



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 1 March 2018¹

Case C-116/16

Skatteministeriet

v

T Danmark

(Request for a preliminary ruling — Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Parent-Subsidiary Directive) — Need for a beneficial owner of dividend payments — Abuse of possible tax arrangements — Criteria for abuse through avoidance of withholding tax — Effect of the commentaries on the OECD Model Tax Convention on the interpretation of an EU Directive — Direct application of a non-transposed provision of a directive — Interpretation of national provisions for the prevention of abuse in conformity with EU law)

I. Introduction

1. In these proceedings and in Case C-117/16, just as in four parallel sets of proceedings on the Interest and Royalties Directive,² the Court has been asked to rule on the conditions under which a subsidiary that has paid dividends to its parent company can be refused exemption from withholding tax pursuant to Directive 90/435/EEC³ ('the Parent-Subsidiary Directive').

2. These questions have been raised in connection with the (planned) disbursement of dividends to a Luxembourg parent company. Its parent company is likewise resident in Luxembourg and its shares are held in turn by several capital investment companies. However, their place of residence is unknown. The Danish Ministry of Finance wishes to refuse exemption from withholding tax until such time it receives an explanation as to what ultimately happens to the dividends.

3. The main question that arises for the referring court is how the prohibition of abuse is defined in EU law and whether it is directly applicable and how the beneficial owner of the dividends is to be determined. Unlike the Interest and Royalties Directive, however, the Parent-Subsidiary Directive is not predicated on a 'beneficial owner'.

4. Nonetheless, that term is used in the Denmark-Luxembourg Double Taxation Convention (DTC). The referring court therefore raises the question as to who should interpret that term in the DTC and whether the subsequent commentaries of the OECD on its Model Tax Convention should be taken into account.

¹ Original language: German.

² Cases C-118/16, C-119/16 (both joined with C-115/16) and C-299/16.

³ Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), since repealed and replaced by Council Directive 2011/96/EU of 30 November 2011 (OJ 2011 L 345, p. 8).

5. However, the nub of the matter is whether the ultimate use of dividends in multi-tiered corporate structures is the criterion by which exemption from withholding tax is obtained under the Parent-Subsidiary Directive, especially where the purpose of such corporate structures is to minimise the tax burden in the form of a final liability for withholding tax on dividend distributions within the group. Thus, the question again arises as to where the dividing line falls between permissible tax arrangements and likewise legal, but possibly abusive, tax arrangements.

II. Legal framework

A. EU law

6. The EU legal framework applicable to this case is the Parent-Subsidiary Directive and Articles 49, 54 and 63 TFEU.

7. Article 1(1) of the Parent-Subsidiary Directive states that each Member State shall apply the directive, inter alia, to distributions of profits received by companies of that Member State which come from their subsidiaries of other Member States.

8. Article 1 of the Parent-Subsidiary Directive provides:

‘(1) Each Member State shall apply this Directive:

- to distributions of profits received by companies of that State which come from their subsidiaries of other Member States;
- to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries;

...

(2) This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.’

9. Article 4 of the Parent-Subsidiary Directive provides:

‘(1) Where a parent company or its permanent establishment, by virtue of the association of the parent company with its subsidiary, receives distributed profits, the State of the parent company and the State of its permanent establishment shall, except when the subsidiary is liquidated, either:

- refrain from taxing such profits; or
- tax such profits while authorising the parent company and the permanent establishment to deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3, up to the limit of the amount of the corresponding tax due.

(2) However, each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company. Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5% of the profits distributed by the subsidiary. ...’

10. Article 5(1) of the Parent-Subsidiary Directive provides:

‘Profits which a subsidiary distributes to its parent company shall be exempt from withholding tax.’

B. International law

11. The Denmark-Luxembourg Double Taxation Convention (DTC) of 17 November 1980 provides as follows in Article 10(1) and (2) on the distribution of the power to tax dividends:

‘1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed:

- (a) five per cent of the gross amount of the dividends if the recipient is a company (excluding a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;
- (b) 15% of the gross amount of the dividends in all other cases.’

12. It follows that the source State, in this case Denmark, can tax dividends paid to a parent company resident in Luxembourg only at a low rate if that person is ‘the beneficial owner’ of the dividends. The concept of ‘beneficial owner’ is not defined in the DTC.

C. Danish law

13. According to the referring court, the legal situation in Denmark in the years at issue was as follows:

14. Taxation of dividends paid by Danish parent companies is regulated in Paragraph 13(1) No 2 of the Selskabsskatteloven (Law on corporation tax) which, as amended by the Danish Official Gazette No 1376 of 7 December 2010, stated as follows for the 2011 tax year:

‘Paragraph 13. The taxable income shall not include: ...

(2) ... Dividends that the companies or associations etc. referred to in Paragraph 1(1) Nos 1 to 2a, 2d to 2i and 3a to 5b receive on shares in companies within the meaning of Paragraph 1(1) Nos 1 to 2a, 2d to 2i and 3a to 5b or companies resident outside Denmark. However, this shall apply only to dividends from shares in subsidiaries and affiliates in accordance with Paragraphs 4A and 4B of the Aktieavancebeskatningsloven (Danish Law on taxation of capital gains). ...’

15. The limited tax liability of foreign companies for dividends is regulated in Paragraph 2(1)(c) of the Law on corporation tax.

16. The limited tax liability in 2011 ultimately did not cover dividend distributions to a parent company on which no or reduced tax is charged pursuant to the Parent-Subsidiary Directive or a DTC.

17. If there is limited tax liability on dividend distributions from Denmark under Paragraph 2(1)(c) of the Law on corporation tax, the Danish dividend payer is required under the Danish Law on withholding tax⁴ to withhold tax at a rate of 28%. In the event of late payment of the tax withheld (where there is limited tax liability), interest is charged on the tax due. The default interest is payable by the person required to withhold tax.

18. There were no general provisions of law to prevent abuse in force in 2011. However, the ‘reality doctrine’ established in case-law requires tax to be assessed on the basis of a specific analysis of the facts. This means, for example, that fictitious and artificial tax arrangements may be disregarded under certain circumstances and tax may be assessed instead based on a ‘substance-over-form’ approach. It is common ground that the reality doctrine does not provide a basis on which to disregard the legal transactions conducted in the present case.

19. The concept of ‘rightful income recipient’ has also been established in Danish case-law. That concept is based on the fundamental provision on income taxation in Paragraph 4 of the Statsskatteloven (Danish Tax Code), which states that the tax authorities are not required to accept an artificial separation between the income-generating business/activity and the allocation of income deriving therefrom. It is therefore necessary to determine who — irrespective of the purported corporate structure — is the actual recipient of certain forms of income and therefore has a tax liability. The question is thus to whom the income is to be allocated for tax purposes. The ‘rightful income recipient’ will thus be the person who is the taxable person for the income in question.

III. Dispute in the main proceedings

20. The Claimant in the main proceedings (T Danmark) is a Danish company of which over 50% of the shares are held by N Luxembourg 2 and which, as the T Danmark Group, provides certain services in Denmark. The remaining shares are held by thousands of shareholders.

21. N Luxembourg 2 is a Luxembourg-resident company incorporated by the Luxembourg-resident company N Luxembourg. N Luxembourg (whose shares, according to N Luxembourg 2, are held by a number of capital investment companies) holds over 99% of the shares in N Luxembourg 2. The remaining share capital (less than 1%) is held by the Luxembourg-resident company N Luxembourg 3.

22. According to a certificate of residence issued by the Luxembourg tax authorities in spring 2011, N Luxembourg 2 is a company resident in Luxembourg, which has its effective management there, and falls within the scope of the Parent-Subsidiary Directive; it is subject to corporation tax in Luxembourg; it is not possible for it to claim exemption from tax and is the beneficial owner of the dividends distributed to it. The certificate was issued by the Luxembourg tax authorities at the request of the Danish tax authorities.

23. T Danmark wanted a binding ruling on whether the dividends distributed by it to N Luxembourg 2 are tax-free under Paragraph 2(1)(c), sentence 3, of the Danish Law on corporation tax and thus exempt from Danish withholding tax.

24. In its request for a binding ruling, T Danmark states that it was considering distributing dividends to N Luxembourg 2 in the third quarter of 2011 in an amount of 6 billion Danish crowns (DKK). As N Luxembourg 2 is an independent entity with its own management and decision-making powers, it states that it could not be predicted with certainty if and when the management of N Luxembourg 2 would adopt a decision disposing of the dividends received from T Danmark.

⁴ Kildeskatteloven — Lovbekendtgørelse No 1086 of 14 November 2005 (Danish Official Gazette No 1086 of 14 November 2005).

25. The Skatteministeriet (Ministry of Finance) took the view that a binding ruling could not be given, if it was not clear how N Luxembourg 2 intended to dispose of the dividends received from T Denmark.

26. T Danmark therefore advised the Skatteråd (Tax Commission) that it should presume, for the purpose of giving a binding ruling, that the lion's share of the dividends of N Luxembourg 2 would be distributed as dividends to its owners (N Luxembourg 3 and N Luxembourg). A small portion of the dividends (probably between 3% and 5%) would be used by N Luxembourg 2, N Luxembourg 3 and N Luxembourg to cover costs or allocated to a reserve for future costs. T Danmark further presumed that the dividends distributed to N Luxembourg (as dividends and/or interest and/or debt repayments) would be channelled via the capital investment companies concerned to their shareholders, but did not know how that would be done or how it would be presented for tax purposes.

27. The ruling given by the Skatteråd was 'no'. T Danmark lodged an appeal against the ruling before the Landsskatteretten (Tax Appeals Commission), as the highest tax authority, which changed the answer to 'yes'.

28. The Skatteministeriet (Ministry of Finance) lodged an appeal against the Landsskatteretten's decision before the Østre Landsret (High Court of Eastern Denmark, Denmark). The Østre Landsret (High Court of Eastern Denmark) decided to make an order for reference.

IV. Proceedings before the Court

29. The Østre Landsret (High Court of Eastern Denmark) has referred the following questions for a preliminary ruling:

- (1) Does a Member State's reliance on Article 1(2) of the Directive on the application of domestic provisions required for the prevention of fraud or abuse presuppose that the Member State in question has adopted a specific domestic provision implementing Article 1(2) of the Directive, or that national law contains general provisions or principles on fraud and abuse that can be interpreted in accordance with Article 1(2)?
 - (1.1) If Question 1 is answered in the affirmative: can Paragraph 2(1)(c) of the Law on corporation tax, which provides that 'it is a precondition that taxation of the dividends be waived ... under the provisions of Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States', then be deemed to be a specific domestic provision as referred to in Article 1(2) of the Directive?
- (2) Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with OECD's Model Tax Convention, under which taxation of distributed dividends is contingent on whether the dividends recipient is deemed to be the beneficial owner of the dividends, a conventional anti-abuse provision covered by Article 1(2) of the Directive?
- (3) If Question 2 is answered in the affirmative: is it then for the national courts to define what is included in the concept 'beneficial owner', or should the concept, in the application of Directive 90/435, be interpreted as meaning that a specific EU law significance should be attached to the concept referred to the EU Court of Justice for a ruling?
- (4) If Question 2 is answered in the affirmative and the answer to Question 3 is that it is not for the national courts to define what is included in the concept of 'beneficial owner': is the concept then to be interpreted as meaning that in a company resident in a Member State which, in

circumstances such as those of the present case, receives dividends from a subsidiary in another Member State, is the ‘beneficial owner’ of those dividends as that concept is to be interpreted under EU law?

- (a) Is the concept ‘beneficial owner’ to be interpreted in accordance with the corresponding concept in Article 1(1) of Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49), read in conjunction with Article 1(4) thereof?
 - (b) Should the concept be interpreted solely in the light of the commentary on Article 10 of the OECD 1977 Model Tax Convention (paragraph 12), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding ‘conduit companies’, and the additions made in 2014 regarding ‘contractual or legal obligations’?
 - (c) What significance does it have for the assessment of the issue whether the dividends recipient must be deemed to be a ‘beneficial owner’ if the dividends recipient has had a contractual or legal obligation to pass the dividends to another person?
 - (d) What significance does it have for the assessment of the issue whether the dividends recipient must be deemed to be a ‘beneficial owner’ that the referring court, following an assessment of the facts of the case, concludes that the recipient — without having been contractually or legally bound to pass the dividends received to another person — did not have the ‘full’ right to ‘use and enjoy’ the interest as referred to in the 2014 Commentaries on the 1977 Model Tax Convention?
- (5) If it is assumed in the case that there are ‘domestic provisions required for the prevention of fraud or abuse’ within the meaning of Article 1(2) of Directive 90/435, that dividends have been distributed from a company (A) resident in a Member State to a parent company (B) in another Member State and from there passed to that company’s parent company (C), resident outside the EU/EEA, which in turn has distributed the funds to its parent company (D), also resident outside the EU/EEA, that no double taxation convention has been entered into between the first-mentioned State and the State where C is resident, that a double taxation convention has been entered into between the first-mentioned State and the State where D is resident, and that the first-mentioned State, under its legislation, would therefore not have had a claim to tax at source on dividends distributed from A to D, had D been the direct owner of A, is there abuse under the Directive so that B is not protected thereunder?
- (6) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 concerning dividends received from a company resident in another Member State (subsidiary), does Article 49 TFEU, read in conjunction with Article 54 TFEU, preclude legislation under which the latter Member State taxes the parent company resident in the other Member State on the dividends, then the Member State in question deems resident parent companies in otherwise similar circumstances to be exempt from tax on such dividends?
- (7) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 concerning dividends received from a company resident in another Member State (subsidiary), and the parent company in the latter Member State is deemed to have limited tax liability in that Member State on the dividends in question, does Article 49 TFEU, read in conjunction with Article 54 TFEU, preclude legislation under which the latter Member requires the company liable for retaining

the tax at source (subsidiary) to pay overdue interest in the event of overdue payment of the tax at source claim at a higher rate of interest than the overdue interest rate that the Member State charges on corporation tax claims lodged against a company resident in the same Member State?

- (8) If Question 2 is answered in the affirmative and the answer to Question 3 is that it is not for the national courts to define what is included in the concept ‘beneficial owner’, and if a company (parent company) resident in a Member State cannot, on that basis, be deemed exempt from tax at source pursuant to Directive 90/435 concerning dividends received from a company resident in another Member State (subsidiary), is the latter Member State then bound pursuant to Directive 90/435 or Article 4(3) TEU to state whom the Member State in that case deems to be the beneficial owner?
- (9) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 90/435 concerning dividends received from a company resident in another Member State (subsidiary), does Article 49 TFEU, read in conjunction with Article 54 TFEU (or Article 63 TFEU), viewed separately or as a whole, preclude legislation under which:
- (a) the latter Member State requires the subsidiary to retain tax at source on the dividends and makes that person liable to the authorities for the non-retained tax at source, where there is no such duty to retain tax at source when the parent company is resident in the Member State?
 - (b) the latter Member State calculates overdue interest on the tax at source owing?

The Court of Justice is requested to include the answer to Questions 6 and 7 in its answer to Question 9.

- (10) In circumstances where:
1. a company (parent company) resident in a Member State fulfils the requirement in Directive 90/435 of owning (in 2011) at least 10% of the share capital of a company (subsidiary) resident in another Member State;
 2. the parent company is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) in Directive 90/435 concerning dividends distributed by the subsidiary;
 3. the parent company’s (direct or indirect) shareholder(s), resident in a non-EU/EEA country, are deemed to be the beneficial owner(s) of the dividends in question;
 4. the aforementioned (direct or indirect) shareholder(s) also fulfil the aforementioned capital requirement,

does Article 63 TFEU then preclude legislation under which the Member State where the subsidiary is situated taxes the dividends in question when the Member State in question deems resident companies fulfilling the capital requirement in Directive 90/435, that is to say in fiscal year 2011 owns at least 10% of the share capital in the dividend-distributing company, to be tax-exempt on such dividends?’

30. Cases C-116/16 and C-117/16 were joined by order of 13 July 2016. Written observations on the questions referred were submitted to the Court of Justice in the joined proceedings by T Danmark, Y Denmark Aps, the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of Sweden, the Italian Republic, the Kingdom of the Netherlands and the European Commission. T Danmark, Y Denmark Aps, the Kingdom of Denmark, the Federal Republic of Germany, the Grand Duchy of Luxembourg and the European Commission attended the hearing on 10 October 2017, which also included Cases C-115/16, C-118/16, C-119/16 and C-299/16.

V. Legal analysis

A. Determination of the dividends recipient in the event of abuse by the taxable person (Questions 1 to 5)

31. The parties to the proceedings do not dispute that, in principle, the relevant dividend payments fall within the Parent-Subsidiary Directive. It follows that Denmark, as the country in which the company making the distributions is resident, should exempt the dividends from withholding tax in accordance with Article 5 of the directive. However, Denmark regards its refusal to grant exemption from withholding tax as manifestly covered by Article 1(2) of the Parent-Subsidiary Directive. According to that provision, the directive does not preclude the application of domestic provisions required for the prevention of fraud or abuse.

32. By its Questions 1 to 5, the referring court primarily asks if a Member State can only rely on Article 1(2) of the Parent-Subsidiary Directive to prevent fraud and abuse if it has adopted a domestic provision implementing it (B.1) and, if so, if Paragraph 2(2)(c) of the Danish Law on corporation tax or a rule in a DTC that uses the term ‘beneficial owner’ can be treated as sufficient transposition thereof (B.2). If that is the case, the referring court asks how the concept of beneficial owner should be interpreted and by whom.

33. These questions only make sense if the requirements of Article 1(2) of the Parent-Subsidiary Directive are in fact fulfilled. That provision requires that there be, on the part of T Danmark, fraud or abuse of the exemption from withholding tax in the present case. Therefore Question 5 must be answered first.

34. First, however, there is a discrepancy between Question 5 referred and the facts disclosed. The parent company (N Luxembourg) of the company in receipt of the dividends (N Luxembourg 2) is a company resident in Luxembourg, not in a third country, as the question referred suggests. If and which shareholders of this ‘grandparent company’ are resident in third countries is not clear from the order for reference. That alone makes it impossible to assess if abuse has been committed. Nonetheless, the Court can provide the referring court with some useful pointers here.

35. In that respect, I will explain the criteria for presuming abuse within the scope of the Parent-Subsidiary Directive (2). First, however, I will investigate the scope of the exemption from withholding tax under Article 5(1) of the Parent-Subsidiary Directive.

1. Theory behind the exemption from withholding tax in Article 5(1) of the Parent-Subsidiary Directive

36. As is apparent from its third recital, the Parent-Subsidiary Directive seeks, by the introduction of a common tax system, to eliminate any disadvantage to cooperation between companies of different Member States as compared with cooperation between companies of the same Member State and thereby to facilitate the grouping together of companies at EU level. The directive seeks thereby to ensure the neutrality, from the tax point of view, of the distribution of profits by a subsidiary

established in one Member State to its parent company established in another Member State.⁵

37. To that effect, Article 4(1) of the Parent-Subsidiary Directive leaves the Member States a choice between two systems, namely between a system of exemption and one of deduction. In fact, in accordance with recitals 7 and 9 of that directive, where a parent company by virtue of its association with its subsidiary receives profits distributed otherwise than on the liquidation of that subsidiary, the Member State of the parent company must either refrain from taxing such profits in so far as they cannot be deducted by the subsidiary and tax them in so far as the subsidiary can deduct them, or tax such profits while authorising the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary and any lower-tier subsidiary which relates to those profits.⁶

38. Thus, Article 4 of the Parent-Subsidiary Directive seeks, in respect of profits distributed to a resident parent company by a non-resident subsidiary, to avoid that subsidiary first being taxed thereon in its State of establishment and the parent company then being taxed on the same profits in its State of establishment.⁷

39. Article 4 of the Parent-Subsidiary Directive concerns economic double taxation, because the dividends are, as a rule, paid from the subsidiary's taxed income (i.e. income on which corporation tax has already been paid in a Member State) and are part of the income of the parent company (and are thus subject to corporation tax again in another Member State). Thus, within large groups, the tax liability depends on the number of tiers in the group, which in most cases is based purely on organisational reasons. Thus, Article 4 of the Parent-Subsidiary Directive takes account of the fact that legal entities can be duplicated any number of times without changing the persons behind them and, by extension, their profits from business conducted via those legal entities.

40. In order, at the same time, to ensure fiscal neutrality, Article 5(1) of the Parent-Subsidiary Directive goes further by exempting from withholding tax profits which a subsidiary distributes to its parent company.⁸ Thus, in order to prevent double taxation, Article 5(1) of the directive lays down a general principle prohibiting withholding tax on profits distributed by a subsidiary resident in one Member State to a parent company resident in another Member State.⁹

41. By prohibiting Member States from imposing withholding tax on the profits distributed by a resident subsidiary to its non-resident parent company, Article 5(1) of the Parent-Subsidiary Directive limits the powers of the Member States to tax profits distributed by companies that are resident in their territory to companies resident in another Member State.¹⁰ Therefore, the Member States cannot unilaterally adopt restrictive measures and make the entitlement to exemption from withholding tax provided for in Article 5(1) contingent upon various requirements.¹¹ Therefore, the entitlement to exemption from withholding tax does not depend on the owners of the parent company being resident or on the dividends payer disclosing how the dividends recipient will use the dividends.

5 Judgments of 7 September 2017, *Egiom and Enka* (C-6/16, EU:C:2017:641, paragraph 20); of 17 May 2017, *AFEP and Others* (C-365/16, EU:C:2017:378, paragraph 21); of 8 March 2017, *Wereldhave Belgium and Others* (C-448/15, EU:C:2017:180, paragraph 25 and the case-law cited).

6 Judgments of 17 May 2017, *X* (C-68/15, EU:C:2017:379, paragraph 71); of 17 May 2017, *AFEP and Others* (C-365/16, EU:C:2017:378, paragraph 22); of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 44).

7 Judgment of 17 May 2017, *AFEP and Others* (C-365/16, EU:C:2017:378, paragraph 24).

8 Judgment of 7 September 2017, *Egiom and Enka* (C-6/16, EU:C:2017:641, paragraph 21).

9 Judgment of 7 September 2017, *Egiom and Enka* (C-6/16, EU:C:2017:641, paragraph 22); see, to that effect: judgments of 17 October 1996, *Denkavit and Others* (C-283/94, C-291/94 and C-292/94, EU:C:1996:387, paragraph 22); of 25 September 2003, *Océ van der Grinten* (C-58/01, EU:C:2003:495, paragraph 83).

10 Judgments of 7 September 2017, *Egiom and Enka* (C-6/16, EU:C:2017:641, paragraph 23); in the same vein, judgment of 1 October 2009, *Gaz de France — Berliner Investissement* (C-247/08, EU:C:2009:600, paragraph 38).

11 Judgment of 7 September 2017, *Egiom and Enka* (C-6/16, EU:C:2017:641, paragraph 24); order of 4 June 2009, *KBC Bank and Beleggen, Risicokapitaal, Beheer* (C-439/07 and C-499/07, EU:C:2009:339, paragraph 38 and the case-law cited).

42. Article 5(1) of the Parent-Subsidiary Directive aims to prevent further (this time, legal) double taxation. As the Court has already ruled, withholding tax actually taxes the recipient of the income (in this case, of the dividends).¹² Thus, withholding tax in the dividends payer's State of residence is simply a particular taxation technique, rather than a type of tax. If withholding tax is paid by the payer based on its place of residence and 'normal' tax is paid by the dividends recipient based on its place of residence, that in itself results in double taxation and, as a rule, puts them at a disadvantage compared to national companies.

43. Precisely in the case of complex group structures spanning several countries, the cascade effect referred to above would be duplicated if there were no exemption at both levels and withholding tax were to apply each time. It is obvious that this would undermine the internal market.

44. However, it is irrelevant, for the purpose of preventing such cascading economic and legal double taxation, whether the dividends recipient is also the 'beneficial owner' of the dividends or suchlike. The decisive question is whether the dividends payer was charged corporation tax and the dividends recipient also has to pay corporation tax on the dividends. The same applies where withholding tax is prohibited. The key question there is whether the dividend income is subject to corporation tax in the State of residence. The Luxembourg tax authorities have expressly confirmed in this case that it is.

45. In that regard, it makes perfect sense that (unlike the Interest and Royalties Directive),¹³ the Parent-Subsidiary Directive is 'only' predicated on the distribution of profits by a subsidiary to its parent company (which must have a certain minimum holding). Unlike interest payments, dividends do not, as a rule, represent operating expenditure which may be set against profit; therefore, it makes sense that, according to its wording, the Parent-Subsidiary Directive does not contain any further substantive criteria (such as drawing of dividends in one's own name and on one's own account or suchlike).

46. Dividend rights ultimately follow from the company's status as parent company under company law, which can only be enjoyed in its own name. The very possibility of acting on a third party's account seems hardly conceivable here. In any event, it cannot be deduced merely from the fact that a 'grandparent company' exists. In principle, therefore, all dividend distributions by a subsidiary to its parent company in another Member State are covered if the company fulfils the requirements of Article 2 of the Parent-Subsidiary Directive, which is not contested in the present case.

47. Limits to this are set only by Article 1(2) of the Parent-Subsidiary Directive, which provides that the directive does not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.

¹² Judgments of 24 June 2010, *P. Ferrero and General Beverage Europe* (C-338/08 and C-339/08, EU:C:2010:364, paragraphs 26 and 34); of 26 June 2008, *Burda* (C-284/06, EU:C:2008:365, paragraph 52).

¹³ Directive 2003/49.

2. The concept of abuse in EU law

48. Article 1(2) of the Parent-Subsidiary Directive reflects the general principle of EU law that EU law cannot be relied on for fraudulent or abusive ends.¹⁴ The application of a rule of EU law cannot be extended to such an extent as to cover abusive practices by economic operators, i.e. transactions that are carried out not in the context of normal commercial transactions, but solely for the purpose of wrongfully obtaining advantages provided for by EU law.¹⁵

49. The wording of the provision adds nothing to the understanding of abuse that underlies it.¹⁶ However, as an exception, Article 1(2) of the Parent-Subsidiary Directive needs to be interpreted strictly.¹⁷ With regard to measures to prevent abuse, this is demanded in particular by the principle of legal certainty. If, in terms of form, an individual meets all the conditions for claiming a right, this right may be denied on grounds of abuse only in particular cases.

50. However, relevant pointers for assessing abuse follow from other EU directives. For example, the Mergers Directive¹⁸ refers in the second sentence of Article 11(1)(a) to an absence of valid commercial reasons for the operation as a typical example of such motivation. Furthermore, Article 6 of the Directive laying down rules against tax avoidance practices¹⁹ ('Directive (EU) 2016/1164'), which was not yet in force in the years at issue, defines the concept of abuse. The criterion there is whether a non-genuine arrangement has 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. According to Article 6(2), an arrangement is regarded as non-genuine to the extent that it was not put into place for valid commercial reasons which reflect economic reality.

51. Last but not least, the Court has held on various occasions that for a restriction of freedom of establishment to be justified on grounds of the prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory.²⁰ As the Court has also since held on various occasions, it suffices if the arrangement is put in place not with the sole aim,²¹ but with the essential aim, of obtaining a tax advantage.²²

14 Judgment of 7 September 2017, *Eqiom and Enka* (C-6/16, EU:C:2017:641, paragraph 26); my Opinion in *Eqiom and Enka* (C-6/16, EU:C:2017:34, paragraph 24).

15 Judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 27); of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 38); of 6 April 2006, *Agip Petroli* (C-456/04, EU:C:2006:241, paragraph 20); of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 35); of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraphs 68 and 69); and of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 24 and the case-law cited); see also my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, paragraph 57).

16 Compare Article 15 of Council Directive 2009/133/EC of 19 October 2009 (Mergers Directive, OJ 2009 L 310, p. 34).

17 Compare judgments of 17 October 1996, *Denkavit and Others* (C-283/94, C-291/94 and C-292/94, EU:C:1996:387, paragraph 27); of 17 July 1997, *Leur-Bloem* (C-28/95, EU:C:1997:369, paragraphs 38 and 39); of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 37); of 11 December 2008, *A.T.* (C-285/07, EU:C:2008:705, paragraph 31); of 20 May 2010, *Zwijnenburg* (C-352/08, EU:C:2010:282, paragraph 46); of 10 November 2011, *FOGGIA-Sociedade Gestora de Participações Sociais* (C-126/10, EU:C:2011:718, paragraph 44).

18 Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1).

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

20 Judgments of 20 December 2017, *Deister Holding and Juhler Holding* (C-504/16 and C-613/16, EU:C:2017:1009, paragraph 60); of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 35); of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraph 64); of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 74); similarly, of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 55).

21 See also judgments of 20 June 2013, *Newey* (C-653/11, EU:C:2013:409, paragraph 46); of 12 July 2012, *J. J. Komen en Zonen Beheer Heerhugowaard* (C-326/11, EU:C:2012:461, paragraph 35); of 27 October 2011, *Tanoarch* (C-504/10, EU:C:2011:707, paragraph 51); of 22 May 2008, *Ampliscientifica and Amplifin* (C-162/07, EU:C:2008:301, paragraph 28).

22 On indirect taxation, see judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 53); of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 36); of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 45); similarly, within the scope of the Mergers Directive, judgment of 10 November 2011, *FOGGIA-Sociedade Gestora de Participações Sociais* (C-126/10, EU:C:2011:718, paragraph 35 et seq.).

52. This case-law of the Court contains two mutually contingent elements. First, wholly artificial arrangements which ultimately only exist on paper are refused recognition a priori. Furthermore, decisive importance is attached to circumvention of tax laws that is also achievable by arrangements that exist in commercial reality. The latter group of cases may be the more frequent and is now expressly covered by the new Article 6 of Directive 2016/1164. The Court too has held in a recent judgment that the wholly artificial nature of the arrangement was just one factor that suggested that the essential aim was to obtain a tax advantage.²³

53. Abuse is determined from an overall examination of all the circumstances of the individual case, which it is for the competent national authorities to make and which must be open to review by the courts.²⁴ It is for the referring court to conduct that general examination.²⁵ However, the Court can give the referring court some useful pointers²⁶ for the purpose of determining whether the transactions are being carried out in the context of normal commercial transactions or solely as an abuse for the purpose of obtaining advantages provided for by EU law.²⁷

3. Criteria for the present case

(a) As to the existence of a wholly artificial arrangement

54. The Court cannot judge whether a wholly artificial arrangement which does not reflect economic reality can be presumed in the present case. First, the facts disclosed by the referring court nowhere near suffice for that. Second, it is for the referring court to appraise those facts. The Court can only give some pointers:

55. As the Court held recently, the fact that the activity consists in the management of assets and the income results only from such management does not mean that a wholly artificial arrangement exists which does not reflect economic reality.²⁸ In light of the fact that asset management companies in particular (may) engage per se in little activity, the requirements for satisfying this criterion are relatively minor. If the company has been validly incorporated, can actually be reached at its registered office and has tangible and human resources at its disposal on site to achieve its object, it cannot be seen as an arrangement that does not reflect economic reality.

56. Nor does the fact that the dividends recipient passes its profits on to its shareholders lead to the assumption of an artificial arrangement. The purpose of an incorporated company is to distribute the profits from its income (which includes income from capital such as dividends) to its shareholders at some point. It cannot be inferred from the Parent-Subsidiary Directive that exemption from withholding tax under Article 5(1) of that directive (and, possibly, exemption from tax on dividends under Article 4 of the directive) should depend on the parent company's approach to distribution. The cascade effect described above, which the directive is intended to prevent (see point 36 et seq.), is indeed increased where distributions are passed on.

²³ This is explicitly stated in judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 60).

²⁴ Judgment of 17 July 1997, *Leur-Bloem* (C-28/95, EU:C:1997:369, paragraph 41), and my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, paragraph 60).

²⁵ Similarly, judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 59); of 20 June 2013, *Newey* (C-653/11, EU:C:2013:409, paragraph 49).

²⁶ Judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 35); of 6 April 2006, *Agip Petroli* (C-456/04, EU:C:2006:241, paragraph 20); of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraphs 68 and 69); of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 24 and the case-law cited); see also my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, paragraph 57).

²⁷ Judgments of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 34); of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 56); of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 77).

²⁸ Judgment of 20 December 2017, *Deister Holding and Juhler Holding* (C-504/16 and C-613/16, EU:C:2017:1009, paragraph 73).

57. The same can be said also of the fact that the shareholders of the grandparent company (the capital investment companies) may be resident in third countries. As the Court has already ruled, the fact that the company in receipt of the dividends is controlled directly or indirectly by persons not resident in the Union is not reason in itself to presume abuse of the exemption from withholding tax.²⁹ Otherwise, the burden of proof of non-fiscal reasons would automatically be imposed on the taxable person, without the administration being obliged to provide sufficient indications of tax avoidance.³⁰

58. The refusal to grant an exemption from withholding tax would therefore be based on a general presumption that tax avoidance would result. However, such presumptions are inadmissible.³¹ There always needs to be an examination of the objective and verifiable facts of the specific case.³² However, there are no indications of an artificial arrangement which does not reflect economic reality in the present case. On the contrary, the certificate issued by the Luxembourg tax authorities (see point 21) suggests that there is no wholly artificial arrangement which does not reflect economic reality in the present case.

59. However, in my opinion, that does not preclude there being an abusive fiscal arrangement, as the wording of the new Article 6 of Directive No 2016/1164 indeed suggests. In that regard, the Court has already ruled in connection with the Parent-Subsidiary Directive that holdings structures whose sole purpose is to benefit from the tax advantages provided for in the directive are a form of abuse.³³ Hence, also in the case of the Parent-Subsidiary Directive, there must be commercial reasons for the structure. Arrangements which seek a tax advantage only and have nothing to do with economic reality are not protected.³⁴

(b) Non-fiscal reasons to be considered

60. Thus decisive importance must be attached to other criteria in the present case, especially the non-fiscal reasons that must be taken into account.

61. According to the case-law of the Court, the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse.³⁵ The mere fact that Luxembourg companies were interpolated in the chain of holdings does not, therefore, automatically mean that abuse must be presumed.

²⁹ Judgment of 7 September 2017, *Egiom and Enka* (C-6/16, EU:C:2017:641, paragraph 27 et seq.).

³⁰ Judgments of 7 September 2017, *Egiom and Enka* (C-6/16, EU:C:2017:641, paragraph 28); and of 5 July 2012, *SIAT* (C-318/10, EU:C:2012:415, paragraph 55).

³¹ Judgments of 7 September 2017, *Egiom and Enka* (C-6/16, EU:C:2017:641, paragraph 30); of 4 March 2004, *Commission v France* (C-334/02, EU:C:2004:129, paragraphs 27); of 9 November 2006, *Commission v Belgium* (C-433/04, EU:C:2006:702, paragraph 35); of 28 October 2010, *Établissements Rimbaud* (C-72/09, EU:C:2010:645, paragraph 34); and of 5 July 2012, *SIAT* (C-318/10, EU:C:2012:415, paragraph 38 and the case-law cited).

³² Judgments of 7 September 2017, *Egiom and Enka* (C-6/16, EU:C:2017:641, paragraph 30); of 17 July 1997, *Leur-Bloem* (C-28/95, EU:C:1997:369, paragraphs 41 and 44); of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 25); of 21 November 2002, *X and Y* (C-436/00, EU:C:2002:704, paragraph 42); of 20 May 2010, *Zwijnenburg* (C-352/08, EU:C:2010:282, paragraph 44); and of 10 November 2011, *FOGGIA-Sociedade Gestora de Participações Sociais* (C-126/10, EU:C:2011:718, paragraph 37).

³³ Compare judgment of 17 October 1996, *Denkavit and Others* (C-283/94, C-291/94 and C-292/94, EU:C:1996:387, paragraph 31).

³⁴ Judgment of 7 September 2017, *Egiom and Enka* (C-6/16, EU:C:2017:641, paragraph 26); compare, with regard to the Mergers Directive, judgments of 17 July 1997, *Leur-Bloem* (C-28/95, EU:C:1997:369, paragraph 47), and of 10 November 2011, *FOGGIA-Sociedade Gestora de Participações Sociais* (C-126/10, EU:C:2011:718, paragraph 34).

³⁵ Compare judgments of 25 October 2017, *Polbud — Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 40); of 30 September 2003, *Inspire Art* (C-167/01, EU:C:2003:512, paragraph 96); and of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 27).

62. Furthermore, where the taxable person has a choice between two possibilities, he is not obliged to choose the one which involves paying the higher amount of tax but, on the contrary, may choose to structure his business so as to limit his tax liability.³⁶ Thus, again according to the Court, taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purpose of limiting their tax burdens.³⁷ The sole fact that in the present case a transaction structure was chosen which did not result in the greatest tax burden (here an additional and final taxation at source) thus also cannot be regarded as an abuse.

63. Furthermore, other than in the case of a wholly artificial arrangement that does not reflect any economic reality, the fact that a Union citizen, whether a natural or a legal person, simply sought to profit from tax advantages available in a Member State other than his State of residence cannot in itself deprive him of the right to rely on the provisions of the Treaty.³⁸ Thus a transaction structure involving a Member State that waives withholding tax, as in the present case, cannot of itself be regarded as abusive.

64. To that extent, freedom of establishment includes the choice of Member State which, in the opinion of the undertaking concerned, offers the best tax situation. If that principle applies to highly harmonised VAT laws,³⁹ it applies a fortiori to less harmonised income tax laws, where acceptance of the differences between the tax regulations⁴⁰ of the individual Member States is intentional under EU law or a matter of conscious political acceptance.

65. Furthermore, the Court has clarified that the tax exemption for dividends provided for under EU law is not contingent upon the origin or residence of the shareholder, as that is irrelevant for the purposes of the Parent-Subsidiary Directive.⁴¹ Therefore, the fact that the shareholders of T Danmark are resident in Luxembourg and the shareholders of its parent company are resident in a third country is therefore also not abusive, when taken in isolation.

(c) Circumvention of the purpose of the law

66. However, it would be a key factor in the present case if the ultimate dividends recipients (i.e. the capital investment companies, which may or may not qualify as fiscally transparent) were registered in particular third countries (as a rule on small islands such as the Cayman Islands,⁴² Bermuda⁴³ or Jersey⁴⁴), which are renowned for refusing to cooperate with other tax authorities. This may suggest an unusual overall approach, the economic reason for which is not immediately apparent.

67. However, no information has been disclosed in these proceedings as to the residence of the shareholders at the top of the corporate structure (i.e. of the capital investment companies). Nonetheless, the Court can provide the referring court with some useful pointers here.

36 Judgments of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 42); of 22 December 2010, *Weald Leasing* (C-103/09, EU:C:2010:804, paragraph 27); of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 47); of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 73).

37 Judgments of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 42), and of 22 December 2010, *RBS Deutschland Holdings* (C-277/09, EU:C:2010:810, paragraph 53).

38 Judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 36); see, in the same vein, judgment of 11 December 2003, *Barbier* (C-364/01, EU:C:2003:665, paragraph 71).

39 Judgments of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 42) and of 22 December 2010, *RBS Deutschland Holdings* (C-277/09, EU:C:2010:810, paragraph 53).

40 Compare judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 36); see, on the divergence between tax rates permitted even under harmonised tax law, and judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraphs 39 and 40).

41 Judgment of 20 December 2017, *Deister Holding and Juhler Holding* (C-504/16 and C-613/16, EU:C:2017:1009, paragraph 66).

42 See case C-119/16.

43 See case C-117/16.

44 See case C-299/16.

68. If the capital investment companies are in fact resident in such third countries, the overall structure might be considered an abusive arrangement, less by reason of the ‘interpolation’ of Luxembourg companies and more by reason of the ‘parking’ of the capital investment companies in certain third countries. A key factor here is the purpose of the arrangement or the objective of the tax law circumvented (in this case taxation in Denmark).

(1) Avoidance of Danish income tax?

69. First, it must be noted that Denmark has not been deprived of taxes on the profits of the operational company acquired (T Danmark). Those profits were duly taxed in the State of residence (Denmark). The dividends were therefore subject to earlier Danish corporation tax.

70. Both Luxembourg companies (parent company and grandparent company) have unlimited tax liability in Luxembourg and are subject in Luxembourg to corporation tax on their income. Thus the requirements of Article 2 of the Parent-Subsidiary Directive are fulfilled. Exemption from tax on dividends in Luxembourg is in keeping with the purpose of the directive and takes account of Danish corporation tax already paid.

71. In that regard, the fact that Luxembourg does not impose a withholding tax on dividends paid to shareholders in third countries is immaterial. That decision is a consequence of the fiscal autonomy of each individual State. If tax competition between Member States is admissible under EU law due to the lack of harmonisation of income taxes, a taxable person cannot be blamed for availing himself in reality (i.e. not just on paper) of the tax advantages offered by certain Member States.

(2) Measures to prevent unfair advantage being taken of the lack of cross-border information

72. In the final analysis, the interpolation of the Luxembourg companies ultimately ‘only’ avoids tax at source on dividend payments in Denmark. As stated previously (in point 42), withholding tax actually taxes the recipient of the income (in this case, of the dividends).⁴⁵ That is achieved by requiring the payer to withhold part of the income at source at the time of disbursement.

73. Thus, tax at source in the dividends payer’s State of residence is simply a particular taxation technique, rather than a type of tax, intended essentially to secure (minimum) taxation of the dividends recipient. In cross-border cases in particular, proper taxation of the recipient’s income is not always ensured. As a rule, the dividends recipient’s State of residence will rarely be aware of his income from abroad, unless functioning data exchange systems exist between the tax authorities (as they do now in the Union).

74. Therefore, two requirements must be fulfilled for an arrangement to qualify as abusive circumvention of this objective of the law (to ensure the dividends recipient is taxed). First, in the case of direct disbursement, tax must in fact be chargeable in Denmark (see point 88 et seq.). Second, there must be a risk that the income will not be declared in the actual State of receipt and thus will not be taxed.

75. If, therefore, one reason for choosing a particular business structure is to pay dividends to investors via a third country in order to prevent their States of residence from obtaining information on their income, then that overall arrangement should, in my opinion, qualify as an abuse of law.

⁴⁵ Judgments of 24 June 2010, *P. Ferrero and General Beverage Europe* (C-338/08 and C-339/08, EU:C:2010:364, paragraphs 26 and 34) and of 26 June 2008, *Burda* (C-284/06, EU:C:2008:365, paragraph 52).

76. Any such complaint of abuse might, in turn, be rebutted if the capital investment companies provide the relevant tax information to the investors' States of residence or if the State of residence of the capital investment companies has the information in question and forwards this information to the relevant States. Any such corporate structure would not then circumvent the purpose of the tax at source avoided (see point 73 above). That too must be included by the referring court in its overall examination.

(d) Conclusion on Question 5

77. Where withholding tax is avoided on dividend payments to capital investment companies resident in third countries, the primary issue is avoidance by the actual dividends recipients (i.e. the investors) of tax on the dividends. Abuse may be assumed to exist here, in particular, if the corporate structure chosen is designed to take advantage of a lack of information exchange between the States involved in order to prevent the effective taxation of those investors. This is a matter which must ultimately be assessed by the referring court.

4. Interpretation of the Parent-Subsidiary Directive in light of the commentaries on the OECD Model Tax Convention? (Questions 3 and 4)

78. By its third and fourth questions, the referring court asks, inter alia, whether refusal to grant the exemption from withholding tax provided for in the Parent-Subsidiary Directive under the terms of an international convention concluded between Denmark and another State (i.e. a DTC) has to be based on a basic understanding in conformity with EU law that is subject to review by the Court. It also wishes to know whether such an interpretation in conformity with EU law should take account of the commentaries on the OECD MTC and, if so, whether subsequent commentaries on an OECD MTC that postdate the directive should be taken into account in the interpretation.

79. In the subsequent commentaries on the OECD MTC, conduit companies are not normally regarded as the beneficial owner if, though the formal beneficial owner, they have, as a practical matter, very narrow powers which render them, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.

80. Inasmuch as a Member State wishes to restrict a tax exemption pursuant to EU law to the detriment of the individual, that restriction must be interpreted in light of EU law. Therefore, the Parent-Subsidiary Directive needs to be interpreted in order to give the referring court a helpful answer. The OECD Model Tax Convention and the commentaries on the OECD Model Tax Convention might be incorporated into that interpretation.

81. However, OECD MTCs are neither EU law nor legally binding on the Court. They are not multilateral conventions under international law; they are the unilateral acts of an international organisation in the form of recommendations to its member countries. Even the OECD does not consider these recommendations to be binding; on the contrary, according to the OECD Rules of Procedure the member countries are to consider whether their implementation is opportune.⁴⁶ This applies a fortiori to the commentaries published by the OECD, which ultimately only contain legal opinions.

⁴⁶ Rule 18(b) of the OECD Rules of Procedure: 'Recommendations of the Organisation, made by the Council in accordance with Articles 5, 6 and 7 of the Convention, shall be submitted to the Members for consideration in order that they may, if they consider it opportune, provide for their implementation.' Available at <https://www.oecd.org/legal/rules%20of%20Procedure%20OECD%20Oct%202013.pdf>.

82. However, in light of settled case-law, it is not inappropriate for the Member States to derive guidance for the balanced allocation of their fiscal competence from international practice as reflected in the Model Tax Convention.⁴⁷ The same applies to guidance from any prevailing international legal opinion that may be reflected in the commentaries on the OECD MTC.

83. However, the commentaries on the OECD MTC cannot have a direct effect on the interpretation of an EU directive (and thus on the interpretation of national law in conformity with EU law). In that respect, those commentaries simply reflect the opinion of the persons who worked on the OECD Model Tax Convention, not the views of a parliamentary legislature or indeed of the Union legislature. At most, should it transpire from the wording and history of the directive that the Union legislature took guidance from 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.

84. Therefore, the Court has already found that a rule in a double taxation agreement, interpreted in the light of the OECD commentaries on its applicable Model Tax Convention, cannot restrict EU law.⁴⁸ This applies in particular to changes to the OECD Model Tax Convention and the commentaries published after the adoption of the directive. Otherwise, the OECD member countries would be able to decide on the interpretation of an EU directive.

85. Therefore, Questions 3 and 4 can be answered to the effect that the Parent-Subsidiary Directive must be interpreted under EU law autonomously and independently of Article 10 of the 1977 OECD Model Tax Convention or subsequent versions.

86. Furthermore, the referring court ultimately asks whether a ‘dividends recipient’ for the purposes of the Parent-Subsidiary Directive should be construed in the same way as ‘beneficial owner’ within the meaning of the Interest and Royalties Directive. The answer is that it should not, since, as stated previously (in point 36), the approach of the Parent-Subsidiary Directive differs from that of the Interest and Royalties Directive and therefore deliberately avoids using the term ‘beneficial owner’.

B. The actual dividends recipient (Question 8)

87. By its eighth question, the referring court asks whether a Member State that does not wish to recognise that the dividends recipient is also the beneficial owner within the meaning of the Parent-Subsidiary Directive, because it is simply an artificial conduit company, is bound to state whom it deems to be the beneficial owner. The nub of this question referred is who bears the burden of proof of abuse.

88. In order for abuse of possible legal arrangement to exist, a legal arrangement must be chosen that differs from the arrangement normally chosen and gives a *more favourable result* than the ‘normal’ arrangement. In the present case, the ‘normal arrangement’ would be a direct dividend disbursement between the capital investment companies and the claimant in the main proceedings. That ‘normal arrangement’ would also have to result in a higher tax burden.

⁴⁷ Judgments of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 22); of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 49); of 7 September 2006, *N* (C-470/04, EU:C:2006:525, paragraph 45); of 12 May 1998, *Gilly* (C-336/96, EU:C:1998:221, paragraph 31); of 23 February 2006, *van Hilten-van der Heijden* (C-513/03, EU:C:2006:131, paragraph 48); however, see also judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 67).

⁴⁸ Judgment of 19 January 2006, *Bouanich* (C-265/04, EU:C:2006:51, paragraphs 50 and 56).

89. In principle, it is for the tax authorities to demonstrate that the approach chosen gives a more favourable tax result than the normal arrangement, although the taxable person may have a certain duty to assist. However, the taxable person may then ‘produce, if appropriate ..., evidence as to the commercial justification for the transaction in question.’⁴⁹ Should it transpire from that evidence that the essential aim⁵⁰ was not to avoid the tax that would normally be assessed, the approach chosen cannot be deemed abusive, especially as it is the State that provides taxable persons with such options.

90. It further follows from the case-law of the Court⁵¹ that, if conduct is deemed abusive, the situation must be determined that would have existed in the absence of the circumstances that constitute the abusive practice and that redefined situation must be assessed in the light of the relevant provisions of national law and EU law. However, for that, the identity of the dividends recipient owner must be clear.

91. Thus, from Denmark’s perspective, abuse within the meaning of Article 1(2) of the Parent-Subsidiary Directive can arise only where dividends distributed directly would have been taxed accordingly in Denmark. However, this would be precluded under Danish law if, disregarding the conduit company, the actual dividends recipient were also an undertaking with its seat in a different Member State or the dividends recipient were resident in a State with which Denmark had concluded a DTC. If the capital investment companies are indeed fiscally transparent companies, each investor would have to be considered individually in order to answer this question.

92. Therefore, the eighth question can be answered to the effect that a Member State that does not wish to recognise a company resident in a different Member State, to which the dividends were paid, as the recipient of the dividend must in principle state whom it considers to be the recipient of the dividend, in order to assume that abuse exists. This is necessary in order to determine whether a more favourable tax result is achieved as a result of the arrangement qualified as abusive. In cross-border cases in particular, the taxable person may have an enhanced duty to assist.

C. Reliance on Article 1(2) of the Parent-Subsidiary Directive (Questions 1, 1.1 and 2)

93. By its Questions 1, 1.1 and 2, the referring court asks (1) whether Denmark can rely directly on Article 1(2) of the Parent-Subsidiary Directive to refuse the taxable person the exemption from tax provided for in Article 5(1) of that directive and, if not, to clarify (2) whether, by its current national law, Denmark has in fact adequately transposed Article 1(2) of the Parent-Subsidiary Directive.

1. A directive cannot be applied directly in order to create obligations to the detriment of the individual

94. If, based on the aforementioned criteria, there is abuse within the meaning of Article 1(2) of the Parent-Subsidiary Directive, the peculiarity of the present case is that Danish law contained no specific provision transposing that provision. Nor, according to the referring court, was there any general provision to prevent abuse. Some of the parties in the main proceedings are therefore of the opinion that they cannot be denied tax relief under national law even if abuse were assumed to exist.

⁴⁹ Judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 92).

⁵⁰ Judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 53); of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 36); and of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 45).

⁵¹ Judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 47); of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 52); of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 58).

95. However, it is not always necessary formally to enact the requirements of a directive (in this case, Article 1(2) of the Parent-Subsidiary Directive) in specific legal provisions. On the contrary, the transposition of a directive may, depending on its content, be achieved through a general legal context, including general principles of national constitutional or administrative law, if it ensures the full application of the directive in a sufficiently clear and precise manner.⁵²

96. The referring court refers in the proceedings for a preliminary ruling to the existence of two principles (the ‘reality doctrine’ and the principle of the ‘rightful income recipient’). However, it is common ground that these are irrelevant here if, in fact, the dividends are formally paid first to the Luxembourg companies.

97. Article 1(2) of the Parent-Subsidiary Directive allows the Member States to apply provisions to prevent abuse. That is in keeping with practice throughout the Union. For example, all Member States have developed, to the greatest possible extent, instruments to prevent abuse of the law for the purposes of tax avoidance.⁵³ Thus, there is a consensus, also under national tax laws, that the application of the law cannot in any case be extended to such an extent that abusive practices by economic operators must be tolerated. This principle, which is accepted throughout the Union,⁵⁴ is now also enshrined in Article 6 of Directive 2016/1164.

98. To that extent, all national provisions, whether adopted in transposition of the Parent-Subsidiary Directive or not, must be interpreted and applied in accordance with this general principle of law and, in particular, with the wording and purposes of the Parent-Subsidiary Directive and Article 1(2) thereof.⁵⁵ The fact that, in interpreting national law in conformity with EU law, detriment to an individual may result is not an obstacle to such an interpretation. It is lawful, by way of national law provisions, that is to say indirectly, to apply EU law to the detriment of an individual.⁵⁶

99. Only a direct application of Article 1(2) of the Parent-Subsidiary Directive to the claimant’s detriment would be denied the Danish authorities, for reasons of legal certainty.⁵⁷ Thus, a Member State cannot hold an individual to the provision of a directive that it has not transposed.⁵⁸ It is settled case-law that a directive cannot of itself impose obligations upon an individual; the directive cannot be

52 To that effect, see settled case-law, e.g. judgments of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 44); of 6 April 2006, *Commission v Austria* (C-428/04, EU:C:2006:238, paragraph 99); of 16 June 2005, *Commission v Italy* (C-456/03, EU:C:2005:388, paragraph 51), and my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, paragraph 62).

53 Some Member States have enacted general clauses for the prevention of abuse. They include the Federal Republic of Germany (Paragraph 42 of the Abgabenordnung (General Tax Code)), Luxembourg (Paragraph 6 of the Tax Adjustment Law), Belgium (Article 344(1) of the Code des impôts sur les revenus (Income Tax Code)), Sweden (Article 2 of Law 1995:575) and Finland (Article 28 of the Law on income tax; some have special rules, such as Denmark (on transfer prices under Paragraph 2 of the Ligningsloven (Law on assessment)) or general principles, such as the Federal Republic of Germany (e.g. the principle of the economic viewpoint, which can be extrapolated, inter alia, from Paragraph 39 et seq. of the Abgabenordnung (General Tax Code)).

54 See judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 27); of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 68); of 3 March 2005, *Fini H* (C-32/03, EU:C:2005:128, paragraph 32); of 14 December 2000, *Emsland-Stärke* (C-110/99, EU:C:2000:695, paragraph 51); and of 23 March 2000, *Diamantis* (C-373/97, EU:C:2000:150, paragraph 33).

55 On the obligation of national courts to interpret national law in conformity with directives, see settled case-law, in particular judgments of 4 July 2006, *Adeneler and Other* (C-212/04, EU:C:2006:443, paragraph 108 et seq.); of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 113 et seq.); of 10 April 1984, *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 26).

56 Judgments of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 45); of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12, paragraph 57); of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraphs 20, 25 and 26); of 13 November 1990, *Marleasing* (C-106/89, EU:C:1990:395, paragraphs 6 and 8), and my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, point 65).

57 Judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 42).

58 Judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 49); of 21 September 2017, *DNB Banka* (C-326/15, EU:C:2017:719, paragraph 41); of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 42); of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 21); see also my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, point 66).

invoked as such against him.⁵⁹ A Member State that did so would itself be guilty of ‘abusive conduct’: first, it would not have transposed a directive addressed to it (even though it could) and, second, it would be relying on a possibility of preventing abuse that was contained in a directive which it had not transposed.

100. Nor could the competent authorities in the main proceedings rely directly against the individual on the general principle of EU law that abuse of rights is prohibited. At least, in cases falling within the scope of the Parent-Subsidiary Directive, such a principle has been given specific expression in Article 1(2) of the Directive and has been expressed in a concrete manner.⁶⁰ If it were to be permitted, in addition, to have direct recourse to a general principle of law which in terms of content is much less clear and precise, there would be a danger that the harmonisation objective of the Parent-Subsidiary Directive and of all other directives containing specific provisions to prevent abuse (such as Article 6 of Directive 2016/1164) would be undermined. Moreover, such an approach would undermine the prohibition, already mentioned, on directly applying non-transposed provisions of directives to the detriment of individuals.⁶¹

2. Case-law on VAT legislation is not transferable

101. This does not conflict with judgments delivered by the Court⁶² in *Italmoda* and *Cussens*, in which the Court ruled that the principle of the prohibition of abusive practices must be interpreted as being capable, regardless of a national measure giving effect to it in the domestic legal order, of being applied directly in order to refuse exemption from value added tax (VAT), without conflicting with the principles of legal certainty and legitimate expectation.

102. However, those two judgments referred exclusively to VAT, which differs from the subject matter at issue here. First, VAT is much more harmonised under EU law and, as it is coupled to the funding of the Union, has a far greater impact on interests under EU law than national income tax.

103. Second, EU law (Article 325(1) and (2) TFEU) requires the Member States to take (effective) measures to collect value added tax,⁶³ whereas the same does not apply under income tax law. Moreover, VAT law is particularly susceptible to fraud; therefore particularly effective enforcement of tax claims is required. In that sense, the Court itself drew a distinction in a recent judgment between VAT law and secondary EU law, which contains an express authority to prevent abuse.⁶⁴ Therefore, direct application of Article 1(2) of the Parent-Subsidiary Directive to the detriment of the taxable person is out of the question.⁶⁵

⁵⁹ Judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 42), and my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, point 65); see also, for example, judgment of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 108 and the case-law cited).

⁶⁰ See my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, point 67), and judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraphs 38 et seq.). See also my Opinion in *Satakunnan Markkinapörssi and Satamedia* (C-73/07, EU:C:2008:266, point 103).

⁶¹ Unclear in this respect, judgment of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709, paragraphs 74 to 77); see my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, point 67); it is clearly expressed also in judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 42).

⁶² Judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881); of 18 December 2014, *Schoenimport “Italmoda” Mariano Previti* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455).

⁶³ Judgments of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraph 36 et seq.); of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 26).

⁶⁴ This is explicit in judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraphs 28, 31 and 38).

⁶⁵ The Court rules on this in judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 42).

3. The existence of a specific national provision for the prevention of abuse

104. It will be the task of the referring court, however, to determine whether in the present case general provisions or principles of national law (including principles established in case-law) already apply, as a result of which, for example, sham transactions are disregarded under tax law or reliance on particular advantages for abusive ends is prohibited.

105. For a restriction of freedom of establishment to be justified on grounds of the prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory.⁶⁶

106. For that reason, Questions 1.1 and 2 can be answered to the effect that neither Paragraph 2(2)(c) of the Danish Law on corporation tax nor a DTC rule predicated on the beneficial owner for the purpose of taxing distributed dividends suffice to be deemed a transposition of Article 1(2) of the Parent-Subsidiary Directive.

107. However, that would not apply to the application in conformity with EU law of the ‘reality doctrine’ and the principle of the ‘rightful income recipient’ in Denmark, both of which have been developed precisely in order to resolve the problem that civil law allows numerous arrangements, whereas tax law is applied to economic facts. Those legal principles therefore specifically target artificial arrangements or abuse of the law by the individual and therefore also constitute in principle a sufficiently specific legal basis on which to restrict freedom of establishment. Inasmuch as Denmark has not expressly transposed Article 1(2) of the Parent-Subsidiary Directive, that ultimately would not matter. It is for the national court to determine that case-by-case.

108. The ‘reality doctrine’ developed in Denmark, interpreted in conformity with EU law, might therefore suffice as a legal basis on which to ignore wholly artificial or abusive arrangements, where they exist (see point 53 et seq.) for tax purposes. The ‘reality doctrine’ too seems to me to be nothing other than a particular form of the economic viewpoint approach which probably underlies most provisions adopted by the individual Member States for the prevention of abuse.⁶⁷ This is also made clear at the level of EU law, for example in Article 6(2) of Directive 2016/1164, which states that an arrangement is deemed non-genuine to the extent that it was not put into place for valid commercial reasons which reflect economic reality. It is for the national court to determine whether that is the case.

109. If the aim of the arrangement is to prevent taxation of the actual investors, then, from an economic point of view, despite a formal distribution of the dividends to the Luxembourg parent company, the payment is actually made to the capital investment companies or their investors. The payment to the Luxembourg parent company then reflects only the (formal) reality under civil law, not the economic reality.

D. Infringement of fundamental freedoms (Questions 6, 7, 9 and 10)

110. As there are no apparent reasons in the present case why the exemption from withholding tax under Article 5 of the Parent-Subsidiary Directive should not apply, no further consideration need be given to Questions 6, 7, 9 and 10.

⁶⁶ Judgment of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraph 64); judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 55); judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 74).

⁶⁷ The Member States often base decisions on the factual content of an act or a transaction (e.g. in Finland, Hungary, Ireland, Italy, Lithuania, Netherlands, Portugal and Slovenia).

111. Inasmuch as, in application of the principles enshrined in national law, interpreted in conformity with EU law, the referring court finds that the arrangement in question is an abuse, withholding tax will indeed apply under certain circumstances. However, the questions then no longer arise in the present case, as that taxation is the result of the abuse and abusive reliance on EU law is not permitted.⁶⁸

112. That notwithstanding, however, the Court has also already ruled that different treatment of national and foreign interest recipients on the grounds of different taxation arrangements relates to situations which are not comparable.⁶⁹ The same applies to national and foreign dividend recipients. Even if they were deemed to be comparable situations, restriction on the freedom of establishment would be justified under the case-law of the Court as long as the liability for Danish tax at source of the dividends recipient resident abroad is no higher than the liability for Danish corporation tax of a national dividends recipient.⁷⁰

113. The same holds for different interest or a different accrual of the Danish corporation tax debt for the dividends recipient and of a Danish obligation to withhold tax for the dividends payer. These are not comparable situations as, on the one hand, a national tax (corporation tax) is owed and, on the other, for the dividends recipient, an actually foreign tax (its income or corporation tax) is withheld and paid on its behalf. Differentiated accrual and interest are the result of the different technique and function of a tax at source (see point 73).

114. Question 10 raises a hypothetical scenario. The referring court has not disclosed the holdings of the (direct or indirect) shareholders of the grandparent company of T Danmark, nor has it disclosed which of those shareholders are resident in third countries. It only follows from the aforementioned request for information submitted by T Danmark that probably some of the investors are resident in the United States. Thus, this is a hypothetical scenario with regard to the holdings. The Court is not, however, required to answer hypothetical questions.⁷¹

VI. Conclusion

115. In view of the foregoing, I propose that the answers to the questions from the Østre Landsret (High Court of Eastern Denmark, Denmark) should be as follows:

- (1) The answer to Question 1 is that a Member State cannot rely on Article 1(2) of the Parent-Subsidiary Directive if it has not transposed it.
- (2) The answer to Questions 1.1 and 2 is that neither Paragraph 2(2)(c) of the Danish Law on corporation tax nor a rule in a Double Taxation Convention corresponding to Article 10 of the OECD Model Tax Convention can be treated as sufficient transposition of Article 1(2) of the Parent-Subsidiary Directive. However, that does not prevent general principles of national law whose purpose is to enable specific action to be taken against artificial arrangements or abuse by individuals from being interpreted and applied in conformity with EU law.

⁶⁸ See, for example, judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 27); judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 68); judgment of 14 December 2000, *Emsland-Stärke* (C-110/99, EU:C:2000:695, paragraph 51 and case-law cited therein).

⁶⁹ Judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762, paragraph 41); upheld by judgment of 18 October 2012, *X* (C-498/10, EU:C:2012:635, paragraph 26).

⁷⁰ Compare judgment of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 90); judgment of 18 October 2012, *X* (C-498/10, EU:C:2012:635, paragraphs 42 et seq.).

⁷¹ See, for example, judgment of 28 November 2017, *Rodrigues de Andrade* (C-514/16, EU:C:2017:908, paragraph 44); judgment of 20 July 2017, *Piscarreta Ricardo* (C-416/16, EU:C:2017:574, paragraph 56 and the case-law cited).

- (3) The answer to Questions 3 and 4 is that a parent company resident in another Member State which receives dividends from its subsidiary is to be treated as the dividends recipient within the meaning of the Parent-Subsidiary Directive. The concepts of the Parent-Subsidiary Directive must be interpreted autonomously under EU law, in accordance solely with the Parent-Subsidiary Directive, and independently of the commentaries on Article 10 of the 1977 OECD Model Tax Convention or subsequent versions.
- (4) The answer to Question 5 is that abuse must be determined from an overall examination of all the facts of the case, which it is for the national court to conduct.
 - (a) A wholly artificial arrangement that does not reflect economic reality or the essential aim of which is to avoid tax that would otherwise be payable based on the purpose of the law may constitute abuse under tax law. The tax authorities must demonstrate that an appropriate arrangement would have given rise to a tax liability and the taxable person must demonstrate that there are important, non-fiscal reasons for the arrangement chosen.
 - (b) Where withholding tax is avoided on dividend payments via companies in other Member States to capital investment companies resident in third countries, the primary issue is avoidance by the actual dividends recipients (i.e. the investors) of tax on the dividends. Abuse may be assumed to exist here if the corporate structure chosen is designed to take advantage of a lack of information exchange between the States involved to prevent the effective taxation of the actual dividends recipients.
- (5) The answer to Question 8 is that a Member State that does not wish to recognise a company resident in a different Member State as the recipient of the dividends must state whom it considers to be the actual dividends recipient in order to assume that abuse exists. In cross-border cases, the taxable person may have an enhanced duty to assist.
- (6) In light of the above answers to Questions 1 and 5, there is no need to answer Questions 6, 7, 9 and 10.