when using the same name. The Applicant further argued that the Subsidiary was not an arrangement also due to the fact that the Subsidiary had been generating income on a regular basis (during the period under review alone, it generated EUR 166 762 000 in income from the activity of game distribution), and the Subsidiary was also subject to audits by the United Kingdom tax authorities and an independent audit firm, which did not raise any concerns as to the actual performance of its activities.

Reasons for the request for a preliminary ruling

17 According to Nordcurrent, the Inspectorate's decision departed from the case-law of the Court of Justice with regard to the assessment of a tax advantage. Nordcurrent claims that, according to the case-law of the Court of Justice, obtaining a tax advantage is linked precisely to the creation of an intermediate company which enables the payment of tax-exempt dividends between legal entities of different jurisdictions.

18 The Tax Disputes Commission notes that the Court of Justice has provided interpretative guidance on what constitutes an abuse of rights and the evidence relating thereto. For example, in its judgment of 26 February 2019 in [*T Danmark and Y Denmark* (Joined] Cases C-116/16 and C-117/16[, EU:C:2019:135)], the Court of Justice stated that: 'A group of companies may therefore be regarded as being an artificial arrangement where it is not set up for reasons that reflect economic reality, its structure is purely one of form and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law. That is so inter alia where, on account of a conduit entity interposed in the structure of the group between the company that pays dividends and the company in the group which is their beneficial owner, payment of tax on the dividends is avoided' (paragraph 100). 'The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans' (paragraph 114).

19 The Inspectorate, in its official summary interpretation (commentary) of Article 32(6) of the Law on corporation tax, has stated: 'in the event that, after taking into account all the relevant facts and circumstances, it is identified that one of the stages of an arrangement may not be genuine, that is to say, it has not been put into place for valid commercial reasons which reflect economic reality, but the existence of such an arrangement is not linked to the obtaining of a tax advantage that defeats the object or purpose [of Directive 2011/96] (that is to say, the tax liability and the amount of tax remain unchanged after the removal of the arrangement that is not genuine), the anti-abuse measure will not be applied.'

20 It is apparent from the circumstances of the proceedings that the Subsidiary in this case received the income that was the source of the dividends at issue from activities carried out in its own name and not in the form of dividends as an intermediate company. Accordingly, the Subsidiary in this case was not an intermediate company embedded in the group structure, but an income-generating company the profits of which were distributed in the form of dividends to the parent company.

21 Having analysed the interpretative provisions relating to the involvement of an intermediate entity in the chain of payment of dividends, the Tax Disputes

Commission is uncertain whether, for the purposes of the anti-abuse rule in Directive 2011/96, the obtaining of a tax advantage from the receipt of tax-exempt dividends can be linked to a subsidiary which is not an intermediate company embedded in a group structure and which generates profits that are then distributed to the parent company, that is to say, where there would be no dividends (profit) to tax at all if the subsidiary were removed.

22 In the main proceedings, the Inspectorate does not question either the establishment of the Subsidiary or the activities of the Subsidiary prior to the period under review; the assessment of the arrangement was carried out during the period under review (2018–2019), that is to say, the circumstances relating to the Inspectorate's finding that there is an arrangement relate only to the moment of the payment (receipt) of tax-exempt dividends and, therefore, according to the Inspectorate, it is not required to assess the circumstances of the establishment of the Subsidiary or the circumstances of its activities prior to the period under review. The Inspectorate further notes that the information received from the United Kingdom tax authorities does not suggest that the Subsidiary's human and material resources in 2015–2017 were different from those identified during the period under review.

23 Nordcurrent submits that the tax authorities failed duly to take into account circumstances outside the period under review, that is to say, the circumstances relating to the establishment of the Subsidiary and the changes in its activities that led to a decrease in the volume of its activities. The Subsidiary was established in the United Kingdom for valid commercial reasons and carried out genuine commercial activities in the United Kingdom between 2009 and 2019. The valid commercial reasons are based, in essence, on the economic, business and personal reasons that led to the establishment of the Subsidiary in the United Kingdom (the United Kingdom was, and continues to be, one of the world's leading video games markets; potential United Kingdom distributors required companies to be established and have accounts in the United Kingdom; the United Kingdom was the place of study, residence and contacts of the founders); market conditions limited Nordcurrent's ability to distribute the games developed by it directly from Lithuania, since for a long time companies in Lithuania were unable to access Apple, Google or other larger sales platforms; the changes in its activity were due to objective factors that led to a decline in activity. After the need to distribute the games developed by Nordcurrent and to purchase game advertising through the Subsidiary ceased to exist, it was decided to wind up the Subsidiary in 2019. Furthermore, Nordcurrent submits that the activities of the Subsidiary prior to the period under review should have been reviewed also in view of the fact that the dividends at issue paid in 2018 arose out of the Subsidiary's profits in 2016, that is to say, the period prior to the start of the period under review (the dividends paid in 2019 arose out of the profits for 2018).

24 In the light of the provisions set out above relating to the putting into place of an arrangement, the Tax Disputes Commission is uncertain as to whether, for the purpose of recognising the Subsidiary established in another Member State as an

arrangement as such, it may be found that such an arrangement has been put into place without assessing the circumstances relating to the establishment of the Subsidiary and its activities prior to the time of payment of the dividends, in which the establishment of the Subsidiary is justified by valid commercial reasons.

25 The Inspectorate set out the provisions of Article 69(1) of Lietuvos Respublikos mokesčių administravimo įstatymas (Law of the Republic of Lithuania on tax administration) and noted that, according to the definition of tax advantage provided for in that article, a tax advantage arises where the aim is to avoid the payment of tax altogether.

In its comments on the tax advantage aspects of the anti-abuse rule [in Directive 2011/96] ('the arrangement has been put into place with the main purpose or one of the main purposes of obtaining a tax advantage', 'obtaining a tax advantage defeats the object or purpose of the Directive'), the Inspectorate took the position that benefiting from a tax advantage through the use of the arrangement (the Subsidiary, which had the characteristics of an arrangement that is not genuine) achieved a purpose that runs counter to Directive 2011/96. According to the Inspectorate, Nordcurrent obtained a tax advantage merely because it benefited from the exemption from taxation provided for in Article 35(2) of the Law on corporation tax (which results in the non-payment of corporation tax). The Inspectorate noted that the Court of Justice has held, in connection with questions concerning the payment of dividends, that to permit the setting up of financial arrangements whose sole aim is to benefit from the tax advantages resulting from the application of Directive 90/435 would not be consistent with such objectives and, on the contrary, would undermine the effective functioning of the internal market by distorting the conditions of competition ([judgment of 26 February 2019, *T Danmark and Y Denmark*,] Joined Cases C-116/16 and C-117/16[, EU:C:2019:135], paragraph 79).

26 Nordcurrent disagrees with the Inspectorate's position that benefiting from the exemption from taxation on dividends provided for in Article 35(2) of the Law on corporation tax constitutes in itself a tax advantage obtained by Nordcurrent, irrespective of how much and what kind of tax the taxpayer was (not) actually able to save. That position of the Inspectorate implies the use of a presumption that the taxpayer obtained a tax advantage by receiving the dividends from a foreign entity under Article 35(2) of the Law on corporation tax. Nordcurrent submits that the exemption from taxation on the dividends received, in the absence of actual tax avoidance or saving, does not defeat the object and purpose of Directive 2011/96. Nordcurrent also argues that there is no tax advantage because the Subsidiary was profitable in the United Kingdom and Lithuania charges a lower rate of corporation tax (15%) on taxable profits than the United Kingdom (24%). The United Kingdom Subsidiary made a total net profit of GBP 8 289 930 from its establishment through to its winding up, on which it paid GBP 2 112 598 (EUR 2 670 639) in corporation tax to the United Kingdom budget. According to Nordcurrent, more tax was paid in the United Kingdom

compared to the situation if Nordcurrent would have had to pay tax in Lithuania (according to the Inspectorate, in order to reach a conclusion as to where the higher amount of corporation tax would have been incurred, the company's income and costs would first have to be assessed in accordance with the provisions of the Lithuanian Law on corporation tax, which has not been done).

27 According to the Inspectorate, the mere fact of having paid taxes in the United Kingdom is not a reason to exclude a United Kingdom company from being regarded as an arrangement if the company was an arrangement that was not genuine and not put into place for valid commercial reasons.

28 In the light of the provisions set out above relating to the difference in treatment of tax advantages, the Tax Disputes Commission is uncertain whether, in the event that the Subsidiary, which subjects the profits earned in its State of establishment to taxation and then pays out dividends on those profits that are not taxable in the State of the parent company, is recognised as an arrangement, it is sufficient to find that the main purpose or one of the main purposes of the arrangement is to obtain a tax advantage that defeats the object or purpose of Directive 2011/96. Furthermore, the question arises as to whether the circumstances relating to the fact that the profits earned under the Subsidiary's name were subject to tax in the Member State of establishment are to be regarded as relevant for the purpose of challenging the finding that a tax advantage that defeats the object or purpose of Directive 2011/96 was obtained or that there was an arrangement.

29 The different or contradictory positions on the interpretation of EU law and the case-law of the Court of Justice are clearly reflected in the pleadings of the parties and the opinions expressed at the sitting, and the Tax Disputes Commission therefore asks the Court of Justice to provide its interpretation with regard to the application of the anti-abuse rule in Directive 2011/96.

30 The Tax Disputes Commission notes that the common minimum anti-abuse rule in Directive 2011/96 was introduced in order to prevent misuse of Directive 2011/96 and to ensure greater consistency in its application in different Member States ([recital 5] of Directive 2015/121). The Court of Justice has not yet ruled on the implementation of the provisions of the anti-abuse rule in Directive 2011/96 in cases where it has to be decided whether an exemption from taxation may be applied at the level of the recipient of the dividends (the parent company) in respect of the dividends paid by a subsidiary registered in a Member State.

31 […] [information unrelated to the questions referred].

32 The answers to these questions are essential and necessary in order to resolve the tax dispute between Nordcurrent and the Inspectorate that is being examined by the Tax Disputes Commission, since it is the interpretation of the legal provisions concerned that determines whether the taxation of Nordcurrent is well founded and the Inspectorate in entitled to calculate the amount of corporation tax payable by Nordcurrent.

33 The Tax Disputes Commission also considers that a reference to the Court of Justice at the pre-litigation stage of examination of the tax dispute is expedient with a view to the expeditious examination of tax disputes.

The Tax Disputes Commission […] [reference to provisions of procedural law] orders as follows:

1. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. In circumstances such as those of the present case, is a national practice under which an exemption from taxation on dividends is not granted to a parent company in a Member State in respect of the dividends received from a subsidiary established in another Member State on the ground that such a subsidiary is recognised as an arrangement, where the subsidiary is not an intermediate company and the profits distributed by way of dividends were generated by activities carried out under the subsidiary's name, so that removing the subsidiary would result in a situation where there are no profits at all or no payment of dividends, consistent with the objectives of the anti-abuse rule in Directive 2011/96?

2. If the answer to the first question is in the affirmative, is a national practice under which, for the purpose of recognising a subsidiary established in another Member State as an arrangement as such, an assessment is made of the circumstances at the time of payment of the dividends, where the establishment of the subsidiary is justified by commercial reasons, consistent with the objectives of the anti-abuse rule in Directive 2011/96?

3. May the anti-abuse rule in Directive 2011/96 be interpreted as meaning that, where a parent company has received dividends from a subsidiary that is established in another Member State and is recognised as an arrangement, that recognition alone is sufficient for it to be found that the parent company, through the application of the exemption from taxation on dividends, obtained a tax advantage that defeats the object or purpose [of Directive 2011/96]? Furthermore, are the circumstances relating to the fact that the profits earned by a subsidiary that has been recognised as an arrangement were subject to corporation tax in the Member State of establishment in accordance with the national rules in force in that Member State to be regarded as relevant for the purpose of challenging the finding that a tax advantage was obtained or that there was an arrangement?

2. […]

[standard procedural wording and composition of the Tax Disputes Commission]