

# Opinion Statement ECJ-TF 2/2019 on the CJEU decisions of 26 February 2019 in Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg I et al*, and Cases C-116/16 and C-117/17, *T Danmark et al*, concerning the “beneficial ownership” requirement and the anti-abuse principle in the company tax directives

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**Prepared by the CFE ECJ Task Force  
Submitted to the EU Institutions in June 2019**

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CFE Tax Advisers Europe acknowledges that the “Danish beneficial ownership cases” address a number of important and timely issues, especially with regard to the concept of abuse in EU law. Those include (1) the expansion of the general anti-abuse principle enshrined in EU law to areas of tax law that are subject to minimum harmonization, (2) the use of the OECD materials to define the beneficial ownership concept, (3) the conflation of the beneficial ownership concept with the general anti-abuse principle and the Court’s attempt to give the notion of “abuse” workable contours, and (4) the reading of an effective subject-to-tax clause with regard to the interest income into the definition of a “company” laid down in the Interest-Royalties-Directive (IRD).

However, CFE Tax Advisers Europe also expects that domestic courts will likely struggle to translate the abstract guidance of the “Danish beneficial ownership cases” into concrete judgments, that practitioners and academics alike will have to discuss building blocks and nuances of the Grand Chamber’s judgments for quite some time to come, and that consideration needs to be given on what impact those cases have on current tax structures.

CFE Tax Advisers Europe is a Brussels-based umbrella association uniting 30 European national tax institutes and associations of tax advisers from 24 European countries. Founded in 1959, CFE represents more than 200,000 tax advisers. CFE Tax Advisers Europe is part of the European Union Transparency Register no. 3543183647-05. For further information regarding this Opinion statement of the CFE ECJ Task Force please contact Prof. Dr. Georg Kofler, Chair of the CFE ECJ Task Force or Aleksandar Ivanovski, Tax Policy Manager at [info@taxadviserseurope.org](mailto:info@taxadviserseurope.org)

This is an Opinion Statement prepared by the CFE ECJ Task Force<sup>1</sup> on the so-called “Danish beneficial ownership cases” – Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg I et al*, on the Interest-Royalties Directive (IRD) and Cases C-116/16 and C-117/17, *T Danmark et al*, on the Parent-Subsidiary Directive (PSD) –, in which the Grand Chamber of the Court of Justice of the EU (ECJ) delivered its decisions on 26 February 2019.<sup>2</sup> In the two rather lengthy judgments, the ECJ’s Grand Chamber addressed a number of important issues concerning the interpretation and application of the IRD and the PSD, including the general (unwritten) EU principle prohibiting abusive practices, the notions of “abuse” and “beneficial owner” in EU direct tax law, the burden of proof regarding abuse, abuse of rights and fundamental freedoms, and the requirement of “being subject to corporate income tax without being exempt” in the IRD. The Court broadly deviated from Advocate General Kokott’s Opinions of 1 March 2018<sup>3</sup> on all major points.

## Background and Issues

1. The “Danish beneficial ownership cases” deal with the source taxation of interest and dividends paid by various Danish companies to their EU parent companies in taxable years in the mid- to late 2000s. Those EU companies were themselves held by third-country funds, partnerships or corporations and had obviously been interposed following legislative changes in Denmark (introducing withholding taxation of cross-border interest payments) and in the United States (permitting tax-favorable repatriation of foreign profits), respectively. Four of the six cases involved back-to-back financing transactions, under which a Danish resident subsidiary was financed by its non-resident parent company via a series of loans granted to intermediary EU holding companies in Luxembourg and Sweden. The other two cases concerned dividend distributions by Danish companies to intermediate EU holding companies in Cyprus and Luxembourg. It should be noted that in all applicable (bi- and multilateral) tax treaties between Denmark on the one hand and Sweden and Luxembourg on the other hand, there was no source tax on interest,<sup>4</sup> while the treaties with Cyprus and Luxembourg foresaw a reduced 10% and 5% withholding tax on dividends, respectively,<sup>5</sup> each under the condition that the recipient is the “beneficial owner” of that income.
2. Faced with the taxpayers’ claims for withholding tax exemptions under the Interest-Royalties Directive (IRD)<sup>6</sup> and the Parent-Subsidiary-Directive (PSD),<sup>7</sup> the Danish tax authorities (SKAT, now the Skattestyrelsen) and the Danish national tax board (Skatterådet), respectively, denied those exemptions arguing that the interposed EU companies were mere “conduits” and could not be considered “beneficial owners” of the payments.

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<sup>2</sup> DK: ECJ (Grand Chamber), 26 February 2019, Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg I, X Denmark, C Denmark I and Z Denmark v. Skatteministeriet*, EU:C:2019:134, ECJ Case Law IBFD, and DK: ECJ (Grand Chamber), 26 February 2019, C-116/16 and C-117/17, *Skatteministeriet v T Danmark and Y Denmark*, EU:C:2019:135, ECJ Case Law IBFD.

<sup>3</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-115/16 (*N Luxembourg I*, EU:C:2018:143), C-118/16 (*X Denmark*, EU:C:2018:146), C-119/16 (*C Denmark I*, EU:C:2018:147), and C-299/16 (*Z Denmark*, EU:C:2018:148), and in Cases C-116/16 (*T Danmark*, EU:C:2018:144) and C-117/16 (*Y Denmark*, EU:C:2018:145).

<sup>4</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 16-18.

<sup>5</sup> *T Danmark et al* (C-116/16 and C-117/17), paras 14-18.

<sup>6</sup> Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, [2003] OJ L 157, p. 49.

<sup>7</sup> Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [1990] OJ L 225, p. 6, as amended by Council Directive 2003/123/EC of 22 December 2003, [2004] OJ L 7, p. 41.

3. The Danish Østre Landsret (High Court of Eastern Denmark) and – in a supplemental reference – also the second Danish high court, the Vestre Landsret (High Court of Western Denmark), put a series of detailed and complex questions to the ECJ. These elaborate questions – which were addressed by the ECJ in a combined manner – largely dealt with the question what “beneficial ownership” means in EU law (Art 1(4) IRD), whether – for lack of a domestic anti-abuse provision in Danish tax law<sup>8</sup> – a “beneficial ownership” requirement in tax treaties would suffice as a domestic implementation of the directives’ anti-abuse reservations (Art 5 IRD and Art 1(2) PSD), whether a Luxembourg SICAR qualifies as a “company of a Member State” in light of its special legal status (Art 3(a)(iii) IRD), and how the fundamental freedoms might play a role in these cases.
4. This Opinion Statement will first give a detailed overview of the Court’s decision on the IRD (Cases C-115/16, C-118/16, C-119/16 and C-299/16) in Chapter II.B. and then describe the similarities and differences to the decision on the PSD (Cases C-116/16 and C-117/16) in Chapter II.C. Chapter III of this Opinion Statement identifies a number of – at least in our view – important issues raised by the Court’s decisions and tries to give some initial thoughts on those issues. The policy statement of the CFE Tax Advisers Europe is found in Chapter IV.

## II. The Judgments of the Court of Justice

### A. Preliminary Remarks

5. The “Danish beneficial ownership cases” raised a number of nuanced and sophisticated questions (e.g., ten questions with several sub-questions in Case C-116/16 on the PSD alone), which the Court considered similar enough to combine the cases on the IRD (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16)<sup>9</sup> and on the PSD (Joined Cases C-116/16 and C-117/16)<sup>10</sup> and then, following Denmark’s request, to refer them to the Grand Chamber of the Court and permit a joint hearing of all the cases.<sup>11</sup> After six separate Opinions of AG Kokott on 1 March 2018,<sup>12</sup> the Grand Chamber of the Court rendered its two judgments on 26 February 2019.<sup>13</sup>
6. The Grand Chamber of the Court aimed at setting out its positions on a number of pressing issues, most notably that the general anti-abuse principle enshrined in EU law must be applied also in the area of the

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<sup>8</sup> As the Court explains, “[u]ntil the adoption of Law No 540 of 29 April 2015, no general statutory rule to combat abuse existed in Denmark. However, case-law developed the ‘reality’ principle, under which taxation must be determined on the basis of a specific assessment of the facts. This means in particular that artificial tax arrangements may, depending on the circumstances, be set aside so that taxation takes account of reality, under the principle of substance over form. [...] It is clear from the orders for reference that, in each of the main actions, the parties are in agreement that the reality principle is not sufficient to justify setting aside the arrangements at issue in those actions” (see, e.g., *N Luxembourg I et al* [Cases C-115/16, C-118/16, C-119/16 and C-299/16], paras 24-25). Danish case law “has also developed the ‘rightful income recipient’ (*rette indkomstmodtager*) principle. This principle is based on the fundamental provisions relating to taxation of income [...], which have the effect that the tax authorities are not obliged to accept an artificial separation between the income-generating undertaking or activity and the allocation of the income deriving therefrom. This principle is therefore intended to determine the person who – regardless of formal appearances – is the real recipient of certain income and thus the person who is liable for tax on it” (see, e.g., *N Luxembourg I et al* [Cases C-115/16, C-118/16, C-119/16 and C-299/16], para. 26). However, the Court did not find it necessary to comment on either doctrine, as it found that Denmark could rely on the EU general principle of anti-abuse without the need for implementing domestic legislation (see, e.g., see *N Luxembourg I et al* [Cases C-115/16, C-118/16, C-119/16 and C-299/16], paras 95-122). It should be noted, however, that AG Kokott, whose Opinion insisted on the need for a domestic implementation of the directives’ anti-abuse reservation, argued that specifically the “reality doctrine” might suffice as a legal basis to ignore wholly artificial or abuse arrangements (see, e.g., Opinion of AG Kokott in *N Luxembourg I* [C-115/16], paras 108-113).

<sup>9</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 80.

<sup>10</sup> *T Denmark et al* (C-116/16 and C-117/16), para. 65.

<sup>11</sup> See *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 81, and *T Denmark et al* (C-116/16 and C-117/16), para. 66.

<sup>12</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-115/16 (*N Luxembourg I*, EU:C:2018:143), C-118/16 (*X Denmark*, EU:C:2018:146), C-119/16 (*C Denmark I*, EU:C:2018:147), and C-299/16 (*Z Denmark*, EU:C:2018:148), and in Cases C-116/16 (*T Denmark*, EU:C:2018:144) and C-117/16 (*Y Denmark*, EU:C:2018:145).

<sup>13</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16) and *T Denmark et al* (C-116/16 and C-117/16).

direct tax directives, on what the constituent elements of an abuse of rights and the relevant evidence are, and on who bears which burden of proof. The Court deviated from AG Kokott's Opinions on all major points.

7. It should be mentioned that a number of intriguing issues raised in the facts of the case remained unaddressed in the decisions. The Luxembourg tax authorities, for example, had drawn up a "residence certificate" confirming that one of the interposed Luxembourg entities "was subject to corporate income tax and was the beneficial owner of the dividends paid on the shares that it owned in [the relevant Danish company]".<sup>14</sup> While it seems clear in international tax law that a certificate of residence is usually a necessary but not a sufficient condition for a taxpayer to receive source State benefits, it would have been interesting to see if, e.g., the loyalty principle under Art 4(3) TEU would require additional considerations in the context of the company directives or would even effectuate a shift in the burden of proof to the tax authorities that wish to disregard such a "residence certificate" issued by another Member State.

## B. Interest-Royalties Directive (Cases C-115/16, C-118/16, C-119/16 and C-299/16)

8. The Court first noted that, under Art 1(1) and (4) IRD, the exemption of interest payments from any source taxes is restricted solely to the "beneficial owners" of such interest, a notion that requires autonomous interpretation and cannot refer to concepts of national law that vary in scope.<sup>15</sup> "Beneficial owner" means the entity which actually benefits from the interest, with that reference to economic reality confirmed by Art 1(4) IRD's requirement that a company shall be treated as "the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person".<sup>16</sup> Delving into the different language versions of the term,<sup>17</sup> the Court concluded that the term "beneficial owner" concerns not a formally identified recipient but rather the entity which benefits economically from the interest received and accordingly has the power to freely determine the use to which it is put.<sup>18</sup> Moreover, the exemption provided for in Article 1(1) of the IRD is only available to an entity established in the European Union which is the beneficial owner of interest.<sup>19</sup> Taking account of the Commission's 1998 IRD proposal's reference to Article 11 of the OECD Model Tax Convention (OECD MC) and the aim of avoiding double taxation, the Court – in contrast to AG Kokott's Opinions<sup>20</sup> – concluded that

"[t]he concept of 'beneficial owner', which appears in the bilateral conventions based on that model, and the successive amendments of that model and of the commentaries relating thereto are, therefore, relevant when interpreting [the IRD]."<sup>21</sup>

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<sup>14</sup> *T Denmark et al* (C-116/16 and C-117/16), para. 40.

<sup>15</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 84.

<sup>16</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 85-88.

<sup>17</sup> The Court noted that "[t]he term used in Article 1(1) of Directive 2003/49 is, depending on the language version, the 'beneficiary'/'recipient' (in Bulgarian (бенефициерът), French (bénéficiaire), Latvian (beneficīārs) and Romanian (beneficiarul)), the 'beneficial owner'/'actual beneficiary' (in Spanish (beneficiario efectivo), Czech (skutečný vlastník), Estonian (tulusaaja), English (beneficial owner), Italian (beneficiario effettivo), Lithuanian (tikrasis savininkas), Maltese (sid beneficijaru), Portuguese (beneficiário efectivo) and Finnish (tosiasiallinen edunsaaja)), the 'owner'/'person entitled to use' (in German (der Nutzungsberechtigte), Danish (retmæssige ejer), Greek (ο δικαιούχος), Croat (ovlašteni korisnik), Hungarian (haszonhúzó), Polish (właściciel), Slovak (vlastník požitkov), Slovenian (upravičeni lastnik) and Swedish (den som har rätt till)), or the 'person entitled in the end' (in Dutch (de uiteindelijk gerechtigde))" (*N Luxembourg I et al* [C-115/16, C-118/16, C-119/16 and C-299/16], para. 10). From that analysis, the Court concludes that most language versions "have recourse to expressions such as 'beneficial owner'/'actual beneficiary' (the Spanish, Czech, Estonian, English, Italian, Lithuanian, Maltese, Portuguese and Finnish versions), 'owner'/'person entitled to use' (the German, Danish, Greek, Croat, Hungarian, Polish, Slovak, Slovenian and Swedish versions) or 'person entitled in the end' (the Dutch version)" (*N Luxembourg I et al* [C-115/16, C-118/16, C-119/16 and C-299/16], para. 89).

<sup>18</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 89.

<sup>19</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 89.

<sup>20</sup> AG Kokott had argued that the notion of "beneficial owner" in the IRD is to be interpreted autonomously and without recourse to the corresponding notion in tax treaties. See the Opinions of AG Kokott of 1 March 2018 in Cases C-115/16 (*N Luxembourg I*, EU:C:2018:143, paras 48-55), C-118/16 (*X Denmark*, EU:C:2018:146, paras 48-55), C-119/16 (*C Denmark I*, EU:C:2018:147, paras 48-55), and C-299/16 (*Z Denmark*, EU:C:2018:148, paras 48-55).

<sup>21</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 90-91, also rejecting concerns with regard to a lack of democratic legitimacy. One should note already here, however, that neither the Directive's preamble nor the text refers to the OECD MC

Referring to its own descriptions of the “beneficial ownership” concept in the 1977 OECD MC and the OECD Update in 2003, which addressed certain conduit companies, and the development of the OECD interpretation, the Court concluded “that the concept of ‘beneficial owner’ excludes conduit companies and must be understood not in a narrow technical sense but as having a meaning that enables double taxation to be avoided and tax evasion and avoidance to be prevented”.<sup>22</sup> Finally, the Court – again in line with the current OECD MC Commentaries<sup>23</sup> – clarified that if the immediate recipient is not the beneficial owner, one has to look further up the chain, i.e.,

“that the mere fact that the company which receives the interest in a Member State is not its ‘beneficial owner’ does not necessarily mean that the exemption provided for in Article 1(1) of [the IRD] is not applicable. It is conceivable that such interest will be exempt on that basis in the source State when the company which receives it transfers the amount thereof to a beneficial owner who is established in the European Union and furthermore satisfies all the conditions laid down by [the IRD] for entitlement to such an exemption.”<sup>24</sup>

9. Secondly, the Court addressed the question whether there is the need for a specific domestic or agreement-based provision implementing the general anti-abuse reservation of Article 5 of the IRD, according to which the IRD “shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse” and “Member States may, in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse, withdraw the benefits of this Directive or refuse to apply this Directive”. The referring Danish court asked whether Danish domestic law or the beneficial ownership clauses in the applicable tax treaties were a sufficient implementation of Article 5 of the IRD. The Grand Chamber of the Court took a different approach: It discounted the implementation-requirement seemingly established in *Kofoed*<sup>25</sup> (on which AG Kokott’s Opinion relied in rejecting the idea that non-implemented anti-avoidance provisions of the company tax directives could be applied directly against taxpayers<sup>26</sup>) and instead focused on the “general legal principle that EU law cannot be relied on for abusive or fraudulent ends”.<sup>27</sup> This general principle, according to the Court, has been established in the context of the fundamental freedoms,<sup>28</sup> in various fields of EU law,<sup>29</sup> and more specifically also in the area

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or the OECD MC Commentaries. Moreover, the Commission’s 1998 IRD proposal refers to Article 11 OECD MC merely for the definition of interest in Article 2(a) IRD, but not for the explanation of the term “beneficial ownership” (see the Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM(1998)67 final [4 March 1998], p. 6-7).

<sup>22</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 92.

<sup>23</sup> See Art 11 no. 11 OECD MC Comm. 2017.

<sup>24</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 94.

<sup>25</sup> ECJ, 5 July 2007, Case C-321/05, *Hans Markus Kofoed v Skatteministeriet*, EU:C:2007:408, paras 41-42

<sup>26</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-115/16, *N Luxembourg 1*, EU:C:2018:143, paras 98-113, C-116/16, *T Danmark*, EU:C:2018:144, paras 94-109, C-117/16, *Y Denmark*, EU:C:2018:145, paras 94-109, C-118/16, *X Denmark*, EU:C:2018:146, paras 108-123, C-119/16, *C Danmark I*, EU:C:2018:147, paras 96-111, and C-299/16, *Z Denmark*, EU:C:2018:148, paras 98-113.

<sup>27</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 95-122.

<sup>28</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 96, referring, inter alia, to ECJ, 9 March 1999, Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, EU:C:1999:126, para. 24; ECJ, 21 February 2006, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise*, EU:C:2006:121, para. 68; ECJ, 12 September 2006, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, EU:C:2006:544, para. 35; ECJ, 22 November 2017, C-251/16, *Edward Cussens and Others v T. G. Brosman*, EU:C:2017:881, para. 27.

<sup>29</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 100, mentioning case-law in fields such as the free movement of goods, the freedom to provide services, public service contracts, freedom of establishment, company law, social security, transport, social policy, restrictive measures and value added tax (VAT).

of customs (e.g., in *Emsland-Stärke*<sup>30</sup>) and VAT (e.g., in *Italmoda* and *Cussens*<sup>31</sup>). Applying that principle and its considerations in *Cussens* to the IRD, the Court stated that where a case is about the abuse of a Directive's provision, the general principle of EU law applies irrespective of any domestic implementation:

"In the main proceedings, the rules that are claimed by SKAT to have been abused are the provisions of [the IRD], which was adopted in order to foster the development of a single market having the characteristics of a domestic market and provides for an exemption, in the source Member State, of interest paid to an associated company established in another Member State. As is apparent from the proposal for a directive referred to in paragraph 90 above, certain definitions set out in Directive 2003/49 are based on the definitions in Article 11 of the OECD 1996 Model Tax Convention. [...] Whilst Article 5(1) of [the IRD] provides that the directive is not to preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse, that provision cannot be interpreted as excluding the application of the general principle of EU law [...] that abusive practices are prohibited. The transactions alleged by SKAT to constitute an abuse of rights fall within the scope of EU law [...] and could prove incompatible with the objective pursued by that directive. [...] Furthermore, whilst Article 5(2) of [the IRD] provides that Member States may, in the event of evasion, avoidance or abuse, withdraw the benefits of the directive or refuse to apply it, that provision likewise cannot be interpreted as excluding the application of the principle of EU law that abusive practices are prohibited, since the application of that principle is not — as the provisions of the directive are — subject to a requirement of transposition [...]"<sup>32</sup>

Focusing on the objective of the IRD to eliminate double taxation of interest and royalties, the Court noted that it would not be consistent with such objectives "[t]o permit the setting up of financial arrangements whose sole aim is to benefit from the tax advantages resulting from the application" of the IRD and, on the contrary, "would undermine economic cohesion and the effective functioning of the internal market by distorting the conditions of competition".<sup>33</sup> This would also be the case if the transactions do not exclusively pursue such an aim, as it is sufficient for the general principle of prohibition of abusive practices in tax matters to apply "where the accrual of a tax advantage constitutes the essential aim of the transactions at issue".<sup>34</sup> Neither taking advantage of tax competition between Member States nor a taxpayer's right to pursue the most favorable regime allows a taxpayer to "enjoy a right or advantage arising from EU law where the transaction at issue is purely artificial economically and is designed to circumvent the application of the legislation of the Member State concerned".<sup>35</sup> It is therefore "incumbent upon the national authorities and courts to refuse to grant entitlement to rights provided for by [the IRD] where they are invoked for fraudulent or abusive ends",<sup>36</sup> even in the absence of domestic or agreement-based anti-abuse provisions.<sup>37</sup> The Court moreover held that *Kofoed* must not be misunderstood to require implementing legislation,<sup>38</sup> specifically

<sup>30</sup> See, e.g., ECJ, 27 October 1981, Case 250/80, *Anklagemyndigheden v Hans Ulrich Schumacher, Peter Hans Gerth, Johannes Heinrich Gothmann and Alfred C. Töpfer*, EU:C:1981:246, para. 16; ECJ, 3 March 1993, Case C-8/92, *General Milk Products GmbH v Hauptzollamt Hamburg-Jonas*, EU:C:1993:82, para. 21; ECJ, 14 December 2000, Case C-110/99, *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas*, EU:C:2000:695., para. 59.

<sup>31</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 102, referring to ECJ, 18 December 2014, Cases C-131/13, C-163/13 and C-164/13, *Staatssecretaris van Financiën v Schoenimport 'Italmoda' Mariano Previti vof and Turbu.com BV and Turbu.com Mobile Phone's BV v Staatssecretaris van Financiën*, EU:C:2014:2455, and *Cussens* (C-251/16).

<sup>32</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 103-105.

<sup>33</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 106-107.

<sup>34</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para 106, referring to ECJ, 21 February 2008, Case C-425/06, *Ministero dell'Economia e delle Finanze v Part Service Srl*, EU:C:2008:108, para. 45, and *Cussens* (C-251/16), para. 53.

<sup>35</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 108-109, referring, *inter alia*, to *Cadbury Schweppes* (C-196/04), para. 51, ECJ, 7 November 2013, C-322/11, K, EU:C:2013:716, para. 61, and ECJ, 25 October 2017, C-106/16, *Polbud — Wykonawstwo*, EU:C:2017:804, paras 61 to 63.

<sup>36</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 110.

<sup>37</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 111.

<sup>38</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 112-118.

“since [...] abusive or fraudulent acts cannot be found a right provided for by EU law, the refusal of an advantage under a directive [...] does not amount to imposing an obligation on the individual concerned under that directive, but is merely the consequence of the finding that the objective conditions required for obtaining the advantage sought, prescribed by the directive as regards that right, are met only formally [...]”.<sup>39</sup>

This, however, is not only an option for Member States, but, as the Court stated, an obligation: The general principle that abusive practices are prohibited forces national authorities and courts to refuse the advantage resulting from the IRD in such circumstances, even if there are no domestic or agreement-based provisions providing for such a refusal.<sup>40</sup>

10. Thirdly, without mentioning the recent landmark decisions on the concept of abuse in the PSD in *Eqiom*<sup>41</sup> and *Deister and Juhler*,<sup>42</sup> the Court (a) identified a number of constituent elements of an abuse of rights and the relevant evidence,<sup>43</sup> (b) determined the effect of tax treaty benefits on the finding of abuse,<sup>44</sup> and (c) addressed the allocation of the burden of proof.<sup>45</sup>

a. As for the constituent elements of an abuse of rights, the Grand Chamber of the Court clarified that abuse consists of an objective and a subjective element, noting that “proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it”.<sup>46</sup> This requires an examination of the facts to “establish whether the constituent elements of an abusive practice are present, and in particular whether economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting from an improper advantage”.<sup>47</sup> While this is the task of the domestic court (including to establish whether the indications of abuse are objective and consistent, and whether the applicants in the main proceedings have had the opportunity to adduce evidence to the contrary), the Grand Chamber went on to specify a number of indicia:

- The Court first noted that “[a] group of companies may 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 interest and the entity which is its beneficial owner, payment of the tax on the interest is avoided.”<sup>48</sup>

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<sup>39</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 119.

<sup>40</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 120 (“must ... refuse”).

<sup>41</sup> ECJ, 7 September 2017, Case C-6/16, *Eqiom SAS, formerly Holcim France SAS and Enka SA v Ministre des Finances et des Comptes publics*, EU:C:2017:641; see for a detailed discussion ECJ CFE Task Force, Opinion Statement ECJ-TF 2/2018 on the CJEU decision of 7 September 2017 in Case C-6/16, *Eqiom*, concerning the compatibility of the French anti-abuse rule regarding outbound dividends with the Parent-Subsidiary Directive and fundamental freedoms, ET 2018, 471 et seq.

<sup>42</sup> ECJ, 20 December 2017, C-504/16 and C-613/16, *Deister Holding AG and Juhler Holding A/S v Bundeszentralamt für Steuern*, EU:C:2017:1009.

<sup>43</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 124-133.

<sup>44</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 134-138.

<sup>45</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 140-144.

<sup>46</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 124, referring to *Emsland-Stärke* (C-110/99), paras 52 and 53, and ECJ, 12 March 2014, Case C-456/12, *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*, EU:C:2014:135, para. 58.

<sup>47</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 125.

<sup>48</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 127.

- It is therefore an indication of the existence of an arrangement intended to obtain improper entitlement to the exemption under the IRD “that all or almost all of the aforesaid interest is, very soon after its receipt, passed on by the company that has received it to entities which do not fulfil the conditions for the [IRD], either because those entities are not established in any Member State, or because they are not incorporated in one of the forms referred to in the annex to the directive, or because they are not subject to one of the taxes listed in Article 3(a)(iii) of the directive without being exempt, or because they do not have the status of associated company within the meaning of Article 3(b) of the directive.”<sup>49</sup> This would be the case where the beneficial owners are entities resident for tax purposes outside the European Union.
- Likewise, “the artificiality of an arrangement is capable of being borne out by the fact that the relevant group of companies is structured in such a way that the company which receives the interest paid by the debtor company must itself pass that interest on to a third company which does not fulfil the conditions for the application of [the IRD], with the consequence that it makes only an insignificant taxable profit when it acts as a conduit company in order to enable the flow of funds from the debtor company to the entity which is the beneficial owner of the sums paid.”<sup>50</sup> An entity’s characteristic as a “conduit company” may be established where its “sole activity is the receipt of interest and its transmission to the beneficial owner or to other conduit companies”.<sup>51</sup> The absence of actual economic activity must, “in the light of the specific features of the economic activity in question, be inferred from an analysis of all the relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to expenditure actually incurred, to the staff that it employs and to the premises and equipment that it has”.<sup>52</sup>
- Also, “indications of an artificial arrangement may also be constituted by the various contracts existing between the companies involved in the financial transactions at issue, giving rise to intragroup flows of funds which, as is mentioned in Article 4 of [the IRD], may have the aim of transferring profits from a profit-making commercial company to shareholding entities in order to avoid the tax burden or reduce it as much as possible. The way in which the transactions are financed, the valuation of the intermediary companies’ equity and the conduit companies’ inability to have economic use of the interest received may also be used as indications of such an arrangement.”<sup>53</sup>
- In that connection the Court also indirectly addressed a question that the domestic referring court raised with regard to the 2014 OECD Update on “beneficial ownership”,<sup>54</sup> where the OECD clarified that an entity is not the beneficial owner of interest income where “that recipient’s right to use and enjoy the interest is constrained by a contractual or legal obligation to pass on the payment received to another person”, a conclusion that would normally derive from relevant legal documents “but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person”.<sup>55</sup> Addressing that “in substance”-determination, the Court noted that the above indications “are capable of being constituted not only by a contractual or legal obligation of the company receiving interest to pass it on to a third party but also by the fact that, ‘in substance’

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<sup>49</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 128.

<sup>50</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 130.

<sup>51</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 131.

<sup>52</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 131.

<sup>53</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 132.

<sup>54</sup> See question (1)(f) in Case C-115/16, C-118/16 and C-119/16, respectively.

<sup>55</sup> Art. 11 no. 10.2 OECD MC Comm. 2017.

[...] that company, without being bound by such a contractual or legal obligation, does not have the right to use and enjoy those sums.”<sup>56</sup>

- Finally, the Court argued that “such indications may be reinforced by the simultaneity or closeness in time of, on the one hand, the entry into force of major new tax legislation, such as the Danish legislation at issue in the main proceedings, which some of the groups of companies strive to circumvent and, on the other hand, the setting up of complex financial transactions and the grant of intragroup loans”<sup>57</sup>
- b. The second and third issue, i.e., the impact of a tax treaty and the burden of proof, are somewhat intermingled: AG Kokott had, *inter alia*, argued that an abuse within the meaning of Art 5 of the IRD would only exist where “interest disbursed directly” to the (third state) beneficial owner “would have been taxed accordingly in Denmark”.<sup>58</sup> Such taxation would, however, be precluded under Danish law if, disregarding the conduit companies, “the actual interest recipient is also an undertaking registered in a different Member State or the interest recipient is resident in a State with which Denmark has concluded a DTC”.<sup>59</sup> Consequently, “in order to determine whether a more favourable tax result is achieved as a result of the arrangement qualified as abusive”, AG Kokott concluded “that a Member State that does not wish to recognise a company resident in a different Member State, to which the interest was paid, as the beneficial owner of the interest must in principle state whom it considered to be the beneficial owner in order to assume that abuse exists”, but that “[i]n particular in cross-border cases, the taxable person may have an enhanced duty to assist”.<sup>60</sup> The Court’s Grand Chamber, however, arrived at a different conclusion: “The existence of such a convention cannot in itself rule out an abuse of rights”<sup>61</sup> and that “the existence of a double taxation convention is not, as such, capable of establishing that a payment was really made to recipients resident in the third State with which that convention has been concluded”,<sup>62</sup> but that (if the “beneficial owner” is not in a third State<sup>63</sup>)

“it remains possible, in a situation where the interest would have been exempt had it been paid directly to the company having its seat in a third State, that the aim of the group’s structure is unconnected with any abuse of rights. In such a case, the group cannot be reproached for having chosen such a structure rather than direct payment of the interest to that company”.<sup>64</sup>
- c. As for the burden of proof, the Court referenced the obligation of a company to establish that it is the beneficial owner of the interest (Art 1(11), (12) and (13)(b) of the IRD) on the one hand and the obligation of the tax authorities, when refusing the exemption under Art 1(1) IRD based on abuse, to establish the existence of elements constituting an abuse practice while taking account of all the relevant factors, in particular the fact that the company to which the interest has been paid is not its beneficial owner on the other hand.<sup>65</sup> However, as the Court found in contrast to AG Kokott’s

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<sup>56</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 132.

<sup>57</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 133.

<sup>58</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-115/16 (*N Luxembourg 1*, EU:C:2018:143, para. 95), C-118/16 (*X Denmark*, EU:C:2018:146, para. 106), C-119/16 (*C Denmark I*, EU:C:2018:147, para. 93), and C-299/16 (*Z Denmark*, EU:C:2018:148, para. 95).

<sup>59</sup> *Id.*

<sup>60</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-115/16 (*N Luxembourg 1*, EU:C:2018:143, para. 96), C-118/16 (*X Denmark*, EU:C:2018:146, para. 105), C-119/16 (*C Denmark I*, EU:C:2018:147, para. 96), and C-299/16 (*Z Denmark*, EU:C:2018:148, para. 96).

<sup>61</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 135.

<sup>62</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 136.

<sup>63</sup> The Court had also noted the different effects of the beneficial ownership requirement and the anti-abuse principle, as – irrespective of any finding of fraud or abuse – “beneficial owners” in third states are not beneficiaries of the IRD in the first place (see *N Luxembourg I et al* [C-115/16, C-118/16, C-119/16 and C-299/16], para. 138).

<sup>64</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 137.

<sup>65</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 140-142.

Opinions,<sup>66</sup> the tax authority has no obligation to identify the entity or entities which it regards as being the beneficial owner or owners of the interest. In the words of the Court, it:

“has the task not of identifying the beneficial owners of that interest but of establishing that the supposed beneficial owner is merely a conduit company through which an abuse of rights has been committed. Indeed, identification of that kind may prove impossible, in particular because the potential beneficial owners are unknown. Given the complexity of certain financial arrangements and the possibility that the intermediary companies involved in the arrangements are established outside the European Union, the national tax authority does not necessarily have information enabling it to identify those owners. That authority cannot be required to furnish evidence that would be impossible for it to provide. [...] Furthermore, even if the potential beneficial owners are known, it is not necessarily established which of them are or will be the actual beneficial owners. Thus, where a company receiving interest has a parent company, which itself has a parent company, the tax authorities and courts of the source Member State are, in all probability, unable to determine which of those two parent companies is or will be the beneficial owner of the interest. Moreover, the allocation of that interest may have been decided upon after the tax authority’s findings relating to the conduit company.”<sup>67</sup>

11. The Court, fourthly, also addressed the question on the general interpretation of the IRD that did not directly relate to abusive situations, i.e., the question whether a Luxembourg partnership limited by shares (“société en commandite par actions”, SCA) is a “company of a Member State” within the meaning of Art 3(a) IRD if it enjoys a privileged tax treatment as a “risk capital investment company” (“société d’investissement en capital à risqué”, SICAR).<sup>68</sup> Being a “company of a Member State” is a necessary condition for the entitlement to the benefits of that directive. It requires that a three-prong test is met, where the final prong basically necessitates that the company be subject to one of the taxes listed in Article 3(a)(iii) IRD without being exempt.<sup>69</sup> The Court did not doubt that the company itself, i.e., the SICAR at issue, “is subject to *impôt sur les revenus des collectivités* (corporate income tax) in Luxembourg, which is one of the taxes listed in Article 3(a)(iii) [iRD]”, i.e., that it is a subjectively taxable entity, but – in arguable contrast to AG Kokott’s Opinion<sup>70</sup> – rather focuses on the tax treatment of the interest income itself and left that determination to the domestic courts:

“However, should it have to be found that [...] the interest received by X SCA, SICAR is in fact exempt in that respect from corporate income tax in Luxembourg, it would then have to be stated that that company does not satisfy the third condition [of Art 3(a) IRD] and that it cannot therefore be regarded

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<sup>66</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-115/16 (*N Luxembourg 1*, EU:C:2018:143, para. 96), C-118/16 (*X Denmark*, EU:C:2018:146, para. 105), C-119/16 (*C Danmark I*, EU:C:2018:147, para. 94), and C-299/16 (*Z Denmark*, EU:C:2018:148, para. 96).

<sup>67</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 143-144.

<sup>68</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 146-153.

<sup>69</sup> The other two prongs of the test, i.e., that the company takes a listed legal form (Art 3(a)(i) IRC) and is a (treaty) resident of a Member State (Art 3(a)(ii) IRD), appeared to have been met; see *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras. 147-149.

<sup>70</sup> AG Kokott described the SICAR’s tax privilege as resulting from the “fact that while an S.C.A., which has been authorised as a SICAR by the financial regulator, is subject to corporation tax, its income from securities as well as from the sale, the contribution or the liquidation of its securities are exempt from corporation tax. Luxembourg law does not, however, contain provisions to suggest that interest income from a loan is also tax-exempt.” (Opinion AG Kokott in *X Denmark* [C-118/16], para. 92). She then noted “that none of the provisions in [in the IRD] stipulates that an actual taxation of the beneficial owner (here the Luxembourg companies) in a certain amount is a requirement for the exemption. The Commission’s attempts at making changes [...] by linking the tax exemption not only with a company’s corporation tax liability but with an ‘effective’ taxation of the interest and royalty income have so far not been implemented.” (Opinion AG Kokott in *X Denmark* [C-118/16], para. 93). Moreover, AG Kokott left it open “[w]hether a teleological reduction would lead to a different result if a Member State allows that a company form listed in the annex of [the IRD] is subject to corporation tax, but *all* income covered by the directive (i.e. income from interest and royalties) is tax-exempt [...]. It appears that ‘normal’ interest payments are not exempt from corporation tax. The particular case does not involve any dividend payments either, in relation to which the question of a teleological reduction of the directive would arise.” (Opinion AG Kokott in *X Denmark* [C-118/16], para. 94).

as being a ‘company of a Member State’ within the meaning of [the IRD]. It is, however, for the referring court alone to make, if appropriate, the necessary checks in that regard.”<sup>71</sup>

12. Finally, the Court focused on the potential infringement of the fundamental freedoms by the Danish withholding tax of outbound interest, as no such withholding tax obligation exists for purely domestic payments.<sup>72</sup> The Court distinguished two situations: Where the withholding tax exemption is not granted based on a finding that there is fraud or abuse, within the meaning of Article 5 of the IRD, “a company resident in a Member State cannot [...] claim the benefit of the freedoms enshrined in the FEU Treaty in order to call into question the national legislation governing the taxation of interest paid to a company resident in another Member State”.<sup>73</sup> Where, however, the denial of the withholding tax exemption is based on other grounds (i.e., because one of the other conditions for the application of that system of exemption are not fulfilled) “it should be determined whether the articles of the FEU Treaty [...] must be interpreted as precluding national legislation, such as that at issue in the main proceedings, relating to the taxation of the aforesaid interest”.<sup>74</sup> In the latter respect regarding the Danish legislation possibly infringing the free movement of capital in non-abusive cases, the Court followed settled case law (such as *Brisal*<sup>75</sup> and *Sofina*<sup>76</sup>) and concluded that the Danish withholding tax on interest paid to non-residents infringed EU law insofar as resident taxpayers receiving Danish sourced interest (1) benefit from a tax payment deferral because Danish recipients are exempt from prepayments of corporation tax during the first two years, (2) enjoy lower late payment interest rates, and (3) may take any business expenses directly related to the interest income received into account when assessing their taxable income.

## C. Parent-Subsidiary Directive (Cases C-116/16 and C-117/16)

13. The Court’s decision on the PSD largely follows along the lines set by the decision on the IRD, sometimes using the exact same language, and clearly treats the issues under both directives as well as for interest and dividend payments as being very much the same. This concerns (1) the application of the general anti-abuse principle enshrined in EU law, i.e., that – contrary to AG Kokott’s Opinions<sup>77</sup> – in cases of abuse the national authorities and courts are to refuse a taxpayer the exemption from withholding tax on profits distributed by a subsidiary to its parent company, provided for in Article 5 of the PSD, even if there are no domestic or agreement-based provisions providing for such a refusal,<sup>78</sup> and (2) the constituent elements of abuse, the impact of tax treaties, and that – again contrary to AG Kokott’s Opinions<sup>79</sup> – the tax authorities are not required to identify the entity which they regards to be the beneficial owner.<sup>80</sup>
14. As for the fundamental freedoms dimension of the cases, the Court noted that the questions referred by the Danish court “are based on the premiss that the inapplicability of that system of exemption arises from

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<sup>71</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 151. The Court thought that result to be supported by Art 1(5)(b) IRD (dealing with permanent establishment being “beneficial owners”) and by the objective of the IRD which “is to ensure that such interest payments are subject to tax once in a single Member State” (*N Luxembourg I et al* [C-115/16, C-118/16, C-119/16 and C-299/16], para. 152). For analysis see *infra* Chapter III.D.

<sup>72</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 154-180.

<sup>73</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 155.

<sup>74</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 156.

<sup>75</sup> ECJ, 13 July 2016, C-18/15, *Brisal – Auto Estradas do Litoral SA and KBC Finance Ireland v Fazenda Pública*, EU:C:2016:549; for a detailed analysis of that decision see, e.g., CFE ECJ Task Force, Opinion Statement ECJ-TF 2/2016 on the decision of 13 July 2016 of the Court of Justice of the EU in Case C-18/15, *Brisal and KBC Finance Ireland*, on the admissibility of gross withholding taxation of interest, ET 2017, 30 et seq.

<sup>76</sup> ECJ, 22 November 2018, Case C-575/17, *Sofina SA and Others v Ministre de l’Action et des Comptes publics*, EU:C:2018:943, again distinguishing ECJ, 22 December 2008, Case C-282/07, *Belgian State – SPF Finances v Truck Center SA*, EU:C:2008:762.

<sup>77</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-116/16 (*T Danmark*, EU:C:2018:144, paras 93-109) and C-117/16 (*Y Denmark*, EU:C:2018:145, paras 93-109).

<sup>78</sup> *T Danmark et al* (C-116/16 and C-117/16), paras 68-95.

<sup>79</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-116/16 (*T Danmark*, EU:C:2018:144, paras 87-92) and C-117/16 (*Y Denmark*, EU:C:2018:145, paras 87-92).

<sup>80</sup> *T Danmark et al* (C-116/16 and C-117/16), paras 97-120.

the finding that there is fraud or abuse, within the meaning of Article 1(2) of [the PSD]. However, in such a situation, a company resident in a Member State cannot [...] claim the benefit of the freedoms enshrined in the FEU Treaty in order to call into question the national legislation governing the taxation of dividends paid to a company resident in another Member State".<sup>81</sup> Hence, the fundamental freedoms cannot be relied upon in abusive situations.

15. However, two slight nuances and additions in the cases concerning the PSD should be pointed out:

- a. First, the Court did not address the Danish court's questions with regard to "beneficial ownership" of dividends. As the PSD does not have its own beneficial ownership requirement, it became a pressing issue for the Danish court to see if the beneficial ownership requirement in an applicable tax treaty could be considered as an agreement-based anti-abuse provision under (old) Art 1(2) of the PSD, which would then make the application of the directive subject to that requirement. However, the Court's conclusions on the application of the general anti-abuse principle enshrined in EU law made it unnecessary to answer the Danish court's questions "relating in essence to whether a provision of a bilateral double taxation convention that refers to the concept of 'beneficial owner' can constitute a legal basis for combating fraudulent and abusive practices in the context of [the PSD]"<sup>82</sup> and what that concept means.<sup>83</sup> However, the Grand Chamber – contrary to AG Kokott's Opinions<sup>84</sup> – seemed to assume that a "beneficial owner" requirement is implicit in the PSD when it argued – in largely the same language as in the IRD cases<sup>85</sup> – that "where the beneficial owner of dividends paid is resident for tax purposes in a third State, refusal of the exemption provided for in Article 5 of [the PSD] is not in any way subject to fraud or an abuse of rights being found".<sup>86</sup>
- b. Second, when the Court considered "the simultaneity or closeness in time of, on the one hand, the entry into force of major new tax legislation [...] and, on the other hand, the setting up of complex financial transactions and the grant of intragroup loans" as one (supplemental) indication for abuse, such legislation to which the tax planning reacts need not necessarily be that of the (EU) source State but could also be the legislation of a non-EU Member State.<sup>87</sup>

### III. Comments

#### A. Overview

16. The "Danish beneficial ownership cases" raise numerous issues that will engage scholars and practitioners of EU tax law for years to come including the following questions:

- Can a Member State rely on the general anti-abuse principle inherent in EU law to deny benefits to taxpayers without implementation of a Directive's provision in domestic law? Would it amount to illegal state aid if a Member State is more lenient? Are domestic save harbours possible? What does it mean for non-harmonized areas and how it does relate to *3M Italia*<sup>88</sup>?

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<sup>81</sup> *T Danmark et al* (C-116/16 and C-117/16), paras 121-123.

<sup>82</sup> *T Danmark et al* (C-116/16 and C-117/16), para. 93.

<sup>83</sup> *T Danmark et al* (C-116/16 and C-117/16), para. 94

<sup>84</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-116/16 (*T Danmark*, EU:C:2018:144, paras 78-86) and C-117/16 (*Y Denmark*, EU:C:2018:145, paras 78-86).

<sup>85</sup> See *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 138: "Furthermore, where the beneficial owner of interest paid is resident for tax purposes in a third State, refusal of the exemption provided for in Article 1(1) of [the IRD] is not in any way subject to fraud or an abuse of rights being found. [T]hat provision is designed to exempt interest payments in the source Member State only where the beneficial owner of the interest is a company established in another Member State or a permanent establishment situated in another Member State belonging to a company of a Member State".

<sup>86</sup> *T Danmark et al* (C-116/16 and C-117/16), para. 111.

<sup>87</sup> See *T Danmark et al* (C-116/16 and C-117/16), para. 106, referring to the United States legislation under the 2004 American Jobs Creation Act, which temporarily provided for a favorable repatriation of foreign profits.

<sup>88</sup> ECJ, 29 March 2012, C-417/10, *3M Italia*, ECLI:EU:C:2012:184.

- What exactly does “beneficial ownership” mean in the IRD? Is that concept also implicit in the PSD? What about the OECD guidance and its ongoing development? Which version of the OECD MC Commentaries should be used? What is the burden of proof and who bears it?
- What is “abuse” and how does it relate to “beneficial ownership”, especially in the PSD? How does this relate to other recent cases (e.g., *Eqiom*<sup>89</sup> and *Deister and Juhler*<sup>90</sup>), to the GAAR in Art 6 of the ATAD<sup>91</sup> and the new anti-abuse clause in Art 1(2), (3) of the PSD after the 2015 amendment<sup>92</sup>? Is the “essential” purpose the same of “the main purpose or one of the main purposes”? What if the structure is in line with a tax treaty and the “Principal Purposes Test” (PPT), but not with EU law?
- How can Member States legislatively implement the “general principle” in line with the procedural requirements that the Court has established in prior case law?<sup>93</sup>
- How much “substance” is required for intermediary holdings in light of the relevant factors to establish an actual economic activity relating “to the management of the company, to its balance sheet, to the structure of its costs and to expenditure actually incurred, to the staff that it employs and to the premises and equipment that it has”<sup>94</sup>?
- What entity is a qualified “company of a Member State” under the IRD or the PSD? What does the criterion of “not exempt” generally mean in the company tax directives?

17. Some of those questions were (partly) answered by the Court, while others will be resolved and refined over time. The ECJ Task Force takes the opportunity of this Opinion Statement to address three intriguing aspects of the “Danish beneficial ownership cases”, i.e., the Court’s

- expansion of the general anti-abuse principle enshrined in EU law to areas of tax law that are subject to minimum harmonization (chapter III.B);
- use of the OECD materials to define the beneficial ownership concept, its conflation with the general anti-abuse principle and the attempt to give the notion of “abuse” workable contours (chapter III.C);
- reading of an effective subject-to-tax clause into the definition of a “company” laid down in the Interest-Royalties-Directive (IRD) (chapter III.D).

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<sup>89</sup> *Eqiom SAS* (C-6/16); see for a detailed discussion ECJ CFE Task Force, Opinion Statement ECJ-TF 2/2018 on the CJEU decision of 7 September 2017 in Case C-6/16, *Eqiom*, concerning the compatibility of the French anti-abuse rule regarding outbound dividends with the Parent-Subsidiary Directive and fundamental freedoms, ET 2018, 471 et seq.

<sup>90</sup> *Deister and Juhler* (C-504/16 and C-613/16).

<sup>91</sup> Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, [2016] OJ L 193, p. 1. Art 6 of that Directive, which had to be implemented in the Member States effective 1 January 2019, requires that, “[f]or the purposes of calculating the corporate tax liability, a Member State shall ignore 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. An arrangement may comprise more than one step or part.” Non-genuineness is defined as “an arrangement or a series thereof” that “are not put into place for valid commercial reasons which reflect economic reality”. For analysis see, e.g., A. Garcia Prats et al, “EU Report”, in: IFA (Hrsg), *Seeking anti-avoidance measures of general nature and scope – GAAR and other rules*, CDFI Vol. 103a (2018), Chapter 3.1.

<sup>92</sup> See Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [2015] OJ L 21, p. 1, which introduced a new minimum-anti-abuse-standard in Art 1(2) and (3) PSD that had to be implemented by the Member States effective 1 January 2016. Under that anti-abuse provision, “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.” Moreover, “[a]n arrangement may comprise more than one step or part.” Non-genuineness is defined as “an arrangement or a series of arrangements” that “are not put into place for valid commercial reasons which reflect economic reality”. For analysis see, e.g., A. Garcia Prats et al, “EU Report”, in: IFA (Hrsg), *Seeking anti-avoidance measures of general nature and scope – GAAR and other rules*, CDFI Vol. 103a (2018), Chapter 3.2.2.

<sup>93</sup> See, with further references, A. Garcia Prats et al, “EU Report”, in: IFA (Hrsg), *Seeking anti-avoidance measures of general nature and scope – GAAR and other rules*, CDFI Vol. 103a (2018), Chapter 3.2.1.

<sup>94</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 131.

## B. No need for a specific domestic or agreement-based provision implementing (old) Article 1(2) PSD or Article 5 IRD

18. The Court found that a specific domestic or agreement-based implementation of anti-abuse provisions is not necessary because the tax authorities may and must rely on the general (unwritten, abstract and evolving)<sup>95</sup> principle that EU law cannot be relied on for abuse or fraudulent ends to deny benefits.<sup>96</sup> This finding may only be explained on account of the specificities of Danish legislation. Let us revisit some basics first: Directives are addressed to the Member States (Article 288(3) TFEU) and require implementation into domestic law. More specifically, a Member State may not invoke against an individual or a company a provision of a directive which has not (yet) been implemented.<sup>97</sup> Focusing on direct taxation, there are sufficient precedents that

“a Member State which has failed to transpose the provisions of a directive into national law cannot rely, as against Community citizens, upon limitations that might have been laid down on the basis of those provisions”.<sup>98</sup>

So, if the legislature of a Member State decides not to implement rules permitted by a directive’s anti-abuse reservation such as Art 1(2) in the pre-2015 PSD or Art 5 in the IRD, can the tax administration and courts nevertheless rely on a general EU principle that EU law cannot be relied on for abusive or fraudulent ends? One may be inclined to answer that question resoundingly to the negative: The Court’s precedence in *Kofoed* has made it (seemingly) clear that national tax authorities are precluded from relying directly, against a taxpayer, on the anti-abuse reservation of Art 15 of the Merger Directive<sup>99</sup> (unless there is some way to interpret Danish law to that effect<sup>100</sup>), with AG Kokott also adding that recourse to “any existing general principle of [EU] law prohibiting the misuse of law” would be barred, as Art 15 is a concrete expression of such principle.<sup>101</sup> As far as we can see this was also the prevailing position in literature<sup>102</sup> and – even after *Cussens*<sup>103</sup> – AG Kokott has clearly rejected the idea that non-implemented anti-avoidance provisions of the company tax directives could be applied directly against taxpayers.<sup>104</sup>

19. The Court now took a quite different approach:<sup>105</sup> It emphasized the (unwritten) general principle of EU law that EU law cannot be relied on for abuse or fraudulent ends. This has recently also been confirmed in the

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<sup>95</sup> See also Opinion AG Kokott, 8 February 2007, Case C-321/05, *Hans Markus Kofoed v Skatteministeriet*, EU:C:2007:86, para. 67, noting that in comparison to the Merger Directive’s anti-abuse reservation “in terms of content” the general principle “is much less clear and precise”.

<sup>96</sup> See *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 95-120 (with regard to the IRD); *T Danmark et al* (C-116/16 and C-117/16), paras 68-92 (with regard to the PSD).

<sup>97</sup> There is, in other words, no so-called “inverse vertical direct effect”. See, e.g., ECJ, 26 February 1986, Case 152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority*, EU:C:1986:84; ECJ, 11 June 1987, Case 14/86, *Pretore di Salò*, EU:C:1987:275, para. 19; ECJ, 8 October 1987, Case 80/86, *Criminal proceedings against Kolpinghuis Nijmegen BV*, EU:C:1987:431.

<sup>98</sup> ECJ, 12 February 2009, Case C-138/07, *Belgische Staat v Cobelfret NV*, EU:C:2009:82, para. 49. See also, e.g., Opinion of AG Sharpston, 12 May 2011, Case C-397/09, *Scheuten Solar Technology GmbH v Finanzamt Gelsenkirchen-Süd*, EU:C:2011:499, paras. 92-96.

<sup>99</sup> *Kofoed* (C-321/05), paras 41-42; Opinion of AG Kokott in *Kofoed* (C-321/05), para. 66; see also Opinion AG Kokott, 16 July 2009, Case C-352/08, *Modehuis A. Zwijnenburg BV v Staatssecretaris van Financiën*, EU:C:2009:483, paras 60-68.

<sup>100</sup> Indeed, the Court in *Kofoed* noted that through the mechanism of “consistent interpretation” EU law could indirectly apply to the detriment of the taxpayer if “there is, in Danish law, a provision or general principle prohibiting abuse of rights or other provisions on tax evasion or tax avoidance which might be interpreted in accordance with [Art 15 of the Merger Directive] and thereby justify taxation of the exchange of shares in question”. See *Kofoed* (C-321/05), para. 46, and also Opinion of AG Kokott in *Kofoed* (C-321/05), paras 63-65.

<sup>101</sup> See Opinion of AG Kokott in *Kofoed* (C-321/05), para. 67, and Opinion of AG Kokott in *Zwijnenburg* (C-352/08), para. 62.

<sup>102</sup> See, e.g., A. Garcia Prats et al, “EU Report”, in: *IFA, Seeking anti-avoidance measures of general nature and scope – GAAR and other rules*, CDFI Vol. 103a (2018), Chapter 3.2.1 with further references.

<sup>103</sup> *Cussens* (C-251/16), para. 30.

<sup>104</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-115/16, *N Luxembourg 1*, EU:C:2018:143, paras 98-113, C-116/16, *T Danmark*, EU:C:2018:144, paras 94-109, C-117/16, *Y Denmark*, EU:C:2018:145, paras 94-109, C-118/16, *X Denmark*, EU:C:2018:146, paras 108-123, C-119/16, *C Denmark I*, EU:C:2018:147, paras 96-111, and C-299/16, *Z Denmark*, EU:C:2018:148, paras 98-113.

<sup>105</sup> See *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 95-120 (with regard to the IRD); *T Danmark et al* (C-116/16 and C-117/16), paras 68-92 (with regard to the PSD).

VAT area in *Italmoda*<sup>106</sup> and *Cussens*,<sup>107</sup> which implies that any right or advantage can be denied based on the EU general principle of prohibition of abusive practices, regardless of any specific EU or domestic law provision. Unlike AG Kokott, the Court transferred that notion also to the PSD and the IRD so that,

“in the light of the general principle of EU law that abusive practices are prohibited and of the need to ensure observance of that principle when EU law is implemented, the absence of domestic or agreement-based anti-abuse provisions does not affect the national authorities’ obligation to refuse to grant entitlement to rights provided for by [Directives 90/435 and 2003/49] where they are invoked for fraudulent or abusive ends”.<sup>108</sup>

This obligation does not require domestic legislative implementation because, in the Court’s eyes, this is not an obligation imposed on taxpayers but rather merely part of the objective conditions required for obtaining the advantage sought. What then, one might ask, about *Kofoed*? The Court distinguishes: What it said in *Kofoed* with regard to the need for domestic anti-abuse rules and the possibility of “directive-compliant” interpretation of domestic law<sup>109</sup> was just a first step and was not meant to exclude reliance on the general EU principle:

„Nevertheless, even if it were to transpire, in the main proceedings, that national law does not contain rules which may be interpreted in compliance with [Art 1(2) of Directive 90/435 or Art 5 of Directive 2003/49], this — notwithstanding what the Court held in the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408) — could not be taken to mean that the national authorities and courts would be prevented from refusing to grant the advantage derived from the right of exemption provided for in [Art 4 of Directive 90/435 or Art 1(1) of Directive 2003/49] in the event of fraud or abuse of rights”.<sup>110</sup> 20. This certainly means that taxpayers cannot abusively rely on rights based on the direct effect of tax directives even in the absence of a domestic anti-abuse provision or principle. That means that abuse of rights under EU law, such as an exemption of withholding tax, is prohibited. In light of the GAAR in Article 6 ATAD,<sup>111</sup> which had to be implemented by all Member States by 1 January 2019, some of the potential issues might, however, have little practical relevance in the future. Nevertheless, it deserves some fundamental, high-level analysis with regard to national tax sovereignty and separation of powers: Let us depart from the rather solid foundation that, e.g., the pre-2015 PSD<sup>112</sup> and the IRD only provide for minimum harmonization (and not for full harmonization as in the area of value-added taxation at issue in *Cussens* and *Italmoda*). This means that Member States may also enact more liberal rules and grant benefits that go beyond the directive, e.g., for situations where the directive’s capital ownership requirement is not fulfilled.<sup>113</sup> If that assumption holds true, one might further argue that a Member State that provides for such further beneficial treatment is insofar effectively not implementing that directive but rather goes beyond it by means of plain non-harmonized domestic law (and may do so based on its sovereignty if it does not infringe on the fundamental freedoms or violate state aid rules). You see where this is going: If a Member State decides not to issue

<sup>106</sup> *Italmoda* (C-131/13, C-163/13 and C-164/13), para. 62.

<sup>107</sup> See *Cussens* (C-251/16), paras 25-44.

<sup>108</sup> See *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 111, and *T Danmark et al* (C-116/16 and C-117/16), para. 83.

<sup>109</sup> See *Kofoed* (C-321/05), para. 42 et seq.

<sup>110</sup> See *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 117, and *T Danmark et al* (C-116/16 and C-117/16), para. 89.

<sup>111</sup> Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, [2016] OJ L 193, p. 1.

<sup>112</sup> It should be noted that the current version of PSD provides for (1) an obligation to tax distributions if the payments have been deductible in the source State (Art 4(1)(a) of the PSD after the amendment by Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [2014] OJ L 219, p. 40) and (2) a minimum anti-abuse provision (Art 1(2) and (3) of the PSD after the amendment by Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [2015] OJ L 21, p. 1).

<sup>113</sup> This is not only clear from the wording of the PSD (arg “at least” in Article 3) but also the legislative history (see, e.g., Doc. 6446/84 FISC 42 of 18 April 1984, p. 2, and the *Rossi*-Report of the European Parliament [Doc. 195/69], p. 15, explicitly noting that the proposal does not exclude more liberal rules)..

legislation to implement a directive's anti-abuse reservation (such as Art 1(2) of the pre-2015 version of the PSD), it is effectively making a sovereign domestic tax policy decision to grant these benefits under domestic law, and that decision is not only unrelated to EU law, it also cannot logically be subject to an unwritten EU general principle that prohibits abuse of EU (and not also domestic) law. Staying within this hypothetical, applying an EU anti-abuse provision to what is clearly only domestic law (and outside the scope of EU Law) would upset the domestic separation of powers in that it would undermine the decision of a national legislature not to exercise a Directive's anti-abuse reservation (such as Art 1(2) of the pre-2015 PSD or Art 5 of the IRD) by granting the executive or the judiciary the power to override that domestic legislative decision.

21. Returning to the Beneficial Ownership cases, the situation is different. The Danish rules did not phrase the withholding tax exemptions in its own words, but rather explicitly referred to the PSD and the IRD by stating, e.g., that the withholding tax liability "does not apply to interest which is not taxed or is subject to reduced taxation under Directive [2003/49]".<sup>114</sup> This might arguably be the opening door for the Court's analysis as the Danish rules might be read as "importing" all criteria of the directives, including – from the Court's perspective – the general principle that EU law cannot be relied on for abuse of fraudulent ends without creating an independent domestic framework that goes beyond the directives and establishes domestic rights for taxpayers (even though there is indeed evidence that this was a very deliberate decision by the Danish legislator not to implement anti-abuse provisions<sup>115</sup>).

### C. The use of OECD materials to define the "beneficial ownership" concept, its conflation with the general anti-abuse principle and the contours of the notion of "abuse"

22. On the condition of "beneficial ownership" in Art 1(4) of the IRD, it was quite clear – and also in line with previous statements by the Commission<sup>116</sup> – that this notion is one of Union law and requires autonomous interpretation.<sup>117</sup> In that respect, however, the Court – deviating from AG Kokott's analysis<sup>118</sup> – concluded that the OECD materials are "relevant when interpreting the [IRD]".<sup>119</sup> While this may be correct given the context of the IRD's adoption and the use of the OECD Model's terminology (which is found in Art 10, 11 and 12 of the OECD MC), the Court's foundation of that conclusion – i.e., that the Commission's 1998 IRD proposal<sup>120</sup> refers to Article 11 OECD MC – seems questionable: Neither the Directive's preamble nor the text refers to the OECD MC or the OECD MC Commentaries with regard to the "beneficial ownership" requirement; moreover, the Commission's 1998 IRD proposal refers to Article 11 OECD MC merely for the

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<sup>114</sup> See *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 19, and *T Danmark et al* (C-116/16 and C-117/16), para. 19.

<sup>115</sup> See for a detailed account of the development of Danish withholding tax law and the efforts in the 1990s and early 2000s to offer itself as a conduit jurisdiction H. S. Hansen, "Det store hykleri – om 'beneficial owner' sagerne", *Tidsskrift for Skatter og Afgifter* (TfS) 2011, 537 (537 et seq.).

<sup>116</sup> See the Report from the Commission to the Council in accordance with Article 8 of Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM(2009)179, para. 3.3.1.

<sup>117</sup> See *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 84, and the Opinions of AG Kokott of 1 March 2018 in Cases C-115/16 (*N Luxembourg I*, EU:C:2018:143, paras 48-55), C-118/16 (*X Denmark*, EU:C:2018:146, paras 48-55), C-119/16 (*C Denmark I*, EU:C:2018:147, paras 48-55), and C-299/16 (*Z Denmark*, EU:C:2018:148, paras 48-55).

<sup>118</sup> AG Kokott had argued that the notion of "beneficial owner" in the IRD is to be interpreted autonomously and without recourse to the corresponding notion in tax treaties. See the Opinions of AG Kokott of 1 March 2018 in Cases C-115/16 (*N Luxembourg I*, EU:C:2018:143, paras 48-55), C-118/16 (*X Denmark*, EU:C:2018:146, paras 48-55), C-119/16 (*C Denmark I*, EU:C:2018:147, paras 48-55), and C-299/16 (*Z Denmark*, EU:C:2018:148, paras 48-55).

<sup>119</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 90.

<sup>120</sup> Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM(1998)67 final [4 March 1998], p. 6-7.

definition of interest in Article 2(a) IRD, but not for the explanation of the term “beneficial ownership”, and also the 2009 Commission Report on the IRD does not even mention the tax treaty context of that term.<sup>121</sup>

23. The Court, moreover, did not explain how the OECD MC Commentaries “being relevant” is going to influence the outcome when applying the IRD to a concrete case, and which version of the OECD guidance should be used to interpret the Directive’s corresponding requirement.

- a. As for the former aspect, the Court’s finding of a “relevance” of the OECD MC Commentaries did not much in answering the concrete (and hard) questions of the Danish court<sup>122</sup> on the significance that (1) equity capital is used for the loan, (2) the interest in question is entered on the principal (“rolled up”), (3) the interest recipient has subsequently made an intragroup transfer to its parent company resident in the same State with a view to adjusting earnings for tax purposes under the prevailing rules in the State in question, (4) the interest in question is subsequently converted into equity in the borrowing company, or (5) the interest recipient has had a contractual or legal obligation to pass the interest to another person, which, had it received the interest directly, would not have been taxable in Denmark. More guidance on these questions would be desperately needed.
- b. In the latter aspect, it seems that the Court endorsed an ambulatory (dynamic) use of the OECD MC Commentaries by referring to its own descriptions of the “beneficial ownership” concept in the 1977 OECD MC and the 2003 OECD Update, which addressed certain conduit companies. The Court, however, did not (explicitly<sup>123</sup>) refer to the 2014 OECD Update,<sup>124</sup> which might either imply that it did not want to go “fully dynamic” or that it did not consider it necessary. Moreover, the Court’s seemingly dynamic approach might not technically be “dynamic” at all: While the IRD was proposed in 1998, it was adopted in Council on 3 June 2003, whereas the 2003 OECD Update was adopted by the OECD Council already on 28 January 2003<sup>125</sup> and was based on an even earlier 2002 Report,<sup>126</sup> i.e., both before the IRD was passed. However, a dynamic approach would not be surprising as the ECJ in *Berlioz*<sup>127</sup> had already used the 2012 OECD MC Commentaries Update on Article 26 OECD MC<sup>128</sup> to interpret the concept of foreseeable relevance in the 2011 Mutual Assistance Directive.<sup>129</sup> It is, however, hard to see how such dynamic understanding would fit into the EU legal order, since – as AG Kokott, who certainly prefers a static approach,<sup>130</sup> succinctly pointed out – “[o]therwise the

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<sup>121</sup> See the Report from the Commission to the Council in accordance with Article 8 of Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM(2009)179, para. 3.3.1.

<sup>122</sup> See, e.g., question (1)(e) in Case C-115/16.

<sup>123</sup> It did, however, implicitly refer to a notion that was introduced by the 2014 OECD Update (the “in substance”-criterion) in explaining the indicia for abuse; see *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 132, and the discussion *infra* in Chapters II.3. and III.C.

<sup>124</sup> It should be noted that the Court referred to the “development — as set out in paragraphs 4 to 6 above — of the OECD Model Tax Convention and the commentaries”, with paras 4 and 5 dealing with the 1977 OECD MC and para. 6 dealing with the revision of the OECD MC Commentaries in 2003, while para. 7 of the judgment mentions the 2014 OECD Update of the commentaries (see *N Luxembourg I et al* [C-115/16, C-118/16, C-119/16 and C-299/16], paras 92).

<sup>125</sup> As “The 2002 Update to the Model Tax Convention”.

<sup>126</sup> Entitled “Restricting the Entitlement to Treaty Benefits” (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

<sup>127</sup> ECJ (Grand Chamber), 16 May 2017, Case C-682/15, *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes*, EU:C:2017:373, para. 66.

<sup>128</sup> “Update to Article 26 of the OECD Model Tax Convention and its Commentary”, adopted by the OECD Council on 17 July 2012, and later included in the 2014 Update to the OECD Model Tax Convention, adopted by the OECD Council on 16 July 2014.

<sup>129</sup> Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, [2011] OJ L 64, p. 1.

<sup>130</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-115/16 (*N Luxembourg 1*, EU:C:2018:143, para. 52), C-118/16 (*X Denmark*, EU:C:2018:146, para. 52), and C-119/16 (*C Denmark I*, EU:C:2018:147, para. 52), noting that “[a]t most, should it transpire from the wording and history of the directive that the EU legislature was guided by the wording of an OECD Model Tax Convention and the commentaries (available at the time) on that OECD Model Tax Convention, a similar interpretation might be appropriate”.

contracting countries to the OECD would have the power to decide on the interpretation of an EU directive".<sup>131</sup>

24. Given the more specific explanations and conditions found in the IRD that differ from the wording of the OECD MC, this raises both methodological and substantive questions. For instance, the Court's starting point that the term 'beneficial owner' "cannot refer to concepts of national law which vary in scope"<sup>132</sup> appears to be undermined by the condition in Art 1(5)(b) IRD according to which a permanent establishment (PE) is treated as the beneficial owner only if it is subject to income tax on the relevant payment. In the case of a PE the concept would thus seem to vary explicitly with national tax rules. One may counter this by arguing that the situation of a PE is special: It can never actually *be* the beneficial owner, but is, as Art 1(5) IRD makes plain, only *treated as such*. However, as the Court invoked that same provision in order to explain the meaning of "company of a Member State",<sup>133</sup> it does not appear to see it as a particularity for PEs. Does this mean that taxation in the residence State of the recipient is to be considered a requirement for beneficial ownership? That might appear to be the result of the Court's judgment, but is clearly not derived from OECD guidance. While the latter makes it clear that the recipient of a dividend, interest or royalties needs to be considered the owner for tax purposes of that payment by its State of residence in order to qualify as beneficial owner,<sup>134</sup> actual taxation there is clearly not a condition.
25. The concepts of beneficial ownership and abuse of law are intertwined in the Court's analysis. This may not seem surprising at first, considering the indubitable purpose of the beneficial ownership concept in tax treaties to counter some specific forms of tax avoidance, i.e., "those involving the interposition of a recipient who is obliged to pass on the interest to someone else".<sup>135</sup> Just like in the OECD MC, however, the "beneficial ownership" concept merely aims at avoiding specific types of abuses and not all possible avoidance structures. As pointed out by AG Kokott, the concerns addressed by the abuse concept and the beneficial ownership concept are fundamentally different,<sup>136</sup> and also the Court appears to recognize the difference between both concepts at certain stages of its analysis, making it clear that denial of a benefit based on a lack of "beneficial ownership" (e.g., because the beneficial owner is an entity resident in a non-EU Member State) does not require tax authorities to prove abuse of law.<sup>137</sup> That seems to be a reasonable understanding of the IRD, which explicitly contains a "beneficial owner" requirement, but needs some purposive interpretation of the PSD, which does not explicitly contain such a requirement. Essentially avoiding the Danish court's question whether the tax treaty concept of beneficial ownership can constitute a legal basis for combating fraudulent and abusive practices in the context of (old) Art 1(2) PSD,<sup>138</sup> the Court took a different path from AG Kokott's Opinions<sup>139</sup> and seems to assume that a "beneficial owner" requirement is implicit in the PSD as stand-alone anti-avoidance tool.<sup>140</sup> Even in non-abuse situations, therefore, the PSD's withholding tax exemption in the source Member State would not be applicable if the "beneficial owner" of a dividend resides outside the EU. The Court finds support for that conclusion based

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<sup>131</sup> Opinion of AG Kokott in *Z Denmark* (C-299/16), para. 53.

<sup>132</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 84.

<sup>133</sup> See *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 152, and *infra* Chapter III.D.

<sup>134</sup> See Art 10 no. 12 et seq., Art 11 no. 9 et seq. and Art 12 no. 4 et seq. OECD MC Comm. 2017.

<sup>135</sup> See, e.g., Art 11 no. 10.3 OECD MC Comm. 2017.

<sup>136</sup> See, e.g., the Opinion of AG Kokott in *N Luxembourg I* (C-115/16), para. 60.

<sup>137</sup> See *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 138, and *T Danmark et al* (C-116/16 and C-117/16), para. 111.

<sup>138</sup> *T Danmark et al* (C-116/16 and C-117/16), para. 93.

<sup>139</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-116/16 (*T Danmark*, EU:C:2018:144, paras 78-86) and C-117/16 (*Y Denmark*, EU:C:2018:145, paras 78-86).

<sup>140</sup> *T Danmark et al* (C-116/16 and C-117/16), para. 111 ("[W]here the beneficial owner of dividends paid is resident for tax purposes in a third State, refusal of the exemption provided for in Article 5 of [the PSD] is not in any way subject to fraud or an abuse of rights being found").

on the aim of the PSD to avoid double taxation of profit distributions within the EU<sup>141</sup> and moreover ensures teleological consistency between the IRD and the PSD despite their different wording and definitions.

26. However, “beneficial ownership”-related elements also found their way into the Court’s list of indicative criteria for abuse. As for “beneficial ownership” the Court confined itself to the statement that it is an economic concept denoting the “entity which benefits economically from the interest received and accordingly has the power freely to determine the use to which it is put”.<sup>142</sup> The Court’s subsequent analysis regarding the constituent elements of abuse of rights also employs some similar notions – e.g., the reference to “the conduit companies’ inability to have economic use of the interest received”<sup>143</sup> or “that all or almost all of the aforesaid interest is, very soon after its receipt, passed on by the company that has received it to entities which do not fulfil the conditions for the [IRD]”<sup>144</sup> – but moreover refers to the situation of a recipient company that does not “in substance” have the right to use and enjoy the sum it received: Indications for abuse “are capable of being constituted not only by a contractual or legal obligation of the company receiving interest to pass it on to a third party but also by the fact that, ‘in substance’ [...] that company, without being bound by such a contractual or legal obligation, does not have the right to use and enjoy those sums.”<sup>145</sup> This ostensibly goes beyond the OECD MC Commentary’s guidance on “beneficial ownership” since the 2014 Update, which confines the denial of treaty benefits to situations where such contractual or legal obligation exists.<sup>146</sup> While that conclusion would normally derive from relevant legal documents, it “may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person”.<sup>147</sup> While the latter “in substance”-determination under the OECD MC might reasonably be understood as a mere procedural standard of proof, the context of the Court’s inquiry suggests that it did not interpret the concept of beneficial ownership in this context but rather within the concept of artificial arrangements. As a result, this may be best understood as clarifying the relationship between beneficial ownership and the abuse of law: An entity may well be the beneficial owner (as interpreted in conformity, most likely, with the OECD material), yet still be denied the directive’s benefits due to the artificiality of the legal structure.
27. As for the constituent elements of an abuse of rights and the relevant evidence, it is quite surprising that the Court refrained from utilizing its recent decisions on the concept of abuse in the PSD in *Eqiom*<sup>148</sup> and *Deister and Juhler*.<sup>149</sup> Possibly creating “new” standards that foreshadow the imminent interpretation of the GAAR in Art 6 ATAD and the minimum anti-avoidance standard in (new) Art 1(2), (3) PSD, the Court identifies a set of indicia that national courts must take into account in assessing whether a transaction is

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<sup>141</sup> See *T Danmark et al* (C-116/16 and C-117/16), para. 113: “The mechanisms of Directive 90/435, in particular Article 5, are therefore 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.” It might be noted in passing that this argument is not fully intuitive, as the PSD would always lead to non-taxation of the distribution (if the parent company’s Member State has chosen the exemption method under Art 4 PSD); what the Court seems to imply is that a withholding tax exemption in a Member State should not economically benefit a third State.

<sup>142</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 89.

<sup>143</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 132.

<sup>144</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 128.

<sup>145</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 132.

<sup>146</sup> See, e.g., Art 10 no. 12.4 OECD MC Comm. 2017.

<sup>147</sup> Art. 11 no. 10.2 OECD MC Comm. 2017.

<sup>148</sup> ECJ, 7 September 2017, Case C-6/16, *Eqiom SAS, formerly Holcim France SAS and Enka SA v Ministre des Finances et des Comptes publics*, EU:C:2017:641; see for a detailed discussion ECJ CFE Task Force, Opinion Statement ECJ-TF 2/2018 on the CJEU decision of 7 September 2017 in Case C-6/16, *Eqiom*, concerning the compatibility of the French anti-abuse rule regarding outbound dividends with the Parent-Subsidiary Directive and fundamental freedoms, ET 2018, 471 et seq.

<sup>149</sup> ECJ, 20 December 2017, C-504/16 and C-613/16, *Deister Holding AG and Juhler Holding A/S v Bundeszentralamt für Steuern*, EU:C:2017:1009.

abusive.<sup>150</sup> Those criteria include the conduit role of an entity, lack of economic substance and exercise of very limited activities (to be inferred from an analysis of all the relevant facts, including the management of the company, the cost structure, the presence of staff, premises and equipment) and that the structure was put in place simultaneously or shortly after the introduction of changes in the tax laws of the source EU Member State or any other (third) State.<sup>151</sup> Needless to say, all those criteria on one hand may help national courts to identify abusive situations but, on the other hand, they are necessarily vague and may lead to quite some uncertainty going forward.

28. It seems, moreover, that the Court wanted to put a “sword” in the hands of national tax authorities also with regard to the allocation of the burden of proof:

- a. First, the Court was rather reluctant to fully embrace the obvious argument that no abuse exists where the same tax burden would result without the interposition of EU intermediary companies because a tax treaty would grant the same benefits also to the “direct” third-State recipients<sup>152</sup> (and the corresponding reasoning of AG Kokott<sup>153</sup>). It is, however, hard to see how a “tax advantage” (as required by the general principle as well as, e.g., by Art 6 ATAD) would be obtained if the “genuine” arrangement, e.g. direct ownership, would have triggered the same (low) tax burden in the source State.<sup>154</sup> The Court seems to recognize that argument half-heartedly by noting that “it remains possible, in a situation where the interest would have been exempt had it been paid directly to the company having its seat in a third State, that the aim of the group’s structure is unconnected with any abuse of rights. In such a case, the group cannot be reproached for having chosen such a structure rather than direct payment of the interest to that company”.<sup>155</sup> Moreover, the Court had also noted the different effects of the beneficial ownership requirement and the anti-abuse principle, as – irrespective of any finding of fraud or abuse – “beneficial owners” in third states are not beneficiaries of the IRD in the first place.<sup>156</sup>
- b. Second, the Court found that the tax authorities are not even required to identify the entity which they regard to be the beneficial owner<sup>157</sup> (again departing from AG Kokott’s conclusions<sup>158</sup>). The Court based that latter conclusion on the fact that “the national tax authority does not necessarily have information enabling it to identify those owners” so that it “cannot be required to furnish evidence that would be impossible for it to provide”,<sup>159</sup> and even if they were known, said the Court, “it is not necessarily established which of them are or will be the actual beneficial owners”.<sup>160</sup> That said, it is not

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<sup>150</sup> See *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 124-133, and *T Danmark et al* (C-116/16 and C-117/16), paras 97-114.

<sup>151</sup> See *T Danmark et al* (C-116/16 and C-117/16), para. 106, referring to the United States legislation under the 2004 American Jobs Creation Act, which temporarily provided for a favorable repatriation of foreign profits.

<sup>152</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 134-137, and *T Danmark et al* (C-116/16 and C-117/16), paras 107-110.

<sup>153</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-115/16 (*N Luxembourg I*, EU:C:2018:143, para. 96), C-118/16 (*X Denmark*, EU:C:2018:146, para. 105), C-119/16 (*C Danmark I*, EU:C:2018:147, para. 94), and C-299/16 (*Z Denmark*, EU:C:2018:148, para. 96) and in Cases C-116/16 (*T Danmark*, EU:C:2018:144, paras 87-92) and C-117/16 (*Y Denmark*, EU:C:2018:145, paras 87-92).

<sup>154</sup> See also, e.g., Opinion AG Kokott, 19 January 2017, C-6/16, *Egiom SAS, formerly Holcim France SAS and Enka SA v Ministre des Finances et des Comptes publics*, EU:C:2017:34, para. 26 with footnote 14, where a holding of a French subsidiary not through an interposed EU company but rather directly by the Swiss parent would likewise not have triggered a withholding tax because of Art 15 of the EU-Swiss Agreement, [2004] OJ L 385, p. 30 (now Art 9 of the EU-Swiss Agreement, [2015] OJ L 333, p. 12).

<sup>155</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 137.

<sup>156</sup> See *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 138.

<sup>157</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), paras 143-144, and *T Danmark et al* (C-116/16 and C-117/16), paras 97-120.

<sup>158</sup> See the Opinions of AG Kokott of 1 March 2018 in Cases C-115/16 (*N Luxembourg I*, EU:C:2018:143, para. 96), C-118/16 (*X Denmark*, EU:C:2018:146, para. 105), C-119/16 (*C Danmark I*, EU:C:2018:147, para. 94), and C-299/16 (*Z Denmark*, EU:C:2018:148, para. 96) and in Cases C-116/16 (*T Danmark*, EU:C:2018:144, paras 87-92) and C-117/16 (*Y Denmark*, EU:C:2018:145, paras 87-92).

<sup>159</sup> See, e.g., *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 143.

<sup>160</sup> See, e.g., *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 144.

entirely clear if the taxpayers could nevertheless show – in line with their burden of proof<sup>161</sup> – who the beneficial owner really is and claim corresponding benefits. Assume, for example, that the beneficial owner is a qualified EU company on top of a chain of (artificially interposed) third-State and EU-entities. In that case the Court – in line with the current OECD MC Commentaries<sup>162</sup> – clearly prefers an approach that “ignores” the non-beneficial owners and grants the IRD’s benefits if the beneficial owner is indeed a qualified EU company.<sup>163</sup>

#### D. Does being a “company of a Member State” require that the company’s income is subject-to-tax?

29. Both the PSD and the IRD only apply to a “company of a Member State”. To be such qualified “company of a Member State”, a three prong-test has to be met, the third prong of which requires that the company is “subject to” the Member States’ corporate taxes “without [...] being exempt” (Art 2(a)(iii) and Art 3(a)(iii), respectively). This criterion is intensely discussed in literature,<sup>164</sup> and case law also provides some guidance: While the directives’ wording might suggest that we have to focus on whether the company as a taxable person is, in principle, “subject to” a domestic corporate tax (and not, e.g., a personally exempt charity or foundation), the Court seems to understand the second prong of the test (“without [...] being exempt”) as referring to the treatment of the company’s income.<sup>165</sup> The Court has, for example, held a company to be “exempt” within the meaning of Art 2(a)(iii) of the PSD where (1) its income was fully exempt from corporate taxation (and only subject to a subscription tax under the local tax regime for investment funds),<sup>166</sup> or (2) where it “is entitled [...] to a zero rate of taxation for all its profits, provided that all those profits are distributed to its shareholders”.<sup>167</sup> So while a “zero rate” seems to disqualify a company from the benefits of the directive, a reduced rate would not.<sup>168</sup> The outcome is less clear in situations where a company enjoys exemption for certain items of income but not for others. Assume, for example, that a company’s dividend income and capital gains are exempt, but its interest and royalty income is taxed at normal rates.
30. Could, for example, the source State levy a dividend withholding tax on a distribution to such parent company based on the argument that the exemption for dividend income removes it from being a “company of a Member State”? The Italian Supreme Court recently came to that surprising result.<sup>169</sup> But that clearly goes too far, as it (1) disregards the economic double taxation in the source State that the PSD (also) aims to avoid and (2) is not in line with the Court’s “but for”-test developed in *Wereldhave*: The mechanisms of the PSD 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 company to the parent company being subject to double taxation”.<sup>170</sup> This test seems to disregard the taxation of

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<sup>161</sup> See *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 140, finding that, “[a]s is apparent from Article 1(11) and (12) and Article 1(13)(b) of Directive 2003/49, the source Member State may require the company which has received interest to establish that it is its beneficial owner”.

<sup>162</sup> See Art 11 no. 11 OECD MC Comm. 2017.

<sup>163</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 94, finding “that the mere fact that the company which receives the interest in a Member State is not its ‘beneficial owner’ does not necessarily mean that the exemption provided for in Article 1(1) of [the IRD] is not applicable. It is conceivable that such interest will be exempt on that basis in the source State when the company which receives it transfers the amount thereof to a beneficial owner who is established in the European Union and furthermore satisfies all the conditions laid down by [the IRD] for entitlement to such an exemption.”

<sup>164</sup> For a recent overview see, e.g., P. Arginelli, “The Subject-to-Tax Requirement in the EU Parent-Subsidiary Directive (2011/96)”, 57 ET 2017, 334 (340).

<sup>165</sup> See, e.g., Opinion AG Sánchez-Bordona, 26 October 2016, Case C-448/15, *Belgische Staat v Wereldhave Belgium Comm. VA and Others*, EU:C:2016:808, paras 37-47.

<sup>166</sup> ECJ, 18 June 2009, Case C-303/07, *Aberdeen Property Fininvest Alpha Oy*, EU:C:2009:377, para. 27.

<sup>167</sup> ECJ, 8 March 2017, Case C-448/15, *Belgische Staat v Wereldhave Belgium Comm. VA and Others*, EU:C:2017:180, para. 40.

<sup>168</sup> See, e.g., Opinion of AG Kokott in *X Denmark* (C-118/16), para. 96.

<sup>169</sup> See Italian Supreme Court, 13 December 2018, no. 32255.

<sup>170</sup> *Wereldhave* (C-448/15), para. 39.

income not covered by the respective directive and effectively leads us to an effective “subject-to-tax”-criterion for interest and royalties under the IRD.<sup>171</sup> And that was indeed what the Court has found:

Should it turn out that “the interest received by [the Luxembourgian SICAR] is in fact exempt in that respect from corporate income tax in Luxembourg, it would then have to be stated that that company does not satisfy the third condition [...] and that it cannot therefore be regarded as being a ‘company of a Member State’ within the meaning of Directive 2003/49. It is, however, for the referring court alone to make, if appropriate, the necessary checks in that regard.”<sup>172</sup>

31. This finding creates some tension with a broader reading of the directive in the past, which understood that “none of the provisions in Directive 2003/49 stipulates that an actual taxation of the beneficial owner (here the Luxembourg companies) in a certain amount is a requirement for the exemption”.<sup>173</sup> This interpretation, in turn, was supported by two – to date: not adopted – proposals by the EU Commission: Already in 2003<sup>174</sup> and more recently in 2011,<sup>175</sup> the Commission proposed to include a more stringent “subject-to-tax” clause, hence indicating that the current wording might indeed only refer to subjective exemptions of the recipient company, but not to objective exemptions of its interest or royalties income.<sup>176</sup>
32. Such amendment would align the “subject-to-tax” requirement for companies in Art 3 of the IRD with the one that is already enshrined in Art 1(5) in the “beneficial ownership” test for permanent establishments:<sup>177</sup> The latter has always required that the “interest or royalty payments represent income in respect of which that permanent establishment is subject in the Member State in which it is situated to one of the taxes” specifically listed in the directive. This means that a permanent establishment would not qualify as the beneficial owner if the income is either not attributable to it for tax purposes or if interest or royalties would be objectively exempt from taxation. It does, however, not require a minimum rate or effective taxation in a narrow sense; hence, beneficial ownership is not put into question just because no tax liability arises, e.g.,

<sup>171</sup> See already the position taken by some Member States mentioned in the Report from the Commission to the Council in accordance with Article 8 of Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM(2009)179, para. 3.3.5.4. (noting that “most MS appear to apply a ‘subjective’ subject-to-tax requirement – i.e. it applies to the company as such, rather than to the specific interest or royalty payment – some MS require that the payment itself should be subject to tax (an ‘objective’ subject-to-tax requirement”).

<sup>172</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 151.

<sup>173</sup> See Opinion AG Kokott, 1 March 2018, C-118/16, *X Denmark*, EU:C:2018:146, para. 93.

<sup>174</sup> Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM(2003)841 final.

<sup>175</sup> Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM(2011)714 final, p. 5.

<sup>176</sup> Indeed, the European Economic and Social Committee has noted with respect to the 2003 proposal that such a criterion of effective taxation would be “introducing a proviso which was not there before” (see Pt 2.1 of the Opinion of the European Economic and Social Committee on the ‘proposal for a Council Directive amending Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States’, [2004] OJ C 112/113). See also the Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM(2011)714 final, 5: ‘The ‘Statements for entry in the minutes of the Council’, when the Directive was adopted, contained the following passage: ‘The Council and the Commission agree that the benefits of the Interest and Royalty Directive should not accrue to companies that are exempt from tax on income covered by this Directive. The Council invites the Commission to propose any necessary amendments to this Directive in due time’. The recitals to the Directive state that ‘it is necessary to ensure that interest and royalty payments are subject to tax once in a Member State’. The Commission shares the Council’s view that there should be no loopholes in the Directive allowing the taxation of interest and royalty payments to be circumvented. To this end, it adopted a proposal in 2003 [COM(2003)841 final] which was close to an agreement in the Ecofin Council. The Commission withdrew that proposal because it was due to put forward this recast of the Directive, as planned in Annex II to the Commission’s Work Programme 2010 [COM(2010)135 final]. Thus, the recast amends Article 1 (1) in order to make it clear that Member States have to grant the benefits of the Directive only where the interest or royalty payment concerned is not exempt from corporate taxation in the hands of the beneficial owner in the Member State where it is established. In particular this addresses the situation of a company or a permanent establishment paying income tax but benefiting from a special tax scheme exempting foreign interest or royalty payments received. The source State would not be obliged to exempt it from withholding tax under the Directive in such cases.”

<sup>177</sup> A reading that the Commission did not share in the past, noting that “[w]hile there are differences of wording between the beneficial ownership criteria for companies and PEs, respectively, the key difference lies in the reference to ‘...income in respect of which that permanent establishment is subject...to one of the taxes...’. The Directive here makes explicit that the payments as such must be taxed in the hands of the beneficial owner.” See the Report from the Commission to the Council in accordance with Article 8 of Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM(2009)179, para. 3.3.1.

because of loss carry-forwards, credits, or deductions. That proposed amendment now seems moot, as the Court closes the circle with a (surprising) systematic and teleological reasoning:

“That interpretation of the scope of the third condition [...] is supported, first, by Article 1(5)(b) of Directive 2003/49, from which it is apparent that a permanent establishment can be regarded as being the beneficial owner of interest, within the meaning of the directive, only ‘if the interest ... payments [which it receives] represent income in respect of which that permanent establishment is subject in the Member State in which it is situated to one of the taxes mentioned in Article 3(a)(iii) ...’, and second, by the objective of Directive 2003/49, which [...] is to ensure that such interest payments are subject to tax once in a single Member State.”<sup>178</sup>

33. Hence, even if the SICAR is formally subject to corporate income tax in Luxembourg, it cannot benefit from the Directive if the interest income is in fact tax-exempt. Even so, however, it is unclear whether a company would qualify as a “company of a Member State” if some of its interest income (e.g., from tradeable securities) is exempt while other interest income (e.g., from non-securitized loans) is taxable. Would such company only be in part a “company of a Member State” and in part a non-qualifying entity? And how would that align with the black-or-white wording of Art 3(a) IRD? That question alone calls for a legislative clarification that focuses on the tax treatment of the interest or royalty income not to define whether a qualified recipient exists but rather to limit the available benefits.

## IV. The Statement

34. CFE Tax Advisers Europe acknowledges that the “Danish beneficial ownership cases” address a number of important and timely issues, especially with regard to the concept of abuse in EU law. Those include (1) the expansion of the general anti-abuse principle enshrined in EU law to areas of tax law that are subject to minimum harmonization, (2) the use of the OECD materials to define the beneficial ownership concept, (3) the conflation of the beneficial ownership concept with the general anti-abuse principle and the Court’s attempt to give the notion of “abuse” workable contours, and (4) the reading of an effective subject-to-tax clause with regard to the interest income into the definition of a “company” laid down in the Interest-Royalties-Directive (IRD).
35. However, CFE Tax Advisers Europe also expects that domestic courts will likely struggle to translate the abstract guidance of the “Danish beneficial ownership cases” into concrete judgments, that practitioners and academics alike will have to discuss building blocks and nuances of the Grand Chamber’s judgments for quite some time to come, and that consideration needs to be given on what impact those cases have on current tax structures.

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<sup>178</sup> *N Luxembourg I et al* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 152.