*CFE ECJ Task Force**

Opinion Statement ECJ-TF 2/2019 on the ECJ Decisions of 26 February 2019 in *N Luxembourg I et al.* (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16) and *T Danmark et al.* (Joined Cases C-116/16 and C-117/17), Concerning the "Beneficial Ownership" Requirement and the Anti-Abuse Principle in the Company Tax Directives

This CFE Opinion Statement, submitted to the European Institutions in June 2019, comments on the "Danish beneficial ownership cases" (*N Luxembourg I et al.* (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16) and *T Danmark et al.* (Joined Cases C-116/16 and C-117/17), in respect of which the Grand Chamber of the Court of Justice of the ECJ delivered its decisions on 26 February 2019.

1. Executive Summary

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 under EU law. These include: (i) the expansion of the general anti-abuse principle enshrined in EU law to areas of tax law that are subject to minimal harmonization; (ii) the use of OECD materials to define the beneficial ownership concept; (iii) 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 (iv) the reading of an effective subject-to-tax clause with regard to interest income into the definition of "company" laid down in the EU Interest and Royalties-Directive (2003/49) (IRD).[1]

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

2. Introduction

This is an Opinion Statement prepared by the CFE ECJ Task Force on the "Danish beneficial ownership cases" (*N Luxembourg I et al* (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16), on the IRD and *T Danmark et al* (Joined Cases C-116/16 and C-117/17), on the EU Parent-Subsidiary Directive (2011/96) (PSD),[2] in respect of which the Grand Chamber of the Court of Justice of the European Union (ECJ) delivered its decisions on 26 February 2019.[3] In the two rather lengthy decisions, 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

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1. Council Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Companies of Different Member States, OJ L 157 (2003), Primary Sources IBFD [IRD].
2. Council Directive 2011/96/EU of 30 November 2011 on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States, OJ L 345/8 (2011), Primary Sources IBFD [PSD].
3. DK: ECJ (Grand Chamber), 26 Feb. 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg I, X Denmark, C Danmark I and Z Denmark v. Skatteministeriet*, EU:C:2019:134, Case Law IBFD and DK: ECJ (Grand Chamber), 26 Feb. 2019, Joined Cases C-116/16 and C-117/17, *Skatteministeriet v. T Danmark and Y Denmark*, EU:C:2019:135, Case Law IBFD.

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Court broadly deviated from Advocate General Kokott's Opinions of 1 March 2018[4] on all major points.

3. Background and Issues

The "Danish beneficial ownership cases" deal with 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. These 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-favourable 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 (bilateral and multilateral) tax treaties between Denmark, on the one hand, and Sweden and Luxembourg, on the other, there was no source tax on interest,[5] while the Cyprus-Denmark Income Tax Treaty (2010) and the Denmark-Luxembourg Income and Capital Tax Treaty (1980)[6] foresaw a reduced 10% and 5% withholding tax on dividends, respectively,[7] each on the condition that the recipient was the "beneficial owner" of that income.

Faced with the taxpayers' claims for withholding tax exemptions under the IRD and the PSD, 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.

The Danish High Court of Eastern Denmark (*Østre Landsret*) and – in a supplemental reference – also the second Danish High Court, i.e. the High Court of Western Denmark (the *Vestre Landsret*), posed 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 of what "beneficial ownership" means under EU law (article 1(4) of the IRD), whether – due to the lack of a domestic anti-abuse provision in Danish tax law[8] – a "beneficial ownership" requirement in tax treaties would suffice as domestic implementation of the Directives' anti-abuse reservations (article 5 of the IRD and article 1(2) of the PSD), whether a Luxembourg SICAR qualifies as a "company of a Member State" in light of its special legal status (article 3(a)(iii) of the IRD), and how the fundamental freedoms might play a role in these cases.

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 section 4.2. and then describe the similarities to and differences from the decision on the PSD (Cases C-116/16 and C-117/16) in section 4.3. Section 5. of this Opinion Statement identifies a number of – at least in the CFE's 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 section 6.

4. The ECJ Decisions

4.1. Preliminary remarks

The "Danish beneficial ownership cases" raised a number of nuanced and sophisticated questions (for example, ten questions with several sub-questions in Case C-116/16 on the PSD alone). The Court considered the issues similar enough to pool the cases into two decisions, i.e. the case on the IRD, *N Luxembourg I et al*,[9] and the case on the PSD, *T Danmark et al*.[10] Then, following Denmark's request, the ECJ referred the cases to the Grand Chamber of the Court and permitted a joint hearing of all the cases.[11] After six separate Opinions of Advocate General Kokott on 1

4. *See* DK: Opinion of Advocate General Kokott, 1 Mar. 2018, Case C-115/16 (*N Luxembourg I*, EU:C:2018:143), Case C-118/16 (*X Denmark*, EU:C:2018:146), Case C-119/16 (*C Danmark I*, EU:C:2018:147) and Case C-299/16 (*Z Denmark*, EU:C:2018:148), as well as Case C-116/16 (*T Danmark*, EU:C:2018:144) and Case C-117/16 (*Y Denmark*, EU:C:2018:145).
5. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), paras. 16-18.
6. *Agreement between the Kingdom of Denmark and the Republic of Cyprus for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (11 Oct. 2010), Treaties & Models IBFD. *Convention between the Government of the Grand Duchy of Luxembourg and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Establishment of Rules for Reciprocal Administrative Assistance with Respect to Taxes on Income and Capital* (17 Nov. 1980), Treaties & Models IBFD.
7. *T Danmark et al.* (C-116/16 and C-117/17), paras. 14-18.
8. 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*, for example, *N Luxembourg I et al.* (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*, for example, *N Luxembourg I et al.* (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 to implement domestic legislation (*see*, for example, *N Luxembourg I et al.* (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 domestic implementation of the directives' anti-abuse reservation, argued that the "reality doctrine" specifically might suffice as a legal basis to ignore wholly artificial or abusive arrangements (*see* AG Opinion in *N Luxembourg 1* (C-115/16), paras. 108-113).
9. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 80.
10. *T Danmark et al.* (C-116/16 and C-117/16), para. 65.
11. *See N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 81 and *T Danmark et al.* (C-116/16 and C-117/16), para. 66.

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March 2018,[12] the Grand Chamber of the Court gave its two decisions on 26 February 2019.[13]

The Grand Chamber of the Court set out its position on a number of pressing issues, most notably it (i) held that the general anti-abuse principle enshrined in EU law must also be applied in the area of the direct tax directives, (ii) identified the constituent elements of an abuse of rights and the relevant evidence, and (iii) determined who bears which burden of proof. The Court deviated from Advocate General Kokott's Opinions on all major points.

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]".[14] While it seems clear that, under international tax law, 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, for example, the loyalty principle under article 4(3) of the Treaty on European Union (2007) (TEU)[15] requires additional considerations in the context of the company directives or would even cause a shift in the burden of proof to the tax authorities that wish to disregard such a "residence certificate" issued by another Member State.

4.2. IRD cases

The Court first noted that, under article 1(1) and (4) of the IRD, the exemption of interest payments from source taxes is restricted solely to the "beneficial owners" of such interest, a notion that requires an autonomous interpretation and does not refer to concepts of national law that vary in scope.[16] "Beneficial owner" means the entity that actually benefits from the interest, the reference to economic reality being confirmed by the requirement in article 1(4) of the IRD that a company 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".[17] Delving into the different language versions of the term,[18] the Court concluded that the term "beneficial owner" concerns not a formally identified recipient but rather the entity that benefits economically from the interest received and accordingly has the power to freely determine the use to which it is put.[19] Moreover, the exemption provided for in article 1(1) of the IRD is only available to an entity established in the European Union that is the beneficial owner of interest.[20] Taking into account the Commission's 1998 IRD proposal's reference to article 11 of the OECD Model (1977)[21] and the aim of avoiding double taxation, the Court – in contrast to Advocate General Kokott's Opinions[22] – 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]".[23]

Referring to its own descriptions of the "beneficial ownership" concept in the OECD Model (1977) and the OECD Update in the OECD Model (2003),[24] 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".[25] Finally, the Court – again in line with the current

12. *See* AG Opinions in *N Luxembourg* (C-115/16), *X Denmark* (C-118/16), *C Danmark I* (C-119/16) and (*Z Denmark* (C-299/16), as well as *T Danmark* (C-116/16) and *Y Denmark* (C-117/16).
13. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16) and *T Danmark et al.* (C-116/16 and C-117/16).
14. *T Danmark et al.* (C-116/16 and C-117/16), para. 40.
15. Treaty on European Union of 13 December 2007, OJ C 306 (2007), EU Law IBFD.
16. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 84.
17. Id., paras. 85-88.
18. 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 (*beneficiārs*) 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 benefiċjarju*), 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).
19. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 89.
20. Id.
21. *OECD Model Tax Convention on Income and on Capital* (11 Apr. 1977), Treaties & Models IBFD.
22. 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* AG Opinion in *N Luxembourg I* (C-115/16), paras. 48-55; *X Denmark* (C-118/16); paras. 48-55; *C Danmark I* (C-119/16), paras. 48-55) and *Z Denmark* (C-299/16), paras. 48-55.
23. *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 Model* or its *Commentary*. Moreover, the Commission's 1998 IRD proposal refers to *OECD Model Tax Convention on Income and on Capital* (11 Apr. 1977), art. 11, Treaties & Models IBFD merely for the definition of interest in art. 2(a) IRD, but not for the explanation of the term "beneficial ownership" (*see* 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 Mar. 1998), pp. 6-7, Primary Sources IBFD).
24. *OECD Model Tax Convention on Income and on Capital* (28 Jan. 2003), Treaties & Models IBFD.
25. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 92.

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Commentary on the OECD Model (2017)[26] – clarified that if the immediate recipient is not the beneficial owner, one has to look further up the chain, i.e. it stated:[27]

> 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.

Secondly, the Court addressed the question of whether there is a 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 sufficiently implemented article 5 of the IRD. The Grand Chamber of the Court took a different approach: it discounted the implementation requirement seemingly established in *Kofoed* (Case C-321/05)[28] (on which Advocate General Kokott's Opinion reliedin rejecting the idea that non-implemented anti-avoidance provisions of the company tax directives could be applied directly against taxpayers)[29] and instead focused on the "general legal principle that EU law cannot be relied on for abusive or fraudulent ends".[30] This general principle, according to the Court, has been established in the context of the fundamental freedoms,[31] in various fields of EU law,[32] and more specifically also in the area of customs (for example, in *Emsland-Stärke* (Case C-110/99))[33] and VAT (for example, in *Italmoda* (Joined Cases C-131/13, C-163/13 and C-164/13) and *Cussens* (Case C-251/16)).[34] Applying this 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:[35]

> 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 [...].

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, in contrast, "would undermine economic cohesion and the effective functioning of the internal market by distorting the conditions of competition".[36] 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".[37] Although a taxpayer is entitled to take advantage of tax

26. *See OECD Model Tax Convention on Income and on Capital: Commentary on Article 11* para. 11 (21 Nov. 2017), Treaties & Models IBFD.
27. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 94.
28. DK: ECJ, 5 July 2007, Case C-321/05, *Hans Markus Kofoed v. Skatteministeriet*, paras. 41-42, Case Law IBFD.
29. *See* AG Opinions in *N Luxembourg I* (C-115/16), paras. 98-113; *T Danmark* (C-116/16), paras. 94-109; *Y Denmark* (C-117/16), paras. 94-109; *X Denmark* (C-118/16), paras. 108-123; *C Danmark I* (C-119/16), paras. 96-111 and *Z Denmark* (C-299/16), paras. 98-113.
30. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), paras. 95-122.
31. Id., para. 96, referring, inter alia, to DK: ECJ, 9 Mar. 1999, Case C-212/97, *Centros Ltd v. Erhevervs- og Selskabsstyrelsen*, para. 24, Case Law IBFD; UK: ECJ, 21 Feb. 2006, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v. Commissioners of Customs & Excise, BUPA Hospitals Ltd, Goldsborough Developments Ltd v Commissioners of Customs and Excise and University of Huddersfield Higher Education Corporation v. Commissioners of Customs and Excise*, para. 68, Case Law IBFD; UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue,* para. 35, Case Law IBFD; and IE: ECJ, 23 Nov. 2017, Case C-251/16, *Edward Cussens, John Jennings, Vincent Kingston v. T.G. Brosnan*, ECLI:EU:C:2017:881, para. 27, Case Law IBFD.
32. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 100, mentioning case law in areas 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).
33. *See*, for example, DK: ECJ, 27 Oct. 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; DE: ECJ, 3 Mar. 1993, Case C-8/92, *General Milk Products GmbH v. Hauptzollamt Hamburg-Jonas*, EU:C:1993:82, para. 21; and DE: ECJ, 14 Dec. 2000, Case C-110/99, *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, para. 59, Case Law IBFD.
34. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 102, referring to NL: ECJ, 18 Dec. 2014, Joined 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).
35. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), paras. 103-105.
36. Id., paras. 106-107.
37. Id., para. 106, referring to IT: ECJ, 21 Feb. 2008, Case C-425/06, *Part Service, Ministero dell'Economia e delle Finanze, formerly Ministero delle Finanze v. Part Service Srl, company in liquidation, formerly Italservice Srl*, EU:C:2008:108, para. 45, Case Law IBFD and *Cussens* (C-251/16), para. 53.

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competition between Member States and pursue the most favourable regime, this leeway does not extend to enjoying "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".[38] 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",[39] even in the absence of domestic or agreement-based anti-abuse provisions.[40] The Court moreover held that *Kofoed* must not be misunderstood as requiring implementing legislation,[41] specifically:[42]

> since […] abusive or fraudulent acts cannot 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 […].

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.[43]

Thirdly, without mentioning the recent landmark decisions on the concept of abuse in the PSD in *Eqiom* (Case C-6/16)[44] and *Deister and Juhler* (Joined Cases C-504/16 and C-613/16),[45] the Court (i) identified a number of constituent elements of an abuse of rights and the relevant evidence,[46] (ii) determined the effect of tax treaty benefits on the finding of abuse,[47] and (iii) addressed the allocation of the burden of proof:[48]

(i) 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".[49] 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".[50] 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".[51]
- 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".[52] This would be the case where the beneficial owners are entities resident for tax purposes outside the European Union.

38. *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; FI: ECJ, 7 Nov. 2013, Case C-322/11, *K*, EU:C:2013:716, para. 61, Case Law IBFD and PL: ECJ, 25 Oct. 2017, Case C-106/16, *Polbud — Wykonawstwo*, EU:C:2017:804, paras. 61-63.
39. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 110.
40. Id., para. 111.
41. Id., paras. 112-118.
42. Id., para. 119.
43. Id., para. 120 ("must … refuse").
44. FR: ECJ, 7 Sept. 2017, Case C-6/16, *Eqiom SAS, formerly Holcim France SAS, Enka SA v. Ministre des Finances et des comptes publics*, ECLI:EU:C:2017:641, Case Law IBFD. *See*, for a detailed discussion, CFE ECJ Task Force, *Opinion Statement ECJ-TF 2/2018 on the ECJ Decision of 7 September 2017 in* Eqiom *(Case C-6/16), Concerning the Compatibility of the French Anti-Abuse Rule Regarding Outbound Dividends with the EU Parent-Subsidiary Directive (2011/96) and the Fundamental Freedoms*, 58 Eur. Taxn. 10, p. 471 et seq. (2018), Journals IBFD.
45. DE: ECJ, 20 Dec. 2017, Joined Cases C-504/16 and C-613/16, *Deister and Juhler Holding v. Bundeszentralamt für Steuern*, ECLI:EU:C:2017:1009, Case Law IBFD.
46. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), paras. 124-133.
47. Id., paras. 134-138.
48. Id., paras. 140-144.
49. Id., para. 124, referring to *Emsland-Stärke* (C-110/99), paras. 52 and 53 and NL: ECJ, 12 Mar. 2014, Case C-456/12, *O. v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. B.*, para. 58.
50. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 125.
51. Id., para. 127.
52. Id., para. 128.

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– 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".[53] 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".[54] 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".[55]

– 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".[56]

– In that connection, the Court also indirectly addressed a question that the domestic referring court raised with regard to the OECD Model (2014)[57] concept of "beneficial ownership",[58] 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".[59] Addressing this "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' […] that company, without being bound by such a contractual or legal obligation, does not have the right to use and enjoy those sums".[60]

– 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".[61]

(ii) The second and third issue, i.e. the impact of a tax treaty and the burden of proof, are somewhat intermingled: Advocate General Kokott had, inter alia, argued that an abuse within the meaning of article 5 of the IRD would only exist where "interest disbursed directly" to the (third-state) beneficial owner "would have been taxed accordingly in Denmark".[62] 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".[63] Consequently, "in order to determine whether a more favourable tax result is achieved as a result of the arrangement qualified as abusive", Advocate General 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".[64] The Court's Grand Chamber, however, arrived at a different conclusion: "The existence of such a convention

53. Id., para. 130.
54. Id., para. 131.
55. Id., para. 131.
56. Id., para. 132.
57. *OECD Model Tax Convention on Income and on Capital* (26 July 2014), Treaties & Models IBFD.
58. *See* question (1)(f) in Case C-115/16, C-118/16 and C-119/16, respectively.
59. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 11* para. 10.2 (21 Nov. 2017), Treaties & Models IBFD.
60. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 132.
61. Id., para. 133.
62. *See* the AG Opinions in *N Luxembourg I* (C-115/16), para. 95; *X Denmark* (118/16), para. 106; *C Danmark I* (C-119/16), para. 106; and *Z Denmark* (C-299/16), para. 95.
63. Id.
64. *See* the AG Opinions in *N Luxembourg I* (C-115/16), para. 96; *X Denmark* (118/16), para. 105; *C Danmark I* (C-119/16), para. 96; and *Z Denmark* (C-299/16), para. 96.

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cannot in itself rule out an abuse of rights"[65] 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",[66] but that (if the "beneficial owner" is not in a third State)[67] "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".[68]

(iii) 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 (article 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 article 1(1) IRD based on abuse, to establish the existence of elements constituting an abusive practice while taking into account 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.[69] As the Court did not follow Advocate General Kokott's Opinions,[70] however, the tax authorities have no obligation to identify the entity or entities that it regards as being the beneficial owner or owners of the interest. In the words of the Court, it:[71]

> 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.

The Court, fourthly, also addressed a question on the general interpretation of the IRD that did not directly relate to abusive situations, i.e. the question of whether a Luxembourg partnership limited by shares (*société en commandite par actions*, SCA) is a "company of a Member State" within the meaning of article 3(a) of the IRD if it enjoys a privileged tax treatment as a "risk capital investment company" (*société d'investissement en capital à risqué*, SICAR).[72] Being a "company of a Member State" is a necessary condition for entitlement to the benefits of that Directive. It requires that a three-pronged test be met, the final prong basically necessitating that the company be subject to one of the taxes listed in article 3(a)(iii) of the IRD without being exempt.[73] 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 Advocate General Kokott's Opinion[74] – rather focuses on the tax treatment of the interest income itself and left that determination to the domestic courts:[75]

> 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 article 3(a) IRD] and that it cannot therefore be regarded 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.

65. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 135.
66. Id., para. 136.
67. 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).
68. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 137.
69. Id., paras. 140-142.
70. *See* the AG Opinions in *N Luxembourg I* (C-115/16), para. 96; *X Denmark* (118/16), para. 105; *C Danmark I* (C-119/16), para. 94; and *Z Denmark* (C-299/16), para. 96.
71. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), paras. 143-144.
72. Id., paras. 146-153.
73. The other two prongs of the test, i.e. that the company take a listed legal form (art. 3(a)(i) IRD) 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.
74. AG Kokott described the SICAR's tax privilege as resulting from the "fact that while an S.C.A., which has been authorized as a SICAR by the financial regulator, is subject to corporate tax, its income from securities, as well as from a sale, contribution or liquidation of its securities are exempt from corporate tax. Luxembourg law does not, however, contain provisions to suggest that interest income from a loan is also tax-exempt". (AG Opinion 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". (AG Opinion 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". (AG Opinion in *X Denmark* (C-118/16), para. 94).
75. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 151. The Court thought that that result was supported by art. 1(5)(b) IRD (dealing with PEs 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 an analysis, *see* sec. 5.4.

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Finally, the Court focused on the potential infringement of the fundamental freedoms by the Danish withholding tax on outbound interest, as no such withholding tax obligation exists for purely domestic payments.[76] 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".[77] 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".[78] 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*[79] and *Sofina*)[80] and concluded that the Danish withholding tax on interest paid to non-residents infringed EU law insofar as resident taxpayers receiving Danish sourced interest (i) benefit from a tax payment deferral because Danish recipients are exempt from prepayments of corporate tax during the first 2 years, (ii) enjoy lower late payment interest rates, and (iii) may take any business expenses directly related to the interest income received into account when assessing their taxable income.

4.3. PSD cases

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 (i) the application of the general anti-abuse principle enshrined in EU law, i.e. that – contrary to Advocate General Kokott's Opinions[81] – 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,[82] and (ii) the constituent elements of abuse, the impact of tax treaties, and that – again contrary to Advocate General Kokott's Opinions[83] – the tax authorities are not required to identify the entity that they regard to be the beneficial owner.[84]

As for the fundamental freedoms dimension of the cases, the Court noted that the questions referred by the Danish court "are based on the premises that the inapplicability of that system of exemption arises from 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".[85] Hence, the fundamental freedoms cannot be relied upon in abusive situations.

However, two slight nuances and additions in the cases concerning the PSD should be pointed out. 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 an agreement-based anti-abuse provision under (former) article 1(2) of the PSD, which would then make the application of the PSD subject to that requirement. The Court's conclusions on the application of the general anti-abuse principle enshrined in EU law, however, 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]"[86] and what that concept means.[87] However, the Grand Chamber – contrary to Advocate General Kokott's Opinions[88] – seemed to assume that a "beneficial owner" requirement is implicit in the PSD when it argued – using largely the same language as in the IRD cases[89] – 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".[90] Second, when the Court consid-

76. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), paras. 154-180.
77. Id., para. 155.
78. Id., para. 156.
79. IE: ECJ, 13 July 2016, Case C-18/15, *Brisal – Auto Estradas do Litoral S.A., KBC Finance Ireland v. Fazenda Pública*, EU:C:2016:549, Case Law IBFD; for a detailed analysis of that decision, *see*, for example, CFE ECJ Task Force, *Opinion Statement ECJ-TF 2/2016 on the Decision of the Court of Justice of the European Union of 13 July 2016 in* Brisal and KBC Finance Ireland *(Case C-18/15), on the Admissibility of Gross Withholding Tax of Interest*, 57 Eur. Taxn. 1 (2017), Journal Articles & Papers IBFD (accessed 14 Aug. 2019).
80. FR: ECJ, 22 Nov. 2018, Case C-575/17, *Sofina SA, Rebelco SA, Sidro SA v. Ministre de l'Action et des Comptes Publics*, EU:C:2018:943, Case Law IBFD again distinguishing BE: ECJ, 18 Sept. 2008, Case C-282/07, *Belgian State v. Truck Center SA*, EU:C:2008:762, Case Law IBFD.
81. *See* AG Opinion *T Danmark* (C-116/16), paras. 93-109 and *Y Denmark* (C-117/16), paras. 93-109.
82. *T Danmark et al.* (C-116/16 and C-117/16), paras. 68-95.
83. *See* AG Opinions in *T Danmark* (Cases C-116/16), paras. 87-92 and *Y Denmark* (C-117/16), paras. 87-92.
84. *T Danmark et al.* (C-116/16 and C-117/16), paras. 97-120.
85. Id., paras. 121-123.
86. Id., para. 93.
87. Id., para. 94.
88. *See* AG Opinions *T Danmark* (C-116/16), paras. 78-86 and *Y Denmark* (C-117/16), paras. 78-86.
89. *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".
90. *T Danmark et al.* (C-116/16 and C-117/16), para. 111.

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ered "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[ing] of intragroup loans" as one (supplemental) indication of 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.[91]

5. Comments

5.1. Overview

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:

- 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 were to be more lenient? Are domestic safe harbours possible? What does it mean for non-harmonized areas and how does it relate to *3M Italia*?[92]
- 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 Model 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 (for example, *Eqiom*[93] and *Deister and Juhler*),[94] to the GAAR in article 6 of the EU Anti-Tax Avoidance Directive (2016/1164)[95] and the new anti-abuse clause in article 1(2), (3) of the PSD after the 2015 amendment?[96] Is the "essential" purpose the same as "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?[97]
- 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"?[98]
- 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?

Some of those questions were (partly) answered by the Court, while others will be resolved and refined over time. The ECJ Task Force is taking the opportunity in 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 minimal harmonization (section 5.2.);
- 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 (section 5.3.); and
- reading of an effective subject-to-tax clause into the definition of a "company" laid down in the IRD (section 5.4.).

5.2. No need for a specific domestic or agreement-based provision implementing (former) article 1(2) of the PSD or article 5 of the IRD

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)[99]

91. *See T Danmark et al.* (C-116/16 and C-117/16), para. 106, referring to the US: Tax Cuts and Jobs Act (TCJA), Pub. L. no: 115-97 (22 Dec. 2017), which temporarily provided for favourable repatriation of foreign profits.
92. IT: ECJ, 29 Mar. 2012, Case C-417/10, Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. 3M Italia SpA, ECLI:EU:C:2012:184, Case Law IBFD.
93. *Eqiom SAS* (C-6/16); *see*, for a detailed discussion, CFE ECJ Task Force, *Opinion Statement ECJ-TF 2/2018* (2018), *supra* n. 44.
94. *Deister and Juhler* (C-504/16 and C-613/16).
95. Council Directive 2016/1164 of 12 July 2016 Laying down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, OJ L 193/1 (2016), art. 6, Primary Sources IBFD, which had to be implemented in the Member States effective 1 Jan. 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 sn analysis, *see*, for example, A. Garcia Prats et al., *EU Report*, in *Seeking anti-avoidance measures of general nature and scope – GAAR and other rules* ch. 3.1. (IFA Cahiers vol. 103a, IBFD 2018), Books IBFD.
96. Council Directive 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, OJ L 21/1 (28 Jan. 2015), Primary Sources IBFD, 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 Jan. 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 an analysis, *see*, for example, Garcia Prats et al., *supra* n. 95, at ch. 3.2.2.
97. *See*, with further references, id., at ch. 3.2.1.
98. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 131.
99. *See also* DK: Opinion of Advocate General Kokott, 8 Feb. 2007, Case C-321/05, *Hans Markus Kofoed v Skatteministeriet*, EU:C:2007:86,

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principle that EU law cannot be relied on for abusive or fraudulent ends to deny benefits.[100] This finding may only be explained based on the specificities of Danish legislation. Some basics should first be revisited: directives are addressed to the Member States (article 288(3) of the Treaty on the Functioning of the European Union (TFEU) (2007))[101] 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 that has not (yet) been implemented.[102] Focusing on direct taxation, there is sufficient precedent 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".[103]

So, if the legislature of a Member State decides not to implement rules permitted by a directive's anti-abuse reservation, such as article 1(2) of the pre-2015 PSD or article 5 of 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 in 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 article 15 of the Merger Directive (2009/133)[104] (unless there is some way to interpret Danish law to that effect),[105] with Advocate General Kokott also adding that recourse to "any existing general principle of [EU] law prohibiting the misuse of law" would be barred, as article 15 is a concrete expression of such principle.[106] As far as the CFE can see, this was also the prevailing position in the literature[107] and – even after *Cussens*[108] – Advocate General Kokott has clearly rejected the idea that non-implemented anti-avoidance provisions of the company tax directives can be applied directly against taxpayers.[109]

The Court is now taking quite a different approach:[110] it is emphasizing the (unwritten) general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends. This has recently also been confirmed in the VAT area in *Italmoda*[111] and *Cussens*,[112] 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 Advocate General Kokott, the Court transferred that notion 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".[113]

This obligation does not require domestic legislative implementation because, in the Court's eyes, this is not an obligation imposed on taxpayers but merely part of the objective conditions required for obtaining the advantage sought. What, one might ask, about *Kofoed*? The Court makes the following distinction: 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[114] was just a first step and was not meant to exclude reliance on the general EU principle:[115]

> 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 [article 1(2) of Directive 90/435 or article 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 [article 4 of Directive 90/435 or article 1(1) of Directive 2003/49] in the event of fraud or abuse of rights.

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

para. 67, Case Law IBFD, 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".

100. *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) and *T Danmark et al.* (C-116/16 and C-117/16), paras. 68-92 (with regard to the PSD).
101. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), Primary Sources IBFD.
102. There is, in other words, no "inverse vertical direct effect". *See*, for example, UK: ECJ, 26 Feb. 1986, Case 152/84, *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority*, EU:C:1986:84; IT: ECJ, 11 June 1987, Case 14/86, *Pretore di Salò v. persons unknown*, EU:C:1987:275, para. 19; and NL: ECJ, 8 Oct. 1987, Case 80/86, *Criminal proceedings against Kolpinghuis Nijmegen BV*, EU:C:1987:431, para. 9.
103. BE: ECJ, 12 Feb. 2009, Case C-138/07, *Belgische Staat v. Cobelfret NV*, EU:C:2009:82, para. 49. *See also*, for example, DE: Opinion of Advocate General Sharpston, 12 May 2011, Case C-397/09, *Scheuten Solar Technology GmbH v. Finanzamt Gelsenkirchen-Süd*, EU:C:2011:499, paras. 92-96.
104. *Kofoed* (C-321/05), paras. 41-42; AG Opinion in *Kofoed* (C-321/05), para. 66; *see also* NL: Opinion of Advocate General Kokott, 16 July 2009, Case C-352/08, *Modehuis A. Zwijnenburg BV v. Staatssecretaris van Financiën*, EU:C:2009:483, paras. 60-68, Case Law IBFD.
105. Indeed, the ECJ 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 [article 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 AG Opinion in *Kofoed* (C-321/05), paras. 63-65.
106. *See* AG Opinion in *Kofoed* (C-321/05), para. 67, and AG Opinion in *Zwijnenburg* (C-352/08), para. 62.
107. *See*, for example, Garcia Prats et al., *supra* n. 95, at ch. 3.2.1. with further references.
108. *Cussens* (C-251/16), para. 30.
109. *See* AG Opinions in *N Luxembourg I* (C-115/16), paras. 98-113; *T Danmark* (C-116/16), paras. 94-109; *Y Denmark* (C-117/16), paras. 94-109; *X Denmark* (C-118/16), paras. 108-123; *C Danmark I* (C-119/16), paras. 96-111; and *Z Denmark* (C-299/16), paras. 98-113.
110. *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).
111. *Italmoda* (C-131/13, C-163/13 and C-164/13), para. 62.
112. *See Cussens* (C-251/16), paras. 25-44.
113. *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.
114. *See Kofoed* (C-321/05), para. 42 et seq.
115. *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.

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as an exemption of withholding tax, is prohibited. In light of the GAAR in article 6 of the EU Anti-Tax Avoidance Directive (2016/1164), 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, this issue deserves some fundamental, high-level analysis with regard to national tax sovereignty and the separation of powers: let us depart from the rather solid foundation that, for example, the pre-2015 PSD[116] and the IRD only provide for minimal 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 both Directives, for example, for situations in which the Directives' capital ownership requirement is not fulfilled.[117] If that assumption holds true, one might further argue that a Member State that provides for such further beneficial treatment is, to this extent, effectively not implementing the Directives but rather goes beyond them by means of plain non-harmonized domestic law (and may do so based on its sovereignty if it does not infringe the fundamental freedoms or violate State aid rules). It is obvious where this is going: if a Member State decides not to issue legislation to implement a directive's anti-abuse reservation (such as article 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 article 1(2) of the pre-2015 PSD or article 5 of the IRD) by granting the executive or the judiciary the power to override that domestic legislative decision.

Returning to the beneficial ownership cases, the situation is different. The legislators, in drafting the Danish rules, did not phrase the withholding tax exemptions in their own words, but rather explicitly referred to the PSD and the IRD by stating, for example, that the withholding tax liability "does not apply to interest which is not taxed or is subject to reduced taxation under Directive [2003/49]".[118] This might arguably offer an opening 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 or 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 it was a very deliberate decision of the Danish legislator not to implement anti-abuse provisions).[119]

5.3. 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"

On the condition of "beneficial ownership" in article 1(4) of the IRD, it was quite clear – and also in line with previous statements by the Commission[120] – that this notion is one of Union law and requires an autonomous interpretation.[121] In that respect, however, the Court – deviating from Advocate General Kokott's analysis[122] – concluded that the OECD materials are "relevant when interpreting the [IRD]".[123] 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 articles 10, 11 and 12 of the OECD Model), the Court's foundation for that conclusion – i.e. that the Commission's 1998 IRD proposal[124] refers to article 11 of the OECD Model – seems questionable: neither that Directive's preamble nor the text refers to the OECD Model or the OECD Model Commentaries with regard to the "beneficial ownership" requirement; moreover, the Commission's 1998 IRD proposal refers to article 11 of the OECD Model merely for the definition of interest in article 2(a) of the IRD but not for the explanation of the term "beneficial ownership". In fact, the 2009 Commission Report on the IRD does not even mention the tax treaty context of that term.[125]

The Court, moreover, did not explain how the relevance of the Commentary on the OECD Model is going to influence the outcome when applying the IRD to a concrete

116. It should be noted that the current version of the PSD provides for (i) an obligation to tax distributions if the payments were deductible in the source state (art. 4(1)(a) PSD, following 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, OJ L 219 (2014), Primary Sources IBFD and (ii) a minimum anti-abuse provision (art. 1(2) and (3) PSD following the amendment by Council Directive 2015/121, *supra* n. 96.
117. This is not only clear from the wording of the PSD (the phrase "at least" in art. 3) but also the legislative history (*see*, for example, Doc. 6446/84 FISC 42 of 18 Apr. 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).
118. *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.
119. *See*, for a detailed account of the development of withholding tax law in Denmark 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) p. 537 (2011).
120. *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. (17 Apr. 2009).
121. *See N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 84 and AG Opinion in *N Luxembourg I* (C-115/16), paras 48-55; *X Denmark* (C-118/16), paras. 48-55; *C Danmark I* (C-119/16), paras. 48-55 and *Z Denmark* (C-299/16), paras. 48-55.
122. 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* AG Opinion in *N Luxembourg I* (C-115/16), paras. 48-55; *X Denmark* (C-118/16), paras. 48-55; *C Danmark I* (C-119/16), paras. 48-55; and *Z Denmark* (C-299/16), paras. 48-55.
123. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 90.
124. 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 Mar. 1998), Primary Sources IBFD.
125. *See supra* n. 120, at para. 3.3.1.

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case, and which version of the OECD guidance should be used to interpret the IRD's corresponding requirement.

As for the former aspect, the Court's finding that the Commentary on the OECD Model are relevant did not do much in terms of answering the concrete (and hard) questions of the Danish court[126] on the significance of (i) equity capital being used for the loan, (ii) the interest in question being added to the loan, to form part of the principal ("rolled up"), (iii) the interest recipient having subsequently made an intra-group 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, (iv) the interest in question being subsequently converted into equity in the borrowing company, or (v) the interest recipient having had a contractual or legal obligation to pass the interest on to another person, which, had it received the interest directly, would not have been taxable in Denmark. More guidance on these questions is desperately needed.

In the latter respect, it seems that the Court endorsed an ambulatory (dynamic) use of the Commentary on the OECD Model by referring to its own descriptions of the "beneficial ownership" concept in the OECD Model (1977) and the update in the OECD Model (2003), which addressed certain conduit companies. The Court, however, did not (explicitly)[127] refer to the OECD Model (2014),[128] 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 by the Council on 3 June 2003, whereas the 2003 OECD Update was already adopted by the OECD Council on 28 January 2003[129] and was based on an even earlier 2002 Report,[130] i.e. both were introduced before the IRD was passed. A dynamic approach, however, would not be surprising, as the ECJ in *Berlioz* (Case C-682/15)[131] had already used the Commentary on Article 26 of the OECD Model (2012)[132] to interpret the concept of foreseeable relevance in the 2011 EU Mutual Assistance Directive (2011/16).[133] It is, however, hard to see how such a dynamic understanding would fit into the EU legal order, since – as Advocate General Kokott, who certainly prefers a static approach,[134] succinctly pointed out – "[o]therwise the contracting countries to the OECD would have the power to decide on the interpretation of an EU directive".[135]

Given the more specific explanations and conditions found in the IRD, which differ from the wording of the OECD Model, 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"[136] appears to be undermined by the condition in article 1(5)(b) of the 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. With regard to a PE, the concept would thus seem to vary explicitly depending on 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 article 1(5) of the IRD makes plain, only *treated as such*. As, however, the Court invoked that same provision in order to explain the meaning of "company of a Member State",[137] 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? This might appear to be the result of the Court's decision, 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,[138] with regard to actual taxation of the dividend, interest or royalties there is clearly not a condition to benefit from a reduced withholding tax rate under articles 10(2), 11(2) or 12(1) of the OECD Model in the source state.

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".[139] Just like in the OECD Model, however, the "beneficial ownership" concept merely aims to avoid specific types of abuse and not all possible avoidance structures. As pointed out by Advocate General Kokott, the concerns addressed by the abuse concept and

126. *See*, for example, question (1)(e) in *N Luxembourg* (Case C-115/16).
127. It did, however, implicitly refer to a notion that was introduced by the *OECD Model* (2014) (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 in sec. 4.2.
128. 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 *OECD Model* (1977) and para. 6 dealing with the revisions in the *OECD Model* (2003), while para. 7 of the decision mentions the *OECD Model: Commentary* (2014) (*see N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 92).
129. As "The 2002 Update to the Model Tax Convention".
130. Entitled "Restricting the Entitlement to Treaty Benefits" (adopted by the OECD Committee on Fiscal Affairs on 7 Nov. 2002).
131. LU: ECJ, 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, Case Law IBFD.
132. "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 *OECD Model* (2014), adopted by the OECD Council on 16 July 2014.
133. Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64 (2011), Primary Sources IBFD.
134. *See* AG Opinions in *N Luxembourg I* (C-115/16), para. 52; *X Denmark* (C-118/16), para. 52 and *C Danmark I* (C-119/16), 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".
135. AG Opinion in *Z Denmark* (C-299/16), para. 53.
136. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 84.
137. Id., para. 152, and sec. 5.4.
138. *See* para. 10 *OECD Model: Commentary on Article 10* (2017), para. 9 *OECD Model: Commentary on Article 11* (2017) and para. 4 *OECD Model: Commentary on Article 12* (2017).
139. *See*, for example, para. 10.3 *OECD Model: Commentary on Article 11* (2017).

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the beneficial ownership concept are fundamentally different,[140] 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" (for example, because the beneficial owner is an entity resident in a non-EU Member State) does not require tax authorities to prove abuse of law.[141] 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 of whether the tax treaty concept of beneficial ownership can constitute a legal basis for combating fraudulent and abusive practices in the context of (former) article 1(2) of the PSD,[142] the Court took a different path from Advocate General Kokott's Opinions.[143] It seems to assume that a "beneficial owner" requirement is implicit in the PSD as a standalone anti-avoidance tool.[144] 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 European Union. The Court finds support for that conclusion based on the aim of the PSD to avoid double taxation of profit distributions within the European Union[145] and moreover ensures teleological consistency between the IRD and the PSD despite their different wording and definitions.

"Beneficial ownership"-related elements, however, 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".[146] The Court's subsequent analysis regarding the constituent elements of abuse of rights also employs some similar notions – for example, the reference to "the conduit companies' inability to have economic use of the interest received"[147] 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]"[148] – 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 of 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".[149] This ostensibly goes beyond the Commentary on the OECD Model (2014) guidance on "beneficial ownership" since the 2014 Update, which confines the denial of treaty benefits to situations in which such a contractual or legal obligation exists.[150] 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".[151] While the latter "in substance" determination under the OECD Model (2014) 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 based on the concept of artificial arrangements. As a result, this may be best understood as clarifying the relationship between beneficial ownership and abuse of law: an entity may well be the beneficial owner (as interpreted in conformity, most likely, with the OECD Commentaries), yet still be denied the Directives' benefits due to the artificiality of the legal structure.

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*[152] and *Deister and Juhler*.[153] Possibly creating "new" standards that foreshadow the imminent interpretation of the GAAR in article 6 of the ATAD and the minimum anti-avoidance standard in (new) article 1(2) and (3) of the PSD, the Court identifies a set of indicia that national courts must take into account in assessing whether a transaction is abusive.[154] These criteria include the conduit role of an entity, lack of economic substance and the 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)

140. *See*, for example, AG Opinion in *N Luxembourg I* (C-115/16), para. 60.
141. *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.
142. *T Danmark et al.* (C-116/16 and C-117/16), para. 93.
143. *See* AG Opinions in *T Danmark* (C-116/16), paras. 78-86 and *Y Denmark* (C-117/16), paras. 78-86.
144. *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").
145. *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.
146. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 89.
147. Id., para. 132.
148. Id., para. 128.
149. Id., para. 132.
150. *See*, for example, para. 12.4 *OECD Model: Commentary on Article 10* (2017).
151. Para. 10.2 *OECD Model: Commentary on Article 11* (2017).
152. *Eqiom* (C-6/16); *see*, for a detailed discussion, CFE ECJ Task Force, *Opinion Statement ECJ-TF 2/2018* (2018), *supra* n. 44.
153. *Deister and Juhler* (C-504/16 and C-613/16).
154. *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.

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and the fact that the structure was put into place simultaneously or shortly after the introduction of changes in the tax laws of the source EU Member State or any other (third) state.[155] Needless to say, all these criteria, on the one hand, may help national courts to identify abusive situations but, on the other hand, are necessarily vague and may lead to uncertainty going forward.

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:

– 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 to the "direct" third-state recipients[156] (and the corresponding reasoning of Advocate General Kokott).[157] It is, however, hard to see how a "tax advantage" (as required by the general principle, as well as, for example, by article 6 of the ATAD) would be obtained if the "genuine" arrangement, for example, direct ownership, would have triggered the same (low) tax burden in the source state.[158] The Court seems to recognize that argument half-heartedly by noting that:[159]

  > 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.

  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.[160]

– Second, the Court found that the tax authorities are not even required to identify the entity that they regard to be the beneficial owner[161] (again departing from Advocate General Kokott's conclusions).[162] 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";[163] 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".[164] That said, it is not entirely clear if the taxpayers could nevertheless show – in line with their burden of proof[165] – 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 scenario, the Court – in line with the current Commentaries on the OECD Model (2017)[166] – 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.[167]

5.4. Does being a "company of a Member State" require that the company's income be subject-to-tax?

Both the PSD and IRD only apply to a "company of a Member State". To be such a qualified "company of a Member State", a three pronged-test has to be met, the third prong of which requires that the company be "subject to" the Member States' corporate taxes "without […] being exempt" (articles 2(a)(iii) and 3(a)(iii), respectively). This criterion is being extensively discussed in the literature,[168] and case law also provides some guidance: while the Directives' wording might suggest that the focus is on whether the company as a taxable person is, in principle, "subject to" a domestic corporate tax (and not, for example, a personally exempt charity or foundation), the

155. *See T Danmark et al.* (C-116/16 and C-117/16), para. 106, referring to the US legislation under the US: American Jobs Creation Act of 2004, Pub. L. No. 108-357, §101, 118 Stat. 1418, 1423-24, which temporarily provided for a favourable repatriation of foreign profits.
156. *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.
157. *See* AG Opinions in *N Luxembourg I* (C-115/16), para. 96; *X Denmark* (C-118/16), para. 105, *C Danmark I* (C-119/16), para. 94 and *Z Denmark* (C-299/16), para. 96, *T Danmark* (C-116/16), paras. 87-92) and *Y Denmark* (C-117/16), paras. 87-92.
158. *See also*, for example, FR: Opinion of Advocate General Kokott, 19 Jan. 2017, Case C-6/16, *Eqiom SAS, formerly Holcim France SAS and Enka SA v. Ministre des Finances et des Comptes publics*, EU:C:2017:34, para. 26 and note 14, Case Law IBFD, wherein 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 the *Amending Protocol to the Agreement between the Swiss Confederation and the European Community Providing for Measures Equivalent to Those Laid down in Council Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments* (27 May 2015), art. 9, Primary Sources IBFD [*EU-Swiss Agreement*].
159. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 137.
160. *See N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 138.
161. *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.
162. *See* AG Opinions in *N Luxembourg I* (C-115/16), para. 96; *X Denmark* (C-118/16), para. 105; *C Danmark I* (C-119/16), para. 94 and *Z Denmark* (C-299/16), para. 96, as well as in *T Danmark* (C-116/16), paras. 87-92 and *Y Denmark* (C-117/16), paras. 87-92.
163. *See*, for example, *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 143.
164. Id., para. 144.
165. *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".
166. *See* para. 11 *OECD Model: Commentary on Article 11* (2017).
167. *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".
168. For a recent overview, *see*, for example, P. Arginelli, *The Subject-to-Tax Requirement in the EU Parent-Subsidiary Directive (2011/96)*, 57 Eur. Taxn. 8, p. 334 at p. 340 (2017), Journal Articles & Papers IBFD.

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Court seems to understand the second prong of the test ("without […] being exempt") as referring to the treatment of the company's income.[169] The Court has, for example, held that a company is "exempt" within the meaning of article 2(a)(iii) of the PSD where (i) its income was fully exempt from corporate taxation (and only subject to a subscription tax under the local tax regime for investment funds),[170] or (ii) where it "is entitled […] to a zero rate of taxation for all its profits, provided that all those profits are distributed to its shareholders".[171] So while a "zero rate" seems to disqualify a company from the benefits of the PSD, a reduced rate would not.[172] The outcome is less clear in situations in which a company enjoys an exemption in respect of certain items of income but not 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.

Could, for example, the source state levy a dividend withholding tax on a distribution to such a parent company based on the argument that the exemption of dividend income removes it from being a "company of a Member State"? The Italian Supreme Court recently came to that surprising result.[173] But that clearly goes too far, as it (i) disregards the economic double taxation in the source state that the PSD (also) aims to avoid and (ii) is not in line with the Court's "but for"-test developed in *Wereldhave* (Case C-448/15): 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".[174] This test seems to disregard the taxation of income not covered by the respective Directive and leads us to an effective "subject-to-tax"-criterion for interest and royalties under the IRD.[175] And that was indeed what the Court has found: should it turn out that:[176]

> 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.

This finding creates some tension with the previous broader reading of the IRD, according to which "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".[177] This interpretation, in turn, was supported by two – to date not adopted – proposals of the EU Commission. Already in 2003[178] and, more recently, in 2011,[179] 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.[180]

Such an amendment would align the "subject-to-tax" requirement for companies in article 3 of the IRD with the one already enshrined in article 1(5) in the "beneficial ownership" test for PEs.[181] 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

169. *See*, for example, BE: Opinion of Advocate General Sánchez-Bordona, 26 Oct. 2016, Case C-448/15, *Belgische Staat v. Wereldhave Belgium Comm. VA and Others*, EU:C:2016:808, paras. 37-47, Case Law IBFD.
170. FI: ECJ, 18 June 2009, Case C-303/07, *Aberdeen Property Fininvest Alpha Oy*, EU:C:2009:377, para. 27, Case Law IBFD.
171. BE: ECJ, 8 Mar. 2017, Case C-448/15, *Belgische Staat v. Wereldhave Belgium Comm. VA and Others*, EU:C:2017:180, para. 40, Case Law IBFD.
172. *See*, for example, AG Opinion in *X Denmark* (C-118/16), para. 96.
173. *See* IT: Supreme Court, 13 Dec. 2018, Case no. 32255.
174. *Wereldhave* (C-448/15), para. 39.
175. *See* the position already taken by some Member States mentioned in the Commission's Report, *supra* n. 120, at 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").
176. *N Luxembourg I et al.* (C-115/16, C-118/16, C-119/16 and C-299/16), para. 151.
177. *See* AG Opinion in *X Denmark* (C-118/16), para. 93.
178. 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 (30 Dec. 2003), Primary Sources IBFD.
179. 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 (11 Nov. 2011).
180. 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' (COM(2003) 841 final – 2003/0331 (CNS)), OJ C 112/113 (2004)). *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, *supra* n. 179, at p. 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 art. 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".
181. 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 Commission's Report, *supra* n. 120, at para. 3.3.1.

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taxes" specifically listed in the IRD. This means that a PE 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 not, however, 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, for example, because of loss carry-forwards, credits or deductions. That proposed amendment now seems moot, as the Court has closed 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.

Hence, even if the SICAR is formally subject to corporate income tax in Luxembourg, it cannot benefit from the IRD 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 (for example, from tradeable securities) is exempt while other interest income (for example, from non-securitized loans) is taxable. What if such a company were only in part a "company of a Member State" and in part a non-qualifying entity? And how would that align with the black-and-white wording of article 3(a) of the 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.

6. The Statement

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. These include (i) the expansion of the general anti-abuse principle enshrined in EU law to areas of tax law that are subject to minimal harmonization, (ii) the use of the OECD materials to define the beneficial ownership concept, (iii) 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 (iv) the reading of an effective subject-to-tax clause with regard to interest income into the definition of a "company" laid down in the IRD.

CFE Tax Advisers Europe also, however, expects that domestic courts will struggle to translate the abstract guidance of the "Danish beneficial ownership cases" into concrete decisions, that practitioners and academics alike will have to discuss building blocks and nuances of the Grand Chamber's decisions for some time to come, and that consideration needs to be given to the impact these cases will have on current tax structures.

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