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The complex situation of intermediary holding companies in the EU after the CJEU landmark decisions on the "Danish cases"

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ABSTRACT: In this article, we analyse the main implications for European intermediary holding companies in light of the Court of Justice of the EU landmark decisions on the Danish cases. Herein, the Court established a simultaneously relevant and complex doctrine on the interpretation of anti-abuse rules and principles, derived from Directives 2003/123/ EC "Parent-Subsidiary" and 2003/49/CE, "Interest and Royalties". By carefully studying the Court's decisions one has to acknowledge that the doctrine set forward by the CJEU in the Danish cases impacts significantly on the general concept of abusive tax practice and will also produce consequences on the use of "intermediary holding companies" located in EU Member States, in regard to the tax exemption entitlements provided by European Directives.

KEYWORDS: parent-subsidiary and interest and royalties Directives – Danish cases – beneficial owner rule.

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1. Introduction

Throughout this article, we analyse the main implications for European intermediary holding companies in light of the Court of Justice of the EU (CJEU, hereinafter) landmark decisions of February 26th of 2019,[1] addressed as "*Danish cases*", where the Court established a simultaneously relevant and complex doctrine on the interpretation of anti-abuse rules and principles, derived from Directives 2003/123/EC "*Parent-Subsidiary*" and 2003/49/CE, "*Interest and Royalties*".

Those rulings of February 26th of 2019, depict the current approach of CJEU case law on anti-abuse rules which is in line with post-BEPS international trend which changes the divide between legitimate tax planning and abusive and artificial tax arrangements. In connection with that, it is important to highlight the implications this case law has on the interpretation of domestic anti-abuse rules, whenever they refer to the application of EU law.

Based on what was said above, one has to acknowledge that the doctrine set forward by the CJEU in the "*Danish cases*" impacts significantly on the general concept of abusive tax practice and will also produce consequences on the use of "*intermediary holding companies*" located in EU Member States, in regard to the tax exemption entitlements provided by European Directives.

2. CJEU's doctrine regarding the "Danish Cases" in respect of interpretation of parent/subsidiary and interest and royalties EU tax Directives

The February 26th of 2019 rulings concern a set of cases relating to different situations in which Danish tax authorities refused to exempt interest and dividends payments, as provided by the Parent/Subsidiary Directive (2003/123) and the Interest and Royalty Directive (2003/49) (the "Directives"), on the ground that they deemed those payments related to abusive situations was not covered within the purview of the rules embodied in the Directives.

Danish tax authorities claimed that refusing exemption of interest and dividends payments made to "*intermediate holding companies*" (controlled by residents of third States) was justified and consistent with anti-abuse rules set forward by the Directives. The position of Danish tax authorities led to a reference for a Preliminary Ruling concerning the interpretation of the **beneficial owner rule** enclosed in the Interest and Royalty Directive (Art.º 1), and the general anti-abuse rule embodied in Arts.1.2 of the Parent/ Subsidiary Directive (2003/123) and 5 of the Interest and Royalty Directive (2003/49).

In basic terms, the doctrine adopted by the CJEU can be summarised as follows:

a) the **beneficial owner clause laid down in Directive 2003/49** represents a material requirement to be proved by taxpayers, and verified by tax authorities;

b) the **beneficial owner clause laid down in the Interest and Royalty Directive 2003/49 (Art.º 1.1)** must be given an autonomous interpretation based on how it is regulated by the Directive (Art.º 1.4), taking into account its rationale and the European Union goals, such as eliminating double taxation and ensuring equality

[1] CJEU ruling of February 26 of 2019, joined cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1, X Denmark A/S, C Denmark I, Z Denmark ApS v. Skatteministeriet,* on the potential abuse of the Directive 2003/49. And CJEU ruling of February 26 of 2019, cases C-116/16 and C-117/16, *T Denmark and Denmark Aps*, on the potential abuse of the Directive 2003/123, Parent/Subsidiary.

of tax treatment between national and cross-border transactions. In connection with this, it is important to observe that even if the domestic concept of beneficial owner is not relevant, considering that domestic concepts have a different scope, OECD's *soft-law* represented by the OECD Model and its commentaries on the concept of beneficial, on the contrary, represent a valuable interpretation tool, due to the fact that the Proposal Directive that preceded the current Directive drew inspiration from OECD materials;[2] the use of OECD *soft-law* was not considered to lack democratic legitimacy;

c) the **beneficial owner clause laid down in the Interest and Royalty Directive** is independent from the general principle of EU law that asserts that abusive practices are prohibited, in the sense that they have different subjective requirements and diverse burden of proof rules, being, therefore, compatible and complementary; the absence of a general or specific domestic anti-abuse rule, v*is-a-vis* Directive abuse, does not limit or exclude whatsoever the possibility of having tax authorities controlling the existence of abusive arrangements in light of the Directive and denying tax advantages derived from those arrangements whenever evidence of abusive tax practices is identified according to the conditions laid down by the CJEU (*Italmoda* and *Cussens* rulings);

d) **the absence of beneficial owner rule in the Parent/Subsidiary Directive (2003/123)** does not mean that abuse and "*Directive Shopping*" cannot be tackled, considering that said Directive includes a set of rules that allow tax authorities to have a broad scope of powers to investigate potential abusepractices; also the general principle of EU law prohibiting abusive practices is also implied by the context of the Parent/Subsidiary Directive; it is not clear-cut whether the fact the recipient of dividends is not the beneficial owner implies by itself that an abusive situation occurs;[3]

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[2] We have stressed that the CJEU does not seem to validate in these rulings a dynamic interpretation in restrictive sense in regard to the use of OECD Model commentaries to the concept of beneficial owner (see: CFE, "Opinion Statement ECJ-TF 2/2019 on the CJEU decisions of 26 February 2019 in Cases C-15/16, C-118/16 and 299/16, N Luxemburg I et al, and cases C-116/16 and C-117/17, T Denmark et al., concerning the beneficial ownership requirement and the anti-abuse principle in the company tax directives", June 2019, p. 17, and 19).

[3] Actually, the doctrine advocated by the CJEU in the February 26, 2019 ruling (cases C-116/96 *T Denmark*, and C-117/16 and *Denmark*), is not clear in that regard; however, we consider that the fact an intermediary company is not the "beneficiary owner" for the purpose of the application of the Parent/ Subsidiary Directive is merely an *indicium* (very relevant) that an arrangement made with the purpose of benefiting from the exemption derived from art.º 5 of the said Directive is in place. The CJEU, throughout the decision (because it does not allude to other rulings that follow the same reasoning), refers to tax authorities gathering evidence on the abusive practice occurrence in light of a global analysis of the facts based on a set of indicia of an objective and consistent artificiality, allowing, at the end of the day, the submission of evidence of the contrary by the taxpayer. The CJEU, in its turn, seems to recognise the legitimacy of intermediary holding companies which undertake a real economic activity and are established in the EU (paras.103 and 104) or that have commercial purpose (para.110). On the contrary, in situations where dividends paid by an European subsidiary are transferred to an entity (beneficial owner) which meets the Parent/ Subsidiary Directive requirements through a conduit that, in reality, represents an artificial arrangement close to a company simulation (lacking economic substance and commercial purpose) we would be in the presence of abusive situations that seem to go beyond the scope of Parent/Subsidiary Directive; this interpretation, in our opinion, is compatible with CJEU ruling on Parent/Subsidiary Directive (C-116/16 and C-117/16); the concept of beneficial owner would not be used in a technical sense (OECD meaning), but with the purpose of addressing a conduit artificially interposed to achieve a Company simulation (in similar terms: B. Larking, "CJEU Decisions on Tax Avoidance and Conduits: More Questions than Answers", *TNI,* July 1, 2019, p. 30). On the other

e) **intermediary companies (conduit companies) interposed in a chain of companies belonging to a group or a private equity fund do not qualify as beneficiary owners** whenever taxpayers do not manage to demonstrate that those entities have real powers to make decisions, control, use or have enjoyment of the income received (interest, dividends or royalties); the expression "*beneficiary owner*" designates an entity which actually benefits from the income (interest) that is paid to it;[4]

f) the **application of the Directive 2003/49** is effective when taxpayers demonstrate sufficiently that **the ultimate beneficial owner (or "second level beneficiary owner")** to which income is actually transferred, by the first recipient, has control over the use and enjoyment of the income and fulfils the remaining requirements laid down in the Directive (e.g., tax residence, legal form, etc.); tax authorities may refuse the benefits granted by a Directive if that Directive includes beneficial owner rules, and taxpayers fail to demonstrate they meet the requirements laid down in those rules; in those situations tax authorities, as long as they justify in a well sustained manner that requirements were not met by taxpayers, do not need to identify the ultimate or real beneficial owner of the income;

g) It is settled case-law that there is, in EU law, **a general legal principle that EU law cannot be relied on for abusive or fraudulent ends** (CJEU rulings on the following cases ***Halifax***, ***Cadbury Schweppes***, ***Cussens***, *and* ***Kofoed***, among others); said principle requires that Member State must refuse to grant the benefit of the provisions of EU law where they are relied upon not with a view of achieving the objectives of those provisions, but with the aim of benefiting from an advantage in EU law, although the conditions for benefiting from that advantage are fulfilled only formally (e.g. cases of non-genuine commercial operations); in the tax field, as a consequence of that principle, abusive tax practices are prohibited;

end, in the CJEU decision of February 26 2019 addressing Interest and Royalty Directive (C-115/16, C-118/16, C-119/16 y C-299/16), the beneficial owner would be used in the OECD technical sense in order to prevent specific abusive situations, in a way that leads the CJEU to distinguish in a clearer way the consequences derived from such clause (beneficial owner) if compared with those that result from the general prohibition of abuse (see: Haslehner and Kofler, "Three Observations on the Danish Beneficial Ownership cases", *Kluwer Tax Blog (KTB)*, April 2019).

[4] The CJEU declared that paragraph 4 of art.º 1 of the Directive 2003/49 corroborates the reference to economic reality by making the precision that a Member State company will be considered the beneficial owner of the interest or royalties only if it receives those payments for his own benefit and not in the capacity of a conduit for another person, that is, as an agent or nominee; the concept of beneficial owner concerns not a formally identified recipient, but rather the entity which benefits economically from the income received (interest, dividends and royalties) and, accordingly, has the power to freely determine the use to which it is put. Hence the CJEU seems to favour a factual analysis and not a strictly legal one. The concept of beneficial owner as the one that operated by the CJUE is very marked by the concept of abuse and the artificial arrangement test, considering that what is the most relevant is that the recipient has the actual control over the use of the income received "*in terms of substance*", through a contractual and factual analysis (see: CFE, "Opinion Statement ECJ-TF 2/2019 on the CJEU decisions of 26 February 2019 un Cases C-15/16, C-118/16 and 299/16, N Luxemburg I et al, and cases C-116/16 and C-117/17, T Denmark et al, concerning the beneficial ownership requirement and the anti-abuse principle in the company tax directives", June 2019, p. 17, and 19). Nevertheless, in connection with the burden of the proof on the taxpayer, the latter cannot be forced to produce evidence when that is very difficult or almost impossible, sufficing that taxpayer gathers facts that prove that it is not bound by a contract to transfer that income and has enough powers to use and manage that income.

h) the **general principle that abusive practices are prohibited** may be relied on ***against*** a person where that person invokes certain rules of EU law providing for an advantage in a manner which is not consistent with the objectives of those rules; we are, therefore, in the presence of an anti-abuse test that applies on a case-by-case basis and takes into account the facts and circumstances that relate to the case, to determine whether the attribution of tax benefits derived from the Directive at stake (Parent/Subsidiary or Interest and Royalty Directive) is consistent with the purposes of European law at hand, more than the strictly formal compliance of the requirements set forward; it is important to note that the CJEU claims that this EU principle is diverse and independent from similar domestic principles; as a consequence, even if a Member State has not adopted a general anti-abuse rule embodied in an EU Directive, that does not result in there being no protection against abuse of the Directives' provisions.[5]

i) the **concept of abusive practice** adopted by the CJEU in the rulings under analysis appears broader in scope and somewhat more flexible than in previous decisions, notwithstanding the attempt to harmonise the new approach with the previous one (see *Cadbury Schweppes*, *Polbud* o *Halifax*, cases); thus, on the one hand, it points out that to permit the setting up of financial arrangements whose sole aim is to benefit from the tax advantages resulting from the application of Directive 2003/49 would not be consistent with such objectives and, on the other hand, highlights the compatibility between the prohibition of abuse and the right to the pursuit, by the taxpayer, of the tax regime most favourable for him, in a way that cannot, as such, establish a general presumption of fraud or abuse based on the purpose of the transaction, considering that the prohibition of abuse requires that objective and subjective requirements relating to the artificiality of the operations (lacking economic reality) are met, and that the purpose of the rules applied is jeopardised;[6]

j) In relation to the elements that prove an abusive practice, the CJEU revisited its previous doctrine on the elements that should be observed and proved by tax authorities:

a) objective element: objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved, and

b) subjective element consisting in the intention to obtain an advantage from the EU (tax advantage) rules by artificially creating the conditions laid down for obtaining it; examination of a set of facts is, therefore, needed to establish whether the constituent elements of an abusive practice are present, namely;

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[5] That position advocated by the CJEU is consistent with preceding case law such as *Italmoda* (C-131/13) or *Cussens* (C-251/16), and represents somewhat an *overruling* of the doctrine conveyed by *Kofoed* C-321/05 (see: CFE, "Opinion Statement ECJ-TF 2/2019 on the CJEU decisions of 26 February 2019 un Cases C-15/16, C-118/16 and 299/16, N Luxemburg I et al, and cases C-116/16 and C-117/17, T Denmark et al, concerning the beneficial ownership requirement and the anti-abuse principle in the company tax directives", June 2019, p. 15-16).

[6] The fact that the ultimate beneficiary of the interest and royalties benefits from the same tax regime it could have benefited in light of a tax treaty concluded with the source state cannot be considered as a circumstance that, by itself, excludes the abuse of EU law, according to the CJEU. The CJEU, however, acknowledges that such fact may be an indicium that such an arrangement was not artificial and had not mainly a tax purpose. The OECD seems to adopt a similar position in the example M of the commentaries (para. 182) to art.º 29.9 OECD Model Convention 2017.

"*whether economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting from an improper advantage*";[7]

k) the CJEU specified a set of indicia (objective and consistent) which national tax authorities and courts should take into account when they have to determine the verification of the above mentioned **abusive practice elements**, based on the analysis of the circumstances present in each concrete situation; in relation to the indicia of potential abusive practices, the CJEU referred to the following:[8]

a) **Indicia of the existence of an arrangement intended to obtain improper entitlement to the exemption**: the circumstance rests on the fact that the income (interest) is, very soon after its receipt, passed on by the company that has received it to entities which do not fulfil the conditions for the application of Directive 2003/49; and

b) **Indicia (objective and consistent)** of the existence of an artificial arrangement (set up in an artificial manner in order to benefit from a tax advantage provided by EU law), namely: i) where the sole activity of the recipient of the interest is the receipt of it and its transmission to the beneficial owner or to other conduit companies; ii) the absence of economic activity of the entity, in light of its specific features, inferred from an analysis of several relevant factors (balance sheet, the structure of its costs and expenditure actually incurred, the staff that it employs and the premises and equipment that it has); iii) the existence of various intragroup contracts related to financial transactions with the aim of transferring profits from a profit-making commercial company to shareholding entities in order to avoid the tax burden or reduce it as much as possible,[9] in particular when the valuation of the intermediary companies' equity and the analysis of the transactions shows instrumental companies' inability to have economic use of the income received based on those intragroup contracts.

l) the CJEU has also dealt with the **"subject to tax and no exemption" requirement** laid down in the Interest and Royalty Directive [Art.º 3(a)(iii)], determining that such requirement is not fulfilled whenever the company at hand

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[7] It is important to note that those operations or arrangements whose goal is to obtain a tax advantage consistent with the rules to be applied are not contrary to the EU Law, neither represent an abusive practice, in line with what was observed by the CJEU itself (*Halifax* case) and the European legislator himself [paragraph 11 of foreword of the 2016/1164 Directive, ATAD; see.: Calderon and Martín Jiménez*, Derecho Tributario de la UE* (Valencia: Ciss 2019), 374].

[8] At the end of the day, the CJEU case law represents a kind of positive and negative guide on the existence of abusive practices by intermediary companies. According to the perspective of the negative guide results clear that "*letter box companies*" or mere "*front subsidiaries*" are examples of artificiality (*Cadbury*, C-196/04); in light of the positive perspective, the holding entity cannot be considered, in itself, an example of abuse (*Eqiom,* C-6/16). The CJEU "Danish Cases» rulings bring about new situations where intermediary companies or conduits represent artificial arrangements (especially when that lack substance and economic reality), but at the same time, we have to highlight, that this case law places many intermediary structures on the "grey zone", considering that it will be necessary to verify on a case-by-case basis, according to an integrated approach, if those structures that benefit from the EU Law have economic reality and, actually, operate (in similar terms see: B. Larking, "CJEU Decisions on Tax Avoidance and Conduits: More Questions than Answers", 25 et seq.).

[9] The CJEU in case *N Luxembourg 1* seems to attribute relevance, as an abuse indicium, to the circumstance that the Company benefiting from interest makes "*an insignificant taxable profit when it acts as a conduit company, in order to enable the flow of funds from the debtor company to the entity which is the beneficial owner of the sums paid*" (para. 130).

(in the situation under analysis it was a Luxembourgish SICAR), irrespective of being subject to taxation and not exempt from corporate tax in the Member State involved, is not taxed for the interest it is paid.[10] This interpretation of the subject to tax requirement covered by the Directive is controversial, considering that neither the beneficial owner's status demands that the derived income is actually taxed, nor does the Interest and Royalty Directive put forward an actual taxation requirement in relation to the recipient of income, except if a permanent establishment is in place. The *subject to tax and no exemption to corporate tax requirement* (Art.º 3. a.iii of the Interest and Royalty Directive) has been construed in a clear-cut manner, in the sense that it is understood as a subjective, rather than an objective requirement; in fact, the Commission itself made several proposals to modify the Directive, introducing a "*subject-to-tax*" requirement in relation to the income.[11] The CJEU adopted a not very clear interpretation of the *subject to tax and no exemption requirement*, by excluding its application in situations such as the ones involving Luxembourg SICARs where interest was exempt. It is true that the CJEU has already made clear that the *subjective tax liability with total income exemption* is available to an entity subject to corporate tax and equates to a situation where the requirement laid down in the Parent-Subsidiary Directive (Art.º 2.a.iii)[12] is met. As a result, the fact that the CJEU again, adopted a similar interpretation of the *subject-to-tax and no exemption* requirement of the Interest and Royalty Directive in the case *N Luxembourg* is not a total surprise, even though such an approach, based solely on a finalistic and extensive interpretation of the Directive, has the potential to collide with requirements set out by the Directive itself. Hence, it seems the CJEU does not accept that subject-to-tax and not exempted of corporate tax entities meet the requirements for the application of the Directives under analysis, whenever those entities are fully exempted (such as the as the dividends paid by subsidiary to the parent) or whenever interest and royalties covered are fully exempted. From the decisions under scrutiny one cannot derive, though, that a requirement of a minimum level of actual taxation may be set out, considering that it would jeopardise the principle of the autonomy of Member States in the field of direct taxation. Likewise, it seems also that a partial exemption applied to the tax base of an entity (e.g. via Patent Box) in relation to the income (royalties) excludes the possibility of applying the Directives. We can neither say that the CJEU's new approach to the *subject-to-tax and no exemption requirement* has probatory implications for the taxpayer which may be willing to benefit from the advantages provided by the Directives.

[10] For a similar position see.: Haslehner and Kofler, "Three Observations on the Danish Beneficial Ownership cases", *Kluwer Tax Blogg*, April 2019.

[11] See: CFE, "Opinion Statement ECJ-TF 2/2019 on the CJEU decisions of 26 February 2019 un Cases C-15/16, C-118/16 and 299/16, N Luxemburg I et al, and cases C-116/16 and C-117/17, T Denmark et al, concerning the beneficial ownership requirement and the anti-abuse principle in the company tax directives", June 2019, pp. 21-22.

[12] CJEU, March 8 of 2017, *Wereldhave*, C-448/15. It is not clear-cut how the mentioned *no total exemption of the entity* requirement operates in the context of the Parent/Subsidiary Directive when the Directive lays down overtly the exemption of the dividends covered by its purview. It might happen that such *participation exemption* encompasses capital gains; we think that such partial objective exemption does not affect the application of the Directive.

3. Remarks on the potential consequences of the CJEU decisions

The CJEU established a new doctrine about the interpretation of the concept of *beneficial owner* and abuse of law in connection with the Parent and Subsidiary Directive and the Interest and Royalty payments Directive which converges with international standards (OECD) about *beneficial owner* and *treaty shopping*.

However, there are some differences between the OECD approach and the EU law approach, in the sense that those legal contexts are ruled by different principles and rules which envisage heterogeneous purposes.[13] Those differences may imply that, in certain situations, a tax treaty between the source State and the resident State of the beneficial owner is applied rather than the Directives.[14]

In connection with what argued above, it is important to highlight that in accordance with those treaties that follow the OECD Model Convention, the *beneficial owner* rule is not an *anti-treaty shopping* rule of general scope, but simply a rule limited in scope. In fact, the OECD, both in a pre-BEPS and post-BEPS scenario, has acknowledged the limited purview of the beneficial owner clause, considering that both domestic general anti-abuse rules and specific anti-abuse rules may be applied to avoid the abusive application of tax treaties. It is interesting to notice, that BEPS Action 6 has not expanded the scope of the beneficial owner clause in order to curb the improper use of tax treaties, having simply developed a minimum standard, based on other specific anti-abuse rules.[15]

As a result, the absence of a beneficial owner in a tax treaty does not necessarily mean that the treaty in place becomes vulnerable to artificial arrangements leading to tax treaty abuse, in the sense that other rules could be applied to neutralise those operations, as it is recognised by the OECD.[16]

Moreover, we cannot overlook how the OECD, following the changes introduced in the 2003 OECD Model version aimed at "*clarifying*" and delimitating the scope of the application of the *beneficial owner* concept, by taking into consideration the reports produced by the Tax Committee in 1986 and 2002 about this topic, and by adapting the application of the *beneficial owner* rule to the "*CIVs*" ("*regulated open funds*") and "*Non-CIVs*" (*hedge funds, private equity funds*), through another series of reports[17]. The

[13] In connection with this, it is important to highlight how tax treaties and EU tax related Directives operate in different legal contexts and pursue heterogeneous goals, but also that the whole regulatory system they frame is consistent. The OECD has spelled out that situations related to intermediary holding companies operated by investment funds may not translate into abuse; the concept of beneficial owner is also framed in its scope by the relationship it has with CIV and *non-CIVs funds*.

[14] It is important to highlight that, as we have mentioned above, the CJEU seems to use the concept of beneficial owner in an heterogeneous manner, considering that in the framework of the Parent/ Subsidiary Directive said concept is more connected with general abusive situations resting on the idea of simulation, whereas in the framework of the Interest and Royalty Directive the focus is more specific and more linked with the technical sense OECD attributes to the concept of beneficial owner.

[15] The OECD OCDE/G20 Final Report regarding action 6 of the BEPS Action Plan (*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, October 2015, p. 17-18 and 81) refers to the beneficial owner rule as an *anti-treaty shopping* measure. However, it does not introduce specific changes in that clause, probably because its scope, as an anti-abuse measure, was already exhausted.

[16] See paragraph 12.5 of the Commentaries to art.º 10 OECD Model Convention, and paragraphs 7-12 of the commentaries to art.º 1 of 2014 OECD Model Convention, including the specific reference to the beneficial owner rule as an anti-abuse provision similar to art.º 17.2 of OECD Model Convention See: Martin Jiménez, "The 2003 Revision of the OECD Commentaries on the Improper Use of Tax Treaties: A Case for the declining effect of the OECD Commentaries?", *BIT*, January 2004, 17 *et. seq*.

[17] OECD, *The Granting of Treaty Benefits with respect to the Income of Collective Investment Vehicles,* (OECD

OECD clarified further that the *CIV* vehicles (and with some variation the *Non-CIVs*) comply with the *beneficial owner* test, whenever the administrators of the vehicle or entity (resident for the purposes of Art.º 4 of the OECDE MC) have discretionary powers to manage the assets generating income (beyond the powers of a mere nominee or fiduciary or conduit for another person), in a way that even if the statutes of the entity set out a rule concerning the annual distribution of income to the shareholders, that would not suffice to affect the beneficial owner status. Those circumstances should be analysed on a case-by-case basis according to the legal perspective of the residence state of the entities receiving the income.[18] The problems emerging from the application of *nti-treaty shopping* rules (Principal Purpose Test/PPT, Limitation of Benefits clause/ LOB) to these entities or investment vehicles are diverse, though.[19]

2010), OECD Public Discussion drafts, *Clarification of the meaning of the beneficial owner in the OECD Model Tax Convention,* drafts 2011 & 2012, enclosed in the 2014 OECDE MC of 2014 commentaries), and OECD, *Draft of Non-CIVs Examples* (OECD BEPS, Action 6, January 2017) enclosed in the 2017 OCDE MC.

[18] See the *OECD CIV Report 2010* (currently enclosed in the commentaries to art.º 1 of 2017 MC OECD MC, paragraphs 28 *et. seq.)* which determines that CIVs should be considered beneficial owners in relation to the income they obtain (dividends, interest, capital gains) whenever a set of requirements is met: a) CIV entity should qualify as a resident in the contracting State where it is established; and b) the managers of the CIV should have discretionary powers to manage the assets generating income, and to control the decisions related to the investments made. The fact that the statutes of these investment vehicles set out a contractual or legal obligation of distributing the yield of the investment should not be seen as excluding the application of the beneficial owner rule, every time OECD deems we are in the presence of a "*disconnected obligation*" of the income generated, in the source state, by the CIV. In connection with this, OECD clarified, through the commentaries introduced in 2014 in the OECD Model Convention, that the requirement related to the obligation of transferring the income to which the beneficial owner rule refers should be deemed as referring to certain specific income flows, and not to the global financial return obtained by a CIV. The report considers, therefore, that the funds with a broad base of investments (*CIVs & hedge funds*) of a general type qualify as beneficial owners for the purpose of arts.10-13 of tax treaties OECD Model based. In the case of the *Non-CIVs* (*private equity funds*) things are more complex, especially when the investment base is narrow. Consequently, the key to verify that the beneficial owner requirement was met relates to exercising discretionary powers over investments made, the management of those investments (including disinvestment) and the submission of evidence of the economic and operational functionality of the entity, so that it results proved that said entity does not operate as mere conduit without powers over the future use of the income generated by the assets of said entity. See, on this issue: T. Chew, "The Application of Tax Treaties to CIVs: Beneficial Owner Requirement Explained?", *Derivatives & Financial Instruments*, nº 6 (2015); Lawson, "Treaty Entitlement of Funds in the Post-BEPS World", in *Investment Fund Taxation*, ed. Hashlener, (Trevose, PA: Kluwer, 2018), oo.260 *et seq.*; and M. Merten, "Taxation of Investment Funds Following the OECD BEPS Initiative I", *BIT*, February 2019, 76 *et seq.*

[19] We think that the OECD Report (*Action 6 Final Report: Public discussion draft on non-CIV Examples*, OECD 2017), whose main conclusions were included in the commentary to art.º 29 of 2017 OCDE MC, represents an attempt by OECD to protect the *private equity* sector from an automatic application of the PPT (principal purpose test) clause that would stop tax treaties from being applied to vehicles or intermediary entities of investment used by that sector; as a result, the OECD claims that the application of the PPT in that context should be based on a fact and circumstance analysis and not on a general and pre-set conclusion that those vehicles have a mainly a tax purpose and that the application of tax treaties is contrary to the object and purpose of those treaties. Those examples are, therefore, mere illustrations of *bona fide* situations in which the inherent tax advantages are considered compatible with the object and purpose of the tax treaties. Those examples, however, do not set a *bona fide* standard that excludes them from the application of the PPT, neither lay down a *minimum* economic substance or a closed list of valid commercial motives. We consider that those examples do not succeed in terms of bringing clarity to the issue, and therefore, do not favour the development of investments done by funds using that type of vehicles, which, in a way, contrasts with purposes of tax treaties. See: Kuijk and Haarsma, "Reflections on the OECD´s Non-CIV Fund Examples", *Derivatives & Financial Instruments*,

It is important to highlight that the beneficial owner clause, in light of OECD's perspective, disregards the asset owner (e.g., shares, credit rights or intangibles) putting the emphasis on the control over the income derived from the asset or right.[20] Likewise, the mere majoritarian or total control of the company recipient of the income, by any means, stops that company from being considered as a beneficial owner. However, the application of an economic substance test, as an adjuvant criterion to determine if the recipient of income is a beneficial owner – although utilised in some jurisdictions in Asia, such as China[21] – is not covered by the content of that rule; even though that economic substance test is relevant for the application of measures tackling "*conduit companies*" or *treaty shopping* (such as *Limitation of Benefits clauses* and the *Principal Purpose test clause*).[22] Moreover, the absence of double non taxation or actual taxation of beneficial owner's income is not a requirement that must be met in order for an entity to be considered as such (a beneficial owner) and the tax treaty to be applied.

Despite the differences pointed out above between the OECD anti-abuse principles relating to tax treaties application and the CJEU doctrine on "*Directive Shopping*", we have to acknowledge that CJEU rulings on the "*Danish cases*" (despite the differences between the decisions)[23] should be read by tax authorities as making a case for the reinforcement of an extensive application of anti-abuse principles that sustains a stricter en*forcement* not only in relation to the requirements for the application of Parent/Subsidiary Directive and Interest and Royalty Directive, but also in relation to Tax treaties, in relation to situations that involve intermediary holding companies.[24]

It is important to observe that if those intermediary holding companies have an adequate level of operative and functional substance evinced by their commercial reality, they should not be negatively affected by this anti-abuse doctrine.[25] Nevertheless, we cannot, overlook the implications of a supposedly latent "*beneficiary owner*" clause, especially in the context of intermediary holding structures.[26]

nº 6 (2017).

[20] 2014 OECD Model Convention highlighted the relevance of having the beneficial owner entitled to the right of "*use and enjoyment*" over the obtained income, not limited by a legal or contractual obligation of transferring the income to another person (paragraph 4.3 of the commentaries to art.º 12 of 2014 OECD MC 2014).

[21] Qiu, D, "The concept of beneficial ownership in China´s tax treaties", *BIT*, February 2013.

[22] See: Jain, Prebble and Bunting, "Conduit companies, beneficial ownership, and the test of substantive business activity in claims for relief under double tax treaties", *eJournal of Tax Research*, vol. 11, nº 3 (2013): 408-412.

[23] We are addressing especially to the distinct CJEU doctrine on the beneficial owner in the context of Parent/Subsidiary Directive and Interest and Royalty Directive (see footnote nº 3).

[24] In fact, the authorities of some Member States have acknowledge that the CJEU case law on the concept of abusive tax practice (considered in a global way and not the one emerging from the "Danish cases" alone) may have some impact on the application of conventional anti-abuse rules, irrespectively of the difference in terms of legal context (tax treaties and tax Directives set forward different anti-abuse rules and represent different systems with heterogeneous purposes) and the fact taxa administrations have to analyse (EY, "Dutch Secretary of Finance shares views on impact of CJEU Danish cases to anti-abuse provisions in Dutch dividend withholding tax and corporate income tax", *Global Tax Alert,* June 19, 2019).

[25] Along the same lines: A. Iannaccone, "*T-Danmark*: A Milestone of CJEU Decision on Abuse of the Parent-Subsidiary Directive", *TNI*, June 24, 2019, 1361; y Bieber and Plowgian, "BEPS for Asset management*", KPMG Tax Flash*, July 3, 2019.

[26] See what was said in footnote nº 3 about when the company receiving the dividends is not the beneficial owner of those dividends for the purpose of the application of art.º 5 of the Parent/ ubsidiary Directive.

In a nutshell, the application of the "*Danish case*s" CJEU case law by tax authorities and national courts may bring about, not only an expansion of the concept of potential abusive arrangements but also affect the burden of proof, requiring a broader "*factual*" analysis of the abusive practice, in light of a set of abuse indicia that may be present in each situation. It is likely that this type of analysis and the emphasis it gives to different indicia will intensify the levels of legal uncertainty and tax risks associated with cross-border investment operations and arrangements.[27]

In connection with this, it is important to stress that the analysis of the application of benefits derived from Directives or Tax treaties should continue to be based on facts and circumstances present in each case, and should neither allow the mentioned "*Danish cases*" rulings to serve as an argument to presume that an abusive situation is in place, nor change the need for tax authorities to analyse the conditions present in each situation or arrangements, in a case-by-case (and global) basis.

Despite of what we have observed, it seems apparent that the anti-abuse rulings emerging from the "*Danish cases*", the same way the "*principal purpose test*" laid out in BEPS Action 6 and embodied in tax treaties through the Multilateral Instrument for BEPS Tax Treaty related measures (MLI) or bilateral agreements such as Protocols (or new treaties), further intensifies the level of legal uncertainty , in the sense that it blurs the divide between legitimate situations and those that can be considered abusive, generating, as a result, a "*chilling-effect*" in relation to those investments made by "*non-CIV funds*".[28]

In connection with what was said, we think the Commission and the tax authorities themselves could develop a "*practical guide*" in which the main criteria to determine when the EU Tax Directives or tax treaties would legitimately apply would be compiled in an open and generic manner, in order to reduce the high level of legal uncertainty, which constitutes a major hurdle to *bona fide* investments.

In spite of what was said, we have to stress that "the *Danish cases*" cannot be taken separately or in an insulated way from the series of the CJEU cases dealing with principles applied to the prevention of abusive tax practices (e.g., ***Halifax, Cadbury Schweppes*, *Denkavit*, *Equiom*, *Deister Holding & Juhler Holding*, *GS***, amongst other)[29] and neither can they be construed as establishing a presumption of intermediary holding companies constituting abusive arrangements to which Parent/Subsidiary Directive and Interest and Royalty Directive do not apply. Likewise, that case law cannot be extrapolated in an automatic way to tax treaties or other instruments (e.g., Bilateral/Multilateral Investment Treaties), which are ruled by distinct principles and pursue different goals.

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[27] Along the same lines: Hoor, "Danish Court´s Questions on Beneficial Ownership", *Bloomberg Tax,* May 8, 2019; y McLoughlin, "CJEU Beneficial Ownership Cases Could Spawn Varying Approaches", *TNI,* April 22, 2019, 361 ss.

[28] Gagnon advocates a similar position ("Traveling without a Destination: Post-BEPS Anti-Treaty-Shopping Rules and Non-CIV Funds in Canada and the US", *TNI*, September 4, 2017, 987), in relation to PPT and its impact an investments made through *private equity* vehicles, bringing the attention to the commentaries on large investment funds, such as *Blackrock*.

[29] In connection with these rulings, see: Calderón and Martín, *Derecho Tributario de la UE*, 228 *et seq*.