



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 1 March 2018<sup>1</sup>

**Case C-299/16**

**Z Denmark**  
**v**  
**Skatteministeriet**

**(Request for a preliminary ruling  
from the Vestre Landsret (High Court of Western 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 fiscal arrangements — Criteria for abuse through avoidance of tax at source — Abuse by taking advantage of a lack of cross-border information — 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 three parallel sets of proceedings,<sup>2</sup> the Court is required to rule on the conditions under which the beneficial owner of interest under civil law also qualifies as beneficial owner within the meaning of the Interest and Royalties Directive.<sup>3</sup> In order to do so, it will need to clarify whether EU law has also to be interpreted in the light of the commentaries on the OECD Model Tax Convention, especially those revised after the adoption of the directive. The question also arises as to how the ban on abuse is defined in EU law and whether it is directly applicable.

2. In this case, investors lent money, via a capital investment company resident in a third country, to a Danish company controlled by it. Apparently, owing to the fact that the tax parameters for non-Danish investors had worsened following the introduction of tax at source, the loan obligation in question and the shares in the Danish company were transferred to a company established in Luxembourg. As part of the transfer, the latter was granted a loan of the same amount by the capital investment company. By interposing a company resident in an EU country outside Denmark, Danish tax at source on interest payments, amongst other things, was to be avoided.

<sup>1</sup> Original language: German.

<sup>2</sup> This concerns specifically Joined Cases C-115/16, C-118/16 and C-119/16.

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

3. The above questions ultimately concern the fundamental conflict between the taxable person's freedom to arrange his affairs under civil law and the need to prevent arrangements that are valid under civil law but nonetheless abusive under certain circumstances. Even though this problem has existed since the invention of modern tax legislation, it is hard to draw a dividing line between admissible and inadmissible tax-reduction measures. A driver who sells his car following an increase in road tax obviously acts in order to avoid road tax. However, that cannot be construed as an abuse of law, even if his sole reason was to save tax.

4. In the light of the angry political mood concerning the tax practices of certain multinational groups, drawing that dividing line is no easy task for the Court and not every action by an individual to reduce their tax should be open to a verdict of abuse.

## II. Legal context

### A. EU law

5. The EU legal framework applicable to this case is Directive 2003/49/EC and Articles 43, 48 and 56 EC (now Articles 49, 54 and 63 TFEU):

6. Directive 2003/49 states in recitals 1 to 6:

- '(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 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 Denmark-Luxembourg Double Taxation Convention (‘the DTC’) of 17 November 1980 provides as follows in Article 11(1) on the distribution of the power to tax interest:

‘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 Luxembourg, if that person is ‘the beneficial owner’ of the interest. The concept ‘beneficial owner’ is not defined in the DTC.

## **C. Danish legislation**

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

14. The Danish Law on corporation tax<sup>4</sup> 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/EC 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 ...’

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, interest channelled outside Denmark is subject to a limited tax liability under Paragraph 2(1)(d) of the Law on corporation tax, the interest payer is required under Paragraph 65D of the Danish Law on tax at source<sup>5</sup> to withhold the tax at source (‘tax on interest’).

17. The rate was 30% for the 2006 and 2007 tax years. In the event of late payment of tax withheld at source (where there is limited tax liability), interest is charged on the tax liability (Paragraph 66B of the Law on tax at source). The default interest is payable by the person required to withhold the tax at source.

18. There were no general statutory provision to prevent abuse in force in Denmark between 2006 and 2008. 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 the legal transactions conducted in the present case could be disregarded.

19. The principle of the ‘rightful income recipient’ has also been established in Danish case-law. That principle 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 interest deriving therefrom. It is therefore necessary to determine who — irrespective of the corporate structure as presented — is the real 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.

<sup>4</sup> Bekendtgørelse af lov om indkomstbeskatning af aktieselskaber m.v., selskabsskatteloven — Lovbekendtgørelse nr. 1037 af 24 August 2007 (*Official Gazette* No 1037 of 24 August 2007).

<sup>5</sup> Kildeskatteloven — Lovbekendtgørelse nr. 1086 af 14 November 2005 (publication in the *Official Gazette* No 1086 of 14 November 2005).

### III. Dispute in the main proceedings

20. Z Denmark is a Danish industrial company, 66% of whose shares were acquired by a capital investment company, A Fund, in August 2005. In connection with the acquisition — on 27 September 2005 — A Fund provided a loan to Z Denmark at an interest rate of 9%.

21. In 2006, Denmark decided to introduce taxation at source for outbound interest payments. On 28 April 2006, A Fund established Z Luxembourg in Luxembourg and transferred the debt claim against Z Denmark to that company. In connection with the transfer, A Fund also granted a loan to Z Luxembourg at an interest rate of 9.875%. By agreement of 21 June 2006, A Fund transferred its shares in Z Denmark to Z Luxembourg.

22. According to the information provided by the referring court, the annual financial statements of Z Luxembourg for 2007 and 2006 showed that the company's activities consisted solely of the investment in Z Denmark. The annual financial statements show that in 2006 the company had a negative result amounting to EUR 23 588 and in 2007 a positive result amounting to EUR 15 587. The item 'Tax on Profits' showed an amount of EUR 3 733 for one year (presumably 2007).

23. Z Denmark repaid the loan referred to in the previous paragraph on 1 November 2007. On the same day, Z Luxembourg also repaid its debt to A Fund, including the interest accrued.

24. A Fund consists of five capital investment companies, four of which are organised as tax-transparent (under Danish tax law)<sup>6</sup> limited partnerships on Jersey.

25. There are approximately 70 direct investors in the four transparent investment companies, including pension funds, financial institutions, fund of funds, investment funds and firms, ordinary companies and private individuals.

26. These shareholders are resident in a number of countries within and outside the European Union as well as within and outside countries with which Denmark has entered into a DTC. A Fund (No 5) Limited, Jersey, is organised as a non-tax-transparent company and holds around 0.6% of A Fund.

27. In its decision of 10 December 2010, the SKAT (the Danish finance authorities) did not regard Z Luxembourg as "beneficial owner" of the interest for the purposes of Directive 2003/49 and the Danish-Luxembourg DTC.

28. It held that Z Denmark should have retained at source the tax credited to the main shareholder, Z Luxembourg, in 2006 and 2007, and that Z Denmark is liable for the unpaid tax at source.

29. Before the Vestre Landsret (High Court of Western Denmark, Denmark) the Skatteministeriet has stated that Z Luxembourg must be deemed to be the 'rightful income recipient' under Danish law. Z Luxembourg therefore has limited tax liability for the interest in question.

30. An appeal was brought against SKAT's decision before the Landsskatteretten (highest tax authority) which, by order of 31 January 2012, upheld SKAT's decision. An appeal has been brought by Z Denmark before the Vestre Landsret (High Court of Western Denmark) against the order of the Landsskatteretten.

<sup>6</sup> This describes a situation in which, although 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).

31. The Vestre Landsret (High Court of Western Denmark) has now decided to conduct preliminary ruling proceedings.

#### IV. Proceedings before the Court

32. The Vestre Landsret (High Court of Western 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 in the present case, receives interest from a subsidiary 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 significant in this case for the assessment of whether a company can be deemed not to be a “beneficial owner” for the purposes of Directive 2003/49, if the interest in question is added to the principal debt (“rolled up”), if the interest creditor had a contractual or legal obligation to pass the interest to another person and if a majority of the persons whose interest is credited/paid to and who are 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 Danish law there would not have been a basis for retaining tax at source had those persons been lenders and had 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/EC 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 the OECD 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 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?
- (5) In a case where an interest payer is resident in one Member State and the interest creditor is resident in another Member State and where the interest creditor is deemed by the first Member State not to be the “beneficial owner” of the interest in question under Directive 2003/49 and is therefore deemed to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC, preclude legislation under which the first Member State, in the taxation of the non-resident interest creditor, does not take account of expenses in the form of interest expenses that the interest creditor has incurred in circumstances such as those in the present case, whilst interest expenses are generally deductible under that Member State’s legislation and can therefore be deducted from taxable income by a resident interest creditor?
- (6) 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, 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, *inter alia*, interest income) lodged against a company resident in the same Member State?
- (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 (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 interest creditor 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 Court is requested to take the answer to Question 6 into account in its answer to this question.’

33. Z Denmark, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Austria, the Kingdom of Sweden, the Italian Republic, the Kingdom of the Netherlands and the European Commission have made written observations to the Court regarding the questions referred. Z Denmark, 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-115/16 to C-119/16.

## V. Legal assessment

### A. On the 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 of beneficial owner in Article 1(1), read in conjunction with Article 1(4) of Directive 2003/49, is to be interpreted. Therefore, the concept of beneficial owner within the meaning of Directive 2003/49 needs to be elaborated (1) and then the effect of the OECD Model Tax Convention ('OECD MTC') and its commentaries ('OECD model commentaries') on that interpretation needs to 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) Principle: interest creditor as the beneficial owner*

36. Article 1(1) of Directive 2003/49, read in the 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 creditor only.<sup>7</sup>

37. The interest 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.<sup>8</sup>

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.

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

<sup>8</sup> 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.'



39. The referring court states that the claim of A Fund against Z Denmark arising from a loan agreement was transferred to Z Luxembourg. Z Luxembourg therefore collects the interest paid to it by Z Denmark 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. It follows from Article 1(4) of Directive 2003/49 that a beneficial owner under civil law acting simply as a trustee would not qualify as the beneficial owner within the meaning of the directive.

41. An ‘open trust’ on the part of Z Luxembourg for the benefit of A Fund or the investors 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 Z Luxembourg for the benefit of A Fund or the investors. The Court can, however, provide useful guidance in this regard.

43. A contractually agreed refinancing by a third party (here A Fund) under similar conditions and with a certain temporal connection, as is the case here, is in itself insufficient in the absence of other factors for the assumption of the existence of a trust relationship. 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 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 A Fund and Z Luxembourg) that limited the existing powers that Z Luxembourg has in relation to 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. In my view, this would be different however, for instance, if Z Luxembourg had been under an obligation not to pay its expenses out of the interest income and the interest had to be passed on alone and in full. A different view might also be taken if the interest rate of the refinancing and the interest rate collected are identical or if the intermediary company does not incur any costs of its own which are to be borne out of the interest income. The position would also be different if the risk concerning the solvency of the company resident in Denmark (Z Denmark) was to be borne solely by A Fund because, in this case, the debt of Z Luxembourg vis-à-vis A Fund under the loan agreement would also lapse. However, only the referring court is able to decide whether there is any evidence to that effect.

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) Conclusion on 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 the 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 (for example 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.<sup>9</sup> This applies a fortiori to the commentaries published by the OECD, which ultimately only contain legal opinions.

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

<sup>9</sup> 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>

<sup>10</sup> 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, also see in this regard judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 67).

52. The commentaries on the OECD MTC may not, however, have a direct effect on the interpretation of an EU Directive, even if the terms used might be identical. In this regard, the commentaries only reflect the view of those who worked on the OECD MTC but not the view of parliaments let alone the EU legislator. Only if it follows from the wording and the legislative background of the Directive that the EU legislator drew guidance from the wording of the OECD MTC and the commentaries issued (at the time) to that OECD MTC, such interpretation may be appropriate.

53. This is why the Court has previously held that the provisions of a DTC, interpreted in the light of the commentaries on the applicable OECD Model Convention, cannot restrict EU law.<sup>11</sup> This applies, in particular, to changes to the OECD MTC and the commentaries issued after the adoption of the directive. Otherwise the contracting countries to the OECD would have the power 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.

## **B. Criteria for the assumption of abuse (Question 2)**

56. The primary reason for the referring court to ask its second question is to learn whether a Member State is entitled to rely on Article 5 of Directive 2003/49 in order to prevent fraud and abuse. This does, however, necessarily presuppose that an arrangement such as the present one, which avoids taxation at source in Denmark among other things, constitutes an abuse for the purposes of Article 5 of Directive 2003/49; this question needs to be examined next.

57. Whether or not it constitutes an abuse depends on a general examination of each particular case which is to be carried out by the competent national authorities and which must be open to review by the courts.<sup>12</sup> While this general examination must be carried out by the referring court,<sup>13</sup> the Court may, however, provide useful guidance to the referring court<sup>14</sup> for the assessment of whether the activities are carried out in the context of normal commercial transactions or solely for the purpose of wrongfully obtaining advantages provided for by EU law.<sup>15</sup>

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).

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

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> 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).

<sup>15</sup> 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); 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, paragraph 57).

## 1. The concept of abuse under EU law

59. According to Article 5 of Directive 2003/49, the Member States should not be precluded from taking suitable measures in order to combat fraud and abuse (also see the sixth recital in this regard).

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.<sup>16</sup>

62. Although Directive 2003/49 itself does not define abuse, other EU directives provide necessary pointers. For example, the Mergers Directive,<sup>17</sup> 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 practices<sup>18</sup> (Directive 2016/1164) — which was not yet applicable in relation to the years in dispute — 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.

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.<sup>19</sup> As the Court has also since held on various occasions, it suffices if the arrangement is put in place not with the sole aim<sup>20</sup> but with the essential aim, of obtaining a tax advantage.<sup>21</sup>

<sup>16</sup> 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); of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 24); with further references, also see my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, paragraph 57).

<sup>17</sup> 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).

<sup>18</sup> Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1).

<sup>19</sup> 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, judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 55).

<sup>20</sup> 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).

<sup>21</sup> 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, paragraphs 35 and 36).



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.<sup>22</sup>

## **2. Criteria for the present case**

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

65. The Court is unable to assess whether this case involves a wholly artificial arrangement that does not reflect economic reality. The facts submitted by the referring court are insufficient to do this and, moreover, it is a matter for the referring court to assess these facts. The Court is only able to provide guidance.

66. As the Court has recently decided, the fact that the economic activity consists solely in the management of assets and that the income results only from such management does not indicate the existence of a wholly artificial arrangement which does not reflect economic reality.<sup>23</sup> Given the fact that particularly asset management companies (can) per se carry out only a limited number of activities, this criterion can only really be subject to very limited requirements. If the company has been actually validly established, if it can actually be contacted at its registered office and if it has the appropriate physical and human resources at its premises in order to meet its object (here, the administration of a loan agreement), it cannot be seen as an arrangement which does not reflect economic reality.

67. Another argument against a wholly artificial arrangement is that the Luxembourg company reported a loss in 2006 and a profit in 2007, which appears to derive from certain commercial activities. In particular if the interest rate payable to A Fund exceeded the interest rate received from Z Denmark, Z Luxembourg must have had other income in order to have achieved a profit and be subject to tax on such income. There are no more specific indications in the request for a preliminary ruling submitted by the national court to suggest that these activities are purely carried out on paper.

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. This means that, in the present case, other criteria and in particular non-fiscal reasons are of key importance.

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.<sup>24</sup> 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.

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

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

<sup>24</sup> 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).



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.<sup>25</sup> 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.<sup>26</sup> 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. Moreover — beyond a wholly artificial arrangement which does not reflect economic reality — an EU national, whether a natural or a legal person, may not be deprived of the right to rely on the provisions of the Treaty because he sought to profit from tax advantages in force in a Member State other than his State of residence.<sup>27</sup> Therefore a transaction structure — such as the one here — in which another Member State which does impose any taxation at source is involved cannot be found to be abusive for that reason alone.

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,<sup>28</sup> it applies a fortiori to less harmonised income tax laws, where acceptance of the differences between the tax regulations<sup>29</sup> of the individual Member States is an intentional and/or political choice.

74. Furthermore, the Court has clarified, in the 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.<sup>30</sup> 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.<sup>31</sup> Nor does Directive 2003/49 make any such distinction. The fact that the shareholder of Z Luxembourg is a company resident in a third country is, taken on its own, not abusive either.

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. in the same vein, 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, *RBS Deutschland Holdings* (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).

30 Judgments of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 73); 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).

76. In my view, in the present case, the legislative background of the arrangement considered to be abusive plays a key role in the general examination. According to the parties' submissions at the hearing, it used to be advantageous in the past for foreign investors to acquire operating companies in Denmark due to Danish tax laws. Denmark later changed this legal position (for the year 2006) to the detriment of investors, by introducing a corresponding tax at source, which led to an additional and definitive tax burden.

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 A Fund with its five capital investment companies, whether they are treated as transparent or non-transparent for tax purposes — often have their registered office in certain third countries (regularly on certain smaller islands such as the Cayman Islands<sup>32</sup>, Bermuda<sup>33</sup>, or, as in this case, on Jersey). 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 a Luxembourg company. Of particular significance here is the purpose of the arrangement or the objective of the tax law circumvented (in this case taxation in Denmark).

*(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 (Z Denmark). Those profits were duly taxed in the State of residence (i.e. in Denmark)).

81. The fact that these profits were reduced due to the interest payments to the creditor from Luxembourg constitutes taxation of the financial capacity and takes account of the fact that Denmark accepts these interest payments as business expenses in full.

82. These interest payments were taxed as business income of the Luxembourg company in Luxembourg. The fact that interest payments to its investor were, in turn, recognised as business expenses is in accordance with the principle of taxation on the basis of financial performance. Luxembourg taxed the difference between the interest (9%), paid from Denmark, and the interest (9.875%), paid to A Fund in the third country, plus any other income which evidently existed given that a positive result was achieved in 2007.

<sup>32</sup> As in Case C-119/16.

<sup>33</sup> As in Case C-117/16.

83. The Luxembourg company is fully liable to tax in Luxembourg and is subject to corporation tax in Luxembourg with regard to its 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 Luxembourg 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.

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) Preventing the exploitation of cross-border information deficits*

85. In the final analysis, the interpolation of the Luxembourg company 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).<sup>34</sup> That is achieved by having the payer withhold part of the income at source at the time of disbursement.

86. Taxation at source in the country of residence of the interest debtor is therefore not a separate type of tax but merely a special type of taxation arrangement, mainly in order to safeguard a (minimum) taxation of the interest creditor. After all, in particular in international matters it cannot always be guaranteed that the recipient taxes his income in the proper way. Typically, the country of residence of the interest creditor rarely receives information about his income received from abroad unless there are functioning data exchange systems between the tax authorities as are now in place within the European Union.

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 92 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.

<sup>34</sup> 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).

**(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. Naming the actual beneficial owner (Question 5)**

91. By the fifth 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.

92. 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.

93. 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'.<sup>35</sup> Should it emerge from that evidence that the essential aim<sup>36</sup> 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.

94. It further follows from the case-law of the Court<sup>37</sup> 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.

95. 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 so-called conduit company, 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 investment companies are indeed fiscally transparent companies, each investor would have to be considered individually in order to answer this question.

<sup>35</sup> Judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 92).

<sup>36</sup> 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).

<sup>37</sup> 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).

96. 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.

#### **D. Reliance on Article 5 of Directive 2003/49 (Questions 2 and 3)**

97. 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.

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

98. 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.

99. 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.<sup>38</sup>

100. 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.

101. 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.<sup>39</sup> 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<sup>40</sup>, is now also expressed in Article 6 of Directive 2016/1164.

<sup>38</sup> In this vein, 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, paragraph 62).

<sup>39</sup> 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 Steueranpassungsgesetzes (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 (for example the principle of the economic viewpoint, which can be extrapolated, inter alia, from Paragraph 39 et seq. of the General Tax Code)).

<sup>40</sup> 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 judgment of 23 March 2000, *Diamantis* (C-373/97, EU:C:2000:150, paragraph 33).



102. 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.<sup>41</sup> 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.<sup>42</sup>

103. 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.<sup>43</sup> A Member State cannot rely against an individual on provisions of a directive which it itself has not transposed.<sup>44</sup> 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.<sup>45</sup> 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.

104. 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.<sup>46</sup> 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.<sup>47</sup>

## 2. Case-law on VAT legislation is not transferable

105. This does not conflict with the judgment delivered by the Court in *Italmoda* and *Cussens*,<sup>48</sup> 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.

41 On the obligation of national courts to interpret domestic law in accordance 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).

42 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, paragraph 65).

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

44 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, paragraph 66).

45 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, paragraph 65); cf. inter alia 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).

46 Cf. my Opinion in *Kofoed* (C-321/05, EU:C:2007:86, paragraph 67), and 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, paragraph 103).

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

48 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).

106. 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.

107. Second, EU law (Article 325(1) and (2) TFEU) requires the Member States to take (effective) measures to collect VAT,<sup>49</sup> 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.<sup>50</sup> Therefore, direct application of Article 5 of Directive 2003/49 to the detriment of the taxable person is out of the question.<sup>51</sup>

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

108. 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.

109. According to case-law of the Court, a restriction of the freedom of establishment can only be justified on the ground of prevention of abusive practices if the specific objective of such a restriction is 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.<sup>52</sup>

110. 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.

111. 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.

112. 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

<sup>49</sup> 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).

<sup>50</sup> Explicitly to this effect, judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 28, 31 and 38).

<sup>51</sup> As already stated by the Court in the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 42).

<sup>52</sup> 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).

defence measures of the individual Member States.<sup>53</sup> This becomes clear at EU level, for example in Article 6(2) of Directive 2016/1164, under which an arrangement is deemed non-genuine to the extent that it is 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.

113. If the aim of the arrangement is to prevent a taxation of the investors, then despite the formal payment to the Luxembourg company, from an economic point of view the payment is actually made to A Fund or its investors. The payment to Z Luxembourg simply reflects the (formal) reality under civil law, not the economic reality.

#### **E. Breach of fundamental freedoms (Questions 5, 6 and 7)**

114. Given that Z Luxembourg — as has been set out in detail in paragraph 33 et seq. above — must be treated in principle as the beneficial owner, no further consideration need be given to Questions 6 and 7.

115. 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.<sup>54</sup>

116. 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.<sup>55</sup> Even if this is considered to be a comparable situation, according to the case-law of the Court a restriction of the fundamental freedom would be justified in so far as Danish tax at source borne in that Member State by a non-resident interest creditor is not greater than the Danish corporation tax borne by a resident interest creditor.<sup>56</sup>

117. The exclusion of expenses of the non-resident interest recipient in the context of taxation at source, as referred to by the referring court in its question 5, necessarily follows from the taxation at source system. If a foreign third party (the interest payer) ultimately transfers the income tax of the payee to the tax authorities as a lump sum, it cannot deduct the payee's expenses (business expenses) of which it will typically not even have been aware. These are usually already taken into account, in a roughly standardised way, in a lower rate of tax at source.

118. The referring court is therefore ultimately asking in Question 5 whether the foreign interest recipient needs to be able to claim for its expenses via a tax assessment in Denmark in the same way as the domestic interest creditor. The answer to this question is, however, irrelevant to this case — Z Denmark is challenging a liability in the context of its obligation to deduct tax at source.

<sup>53</sup> The Member States frequently base their assessment on the actual content of an action or a transaction — for example, in Finland, Hungary, Ireland, Italy, Lithuania, the Netherlands, Portugal and Slovenia.

<sup>54</sup> 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).

<sup>55</sup> 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).

<sup>56</sup> 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.).

119. The same (in relation to point 115) 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

120. I therefore propose that the questions referred by the Vestre Landsret (High Court of Western 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 Directive 2003/49/EC 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 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.
  - (c) A Member State cannot, however, rely on Article 5 of Directive 2003/49 if it has failed to transpose 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.

- (4) The answer to Question 4 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.
- (5) In the light of the answers to Questions 1 and 2, there is no need to answer Questions 5, 6 and 7.