



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 1 March 2018¹

Case C-118/16

X Denmark A/S (C-118/16)

v

Skatteministeriet

(Request for a preliminary ruling
from the Østre Landsret (High Court of Eastern Denmark, Denmark))

(Request for a preliminary ruling — Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (Interest and Royalties Directive) — Concept of beneficial owner — Acting in one's own name on behalf of a third party — Effect of the commentaries on the OECD Model Tax Convention on the interpretation of an EU directive — Abuse of possible tax arrangements — Criteria for abuse through avoidance of withholding tax — Abuse by taking advantage of a lack of information exchange systems between the States — Application of Directive 2003/49 to payments to a Luxembourg S.C.A., SICAR — Direct application of a non-transposed provision of a directive — Interpretation of national principles on the prevention of abuse in conformity with EU law)

I. Introduction

1. As in three further parallel sets of proceedings,² the Court of Justice is required to rule on the conditions under which the beneficial owner of interest under civil law is also to be regarded as the beneficial owner within the meaning of the Interest and Royalties Directive.³ In order to do so, it will need to clarify whether EU law has also to be interpreted in light of the commentaries on the OECD Model Tax Convention, especially those revised after the adoption of the directive. Moreover, the question arises as to the definition and direct applicability of the prohibition of abuse under EU law. In addition, it needs to be clarified how a Luxembourg legal structure (an S.C.A.) has to be treated in the context of the Interest and Royalties Directive if it constitutes an 'investment company in risk capital' (SICAR) which is subject to a particularly advantageous tax regime in Luxembourg.

2. The background is a company acquisition under which investors lent money to a Luxembourg company, via capital investment companies resident in third countries, through which a Danish operating group was acquired using two Swedish 'intermediary' companies. The parent company of the operating group pays interest under a loan to a Swedish company which makes an intra-group transfer to the other Swedish company to allow the latter, in turn, to pay interest to the Luxembourg

¹ Original language: German.

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

³ 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).

company. The profits of the Luxembourg company, in turn, are distributed to the capital investments companies which are probably resident in third countries and which, for their part, appear to have shareholders that are resident within and outside the European Union. By proceeding in this way, Danish withholding tax on the interest payments is avoided.

3. All the above questions ultimately deal with the general conflict in tax law between freedom on the part of taxpayers to structure their affairs under civil law and the prevention of arrangements that are valid under civil law but might still be abusive under certain circumstances. Even though this issue has existed since the invention of modern tax law, the distinction between an admissible tax reduction and an inadmissible tax reduction remains difficult.

4. Given the politically charged mood against the tax practices of certain global companies, this does not constitute an easy task for the Court of Justice, unless every action taken by an individual in order to reduce tax were to be labelled as an abuse.

II. Legal framework

A. EU law

5. The background to the case under EU law are Directive 2003/49 and Articles 43, 48 and 56 EC (now Articles 49, 54 and 63 TFEU).

6. Recitals 1 to 6 of Directive 2003/49 read:

- ‘(1) In a Single Market having the characteristics of a domestic market, transactions between companies of different Member States should not be subject to less favourable tax conditions than those applicable to the same transactions carried out between companies of the same Member State.
- (2) This requirement is not currently met as regards interest and royalty payments; national tax laws coupled, where applicable, with bilateral or multilateral agreements may not always ensure that double taxation is eliminated, and their application often entails burdensome administrative formalities and cash-flow problems for the companies concerned.
- (3) It is necessary to ensure that interest and royalty payments are subject to tax once in a Member State.
- (4) The abolition of taxation on interest and royalty payments in the Member State where they arise, whether collected by deduction at source or by assessment, is the most appropriate means of eliminating the aforementioned formalities and problems and of ensuring the equality of tax treatment as between national and cross-border transactions; it is particularly necessary to abolish such taxes in respect of such payments made between associated companies of different Member States as well as between permanent establishments of such companies.
- (5) The arrangements should only apply to the amount, if any, of interest or royalty payments which would have been agreed by the payer and the beneficial owner in the absence of a special relationship.
- (6) It is moreover necessary not to preclude Member States from taking appropriate measures to combat fraud or abuse.’

7. Article 1(1) of Directive 2003/49 provides:

‘Interest or royalty payments arising in a Member State shall be exempt from any taxes imposed on those payments in that State, whether by deduction at source or by assessment, provided that the beneficial owner of the interest or royalties is a company of another Member State or a permanent establishment situated in another Member State of a company of a Member State.’

8. Article 1(4) of Directive 2003/49 further provides:

‘A company of a Member State shall be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person.’

9. Article 1(7) of Directive 2003/49 provides:

‘This Article shall apply only if the company which is the payer, or the company whose permanent establishment is treated as the payer, of interest or royalties is an associated company of the company which is the beneficial owner, or whose permanent establishment is treated as the beneficial owner, of that interest or those royalties.’

10. Article 5 of Directive 2003/49 provides as follows, under the heading ‘Fraud and Abuse’:

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

(2) 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.’

B. International law

11. The Nordic Double Taxation Convention of 23 September 1996 (as amended) and the Danish-Luxembourg Double Taxation Convention (DTC) of 17 November 1980 provide as follows in Article 11(1) with regards to the allocation of the power to tax interest:

‘1. Interest arising in a Contracting State and paid to a person resident in another Contracting State can be taxed in that other State only if that person is the beneficial owner of the interest.’

12. Under that provision, the source State, in this case Denmark, cannot tax interest paid to a person resident in Sweden or Luxembourg, if that person is ‘the beneficial owner’ of the interest. The concept of ‘beneficial owner’ is not defined in either DTC.

C. Danish legislation

13. According to the referring court, the legal situation under Danish law in the years at issue was as follows.

14. The Law on corporation tax⁴ regulates the limited tax liability of foreign companies for interest credited or paid by Danish companies as follows in Paragraph 2(1)(d):

‘Paragraph 2 Companies, associations etc. within the meaning of Paragraph 1(1) having their registered office abroad are liable for tax inasmuch as they ...

(d) receive interest from national sources in relation to a liability which a [Danish-registered company] or an ... [establishment of a foreign company] ... has towards foreign legal entities which are listed in Paragraph 3B of the Skattekontrolllov (Tax Control Law) (controlled liability). ... The tax liability does not apply to interest which is not taxed or is subject to reduced taxation under Directive 2003/49 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States or a double taxation convention with the Faroe Islands, Greenland or the State in which the recipient company etc. is registered. However, that only applies if the paying company and the recipient company are associated within the meaning of that Directive for a continuous period of at least one year, which must include the payment date. This shall only apply, however, if the paying company and the recipient company are associated for the purposes of that Directive for a continuous period of at least one year, which must include the payment date ...’

15. Ultimately, limited tax liability did not apply in 2007 to the interest paid to a parent company which is not taxed or is subject only to reduced taxation under Directive 2003/49 or a DTC.

16. Where, however, a limited tax liability applies to outbound interest from Denmark under Paragraph 2(1)(d) of the Corporation Tax Law, the interest payer is required under Paragraph 65(D) of the Danish Law on tax at source⁵ to withhold the tax at source (‘tax on interest’).

17. The rate for the 2008 and 2009 tax years was 25%. In the event of late payment of tax withheld at source (where there is limited tax liability), interest is payable on the tax liability (Paragraph 66(B) of the Law on tax at source). The default interest is payable by the person required to withhold the tax at source.

18. From 2007 to 2009 there were no general statutory provisions in Denmark for the prevention of abuse. 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 in certain cases, and that taxation is instead based on reality (‘substance over form’). It is common ground that the reality doctrine does not provide a basis on which the transactions undertaken in the present case could be disregarded.

19. Furthermore, the principle of the ‘rightful income recipient’ has also been developed in Danish case-law. This principle is based on the fundamental rule regarding taxation of income in Paragraph 4 of the Danish Tax Code (Statsskatteloven) and states that the tax authorities are not obliged to accept an artificial separation between the income-generating operations/activities and the allocation of the income deriving therefrom. It is therefore necessary to determine who — irrespective of the structure as presented — is the actual recipient of certain income and who is therefore liable to pay tax. 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.

4 Bekendtgørelse af lov om indkomstbeskatning af aktieselskaber m.v., selskabsskatteloven — Lovbekendtgørelse nr. 1037 af 24. august 2007 (publication in the official gazette No 1037 of 24 August 2007).

5 Kildeskatteoven — Lovbekendtgørelse nr. 1086 af 14. november 2005 (Danish Official Gazette No 1086 of 14 November 2005).

III. The main proceedings

20. X Denmark A/S (applicant in the main proceedings before the referring court) is part of the X Group. The X Group is a global company which employs a total of 12 500 staff — 600 of whom are employed in Denmark — and which has subsidiaries in more than 70 countries. In 2005, the group was taken over by a syndicate of capital investment companies.

21. These investment companies hold 100% of the shares of the uppermost company in the group (X S.C.A.), which is resident in Luxembourg, and are regarded as transparent for tax purposes.⁶ According to the referring court, the investors in these tax-transparent capital investment companies are thus, for tax purposes, ultimately direct shareholders in the uppermost company in the group, X S.C.A.

22. According to information provided by X Denmark A/S, these shareholders are resident in a number of countries within and outside of the European Union as well as within and outside of countries with which Denmark has entered into a DTC.

23. X S.C.A. is the group's ultimate parent company. Due to its nature as a general investment firm, X S.C.A. was entitled to be registered as a 'société d'investissement en capital à risque' (SICAR).

24. This means that the company is exempt from income tax on earnings originating from the company's investments in securities (i.e. dividends and capital growth). A SICAR is also exempt from the rules on compulsory tax retention upon distribution of dividends. X S.C.A. holds 100% of shares in X Sweden Holding AB (X Sweden Holding). X S.C.A. was not engaged in any business operations other than ownership of and the loan to X Sweden Holding.

25. X Sweden Holding, in turn, holds 97.5% of shares in a Swedish company (X Sweden), which for its part holds 100% of shares in X Denmark A/S. The sole activity of X Sweden Holding consists in being the holding company of X Sweden. On 27 December 2006, X Sweden Holding took out a loan from its parent company, X S.C.A. The company's interest expenses in connection with that loan for the fiscal years 2007, 2008 and 2009 were deducted from the company's taxable income.

26. In the fiscal years 2007-2009 — in accordance with the specific Swedish rules on adjusting earnings for tax purposes within a group in Chapter 35 of the Swedish Law on income tax (Inkomstskattelagen) — X Sweden made intra-group transfers to its parent company, X Sweden Holding. The intra-group transfers are tax deductible for the company making the payment and taxable for the recipient company.

27. Under a loan agreement of 27 December 2006 X Denmark received a loan for 501 million euros (EUR) from its parent company, X Sweden. X Denmark did not retain any tax at source for the annual interest credits for 2007, 2008 and 2009, given that X Denmark considered the lender X Sweden to be the 'beneficial owner' of the interest. In its tax returns, X Denmark deducted the interest from its taxable income.

28. In early 2007, X Sweden, in turn, took on responsibilities in connection with product registration with public authorities and various administrative duties in connection with clinical trials. From then on the company employed around 10 employees.

29. In 2007, 2008 and 2009 interest income accounted for 98.1%, 97.8% and 98%, respectively, of X Sweden's overall income.

⁶ This describes the situation that while the company is able to carry out legally-relevant actions, for tax purposes it is not the company but its shareholders to whom the profits of the company are directly allocated pro rata and who have to pay tax on such profits. The result is that, as a rule, it is not the company's country of residence but the country of residence of the shareholders which levies taxes on the 'income of the company' (here the interest receipts of the capital investment companies) on a pro rata basis.

30. In its decision of 13 December 2010, SKAT (Danish tax authority) ruled that neither X Sweden, X Sweden Holding, or X S.C.A. could be deemed to be the ‘beneficial owner’ of the interest under the Interest & Royalties Directive and the relevant double taxation convention. Instead, SKAT ruled that the owners of X S.C.A. were the ‘beneficial owners’ of the interest. An appeal was brought against SKAT’s decision before the Landsskatteretten (the highest tax authority). In the absence of a decision by the Landsskatteretten, X Denmark brought appeal proceedings before the Østre Landsret (High Court of Eastern Denmark, Denmark).

31. The Østre Landsret (High Court of Eastern Denmark) has now decided to make an order for reference.

IV. Proceedings before the Court

32. The Østre Landsret (High Court of Eastern Denmark) has submitted the following questions:

- ‘(1) Must Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, be interpreted as meaning that a company resident in a Member State that is covered by Article 3 of the directive and, in circumstances such as those of the present case, receives interest from a company resident in another Member State, is the “beneficial owner” of that interest for the purposes of the directive?
- (1.1) Must the concept “beneficial owner” in Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, be interpreted in accordance with the corresponding concept in Article 11 of the OECD 1977 Model Tax Convention?
- (1.2) If Question 1.1 is answered in the affirmative, must the concept then be interpreted solely in the light of the commentary on Article 11 of the 1977 Model Tax Convention (paragraph 8), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding “conduit companies” (paragraph 8.1, now paragraph 10.1), or the additions made in 2014 regarding “contractual or legal obligations” (paragraph 10.2)?
- (1.3) If the commentaries of 2003 can be incorporated into the interpretation, is it then a condition for deeming a company not to be a “beneficial owner” for the purposes of Directive 2003/49 that there actually has been a channelling of funds to those persons who are deemed by the State in which the interest payer is resident to be “the beneficial owners” of the interest in question, and — if so — is it then a further condition that the actual passing take place at a point close in time to the payment of the interest and/or take place as a payment of interest?
- (1.3.1) Of what significance is it in that connection if equity capital is used for the loan, if the interest in question is entered on the principal (“rolled up”), if the interest recipient has 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 Member State in question, if the interest in question is subsequently converted into equity in the borrowing company, if the interest recipient has had a contractual or legal obligation to pass the interest to another person, and if most of the persons deemed by the State where the person paying the interest is resident to be the “beneficial owners” of the interest are resident in other Member States or other States with which Denmark has entered into a double taxation convention, so that under the Danish taxation legislation there would not have been a basis for retaining tax at source had those persons been lenders and thereby received the interest directly?
- (1.4) What is the significance for the assessment of the issue whether the interest creditor must be deemed to be a “beneficial owner” for the purposes of the directive if the referring court, following an assessment of the facts of the case, concludes that the interest creditor —

without having been contractually or legally bound to pass the interest 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?

- (2) Does a Member State’s reliance on Article 5(1) of the directive on the application of national provisions for the prevention of fraud or abuse, or of Article 5(2) of the directive, presuppose that the Member State in question has adopted a specific domestic provision implementing Article 5 of the directive, or that national law contains general provisions or principles on fraud, abuse and tax evasion that can be interpreted in accordance with Article 5?
- (2.1) If Question 2 is answered in the affirmative, can Paragraph 2(2)(d) of the Selskabsskattelov (Law on Corporation Tax), which provides that the limited tax liability on interest income does not include “interest which is tax-exempt under Directive 2003/49 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States”, be deemed to be a specific domestic provision as referred to in Article 5 of the directive?
- (3) 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 interest is contingent on whether the interest creditor is deemed to be the beneficial owner of the interest, a conventional anti-abuse provision covered by Article 5 of the directive?
- (4) Is it abuse etc. under Directive 2003/49 if, in the Member State where the interest payer is resident, no tax deductions are made for interest, whilst in the Member State where the interest recipient is resident this interest is not taxed?
- (5) Is a company resident in Luxembourg, established and registered under Luxembourg company law as a “société en commandite par actions” (S.C.A.) and also classified as a “société d’investissement en capital à risque” (SICAR) under the Luxembourg law of 15 June 2004 relating to the investment company in risk capital (SICAR), covered by Directive 2003/49?
- (5.1) If Question 5 is answered in the affirmative, can a Luxembourg “S.C.A./SICAR” then be “beneficial owner” of interest for the purposes of Directive 2003/49, even though the Member State in which the interest-paying company is resident deems the company in question to be a tax-transparent entity under its domestic law?
- (5.2) If Question 1 is answered in the negative, i.e. if the company receiving the interest is not deemed to be “beneficial owner” of the interest in question: in circumstances such as in the present case — can the S.C.A./SICAR at issue be deemed to be the “beneficial owner” of the interest in question for the purposes of the directive?
- (6) Is a Member State, which does not wish to recognise that a company resident in another Member State is the beneficial owner of interest and claims that the company in the other Member State is an “artificial conduit company”, bound under Directive 2003/49 or Article 10 EC to state whom it deems to be the beneficial owner in this case?
- (7) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 concerning interest received from a company resident in another Member State (subsidiary), and the latter Member State deems that parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC, then preclude legislation under which the latter Member State requires the company liable for retaining the tax at source (subsidiary) to pay

default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims (including interest income) lodged against a company resident in the same Member State?

- (8) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 concerning interest received from a company resident in another Member State (subsidiary), and the latter Member State deems the parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC (in the alternative Article 56 EC), viewed separately or as a whole, preclude legislation under which:
- (a) the latter Member State requires the person paying the interest to retain tax at source on the interest 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 latter Member State?
 - (b) a parent company in the latter Member State would not have been required to make advance payments of corporation tax in the first two fiscal years, but would only have begun to pay corporation tax at a much later time than the due date for tax at source?

The EU Court of Justice is requested to take the answer to Question 7 into account in its answer to Question 8.'

33. By order of 13 July 2016, Cases C-115/16, C-118/16 and C-119/16 were joined. N Luxembourg 1, X Denmark A/S, C Danmark I, the Kingdom of Denmark, the Federal Republic of Germany, the Grand Duchy of Luxembourg, the Kingdom of Sweden, the Italian Republic, the Kingdom of the Netherlands and the European Commission have made written observations to the Court of Justice regarding the questions referred in the joined proceedings. N Luxembourg 1, X Denmark A/S, C Danmark I, the Kingdom of Denmark, the Federal Republic of Germany, the Grand Duchy of Luxembourg and the European Commission participated in the hearing of 10 October 2017 — which also included the Cases C-116/16, C-117/16 and C-299/16.

V. Legal analysis

A. Determination of the beneficial owner (Questions 1 to 1.4)

34. By its Questions 1 to 1.4, which should be examined together, the referring court ultimately asks how the concept 'beneficial owner' in Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) of Directive 2003/49, is to be interpreted. Therefore, the concept 'beneficial owner' within the meaning of Directive 2003/49 must be elaborated (1) and then the effect of the OECD Model Tax Convention (OECD MTC) and its commentaries (OECD model commentaries) on that interpretation must be investigated (2).

1. Concept 'beneficial owner' within the meaning of Directive 2003/49 (Questions 1 and 1.4)

35. Directive 2003/49 seeks to ensure equality of tax treatment between national and cross-border transactions between associated companies.

(a) Basic principle: Interest creditor as the beneficial owner

36. Article 1(1) of Directive 2003/49, read in light of recitals 2 to 4 of the directive, aims to avoid legal double taxation of cross-border payments of interest by prohibiting the taxation of interest in the source State to the detriment of the actual beneficial owner. That provision thus concerns the tax position of the interest recipient only.⁷

37. The interest recipient is the person with a civil-law claim to the interest in his own name. In that regard, it follows from the case-law of the Court that, as a rule, the beneficial owner within the meaning of Directive 2003/49 is the person entitled under civil law to demand payment of the interest.⁸

38. Article 1(4) of Directive 2003/49 confirms this. It states that an agent, trustee or authorised signatory cannot be treated as the beneficial owner. Such persons enforce the claim either not in their own name (agent or authorised signatory) or not on their own account (trustee). Conversely, it follows that an interest recipient who collects the interest in his own name and on his own account (i.e. for his own benefit) is also the beneficial owner.

39. The referring court states that X Sweden had entered into a loan agreement with X Denmark A/S. This means that X Sweden also receives the interest in its own name. The decisive question, therefore, is whether that interest is being drawn on own account or on behalf of a third party. A person who alone can decide on the appropriation of the interest and who also alone bears the risk of loss is acting on his own account, while a person who is bound to a third party in such a way that that third party ultimately bears the risk of loss (in this case of the interest) is acting on behalf of a third party.

(b) Exception: Trustees

40. As can be seen from Article 1(4) of Directive 2003/49, the beneficial owner for the purposes of civil law would not be the beneficial owner for the purposes of the directive if he merely acted as a trustee.

41. An ‘open trust’ on the part of X Sweden for the benefit of X Sweden Holding or X S.C.A. or the investment firms can be ruled out. Although a trustee has property rights transferred to him, he can only exercise them in keeping with the trust agreement. By reason of that agreement, a trustee’s legal authority vis-à-vis third parties takes precedence over the legal, fiduciary, relationship between the trustee and the trustor. It is only by reason of that particular relationship that, although he acts in his own name, he no longer does so on his own account. However, there appears to be no such relationship here.

42. Only the referring court can decide, as part of a general examination, whether in the present case, owing to the legislative background and the proximity of the companies involved, an economic approach might find some kind of ‘hidden trust’ of X Sweden, of X Sweden Holding or of X S.C.A. for the benefit of the investment firms. However, the Court can provide some useful pointers here.

43. A refinancing agreement concluded with a third party on similar terms and at a similar time as in the present case would not, of itself, suffice to assume that a trust relationship exists. Directive 2003/49 too assumes in Article 1(7) and in recital 4 that certain ties under company law exist, which per se (i.e. taken in isolation) cannot affect the determination of the beneficial owner. This is further underlined

⁷ Judgment of 21 July 2011, *Scheuten Solar Technology* (C-397/09, EU:C:2011:499, paragraph 28).

⁸ Judgment of 21 July 2011, *Scheuten Solar Technology* (C-397/09, EU:C:2011:499, paragraph 27) — ‘In this respect, Article 2(a) of Directive 2003/49 defines this interest as “income from debt-claims of every kind”. Only the actual beneficial owner can receive interest which constitutes income from such claims.’

by recital 5 and by Article 4(2) of Directive 2003/49, which, even where a ‘special relationship’ exists between the payer and the beneficial owner, only provides for a correction in that amount, without calling into question the status of payer or beneficial owner. In that respect, a trust within the meaning of Article 1(4) of Directive 2003/49 goes beyond a loan agreement between associated companies.

44. Rather, more extensive ties would have to exist internally (i.e. between the capital investment companies and X S.C.A. or between them and X Sweden Holding or between them and X Sweden) that limited the existing powers of X Sweden and/or X Sweden Holding and/or X S.C.A. vis-à-vis third parties. No such legal ties have been identified to date. In any event, they would not be established merely by reason of the fact that equity capital was used for the loan or that interest was added to the principal or converted into equity in the recipient company.

45. However, in my opinion, it would be different if, for example, the considerable expenses of the Luxembourg companies were not to be met out of the interest income and the interest had to be passed on alone and in full. It might also be different if the refinancing interest rate and the interest rate received were identical or the interpolated company incurred no costs of its own to be paid out of its interest income. The position might also be different if the risk concerning the solvency of the company resident in Denmark (X Denmark) was to be borne solely by the capital investment companies because, in this case, the liabilities of the other companies, in particular the liability of X S.C.A. vis-à-vis the capital investment companies would also lapse. However, only the referring court is able to decide whether there is any evidence to that effect. It does not follow from the order for reference, however, that such a liability on the part of X S.C.A. did in fact exist vis-à-vis the capital investment companies in 2007 to 2009. However, it is also important to bear in mind in this regard, that a ‘channelling’ of the interest in the true sense does not occur. It is only due to the Swedish group taxation provisions that the interest income of X Sweden is offset against the interest expenditure of X Sweden Holding. This does not, however, entail a change to the liabilities under civil law. It is for the national court to decide whether a trust relationship can be derived at all from a group taxation provision under tax law.

46. If the referring court were to find, based on all the circumstances of the case, that such a trust relationship exists, then, on the basis of the wording of Article 1(4) of Directive 2003/49, the trustor would indeed be the beneficial owner within the meaning of Directive 2003/49. Inasmuch as the interest payment made to it via the trustee also fulfils the requirements of Directive 2003/49, exemption from tax at source would still apply.

(c) Answer to Questions 1 and 1.4

47. The answer to Question 1 and 1.4 is therefore that a company resident in another Member State which owns the interest-bearing claim is to be regarded as the beneficial owner within the meaning of Article 1(1) of Directive 2003/49. The situation would be different if it was acting not in its own name and on its own account, but for and on the account of a third party pursuant to a (possibly hidden) trust relationship. In that case the third party would have to be regarded as the beneficial owner. It is for the referring court to determine whether that is the case in the course of its overall assessment of all the facts.

2. Interpretation in accordance with the commentaries on the OECD Model Tax Convention? (Questions 1.1 to 1.3)

48. By Questions 1.1 to 1.3, the referring court asks in particular whether the concepts of Directive 2003/49 should be interpreted in light of the commentaries on the OECD MTC and, if so, whether subsequent commentaries on an OECD MTC that postdates the directive should be taken into account.

49. In the subsequent commentaries on the OECD MTC (e.g. sections 8 and 9 added in 2008), a conduit company is not normally regarded as the beneficial owner if, though the formal beneficial owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.

50. OECD MTCs are not legally binding, 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; rather, under the OECD Rules of Procedure, the member countries must consider whether their implementation is opportune.⁹ This applies a fortiori to the commentaries published by the OECD, which ultimately only contain legal opinions.

51. 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 Conventions.¹⁰ The same applies to guidance from any prevailing international legal opinion, which may be reflected in the commentaries on the OECD MTC.

52. Nonetheless, the commentaries on the OECD MTC cannot have a direct effect on the interpretation of an EU directive, even if the terms used are identical. In that sense, 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 EU legislature. At 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.

53. Therefore, the Court has already held 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.¹¹ 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.

54. However, if the OECD commentaries have no direct binding effect and if the criterion applied in Article 1(4) of Directive 2003/49 is whether the recipient receives the payments for its own benefit rather than as a trustee, then that is the decisive criterion (under EU law) by which to determine a beneficial owner within the meaning of Article 1(1) of Directive 2003/49. If no (possibly hidden) trust exists, then the person with the civil-law claim is also the beneficial owner for the purposes of Directive 2003/49. In the final analysis, however, this is again similar to the approach taken in the more recent commentaries on the OECD MTC.

55. Therefore, the answer to Questions 1.1 and 1.2 is that the concept of beneficial owner must be interpreted under EU law autonomously and independently of Article 11 of the 1977 OECD Model Tax Convention or subsequent versions. It is therefore unnecessary to answer Question 1.3.

⁹ Rule 18 lit. b 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'. These can be found under <https://www.oecd.org/legal/rules%20of%20Procedure%20OECD%20Oct%202013.pdf>.

¹⁰ 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); and of 23 February 2006, *van Hilten-van der Heijden* (C-513/03, EU:C:2006:131, paragraph 48); however, also see in this regard the judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 67).

¹¹ Judgment of 19 January 2006, *Bouanich* (C-265/04, EU:C:2006:51, paragraph 50 and 56).

B. Criteria for the assumption of abuse (Question 4)

56. By its fourth question, the referring court essentially asks if an arrangement such as that in the present case, which *inter alia* avoids tax at source in Denmark, may be seen as abuse within the meaning of Article 5 of Directive 2003/49.

57. Abuse is determined from a general 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.¹² It is for the referring court to conduct that general examination;¹³ however, the Court can give the referring court some useful pointers¹⁴ for the purpose of determining if the transactions are being carried out in the context of normal commercial transactions or solely for the purpose of wrongfully obtaining advantages provided for by EU law.¹⁵

58. To that end, the concept of abuse is examined more closely (1) and then criteria for the assumption of an abuse are examined in relation to this particular case (2).

1. The concept of abuse in EU law

59. According to Article 5 of Directive 2003/49, the Member States should not be precluded from taking appropriate measures to combat fraud and abuse (recital 6).

60. The interpretation of the concept of beneficial owner suggested above (point 36 *et seq.*) does not conflict with that concern. On the contrary, that concern is addressed not primarily via the concept of beneficial owner (in particular, the involvement of a trustee is not necessarily abusive), but by Article 5 of the directive.

61. That provision ultimately expresses what has been held in settled case-law: EU law cannot be relied on for fraudulent or abusive ends. In fact, the application of a rule of EU law cannot be extended 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.¹⁶

62. Although Directive 2003/49 itself does not define abuse, other EU directives provide necessary pointers. For example, the Mergers Directive¹⁷ 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 practices¹⁸ (Directive 2016/1164), which was not yet in force in the years at issue, defines the concept of abuse. The

¹² 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, point 60).

¹³ Also judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 59), and of 20 June 2013, *Newey* (C-653/11, EU:C:2013:409, paragraph 49).

¹⁴ 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); and of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 77).

¹⁵ 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, paragraph 68 and 69); and of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 24 and the case-law cited); also see my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, point 57).

¹⁶ 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, paragraph 68 and 69); and of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 24 and the case-law cited); also see my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, point 57).

¹⁷ 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).

¹⁸ 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).

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.

63. 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.¹⁹ As the Court has also since held on various occasions, it suffices if the arrangement is put in place not with the sole aim²⁰ but with the essential aim, of obtaining a tax advantage.²¹

64. 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 made achievable by arrangements that exist in commercial life. Such cases may be the more frequent and are now also expressly covered by the new Article 6 of Directive 2016/1164. The Court too held in a more recent judgment that the wholly artificial nature of the arrangement was just one fact that suggested that the essential aim was to obtain a tax advantage.²²

2. Criteria for the present case

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

65. A wholly artificial arrangement which does not reflect economic reality can hardly be assumed in the present case. Arguments against such findings are the existence of rented office premises and the number of employees as well as corresponding business income and expenses. According to the order for reference, X Sweden has been employing ten staff members since the start of 2007 and has taken on responsibilities in connection with product registration with public authorities and various administrative duties. X Sweden therefore carried out real actions, as is evidenced by the interest income and other income.

66. The composition of the income (according to the referring court approximately 98% of which constituted interest income and 2% other income) is irrelevant in that regard. As the Court found recently, the fact that the activity consists only 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.²³ This applies all the more if there is other income as well. There are no further indications in the request for a preliminary ruling submitted by the national court to suggest that these activities are purely carried out on paper.

19 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); and of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 74); similar, judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 55).

20 In addition, 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); and of 22 May 2008, *Ampliscientifica and Amplifin* (C-162/07, EU:C:2008:301, paragraph 28).

21 With regard to indirect tax law: 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); similar, within the scope of application of the Merger Directive: judgment of 10 November 2011, *FOGGIA-Sociedade Gestora de Participações Sociais* (C-126/10, EU:C:2011:718, paragraph 35 and 36).

22 Explicitly to this effect, judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 60).

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

67. In light of the fact that asset management companies in particular (may) engage per se in little activity, this criterion is also subject to very minor requirements. 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 (in this case the management of a loan agreement and additional activities), it cannot be seen as an arrangement that does not reflect economic reality.

68. However, in my opinion, that does not preclude the existence of an abusive tax arrangement, as the wording of the new Article 6 of Directive 2016/1164 shows.

(b) Any non-tax-related reasons to be taken into account

69. Thus, there are other criteria that are key factors in the present case, especially the non-fiscal reasons to be considered.

70. 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.²⁴ The mere fact that interpolated Luxembourg companies were also involved in the business transaction with foreign investors in the present case does not, therefore, automatically mean that abuse must be assumed.

71. 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.²⁵ 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.²⁶ The mere fact that a business structure was chosen in the present case that did not generate the maximum tax burden (in this case additional and final liability for tax at source) cannot in itself qualify as abuse.

72. Furthermore, apart from in the case of a wholly artificial arrangement that does not reflect economic reality, a Union citizen, whether a natural or a legal person, cannot be deprived of the possibility of relying on the provisions of the Treaty because he has sought to profit from tax advantages in force in a Member State other than his State of residence.²⁷ Thus, a business structure that involves a Member State that dispenses with tax at source, as in the present case, cannot for that reason alone be considered to be an abuse.

73. In that regard, 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 the more highly harmonised VAT laws,²⁸ it applies a fortiori to less harmonised income tax laws, where acceptance of the differences between the tax regulations²⁹ of the individual Member States is an intentional and/or political choice.

²⁴ Cf. 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).

²⁵ 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); and of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 73).

²⁶ 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).

²⁷ Judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 36); cf. to this effect, judgment of 11 December 2003, *Barbier* (C-364/01, EU:C:2003:665, paragraph 71).

²⁸ Judgments of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 42), and of 22 December 2010, *Weald Leasing* (C-277/09, EU:C:2010:810, paragraph 53).

²⁹ Cf. judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 36); regarding the divergence of tax rates permitted under EU law even in relation to harmonised tax rates, see also judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 39 and 40).

74. Furthermore, the Court has clarified, in light of the fundamental freedoms which are also relevant to this case, that the mere fact that a resident company is granted a loan by a related company which is established in another Member State cannot be the basis of a general presumption of abusive practices and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty.³⁰ Consequently, the various loan arrangements between the parent, subsidiary and sub-subsidiary companies in the present case are not in themselves abusive.

75. The Court has further clarified that the tax relief on dividends provided for under EU law is not contingent upon the origin or residence of the shareholder, which is immaterial for the purposes of the Parent-Subsidiary Directive.³¹ Nor does Directive 2003/49 make any such distinction. The fact that the shareholder of X Sweden is a Swedish company (X Sweden Holding) whose shareholder is a Luxembourg company (X S.C.A.) and that the shareholders of X S.C.A. in turn are capital investment companies from a third country is, taken on its own, not abusive either.

76. In my opinion, the background to the arrangement deemed abusive is a decisive factor in an overall examination. According to the parties at the hearing, it was advantageous in the past, due to Danish tax laws, for foreign investors to acquire operational companies in Denmark via a Danish (leveraged) holding company. The acquisition of the Danish group took place in 2005. Denmark later tightened up those laws (for 2006) by introducing a tax at source that gives rise to an additional and final tax liability.

77. Every State is at liberty to amend its tax laws. However, that also changes the basis of assessment of the economic operators involved. In my opinion, to attempt to maintain the original basis for assessment of a business transaction (in this case the acquisition of an operational Danish company with the help of foreign investors) is not abusive. Indeed every undertaking must be expected to want to maximise its profits.

(c) On the circumvention of the purpose of the law

78. Of greater significance in the present case, however, is the fact that the actual investors — here the capital investment companies, whether they are treated as transparent or non-transparent for tax purposes — often have their seat in certain third countries (regularly on certain smaller islands such as the Cayman Islands³², Bermuda³³, or on Jersey³⁴). This may indicate an unusual overall approach, the economic reason for which does not become immediately apparent. The capital investment companies could also be established in other States, in particular given that — as the applicant's representative pointed out at the hearing — they are to be considered as transparent for tax purposes in any event.

79. To that extent, the overall arrangement might qualify as an abusive arrangement due more to the 'establishment' of the capital investment companies in particular third countries than to the 'interpolation' of Luxembourg and Swedish companies. Of particular significance here is the purpose of the arrangement or the objective of the tax law circumvented (in this case taxation in Denmark).

³⁰ Judgments of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 73), and of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 50); cf. in this spirit judgments of 4 March 2004, *Commission v France* (C-334/02, EU:C:2004:129, paragraph 27), and of 26 September 2000, *Commission v Belgium* (C-478/98, EU:C:2000:497, paragraph 45).

³¹ Judgment of 20 December 2017, *Deister Holding and Juhler Holding* (C-504/16 and C-613/16, EU:C:2017:1009, paragraph 66).

³² See Case C-119/16.

³³ See Case C-117/16.

³⁴ See Case C-299/16.

(1) Circumvention of Danish income tax revenue?

80. First, it must be noted that Denmark has not been deprived of taxes on the profits of the operational company acquired. Those profits were duly taxed in the State of residence (i.e. in Denmark).

81. The profits of the group holding company resident in Denmark (X Denmark A/S) were also fully taxed in Denmark. That those profits were reduced by interest payments to the Swedish investors is compatible with the taxation of financial performance and the fact that such interest is fully deductible in Denmark as operating expenditure.

82. These interest payments were taxed as business income of the Swedish company in Sweden. The fact that interest payments to the investor of X Sweden Holding were, in turn, recognised as business expenses in Sweden via a group taxation provision is in accordance with the principle of taxation on the basis of financial performance. Sweden only taxed the difference between the interest paid from Denmark and the interest paid to X S.C.A. in Luxembourg. The same applies, in principle, with regard to X S.C.A., whose interest income is taxed in Luxembourg.

83. The two Swedish companies are fully liable to tax in Sweden and are subject to corporation tax in Sweden with regard to their income. The requirements of Article 3(a)(iii) of Directive 2003/49 have therefore been met. In addition, it should be noted that none of the provisions in Directive 2003/49 stipulates that an actual taxation of the beneficial owner (here the Swedish companies) in a certain amount is a requirement for the exemption. While the fact that the beneficial owner has correspondingly high business expenses (or carry forwards of losses from previous years) in the country of residence results in no actual taxation, this taxable person is still liable to corporation tax. The taxable person thereby falls within the scope of application of Directive 2003/49 and his interest income is consequently taxed ‘in a Member State’. This is also the case if the country of residence of the beneficial owner levies only a low corporate tax rate and no tax at source. The same applies in principle in relation to the Luxembourg X S.C.A., although the unique circumstances of a SICAR are discussed in more detail below (point 90 et seq.).

84. Any existing low taxation or absence of taxation is the consequence of the fiscal autonomy enjoyed by each State. If, due to a lack of harmonisation of income taxes within the European Union, tax-related competition between the Member States is permitted under EU law, then a taxpayer may not be accused of availing himself of the advantages offered by some Member States in actual fact (i.e. not just on paper).

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

85. In the final analysis, the interpolation of the Luxembourg and Swedish companies ultimately ‘only’ avoids tax at source on interest payments in Denmark. However, as the Court has previously ruled, tax at source actually taxes the recipient of the income (in this case, the interest).³⁵ That is achieved by having the payer withhold part of the income at source at the time of disbursement.

86. Thus, tax at source in the interest 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 interest recipient. In cross-border cases in particular, proper taxation of the recipient’s income is not always ensured. As a rule, the interest 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 European Union).

³⁵ Judgments of 24 June 2010, *P. Ferrero and General Beverage Europe* (C-338/08 and C-339/08, EU:C:2010:364, paragraph 26 and 34), and of 26 June 2008, *Burda* (C-284/06, EU:C:2008:365, paragraph 52).

87. Therefore, two requirements must be fulfilled for an arrangement to qualify as abusive circumvention of this objective of the law (to ensure the interest recipient is taxed). First, in the case of direct disbursement, tax must be chargeable in Denmark (see point 102 et seq.). Second, there must be a risk that the income will not be caught in the actual State of receipt and thus will not be taxed.

88. If, therefore, one reason for choosing a particular business structure is to pay interest 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 abuse of law.

89. Any such complaint of abuse might, in turn, be invalidated if the capital funds provide the relevant tax information to the investors' States of residence or if the information in question is available to the State of residence of the capital investment companies and they forward the information to the relevant States. Any such corporate structure would not then circumvent the purpose of the tax at source that has been avoided (see point 86 above). That too must be included by the referring court in its overall examination.

(d) Answer to Question 4

90. Where tax at source is avoided on interest payments to capital investment companies resident in third countries, the primary issue is avoidance by the actual interest recipients (i.e. the investors) of tax on their interest income. In particular, 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 in order to prevent the effective taxation of interest recipients.

C. Payments to an S.C.A., SICAR (Questions 5 and 5.1)

91. The fifth question only arises if neither the Swedish companies nor the capital investment companies are considered to be the beneficial owner of the interest payments, but instead the intermediary Luxembourg company. In this case, apparently, the referring court wishes to know whether Directive 2003/49 covers interest paid to a Luxembourg company established as a partnership limited by shares ('société en commandite par actions' — S.C.A.) if, at the same time, this company enjoys a very privileged tax treatment as a 'risk capital investment company' ('société d'investissement en capital à risque' — SICAR).

92. This privilege lies in the fact that while an S.C.A., which has been authorised as a SICAR by the financial regulator, is subject to corporation tax, its income from securities as well as from the sale, the contribution or the liquidation of its securities are exempt from corporation tax. Luxembourg law does not, however, contain provisions to suggest that interest income from a loan is also tax-exempt.

93. The wording of Article 3(a)(iii) in conjunction with the annex makes it clear that a société en commandite par actions (S.C.A.) falls within the scope of Directive 2003/49. In addition, it should be noted that none of the provisions in Directive 2003/49 stipulates that an actual taxation of the beneficial owner (here the Luxembourg companies) in a certain amount is a requirement for the exemption. The Commission's attempts at making changes³⁶ 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.

³⁶ Article 1 No. 1 Proposal for a Council Directive amending Directive 2003/49 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States of 30 December 2003, COM(2003) 841 final, 2003/0331 (CNS) and of 11 November 2011, COM(2011) 714 final, 2011/0314 (CNS)

94. Whether a teleological reduction would lead to a different result if a Member State allows that a company form listed in the annex of Directive 2003/49 is subject to corporation tax, but *all* income covered by the directive (i.e. income from interest and royalties) is tax-exempt, does not need to be answered here. 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.

95. The fact that, in the event of a later sale, increases in the capital value of the assets of a SICAR are not taxed (if there are any increases in value at all), ultimately only constitute a reduced corporation tax with regard to this company. According to the wording of Article 3(a)(iii), which is unambiguous in this respect, it is only detrimental if the S.C.A. is exempt from corporation tax. A reduced corporation tax, however, is not detrimental.

96. With regard to the objective pursued by Directive 2003/49, there are no concerns regarding this result. As set out above (point 85 et seq.), the objective is the avoidance of double taxation and the equal treatment of national and cross-border financial relations between associated companies. At the same time, the objective is to ensure single taxation in a Member State. This is also the case if Luxembourg only imposes a very low (or, as here, reduced) corporation tax.

97. The answer to questions 5 and 5.1 must therefore be that interest payments under a loan to a Luxembourg S.C.A. continue to fall within the scope of Directive 2003/49 even if the country of residence has registered this company as a SICAR.

D. Assessment of whether the interest creditor is a taxable entity (Question 5.2)

98. By Question 5.2 the referring court asks, in essence, whether the scope of Directive 2003/49 can depend on whether the State deducting tax at source perceives the recipient company to also be non-transparent for tax purposes (i.e. as a separate taxable entity).

99. The reason why an S.C.A. — which is expressly mentioned in the annex to Directive 2003/49 — should be regarded as a transparent company is not clear however. The directive requires that the recipient company is subject to its own tax on earnings (in the case of Luxembourg, the *impôt sur le revenu des collectivités*) which, in the case of a transparent approach, would be excluded. The special treatment as a SICAR does not change this. A Member State may ultimately not call the scope of Directive 2003/49 into question by doubting the nature as a taxable entity of the company forms listed in the annex of Directive 2003/49.

100. The answer to Question 5.2. is therefore that, for there to be recourse to the tax exemption in accordance with Directive 2003/49, it is not relevant whether the State deducting tax at source deems the recipient company to be transparent, if that the company is explicitly listed in the annex to Directive 2003/49.

E. Information on the actual beneficial owner (Question 6)

101. By the sixth question, the referring court asks whether the Member State that does not wish to recognise that the interest recipient is also the beneficial owner within the meaning of Directive 2003/49, 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 is who bears the burden of proving the existence of an abuse.

102. In order for abuse of possible legal arrangements 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 have been a direct loan agreement between the investors and the claimant in the main proceedings for the purpose of acquiring the target company.

103. 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'.³⁷ Should it transpire from that evidence that the essential aim³⁸ 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.

104. It further follows from the case-law of the Court³⁹ 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, the identity of the beneficial owner must be clear.

105. Thus, from Denmark's perspective, abuse within the meaning of Article 5 of Directive 2003/49 can only arise if interest disbursed directly would have been taxed accordingly in Denmark. However, this is precluded under Danish law if, disregarding the conduit companies (in this case, these would be X Sweden, X Sweden Holding and the X S.C.A.), 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. If the capital funds are indeed fiscally transparent companies, each investor would have to be considered individually in order to answer this question.

106. Therefore, the sixth 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 interest was paid, as the beneficial owner of the interest must in principle state whom it considers to be the beneficial owner 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 particular in cross-border cases, the taxable person may have an enhanced duty to assist.

F. Reliance on Article 5 of Directive 2003/49 (Questions 2 to 3)

107. By Questions 2, 2.1 and 3, the referring court asks (1) if Denmark can rely directly on Article 5 of Directive 2003/49 in order to refuse taxable persons exemption from tax. If this is not so, it must be clarified whether (2) by its current national law, Denmark has in fact adequately transposed Article 5 of Directive 2003/49.

³⁷ Judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 92).

³⁸ 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).

³⁹ 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); and of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 58).

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

108. If, based on the aforementioned criteria, abuse exists within the meaning of Article 5 of Directive 2003/49, the peculiarity of the present case is that Danish law contained no specific provision transposing Article 5 of Directive 2003/49. Nor, according to the referring court, does it contain any general provision to prevent abuse. The claimant in the main proceedings is therefore of the opinion that it cannot be denied tax relief under national law even if abuse were assumed to exist.

109. However, it is not always necessary formally to enact the provisions of a directive (in this case Article 5 of Directive 2003/49) in specific legislation; 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.⁴⁰

110. 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 interest is formally paid first to the Luxembourg companies.

111. However, Article 5 of Directive 2003/49 allows the Member States to apply provisions to prevent abuse. That is in keeping with practice throughout the Union. Thus, all Member States have developed, to the greatest possible extent, instruments to prevent abuse of the law for the purposes of tax avoidance.⁴¹ So there is a consensus, even under national tax law, that the application of the law must in no case be extended to such an extent that abusive practices by economic operators must be tolerated. This principle, which is accepted throughout the Union,⁴² is now also expressed in Article 6 of Directive 2016/1164.

112. In that respect, all national provisions, whether adopted in transposition of Directive 2003/49 or not, must be interpreted and applied in accordance with this general principle of law and, in particular, with the wording and purpose of Regulation 2003/49 and Article 5 thereof.⁴³ The fact that, in interpreting national law in conformity with EU law, detriment to an individual may result does not militate against such 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.⁴⁴

⁴⁰ To that effect, settled case-law, cf. for instance the 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, point 62).

⁴¹ 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 General Tax Code).

⁴² Cf. for example: 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).

⁴³ On the obligation of national courts to interpret domestic law in conformity with EU directives, cf. settled case-law and in particular the judgments of 4 July 2006, *Adeneler and Others* (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.); and of 10 April 1984, *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 26).

⁴⁴ 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, paragraph 20, 25 and 26); and of 13 November 1990, *Marleasing* (C-106/89, EU:C:1990:395, paragraph 6 and 8); and my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, point 65).

113. Only a direct application of Article 5 of Directive 2003/49 to the claimant's detriment would be denied the Danish authorities, also for reasons of legal certainty.⁴⁵ A Member State cannot rely against an individual on provisions of a directive which it itself has not transposed.⁴⁶ It is settled case-law that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual.⁴⁷ A Member State that did so would itself be guilty of 'abusive conduct', first, by not transposing a directive addressed to it (even though it could) and, second, by relying on a provision to prevent abuse enacted in a directive which it had not transposed.

114. Nor could the competent authorities in the main proceedings rely directly against the individual on the basis of the general principle of EU law that abuse of rights is prohibited. At least in cases falling within the scope of Directive 2003/49, such a principle has been given specific effect in Article 5(2) of the directive and has been expressed in a concrete manner.⁴⁸ 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 Directive 2003/49 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.⁴⁹

2. Case-law on VAT legislation is not transferable

115. This does not conflict with judgment delivered by the Court in *Italmoda* and *Cussens*,⁵⁰ in which the Court ruled that the prohibition in principle on 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.

116. 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 far more of an impact on interests under EU law than national income tax.

117. Second, EU law (Article 325(1) and (2) TFEU) requires the Member States to take (effective) measures to collect VAT,⁵¹ 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.⁵² Therefore, direct application of Article 5 of Directive 2003/49 to the detriment of the taxable person is out of the question.⁵³

⁴⁵ As stated explicitly in the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 42).

⁴⁶ 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); and of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 21); cf. my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, point 66).

⁴⁷ 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); cf. inter alia the 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).

⁴⁸ Cf. my opinion in *Kofoed* (C-321/05, EU:C:2007:86, point 67) and the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 38 et seq.). In a similar vein, my Opinion in *Satakunnan Markkinapörssi and Satamedia* (C-73/07, EU:C:2008:266, point 103).

⁴⁹ Unclear in this regard, the judgment of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709, paragraph 74 to 77); see in this regard, my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, point 67); it is clearly expressed in judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 42).

⁵⁰ Judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881), and of 18 December 2014, *Schoenimport "Italmoda" Mariano Previti* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455).

⁵¹ Judgments of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraph 36 et seq.), and of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 26).

⁵² Explicitly to this effect, judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 28, 31 and 38).

⁵³ As already stated by the Court of Justice in the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 42).

3. Existence of a national provision specifically aimed at combating abuse

118. 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.

119. According to case-law of the Court of Justice, a restriction of freedom of establishment may be justified on grounds of the prevention of abusive practices, but 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.⁵⁴

120. For that reason, Questions 2.1 and 3 can be answered to the effect that neither Paragraph 2(2)(d) of the Danish law on corporation tax, nor a DTC rule predicated on the beneficial owner for the purpose of taxing interest, suffice to be deemed to be a transposition of Article 5 of Directive 2003/49.

121. 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 constitute a sufficiently specific legal basis on which to restrict freedom of establishment. Inasmuch as the claimant in the main proceedings pointed out several times at the hearing that Denmark has not expressly transposed Article 5 of Directive 2003/49, that would ultimately not matter. It is for the national court to determine this case-by-case.

122. 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 57 et seq.) for tax purposes. The ‘reality doctrine’ too seems to me to be nothing other than a particular kind of economic viewpoint which probably underlies the majority of abuse defence measures of the individual Member States.⁵⁵ This becomes clear at EU level, e.g. in Article 6(2) of Directive 2016/1164, under which an arrangement is deemed non-genuine to the extent that they are 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.

123. If the aim of the arrangement is to prevent taxation of investors, then, despite the formal payment to the Swedish and Luxembourg companies, from an economic point of view the payment is actually made to the capital investment companies or their investors. The payment to the Swedish and Luxembourg companies simply reflects the (formal) reality under civil law, not the economic reality.

G. Breach of fundamental freedoms (Questions 7 and 8)

124. As the Swedish company (X Sweden) must be treated in principle as the beneficial owner (as explained in point 34 et seq.), no further consideration need be given to Questions 6 and 7.

⁵⁴ Judgments of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraph 64); of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 55); and of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 74).

⁵⁵ The Member States often base decisions on the factual content of an act or a transaction (e.g. in Finland, Hungary, Ireland, Italy, Lithuania, the Netherlands, Portugal and Slovenia).

125. Inasmuch as, in application of the principles enshrined in national law, interpreted in compliance with EU law, the referring court finds that the arrangement in question is abusive, tax at source will apply under certain circumstances. However, the question then no longer arises in the present case, as that taxation is the result of abuse and it is settled case-law of the Court that abusive reliance on EU law is not permitted.⁵⁶

126. 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.⁵⁷ Even if this were considered to be a comparable situation, the Court has also already ruled that a restriction of the fundamental freedom would be justified, provided that the Danish taxation at source of the interest recipient resident abroad is not higher than the Danish corporation tax burden of a domestic interest recipient.⁵⁸

127. The same holds for different interest or a different accrual of the Danish corporation tax debt for the interest recipient and a Danish obligation to withhold tax at source for the interest payer. These are not similar situations as, on the one hand, a *national* tax (corporation tax) is charged and, on the other, a *foreign* tax payable by interest recipients (their income or corporation tax) is withheld and paid on their behalf. Differentiated accrual and interest are the result of the different technique and function of a tax at source (see point 86).

VI. Conclusion

128. I therefore propose that the questions referred by the Østre Landsret (High Court of Eastern Denmark, Denmark) for a preliminary ruling be answered as follows:

- (1) The answer to Questions 1 to 1.4 is that a company resident in another Member State which owns the interest-bearing claim is treated in principle as the beneficial owner within the meaning of 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. The situation would be different only if it was acting not in its own name and on its own account, but for and on the account of a third party.

The concept of beneficial owner must be interpreted under EU law autonomously and independently of the commentaries on Article 11 of the 1977 OECD Model Tax Convention or subsequent versions.

- (2) The answer to Question 2 is that a Member State cannot rely on Article 5 of Directive 2003/49 if it has not transposed it.
- (3) The answer to Question 3 is that neither Paragraph 2(2)(d) of the Danish law on corporation tax nor a rule in a double taxation agreement corresponding to Article 11 of the OECD Model Tax Convention can be treated as sufficient transposition of Article 5 of Directive 2003/49. 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.

⁵⁶ Cf. inter alia: 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); and of 14 December 2000, *Emsland-Stärke* (C-110/99, EU:C:2000:695, paragraph 51 and the case-law cited).

⁵⁷ Judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762, paragraph 41); confirmed by judgment of 18 October 2012, *X* (C-498/10, EU:C:2012:635, paragraph 26).

⁵⁸ Cf. judgments of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 90), and of 18 October 2012, *X* (C-498/10, EU:C:2012:635, paragraph 42 et seq.).

- (4) The answer to Question 4 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 tax at source is avoided on interest payments to capital funds resident in third countries, the primary issue is avoidance by the actual interest recipients (i.e. the investors) of tax on their interest income. 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 interest recipients.
- (5) The answer to Question 5 is that interest payments under a loan to a Luxembourg S.C.A. fall within the scope of Directive 2003/49 even if the State of residence has authorised this company as a SICAR. Moreover, in order to have recourse to the tax exemption of taxation at source in accordance with Directive 2003/49 it is not relevant whether the State deducting tax at source deems the recipient company to be transparent, if that the company is explicitly listed in the annex to Directive 2003/49.
- (6) The answer to Question 6 is that a Member State that does not wish to recognise a company resident in a different Member State as the beneficial owner must state whom it considers to be the beneficial owner in order to assume that abuse exists. In cross-border cases, the taxable person may have an enhanced duty to assist.
- (7) In light of the answers to Questions 1 and 4, there is no need to answer Questions 7 and 8.