Danish Cases on the Use of Holding Companies for Cross-Border Dividends and Interest – A New Test to Disentangle Abuse from Real Economic Activity?

This article provides a critical analysis of the rulings from the European Court of Justice in six Danish cases on the use of holding companies for cross-border dividends and interest, the so-called “Danish beneficial ownership cases”. The rulings are analysed in light of their unique facts and background to provide a better understanding of their outcome. In particular, the indications of abusive situations as provided by the Court are analysed in the light of economic theory in order to ascertain their meaning and effectiveness in disentangling abusive behaviour from valid business activity. Finally, this assessment is used to substantiate that the subjective element of the abuse test as developed by the Court has developed into an economic assessment to be based on everyday hallmarks of economic standards, rather than a legal assessment.

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1. Introduction

With the introduction of the Organisation for Economic Co-operation and Development’s (OECD) Base Erosion and Profit Shifting Project (BEPS) in 2015 and the European Union Anti-Tax Avoidance Directive (ATAD) in 2016, tax strategies to exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax jurisdictions have been limited. Introducing different forms of general anti-avoidance rules, each project has raised the need for both taxpayers and tax administrations (Member States) to master the art of separating abuse from real economic activity. This is no easy task, especially when guided by rules that are defined by the very fact that they are general in nature.

Given the number of states participating and given that the general anti-avoidance rules, i.e. the principal purposes Test (PPT) in BEPS and the general anti-avoidance rule (GAAR) in ATAD are minimum requirements, the prevalence of these rules is of an unprecedented scale. What is also without precedent is the level of alignment between the European Union and the OECD in the methods to combat tax avoidance. This newfound common ground raises a number of questions about the interpretation of the rules and, consequently, it creates a need for clarification.
On 26 February 2019, the Court of Justice of the European Union (CJEU), or more specifically the Court of Justice (ECJ), handed down the rulings in six Danish cases regarding cross-border dividends and interest, which have popularly been dubbed “the Danish beneficial ownership cases” (here also referred to as the “Danish BO cases”). These rulings have shed new light on what is considered abusive behaviour in EU direct tax law, and due to the fundamentally economic nature of the abuse assessment composed by the ECJ, they have provided new tools for disentangling abusive behaviour from valid business activity. This new method is the fascinating outcome of a range of cases brought on by a Member State in search of a legal basis for combatting group structures it no longer desired to attract. On one hand, the ECJ has provided the tax administration with a potent weapon to define and combat abuse, but on the other hand, it has also provided meaning to the notion of abuse in a way that taxpayers can use in order to obtain certainty. This is done by clarifying that the subjective element of the abuse test is an economic assessment to be based on everyday hallmarks of economic standards.

The purpose of this article is to analyse the rulings to assess how they contribute to disentangling abusive behaviour from real economic activity in EU direct tax law. This is done by reference to the existing case law from the ECJ and by deciphering the guidelines for determining abusive behaviour provided in the rulings and viewing them in the light of economic theory. Finally, these findings are put into perspective by reflecting on the future implications for both corporations, tax advisers and tax administrations.

Section 2. of this article provides a short overview of the legal framework and the Opinions from the Advocate General (AG) in the cases to form the basis of the analysis of the anti-abuse principle. In section 3., the outcome of the cases is viewed in light of the definition of beneficial ownership and the notion of abuse in EU law, and in section 4. the Member States’ obligation to deny benefits in abusive situations is examined. Section 5. examines the outcome of the cases in light of economic theory, and section 6. concludes and provides a perspective of the practical implications of the cases.

2. Introductory Remarks

The world of international tax law is ever evolving and changing, and since 26 February 2019, it appears to have taken a new shape after the ECJ handed down its preliminary rulings in the long expected Danish BO-cases. With these rulings, the Court has provided a number of answers as requested by Denmark and simultaneously opened the gates for new technical puzzles to be solved in the years to come. The cases are currently pending before the Danish Eastern and Western High Courts as the court of first instance, i.e. referred to the High Court from the District Court that would normally be the court of first instance, as they are expected to set the precedent for combatting tax abuse and avoidance at a domestic level. Because the High Courts are the first instance in the cases, they can be appealed to the Danish Supreme Court without obtaining permission from the Danish Appeals Permission Board. Presumably, the cases will continue to the Danish Supreme Court no matter if the outcome is in favour of the taxpayers or the Danish Ministry of Taxation simply due to the very large potential taxable amounts involved. This means that it is likely to still take several years before they are finally decided at a national level. Despite the very distant prospect of the final national rulings, several important outcomes can be derived from the cases already at this point.
The rulings will inevitably mean a change for many taxpayers in how they compose their tax policy, for advisers in how they assist the taxpayers in solving this task and finally for the Member States and tax administrations in how they deal with these issues.

The preliminary rulings provided four key messages, which will be the focus of this article: (1) a self-executing anti-abuse principle exists in EU direct tax law; (2) disentangling abusive activity from real business activity is an economic analysis, not a legal one; (3) a specific definition of “beneficial ownership” has been provided for EU tax law; and (4) Member States are obliged – not just allowed – to deny benefits in case of abuse.

Whereas the rulings certainly provide interpretative aid in relation to abusive activities, they also raise several questions that are likely to keep scholars, tax lawyers and administrations busy for the foreseeable future. Several scholarly articles have already contributed their view on the rulings with varying degrees of scepticism, but no matter the view on the rulings, they are landmark decisions decided by a full court. In the author’s view, there are important and positive results for the taxpayers as well, as they will be able to apply the general anti-abuse principle from the ECJ for their own benefit and demonstrate the right to certain benefits from e.g. the Parent-Subsidiary Directive in cases where there is in fact not abuse. Furthermore, actual guidelines based on everyday hallmarks of economic standards are provided by the rulings, and these guidelines are not only useful in distinguishing abuse from real economic activity, they also substantiate that this assessment to determine the apportionment between tax considerations and other valid business considerations should not be a test of the taxpayer's reprehensible intentions, as it is simply an economic test. Ultimately, this should aid taxpayers in lifting their burden of proof when it is shifted to them from the tax administration, and they need to demonstrate their valid business considerations.

2.1. Background

The history of the Danish BO-cases is ultimately a story of the rapid development of international tax policy in recent years and of the pitfalls of an international tax system that is in need of an overhaul in more ways. In order to assess why such overhaul is needed, some background is necessary:

The challenges in the international tax system are rooted in the fact that under international law each state is entitled to tax persons or transactions with which it has a sufficient nexus. Consequently, states generally tax companies based on their residence or based on the source of the relevant income. In cases of cross-border activity, two or more states may have a sufficient nexus and therefore the right to tax. States deal with this issue both unilaterally through domestic law and bilaterally through double tax treaties (DTTs). Another challenge is the distinction traditionally made between business (active) and investment considerations.

3. An example of this is the OECD/G20 Inclusive Framework’s, Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy (OECD 2019), which entails the most significant reforms of the international tax system in decades, namely a reallocation of taxing rights and the introduction of a global minimum tax.
(passive) income, where the OECD defines passive income as: “income in respect of which, broadly speaking, the recipient does not participate in the business activity giving rise to the income, e.g. dividends, interest, rental income, royalties etc.” At a unilateral level, states may choose to tax certain forms of passive income paid to foreign companies at lower rates or not at all, e.g. dividends paid to shareholders holding more than a certain percentage of shares in a domestic company. At a bilateral level, the DTTS generally allocate the primary taxing rights over passive income such as dividends and interest subject to the source state’s restricted right to impose a withholding tax. The result is that under the DTTS, the source countries forfeit their right to tax passive income paid to non-residents or to reduce this tax. This feature provides the backbone for many archetypes of tax planning structures. At an EU level, the Parent-Subsidiary Directive (90/435/EC) (PSD), the Interest and Royalties Directive (2003/49/EC) (IRD) and the case law of the ECJ has significantly influenced the domestic laws of the Member States and considerably constrained their freedom in designing their domestic tax laws on cross-border activity.

The fundamental allocation of taxing rights to active income to source states and taxing rights to passive income to residence states pervades the international tax system and has also been dubbed the “1920s compromise”, as it originates all the way back to the work of the League of Nations almost a century ago. This system is flawed in the context of today’s world as it is ill-suited to contain modern MNEs and their cross-border activities, and especially because this system invites states to compete with each other, which undermines the system.

When deciding their international tax policies, governments will seek to raise revenue, and may also desire to attract investment by engaging in tax competition. In the late 1990s/early 2000s, this was exactly what Denmark attempted by profiling itself as a very attractive jurisdiction for establishing holding companies as there was no withholding tax on dividends paid to parent companies, regardless of residence. This policy was criticized by the European Union for being unfair tax competition, and in 2001 a condition that the withholding tax was lowered only in cases covered by either the Parent-Subsidiary Directive and/or in case a DTT was added as a requirement for the exemption to withhold the taxes.

8. For a thorough analysis on this issue, see e.g. J. Vella, Nominal vs. Effective Corporate Tax Rates Applied by MNEs and an Overview of Aggressive Tax Planning Tools, Instruments and Methods: In-Depth Analysis for the TAXE Special Committee, European Parliament (Oct. 2015).
A couple of years later, national political attention turned towards a number of large Danish corporations that had been acquired by private equity funds under highly leveraged structures, resulting in a potential decrease in corporate income tax from these companies, at least from a theoretical point of view. Consequently, the Danish tax authorities launched a project to investigate seven specific acquisitions in order to determine whether they were compliant, inter alia, in terms of withholding taxes on dividends. The morale of the story appeared to be that as a taxpayer, you only have the advantage until the political winds change as Denmark had indeed attracted international groups to establish holding companies on its territory and then amended its attractive tax legislation again, as was also pointed out by AG Juliane Kokott in her Opinions.

It became apparent that determining whether or not these multinationals were in fact entitled to the benefits of the PSD and the IRD was no easy quest. Some of the cases went to the High Courts of Denmark, and on 19 February 2016, the High Courts of Eastern and Western Denmark brought a series of them before the ECJ for a preliminary ruling, two cases on withholding tax on dividends distributed by Danish companies to foreign parent companies and four cases regarding payments of interest from Danish subsidiaries to foreign entities. The cases, namely *Skatteministeriet v. T Danmark* (Case C-116/16) and *Skatteministeriet v. Y Denmark* (Case C-117/16) (both on dividends) and *N Luxembourg I and Others v. Skatteministeriet* (Case C-115/16), *X Denmark A/S v. Skatteministeriet* (Case C-118/16), *C Danmark I v. Skatteministeriet* (Case C-119/16) and *Z Denmark v. Skatteministeriet* (Case C-299/16) (all on interest), were reviewed collectively by the ECJ. The heart of the matter concerned the issue as to whether there was a clear legal basis for denying the benefits, and if so, how to apply the rules. These issues will be described in the next section.

### 2.2. Legal framework

The six cases concern source taxation of interest and dividends paid by Danish subsidiaries to their EU parent companies. In four of the cases (one on dividends and three on interest), the global ultimate parent was a private equity fund, i.e. its investors. In two of the cases (one on dividends and one on interest), the global ultimate parent company was resident in the US and the structure included a tax haven in Bermuda or the Cayman Islands.

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13. DK: ECJ, 26 Feb. 2019, Joined Cases C-115/16, C-118/16, C-119/16, C-299/16, *N Luxembourg I and Others v. Skatteministeriet*, Case Law IBFD was brought before the ECJ by the High Court of Western Denmark.
15. *Y Denmark Aps* (C-117/16).
17. *X Denmark A/S* (C-118/16).
18. *C Danmark I* (C-119/16).
19. *Z Denmark* (C-299/16).
20. For an extensive description of the facts, see S.H. Baerentzen, *Cross-Border Dividend and Interest Payments and Holding Companies – An Analysis of Advocate General Kokott’s Opinions in the Danish...*
In all of the cases, the Danish tax authorities and the Danish Tax Tribunal had argued that the immediate recipient of the dividends or the interest was not the “beneficial owner” according to the relevant tax treaty or the PSD or the IRD.

The Tax Tribunal, however, endorsed the taxpayers’ claim that they were not obligated to withhold tax at source for the dividends, as the PSD at the time did not contain a beneficial ownership requirement. The concept of “beneficial ownership” is not known under Danish tax law.\(^{21}\) In fact, until 2008-2009, when the Danish tax authorities initiated the cases, the term had been equated to the Danish concept of “the rightful income recipient” (rette indkomstmødtager), which was determined as a result of case law on the subject from before 2008-2009.\(^{22}\) The rightful recipient is the person to whom the income is allocated for tax purposes regardless of formal appearance, i.e. the civil law owner of the underlying shares in respect of dividends and the creditor under civil law for the purposes of interest.

The principle of the “rightful income recipient” was one of two case law-based general anti-avoidance principles that was considered a possible basis for reassessment in tax cases. The other was a substance-over-form doctrine (the so-called Danish reality doctrine), which has been heavily debated under Danish tax law. Both parties in the cases agreed that none of the two principles was applicable in the cases, and therefore they will not be described further in this article.

The IRD is designed to eliminate withholding taxes on cross-border interest payments within a group by abolishing withholding taxes on interest payments arising in an EU source Member State. Correspondingly, the PSD provides companies with a right to exempt dividends and other profit distributions paid by subsidiaries to their parent company in another Member State from withholding taxes, etc., provided certain conditions are met. Both Directives provide Member States with the possibility of applying domestic or agreement-based provisions for the prevention of fraud or abuse. Composing tax legislation is always difficult and writing it to be sufficiently efficient in combating anti-avoidance is especially so. Prior to 2015, Denmark had not yet implemented any anti-abuse measures under statutory law, and the question remained whether there was a basis for the Danish Ministry of Taxation to maintain that the recipients of the dividends or interest were not, in fact, the “beneficial owners”, thus allowing the Danish tax authorities to deny the benefit of a withholding tax exemption. A non-statutory general anti-avoidance rule to disregard dispositions that are formally legal but are in fact abusive can be found in the case law of the Danish Supreme Court. The Supreme Court has never disregarded a legally incorporated company merely on the basis that the company has been incorporated in order to obtain a tax advantage.\(^{23}\) Furthermore, the Supreme Court has stated that the mere fact that a

\(^{21}\) The term has however been part of the Danish double tax treaties in different versions already from the 1950s, e.g. in the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income between Denmark and the United Kingdom (27 Mar. 1950), in which it was a requirement for the lowering of the withholding tax that the recipient was the “beneficial owner” of the shares in the distributing company.


holding company’s sole activity consists of owning shares in its subsidiary does not equate a complete lack of economic activity in the company.\textsuperscript{24}

Therefore, the heart of the matter was whether there was any kind of legal basis to deny the benefits in these cases that had become the centre of attention of the tax administration. It is uncertain whether Denmark would in fact have had any clear legal basis in the form of a non-statutory anti-abuse principle that would have sufficed as an anti-abuse provision according to the PSD or the IRD and therefore would have resulted in the denying of benefits, and as the following sections will demonstrate, the ECJ argumentation in these cases has largely been lifted from the argumentation brought on by the Danish Ministry of Taxation.

Overall, the questions referred to the ECJ concerned the following subjects:

(i) implementation of the Directives into Danish law: more specifically, whether the transposition into Danish tax law can be regarded as containing an anti-abuse provision;

(ii) tax treaties: according to the OECD Model, source taxation of dividends/interest depends on whether the recipient of the dividends/interest is considered the beneficial owner of the shares from which the dividends are derived or of the receivables/dividends (the investment) from which interest is derived, respectively. The question is what type of legal basis or source is required in order to accept such a basis or source as sufficient; and

(iii) the notion of “beneficial owner”: if the question above is answered in the affirmative, then several more questions relating to the definition of the concept of beneficial ownership arise.

\textbf{2.3. \textit{Difference from AG Kokott’s Opinions}}

On 1 March 2018, AG Juliane Kokott delivered her Opinions,\textsuperscript{25} handling each of the six cases separately, but the final preliminary rulings from the ECJ were bundled into two: Case C-116/16\textsuperscript{26} for the dividend cases and Case C-115/16\textsuperscript{27} for the interest cases.

When AG Kokott delivered her Opinion, the directionality of the outcome was very different from the final rulings.\textsuperscript{28} She recommended that the ECJ maintained its hard-line position on what will be permitted as a derogation or a justification for Member States imposing tax treatment disadvantageously across borders, notwithstanding political pressure to combat tax avoidance. In the interest cases, her introductory remark was that:

\begin{quote}
In 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 of Justice and not every action by an individual to reduce their tax should be open to a verdict of abuse.
\end{quote}

With those words of caution, AG Kokott clearly recommended that the ECJ not give in to the prevailing political sentiment, but that it should keep focus on the basic European internal market rights and the construction of the Directives. More specifically, based on

\begin{itemize}
\item \textsuperscript{26} \textit{T Danmark et al.} (C-116/16 and C-117/16).
\item \textsuperscript{27} \textit{N Luxembourg 1 and Others} (C-115/16, C-118/16, C-119/16 and C-299/16).
\item \textsuperscript{28} For a thorough analysis of AG Kokott’s Opinion in these cases, \textit{see} Baerentzen, \textit{supra} n. 20.
\end{itemize}
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the principle of legal certainty, she recommended that the ECJ should maintain the principle recognized in the Kofoed case that a direct application of the Directive or a general anti-abuse principle to the detriment of the taxpayers should not be possible for Denmark but at the same time keeping the option open that the specific Danish reality doctrine could provide a legal basis to disregard certain structures in case of abuse.

It would appear as if time has worked in the interest of the tax administrations in the year that followed before the final preliminary rulings were handed down with a very different outcome. One substantial element from AG Kokott’s Opinions did transcend to the final rulings concerning the definition of the concept of abuse under EU law, where she refers to the ATAD, which was not yet in force in the years at issue. While this reference to a future anti-avoidance provision may have given rise to critical remarks, this discussion is outside the scope of this article and for the purpose of the analysis here it should simply be noted that the reference was made and that it would appear that the intention was to highlight that the ATAD GAAR is lifted from many years of case law from the ECJ on anti-abuse doctrines and provisions, which will be analysed further in section 3.3.1.

For the abuse assessment, AG Kokott identified that the criterion 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. Defining an arrangement as “non-genuine” to the extent that it was not put into place for valid commercial reasons reflecting economic reality, it follows that an arrangement that is not wholly artificial can still represent an abuse of EU law if it is put in place with the essential aim of obtaining a tax advantage.

This focus on the apportionment between the taxpayer’s individual tax advantages and other business advantages is what we now regard as the subjective element of the abuse test, and the focus on this element has been carried on by the ECJ in the final rulings, as will be analysed further in sections 3.4.1. and 5.2.

Another significant difference from AG Kokott’s Opinions, which will be analysed in section 3.2., is on the concept of beneficial owner, which she recommended should be given an autonomous interpretation of Union law, separate from article 11 of the OECD Model Tax Convention on Income and on Capital (1977) and subsequent versions. This recommendation was based in particular on the concern that the potential impact of amendments to the OECD Model and comments made after the adoption of the Directive would have, as this approach would place the OECD member states in a position to determine how an EU

29. Opinion of AG Kokott in N Luxembourg 1 and Others (C-115/16, C-118/16, C-119/16 and C-299/16), para. 99 et seq.
31. Baerentzen, supra n. 20, at p. 345.
34. OECD Model Tax Convention on Income and on Capital (11 Apr. 1977), Treaties & Models IBFD.
Directive should be interpreted. In AG Kokott’s view, an OECD-conform interpretation should only be used if the wording and the history of the Directive’s origins show that the EU legislator has been guided by the wording of an OECD Model and the Commentary thereto available at the time.

3. Understanding the Outcome

When analysing the outcome, it is important to remember the context of the cases and how they were submitted to the ECJ for the preliminary rulings in order to properly assess their impact and extent. The details are numerous and very unique, which is important when assessing their general impact on EU direct tax law. As mentioned in section 1, the cases have originated in a Member State without a statutory general anti-avoidance rule in search of a legal basis for combating situations perceived as abusive. In the search for such a foundation, the Danish Ministry of Taxation has looked far and wide in its search, including in EU direct tax case law and international case law on beneficial ownership. The rulings in the cases and in particular the argumentation behind these rulings is a direct result of this background.

3.1. Assessing the facts

Stating that the Danish cases are complex and extensive is hardly an exaggeration, as the ECJ rightly points out that the facts are both “particularly complex and detailed. Only the matters necessary for the answers to be given to the questions referred for a preliminary ruling will be noted.” Furthermore, the fact that the cases have been anonymized and boiled down to a set of high-level descriptions does not make it easier to deduct the ECJ’s motives for emphasizing specific facts. Presumably it has been equally complicated for the Court to fully grasp the facts of the cases and identify which ones to prioritize. Some authors have even argued that the reason for the outcome in the rulings that the general anti-abuse principle in EU law is self-executing may to some extent be explained by the lacunae in the Danish legislation.

In the author’s view, there is no question that the ECJ has developed its general anti-abuse principle by adding that it is self-executing, as will be analysed below under section 3.3.1., and that this recent addition is not merely a natural continuation of the Court’s case law but rather a result of the recent current world of international taxation and, frankly, not a result that the Court would have reached if Denmark had had a more substantial legal foundation to combat the structures.

The numerous questions asked by the Danish High Courts were carefully drafted to include every possible detailed legal issue, and the questions related to anti-avoidance concerned two things: (i) the interpretation of beneficial ownership in the IRD and (ii) the prevention

36. Id., para. 53.
37. Id., para. 52.
38. T Danmark et al. (C-116/16 and C-117/16), para. 29 and N Luxembourg 1 and Others (C-115/16, C-118/16, C-119/16 and C-299/16), para. 36.
of tax avoidance in the form of directive shopping by means of a domestic non-statutory doctrine or specific anti-avoidance clauses in the tax treaties. The ECJ did provide its interpretation of beneficial ownership in EU law, but apart from this, the Court almost entirely shifted the focus away from beneficial ownership as a concept, as enquired into by the referring courts, to a focus on the notion of abuse in EU law. The same shift was made by AG Kokott in her Opinions on the cases.

Therefore, when reading the rulings, it is important to bear in mind the context in which they were handed down. First, as mentioned above, the high level of uncertainty surrounding any potential legal basis resulted in what could be described as grasping for straws by the Danish Ministry of Taxation in order to rectify the apparent lack of a transposition of the anti-abuse provisions in the PSD and the IRD into Danish domestic legislation.

Second, prior to being submitted to the ECJ, the cases have been processed for an extensive period of time before the Danish administrative authorities and the national courts, and each step has contributed to the complexity of the cases and added to their facts. While the overarching theme of the six cases might be the same, they are unique in their fact pattern and history, and the questions raised in the requests are very much linked to these individual circumstances.

The challenge is further exacerbated as the ECJ must base the rulings on the facts and materials provided as they are presented by the parties in the preliminary proceedings. The facts presented are different in nature and can be divided into two categories: (i) adjudicative facts that concern the individual parties of the pending cases and that are typically determined by the courts, and (ii) legislative facts that constitute general facts and assumptions, which form the basis of the lawmaker’s decisions.\(^{40}\)

International courts usually have less access to the underlying facts simply due to their geographical and cultural distance from the case, but no matter how uncertain the facts are, the court must always decide the case before it, although of course the task becomes easier when such a court does not in itself decide the case but merely pronounces more general sentences in the shape of a preliminary ruling. This distance to the case means that the court must found its judgments on the facts as presented in the preliminary reference order, and the national rules of law in question are considered part of these facts. As is the case with the Danish BO cases, this means that law and facts can be difficult to distinguish clearly, which makes it more difficult for the ECJ to provide useful guidance to the national courts, ultimately leading to legal uncertainty.\(^{41}\) The question then arises which party benefits and which party is burdened by that uncertainty, and the ECJ seems to have attempted to mitigate this issue by drawing out the contours of abuse by the indications of the subjective element of the abuse test.

Although it is not for the Court to assess the facts in the main proceedings, the ECJ can still specify indicia in order to guide the national court in the assessment of the cases that it has to decide. In the main proceedings, whilst the presence of a number of such indications


could lead to the conclusion that there is an abuse of rights, it is nevertheless for the referring court to establish whether those indications are objective and consistent, and whether the taxpayers in the main proceedings have had the opportunity to adduce evidence to the contrary.\textsuperscript{42}

In assessing the facts, both AG Kokott and the ECJ have clearly diverged from the focus on beneficial ownership as an anti-avoidance tool, to a focus on the notion of abuse in EU law. The difference between the Opinions and the preliminary rulings in this regard very much lies in the fact that the rulings favour a dynamic interpretation of the notion of beneficial ownership, which included interpretative aid from the OECD Model Commentaries, and which altogether seems to be very much in line with the argumentation by the Danish Ministry of Taxation in the cases, as will be analysed in section 3.2.

### 3.2. Beneficial ownership according to the ECJ – Alignment between the European Union and the OECD

Since the proceedings began in the Danish BO cases almost a decade ago, much has happened in the field of international corporate taxation. The challenges related to tax avoidance have moved up on the political agendas at both the OECD and the European Union, and both agendas have been aligned towards similar measures to provide solutions to handle them. When the Council adopted the ATAD on 12 July 2016, the consequence was an implementation of anti-avoidance rules directly into the domestic tax systems of the EU Member States. These anti-avoidance rules bear a clear resemblance to the OECD anti-base erosion and profit shifting rules, which the ATAD is intended to implement.

One of the examples is article 6 of the ATAD providing the EU Member States with a GAAR to disregard non-genuine arrangements that have been put in place to defeat the object or purpose of the applicable tax law with the aim of reducing the effective tax burden. The provision was a minimum requirement to be implemented by all Member States by 1 January 2019, and the fundamental structure is similar to the principal purposes test (PPT) in Action 6 of the OECD’s BEPS Project.\textsuperscript{43} In the OECD’s BEPS Project, this PPT rule is implemented by the Multilateral Convention (MLI)\textsuperscript{44} and the 2017 Commentary to the OECD Model.\textsuperscript{45} Similar to the ATAD GAAR, it provides the Member States with a legal basis to disregard certain structures put in place to obtain a tax advantage contrary to the object and purpose of the DTT.

When analysing international tax law in 2019, it appears therefore that the tax administrations in both the EU and the OECD Member States have been equipped with a very potent weapon to combat tax avoidance. While the paths towards the ATAD GAAR and the BEPS PPT may have led to neighbouring destinations, the journeys towards them have taken different routes.

\begin{itemize}
\item \textsuperscript{42} T Danmark et al. (C-116/16 and C-117/16), para. 99 and N Luxembourg 1 and Others (C-115/16, C-118/16, C-119/16 and C-299/16), para. 126.
\item \textsuperscript{44} Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (2017), Treaties & Models IBFD [hereinafter MLI].
\item \textsuperscript{45} OECD Model Tax Convention on Income and on Capital (21 Nov. 2017), Treaties & Models IBFD.
\end{itemize}
Although the ECJ has deviated from the focus of beneficial ownership, initially it states that the concept should have an autonomous meaning in EU law that cannot refer to concepts of national law that vary in scope.\(^\text{46}\) In addition, the Court applies a number of interpretative methods to give meaning to the notion of beneficial ownership in EU law, including a systematic, comparative literal, historical and teleological method.\(^\text{47}\) The ECJ has established some sort of beneficial ownership notion which was inspired by the OECD, but which has mostly been lifted from the argumentation of the Danish Ministry of Taxation in the cases. While it can be argued that the Ministry has simply been correct in its assumptions as regards beneficial ownership as understood in EU law, it appears from the facts of the cases that it has cherry-picked the elements of the different OECD contributions to suit its own agenda, as its argumentation seems to rely on particularly the 2003 and the 2014 updates to the OECD Model Commentary.\(^\text{48}\)

To sum up the basics, the IRD is designed to eliminate withholding taxes on cross-border interest payments within a group by abolishing withholding taxes on interest payments arising in an EU source Member State. A condition for the Directive to apply is that the beneficial owner of the payment is a company or permanent establishment in a Member State. Article 1(4) of the Directive provides the following definition:

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. (Emphasis added.)

This definition of beneficial ownership is composed of a positive condition, i.e. “to receive the payment for its own benefit” and a negative one, i.e. not to receive the payments “as an intermediary, such as an agent, trustee or authorised signatory, for some other person”. The negative definition is clear, and the crux of the matter lies in what is to be understood by “for its own benefit”, which has been a topic for debate for a long time.

From the side of the Danish Ministry of Taxation it was argued in the interest cases that the concept of “beneficial owner” in the IRD should be interpreted in accordance with the same concept in the OECD Model. This argument was based on two things:

1. AG Eleanor Sharpston’s Opinion of 12 May 2011 in Scheuten Solar Technology GmbH, paragraph 66;\(^\text{49}\)
2. the legislative history of the IRD,\(^\text{50}\) for instance, pages 5, 6 and 8, which state that the Directive is largely based on the OECD Model.

\(^{46}\) N Luxembourg 1 and Others (C-115/16, C-118/16, C-119/16 and C-299/16), para. 84
\(^{47}\) For a thorough analysis of this subject, see Zalasinski, supra n. 1, at p. 6 et seq.
Regarding AG Sharpston’s Opinion, her argument for turning to the OECD Model for interpretative aid was that the IRD was in fact inspired by the OECD Model and that, consequently, the aim to eliminate juridical double taxation in the Directive could then only refer to taxation of income received by the beneficial owner of the interest.\textsuperscript{51}

66. For the sake of completeness, I recall that the Commission’s proposal for Directive 2003/49 was influenced by the OECD Model Tax Convention, the main purpose of which is to set out a means of dealing, on a uniform basis, with the most common problems that arise in the context of international juridical double taxation. Its objective is to introduce a system which ensures that the beneficial owner pays tax in his home State and to minimise the taxation and associated administrative burdens borne by the beneficial owner who receives cross-border interest payments.

67. It therefore seems to me that the words “double taxation” in Directive 2003/49 can only refer to taxation of income received by the beneficial owner of interest. Accordingly, the payer of interest is not included within the exemption from tax provided for in Article 1(1). (Emphasis added.)

In the preliminary rulings, the ECJ makes reference to the rulings in the Scheuten Solar case and concludes that the notion of “beneficial ownership” must be interpreted as referring to an entity which actually benefits from the interest paid to it, stating that:

The concept of “beneficial owner of the interest”, within the meaning of Directive 2003/49, must therefore, be interpreted as designating an entity which actually benefits from the interest that is paid to it. Article 1(4) of the directive confirms that reference to economic reality by stating that a company of a Member State is to 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.\textsuperscript{52}

The fact that the ECJ deals with the concept of beneficial ownership in relation to abuse of rights may be an issue, but it is hardly that surprising since that was how the cases initiated: with the Danish Ministry of Taxation throwing the beneficial ownership requirement into the mix of the abuse assessment to provide a legal basis for denying the benefits according to the PSD and the IRD. As described in section 3.1., the ECJ’s preliminary rulings are only as clear as the requests they are based on and, given the cases at hand, the mixed outcome is understandable.

This entanglement of the basic requirements to benefits from the IRD or the DTT and the abuse assessment is enhanced by the way the ECJ attempts to connect the dots between the notion of beneficial ownership in the IRD and the OECD interpretation. The Court considers that the 1996 OECD Model,\textsuperscript{53} its successive amendments and Commentaries on it are relevant to the interpretation of the concept of beneficial owner. It then follows, according to the Court, that “conduit companies” are excluded from this concept and that it must not be understood in a narrow technical sense, but in such a way as to avoid double taxation and to prevent tax evasion or avoidance.\textsuperscript{54}


\textsuperscript{52} N Luxembourg 1 and Others (C-115/16, C-118/16, C-119/16 and C-299/16), para. 88.

\textsuperscript{53} OECD Model Tax Convention on Income and on Capital and OECD Model Tax Convention on Income and on Capital: Commentary (1 Sept. 1996), Treaties & Models IBFD.

\textsuperscript{54} N Luxembourg 1 and Others (C-115/16, C-118/16, C-119/16 and C-299/16), para. 92.
The Court achieves this connection with the 1998 Commission Proposal for the IRD (1998 Proposal for IRD) which shows that the IRD draws upon article 11 of the OECD Model (1996) and pursues the same objective, namely avoiding international double taxation. However, as has already been pointed out by others, this connection is not entirely obvious. The proposal shows that the 1996 OECD Model is explicitly applied for the definition of “interest” in article 2(1)(a), “royalties” in article 2(1)(b), and the “arm’s length provision” in article 5. However, the memorandum makes no reference to the OECD Model with regards to the concept of “beneficial owner” in article 2(1)(c), which is defined in the 1998 Proposal for IRD as the current article 1(4) of the IRD.

As will be analysed in section 3.5.3., the OECD Model Commentaries up until the 2003 update applied a narrow interpretation of the notion of beneficial ownership, as it was not until the 1998 Report on Harmful Tax Competition that the broad understanding and connection to conduit companies was introduced. The 2003 version of the OECD Model predates the adoption of the IRD on 3 June 2003, and although the Court also refers to the OECD Model Commentary from 2014, ultimately it only refers to the “evolution” of the OECD Model and the Commentary thereon in the introduction in paragraphs 4 to 6 of the preliminary rulings. The Court does not extend this evolution it speaks of to the 2014 version, let alone until the most recent version of the OECD Model of 21 November 2017, as it follows from these versions that the formally determined beneficiary can still qualify as the beneficial owner if, although he does not have the economic benefit of the interest received, his right to use and benefit from that interest is not limited by a contractual or legal obligation to pass on the payment received to another person. This narrow and legal approach differs from the Court’s economic approach as described in paragraph 89 of the ruling.

To substantiate this economic approach, the ECJ uses a linguistic interpretation of the IRD as a point of departure. Interestingly, reference is made to the term “beneficiary”/“recipient” (the Bulgarian, French, Latvian and Romanian versions), whereas other versions (Spanish, Czech, Estonian, English, Italian, Lithuanian, Maltese, Portuguese and Finnish) use expressions such as “beneficial owner”/“actual beneficiary”, and yet other versions (German, Danish, Dutch, Greek, Croatian, Hungarian, Polish, Slovak, Slovenian and Swedish versions) use “owner”/“person entitled to use” or “person entitled in the end” (the Dutch version). On one hand, it seems strange that a term like “beneficial ownership”, which the ECJ interprets in an economic sense, should vary according to different language versions, as an economic notion should have the same meaning no matter the language, especially as the entire section dealing with the concept starts by stating that:

It should be pointed out at the outset that the concept of “beneficial owner of the interest”, which appears in Article 1(1) of Directive 2003/49, cannot refer to concepts of national law that vary in scope.

On the other hand, the ECJ identifies these linguistic differences as an actual reason to give an economic meaning to the notion, as the Court finds that the use of those various expressions underscores that the term “beneficial owner” concerns not a formally identified recipient but rather the entity which benefits economically from the interest received and

56. Boulogne, supra n. 33 and Zalasinski, supra n. 1.
58. N Luxembourg 1 and Others (C-115/16, C-118/16, C-119/16 and C-299/16), para. 84
accordingly has the power freely to determine the use to which it is put. In the author’s opinion, this somewhat contradictory argumentation is a sign of a Court in search of a common EU definition of a much-debated notion, which has clearly developed differently in the various jurisdictions, and it is also a clear indication of the tendency to look beyond borders for interpretative aid to define this notion, as was also done by the Ministry of Taxation in its arguments. What is also striking is that reference is not made to any “economic reality”; rather, it seems that the Court attempts to apply an economic reasoning to the requirement that the entity must receive the interest “for its own benefit” by endorsing a somewhat susceptible use of the OECD Model Commentaries, which will be analysed further in this article. As mentioned in section 2.3., the dynamic approach applied by the ECJ certainly departs from AG Kokott’s Opinions, which clearly recommends a static approach.

To sum up, it is not apparent how the ECJ connects the different OECD Model interpretative aids to the notion of beneficial ownership in the IRD. What is apparent, however, is that by stepping these stones, the Court arrives at the same understanding of the notion as the Danish National Tax Tribunal.

3.3. The notion of abuse in EU law after the Danish beneficial ownership cases

The statement in the Danish BO cases that an EU general principle exists is not surprising. What is an addition to the history of the notion of abuse in EU law, which will be analysed further in section 3.3.1., is that this general principle is in fact self-executing, i.e. it does not rely on a transposition into domestic law. Essentially, this means that the reasoning of the Danish Tax Tribunal in the dividend cases may be contrary to EU law. In contrast to AG Kokott’s Opinion, the ECJ establishes that transposition of the anti-abuse measures in the Directives into national legislation or the DTTs is not necessary to deny the benefits of these Directives in abusive situations. In support of this, the ECJ refers to established case law that Member States shall deny the benefits according to EU law to entities if they attempt to avoid tax by creating situations that artificially qualify for the benefit, as the conditions for obtaining the benefit are then only fulfilled formally.

By shifting the focus away from the question of the necessity of a transposition of the anti-abuse provisions of the Directives into national legislation, the ECJ essentially short-circuited the Danish academic debates as to whether some kind of non-statutory anti-abuse doctrine exists in Danish tax law. Instead, by answering the questions as a matter of abuse, the ECJ has established that the general prohibition of abuse in EU law is indeed self-executing, stating that the Kofoed case must not be misunderstood so as to require a transposition into national law. Since

59. Id., para. 89.
60. Opinions of AG Kokott of 1 Mar. 2018 in Cases C-115/16 (N Luxembourg 1, EU:C:2018:143, para. 52), C-118/16 (X Denmark, EU:C:2018:146, para. 52) and C-119/16 (C Danmark I, EU:C:2018:147, para. 52), noting that “[a]t most, should it transpire from the wording and history of the directive that the EU legislature was guided by the wording of an OECD Model Tax Convention and the commentaries (available at the time) on that OECD Model Tax Convention, a similar interpretation might be appropriate”. For a critical analysis of this, see Mollin Ottosen & Andersen, supra n. 12, at p. 4, and A. Iannaccone, The Taxation of Dividends and Interest Under EU Law: Groundbreaking Conclusions from the Advocate General, 90 Tax Notes International (2018).
61. T Danmark et al. (C-116/16 and C-117/16), para. 70 et seq. and N Luxembourg I and Others (C-115/16, C-118/16, C-119/16 and C-299/16), para. 96 et seq.
abusive or fraudulent acts cannot found a right provided for by EU law, the refusal of an advantage under a directive, such as Directive 90/435, does not amount to imposing an obligation on the individual concerned under that directive, but is merely the consequence of the finding that the objective conditions required for obtaining the advantage sought, prescribed by the directive as regards that right, are met only formally...” 62 (Emphasis added.)

This approach builds on recently established case law in the VAT area, which implies a denial of any right or advantage based on the EU general principle of prohibition of abuse.63 This development has been criticized by several scholars64 as the ECJ extending the direct application of directives to the taxpayer’s detriment in cases of abuse to the field of direct taxation is based on a weak doctrinal function. Similarly, AG Kokott noted that direct recourse to a general principle of law which is much less clear and precise would risk undermining the harmonization objectives of the Directives containing specific anti-abuse provisions.65 However, it is important to bear in mind that the doctrine is one against the circumvention of law and not an equitable principle seeking to restrain excessive reliance on private rights. The doctrine must be understood as seeking to prevent the deriving of benefits which may be in formal compliance with a rule but pursues ends beyond the objectives of this rule. As will be analysed in the next sections, this doctrine is followed up by drawing the contours of abuse using everyday hallmarks of economic notions, which ultimately can be used by the taxpayers to their own benefit.

The ECJ notes that permitting the setup of financial arrangements with the sole aim of benefiting from a tax advantage resulting from the application of directives would undermine economic cohesion and the effective functioning of the internal market by distorting the conditions of competition. Following the Opinion by AG Kokott, the ECJ noted that this would also be the case even if the transactions at issue did not exclusively pursue such an aim. In other words, the arrangements may not be wholly artificial, but even some amount of valid business reasons is not necessarily enough to refute abuse.66 With this addition, the ECJ highlights the subjective element of the abuse test and the outweighing of the tax reasons against the other valid business reasons and the need for the latter to be sufficiently large in order to refute the burden of proof. This continued focus on the subjective element in the abuse test will also be examined further in section 3.4.

3.3.1. The development of the general anti-abuse principle in EU law

The doctrine of abuse has been a latecomer in EU law, as the ECJ has traditionally not recognized the anti-abuse principle. This is quite logical given the relative recent history of the European Union and its predecessors, and since it was simply not necessary for the ECJ to

62. N Luxembourg I and Others (C-115/16, C-118/16, C-119/16 and C-299/16), para. 119, T Danmark et al. (C-116/16 and C-117/16), para. 91.
65. Opinion of AG Kokott in N Luxembourg I and Others (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16), para. 104.
66. N Luxembourg I and Others (C-115/16, C-118/16, C-119/16 and C-299/16), para. 107, T Danmark et al. (C-116/16 and C-117/16), para. 79.
develop a general doctrine of abuse in the formative years of EU law. In filling the lacunae of the Treaties on the European Union (TEU), the Court developed a series of principles based on the rule of law with a view to safeguarding the individual vis-à-vis the exercise of public power. When addressing the case law, a distinction can be made between (i) abuse that occurs when a person seeks to derive excessive advantages by relying on a right, thus causing disproportionate harm to another person, and (ii) abuse that consists in the improper use of a rule. The second category here is broader, defining abuse as a circumvention or evasion. In this regard, the abuse doctrine seeks to prohibit a person from deriving a benefit that may be the result of formally complying with the rules and simultaneously pursues results beyond the objectives of this rule, as it is in the case at hand.

From the 1970s onwards, the case law of the ECJ made some references to the abuse doctrine with the Van Binsbergen case as the first one referring to abusive practices in 1974. Back then, the ECJ opted for a broad definition of the fundamental freedoms, suggesting that the doctrine played a limited role in the field of the internal market. As the EU legal order developed, a doctrine of abuse began to evolve with it for two reasons. First, because a tendency surfaced that Treaty freedoms were stretched to the maximum and defendant governments resorted to the doctrine of abuse as a countervailing source. Second, more opportunities for improper use of EU benefits presented themselves concurrently with the rapidly growing EU legislation in areas such as indirect tax and subsidies. As a result, the ECJ began to draw up the contours of a general abuse principle. Considering the most recent development with the Danish BO cases, it appears that the ECJ has now reflected the fact that the EU tax policy is in line with OECD policy to combat tax avoidance and tax competition between states by eliminating structures that were well-known and even encouraged, for instance by Denmark.

3.3.1.1. Emsland Stärke (Case C-110/99) – The elements of an abuse test

The first steps towards defining the elements of abuse in EU law were taken in the Emsland Stärke case. In this case, the ECJ established that the concept of abuse consists of two elements: an objective element and a subjective element. The abuse test is initiated by presupposing a situation where the purpose of the relevant EU rule has not been achieved in spite of a formal observation of the condition in this rule. Furthermore, it requires the intention of the taxpayer to obtain an advantage from EU law by artificially creating the conditions laid down for obtaining the advantage. The case concerned a purely formal exportation of

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69. NL: ECJ, 3 Dec. 1974, Case 33/74, Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, Case Law IBFD.
73. Id., paras. 52-53.
products to Switzerland followed by an immediate reimport in order to benefit from export refunds, which runs counter to the objectives of the regulation. After referring to the subjective and objective elements of abuse, the ECJ held that it was for the national court to establish their existence, but it provided the Court with a number of guidelines. The Court thereby applied a general principle of abuse of rights, but it did not recognize the principle as such.

What was new in the case was that the ECJ could have decided the case without an abuse test, such as it had previously done in a similar case about a U-turn manoeuvre\(^4\) in the *General Milk Products* case. If the ECJ had followed its own reasoning in this case, it could have made the finding of “abuse” a matter of interpretation of the provisions sought to be exploited, as it stated that the only way to deny the benefits of the importation and re-importation of the goods was if they:

\[\ldots\text{were not realized as bona fide commercial transactions but only in order wrongfully to benefit from the grant of monetary compensatory amounts.}\ldots\text{the bona fide nature of those transactions is a question of fact to be decided by the national courts.}\]

With the *Emsland Stärke* case, the Court instead pursued a new abuse test, focusing also on the subjective intentions, stating that:

52. A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved.

53. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. The existence of that subjective element can be established, inter alia, by evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country.\(^6\) (Emphasis added.)

In relation to the intention to obtain an advantage, the Court specified that:

59. A finding that there is an abuse presupposes an intention on the part of the Community exporter to benefit from an advantage as a result of the application of the Community rules by artificially creating the conditions for obtaining it. Evidence of this must be placed before the national court in accordance with the rules of national law, for instance by establishing that there was collusion between that exporter and the importer of the goods into the non-member country. (Emphasis added.)

3.3.1.2. *Cadbury Schweppes* (Case C-196/04) – Wholly artificial arrangements

The linchpin in the case law from the ECJ is that the taxpayers are entitled to exercise their free movement rights in order to benefit from a more favourable legal regime in another Member State and that this is legitimate. This means that if a company for example conducts corporate forum shopping to take advantage of a more preferential company law regime,
this is not in itself abuse\textsuperscript{77} and the same goes for exercising their free movement rights in order to take advantage of a more favourable tax legislation.\textsuperscript{78}

The case reiterated three principles, namely:

1. a parent company deriving a tax advantage by setting up a subsidiary in another Member State where there is low taxation does not in itself entitle the tax authorities to deny that advantage by imposing a less favourable tax treatment of the parent company;
2. preventing the reduction of tax revenue is not included in the express grounds of derogation, nor is it a matter of overriding general interest, which justifies a restriction on a freedom introduced by the Treaty; and
3. the mere fact that a company establishes a subsidiary in another Member State cannot result in a general presumption of tax evasion and justify a measure that compromises the exercise of a fundamental freedom.

At the same time, a national measure restricting the freedom of movement can be justified when it targets wholly artificial arrangements aimed at circumventing the national legislation of the Member State concerned. In ascertaining whether the measure targets wholly artificial arrangements, the Court defined “wholly artificial arrangements” by focusing on economic reality, i.e. the incorporation of the company “must correspond with an actual establishment intended to carry on genuine economic activities”.\textsuperscript{79} Furthermore, the Court adds that the finding of a genuine activity “must be based on objective factors […] with regard, in particular to the extent to which the CFC physically exists in terms of premises, staff and equipment”.\textsuperscript{80}

In the AG Opinion for the case, AG Léger stated that premises, staff and equipment need to be “necessary to carry out the services provided to the parent company”,\textsuperscript{81} but this was not further elaborated by the ECJ. Effectively, this is the only time the ECJ ever gave a definition of a “wholly artificial arrangement”.\textsuperscript{82}

In the \textit{Cadbury Schweppes} case, the resemblance between the analysis of abuse of fundamental freedoms and the justification for restrictive anti-tax abuse measures is clear,\textsuperscript{83} and consequently, the motivation of the taxpayer is only relevant if the actual exercise of the freedoms does not consist of genuine activities.\textsuperscript{84}

3.3.1.3. \textit{Kofoed}\textsuperscript{85} (Case C-321/05) – A general principle of prohibition of abuse

In the \textit{Kofoed} case, the first reference to prohibition of abuse as a general principle of EU law was made. After three decades of development since the first mentioning of abusive practices in the \textit{Van Binsbergen} case of 1974, the ECJ stated that:

\begin{enumerate}
\item \textsuperscript{77} DK: ECJ, 9 Mar. 1999, Case C-212/97, \textit{Centros Ltd v. Erhvervs- og Selskabsstyrelsen}, para. 27, Case Law IBFD.
\item \textsuperscript{78} UK: ECJ, 12 Sept. 2006, Case C-196/04, \textit{Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue}, para. 36, Case Law IBFD.
\item \textsuperscript{79} \textit{Cadbury Schweppes} (C-196/04), para. 66.
\item \textsuperscript{80} Id., para. 67.
\item \textsuperscript{81} UK: Opinion of AG Léger, 2 May 2006 Case C-196/04, \textit{Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue}, Case Law IBFD.
\item \textsuperscript{82} M. Seiler, \textit{GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU} p. 124 (Linde 2016).
\item \textsuperscript{83} Zalasinski, supra n. 1.
\item \textsuperscript{84} \textit{Cadbury Schweppes} (C-196/04), paras. 35 and 65.
\item \textsuperscript{85} \textit{Kofoed} (C-321/05).
\end{enumerate}
Individuals must not improperly or fraudulently take advantage of provisions of Community Law. The application of Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community Law. (Emphasis added.)

To draw out the contours of the general prohibition of abuse in EU law, the Court referred to a vast selection of cases dealing with abusive behaviours, and it has been discussed in the literature to what extent this notion of abuse is in fact uniform as the development of the abuse doctrine has involved cases on both agriculture, company law, tax and the free movement of workers.

The *Kofoed* case concerned the interpretation of the Merger Directive, which aims to eliminate fiscal barriers to cross-border restructurings. Article 11(1)(a) of the Merger Directive provided that a Member State may refuse to apply or withdraw the benefit of the Directive where it appears that the exchange of shares has tax evasion or tax avoidance as its principal objectives or one of its principal objectives. The ECJ held that article 11(1)(a) reflects the general EU law principle that abuse of rights is prohibited, and given the circumstances of the case, the Court accepted that there was some evidence that could justify the application of this anti-abuse provision.

The core of the case was that Denmark had not implemented the anti-abuse provision into national law, so the Court had to examine whether it could apply without this national implementation. In doing so, the Court reiterated that directives may not in themselves be relied upon by national authorities against individuals to the detriment of their rights. At the same time, the Court highlighted that the transposition of a directive into national legislation may be achieved by a general legal context, provided that the legal situation is sufficiently precise and clear for the persons concerned.

In essence, the *Kofoed* case acknowledges that article 11(1)(a) reflects a general principle of abuse of rights, but the Court abstained from recognizing that the principle was self-executing. In the *Mangold* case, however, the Court established the prohibition of discrimination based on age as an unwritten general principle of law and assigned it full horizontal effect. This development can likely be explained by the difference in the facts of the two cases. First of all, the *Mangold* case concerned a dispute between individuals, whereas the *Kofoed* case was a vertical dispute, i.e. involving a state authority relying on a directive against an individual. Furthermore, *Mangold* involved equal treatment, which is in nature a fundamental constitutional principle subject to dynamic interpretation, and it would appear that the ECJ took a specific ideological stance in the case. Abuse of rights is, by contrast, not a principle that exists on its own, as it can only be applied if EU law is involved in the balancing act, as it is a corrective intervention to ensure that economic benefits remain faithful to the objectives of the law. In essence, this makes abuse of rights an exceptional principle that restricts rights and defensive by nature.

86. Id., para. 37.
87. M. Seiler, *GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU* p. 128 (Linde 2016).
3.3.2. Balancing the general principles of EU law – Legal certainty and anti-abuse

Following the recognition of the general principle on anti-abuse, this principle must be balanced against other general principles of EU law such as legal certainty.

In the Kofoed case analysed above, it was established that the principle of legal certainty precludes directives from being able, by themselves, to create obligations for individuals and therefore precludes Member States from being capable of relying on them in their case against individuals. This was also the basis for AG Kokott’s recommendation that the ECJ should maintain that a direct application of the Directives or a general anti-abuse principle to the detriment of the taxpayer should not be possible, as described in section 2.3. After the ruling in the Danish BO cases, the issue about the need for a legal base has been put to rest. It can be argued that this means that the Kofoed ruling has been overturned, creating issues with legal certainty and taking away part of the Member States’ sovereignty in the sense that they cannot reserve a right to decide whether they wish to enact anti-abuse measures or not. Adding to this that the established anti-abuse principle has been given retroactive effect by the ECJ, it can certainly be argued that it may lead to uncertainty going forward.

Furthermore, the Court does not make any reference to the recent landmark decisions on the concept of abuse in the PSD in the Eqiom & Enka case and in the Deister & Juhler case. This lack of references has been criticized for creating new standards that adds further uncertainty about the use of holding companies, as the indicators for abuse provided by the court in the Danish BO cases are vague. The Eqiom & Enka and Deister & Juhler cases will be further analysed in section 5.2.3. For the purpose of balancing the anti-abuse principle against the principle of legal certainty, it should just be noted that these cases are not immediately comparable to the Danish BO cases. The issue in Eqiom & Enka and Deister & Juhler was that they reflected a broad overkill by essentially reversing the burden of proof, and that they excluded evidence to the contrary against the legal abuse criteria. This was not the issue in the Danish BO cases, as the heart of the matter here was the question about a legal basis.

Ultimately, in assessing legal certainty in relation to the anti-abuse principle, it may also be argued that the outcome of the Danish BO cases is actually good for legal certainty, as we now have an established general principle to deal with abusive situations instead of having to rely on 28 different Member States’ transposition of such a measure into their own domestic legislation. The indicators of abuse given by the ECJ in relation to this principle may be vague, but they are based on objective economic standards and therefore perhaps better suited to create equal requirements than domestic provisions developed in the context of the Member States’ legal tradition and history. Along the same lines, it may be argued that the established general anti-abuse principle and its foreshadowing effect on the interpretation of the GAAR in article 6 of the ATAD will also provide legal certainty in relation to Member States’ assessment as to whether they need to change their current domestic anti-abuse provisions to fully implement article 6. If the Member States have a

90. T Danmark et al. (C-116/16 and C-117/16), para. 86 and N Luxembourg 1 and Others (C-115/16, C-118/16, C-119/16 and C-299/16), para. 114.
93. CFE ECJ Task Force, supra n. 39, at p. 21.
longstanding tradition with a domestic GAAR, they might each be inclined to preserve
this domestic GAAR or certain of its features, which may ultimately lead to an uneven
application of article 6. With the established general anti-abuse principle, at the very least
guidelines have been set to aid the uniform implementation and application of the rule
throughout the European Union.

3.4. The elements of the abuse test

In both the interest and dividend cases, the Ministry of Taxation argued that it follows from
the general anti-abuse principle in EU law that rights under EU law cannot be relied on in
respect of artificial arrangements the main purpose of which is to obtain an unintended
tax benefit. The ECJ has now established that it is settled case law that there is a general
legal principle that EU law cannot be relied on for abusive or fraudulent ends, and that the
general anti-abuse principle is in fact self-executing. The Court continues its argumentation
by stating that it follows from that principle that a Member State must refuse to grant the
benefit of the provisions of EU law where they are relied upon not with a view to 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 formal-
ly. According to the Court, that may be the case if for example the transactions do not
fall within the context of normal commercial transactions but are purely formal and are
designed solely to wrongfully obtain a benefit according to the Directives.

The Court explains that while the pursuit by a taxpayer of the tax regime most favourable
for him cannot, as such, set up a general presumption of fraud or abuse, the fact remains
that such a taxpayer cannot enjoy a right or advantage arising from EU law where the trans-
action at issue is purely artificial economically and is designed to circumvent the application
of the legislation of the Member State concerned. Whereas the Court referred to “wholly
artificial arrangements that do not reflect economic reality” in the Cadbury Schweppes
case, the emphasis is now on the transactions rather than the arrangement, and this transaction
is to be considered “economically” in order to establish whether it is purely artificial. In
the author’s opinion, this suggests that the Court has moved away from considering the
transactions in light of their “legal substance”, i.e. as an evidence-based characterization
of the transaction and its legal relations, and that the Court is now instead considering the
transactions in light of their “economic substance”, i.e. the commercial purpose behind
the form. In doing so, the Court re-emphasizes the recommendation from AG Kokott’s
Opinions, that it is possible to have an arrangement which is not wholly artificial in terms
of legal substance, and which can still represent an abuse of EU law if it is put in place with
the essential aim of obtaining a tax advantage, i.e. because it lacks economic substance.

A good example of this is that the taxpayers in the Danish BO cases continuously argued
that the arrangements could not be wholly artificial as understood by the EU general anti-
abuse principle at the time, as the interposed holding companies had exactly the amount of
substance required for a holding company. Considering the case law up until and including
the Cadbury Schweppes case, that appears to have been a valid assumption on the taxpayer’s
side. However, the Court has developed this case law and established that no matter the
amount of substance in the interposed company, the arrangement can still be abusive.

In outlining the elements of the abuse test, the ECJ continued its existing case law from the
Emsland-Stärke case and expressed that proof of an abusive practice requires:
“a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved”; and

“a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it”\(^94\) (emphasis added).

In order to determine the objective element and subjective element as described, it is necessary to examine the facts of the case at hand in order to establish whether the constituent elements of an abusive practice are present. In this regard, the ECJ highlights that it is particularly important 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.\(^95\) Concerning this intention to obtain an advantage, the Court has provided the following six indications:

(1) if the group structure is put in place to obtain a tax advantage (paragraph 100 in \textit{T Danmark et al.} and paragraph 127 in \textit{N Luxembourg 1 and Others});

(2) that all or almost all of the dividends or interest is passed on by the company that has received it to entities that do not fulfil the conditions for the application of the IRD and the PSD (paragraph 101 in \textit{T Danmark et al.} and paragraph 128 in \textit{N Luxembourg 1 and Others});

(3) if the interposed holding company has an insignificant income due to the redistribution of the dividends or interest (paragraph 103 in \textit{T Danmark et al.} and paragraph 130 in \textit{N Luxembourg 1 and Others});

(4) if the sole activity of the holding company is to redistribute the dividends based on the lack of management, balance sheets, expenses, employees and office facilities (paragraph 104 in \textit{T Danmark et al.} and paragraph 131 in \textit{N Luxembourg 1 and Others});

(5) if the contractual obligations (both legal and actual) renders the holding company unable to enjoy and use the dividend (paragraph 105 in \textit{T Danmark et al.} and paragraph 132 in \textit{N Luxembourg 1 and Others}); and

(6) if there is a close connection between the establishment of complex financial transactions and structures and new tax legislation (paragraph 106 in \textit{T Danmark et al.} and paragraph 133 in \textit{N Luxembourg 1 and Others}).

These indications are everyday hallmarks of economic standards and they are provided as guidelines for weighing the tax benefits against other business reasons in order to demonstrate the “intention” of the taxpayer. As the elaboration of the subjective element of the abuse test is one of the significant novelties in EU direct tax law, this new subjective element will be analysed specifically in the next section.

### 3.4.1. The subjective element of the abuse assessment

The idea of estimating the “intention” of the taxpayer has attracted quite a bit of attention in literature for very good reasons, because how are you supposed to estimate the “intention” of a corporation? After all, they are driven by the most economically rational choice

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\(^{94}\) \textit{T Danmark et al.} (C-116/16 and C-117/16), para. 97 and \textit{N Luxembourg 1 and Others} (C-115/16, C-118/16, C-119/16 and C-299/16), para. 124.

\(^{95}\) \textit{T Danmark et al.} (C-116/16 and C-117/16), para. 98 and \textit{N Luxembourg 1 and Others} (C-115/16, C-118/16, C-119/16 and C-299/16), para. 125.
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in the sense that they will choose the most economically efficient option if given a range of different alternatives. Some have argued that this means that the subjective element of e.g. the abuse test in the ATAD GAAR will automatically be met, because the intention to save taxes will always be there and that purpose will always be significant for the corporation. While this is a fair concern to be raised, it would appear that by means of the indications from the Danish BO cases the ECJ has in fact provided the taxpayers with some tools to use for their own benefit in order to refute such an assumption.

When reading the words “intend”, “motive” or “subjective” it is tempting to assign this analysis a meaning that is in fact useless or perhaps even misleading when viewed in light of real-world business activities. Both in relation to the subjective element of the ATAD GAAR and the BEPS PPT, some academic contributions have attributed a meaning to the “intent” of the corporations that bears a resemblance to some sort of assessment of intent in criminal law, including suggestions that the subjective element really consists of the “objectified subjective intentions” of a person. It suffices to say that determining the intent of a corporation is not straightforward. The problem with associating the intention-test with some sort of knowledge of wrongdoing by the corporations is manifold. Firstly, it implies an element of reprehensible behaviour by the taxpayer which may very well be in line with the angry political sentiment concerning the tax practices of certain multinational groups, but this line of reasoning is a path to be tread carefully and viewed in light of the economic theory as to how businesses behave, namely by choosing the most economically efficient alternative. Second, the dividing line between legitimate tax planning and unacceptable tax abuse is not drawn by reference to a willingness by the taxpayer to cross this line. Instead, this distinction ultimately depends on the economic outcomes for the state’s revenues. The measurement of tax abuse may be in its beginning stages from an economic point of view, and it may also very well be prone to variation over time due to developments in public acceptance based on moral, political and economic considerations. However, when analysing the rulings in the Danish BO cases, the subjective element has been given an objective economic meaning distinct from the miasma of a test based on some sort of wrongdoing.

96. M.F. de Wilde, Is the ATAD’s GAAR a Pandora’s Box?, in The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study p. 314 (IBFD 2018), Books IBFD.

97. E.g. C. Elliffe, The Meaning of The Principal Purpose Test: One Ring to Bind Them All?, 11 World Tax Journal 1, p. 17 (2019), Journal Articles & Papers IBFD describes a subjective test as “a test of a person’s conduct based on what the person actually believed or knew at the time of the conduct…”.

98. E.g. D. Weber, Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the EC – Part 1, 53 European Taxation 6, p. 253 (2013), Journal Articles & Papers IBFD describing that “first, the subjective intention of persons must be examined; however, where it is not known or there are doubts as to what the subjective intention of a certain person is (a person may deny that he has an intention to abuse), the objective circumstances (the activity) must be examined. The subjective intention of the person should be discernable from these objective circumstances, which is what the author refers to as ‘objectified intention’”, and same author in relation to the PPT in The reasonableness test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) versus the EU principle of legal certainty and the EU abuse of law case law, Erasmus Law Review 1 (2017).

99. For a thorough introduction to several of these theories see e.g. R.J.S. Tavares, Multinational Firm Theory and International Tax Law: Seeking Coherence, 8 World Tax Journal 2 (2016), Journal Articles & Papers IBFD.

100. See e.g. J. Vella, Nominal vs. Effective Corporate Tax Rates Applied by MNEs and an Overview of Aggressive Tax Planning Tools, Instruments and Methods: In-Depth Analysis for the TAXE Special Committee, European Parliament (Oct. 2015).

By drawing the contours of a new abuse test based on everyday commercial life notions such as *profit* and *costs* and hallmarks of market-based transactions such as *risk*, *profit* and *intermediaries*, the ECJ has sent a laudable and clear message that the weighing of tax benefits against other business reasons in the subjective test is a clear-cut economic assessment and not to be based on any kind of assessment of the taxpayer’s reprehensible behaviour. The tax benefit and the other business benefits can be estimated for any given arrangement and so they must. It is not a “smell test”, but a matter of the possibility to refute the burden of proof (see section 3.6).

3.5. *From beneficial ownership to a principal purpose test*

At a global level, the delineation between improper treaty shopping and legitimate tax planning has already been discussed for a very long time. This has involved several quasi-definitions of treaty shopping in attempts to draw the contours of such improper practices just as various theoretical arguments have been put forward to justify the campaign against treaty shopping. The term “treaty shopping” is thought to have originated from the United States, but it has never featured in any versions of the OECD Model, nor has it been properly defined or explained in the OECD Model Commentaries, as will be examined further in this section. What one does notice when examining the OECD Model Commentary is that the quasi-definition of treaty shopping includes a broad spectrum of structures ranging from pure sham structures to some with more substance.

While treaty shopping is an instrument of international tax planning, one might question what it is exactly about this sort of tax planning that makes it objectionable. One of the main arguments in this regard is that treaty shopping is a form of tax avoidance and therefore improper and contrary to the purpose of tax treaties. Distinguishing international tax avoidance and legitimate tax planning is difficult, and beneficial ownership is perhaps the most widely used response to treaty shopping. In spite of this, the term as such is not defined in the OECD Model and most tax treaties likewise do not contain a definition of the notion.

In the framework of the OECD, there has also been a long development in relation to narrowing down the contours of unacceptable tax planning behaviour and the provisions to combat this behaviour. The predominant view following the *Indofood* case is that the notion should have an autonomous and international fiscal meaning, but as the following sections will demonstrate, there has been a development back and forth both in terms of how broad a definition beneficial ownership should have and what kind of legal basis is required to transpose the international notion into domestic law.

The heart of the matter very much lies in the fact that some countries, including Denmark, have interpreted beneficial ownership in a broad economic fashion as opposed to a formal and legal interpretation and therefore have used beneficial ownership as a tool to combat


104. Id., at p. 33.

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treaty abuse. This divergence has also been demonstrated in the case law where cases like the Canadian Prévost\(^{106}\) and Velcro Canada cases\(^{107}\) and the Dutch Royal Dutch Oil Company case\(^{108}\) (also known as the “market maker case”) establish low thresholds for beneficial ownership, mainly excluding agents, nominees and conduit companies with no discretion over the amounts received based on a legal obligation,\(^{109}\) effectively rendering this control to another non-resident entity.

At the other end of the scale, the Indofood case, the Total Return Swap case, the Bank of Scotland case, and the Real Madrid case interpret beneficial ownership based on a substance-over-form analysis.

Denmark has at least to some degree used this substance-over-form approach to challenge arrangements perceived by the Ministry of Taxation as abusive, e.g. in the ISS case\(^{110}\) where an explicit reference was made to the Indofood case in relation to the fact that beneficial ownership should have an autonomous and international fiscal meaning, but also implicit in the argumentation from the Danish Eastern High Court in stating that the amendments to the 2003 OECD Model were mere clarifications and not amendments, and therefore could be used to interpret beneficial ownership. According to the Court, in order to not qualify as the beneficial owner, it is required that:

the owner exercises control over the company that goes beyond the planning and management at the corporate group level that is the standard for international corporate groups, cf. also the report from 1986, Section II, B, litra b, no 7.\(^{111}\) (Author’s translation.)

The result of the lack of a clear bright-line rule for beneficial ownership and the different applications of the notion in the various jurisdictions is that the taxpayers are faced with a high level of uncertainty. Essentially, the benchmark of impropriety will shift with time and with location, which has clearly been the case for the notion within the meaning of the OECD Model.

3.5.1. The 1963 and 1977 OECD Models

The international initiatives to combat treaty abuse are widely considered to have begun with the introduction of the beneficial ownership requirement into the dividends,\(^{112}\) interest\(^{113}\) and royalties\(^{114}\) articles in the OECD Model in 1977,\(^{115}\) as the 1963 OECD Model

\(^{106}\) CA: TCC, 22 Apr. 2008, 231, Prévost Car Inc. v. the Queen, Case Law IBFD.
\(^{109}\) In support of this view, see S. van Weeghel, The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States p. 76 et seq. (Wolters Kluwer 1998), and van Weeghel’s expert witness evidence in the Prévost case at Prévost (2008 TCC 231), p. 751 et seq.
\(^{111}\) Id., at p. 88.
\(^{112}\) OECD Model (1977), art. 10(2).
\(^{113}\) Id., at art. 11(2).
\(^{114}\) Id., at art 12(1).
\(^{115}\) R.J. Danon, Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups, 72 Bulletin for International Taxation 1, p. 2 (2018), Journal Articles & Papers IBFD.
was silent on the improper use of tax treaties. The 1977 OECD Model for the first time addressed the improper use of the Convention by introducing the notion of “treaty shopping” without explicitly using the term in paragraphs 8 and 9 of the Commentary to Article 1. Back then, the notion was essentially aimed at denying treaty benefits to agents and nominees. Paragraph 8 stated that:

8. Moreover, the extension of the network of double taxation conventions still reinforces the impact of such manoeuvres as they make it possible, through the creation of usually artificial legal constructions, to benefit from both the tax advantages available under certain domestic laws and relief from tax provided for in double taxation conventions. (Emphasis added.)

The reference to “the creation of usually artificial legal constructions” bears a striking resemblance to “wholly artificial arrangements” as developed under primary and secondary EU law, but interestingly it was removed from the Commentary on Article 1 in the 2017 OECD Model.

Paragraph 9 further states that:

9. This would be the case, for example, if a person (whether or not a resident of a Contracting State), acted through a legal entity created in a state essentially to obtain treaty benefits which would not be available directly to such a person.

The concept of beneficial ownership was introduced into articles 10, 11 and 12 of the 1977 OECD Model Commentary in paragraph 10, which refers to the Commentaries to these articles. Paragraph 10 further refers to “artiste companies” and implies that in the absence of preservation clauses the treaty relief should still be available even in the case of tax avoidance. At this point in time, however, not much attention was paid to the combat of treaty shopping.

This situation in which a person who is not entitled to the benefits of a tax treaty makes use of a legal person in order to obtain those treaty benefits that are not available directly also calls to mind the obtaining of EU law benefits by the interposition of an EU holding company.

3.5.2. The 1986 OECD Conduit Companies Report

A decade later, a new significant development took place in the form of the Four Related Studies on International Tax Avoidance and Evasion, including the Conduit Companies Report, which addressed the theme of treaty shopping.

By referring to the provisions of the 1977 OECD Model, which preclude treaty benefits in certain conduit company cases that concerned the limitation of source taxation, the Conduit Companies Report specifies that the entitlement to the benefit is not available when:

118. For a thorough analysis of this, see also S. van Weeghel, A Deconstruction of the Principal Purposes Test, 11 World Tax Journal 1, p. 5 (2019), Journal Articles & Papers IBFD.
119. Id., at p. 6.
121. OECD, Report on Double Taxation Conventions and the Use of Conduit Companies (OECD 1987).
122. Id., at sec. 2(B), para. 14, litra b.
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... economically, it would benefit a person not entitled to it who interposed the conduit company as an intermediary between himself and the payer of the income.

[...]

Thus a conduit company can normally not be regarded as the beneficial owner if, through the formal owner of certain assets, it has very narrow powers which render it a mere fiduciary or an administrator acting on account of the interested parties. (Emphasis added.)

The Conduit Companies Report hereby introduced the notion of beneficial ownership and stated that the 1977 Model deals with it in a rudimental way, expressing only a general concern that improper use of treaties should be avoided. Thereby, the report highlights that the narrow understanding of beneficial ownership in the 1977 Commentaries was incomplete and it further reiterates that in the absence of specific treaty provisions, improper use of the tax treaty cannot be prevented.  

3.5.3. The 1992 Update to the OECD Model

Large parts of the content of the Conduit Companies Report were reproduced in the Commentary on Article 1 of the 1992 OECD Model, providing several examples of treaty provisions to counter the improper use of the Convention, including limitation on benefit provisions addressing the “direct conduit” and the “stepping stone conduit” by the “look through approach” in paragraph 13 and the “channel approach” in paragraph 19:

13. A solution to the problem of conduit companies would be to disallow treaty benefits to a company insofar as the company is not owned, directly or indirectly, by residents of the State of which the company is a resident. For example, such a “look-through” provision might have the following wording:

A company which is a resident of a Contracting State shall not be entitled to relief from taxation under this Convention with respect to any item of income, gains or profits unless it is neither owned nor controlled directly or through one or more companies, wherever resident, by persons who are not residents of the first-mentioned State.

[...]

19. It has been suggested that the conduit problem be dealt with in a more straightforward way by inserting a provision which would single out cases of improper use with reference to the conduit arrangements themselves (the channel approach). (Emphasis added.)

The 1992 OECD Model clearly shows the member countries’ struggle to reconcile the different domestic anti-abuse provisions like substance-over-form approaches and the divergent theories on how to apply them to existing tax treaties. At the same time, something new emerged from the ashes of the continued confusion after the Conduit Companies Report as paragraph 24 adds that: “it is the view of the wide majority that such rules and the underlying principles, do not have to be confirmed in the text of the convention to be applicable”, i.e. substance-over-form rules could apparently prevent improper use of treaties even in the absence of treaty provisions at this point in time.

123. Id., at sec. 2(B), para. 15.
124. OECD Model Tax Convention on Income and on Capital (1 Sept. 1992), Treaties & Models IBFD.
125. See OECD Model Tax Convention on Income and on Capital: Commentary on Article 1 paras. 13 and 19 (1 Sept. 1992), Treaties & Models IBFD.
126. Id., at paras. 22-24.

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This rather confusing approach towards domestic anti-abuse provisions in tax treaties continues and is made possibly even more unclear with the 1998 Report on Harmful Tax Competition recommending solutions regarding the entitlement to treaty benefits. At this point, there is still a dire need for a clear distinction between the preservation of the application of domestic anti-avoidance provisions for tax treaty purposes and rules pertaining to the improper use of tax treaties as such. A somewhat half-hearted attempt to remedy this was provided with the 2002 OECD Report Restricting the Entitlement to Treaty Benefits (2002 Report), without adding much more than further confusion. The 2002 Report also added extra confusion to the 2003 Commentaries by underlining a broad interpretation to the notion of beneficial ownership, stating that:

[a] conduit company cannot normally be regarded as the beneficial owner if, though the formal 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. (Emphasis added.)

And that the term should not be:

used in a narrow technical sense, rather, it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance. (Emphasis added.)

3.5.5. The 2003 Update to the OECD Model Commentary

For the 2003 OECD Model Commentaries to Articles 10, 11, and 12, the Conduit Companies Report resulted in amendments that are considered by some to be a watershed for the approach towards tax avoidance and tax treaties and which by others are considered mere clarifications. Regardless of the degree of novelty, the fact remains that two highly relevant additions were published in 2003.

In paragraph 7 of the Commentary on Article 1 of the OECD Model (2003), it is made clear that it is also the purpose of tax conventions to prevent tax avoidance and evasion, and in paragraph 9.5 the “guiding principle” that is now incorporated in the PPT with a similar wording and meaning was introduced. The guiding principle stated that:

A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a

128. In the same vein, see Danon, supra n. 115.
130. OECD 2002 Report, supra, at p. 26; OECD Model: Commentary on Article 10 para. 12 (2003); Commentary on Article 11 para. 8; Commentary on Article 12 para. 4.
more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions. (Emphasis added.)

The principle incorporates a subjective requirement (“a main purpose”) and an objective requirement (“more favourable tax position”), and according to the OECD, the PPT is merely a codification of the guiding principle.\(^{133}\) This has prompted the question as to why the changes to the 2017 OECD Model in the form of the preamble and the PPT were not simply included in the 2003 OECD Model. This is likely a sign of the change in international tax policy since then, as it is quite possible that consensus could not be obtained due to fear that these incorporations in 2003 would undermine the application of domestic anti-abuse provisions such as substance-over-form requirements to existing tax treaties in the absence of explicit clauses in those treaties.\(^{134}\) I.e. from that point and until now there has been a development towards a unified approach.

3.5.6. The 2014 Update to the OECD Model Commentary

For the 2014 OECD Model Commentaries,\(^{135}\) the tables appeared to have turned once again and brought the notion of beneficial ownership closer to that which was envisaged in the meaning of the 1977 Commentaries. This follows from a number of passages of the 2014 OECD Model Commentaries, as well as by the context in which they were adopted. First of all, paragraph 2 of the Commentary on Article 10 states that:

> the term “beneficial owner” is intended to address difficulties arising from the use of the words “paid to” in relation to dividends rather than difficulties related to the ownership of the shares of the company paying these dividends.

Furthermore, paragraph 12.4. to the same article clarifies that agents, nominees, and conduit companies acting as fiduciaries or administrators are not the beneficial owners because of an obligation that:

> will normally derive from relevant legal documents but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the rights to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person. (Emphasis added.)

The meaning of the 2014 OECD Model Commentaries has been debated as it is still unclear whether these Commentaries indicate that beneficial ownership is a test that is only capable of addressing conduit situations and not abusive restructurings, or if it means that beneficial ownership is of limited use for conduit situations. As will be shown in the next paragraph, some of these uncertainties may have been clarified by the 2017 update to the OECD Model.

3.5.7. The 2017 Update to the OECD Model Commentary

As a consequence of the 2013 OECD report on Addressing Base Erosion and Profit Shifting,\(^{136}\) the 2015 Final Report on Action 6\(^{137}\) resulted in the culmination of many years of developing measures to handle improper use of tax treaties by implementing the PPT via

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133. For a critical analysis on this, see Danon, supra n. 115.
134. Id., at p. 5.
136. OECD, Addressing Base Erosion and Profit Shifting (OECD 2013), Primary Sources IBFD.
the MLI. The PPT is featured in article 7(1) of the MLI and, with minor differences,\textsuperscript{138} it is as it appears in the 2017 OECD Model.

In relation to article 29 of the 2017 OECD Model, the new Commentaries clarify that the PPT covers:

limitations on the taxing rights of a Contracting State in respect of dividends, interest or royalties arising in that State, and paid to a resident of the other State (who is the beneficial owner) under Article 10, 11 or 12.\textsuperscript{139} (Emphasis added.)

This clearly indicates that despite the beneficial ownership requirement, there was still a need for an efficient measure against conduit situations. This is also indicated in the new Commentaries on Articles 10, 11 and 12:

The provisions of article 29 and the principles put forward ... will apply to prevent abuses, including treaty shopping situations where the recipient is the beneficial owner of the dividends.\textsuperscript{140} (Emphasis added.)

While the extent of this may be debated, it seems clear that fulfilling the beneficial ownership requirement does not automatically rule out the application of the PPT. The PPT rule is based on an apportioning of the purposes and business rationales of the transactions and arrangements in order to separate tax reasons from other business reasons, also known as the subjective test. For the beneficial ownership test, it is debated whether this element exists.\textsuperscript{141}

### 3.6. Abuse and lack of beneficial ownership – Two sides of the same coin?

To sum up the conclusions from the previous sections, the notion of beneficial ownership worldwide has undergone quite the development, just as the notion of abuse has done in EU law. Looking at the different origins of these two notions, in an ideal world beneficial ownership would be different from abuse and not entangled with it. When examining the ECJ’s argumentation in the Danish BO cases, it is clear that the world is not ideal, and that beneficial ownership has become a proxy for abuse in EU law as it is not be understood in a technical narrow sense. A lack of beneficial ownership in EU law is essentially an indication of abuse, which makes this notion somewhat superfluous, especially considering that beneficial ownership in EU law is not completely aligned with the notion in the 2014 OECD Model Commentaries.

It would appear that what ultimately matters is the abuse assessment, and as described above, the development in both the OECD and the European Union in the area of combatting tax avoidance has led to the development of a general anti-avoidance rule comprising such a test. In order to perform this test, it is necessary for the tax administrations and the courts to assess the facts and disentangle abusive/BEPS behaviour from real economic activity. This is no easy feat when the guidelines on how to apply the abuse test are few

\begin{itemize}
\item \textsuperscript{138} Van Weeghel, supra n. 118, at p. 10, note 20.
\item \textsuperscript{139} Action 6 Final Report (2015), at pp. 65-66; OECD Model Tax Convention on Income and on Capital: Commentary on Article 29 para. 175 (21 Nov. 2017), Treaties & Models IBFD.
\item \textsuperscript{140} OECD Model: Commentary on Article 10 para. 12.5 (2017).
\item \textsuperscript{141} See in particular Danon, supra n. 115, at para. 4.8.4.3. arguing for this and D. Gutman, Beneficial Ownership without Specific Beneficial Ownership Provision, in Beneficial Ownership: Recent Trends p. 171-172 (M. Lang et al. eds. IBFD 2013) arguing in favour of including an element of intention into the beneficial ownership analysis.
\end{itemize}
and the individual facts of the cases are countless. The devil is certainly in the detail and separating the sheep from the goats is made even more complex by the fact that there is no agreement or positive definition of what real economic activity is. This lack of consensus is challenging not just for tax administrations and courts dealing with the abuse assessment, but also for the purpose of measuring the effects of the anti-avoidance measures, as it is envisaged in Action 11 of the BEPS Project.\footnote{OECD/G20, Measuring and Monitoring BEPS – Action 11: 2015 Final Report (OECD 2015), Primary Sources IBFD. See also D. Bradbury, T. Hanappi and A. Moore, Estimating the fiscal effects of base erosion and profit shifting: data availability and analytical issues, 25 UNCTAD Special Issue on Investment and International Taxation 2, p. 98 (2018).}

The current international tax rules use a fact-specific approach that addresses the corporation’s functions, assets and risks in order to capture the firm’s incentives to engage in BEPS/abuse and to assess the relationship between profits and tax costs by such firms. This is also the foundation for the assessment in the ATAD GAAR and the BEPS PPT, which read as follows:

**The GAAR in the ATAD (article 6):**

1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law. (Emphasis added.)

**The PPT in the MLI (article 7 – Prevention of Treaty Abuse):**

1. Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement. (Emphasis added.)

In order to conduct this balancing act between legitimate tax minimization and abusive tax avoidance in today’s world, post-BEPS and post-ATAD, it is difficult to derive legal guidelines for when an arrangement is simply too far from reality and too close to solely obtaining a tax benefit.

On one hand, it can be argued that this balancing act causes a high level of uncertainty due to the lack of relevant case law and guidelines. On the other hand, it can also be argued that the economic analysis in the BEPS PPT and the ATAD GAAR or the general EU anti-avoidance principle is not only crucial for providing meaning to the general anti-avoidance rules and principles but that it is also capable of objective determination and application. The test for determining what constitutes genuine economic activity will evidently vary in the different cases based on the individual facts and circumstances, but this adaptability should...
not necessarily be equated to uncertainty and unpredictability.\textsuperscript{143} While the application of the general anti-abuse provisions has different stories and have been applied differently in the respective Member States with various legal traditions and legal systems, the economic test in the general anti-avoidance principle or the ATAD GAAR and the BEPS PPT should not vary depending on which Member State conducts it.

Another issue relating to the BEPS PPT and the ATAD GAAR concerns the compatibility issues from an EU law perspective. An entire study could be done on this and to delve deeper into this issue is beyond the scope of this article. However, for the purpose of this article, a few observations should be noted.

The first issue that has been debated in academic circles is that of genuine economic activities, as it has been argued that the PPT does not expressly favour these and that this lack is contrary to the notion of abuse under EU law. This concern appears to have been shared by the European Commission, as it has previously proposed a modified version of the PPT rule to be included in DTTs between Member States:\textsuperscript{144}

> Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that it reflects a genuine economic activity or that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provision of this Convention. (Emphasis added.)

According to the Commission, this addition by a “genuine economic activity test” was necessary to align the PPT rule with the case law of the ECJ.\textsuperscript{145} This potential difference in treatment between the PPT and the GAAR may be essential and will be examined below.

Furthermore, the division of the burden of proof in the PPT is controversial, as the principle of proportionality in EU law implies that the taxpayer must be given the opportunity to provide evidence of any commercial justification for a given arrangement without being subject to undue administrative constraints. In relation to the principle of legal certainty in EU primary law, it also follows that an anti-avoidance rule must meet the requirements of this principle, which means that rules of law must be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for the taxpayer. Whether the PPT is in breach of the principle of legal certainty is debated among scholars.\textsuperscript{146}

In relation to EU secondary law and the PSD, the reservation in favour of genuine activities can also be found in the ATAD GAAR as it refers to “the main purpose or one of the main purposes” and not “one of the principal purposes”. In addition to this difference in terminology, the arrangements are only considered as not genuine to the extent that they are not put into place for valid commercial reasons that reflect economic reality. It can however be

\textsuperscript{143} For a similar analysis related to the Canadian GAAR, see L. Jinyan, "Economic substance": Drawing the Line Between Legitimate Tax Minimization and Abusive Tax Avoidance, 54 Canadian Tax Journal 1, pp. 23-56 (2006).

\textsuperscript{144} Danon, supra n. 115.


\textsuperscript{146} In favour of the PPT’s accordance with EU law, see P. Baker, The BEPS Action Plan in the light of EU Law: Treaty Abuse, British Tax Review 3, p. 408 (2015) and D. Weber, The reasonableness test of the Principal Purpose Test Rule in OECD BEPS Action 6, p. 59 arguing that the only issue with the PPT in this regard is in relation to the broader definition as artificiality is not required compared to the ATAD GAAR.
argued that the PPT rule is in fact to be construed as a genuine activity test if considered in the light of the 2017 update to the OECD Model Commentaries.  

One final point of relevance is the burden of proof in the PPT, as this is controversial among scholars as well. Some argue that the difficulty for the tax administrations in the past to demonstrate that granting the tax treaty benefit would be contrary to the object and purpose of the tax treaty has now been replaced by the challenge of the taxpayer to demonstrate that granting a benefit would be in accordance with the object and purpose of “the relevant provision of the Convention”.

4. The Member States’ Obligation to Deny Benefits

As was shown in the previous sections, the response to treaty abuse by the OECD and to abuse by the European Union has resulted in an increased focus on general anti-avoidance rules in the form of the ATAD GAAR and the BEPS PPT. In some areas, such as distribution of dividends, these rules will evidently overlap. As the ECJ has stated in the Danish BO cases that EU Member States are obliged to deny any benefit arising from the abusive behaviour, this prompts the question as to whether it is still possible to consider reducing the withholding tax by an intra-EU DTT after the rulings. To use a specific example, this question was raised by MP Bart Snels as part of a number of questions for Menno Snel, the Dutch State Secretary for Finance. Snel’s response was clear as he believed the result of the Danish cases to be that Member States have an obligation to combat abuse of the benefits derived from EU law including the tax directives, but that it does not follow that taxpayers can no longer rely on (comparable) benefits from a bilateral tax treaty.

Ultimately, the question is whether the PPT contains a lower threshold of abuse since it does not include any express exclusion of genuine activities. In addition to the text of the ATAD GAAR, the general principle of anti-abuse as it stands after the cases certainly excludes genuine economic activities, which means that the taxpayers can in fact rely on this principle for their own benefit in case the Member States attempt to invoke an intra-EU DTT and a PPT with a lower threshold for abuse.

The Member States may also wish to apply an intra-EU DTT in order to allow the tax-free distribution of dividends in a situation that is considered abusive according to the ATAD GAAR and the general principle of anti-abuse. The first problem in doing so is that the PPT in the DTT may not have a lower threshold for abuse, but it seems unlikely that it should have a higher threshold that would allow an arrangement otherwise disqualified by the ATAD GAAR or the general anti-abuse principle. However, certain Member States such as the Netherlands and Luxembourg, often feature in structures that make it attractive for them to be able to apply the Netherlands-Luxembourg DTT so that the withholding tax on dividends can at least be lowered if it cannot be exempt according to the PSD as a consequence of the ATAD GAAR or the general anti-abuse principle. Even if we assume that such a possibility exists within the scope of the PPT, such an application would be contrary to the principle of sincere (or loyal) cooperation between the Member States of the European Union.

147. Danon, supra n. 115.
149. MP Bart Snels’ questions for Menno Snel and the latter’s answers can be found here: https://www.tweede kamer.nl/kamerstukken/kamervragen/detail?id=2019Z09124&did=2019D25250.
Union and the EU institutions, which is a key constitutional principle of EU law, as such an application would undermine the effectiveness of the general anti-avoidance principle and hinder its coherent application. The principle of sincere cooperation in article 4(3) of the TEU determines that Member States shall refrain from any measure which would jeopardize the attainment of the European Union’s objectives. If Member States could circumvent the obligation to deny treaty benefits in abusive situations by way of a DTT, this would hinder the European Union’s objectives and would be incompatible with the general anti-avoidance principle.

Consequently, it must be presumed that the benefits according to a DTT between two EU Member States are to be denied in case of abuse, similar to the obligation to deny the benefits according to the PSD, as an alternative interpretation would undermine the obligation to deny benefits in abusive situations according to the general EU anti-avoidance principle and the principle of sincere cooperation. Finally, considering that the outcome of the cases gives a clear indication of the alignment between the European Union and the OECD in combating tax avoidance, it would appear to be counterproductive if there was indeed still an opportunity for taxpayers to achieve benefits in abusive situations by relying on a DTT between two Member States.

5. Disentangling Abuse from Real Economic Activity – An Economic Assessment

Having established that an anti-abuse principle exists in EU direct tax law, essentially making the question about national anti-abuse provisions obsolete, the next challenge involves disentangling the abusive behaviour from valid business activity in order to determine whether an allowance of the tax advantages in the IRD or the PSD is in order or should be denied.

The ECJ has identified six indications of abusive situations and thereby provided some guidelines for where to draw the line. When examining the indications, it is apparent that they bear very little resemblance to a legal assessment just as they have not been spelled out in previous ECJ case law on direct taxation. These circumstances further add to the uncertainty surrounding how to conduct the abuse assessment, which then begs the question of how to interpret these indications in order to thoroughly understand them and even apply them in practice.

In order to do so, it is beneficial and perhaps even necessary to go beyond the legal theory and use economic theory to aid the interpretation and promote the application of the abuse test. After all, the process of elimination here consists of identifying valid economic business conduct, so in the following sections the elements of the abuse test and the indications will be analysed and considered in light of two separate economic theories.

As mentioned in the Introduction (see section 1.), it is laudable that the ECJ has developed a test that is not simply a test to ensure a minimum of business activities slightly above a wholly artificial arrangement and that it is not possible for the taxpayer to simply pass the

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abuse test by adding economic substance in the form of employees to the holding company. And as will be demonstrated further in this section, the abuse test developed by the Court does in fact possess several advantages for the taxpayer if viewed in light of modern economic theories.

The problem with making the abuse test about focusing solely on business purpose and economic substance is that this test is essentially a prospect of profit before taxes. In reality, this provides an unsuitable proxy for the real issue of the taxpayers obtaining these benefits, which is that permitting the setup of financial arrangements with the sole aim of benefiting from a tax advantage resulting from the application of directives would undermine economic cohesion and the effective functioning of the internal market by distorting the conditions of competition as described by the ECJ. If the abuse test was in fact focused merely on the prospect of pre-tax profit and some sort of assessment of the taxpayer’s reprehensible behaviour, i.e. some sort of a “smell test”, then it would be much easier for the taxpayer to manipulate. The result would be that the test would essentially not contribute to distinguishing abusive behaviour from legitimate structures.152 The main issue is that no uniform definition of “economic substance” exists, so determining the activities that must be disallowed in order to ensure the economic cohesion and the effective functioning of the internal market by preventing distortion of the conditions for competition is difficult.

5.1. Understanding the indications of abuse through economic theory

The notion of “ownership” is difficult to get around when we are dealing with beneficial ownership, and with abuse in EU law for that matter. When analysing these issues, it is important to bear in mind that ownership for tax purposes means something not related to the economics and not based on actual possession. To quote Weisbach:

“These puzzles have long intrigued tax scholars, who love conundrums, and created opportunities for tax planners, who salivate at the prospect of economically identical tax positions that are treated differently.”153

Rather than being a bedrock principle based in economics, ownership acts as a default rule for assigning tax characteristics, or “attributes”, to positions, e.g. elimination of withholding taxes on cross-border dividends. Ownership is merely a default rule for assigning these attributes, as it acts as a starting place but is not what fundamentally matters. Instead, the rules for each attribute starts with ownership as a default but the attribute is then overridden based on the relevant policy considerations unique to each attribute. Initially, the tax-exempt cross-border dividends is assigned to the owner, but sometimes that assignment is removed based on policy considerations such as a plan to combat artificial arrangements, i.e. reassigned to the “beneficial owner”. If the risk from owning the shares and receiving the dividends is hedged, e.g. because the recipient is in fact a conduit company, then the tax exemption for the distributed dividends might be lost. And sometimes some attributes of

152. A critical analysis with a similar viewpoint focusing on the US economic substance doctrine, see L. Lederman, Whither Economic Substance?, Iowa Law Review, Research Paper No. 128 (2010), arguing that it should be abandoned and replaced with a direct inquiry into congressional intent. Instead, the courts should consider whether the claimed tax result is consistent with the intent of the applicable provisions.

ownership are assigned to the holder because, for policy reasons related to those attributes, the holder of the attributes should have them.

After the ECJ hands down its preliminary rulings, the cases are referred back to the Danish High Courts, which have the somewhat ungrateful task of assessing each case with its unique fact pattern in light of the ECJ rulings. The assessment they make is whether the specific situations constitute abuse and, consequently, whether no benefit should have been obtained and tax at source should have been withheld. The ECJ has not rendered the national courts completely empty-handed in the abuse assessment as it has in fact provided the specific indications that point in the direction of an abusive situation, if they are present. This attention to both the details and the facts of the cases is quite extraordinary for ECJ rulings, as it is for the national courts to decide on the specific facts and final outcome of the cases.

In specifying its abuse-of-rights principle, the ECJ reiterated its existing case law stating that in order to prove an abusive practice, what is needed is a combination of an objective element and a subjective element, as described in section 3.4. In doing so, the ECJ has further developed its existing case law in the field of treaty freedoms as it has so far held that tax abuse is absent when economic substance is present. The abuse test set forward by the ECJ in the Danish BO cases, on the other hand, implies that abuse may be evident even in the presence of economic substance if this substance has been put in place to create the conditions for obtaining a tax benefit following the EU rules.

The end result is that the corporate taxpayers can no longer underpin any artificially created tax planning arrangement with staff and premises to avoid being accused of abuse. This is in line with the recommendation from AG Kokott in her Opinions on the cases, as the message in those was that it is possible to have an arrangement that is not wholly artificial, and that can still represent an abuse of EU law if it is put in place with the essential aim of obtaining a tax advantage.

While it has raised a number of critical comment and questions as to where these indications come from, it appears that the ECJ has attempted to draw up the contours of abusive structures and provide some sort of guidelines for both the national courts, the taxpayers and the tax administrations in how to deal with this assessment going forward.

By providing the indications of abusive situations the ECJ has developed an abuse test that not only builds on the existing case law from the Court but further develops it by applying an economic test using everyday commercial life notions such as profit, loss and costs and hallmarks of market-based transactions such as risk, profit and intermediaries.

5.1.1. Behavioural theory of corporations

In order to assess the apportionment between a corporation’s tax reasons and other business reasons for any given conduct, it is necessary to consider how a business firm makes its decisions. In standard microeconomics, it is assumed that corporations are holistic entities seeking to maximize their profits. By contrast, other theories on the behaviour of the firm postulates the firm as a coalition of groups, each with their own objectives. Given the

154. See Cadbury Schweppes (C-196/04), and see also De Wilde, supra n. 96, at p. 319.
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public debate on multinational enterprises (MNEs) to pay their “fair share” of taxes, it can be argued that in today’s modern world, it is no longer sufficient to perceive a corporation as having profit maximization for the benefit of its shareholders as its sole objective. This debate on which interests the management of a company should serve: those of the shareholders (only) or those of the broader set of “stakeholders” (which includes the employees, customers, suppliers and the community as well as the shareholders)\(^{156}\) is pushed up the agenda by the current political attention towards international taxation; however, for the purpose of this article, it is assumed that the purpose of a firm is to generate the highest possible after-tax profit for the benefit of its shareholders. Building on this notion, the corporation will be driven by the most economically rational choice in the sense that the corporation will choose the most economically efficient option if given a range of different alternatives. This idea is also based on standard microeconomics and the assumption that the behaviour of the firms can be adequately described as maximizing their behaviour, i.e. that the firms know all the decision alternatives and that they are able to compare all these alternatives and choose the one that maximizes the objective function.\(^{157}\)

If we accept the notion that the world of international taxation has changed following the Danish BO cases and the uncertainty that follows from abandoning known structures makes it necessary for corporations to adjust for the risk that certain legal structures are disregarded, then that presumption also changes the picture of what constitutes the most economically rational option for them. Ultimately, this means that the outcome of the cases will be effective for a behavioural change for the taxpayers.

5.1.2. The theory of the firm

The traditional challenge for both law and policy makers to design and implement tax legislation that allows the intended benefits and simultaneously disallows abuse has evolved rapidly in recent years both in the European Union and in the OECD.

The solution to this challenge has been to use different types of substance tests that have now developed into a test involving a subjective element in order to assess whether the taxpayer would have undertaken the actions at hand in the absence of the tax consequences.

That prompts the practical issue on how to estimate those benefits in order to weigh them against each other and assess whether the non-tax reasons are sufficiently substantive. One traditional way of doing this is by using a discounted cash flow analysis to evaluate the non-tax reasons of an arrangement. This analysis compares the incremental, risk-adjusted benefits of the activities with the incremental risk-adjusted costs, ignoring taxes. The purpose of this test is to determine whether the taxpayer could reasonably expect to realize profit absent the disputed tax benefits. This approach has the clear advantage that it is based on principles of corporate finance that are widely accepted in both business and academic settings. The reverse side of the coin here is that such an analysis can be very sensitive to long-term financial projections, and estimates of discount rates are developed in the context of litigations many years after the fact like in the Danish BO cases where the facts will be assessed by the Danish High Courts in 2019/2020 for facts relating to the mid-/late 2000s.


\(^{157}\) Id., at p. 142.
Another option for dealing with this assessment is to use the theory of the firm developed by Borek, Fratelli and Hart in 2013. The theory is that additional principles of economic and corporate finance based on modern theory of the firm can be helpful in evaluating the economic substance of corporate reorganizations, i.e. to estimate the non-tax reasons for conducting them. This theory builds on the basic difference between individual market players and intra-group transactions, e.g. within an MNE regarding who has the residual control rights. That is, who has the right to determine what happens in events not covered by explicit contractual terms. In many transactions leading to the creation of corporate entities like intermediate holding companies, no meaningful transfer of residual rights actually occurs. These transactions are structured in such a way that both before and after the transaction, the company initiating the transaction has complete control. This suggests that the same benefits could have been achieved in-house. In other words: the reorganization or creation of the new entity lacks economic substance to support the non-tax business reasons for doing it and therefore it should not be respected for tax purposes.

While the theory of the firm has been developed in response to the economic substance test developed by the US Supreme Court, the theory can still be a useful contribution to understanding the abuse test developed by the ECJ in the Danish BO cases and zoom in on what constitutes valid economic business reasons.

The basic theory of the approach called the Nature of the Firm is based on the question as to why some transactions take place in firms and others take place through the market, which was first raised by Ronald Coase in 1937 and since then developed by e.g. Williamson and Klein. A recent branch of this theory called the Property Rights Theory of the Firm forms the specific foundation for the Theory of the Firm and takes the view that firms arise when parties are engaged in long-term relationships and make relationship-specific investments. The parties will in an ideal world govern this relationship with long-term contracts, but in practice it is very difficult to write a comprehensive long-term contract, mainly because it is hard for the corporations to predict the future. This means that the contracts will often be incomplete and there will be a need for the courts to complete them. In order to complete the contracts, the Theory of the Firm uses asset ownership and firm boundaries and it lies at the heart of the Property Rights Theory of the Firm. More specifically, the owner of an asset has residual rights of control, i.e. the right to decide all uses of the asset not specified in an initial contract.

In order to apply the theory, it is important to understand why firms restructure in response to external events. Various types of restructuring are common and will arguably produce large increases in value, e.g. leveraged buyouts as in some of the Danish BO cases. These restructurings involve the heavy use of debt to purchase the ownership of the entity from its public shareholders or its parent company. The transactions are often characterized by,

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for example, increased management ownership, addition of large, active investors to the board of directors and the loss of access to the public market. These transactions mainly occur in slow-growing companies and industries generating a substantial amount of cash, which is invested in inefficient investments and therefore largely wasted. Therefore, it is not hard to see why the leveraged buyout is an ideal structure for efficiency gains. The incentives are powered by a combination of high debt and significant managerial ownership, and the question then arises why a restructuring is necessary to generate value. Or in other words: why is it not possible to duplicate the high-powered incentives of the leveraged buyout while staying within the confines of the original corporate entity, i.e. without a restructuring?

While this pertains to the restructuring of the entire group in the form of the leveraged buyout, it is also useful in reviewing the tax and non-tax reasons for intermediate holding companies to be part of this restructuring, i.e. whether they serve other functions than to siphon profits out of the subsidiaries via an EU Member State to third-state jurisdictions with no withholding taxes. There may be several business reasons for interposing a holding company, e.g. due to corporate law requirement, as a means of creating the adequate control structure within the group or as a requirement for a financing structure, to list but a few.

If we accept the basic notion that restructuring creates value because things become possible in the restructured entity that were not possible before, then the litmus test to any intermediate holding company will be whether this organizational shift brought efficiency gains or the like, that could not have been achieved internally, i.e. could these advantages not have been achieved just as well without the creation of the holding company?

The question whether the interposition of a holding company created value therefore hinges on whether residual control rights shifted to the holding company. So instead of merely focusing on a present value calculation of the efficiency benefits flowing from an arrangement back in the day, the theory of the firm offers an alternative way to determine whether there were valid business reasons for this arrangement by assessing whether it involved a meaningful change of control.

It can be argued, of course, that just like creating substance in order to meet a requirement for a holding company not to appear wholly artificial, parties can design their arrangements so that a shift in control occurs. An argument against this is that control is valuable and that giving it up can expose the company to some serious risks, which is strongly supported both theoretically and empirically.163

It would therefore seem that, unfamiliar as this approach applied by the ECJ in the Danish BO cases may be, it is not that far-fetched when considered in the light of basic microeconomic theory and the Theory of the Firm.

5.2. Everyday hallmarks of economic standards

In order to determine the valid commercial reasons, which reflect economic reality and therefore result in the granting of a benefit based on e.g. the PSD, the ECJ has drawn up the contours of abuse using objective economic hallmarks that are typical notions of market-based transactions – expected pre-tax or non-tax profit, control, risk, and tax-indifferent parties or intermediaries. These notions draw their meaning from everyday commercial life,

163. Cyert and March, supra n. 155.
so in order to apply this new abuse test, it may be beneficial to consider their meaning within these frameworks. In the following sections, a short introduction to the different notions will be provided, before analysing the indications for abuse in the final section.

5.2.1. Pre-tax profit

In order to consider whether an arrangement has been put in place to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it, the test is to assess whether the non-tax reasons for making an arrangement are sufficiently large compared to the tax reasons. While the amounts involved are not the only way to make this assessment, it is a very obvious way for the tax administration to weigh the two groups of benefits. In order to do so, it is necessary to be able to determine the tax benefit arising from the arrangement, which makes it necessary to be able to determine the pre-tax profit. An arrangement has valid commercial reasons reflecting economic reality if it provides an economic benefit of some consequence to the taxpayer separate and apart from tax savings. The question is how much profit is enough to outweigh the tax reasons? Another question is how to measure it? Unfortunately, there is no clear answer to these questions in the rulings in the Danish BO cases, and ultimately the apportionment will differ in the individual cases.

5.2.2. Risk and market forces

In order to assess whether an arrangement and its alleged valid commercial reasons do indeed reflect economic reality, it is necessary to consider whether it is in fact susceptible to supervening risk and market forces. If the steps in the arrangement are so pre-wired and certain to occur that there are no real market forces at work, then the resemblance to economic reality may be difficult to establish. Similarly, if the types of risks that are encountered on a daily basis in real business transactions are hedged, then it is likely that the arrangement does not in fact reflect economic reality.

An example of this can be transactions that are preordained, e.g. loan structures where the interest is effectively redistributed up the chain of corporations immediately after being received or dividends that are immediately redistributed. The steps involved in these kinds of arrangements are not a result of anticipating future events and planning for them, but are there to eliminate the risk and ensure a tax advantage, and any non-tax considerations that could disrupt the scheduled execution of the planned steps in the arrangement would not suffice to hinder them.

5.2.3. Indifferent parties and intermediaries

In order to determine whether an intermediate holding company is indifferent, i.e. that it is a conduit company interposed to obtain a tax benefit, it is necessary to consider the function of the holding company within the entire group structure. This has also been established in the *Eqiom & Enka* case and in the *Deister & Juhler* case, which confirms that the mere presence of a holding company in a structure is not in itself enough to establish abuse, and that the fact that a holding company only conducts traditional activities, i.e. the ownership of shares, does not mean that it is a mere conduit, as it should be considered in light of its functions, which are different from those of an operating company for exam-

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164. *Eqiom & Enka* (C-6/16).
These cases may appear to set a low threshold for holding companies, but it should be kept in mind that the cases reflect the rather blunt German and French treaty/directive shopping measures. Such measures were rejected by the ECJ because they, by means of relatively mechanical tests, gave rise to a categorical suspicion of abuse, which could not be rebutted by the taxpayer. The problem in those cases was that they reflected a broad overkill by essentially reversing the burden of proof in the Eqiom & Enka case and that they did not in any way exclude evidence to the contrary against the legal abuse criteria, as was the issue with the German legislation in the Deister & Juhler case.

As discussed in section 5.1.2., in examining whether an interposed company is indifferent, it should be considered what kind of difference the interposition made. In several of the Danish BO cases, it was argued by the taxpayer that the holding companies were interposed in order to obtain efficiency gains. One of these cases was X Denmark A/S (C-118/16), in which the taxpayer argued that certain transfers were commercially justified because they were intended to obtain a more efficient group structure. Against this, the Ministry of Taxation argued that in fact the transfer did the exact opposite as it resulted in additional bureaucracy. It necessitated the conclusion of two continuous agreements between the companies, i.e. a lease and a service agreement. This complicated paperwork was necessary because the employees continued working at the premises of the company, which was still to be in charge of the administrative work relating to the business transferred. The importance of the transferred group function was negligible, and therefore according to the Ministry, the transfer should be considered “window dressing”, i.e. rendering the interposed holding company an indifferent intermediary.

5.3. The indications of the subjective element in the abuse test

As mentioned in section 3.4., the general anti-abuse principle in EU law after the Danish BO cases entails an abuse test in which the subjective element consists of an economic assessment. For the purpose of understanding the indications provided for this subjective element, each of these will be analysed in light of the economic theory presented above and the specific facts of the cases.

5.3.1. Group structure put in place to obtain a tax advantage

A group of companies may be regarded as being an artificial arrangement where it is not set up for reasons that reflect economic reality, its structure purely being one of form and its principal objective or one of its principal objectives being to obtain a tax advantage running counter to the aim or purpose of the applicable tax law. This is so for example where, on account of a conduit entity interposed in the structure of the group between the company that pays dividends and the company in the group that is their beneficial owner, payment of tax on the dividends is avoided.

In the Danish BO cases, the taxpayers have not focused on providing other business reasons for interposing the holding companies in the structure, as their argumentation has largely been based on the lack of an anti-abuse provision in Danish national legislation at the time. However, it appears clear after the cases that in order for MNEs to defend their tax

165. Deister & Juhler (C-504/16).
166. T Danmark et al. (C-116/16 and C-117/16), para. 100 and N Luxembourg 1 and Others (C-115/16, C-118/16, C-119/16 and C-299/16), para. 127.
position, they need to be able to provide proof of their non-tax reasons for choosing certain structures.

This indication gives rise to questions concerning particularly one of the Danish cases, *Y Denmark ApS* (C-117/16). This case concerned dividends distributed from a Danish subsidiary to its Cyprus parent, which was owned by a Bermuda corporation and a global ultimate in the United States. In this case, the taxpayer argued that there could be no abuse, because even if the Cyprus entity was considered a conduit, it would be the US global ultimate that would be the beneficial owner of the dividend. The taxpayer further argued that it could also have been an alternative for the group to sell the shares in the Danish subsidiary directly to the US global ultimate instead of incorporating the Cyprus entity, as this would have been exempt from withholding tax. Ultimately, the argument was that the arrangement was not wholly artificial as it was set in place to make sure that the dividends were distributed to the US global ultimate to benefit from the American Jobs Creation Act, which temporarily provided for a favourable repatriation of foreign profits.

The Tax Administration, on the other hand, argued that the entire case history clearly shows that the interposing of the Cyprus entity was done entirely for the group to obtain tax benefits, and that accordingly it would be contrary to the objective of the DTT to lower the withholding tax rate. The reasoning here was that the interposition was done in order to avoid withholding tax on the dividends distributed to the Bermuda entity.

On one hand, it can be argued that since there appeared to be an alternative to the structure that would also facilitate the tax-exempt distribution of dividends from the Danish subsidiary to the US global ultimate, the holding company was not interposed in order to obtain a tax advantage, as this was not necessary. On the other hand, one might also ask why then was it interposed, if it was so unessential to obtaining the tax benefit?

Regardless the answer, the case is a good illustration for the issue related to pinpointing the exact reasons for corporations to interposing entities, as there are likely to be several alternative options no matter what they are attempting to achieve by the interposition.

5.3.2. Immediate redistribution of dividends or interest

The analysis of the redistribution of interest and dividends received has a long-standing tradition in Danish tax law and can be described as a “forwarding approach”.167 As previously described, these circumstances are an indication that a structure does not reflect economic reality if the transactions are preordained and not a result of anticipating future events and planning for them. They are simply there to eliminate the risk and ensure a tax advantage, and any non-tax considerations that could disrupt the scheduled execution of the planned steps in the arrangement would not suffice to hinder them.

As mentioned in section 3.1., in the preliminary proceedings the ECJ has no choice but to base its rulings on the facts provided by the parties. In *T Danmark* (C-116/16), the Danish Ministry of Taxation argued that the redistribution of the dividends up the chain to the five private equity funds that owned the interposed holding companies in Luxembourg and the Danish subsidiary, was in fact so preordained that it should not matter that there was no formal legal obligation to redistribute them because the amounts involved were so

significant that it could be assumed that it had already been decided what was to happen to them. In the proceedings before the national courts, the taxpayer stated that the vast majority of the dividends were to be paid up the chain as dividends to the equity funds and, consequently, this also formed the basis for the judgment by the ECJ.

5.3.3. Insignificant income

While it may be peculiar to consider the amount of income generated by a holding company, it does in fact make sense if viewed in light of the theory of the firm as described above. If an interposed holding company has to redistribute such large amounts of dividends or interest that this redistribution renders it incapable of generating a business income, e.g. because the interest expense simply eats away at the income generated, then it could be assumed that interposing the holding company has in fact not resulted in any change of control, as described by the Theory of the Firm in section 5.1.2.

In C Danmark I (C-119/16) and X Denmark A/S (C-118/16), this argument was highlighted by the Danish Ministry of Taxation. The argumentation in relation to the indication about insignificant income appears to be lifted from the argumentation from the Danish National Tax Tribunal in these cases. The argumentation focuses on the fact that none of the holding companies that were established during the restructuring were expected to have any future business activity in addition to the holding activity and therefore they were not expected to generate any future income apart from that in connection to these activities. Therefore, the Tribunal regarded the establishment of the loan structures as something that would require the entities to receive additional funds from other group companies in order to fulfil their debtor obligations. In other words, the interposed entities were so highly leveraged that they required additional funds to fulfil their obligations, and therefore they were not likely to be able to freely determine the use of the interest received.

In C Danmark I (C-119/16), the Danish National Tax Tribunal quoted the 2003 OECD Model Commentary and stated that:

The term “beneficial ownership” was introduced in the 1977-version of OECD’s MC. From the commentaries to the 2003 to the OECD MC Article 10, paragraph 12 it follows that e.g. the notion of beneficial owner should not be used in a narrow technical sense, rather, it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance and that an agent or an intermediary cannot be regarded as the beneficial owner, just like a person who, in another way than as an agent or intermediary, merely acts as “conduit” for another person who actually receives the income in question cannot be considered the beneficial owner either. In that regard reference is made to the Report from the Committee on Fiscal Affairs where it says that a “conduit” cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere “nullity” or administrator acting on account of the interested parties. (Author’s translation.)

Furthermore, the Tax Tribunal concluded that:

None of the entities established by the restructuring had any other activity than holding activities, and therefore their only expected future income was those naturally associated with

holding activity. By establishing the debt structures in connection with the restructuring it must have been a prerequisite for the debtor entities to fulfil their obligations that these entities should receive funds from the other group entities. This must have been a precondition from the onset. (Author’s translation.)

This argumentation by the Danish Ministry of Taxation generally sums up the notion of beneficial ownership in EU law as determined by the ECJ in the rulings in the Danish BO cases. It is a combination of the different notions derived from the OECD Model Commentaries adapted to the specific context of the Ministry needing to fill the lacunas of the national legislation in order to be able to deny the benefits of the PSD and the IRD. While it may definitely be argued that the ECJ buying into this argumentation and quoting it more or less directly in its own reasoning is critical, it may also be argued that the overall reasoning is actually in line with basic economic theory. In any event, this peculiarity combined with the general intertwining between beneficial ownership and the notion of abuse in EU law certainly highlights that the abuse assessment is an economic assessment, and not a legal one.

5.3.4. Sole activity is redistribution and company lacks personnel and facilities

The fact that a company acts as a conduit company may be established where its sole activity is the receipt of interest and the transfer of this interest to the beneficial owner or to other conduit companies. The absence of actual economic activity must, in the light of the specific features of the economic activity in question, be inferred from an analysis of all the relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to expenditure actually incurred, to the staff that it employs and to the premises and equipment that it owns.

This is not exactly new, as this is basically a description of the notion of economic substance. The novelty here is the list of things to look for, which draws its meaning from everyday commercial life. This substance assessment is continued from the Cadbury Schweppes case, as described in section 3.3.1.2., and the focus on personnel and facilities can also be found in AG Kokott’s Opinions on Y Denmark ApS (C-117/16) and C Danmark I (C-119/16), in which she states the following:

54. A wholly artificial arrangement which does not reflect economic reality might be presumed in the present case. The facts disclosed by the referring court support that presumption. Thus, Y Cyprus has no staff and apparently no office premises of its own either. As a result, the company does not incur costs for either staff or premises. Also, the remuneration paid to the members of the management board suggests little activity on their part. Furthermore, asset management activities clearly generated no income of its own for the company. This all appears to be artificial. A natural person would have ceased trading long ago under such circumstances. (Emphasis added.)

65. In this case, it might indeed be assumed that there is a wholly artificial arrangement which does not reflect economic reality. The facts submitted by the referring court indicate as much. The two intermediary Swedish companies (C Sverige II and C Sverige I) did not have any employees, any office premises of their own, any telephone numbers of their own. Their post was opened by employees of a third-party company. As a result, these companies neither incurred any staff costs nor any costs for use of the premises. Moreover, they did not generate any income of their own through the asset management activities. All of this appears very artificial. A natural person would have long since ceased its business activities under these circumstances. (Emphasis added.)
5.3.5. Contractual obligations render the company unable to use and enjoy the sums

This criterion resembles the notion of beneficial ownership as it is defined in the 2014 OECD Model Commentary, as described in section 3.5.6. The indication relates to the subjective element of the abuse test and is a clear example of the link between beneficial ownership and abuse in EU law that the specific fact pattern of the Danish cases has caused. When examining the argumentation from the Danish National Tax Tribunal in the interest cases C Danmark I (C-119/16) and Z Denmark (C-299/16) it is also apparent that the argumentation has been lifted from these rulings where it is argued that the interposed holding companies are mere conduits and not the beneficial owner according to the IRD or the relevant DTT based on a broad economic interpretation of beneficial ownership. The basic notion appears to be in accordance with the 2014 OECD Model Commentary but when viewed in light of the facts of the cases, it is clear that the 2003 OECD Model Commentary has a bearing as well.

5.3.6. Close connection between the arrangement and new tax legislation

As mentioned in section 2.1., the position of Denmark as an eligible holding company jurisdiction has somewhat changed over time. In 1998, the limited tax liability in force at that time for dividends from Danish subsidiaries to their foreign parent companies was abolished. This attraction was later removed in 2001 as a condition that the withholding tax was lowered according to the PSD or a DTT was added as a requirement for the exemption to withhold the taxes.

In relation to interest, Denmark introduced limited tax liability for intra-group interest in 2004 with rules corresponding to those in place for dividends. In 2006, an adjustment was made to this legislation that broadened the definition of intra-group debt, which meant that a lot of structures using Denmark as holding jurisdiction had to start withholding taxes.

The argumentation about a temporal correlation between the interposition of the holding companies and major new tax legislation has been put forward by the Ministry of Taxation in the interest cases N Luxembourg 1 and Others (C-115/16), C Danmark I (C-119/16) and Z Denmark (C-299/16) as the structures were set in place either a few days before the new legislation from 2006 or shortly after.

It has been argued in the literature that the legislation to which the tax planning reacts need not necessarily be that of the EU Member States but can also be that of a third state. This statement is based on Y Denmark ApS (C-117/16) referring to the United States legislation under the 2004 American Jobs Creation Act. However, when examining the facts of this case, the argument about the correlation in time is not put forward, nor is it put forward in any of the dividend cases relating to the PSD for that matter. Considering that the argumentation by the ECJ refers to “the Danish legislation at issue in the main proceedings”, it would appear that the rulings do not support the conclusion that third state tax legislation changes can be considered as an indications. While this argument might have some bearing as part

of economic theory on how corporations respond to changes in their market conditions, it should also be kept in mind that it is in accordance with EU law for the corporations to choose the most favourable tax system in the other Member States, so altogether this argument does not seem to be in accordance with EU law.

While this indication of abuse is a novelty to the continued elements from the ECJ case law, it originates directly from the argumentation of the Danish Ministry of Taxation in the cases. Just as it can be argued that this is a critical way for the ECJ to develop the abuse assessment, it can also be argued that the indication does in fact make sense if viewed in light of economic theory: if an interposition of a holding company is solely conducted to maintain a tax advantage that would otherwise disappear as a consequence of a change in the rules, this arrangement is definitely not the result of intervening market forces. On the contrary, it is a rather obvious attempt to extend attributes of ownership in a situation where the tax rights related to this ownership are intended to be removed by the legislator.

6. Conclusions and Outlook

Considering the rulings in the Danish BO cases, it appears that in order to defend a tax position, the companies will have to focus on their non-tax reasons in order to substantiate it. This is especially so because of the high emphasis of the apportionment between the tax reasons and other valid business reasons in assessing the subjective element of the abuse test. This poses a number of issues for taxpayers in today’s world as this might not have been so much of a focal point for them in previous years. Chances are that e.g. restructurings will have involved at least some tax considerations and, given the developments in international taxation in recent years, it is not unthinkable that these considerations have been analysed thoroughly in order to assess the risk counteracting the potential benefits. So if traditionally the corporations and their tax advisors have focused on the tax reasons (because that is what they are paid to do) and the risk relating hereto, and this is the documentation that is kept for future tax audits, then there is certainly a risk that the tax administrations will analyse this documentation and conclude that the tax reasons for a given arrangement might very well have been dominant. While this is a practical issue, it is one that deserves some attention as the lack of documentation for non-tax business reasons does not necessarily equate that they did not exist or even that they were not in fact dominant. It might simply be explained by a different way of describing and documenting the reasons for certain business decisions prior to the recent developments in international tax law.

Taxpayers, administrations and most certainly tax advisers will need to steer their focus towards these issues to come up with viable solutions for documentation and proof of the business reasons. On the positive side, if they manage to do so, then the new meaning that has been added to the ATAD GAAR and the general anti-abuse principle in EU law by the Danish BO cases may in fact provide an advantage for the taxpayers as they will be able to demonstrate that they are entitled to the benefits of e.g. the PSD because no abuse exists, notwithstanding any assessment in relation to a PPT of a DTT. Essentially, it is also a clear message from the ECJ that if you have a viable business founded on valid commercial reasons, then you should be able to enjoy the benefits within the internal market.

This message is further substantiated by the meaning that the ECJ gives to the notion of abuse in an EU context as it is specified that this assessment is to be founded on everyday hallmarks of economic standards. These hallmarks not only aid the disentanglement of
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abuse from real economic activity, they also establish that the abuse assessment is in fact an economic assessment distinct from any element of a “smell test” or a test of the taxpayer’s “reprehensible” behaviour. While reference is made to the “intent” of the taxpayer in the subjective part of the abuse assessment, it is clear to the author, from the systematic economic assessment by the ECJ, that what is to be understood by “intent” is not to be confused with intention in other areas of the law, like criminal law, where an individual’s subjective state of mind forms part of determining a violation. In assessing the subjective element of the abuse test for a corporate structure, the fulcrum of that structure and the subsequent assessment is the taxpayer, i.e. the corporations. Logically, and in accordance with the meaning provided by the ECJ in the Danish BO cases, assessing the “intention” of these corporations should be based on well-founded theory and notions of business behaviour and not on an angry political sentiment labelling certain business behaviour as reprehensible.

This is also highlighted by the ECJ’s statements in relation to the burden of proof. If the subjective element was not something that could be assessed based on well-founded everyday hallmarks of economic standards, then the burden of proof would effectively be irrebuttable for the taxpayers, which would be contradictory to EU law.

With the clear alignment between the European Union and the OECD in focusing on general anti-avoidance measures and focusing on the subjective element of assessing potential abusive situations, a new standard has been set for combatting tax avoidance. If this standard is to be effective, it is necessary to evaluate these measures to understand their real impact, as has been done with the MLI and its implementation as a minimum standard to combat treaty shopping as part of BEPS Action 11. Even though there is substantial literature discussing anti-avoidance doctrines, there are surprisingly few analyses of the consequences of these doctrines. It could be argued that these impact analyses should have been conducted before implementing general anti-avoidance rules as a minimum requirement in both the European Union and the OECD, but for want of an optimal solution at least the effectiveness of these rules should be considered. If not, any adverse consequences, e.g. due to undesired behavioural changes by the taxpayers, might very well undermine the entire purpose of introducing these rules in the first place. Forces of tax competition among states are likely to undermine the international tax system even after BEPS reforms are introduced and while there is considerable evidence of base erosion and profit shifting by MNEs, the scale of the issue is very uncertain. The lack of adequate data is the main challenge to better evidence in order to adequately address abusive practices without overdoing it.

To conclude this analysis, the rulings by the ECJ in the Danish BO cases are certainly landmark decisions, and their full background and context must be considered in order to properly estimate their impact on EU direct tax law. Earlier EU case law in the field of direct

177. For an analysis of the impact of the Danish beneficial ownership cases on the possibilities of MNE to treaty shop, see S. Baerentzen, A. Lejour and M. van ’t Riet, Limitation of holding structures for intra-EU dividends: A blow to tax avoidance?, CPB Netherlands Bureau for Economic Analysis Discussion Paper Series (Dec. 2019).
taxation focused on what the European Union will allow Member States to incorporate in their national legislation to combat abuse. The focus today, on the other hand, is on what steps it demands Member States take against abuse. While the earlier concept allotted a more passive role to the European Union and its institutions, i.e. to defend fundamental EU rights against measures taken by states to combat abuse, including a number of measures inspired by the OECD Model and its Commentaries, the new concept places the European Union in line with the OECD in actively contributing to combat abuse, but at the same time still maintaining the important role of the ECJ as the guardian of fundamental EU rights of the taxpayers.