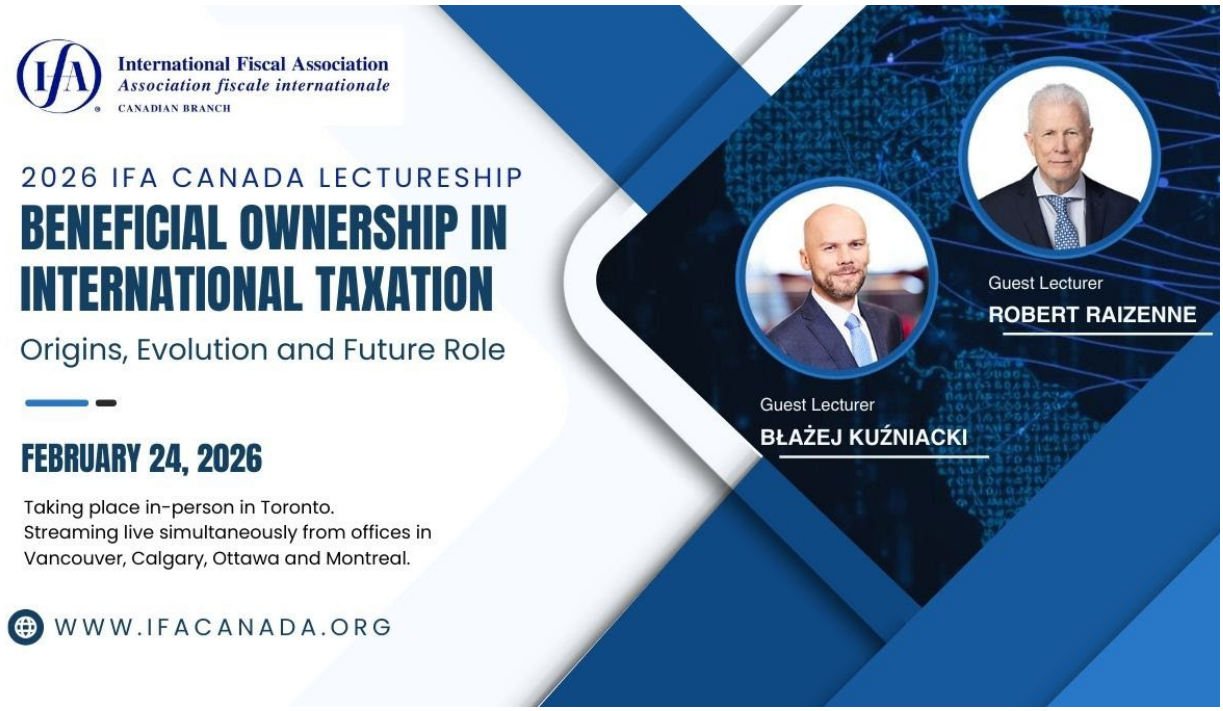

Pre-read Materials

Attached and below are background materials for the upcoming IFA Canada Travelling Lectureship on *Beneficial Ownership in International Taxation – Origins, Evolution and Future Role*

Attached Materials

1. Kuźniacki, Błażej, "Introduction to Beneficial Ownership in International Taxation" (Chapter 1)

2. CJEU, Danish Beneficial Ownership cases (26 February 2019):
   a) Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16 (Interest & Royalties Directive)
   b) Joined Cases C-116/16 and C-117/16 (Parent-Subsidiary Directive)

3. Swiss Federal Supreme Court, 9C_635/2023, Judgment of 3 October 2024 (Cross-Currency Rate Swaps case):
   – English version (AI translation)
   – Original German version

Publicly Available Materials (not attached)

• OECD Model Tax Conventions on Income and on Capital, Commentary to Articles 10–12 (Dividends, Interest, Royalties), with particular attention to the discussion of "beneficial owner" and conduits.

• Canadian Jurisprudence: *Prevost Car Inc. v. R.*, 2009 FCA 57, *Velcro Canada Inc. v. R.*, 2012 TCC 57, *Canada v. Hutchison Whampoa Luxembourg Holdings S.A.R.L.*, 2025 FCA 176

1

INTRODUCTION TO *BENEFICIAL OWNERSHIP IN INTERNATIONAL TAXATION*

I. THE PURPOSE, SCOPE AND BASIC AIM OF THE BOOK

1.001 A dispute has arisen between the domestic tax authorities and foreign taxpayers in respect of the meaning of 'beneficial ownership' or 'beneficial owner' (hereinafter 'BO'), in tax law. An independent domestic court is on a mission to resolve this dispute. Recourse is had to the canons of interpretation in the Vienna Convention on the Law of Treaties (hereinafter the 'VCLT'[1]) and the autonomous and dynamic interpretation presented by the Organisation for Economic Co-operation and Development (OECD) in its Commentary to the OECD Model Tax Convention on Income and on Capital (hereinafter the 'Commentary' and the 'OECD Model'[2] respectively). The Court of Justice of the European Union (hereinafter the 'CJEU') has given its own eclectic view on the disputed matter in its ground-breaking rulings on what are known as the Danish BO cases.[3]

1 Done in Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

2 OECD, 2017 Update to the Model Tax Convention on Income and on Capital (adopted by OECD Council on 21 November 2017), https://www.oecd.org/tax/treaties/oecd-approves-2017-update-model-tax-convention.htm.

3 European Union, the CJEU, *N Luxembourg 1, X Denmark A/S, C Danmark I, Z Denmark ApS*, C-115/16, C-118/16, C-119/16 and C-299/16, 26 February 2019, ECLI:EU:C:2019:134 and *T Danmark and Y Denmark Aps*, C-116/16 and C-117/16, 26 February 2019, ECLI:EU:C:2019:135.

1.002 Despite more than 50 years of attempts by the OECD to clarify the concept of BO, its meaning and scope remains ambiguous and unresolved, not only among tax authorities and courts, but also among scholars.[4] All this has been detrimental to the stable and predictable functioning of tax treaties for several decades and also, more recently, for the Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (hereinafter the 'PSD'[5]) and Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (hereinafter the 'IRD'[6]).

1.003 The worldwide spread of its negative impact on the effectiveness of tax treaties and the European Union (hereinafter 'EU') directives beg the following questions. Why and how did it initially come about? What legal tools do we have to change it? Where are we today when it comes to understanding and applying the concept of BO? And the most central question for the book – what role in the quest for the meaning of BO is played by law-in-action through judicial decisions when courts interpret and apply that concept to solve disputes between the tax authorities and taxpayers?

1.004 The justified criticism of the OECD for the lack of a precise, holistic, principle- and consequence-based approach to the clarification of the meaning of BO does not diminish the practical importance of that concept. It remains regarded as a potent weapon in the arsenal of tax authorities to attack presumably abusive behaviours involving conduit entities.[7] The tax

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4 Oliver, David, et al., 'Beneficial Ownership and the OECD Model', (2001) *Brit. Tax Rev*. 1, 27 et seq.; Vogel, Klaus, 'On Double Taxation Conventions Preface to Arts. 10–12' in: Vogel, Klaus (ed.), *Klaus Vogel on Double Taxation Conventions: A Commentary to the OECD-, UN- and US Model Conventions for the Avoidance of Double Taxation on Income and Capital*, (1997) Kluwer Law International, paras 5–14; Van Weeghel, Stef, *The Improper Use of Tax Treaties*, (1998) Kluwer Law International, 64 et seq.; Du Toit, Charl, *Beneficial Ownership of Royalties in Bilateral Tax Treaties* (1999) IBFD; Walser, J., 'The Concept of Beneficial Ownership in Tax Treaties' in: *The OECD Model Convention – 1998 and Beyond: Proceedings of a Seminar held in London in 1998 during the 52nd Congress of the International Fiscal Association* (2000) Kluwer Law International; Baker, Philip, *Double Taxation Conventions art. 10*, (2000) Sweet & Maxwell, para. 10B-09 et seq.; Pijl, Hans, 'Beneficial Ownership and Second Tier Beneficial Owners in Tax Treaties of the Netherlands', (2003) 31 *Intertax* 353–61; Danon, Robert, *Switzerland's Direct and International Taxation of Private Express Trusts*, (2004) Schulthess, 296 et seq.; Wheeler, Joanna, 'The Attribution of Income to a Person for Tax Treaty Purposes', (2005) 59 *Bull. Intl. Fisc. Docn*. 478–479; Wheeler, Joanna, 'General Report' in: *Conflicts in the Attribution of Income to a Person*, (2007) IFA Cahiers vol. 92b; Bernstein, J., 'Beneficial Ownership: An International Perspective', (2007) 47 *Tax Notes Intl*. 17, 1211–1216; De Broe, Luc, *International Tax Planning and Prevention of Abuse: A Study Under Domestic Tax Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies* (2008) IBFD 654 et seq.; Martín Jiménez, Adolfo 'Beneficial Ownership: Current Trends', (2010) 2 *World Tax J*. 1, 35 et seq.; Lang, Michael, et al. (eds), *Beneficial Ownership: Recent Trends*, (2013) IBFD; Meindl-Ringler, Angelika, *Beneficial Ownership in International Tax Law*, (2016) Kluwer Law International; Danon, Robert, 'Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups', (2018) 72 *Bull. Intl. Taxn*. 31 et seq.; Danon, Robert, 'Tax Treaty Abuse from a Swiss Perspective: Current State of Affairs, Uncertainties and Future Perspective' in: Raphaël, G. and Rochat Pauchard, A. (eds), *Au carrefour des contributions: Mélanges de droit fiscal en l'honneur de Monsieur le Juge Pascal Mollard*, (2020) Stämpfli, 413–446; Martín Jiménez, Adolfo 'Beneficial Ownership' in: Vann, Richard (ed.), *Global Tax Treaty Commentaries* (2020) IBFD.

5 Official Journal of the European Union, L 345/8, 29 December 2011.

6 Official Journal of the European Union, L 157/49, 26 June 2003.

7 Martín Jiménez, Adolfo 'Beneficial Ownership' in: Vann, Richard (ed.), *Global Tax Treaty Commentaries*, IBFD Tax Research Platform (online), IBFD 2020, Chapter 1.

authorities appear to approach that issue very pragmatically: the appropriate meaning of BO does not matter (if it exists at all) as long as its application allows withholding tax to be levied on foreign taxpayers (investors).

1.005 The basic aim of this study is to examine how national judges react to such an approach while exercising their judicial discretion in the search for the meaning of one of the most disputed concepts in international tax law. Do they follow the tax authorities because of the close legal, economic and social connections with them, which encourage them to protect the country's tax base at the cost of the appropriate application of tax treaties and EU directives (source state protectionism)? Or do they resist 'nationalism in judging' and determine the meaning of BO in accordance with the canons of interpretation that lead to the appropriate application of tax treaties and EU directives (the search for the autonomous international meaning)?

1.006 This book tries to give answers to the questions first on the basis of an in-depth analysis of the origin and evolution of the international meaning of the concept of BO under tax treaties, which predominantly stems from the Commentaries to the OECD Model. Then attention will be given to selected judgments in seminal cases concerning BO, taking into account the wide time horizon of 50 years and geography, covering common law countries (the United States (hereinafter US), Canada and the United Kingdom (hereinafter UK) and civil law states (France, the Netherlands and Switzerland). The book pays particular attention to the recent judgments of the CJEU in the Danish BO cases, the importance of which cannot be overstated.

1.007 Before the central analysis, we will set the scene by introducing the fundamental aspects of the book, such as the relations between foreign investments and withholding taxation, as well as the taxpayer's right to choose the most tax favourable intermediary jurisdiction for the investment on the one side, and the source country's right to protect its tax base on the other. The introductory discussion also explains basics terms such as conduits, treaty shopping and directive shopping for the purposes of terminological rigour. Then we strengthen the methodological foundations via the systemic explanation of canons of interpretation relevant for the concept of BO.

1.008 The book aims to measure the convergence/divergence of the judicial understanding of BO with its autonomous international meaning developed by the OECD in its reports and Commentaries, and following from the interpretation of that concept pursuant to the canons of interpretation. The analytical structure of the Extended Contents helps to pursue this task with a systemic view of the interpretive solutions advanced by the courts. We closely examine various perspectives of courts by looking at diverging or converging cases, thereby creating a structural global map of evolving judicial trends in the understanding of BO, often influencing the behaviour of notational legislatures and the OECD. This map sometimes leads to the treasure of an autonomous international meaning of BO. Often it simply leaves an interpreter completely lost. Each time it takes us closer to the end of the BO concept.

II. BENEFICIAL OWNERSHIP: DEFINITIONAL CHAMELEON

1.009 The meaning of BO is extremely vague and fact sensitive. Both features of BO point to a high plasticity; something that was aptly articulated by Johann Hattingh:

> There is probably no perfect, well-described and all-encompassing definition of beneficial ownership waiting to be discovered in a certain case or in an experienced authority. The term beneficial owner is rather like a chameleon, taking colour from the content of the personal property to which it is attached as its label. It is not in the nature of the chameleon to nail its colours to the mast.[8]

1.010 We may assume, therefore, from the outset that the meaning of BO in international and domestic tax laws is extremely susceptible to different understandings and applications. Depending on who and under what circumstances tries to give meaning to BO, this concept takes on different roles and its application leads to different consequences.

1.011 The tax authorities may rely on the plasticity of BO to give to it a meaning that ultimately permits them to levy withholding tax (hereinafter 'WHT'), i.e., to dismiss a status of BO in respect of a recipient of an income that could benefit from an exemption or reduced tax rate in WHT if it was the BO of the income. If doing so requires perceiving BO as a kind of anti-abusive clause, the tax authorities will apply BO 'as if' it was an anti-abusive clause. If, in turn, a narrow perception of BO, as a rule on the allocation of income to a taxpayer, suffices to trigger WHT according to domestic rates, the tax authorities will be satisfied with identifying a BO with a taxpayer to whom income is allocated. All the roles of BO and scenarios of its application during WHT audits carried out by the tax authorities are possible due to its plasticity. The dominant role of BO will arise from its meaning that best suits the more pro-fiscal interests of the tax authorities.

1.012 Clearly, the chameleon nature of BO is detrimental to legal certainty and has a potentially enormous negative impact upon the smooth application of tax treaties and EU directives. This is why courts have such an important role to play in definitional disputes regarding BO among the tax authorities and taxpayers. Firstly, the chameleon nature of BO does not need to work against taxpayers, because the courts may perceive BO differently than the tax authorities, with the result of granting WHT exemption or a reduced tax rate to the taxpayers. Secondly, the tax jurisprudence has the capability to change the nature of BO towards becoming more definitive and precise. In effect, BO does not have to undermine an appropriate functioning of international and EU tax law within the framework of WHT.

1.013 Equally possible, although less desirable from the perspectives of international and EU tax regimes, is the tax jurisprudence that negatively influences the understanding of BO, generally by sustaining or even strengthening the lack of clarity surrounding that concept. The highest risk to the heterogeneous application of BO, exerting a negative effect on the stability and predictability of functioning of tax treaties and EU directives, stems from the tax jurisprudence that perceives this concept anti-abusively, applying a broad economic approach instead of a precise legal analysis.

1.014 The courts may also take a mixed approach that unravels the dual role of BO: (i) a rule on the allocation of income and (ii) a narrow anti-abusive clause that targets only specific transfers of income. A nuanced variation of that approach comes from perceiving BO solely as a rule

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8 Hattingh, Johann, 'Beneficial Ownership and Double Tax Conventions, Part II' in: De-Koker, Alwyn and Brincker, Emil (eds), *International Tax* (2009) LexisNexis. Cited after: Du Toit, Charl P., 'The Evolution of the Term "Beneficial Ownership"' in Relation to International Taxation over the Past 45 Years', (2010) 64 *Bulletin for International Taxation*, sec. 3.2.1.

on allocation of income, the application of which may, in certain circumstances, lead to an anti-abusive effect.[9]

1.015 A highly controversial issue concerning the definitional borders of BO has the potential to lead to diverging lines of tax jurisprudence. A close examination of this jurisprudence aims to identify the dominant judicial approaches and the legal and fact patterns standing behind them. In the process of examining this question, the following additional questions will arise:

(1) Is the concept of BO implicit in every tax treaty and EU directive addressing WHT, regardless of its explicit articulation in their wording?
(2) If the BO status is denied to a direct recipient of payments (income), can a tax treaty or an EU directive be applied to an entity that has the status of BO higher up in the chain of recipients of that payment?
(3) Should the status of an intermediary entity as a BO be assessed exclusively or mainly from the perspective of the source country (hereinafter the 'SC') of the income or resident country (hereinafter the 'RC') of that entity?
(4) Is BO a necessary and helpful concept in international and EU tax law, or an unnecessary and harmful one?

1.016 By providing an in-depth legal analysis concerning disputes surrounding the concept of BO, the book attempts to fill a current gap in the literature by identifying to which functional and structural elements of this concept the jurisprudence pays the most attention and what legal consequences it has for the evolution of the meaning of this concept.

III. THE MOST IMPORTANT AND RELEVANT AREAS CONCERNING THE CONCEPT OF BENEFICIAL OWNERSHIP

1.017 Prior to the deep dive into the jurisprudence on BO, and even before introducing the methodology of understanding of this concept, its origin and evolutions, it is important to step back and see the bigger picture, i.e., why is there so much fuss about BO in the first place? To answer this question, we need to look at the connections between foreign investments, in particular returns from their successful performance, which are typically paid in the form of highly mobile income such as dividends, interest and royalties, and WHT. Then, we introduce the taxpayer's right to the lowest taxation and to choose the most favourable jurisdiction for the investment and the country's right to protect its tax base. A concise look at those aspects sets the scene for the relevance and importance of the issues related to the interpretation and application of BO.

9 Maisto, G., *Tax Treaty Case Law Around the Globe 2020*, during the Conference online Organised by the European Tax College of the Fiscal Institute Tilburg, in joint venture with the Institute for Austrian and International Tax Law and International Tax Law, 15–16 May 2020, https://www.tilburguniversity.edu/research/institutes-and-research-groups/fit/tax-treaty-case-law.

A. Interplay between foreign investments, withholding tax and tax planning friendly jurisdictions

1.018 The International Monetary Fund (hereinafter the 'IMF') presents interesting data on foreign direct investments (hereinafter 'FDIs'[10]) in its Co-ordinated Direct Investment Survey. The top five countries in the world in respect of outward FDIs are the USA, the Netherlands, Luxembourg, China (Mainland), and the UK, at USD 5.959, 5.582, 4.395, 2.198, and 1.895 trillion, respectively. [11] At the same time, those same the countries, in the same order, are the world leaders in the quantum of inward FDIs, at USD 4.458, 4.369, 3.495, 2.938 and 1.974 trillion, respectively. In the vast majority of cases, the returns from such investments fall within the WHT regimes of those countries, and, most importantly, the countries that are originally 'hosting' the investments, to use the jargon of international investment law.[12] Such countries are considered SCs in tax law terminology. This raises the question whether or not the Dutch, Luxembourgish, and the British recipients of the mentioned gigantic profits from the investments that typically 'flow through' the Netherlands, Luxembourg and the UK to the USA and China are their BOs. If not, then many host countries/SCs across the world may challenge the exemptions or reduced WHT in relation to the payments of profits to entities established in the Netherlands, Luxembourg and the UK, often known as special purpose entities (hereinafter 'SPEs'), which may be considered conduits.[13] This is so because, in principle, only the BOs of income from dividends, interests and royalties may benefit from the exemptions or reduced WHT on that income under tax treaties and EU directives.[14]

1.019 The stake is huge: instead of WHT exemptions based on EU directives or an application of reduced rates or exemptions based on tax treaties (whichever is more relevant), for instance 5, 10 or 15 per cent, investors may be obliged to pay WHT on their returns, usually in the form of dividends, interest and royalty payments, calculated in accordance with the domestic WHT rates of SCs, which may range from 19 per cent (Poland) through 35 per cent (Chile

10 According to the OECD's nomenclature, FDI refers to the direct or indirect ownership of 10 per cent or more of the voting power of an enterprise resident in one economy by an investor resident in another economy. This, in the OECD's view, implies a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise and serves statistical consistency across countries. OECD, *Benchmark Definition of Foreign Direct Investment. Fourth Edition*, (2008) Paris, para 117. Cf. IMF, *Balance of Payments and International Investment Position Manual, Sixth Edition (BPM6)*, (2009) Washington, D.C., paras 6.8–6.10 for a definition of FDI and para. 6.54 for the definition of portfolio investment.

11 IMF, *Co-ordinated Direct Investment Survey (CDIS)*. The latest update: 12 September 2020, https://data.imf.org/?sk=40313609-F037–48C1–84B1-E1F1CE54D6D5&sId=1482249019300.

12 The host countries are sometimes referred to as the 'capital-importing countries' Salacuse, Jeswald W., *The Law of Investment Treaties Third Edition*, (2021) Oxford Scholarly Authorities on International Law, 53.

13 For the definitions see *infra* 1.IV.A. and B.

14 Arts 10, 11 and 12 of the OECD MC and Art. 1(1) of the IRD and implicitly Art. 1(1) of the PSD. See also European Union: the CJEU in Joined Cases *N Luxembourg 1 and Others v. Skatteministeriet*, C-115/16, C-118/16, C-119/16 and C-299/16, ECLI:EU:C:2019:134, paras 84–94, 26 February 2019 and *T Danmark and Y Danmark v. Skatteministeriet*, C-116/16 and C-117/16, ECLI:EU:C:2019:135, paras 111–113, 26 February 2019 (hereinafter also as (collectively) the 'Danish BO Cases'). See also Kemmeren, Eric, 'Preface to Arts 10 to 12', in: Rust, Alexander, Reimer, Ekkehart (eds), *Klaus Vogel on Double Taxation Conventions, Fourth Edition*, Vol. 1, (2015) Wolters Kluwer Law & Business, paras 19 et seq., 715 et seq.

or Switzerland) to 44 per cent (Greenland), to list a few.[15] This follows from the fact that, as stated above, the tax treaties and EU directives provide exemptions or reduced WHT rates only to BOs of income, rather than to their mere recipients.

1.020 The preferable tax treatment of gargantuan profits may be challenged particularly by an aggressive pro-fiscal understanding of BO that is embedded within its anti-abusive perception of the tax authorities. This constitutes a sort of problem that is most relevant to the global market players. The following data and observations suggest that the risk associated with this problem is high.

1.021 Senior members of the OECD's Centre for Tax Policy and Administration (hereinafter the 'CTPA') have commented on the context of implementing the OECD/G20's efforts against tax avoidance by multinationals, for which around 80 per cent of global gross income was, as of 2015, generated by 15 per cent of multinational enterprises (MNEs)[16] with large networks of subsidiaries around the world.[17] These subsidiaries are not necessarily SPEs, but it is safe to assume that at least some of them are, since companies within the group of MNEs are actually controlled by an ultimate parent with their income dispersed around the world, including in low tax jurisdictions and tax havens.[18]

1.022 Interesting information can also be obtained from the OECD Investment Database on FDI stock positions, which are composed of equity and debt (intercompany loans) and represent the value of the stock of direct investments held at the end of the reference period (year, quarter, or month).[19] Such datasets are especially interesting from the perspective of tax planning. Financial instruments related to equity and debt are often used in cross-border intercompany loans for tax planning purposes via the hybrid qualification of such instruments, whereby the financial instrument is treated by the issuer state as debt and by the holder state as equity, often resulting in a payment of tax deductible interest by the issuer, which is then exempted from taxation in the holder's state due to the treatment of this payment as dividend (participation

15 PwC, 'Quick Charts: Dividend, interest, and royalty WHT rates for Worldwide Tax Summaries Online territories', (2020/2021), https://taxsummaries.pwc.com/quick-charts/withholding-tax-wht-rates#anchor-U.

16 A precise and legally binding definition of an MNE does not exist. For the purposes of the book, the OECD's open-ended definition is relevant. It says that MNEs:

> usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.

OECD, *OECD Guidelines for Multinational Enterprises – 2011 Edition*, (2011) Paris, 17. The literature indicates that an MNE can be defined as an enterprise that wholly or partly owns, controls and manages value-adding activities in more than one country. MNEs typically consist of groups of companies that are highly interrelated economically and legally, and are often under the control of an ultimate parent. Brewer, L. Thomas, Young, Stephen, *Multilateral Investment System and Multinational Enterprises*, (1998) Oxford University Press, 11; Strasser, A. Kurt, Blumberg, Philip, 'Legal Form and Economic Substance of Enterprise Groups: Implications for Legal Policy', (2011) *Accounting, Economics and Law*, 2152–2820.

17 OECD, *Tax Transparency 2015: Report on Progress*, (2015) Paris.

18 Ibid.

19 OECD, *Addressing Base Erosion and Profit Shifting*, (2013) Paris, 22.

exemption).[20] The data also show that total inward and outward stock investments into and from the Netherlands and Luxembourg were made to a significant extent through SPEs.[21]

1.023 Given that the Netherlands, Luxembourg and the UK are considered in some circles[22] as intermediary jurisdictions facilitating tax treaty and EU directive shopping[23] (as well as investment treaty shopping[24]), the tax authorities may instantly 'smell' that direct payments from their countries (SCs) to entities (especially SPEs) from the above jurisdictions deserve special attention during WHT audits. The tax authorities are likely to pay similar attention to payments to other tax planning friendly jurisdictions that are very high in the IMF's ranking of the world's top countries in relation to inward and outward FDIs such as Switzerland, Ireland, Singapore, Hong Kong, Cyprus and Malta.[25] All of them have very competitive tax systems and have internationally oriented their economies with a high level of intermediate financial flows. As a result, for decades they have been successfully attracting global businesses and investments.[26] They also attract the eyes of the tax authorities, which are nowadays more capable than ever to scrutinise the status of entities established in their territories due to the exponential growth in the cross-border exchange of tax information.[27] Of course, one of the most wanted statuses to be verified by the tax authorities from SCs is BO.

1.024 The tax authorities of SCs may appear hot-headed whenever they audit WHT on payments of dividends, interest and royalties to the above-mentioned jurisdictions, in the sense that they hastily jump to the conclusion that the recipients are not BOs. In many cases, such conclusions will follow from a broad, economic and anti-abusive meaning of the concept of BO, rather than from precise, narrow-oriented legal meaning. The current race for new funds to state budgets from taxes under the Covid-19 pandemic, 2021–2022 global energy crisis and soaring

20 OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – Final Report*, (2015) Paris, OECD, para. 18.

21 OECD, *Addressing Base Erosion and Profit Shifting*, (2013) Paris, 18.

22 Garcia-Bernardo, J., Fichtner, J., Takes, F. W. and Heemskerk, E. M., 'Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network', (2017) 7 *Scientific Reports*, No. 6246, https://www.nature.com/articles/s41598–017–06322–9; Boffey, D., 'Netherlands and UK are biggest channels for corporate tax avoidance', *The Guardian*, 25 July 2017, https://www.theguardian.com/world/2017/jul/25/netherlands-and-uk-are-biggest-channels-for-corporate-tax-avoidance; Fuest, C., et al., 'Profit Shifting and "Aggressive" Tax Planning by Multinational Firms: Issues and Options for Reform', (2013) 5 *World Tax Journal* 310–314; The Database of the International Consortium of Investigative Journalists (ICIJ), http://www.icij.org/project/luxembourg-leaks/explore-documents-luxembourg-leaks-database.

23 For the definitions of these phenomena see *infra* 1.IV.C.

24 Baumgartner, Jorun, *Treaty Shopping in International Investment Law, First Edition*, (2016) Oxford University Press, 143; Samples, R. Tim, 'Winning and Losing in Investor-State Dispute Settlement', 56 (2019) *American Business Law Journal* 160–161.

25 All of them are in the top ten jurisdictions in terms of inward FDIs. Also, Switzerland is in the top ten with regards to outward FDIs. IMF, *Co-ordinated Direct Investment Survey (CDIS)*, (2020). According to other sources, Cyprus and Malta also score high. United Nations Conference on Trade and Development (UNCTAD) Data Centre, https://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx?sCS_ChosenLang=en.

26 Milogolov, Nikolai, 'The Emergence of the "Technological Tax Hub": Digitally Oriented Trajectories of Reforms in Tax Planning Hub Jurisdictions', (2020) 48 *Intertax* 1106–1107, 1113–1122.

27 Nearly 100 countries carried out the automatic exchange of information in 2019, enabling their tax authorities to obtain data on 84 million financial accounts held offshore by their residents, covering total assets of EUR 10 trillion. OECD, 'International community continues making progress against offshore tax evasion', 30 June 2020, https://www.oecd.org/ctp/exchange-of-tax-information/international-community-continues-making-progress-against-offshore-tax-evasion.htm.

inflation which is stronger than after the previous 2007–2009 economic crisis,[28] adds fuel to the aggressive approach of the tax authorities to tax audits, including WHT and BOs. The CJEU's judgments in the Danish BO cases of 2019, as well as subsequent rulings of courts in the EU in 2019–2021, prove that this is indeed the case.[29]

1.025 As a result, the predictability and stability of the protection of taxpayers under tax treaties and EU directives is currently significantly compromised in favour of the prevention of abuses of tax law through the use of the concept of BO, which is not necessarily appropriate for that purpose. To use the language of the great German sociologist Max Weber, two out of three conditions necessary for law to be calculable – (1) the legal text must lend itself to prediction and (2) the administration and application of the legal text must not be arbitrary[30] – are undermined because of the way of the concept of BO is applied by the tax authorities of SCs. In other words, one of the vital goals of tax treaties and EU directives, which is, broadly speaking, to increase the calculability of foreign investment transactions between Contracting States (hereinafter 'CSs') and Member States (hereinafter 'MSs') of the EU is jeopardised by the broad, anti-abusive understanding of the concept of BO. This may, in turn, have a negative spill-over effect on economic growth and the tax base of SCs in the long term, by decreasing inward and outward FDIs to those countries.

1.026 Still, the absence of or low WHT in SCs may not always be beneficial for the developments of the economies, or be acceptable from their tax policy points of view. Adverse effects may result from an imbalance between the expected budget revenues in corporate income tax (hereinafter 'CIT'), on the one hand, and economic growth resulting from the inflow of foreign investments and the related revenue from taxes other than CIT, on the other.[31] If CIT revenues to the treasuries of SCs fall as a result of the *proper* application of exemptions and lower WHT rates, i.e., in line with their content, context and purpose, one may presume that such a phenomenon would be beneficial for the economy and acceptable to the Ministries of Finances of SCs. It is different, however, when an absence of or low WHT results from the *abuse*[32] of tax treaties or domestic provisions implementing EU directives in order to avoid taxation in SCs. The question arises, therefore, in what situations do payments of profits from SCs to foreign entities without WHT or with a low WHT not raise doubts, and in what situations are doubts raised, and whether or not the concept of BO may be a remedy for this? In order to properly understand the tension between an appropriate and inappropriate approach to BO, it is important

28 Agyeman, Ebenezer, 'Tax: how we will pay for the pandemic measures. Previous manifesto promises could be broken and unpopular decisions made as the UK's budget deficit mounts', *Financial Times*, 15 May 2020, https://www.ft.com/content/7a01b73b-d1ec-4b6e-a7b1–2d1a0060de91; Eberhart, Dan, 'Energy Crisis Threatens Return Of 1970s Inflation', Forbes, 19 October 2021, https://www.forbes.com/sites/daneberhart/2021/10/19/energy-crisis-threatens-return-of-1970s-inflation/?sh=4493e9157e20; Schnabel, Isabel, 'Looking through higher energy prices? Monetary policy and the green transition', Remarks by Isabel Schnabel, Member of the Executive Board of the ECB, at a panel on "Climate and the Financial System" at the American Finance Association 2022 Virtual Annual Meeting, 8 January 2022, https://www.ecb.europa.eu/press/key/date/2022/html/ecb.sp220108~0425a24eb7.en.html.

29 See *infra* Chapter 6.

30 The (3) is contracts must be enforced. Swedberg, Richard, 'Max Weber's Contribution to the Economic Sociology of Law', (2006) 2 *Annual Review of Law and Social Science* 61.

31 Tørsløv, R. Thomas, Wier, S. Ludvig, Zucman, Gabriel, *The Missing Profits of Nations,* April 2020, https://missingprofits.world/wp-content/uploads/2020/05/TWZ2020.pdf.

32 This refers to the concept of abusive treaty and directive shopping that is explained *infra* in 1.IV.C.

to present the seemingly clashing rights of the taxpayer and the SC: the taxpayer's right to the possible lowest taxation and to choose the most favourable jurisdiction for its investment, and the country's right to protect its tax base against abusive arrangements and transactions.

B. The taxpayer's right to choose the non-abusive tax path most favourable for the investment

1.027 A modern taxpayer has access to a variety of international tax planning methods,[33] including those aimed at the avoidance or reduction of WHT, by conducting their investments indirectly via intermediaries that are usually established in jurisdictions discussed in the preceding subsection.[34] As a result, they benefit from WHT exemptions or reduced rates, as provided by tax treaties or EU directives, applicable between SCs and the RCs of intermediaries, and finally between the latter countries and the RCs of ultimate (principal) investors.

1.028 Tax law does not prohibit the taxpayer a choice between different legal alternatives to reach factual objectives that are identical or very similar, but with different tax consequences. Hence, depending on the legal choice made by the taxpayer, the same factual objective will result in a lower or higher tax burden.[35] For this reason, the practices of using intermediaries to avoid or reduce WHT stem from exercising one of the most fundamental and universally recognised of taxpayer's rights, namely the right to choose the execution of legal actions in accordance with the law in such a way that it leads to the least possible taxation.[36] Such practices are accepted by the legislatures and courts at a constitutional level.[37] This is because there is no *de lege lata* legal norm that would consider as unlawful the behaviour of a taxpayer aimed at avoiding or reducing taxation.

1.029 The actions undertaken by the taxpayer remain valid, therefore, not only from the point of view of civil law, but their legality and validity may, more broadly, be stated as being of a systemic nature, including tax law. This is also what the CJEU has been saying for decades in the context of EU law: it is permissible for a taxpayer to seek the most favourable tax regime and the least-taxed business or investment route for him, insofar as it does not constitute an *abuse of rights* and is a manifestation of the application of the EU freedoms underlying the EU Treaties for the proper functioning of the single market in the EU.[38]

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33 Seidler, Andrew, Almand, Ken, Langston, Robert, *Tolley's International Tax Planning: 2019–20*, (2019) LexisNexis; Russo, Raffaele, *Fundamentals of International Tax Planning*, (2009) IBFD.

34 De Broe, Luc, *International Tax Planning and Prevention of Abuse: A Study under Domestic Tax Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies*, (2008) 14 Doctoral Series IBFD – Academic Council, IBFD, 5–61.

35 Vanistendael, Frans, 'Legal Framework for Taxation', in: Thuronyi, Victor (ed.), *Tax Law Design and Drafting*, (1996) IMF, 45.

36 Ibid., 35–45; Blaufus, Kay, Braune, Matthias, Hundsdoerfer, Jochen, Jacob, Martin, 'Does Legality Matter? The Case of Tax Avoidance and Evasion', (2015) arqus Discussion Paper, No. 193, 1, https://www.econstor.eu/bitstream/10419/121168/1/837148987.pdf; Delahaye, Thomas, *Le choix de la voie la moins imposée*, (1977) Bruxelles, 48–50; Lerouge, Gaston, *Théorie de la fraud en droit fiscal*, (1944) Paris, 103 et seq.

37 See, e.g., Poland, Trybunał Konstytucyjny (Constitutional Tribunal), K 4/03, Journal of Laws 2004, No. 122, item 1288, 11 May 2004.

38 See, in particular, the judgments of the CJEU: of 26 February 2019 in Joined Cases *N Luxembourg 1 and Others v. Skatteministeriet*, C-115/16, C-118/16, C-119/16 and C-299/16, ECLI:EU:C:2019:134, paras 84–94 and *T Danmark and Y Danmark v. Skatteministeriet*, C-116/16 and C-117/16, ECLI:EU:C:2019:135, paras 111–113; *N Luxembourg 1*

C. The country's right to protect its tax base before abusive arrangements and transactions of foreign investors

1.030 It follows from the above subsection that, as a starting point, *every taxpayer* who invests in an SC has the right to choose the most favourable jurisdiction for making the investment, indirectly resulting in the least WHT. However, this right finds its limit where the abuse of it begins.

1.031 The legislator prevents actions that constitute an abuse of that right by implementing legal measures against abusive transactions and arrangements. The key questions are, therefore, what is abusive when avoiding or reducing taxation, and what is not. The answers to these questions are painstakingly difficult. This was neatly explained by Advocate General (hereinafter 'AG') at the CJEU, Juliane Kokott, in her opinion on one of the Danish BO cases:

> The above questions ultimately apply to the fundamental conflict between the taxable person's freedom to arrange his affairs under civil law and the need to prevent arrangements that are valid under civil law, but nonetheless abusive under certain circumstances. Even though this problem has existed since the invention of modern tax legislation, it is hard to draw a dividing line between admissible and inadmissible tax-reduction measures. A driver who sells his car following an increase in road tax obviously acts in order to avoid road tax. However, that cannot be construed as an abuse of law, even if his sole reason was to save tax.[39]

1.032 The point to be made is that anti-abusive measures must meet certain criteria arising from the Constitution, EU and international law. Notably, they should target abusive practices exclusively and in a precise way. This shows that every country certainly has the right to protect its tax base, but that this right is not absolute. Considering the constitutional, EU and international legal frameworks, it finds its limit beyond the abuse of the taxpayer's right to choose the most favourable jurisdiction for making the investment indirectly resulting in the least taxation. That is to say, in principle, SCs have the right to protect their tax bases only against abusive arrangements and transactions of foreign investors. In the context of questions relevant to this book, this pertains to abusive treaty and directive shopping. Their definitions will be explained *infra* in subsection 1.IV.C.

1.033 An important question at the heart of this book is whether the concept of BO may be deemed an anti-abusive legal measure in WHT or not, and why? The tax jurisprudence may shed a lot of light on that issue. A foundational guidance to the courts can be found in the canons of interpretation relevant to the concept of BO and the origin and evolution of that concept, *infra* in Chapters 2 and 3.

1.034 In addition to the constitutional, EU and international normative reality, while designing anti-abusive legal measures in WHT, SCs must be conscious of the desires and needs of foreign investors, as well as the legal and financial mechanisms of other jurisdictions that constitute

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and Others v. Skatteministeriet, para. 109 and *T Danmark and Y Danmark v. Skatteministeriet*, para. 81; of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, para. 60; of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, para 84; and of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, para. 50.

39 European Union, 1 March 2018, *N Luxembourg 1 v Skatteministeriet*, C-115/16, ECLI:EU:C:2018:143, 3.

global or regional business and investment hubs. The same observation is valid for an application of the concept of BO to foreign recipients of income from SCs. With this in mind, it is worth looking at two jurisdictions that, according to the global statistics of the IMF and the OECD,[40] apart from the USA and China, are homes to the largest volumes of inward and outward investments in the world, i.e., the Netherlands, Luxembourg and the UK.

1.035 The question arises whether the choice of these jurisdictions by foreign investors principally stems from their legitimate right to the least taxation, and therefore does not constitute abusive treaty and directive shopping. Of utmost assistance in answering that question is the identification of non-tax commercial reasons for the choice of these jurisdictions. Such reasons will be weighed by the tax authorities and the courts against the tax reasons of making investments using intermediary entities in these jurisdictions.[41] The more non-tax business and investment advantages the Netherlands, Luxembourg and the UK have to offer to foreign investors, the less accurate and justified it is for the tax authorities of SCs to assume that intermediaries are established in these jurisdictions principally out of abusive treaty and directive shopping.

1.036 Data show that foreign investors usually choose the Netherlands, Luxembourg and the UK as the registered office of funds or holding companies and intermediary entities because these jurisdictions offer a very reliable and comprehensive regulatory and legal framework when it comes to investment funds and performing investments using intermediaries. According to investors, the Netherlands, Luxembourg and the UK are the three most favourable financial centres in Europe. Luxembourg is currently considered the largest market for investment funds in Europe, with assets of EUR 4.6 trillion. In turn, the Netherlands is also one of the largest with assets of EUR 874 billion, while London and the UK remain Europe's leading destination for investment in financial services and remain the world's leading foreign exchange trading centre.[42] In addition, there has been an increase in financial resources invested by Luxembourg funds in excess of EUR 500 million in recent years. Nine of the ten largest funds are located in Luxembourg, with the country also 'hosting' some 500 fund servicing companies such as central administrators, domiciliary agents, law firms, auditors, consultants, depositaries, management companies and a host of fintech players, creating a very dynamic business environment. These financial sector players create a hub that offers a full range of services required by private equity funds, including fund structuring, Value Added Tax (VAT) services, global fund distribution, human resource services, transfer pricing, investor reporting, capital market accounting advisory services, risk management, responsible and ethical investment, and banking services.[43]

1.037 Furthermore, from the information obtained in the course of strategic tax advice to foreign investors in certain SCs, it appears that foreign investment funds, holding companies and

40 See *supra* 1.III.A.

41 See *infra* 1.IV.C.

42 European Fund and Asset Management Association, *Quarterly Statistical Release*, second quarter of 2020, https://www.efama.org/Publications/Statistics/Quarterly/Quarterly%20Statistical%20Reports/20%2009%20Quarterly%20Statistical%20Release%20Q2%202020.pdf. City of London, London leads global financial rankings for the second year running, 27 January 2022, https://news.cityoflondon.gov.uk/london-leads-global-financial-rankings-for-the-second-year-running/#:~:text=London%20and%20the%20UK%20remain,market%20share%20is%20increasing%20again.

43 Garel-Galais, Arnaud, *Luxembourg, a leading hub for Private Equity*, 23 January 2021, https://paperjam.lu/article/luxembourg-a-leading-hub-for-p.

intermediary entities from the Netherlands, Luxembourg and the UK assist in achieving several essential, non-tax purposes, such as:

- *Risk mitigation*: the protection of investment funds/holding structures and their investors from liabilities and potential claims against the fund's property assets, in particular when the funds are financed with external debt, their assets need to be ring-fenced because of the potential liabilities relating to the external financing arrangements;
- *Risk diversification for investors*: various SPEs are established the Netherlands, Luxembourg and the UK to diversify risks connected with foreign investments (per classes/types of assets or from a geographical point of view);
- *Facilitating debt financing*: debts provided by third-party lenders often require the introduction of SPEs in the fund/holding structure, since it is essential for the banks to provide financing necessary to acquire a targeted asset; in addition, the banks often require additional levels of sub-holding companies to provide pledges as means of security;
- *Facilitating the entrance of new co-investors*: adding new SPEs or new sub-holding companies in the fund's corporate structure creates an opportunity for new investors to provide additional investment capital and spreads risks;
- *Consolidation aspects*: having one master holding company serving as an investment platform for multiple investments (held under different SPEs) allows for a simpler and more effective management and oversight of the entire portfolio, which, in turn, contributes to a better corporate governance of the fund/holding structure.

1.038 The above structuring of important large-scale foreign investments is a standard business and investment process. Indeed, the structuring of significant cross-border investments in SCs, e.g., in real estate, is characterised by high leverage and a concentrated network of different entities that can be considered SPEs, but not necessarily *conduits*. In the vast majority of cases, the failure of investors to comply with the request of potential lenders (often banks) to set up separate companies to carry out separate investments results in the refusal of financing, or in higher rates of interest on loans. The first situation completely rules out the possibility of watering down the investment. The second is economically irrational as it increases the costs of investments (interest rates on the loans needed for the investments are too high).

1.039 If SPEs from the Netherlands, Luxembourg and the UK are established primarily for the effective and efficient performance of investments in SCs, this means that any tax benefits arising from the SPE's transactions, e.g., the elimination or reduction of WHT, are secondary to their primary business and investment objectives. Due to the specific conditions of receiving external financing for foreign investments, global investors may not have an economically rational alternative way of making investments in SCs other than by the use of SPEs in the Netherlands, Luxembourg or the UK. This observation clearly shows that the establishment of an SPE in the Netherlands, Luxembourg or the UK may be dictated mainly by investment rather than tax purposes.

1.040 If the primary purpose of the SPEs is other than to avoid or reduce WHT in SCs, they cannot be considered *conduits* for abusive treaty and directive shopping. This is because taxpayers, including foreign investors subject to WHT in SCs, have the right to choose the most favourable jurisdiction in which to make investments, which might well be in SCs with the least taxation on returns from the investments and other payments related to them, including interest from loans provided for the investments. This right may be denied to them, according to the

applicable standards in the constitutional, EU and international law, only in cases of abusive treaty and directive shopping. Therefore, it is so important to properly understand what these terms mean. The same applies to the terms heavily associated to abusive treaty and directive shopping, such as SPEs and conduits. It is only with a proper understanding of these terms that the suitability of the concept of BO to target abusive treaty and directive shopping can be evaluated.

IV. SENSITIVE FUNCTIONAL TERMINOLOGY

A. Special purpose entities

1.041 According to the OECD nomenclature, an enterprise is usually considered an SPE if it meets the following criteria:

(i) the enterprise is a legal entity,
  (a) formally registered with a national authority; and
  (b) subject to fiscal and other legal obligations of the economy in which it is resident.
(ii) The enterprise is ultimately controlled by a non-resident parent, directly or indirectly.
(iii) The enterprise has no or few employees, little or no production in the host economy and little or no physical presence.
(iv) Almost all the assets and liabilities of the enterprise represent investments in or from other countries.
(v) The core business of the enterprise consists of group financing or holding activities, that is – viewed from the perspective of the compiler in a given country – the channelling of funds from non-residents to other non-residents. However, in its daily activities, managing and directing local operations plays only a minor role. an entity (company) that fulfils the following five criteria can be considered to be an SPE.[44]

1.042 An SPE, in the OECD's nomenclature, can therefore be equated with an intermediary entity most often used for treaty or directive shopping.[45] Before discussing these concepts in more detail, we would like to point out that the OECD unquestionably presents SPEs in a pejorative way. For the OECD, SPEs are entities whose use, in principle, is not consistent with the investment policies of OECD member countries. Indeed, the OECD indicates that SPEs serve to channel funds from non-residents to other non-residents, and that their activities do not reflect real investments. Therefore, the OECD has expressed the view that it is worth considering geographically excluding the allocation of FDIs to SPEs, and treating FDI flows through SPEs as a separate category of FDIs.[46]

1.043 Moreover, the OECD includes financing subsidiaries, conduits, holding companies, shell companies, shelf companies and brassplate companies in the category of SPEs.[47] Although

44 OECD, *Benchmark Definition of Foreign Direct Investment. Fourth Edition*, (2008) Paris, para. 558.

45 De Broe, Luc, *International Tax Planning and Prevention of Abuse: A Study under Domestic Tax Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies*, (2008) 14 Doctoral Series IBFD – Academic Council, IBFD, 5–40.

46 OECD, *Benchmark Definition of Foreign Direct Investment. Fourth Edition*, (2008) Paris, paras 316, 346, 393 and 552.

47 Ibid., paras 313–314.

none of these types of entities are explicitly coined by the OECD as sham, artificial and thus abusive, it is quite clear that conduit/shell/shelf/brassplate companies are, as a matter of fact, often labelled as entities that are usually used for abusive tax avoidance purposes, including abusive treaty and directive shopping.[48] Still, for the purpose of demarcating between proper (non-abusive) and improper (abusive) use of WHT exemptions and reductions in SCs based on tax treaties and EU directives, one should primarily take a closer look at *conduits*.

B. Conduits

1.044 'Conduits' constitute a category of SPEs of supreme importance when addressing the issue of abuses of tax treaties and EU directives for the purposes of WHT avoidance. The report 'Double taxation conventions and the use of conduit companies' (hereinafter the 'Conduits Report')[49] issued by the OECD's Committee on Fiscal Affairs (hereinafter the 'CFA') is the authoritative source dealing with conduits.

1.045 As the CFA says, the Conduits Report deals with the *improper use*[50] of tax treaties by a person (whether or not a resident of a CS), acting through a legal entity created in a state with *the main or sole purpose of obtaining treaty benefits* that would not be available directly to that person.[51] The CFA's statement indicates that the most important situations of the improper use of tax treaties are those in which a company established in a tax treaty country is *acting as a conduit* for channelling income economically accruing to a person in another state, who is thereby able to take advantage 'improperly' of the benefits provided by a tax treaty. The CFA also points out that such a situation is often referred to as 'treaty shopping', a phenomenon that is a disadvantage for the SC, since it leads to no or lower WHT in that country in comparison to its domestic taxation.[52]

1.046 The glossary of the International Bureau of Fiscal Documentation (hereinafter 'IBFD') aptly points out that the *channelling income economically* via a conduit is typically achieved by: (i) the conduit lending income to entities from SCs (original host states), (ii) reinvesting income for

48 Fitzgibbon, Will, Hallman, Ben, 'What is a tax haven? Offshore finance, explained', 6 April 2020, https://www.icij.org/investigations/panama-papers/what-is-a-tax-haven-offshore-finance-explained/; Kenton, Will, James, Margaret, 'Shell Corporation', Investopedia, 24 October 2020, https://www.investopedia.com/terms/s/shellcorporation.asp; Piccioto, Sol, *International Business Taxation. A Study in the Internationalization of Business Regulation*, (1992) Cambridge University Press, 126, 135.

49 OECD, *Double Taxation Conventions and the Use of Conduit Companies*, adopted by the OECD Council on 27 November 1986, Paris.

50 Although it was not clearly stated by the CFA, the context and purpose of the Conduits Report shows that the term 'improper use of tax treaties' can be used interchangeably with 'abuse of tax treaties', including 'abusive treaty shopping'. Cf. Van Weeghel, Stef, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States*, (1998) Kluwer Law International, 120–124.

51 Ibid., para. 1. Cf. the definition of a 'conduit entity' in the US legislation that refers an entity participating in the financing arrangement pursuant to a tax avoidance plan. Treasury Regulation para. 1.881–3(a)(2)(iv) and para. 1.881–3(b)(1), Code of Federal Regulation (CFR) (1998), https://www.law.cornell.edu/cfr/text/26/1.881–3 (Jan. 21, 2021). Cf. De Moraes e Castro, Leonardo Freitas, 'US Policy to Counter Treaty Shopping - From Aiken Industries to the Anti-Conduit Regulations: A Critical View of the Current Double-Step Approach from the Perspective of Treaty Objectives and Purposes', (2012) 66 *Bulletin for International Taxation* 306–309.

52 OECD, *Double Taxation Conventions and the Use of Conduit Companies*, adopted by the OECD Council on 27 November 1986, Paris, para. 2.

their ultimate benefit, or distribution by way of a (tax-exempt) dividend.[53] A typical example of the use of conduits is a back-to-back loan, i.e., a chain of loans with the same maturity date is taken among two or more entities in different countries so that the amounts of loans are offset from one another.[54] In general, conduits are also subject to no or minimal taxation under the domestic laws of the state where they are incorporated, or due to the income being paid in a tax-deductible form such as interest or royalties, usually leaving only a small taxable 'spread' in the conduit.[55]

1.047 The use of conduit companies is very different to the use of *base companies,* which are predominantly established in low tax jurisdictions for the purposes of sheltering income there. In effect, the use of base companies is detrimental to RCs of the taxpayers that control these companies, as they lead to taxation in those states being avoided or reduced, including through what are known as long-term tax deferrals.[56] The CFA deals with this practice in a different report – 'Double Taxation Conventions and the Use of Base Companies' (hereinafter 'Base Companies Report'[57]). Although these reports address two conceptually distinctive phenomena, one harmful to SCs, the other for RCs, the CFA rightly observed that often the same structure is designed to avoid or reduce taxation in both SCs and RCs. In such combined cases, the problems can be regarded as different sides of the same coin of the improper use of tax treaties.[58] Indeed, SPEs can function as base companies[59] and conduit companies,[60] depending on the functions attributed to them; the combined effects of both will yield tax benefits to their participants.[61] Base companies are typically located in jurisdictions where the effective taxation of the income of companies or other entities is effectively very low or zero ('classical tax havens'), or other jurisdictions that offer particular tax incentives or benefits that may sometimes be exploited for a particular international tax advantage, including long-term tax deferrals.[62] The

53 IBFD, 'Conduit company', in: *Glossary*, (2021) IBFD Tax Research Platform Online.

54 Chen, James, 'Back-to-Back Loan', Investopedia, 10 December 2020, https://www.investopedia.com/terms/b/backtobackloan.asp.

55 IBFD, 'Conduit company', in: *Glossary*, (2021) IBFD Tax Research Platform Online. This glossary also translated 'conduit company' into several languages as follows: Société relais (French); Briefkastengesellschaft or Durchlaufsgesellschaft (Dutch); sociedad instrumental or sociedad conductora (Spanish); Doorstroomvennootschap (Dutch); sociedade interposta (Portuguese); компания-кондуит (Russian); 导管公司 (Chinese). Zob. więcej infra rozdział 2.

56 As Reuven S. Avi-Yonah explains, tax deferral is equivalent to exemption of the interest on the amount of tax that is deferred. Thus, if tax deferral lasts long enough, the interest eventually dwarfs the principal amount entirely. It is the interest effect of tax deferral. Avi-Yonah, Reuven S., *International Tax as International Law: An Analysis of the International Tax Regime*, (2007) Cambridge University Press, 124–125.

57 OECD, *Double Taxation Conventions and the Use of Base Companies*, adopted by the OECD Council on 27 November 1986, Paris. Historically the term 'base company' was first used by William J. Gibbons. See Gibbons, William J., 'Tax Effects of Basing International Business Abroad', (1956) 69 *Harvard Law Review* 1207, http://www.jstor.org/stable/1337440.

58 Ibid., para. 4.

59 Rapakko, Annamaria, *Base Company Taxation*, (1989) Kluwer Law and Taxation Publishers, 8–11.

60 De Broe, Luc, *International Tax Planning and Prevention of Abuse: A Study under Domestic Tax Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies*, (2008) 14 Doctoral Series IBFD – Academic Council, IBFD, 5–61.

61 Piccioto, Sol, *International Business Taxation. A Study in the Internationalization of Business Regulation*, (1992) Cambridge University Press, 137–139; Fuest, Clemens, et al., 'Profit Shifting and "Aggressive" Tax Planning by Multinational Firms: Issues and Options for Reform', (2013) 5 *World Tax Journal* 310–314.

62 Base companies are often identified with controlled foreign companies (hereinafter 'CFCs'). OECD, *Designing Effective Controlled Foreign Company Rules, Action 3 – Final Report*, 5 October 2015, Paris, para. 61; Arnold, Brian, Dibout,

natural habitat for conduits, in turn, are usually jurisdictions with conventional tax systems and a large network of tax treaties, but which levy no or little tax on receipts of foreign-source or passive investment income (e.g., dividends, interest and royalties).[63]

1.048 The CFA further explains that *conduit entities* are most often companies with legal personality, but they may also be partnerships, trusts or other forms.[64] It is not so much the legal form of the conduit that is important, but rather the fact that the entity has a tax resident status in the RC for the purposes of applying a tax treaty with the SC. Otherwise, conduit entities would not be entitled to benefit from this tax treaty. The conduits in all cases therefore enter the ambit of definition of an entity liable to tax in RC in accordance with the domestic law of that country, thereby meeting the conditions under Articles 1, 3(a) and 4(1). The most important part of the definition of conduits is functional – obtaining tax treaty benefits on an account of an entity that is not entitled to obtain such benefits directly.

1.049 The CFA notes that legal entities are sometimes established in *an intermediary country for non-tax purposes*, such as access to capital markets, currency regulations, political situations or the need to be present in the country of investment under the 'flag' of the intermediary country. The preferable tax consequences of such intermediary entities are not covered by the Conduits Report.[65]

1.050 This shows that the OECD defines conduits exclusively in a pejorative way as entities that solely or mainly aim to obtain benefits under tax treaties for the benefit of non-residents of CSs at the expense of the SC. By contrast, an entity that intermediates and facilitates an investment between the SC (originally hosting the investments) and the RC of the ultimate investor primarily for reasons other than to obtain benefits from tax treaties does not fall within the OECD's meaning of conduit.

1.051 The OECD's definition of conduits is a bit confusing, as it clearly links conduits with the improper use of tax treaties, but relies only on the tax intention as the decisive premise to distinguish between conduits and non-conduit intermediaries. The contradiction in the use of conduits with relevant tax treaty provisions is not articulated by the CFA in the Conduits Report as part of its definition, although a contradiction of an arrangement or transaction with relevant treaty provisions is one of the fundamental premises of the improper use of tax treaties in general.[66] This is explicitly expressed by the OECD via 'a guiding principle' in the Commentary to Article 1 since 2003.[67] The contradiction is also included in the principal purposes test

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Patrick, 'General Report Limits on the Use of Low-Tax Regimes by Multinational Businesses: Current Measures and Emerging Trends', (2001) 86b Cahiers de droit fiscal international, 45.

63 Piccioto, Sol, *International Business Taxation. A Study in the Internationalization of Business Regulation*, (1992) Cambridge University Press, 134–135.

64 Conduits Report, para. 2.

65 Conduits Report, para. 3.

66 Van Weeghel, Stef, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States*, (1998) Kluwer Law International, 97, 117; Baker, Philip, 'Improper Use of Tax Treaties, Tax Avoidance and Tax Evasion', in: *Papers on Selected Topics in Administration of Tax Treaties for Developing Countries*, (2013) Paper No. 9-A, UN, 6, http://www.un.org/esa/ffd/wp-content/uploads/2013/05/20130530_Paper9A_Baker.pdf.

67 Then in para. 9.5 and now in para. 61 of the Commentary to Art. 1. Van Weeghel, Stef, 'A Deconstruction of the Principal Purposes Test', (2019) 11 *World Tax Journal* sec. 4.

(hereinafter the 'PPT') in Article 29(9) and Article 7(1) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (hereinafter 'MLI').[68] More broadly, the premise of the contradiction of an arrangement or transaction with relevant tax provisions is generally recognised as an abusive tax avoidance premise in international and EU case law and legislation.[69] Consequently, limiting the definition of conduits only to entities created by a person (whether or not a resident of a CS) in a state with the main or sole purpose of obtaining treaty benefits that would not be available directly to the person would be at odds with the internationally recognised standard of improper use of tax treaties, i.e., their abuse. Had this definition excluded the improper use of tax treaties, it would not be problematic. But it clearly refers to the improper use of tax treaties and therefore the premise of contradiction of an arrangement or transaction conducted by a conduit must be read into its definition, in addition to the premise of the sole or main tax intention, as described above. Still, the lack of an explicit articulation of that premise in the definition of conduits by the CFA in the Conduits Report may lead to many disputes between taxpayers and tax authorities.[70]

1.052 For the purposes of further analysis, the term 'conduit' means, unless otherwise indicated, an entity (usually a company):

(i) that has its tax residence in a CS of a tax treaty with an SC and/or EU MS if the SC is an EU MS – there may also be conduits in non-tax treaty/EU MSs higher in the chain of ownership, i.e., further away from the SC;
(ii) whose sole or main role is to avoid or reduce WHT in the SC by abusing the tax treaties and/or EU directives (abusive treaty or directive shopping) to the benefit of entities/persons[71] from a jurisdiction other than the conduit entity's country of residence (the entities that benefit from the use of conduits may also come from the SC ('round tripping'[72]).

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68 There are 99 signatories to the MLI from across the world: *Signatories and Parties to The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, Status as of 21 April 2022, https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

69 Martín Jiménez, Adolfo, 'The Prohibition of Abuse of EU Tax Law and the codification of the EU GAAR', in: Arnold, B. (ed.), *The General Anti-Avoidance Rule: Past, Present, and Future*, (2020) Canadian Tax Foundation, secs. 2.3–2.4; Kuźniacki, Błażej, 'Chapter 6: The GAAR (Article)', in: Haslehner, W. et al. (eds), *A Guide to the Anti-Tax Avoidance Directive*, (2020) Edward Elgar Tax Practice Series, paras 6.51–6.90; Zimmer, Frederik, 'In Defence of General Anti-Avoidance Rules', (2019) 72 *Bulletin for International Taxation*, secs. 10 and 13; Arnold, Brian, 'Reflections on the Relationship Between Statutory Interpretation and Tax Avoidance', in: Erlichman, H. (ed.), *Tax avoidance in Canada: The General Anti-Avoidance Rule*, (2002) Irwin Law, 46–48; Dabner, J., 'The Spin of a Coin - In Search of a Workable GAAR', (2000) *Journal of Australian Taxation* 232–233; Atiyah, P. S., Summers, R. S., *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*, (1987) Clarendon, 249–266.

70 For criticism of the OECD for using the veiled language and taking a very simplistic approach to the problem of treaty shopping and conduits in the Conduits Reports see Rosenbloom, David, 'Review: OECD Report Double Taxation Conventions and the Use of Conduit Companies', (1988) *Intertax* 179–182.

71 In the context of third parties that use conduits to indirectly obtain treaty benefits we acknowledge that such third parties may be either entities (usually companies) or individuals. Hence, the term 'entity' is usually used in relation to a company or other entity created under the law with or without legal personality, while the term persons refer to individuals (natural persons).

72 We will come back to that notion in IV.C below.

1.053 This understanding of a conduit means that the conduit is always both an SPE and an intermediary entity, but not every SPE and not every intermediary entity is a conduit. A proper distinction between an intermediary entity and a conduit is very important. Only a conduit entity is involved in abusive treaty or directive shopping, which should always be assessed on a case-by-case basis in light of the specific circumstances and applicable law. Due to the fact that companies and other entities that are not individuals are most relevant for abusive treaty shopping and directive shopping, the book focuses on the above-mentioned phenomena from the perspective of the CIT of SCs exclusively.

1.054 Before moving to a definition of treaty shopping and directive shopping in the following subsection, it is noteworthy that, although the Conduits Report refers to the concept of BO for the purposes of dealing with conduits,[73] this reference is somewhat unclear and problematic. We will come back to this and discuss it in more detail *infra* in Chapter 3. Here it is enough to mention that the Conduits Report addresses the improper use by conduits of the following five approaches that should be included in the treaty provisions in order to be applicable against conduits: (1) the look-through approach; (2) the subject-to-tax approach; (3) the channel approach; (4) the *bona fide* safeguard clauses; and (5) the limitation-of-benefits approach.[74] The OECD's discussion of these approaches rehearses the most obvious methods for dealing with treaty shopping, cataloguing the pros and cons of each of them. Moreover, the examples chosen for discussion are simple, the analysis is not rigorous and the proposed solutions seem rudimentary, even at the time of adopting this report.[75] Although these approaches were added to paragraphs 13–20 of the Commentary to Article 1 in 1992, they were deleted from the current version of the Commentary in 2017, due to the inclusion of PPT and the limitation of benefits clause (hereinafter the 'LOB clause') to Article 29, which comprehensively and exhaustively deals with improper use of tax treaties.[76] Hence, even though some scholars have observed that the courts often applied the anti-treaty abuse approaches mentioned above conflated with the concept of BO,[77] this approach does not hold currently with the content of the Commentary.[78]

C. Treaty shopping and directive shopping

1.055 Treaty shopping[79] was already implicitly defined by the CFA in the Conduits Report as the:

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73 Conduits Report, para. 14.b).

74 Conduits Report, paras 21–42.

75 Rosenbloom, David, 'Review: OECD Report Double Taxation Conventions and the Use of Conduit Companies', (1988) *Intertax*, 180.

76 OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – Final Report* (hereinafter 'BEPS Action 6'), (2015) Paris, paras 19–24; Kuźniacki, Błażej, 'The Principal Purpose Test (PPT) in BEPS Action 6 and the MLI: Exploring Challenges Arising from Its Legal Implementation and Practical Application', (2018) 10 *World Tax Journal* 234–238; Van Weeghel, Stef, 'A Deconstruction of the Principal Purposes Test', (2019) 11 *World Tax Journal* sec. 1; Danon, Robert, 'The PPT in Post-BEPS Tax Treaty Law: It Is a GAAR but Just a GAAR!', (2020) 74 *Bulletin for International Taxation* sec. 1.

77 Garbarino, Carlo, *Judicial Interpretation of Tax Treaties: The Use of the OECD Commentary*, (2016) Edward Elgar Publishing, paras 1.41–1.123, 47–79.

78 See *infra* Chapters 3–6 for an in-depth analysis of the understanding of the concept of BO under the OECD materials and the global case law.

79 The name 'treaty shopping' comes from the way of obtaining treaty benefits directly unavailable to a taxpayer; namely, the taxpayer 'shops' into the treaty benefits by establishing an entity (typically a company) in a country that has ratified

> improper use of tax conventions (see paragraph 9) by a person (whether or not a resident of a Contracting State), acting through a legal entity created in a state with the main or sole purpose of obtaining treaty benefits that would not be available directly to that person.[80]

1.056 The same definition, just by replacing a tax treaty with an EU directive and a CS with an MS, may apply to directive shopping.[81] More precisely, directive shopping is indirectly obtaining benefits under the IRD or the PSD (in fact, the EU MSs' legislation that implements these directives) by a person who is not resident in any of the countries covered by the territorial scope of these directives (i.e., is not resident in any of MSs). In practical terms, directive shopping takes place when a person from outside the scope of the IRD or the PSD receives dividends, interest or royalties from an entity in an EU MS (the SC of the income) indirectly via a company established in another EU MS (the RC of the intermediary company). To make these financial flows fully tax efficient, directive shopping is usually combined with treaty shopping through the 'stepping stone' technique, under which the intermediary company is from an EU MS that has a preferable tax treaty with the RC of the ultimate investor from a third country.[82]

1.057 The CFA depicts two main forms of treaty shopping using conduits: (i) direct conduits and (ii) stepping-stone conduits.[83]

1.058 The essence of the form of treaty shopping qualified as 'direct conduit' is presented by the CFA as follows:

> A company resident of State A receives dividends, interest or royalties from State B. Under the tax treaty between States A and B, the company claims that it is fully or partially exempted from the withholding taxes of State B. The company is wholly owned by a resident of a third State not entitled to the benefit of the treaty between States A and B. It has been created with a view to taking advantage of this treaty's benefits and for this purpose the assets and rights giving rise to the dividends, interest or royalties were transferred to it. The income is tax-exempt in State A, e.g. in the case of dividends, by virtue of a parent-subsidiary regime provided for under the domestic laws of State A, or in the convention between States A and B.[84]

1.059 Stepping-stone conduits, in turn, are structurally the same as direct conduits.

> However, the company resident of State A is fully subject to tax in that country. It pays high interest, commissions, service fees and similar expenses to a second related 'conduit company' set up in State

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an advantageous tax treaty. Becker, Helmut, Wurn, Felix J., *Treaty Shopping: An Emerging Tax Issue and its Present Status in Various Countries* (1988) Kluwer Law International, 1.

80 Conduits Report, para. 1.

81 Knobbe-Keuk, Brigitte, 'The EC Corporate Directives – Anti-Abuse Provisions, Direct Effect, German Implementation Law', (1992) 20 *Intertax* 490 et seq.

82 Cf. the structure called 'The double Irish with a Dutch sandwich'. Fuest, Clemens, et al., 'Profit Shifting and "Aggressive" Tax Planning by Multinational Firms: Issues and Options for Reform', (2013) 5 *World Tax Journal* 310–314.

83 Conduits Report, para. 4. Helmut Becker and Felix J. Wurn qualify the 'same country holding structure' and the 'quintet structure' to treaty shopping, see Becker, Helmut, Wurn, Felix J., *Treaty Shopping: An Emerging Tax Issue and its Present Status in Various Countries* (1988) Kluwer Law International, 7. Although these structures may be combined with treaty shopping, they do not *per se* fall squarely within the prevailing definition of treaty shopping. Van Weeghel, Stef, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States*, (1998) Kluwer Law International, 120.

84 Conduits Report, para. 4.

D. These payments are deductible in State A and tax-exempt in State D where the company enjoys a special tax regime.[85]

1.060 The problems with these definitions of conduits, as discussed in the previous subsection, also apply to the CFA's definition of treaty shopping, and thus by analogy to directive shopping. In particular, it is unclear whether these phenomena should be always automatically associated with abusive practices, or rather it should be carefully evaluated on a case-by-case basis by following appropriate interpretative guidance. Moreover, officially, legally binding and universally valid definitions of treaty shopping and directive shopping do not exist. These are not even legal terms.[86]

1.061 Given the political sensitivity of the topic, the OECD constructed the term of treaty shopping in a very pragmatic and vague way by identifying the lowest common international denominator of a very complex phenomenon. This approach seemingly helped to avoid a backlash from some of the OECD MSs, more or less enhancing the use of their jurisdictions for treaty shopping purposes, as well as the MSs that economically benefit from treaty shopping as RCs of ultimate investors.[87]

1.062 This all means that there is a need for a more nuanced and precise approach in defining treaty and directive shopping. Otherwise the answer to the question about the suitability of the concept of BO for the prevention of treaty and directive shopping would miss the point. Likewise, the evaluation of the jurisprudence on the concept of BO would be flawed. For these reasons, we make an attempt to answer the questions of just what treaty and directive shopping are, what characteristics they have, and why these practices exist in the area of WHT. We first look at the most likely perspective of the tax authorities, then compare that with a holistic perspective, including differences among tax systems and the various needs of the jurisdictions. Finally, we present the perspective of this book and justify it. For the sake of clarity and simplicity, we mainly refer to treaty shopping, as this phenomenon is more richly debated than directive shopping. In any case, as mentioned a few paragraphs above, directive shopping may be identified as applying with treaty shopping.

1. The perspective of the tax authorities

1.063 In view of the CFA's definition of treaty shopping, the tax authorities in SCs[88] will most likely *a priori* identify treaty shopping and directive shopping with the abuse of tax treaties and EU

85 Ibid.

86 The same lacuna exists in international investment law, mainly governed by the worldwide network of bilateral investment treaties (hereinafter 'BITs'). In particular, the practice of treaty shopping appears in investor–state dispute settlement (hereinafter 'ISDS'). Baumgartner, Jorun, *Treaty Shopping in International Investment Law, First Edition*, (2016) Oxford University Press, 7.

87 Rosenbloom, David, 'Review: OECD Report Double Taxation Conventions and the Use of Conduit Companies', (1988) *Intertax* 181.

88 The book focuses on treaty shopping and directive shopping from the perspective of tax benefits obtained in SCs, i.e., no or reduced WHT, as this perspective is of the greatest importance from the practical and theoretical point of view. However, in a broader perspective, treaty shopping and directive shopping may also be examined from the perspective of tax benefits obtained in RCs of taxpayers controlling the conduits (e.g., applying the method of exemption from taxation of income from foreign sources) and from the perspective of RCs of conduits (e.g., applying what are known as tax sparing clause that allows an entity to obtain a tax credit in the nominal amount of WHT that has never actually been

directives. Accordingly, the payments of dividends, interest and royalties from SCs to SPEs in the Netherlands, Luxembourg, the UK and similar jurisdictions are in fact doomed to a high risk of being regarded by the tax authorities in SCs as an element of abuse in the form of treaty shopping and directive shopping.[89] The OECD's definition of SPEs exacerbates this perspective of the tax authorities in SCs, insofar as it classifies conduit/shell/shelf/brassplate companies as SPEs.[90] The situation is similar with the data of IMF and OECD on the global FDIs flowing through the Netherlands, Luxembourg, the UK and similar jurisdictions.[91]

1.064 These observations may prompt not only the tax authorities but also some courts in SCs to presume an abuse of tax treaties and EU directives in respect of payments of dividends, interest and royalties to SPEs established in the Netherlands, Luxembourg, the UK and similar jurisdictions, without properly investigating the existence of these phenomena. Certainly, such assumptions work in favour of SCs levying WHT, and thus are aligned with the naturally pro-fiscal inclinations of the tax authorities.

1.065 Furthermore, the taxpayer's intention to achieve a tax advantage is often not distinguished by the tax authorities from the taxpayer's intention to avoid taxation, even though these are two conceptually and legally distinct categories. The former belongs to neutral (tax minimisation) and the latter comes close to an abusive action by the taxpayer (tax avoidance). This is well illustrated by the case law of CJEU. For instance, in paragraphs 49–51 in *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd, v. Commissioners of Inland Revenue* (hereinafter '*Cadbury Schweppes*'[92]) one of the most important judgments of the CJEU in tax avoidance cases, we can read that:

> 49 In that respect, it is settled case-law that *any advantage resulting from the low taxation* to which a subsidiary established in a Member State other than the one in which the parent company was incorporated is subject *cannot by itself authorize that Member State to offset that advantage by less favourable tax treatment* of the parent company (see, to that effect, Case 270/83 Commission v France [1986] ECR 273, paragraph 21; see also, by analogy, Case C-294/97 Eurowings Luftverkehr [1999] ECR I-7447, paragraph 44, and Case C-422/01 Skandia and Ramstedt [2003] ECR I-6817, paragraph 52). The need to prevent the reduction of tax revenue is not one of the grounds listed in Article 46(1) EC or

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paid in the SC). Cf. De Broe, Luc, *International Tax Planning and Prevention of Abuse: A Study Under Domestic Tax Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies*, (2008) IBFD, 30–38.

89 https://www.opolskie.kas.gov.pl/izba-administracji-skarbowej-w-opolu/wiadomosci/aktualnosci/-/asset_publisher/qKV6/content/kas-wykryla-nieprawidlowosci-w-cit-skarb-panstwa-odzyskal-ponad-55-mln-zl?redirect=https%3A%2F%2Fwww.opolskie.kas.gov.pl%2Fizba-administracji-skarbowej-w-opolu%3Fp_p_id%3D101_INSTANCE_07Lb%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3D_118_INSTANCE_4pNA__column-1%26p_p_col_count%3D1 See, e.g., the press release of the National Tax Information in Poland, *KAS wykryła nieprawidłowości w CIT. Skarb Państwa odzyskał ponad 55 mln* zł, 22 January 2021, https://www.opolskie.kas.gov.pl/izba-administracji-skarbowej-w-opolu/wiadomosci/aktualnosci/-/asset_publisher/qKV6/content/kas-wykryla-nieprawidlowosci-w-cit-skarb-panstwa-odzyskal-ponad-55-mln-zl?redirect=https%3A%2F%2Fwww.opolskie.kas.gov.pl%2Fizba-administracji-skarbowej-w-opolu%3Fp_p_id%3D101_INSTANCE_07Lb%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3D_118_INSTANCE_4pNA__column-1%26p_p_col_count%3D1. Piechocki, W., *Krajowa Administracja Skarbowa podsumowała kontrolę w PLAY*, https://gsmonline.pl/artykuly/play-kontrola-kas-cit.

90 See *supra* 1.IV.A.

91 See *supra* 1.III.A.

92 European Union, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd, v Commissioners of Inland Revenue* (C-196/04), ECLI:EU:C:2006:544, 12 September 2006.

> a matter of overriding general interest which would justify a restriction on a freedom introduced by the Treaty (see, to that effect, Case C-136/00 Danner [2002] ECR I-8147, paragraph 56, and Skandia and Ramstedt, paragraph 53).
>
> 50 It is also apparent from case-law that the *mere fact that a resident company establishes a secondary establishment*, such as a subsidiary, in another Member State *cannot set up a general presumption of tax evasion* [sic!] and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty (see, to that effect, ICI, paragraph 26; Case C-478/98 Commission v Belgium [2000] ECR I-7587, paragraph 45; X and Y, paragraph 62; and Case C-334/02 Commission v France [2004] ECR I-2229, paragraph 27).
>
> 51 On the other hand, a national measure restricting freedom of establishment may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned (see to that effect ICI, paragraph 26; Case C-324/00 Lankhorst-Hohorst [2002] ECR I-11779, paragraph 37; De Lasteyrie du Saillant, paragraph 50; and Marks & Spencer, paragraph 57). (emphasis added)

1.066 In other words, there are no grounds, according to the CJEU, to consider that the pursuit of tax advantages by establishing companies in the most tax favourable MSs is in itself a negative phenomenon justifying its recognition *abusive* tax avoidance. The equivalent argument is that MSs, through enacting anti-abusive legislation and its interpretation and application by their tax authorities and courts, cannot justify a restriction of EU freedoms, including the freedom of establishment regulated in Articles 49 et seq. of The Treaty on the Functioning of the European Union (hereinafter 'TFEU'[93]), in order to prevent a reduction in budget revenue. This means, e.g., that the sole prevention of losing the collection of taxes from WHT does not constitute a justification for SCs to deny benefits arising out of EU law, and by analogy under tax treaties.

1.067 In paragraph 63 of this judgment, the CJEU further stated that:

> the fact that none of the exceptions provided for by the legislation on CFCs applies, and that the intention to obtain tax relief prompted the incorporation of the CFC and the conclusion of the transactions between the latter and the resident company does not suffice to conclude that there is a wholly artificial arrangement intended solely to escape that tax.

1.068 The existence of a tax advantage should therefore not be equated by tax authorities with tax avoidance.

1.069 Not every reduction of budget revenues, including through the reduction of WHT using intermediary entities, involves abusive tax avoidance. Only in certain cases can this practice be regarded as an abuse of tax law. In each case, an abuse of tax law must first be identified by the tax authorities based on objective factors, which should be ascertainable by third parties rather than irrefutably presumed by the tax authorities.[94] Accordingly, the tax authorities and

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93 Signed in Lisbon on 13 December 2007 (entered into force on 1 December 2009), Official Journal C 326, 26/10/2012, 1–390, consolidated version.

94 European Union, the CJEU: *X GmbH v. Finanzamt Stuttgart — Körperschaften*, C-135/17, ECLI:EU:C:2019:136, 26 February 2019, paras 85–88; *Zentralfinanz eG v. Finanzamt Köln-Mitte*, C-347/04, ECLI:EU:C:2007:194, 29 March 2007, paras 50–53; *Commission of the European Communities v. French Republic*, C-334/02, ECLI:EU:C:2004:129, 4 March 2004, para. 27. See also Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – *The Application of Anti-abuse Measures in the Area of Direct Taxation – within the EU and in relation to Third Countries*, COM(2007) 785 final, Brussels, 10 December 2007, 5.

courts in SCs should resist the temptation of presuming that payments of dividends, interest and royalties to SPEs from the Netherlands, Luxembourg, the UK and similar jurisdictions amount to abusive treaty or directive shopping. An appropriate investigation, coupled with a reasonable interpretation of tax treaties and EU directives is needed to identify the existence of abusive practices.

2. Holistic perspective, including differences among tax systems and the various needs of jurisdictions

1.070 In practice, not all intermediary entities that can be used for treaty shopping and directive shopping will necessarily meet all the OECD's criteria of an SPE, let alone a conduit. In some cases, an entity with its own substantial personal and financial resources assumes the role of an intermediary for a single abusive transaction or series of transactions.[95] In this example, we are dealing functionally with a conduit entity that does not meet the definition of an SPE because it owns substantial personal and financial resources. By contrast, an entity with marginal personal and financial resources on its own, which fully or almost fully meets all of the OECD's criteria of an SPE, may not necessarily be recognised as a conduit for the purpose of abusive treaty shopping and directive shopping. This is often the case of holding or sub-holding companies.[96]

1.071 This shows that automatically linking an SPE and an intermediary entity with the abuses of treaty shopping and directive shopping via conduits is precipitate and incorrect. The starting point in the practice and science of tax law should be a neutral and nuanced perception of the phenomena of treaty shopping and directive shopping, in a way that is detached from the unevenly distributed emphases in global tax policy, imposed mainly by the OECD. Attributing a pejorative meaning to these phenomena in the form of the improper use of tax treaties and EU directives is only appropriate after a legal and factual analysis of each specific case. Otherwise, we are dealing not so much with the application of international and EU law as with the articulation of a particular tax policy geared towards protecting the tax base in the SCs at the expense of cross-border investments. Such an approach would be at odds with the general purposes of tax treaties and EU directives. This follows from several fundamental reasons.

1.072 First of all, as mentioned above,[97] the meaning of treaty shopping (and by analogy directive shopping) is mainly shaped by the rigorously weak, rather unbalanced and pro-fiscal views of the OECD.[98] In addition to obscuring the definitions of these terms, the OECD has, in many instances, provided not entirely valid tax policy reasons for the unsatisfactory effects of treaty shopping.[99]

95 For example, a bank, as it was the case in *Société Bank of Scotland*, decided by *Conseil d'État*, No. 283314, 9 International Tax Law Reports (hereinafter 'ITLR') 683 et seq., 29 December 2006. See *infra* 5.IV.

96 See, e.g., the sub-holding company analysed in the case *Italy vs Stiga s.p.a.* by the Supreme Court of Italy (*Corte di cassazione*) in judgment of 10 July 2020, Case no. 14756/2020.

97 See *supra* 1.IV.C.

98 Rosenbloom, David, 'Review: OECD Report Double Taxation Conventions and the Use of Conduit Companies', (1988) *Intertax* 180; Van Weeghel, Stef, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States*, (1998) Kluwer Law International, 120–123.

99 Conduits Report, paras 6–7.

1.073 Although the CFA may be right in most cases when saying that the principle of reciprocity is breached at the costs of SCs,[100] this finding is not correct in all cases. It often happens that practices resulting in minimising WHT by means of treaty shopping actually contribute to the economies and taxable bases of both SCs and the RCs of the investors. Benefits in the form of low or zero WHT flows from the SCs to the RCs of investors encourage them to invest more in those SCs, thereby advancing their economies and increasing their taxable bases in ways other than WHT. The RCs of investors do not need to provide tax credits, or provide lower tax credits, against WHT paid in the SCs, which benefits the taxable bases of the RCs too.[101]

1.074 Second, the CFA correctly states that income flowing internationally under treaty shopping structures may be exempted from taxation altogether, or be subject to low effective taxation in a way unintended by the CS.[102] However, this statement also has a number of exceptions, about which the OECD says nothing.[103]

1.075 Third, the CFA indicates that treaty shopping disincentivises the RCs of investors from entering into tax treaties with SCs, because the residents of the RCs can indirectly receive treaty benefits from the SCs without the need for the RCs to provide reciprocal benefits.[104] This consideration fails to recognise that countries enter into tax treaties not only for the purposes of eliminating double taxation by the most favourable allocation of taxation rights, but also for other purposes such as the exchange of tax information in order to prevent tax evasion.[105]

1.076 Taking a general overview of the CFA's tax policy considerations, it is clear that they only very loosely fit the improper use of tax treaties, i.e., their abuse. Indeed, only the premise of the sole intention to avoid taxation is presumed by the CFA, whereby the premise of a contradiction of an arrangement or transaction with relevant tax treaty provisions is not voiced at all. Just as in the CFA's description of conduits, such an approach is neither compatible with the understanding of treaty abuse, nor with the internationally recognised standards of abusive tax avoidance.[106] Paradoxically, the vague and methodologically doubtful approach of the CFA to treaty shopping is itself dangerous to the stable and uniform application of tax treaties.[107]

1.077 In isolation from the tax policy shaped by the OECD, the development of treaty shopping and directive shopping is in line with the intentions of many legislators and tax administrations. The benefits under tax treaties and EU directives in the form of exemptions from WHT or lower rates are still relatively easy to obtain. The main criterion is tax residence in a CS or an

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100 Ibid, para. 7.a).

101 Van Weeghel, Stef, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States*, (1998) Kluwer Law International, 122.

102 Conduits Report, para.7.b).

103 Van Weeghel, Stef, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States*, (1998) Kluwer Law International, 105–107.

104 Conduits Report, para. 7.c).

105 Van Weeghel, Stef, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States*, (1998) Kluwer Law International, 123. Cf. Edwardes-Ker, Michael, *The International Tax Treaties Service*, (1977) In-Depth Publishing, 27.

106 See *supra* 1.IV.B.

107 Van Weeghel, Stef, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States*, (1998) Kluwer Law International, 123.

MS.[108] As a rule, this criterion is met by establishing a company in that state in accordance with its company law. Moreover, under the EU directives, companies cannot be fully exempt from taxation and must have appropriate capital ties (10 per cent under the PSD and 25 per cent under the IRD),[109] though these criteria are still easy to meet. Thus, a taxpayer may take advantage of contractual and business freedoms to structure their activities entirely in accordance with the intention of legislatures and purposes of tax laws in order to obtain tax benefits from tax treaties and EU directives. In principle, there is no legal requirement to do so directly by a taxpayer. Indeed, the most tax favourable route in cross-border investments often does not lead directly from one country to another, but indirectly through intermediary entities in one or more countries between the RC of the principal investor or entrepreneur and the SC of the targeted investment or business. It is entirely economically reasonable and legally compliant to set up intermediary entities in jurisdictions where domestic law, in combination with the application of tax treaties and EU directives, leads to the least onerous tax consequences of an investment or conducting business in the targeted jurisdiction.

1.078 Of course, the degree of tolerance, or even encouragement, of such intermediary structures varies across legal cultures and jurisdictions. This tolerance is lower in countries with high effective levels of taxation, burdened with high social costs, e.g., Scandinavian countries, Germany or Poland. The main purpose of the tax system in such countries is to ensure budget revenues directly from taxes. For the purpose of further considerations, such countries belong to 'the conservative category of the tax systems'. A higher degree of tolerance and encouragement of treaty and directive shopping is found in countries and jurisdictions characterised by low effective taxation of mobile and passive income, whose tax systems offer taxpayers (especially investment vehicles) many legal solutions in terms of tax planning, e.g., Cyprus, Hong Kong, Ireland, Liechtenstein, Luxembourg, Malta, Mauritius, the Netherlands, Singapore, Switzerland and the UK. The main goal, or at least an important goal, of their tax systems is to increase state budgets (often in long term) by attracting foreign investment.[110] We place such jurisdictions in 'the liberal category of the tax systems'. Finally, a very high degree of tolerance and encouraging of treaty and directive shopping, seen as tax avoidance from the perspective of the vast majority of other countries, is found in tax havens, such as American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu.[111] The primary purpose of their tax systems is to increase state budgets by attracting foreign capital and

108 Art. 1(1) of the PSD and the IRD and of Arts 1, 3 and 4 of the OECD MC.

109 Art. 3(1) of the PSD and Art 3(a)–(b) of the IRD.

110 Sometimes such attraction is considered 'risky' from a reputational point of view, although most often such assessments are populist in nature. Woolrich, N., 'Tax man targets BHP Billiton and Rio Tinto's "Singapore sling"', *ABC News*, 25 May 2015, http://www.abc.net.au/news/2015–05–25/taxman-targetsthe-singapore-sling/6495592; Aston, H., 'BHP Billiton reveals minuscule Singapore tax bill as ATO chases it for $500m', *The Sydney Morning Herald*, 27 April 2015, https://www.smh.com.au/politics/federal/bhp-billiton-reveals-minuscule-singapore-tax-bill-as-ato-chases-it-for-500m-20150427–1muetk.html; Garcia-Bernardo, J., Fichtner, J., Takes, F. W., and E. M. Heemskerk, 'Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network', (2017) 7 *Scientific Reports*, No. 6246, https://www.nature.com/articles/s41598–017–06322–9; Boffey, D., 'Netherlands and UK are biggest channels for corporate tax avoidance', *The Guardian*, https://www.theguardian.com/world/2017/jul/25/netherlands-and-uk-are-biggest-channels-for-corporate-tax-avoidance (accessed 24 February 2022).

111 See the EU list of tax havens in: The Council of the European Union, *The EU list of non-cooperative jurisdictions for tax purposes*, adopted by the Council on 22 February 2021, https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/.

investment, even if they are financed from activities that balance on the verge of legality, and sometimes seem to slip over the edge.[112] For the further discussion, they are deemed to be 'the risky category of tax systems'.

1.079 The countries and jurisdictions belonging to the liberal and risky categories of tax systems tend to be small (liberal: e.g., the Netherlands, Luxembourg, the UK and Ireland) and micro (risky: e.g., Panama, Fiji and Vanuatu). The jurisdictions in the risky category are usually insular, often with an out-of-the-way location (very remote from large economies and financial centres, e.g., Samoa, Fiji and Guam). They are characterised by a lack of natural resources and territory sufficient for the development of a so-called classical economy. Moreover, their population is small or very small, which entails an insufficient labour force. Their features clearly hinder the international exchange of goods and services. The risky jurisdictions often have no access to drinking water. Consequently, the policies, including fiscal policy, of such jurisdictions have to be sophisticated, with the aim of compensating for the geo-economic deficiencies mentioned above. Their aim is to create an ideal environment for the development of global and regional centres of investment, management, legal and insurance services, as well as the creation of foundations and trusts to protect assets from creditors, including tax creditors.[113]

1.080 The operation of liberal and risky tax systems can be seen as a significant source of international tax planning and, in some cases, tax avoidance, including through treaty shopping and directive shopping. The liberal tax systems, in particular the UK ('City of London'), Switzerland, Mauritius, Singapore and Hong Kong mainly contribute to treaty shopping, and the Netherlands, Ireland, Luxembourg, Cyprus and Malta to both treaty shopping and directive shopping.[114] In this regard, intermediaries play a massively important role, among which, depending on the circumstances, some may be conduits. The risky tax systems, in turn, tend to predominantly attract base companies to which sources of income are usually allocated via intermediaries or conduits located in the jurisdictions categorised as liberal tax systems.[115] Such jurisdictions sometimes also domicile conduits.

1.081 This reveals that there is great diversification in the design and enforcement of tax systems around the world, as a natural consequence of the fundamental attributes of sovereignty. Sovereignty entitles each state, among other things, to exercise tax jurisdiction in the manner

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112 This mainly concerns tax evasion, including 'money laundering'. Shaxson, Nicholas, 'Tackling Tax Havens', (2019) 56 IMF Finance & Development, https://www.imf.org/external/pubs/ft/fandd/2019/09/pdf/tackling-global-tax-havens-shaxon.pdf

113 Cf. Mechtler, Lukas, Wong Siu Ching, Cindy, 'Mismatches in Tax Outcomes in the Light of BEPS Actions 2 and 5', (2016) Singapore Management University School of Accountancy, Research Paper No. 2016-S-48, sec. 3.4.1, https://accountancy.smu.edu.sg/cet/sites/accountancy.smu.edu.sg.cet/files/Mismatches%20in%20Tax%20Outcomes%20in%20the%20Light%20of%20BEPS-Actions%202%20and%205.pdf.

114 Cf. Baerentzen, Susi, Lejour, Arjan, Van't Riet, Maarten, 'Limitation of Holding Structures for Intra-EU Dividends: An End to Tax Avoidance?', (2020) 12 *World Tax Journal*, 263 et seq.; Garcia-Bernardo, J., Fichtner, J., Takes, F. W. and Heemskerk, E. M., 'Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network', (2017) 7 *Scientific Reports*, No. 6246, https://www.nature.com/articles/s41598–017–06322–9.

115 As the book focuses on controversies directly related to the concept of BO, and thus benefits under WHT regimes, we will not explore issues concerning base companies, as they do not concern BO and WHT as such. For the use of base companies for tax planning and tax avoidance purposes, and the countermeasures to such practices (CFC rules) see: Kuźniacki, Błażej, *Controlled Foreign Companies and Tax Avoidance. International and Comparative Perspectives with Specific Reference to Polish Tax and Constitutional Law, EU Law and Tax Treaties*, (2020) C.H. Beck.

most appropriate to its needs and circumstances.[116] The different normative realities of taxation, coupled with the low threshold for acquiring tax residence in a particular country, is the source of the flourishing of intermediaries and treaty shopping. However, it would be wrong to view this phenomenon as 'evil incarnate' attacking the global tax system that must be fought by all means. Each country can negotiate and ratify the content of tax treaties in order to eliminate, or at least significantly reduce, treaty shopping in accordance with their individual tax policy. Since the 1980s, the OECD has promoted tax policies aimed at eliminating treaty shopping, mainly representing the fiscal and economic interests of highly developed countries that are RCs of the largest MNEs.[117] The tax systems of such countries have as their primary goal the protection of their own tax bases, including WHT and the foreign interests of their MNEs, often at the expense of the tax bases of other countries, mainly the SCs of the MNEs' foreign sourced income.[118]

1.082 A balanced and holistic approach with regard to the perception of treaty shopping – something missing in the OECD's documentation – was articulated by the Supreme Court of India in its judgment of 7 October 2003 in the *Azadi Bachao Andolan* case. In view of the rich message, it is worth quoting a larger passage from this judgment:

> Many developed countries tolerate or encourage treaty shopping, even if it is unintended, improper or unjustified, for other non-tax reasons, unless it leads to a significant loss of tax revenues. Moreover, several of them allow the use of their treaty network to attract foreign enterprises and offshore activities. Some of them favour treaty shopping for outbound investment to reduce the foreign taxes of their tax residents but dislike their own loss of tax revenues on inbound investment or trade of non-residents. *In developing countries, treaty shopping is often regarded as a tax incentive to attract scarce foreign capital or technology*. They are able to grant tax concessions exclusively to foreign investors over and above the domestic tax law provisions. In this respect, it does not differ much from other similar tax incentives given by them, such as tax holidays, grants, etc. [(…)] Developing countries need foreign investments, and the treaty shopping opportunities can be an additional factor to attract them. The

116 Taking into account the scope of the countries' jurisdictions, the Permanent Court of International Justice (hereinafter 'PCIJ') in its judgment of 7 September 1927 in the *Lotus* case, *S.S. Lotus* (*France v. Turkey*), Ser. A, No. 10, S) and the International Court of Justice (hereinafter 'ICJ') in its judgment of 5 February 1970 in *Barcelona Traction* case, *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*), I.C.J. Reports 1970, p. 3) stated that countries are not limited by public international law in the exercise of jurisdiction to legislate. This also applies to tax law. See Chrétien, Michel, 'Contribution a l'étude du droit international fiscal actuel: Le rôle prees organisations internationales dans le règlement des questions d'impôts entre les divers états', (1954) 86 *Recueil des Cours de Droit International* 115–116; Norr, Martin, 'Jurisdiction to Tax and International Income', (1962) 17 *Tax Law Review* 1962; Knechtle, A., *Basic Problems in International Fiscal Law*, (1979) HFL (Publishers); Monsenego, Jerome, *Taxation of Foreign Business Income within the European Internal Market: An Analysis of the Conflict between the Objective of Achievement of the European Internal Market and the Principles of Territoriality and Worldwide Taxation* (2011) IBFD 3; Lang, Michael, *Introduction to the Law of Double Taxation Conventions, 2nd edition*, (2013) IBFD and Linde Verlag, 27; Avi-Yonah, Reuven S., *Advanced Introduction to International Tax Law*, (2015) Edward Elgar Publishing, 8.

117 This was especially visible in the first 30 years of the OECD. OECD, 'Where: Global reach', https://www.oecd.org/about/members-and-partners.

118 A good example in this context is the implementation of US tax policy through, among other things, the so-called check-the-box rules, which allow US multinationals to choose the tax status of their foreign companies (taxable or transparent) from the point of view of the US tax authorities. This, in turn, enables these corporations to engage in far-reaching (aggressive) tax planning, often leaving SCs with no way of effectively taxing the income of the US MNEs. It is also worth noting that the OECD MC is structured in such a way that it leaves more taxing rights to the RCs of MNEs than to the SCs of their income. Cf. Avi-Yonah, Reuven S., *Advanced Introduction to International Tax Law,* (2015) Edward Elgar Publishing, Chapters 3 and 10.

> use of Cyprus as a treaty haven has helped capital inflows into Eastern Europe. Madeira (Portugal) is attractive for investments into the European Union. Singapore is developing itself as a base for investments in South East Asia and China. Mauritius today provides a suitable treaty conduit for South Asia and South Africa. In recent years, India has been the beneficiary of significant foreign funds through the 'Mauritius conduit'. Although the Indian economic reforms since 1991 permitted such capital transfers, the amount would have been much lower without the India-Mauritius tax treaty. [(…)] *This court cannot judge the legality of treaty shopping merely because one section of thought considers it improper. A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy.*[119] (emphasis added)

1.083 The Supreme Court of India makes it clear that treaty shopping has the ability to promote real investments in the SCs, and thus cannot be seen as a condemnable phenomenon in all cases. Indeed, treaty shopping often promotes a significant increase in foreign investment in various jurisdictions through intermediary entities. That is to say:

- Cyprus allows for capital flows to Eastern Europe in a tax favourable way,
- Madeira facilitates investments in the EU by South American investors,
- Singapore fosters global expansion into Southeast Asian and Chinese markets,
- Mauritius accelerates flows of global investments to India.

1.084 Following this provocative, albeit rational and geo-politically empathetic line of reasoning, one may conclude that intermediaries from the Netherlands, Luxembourg and the UK (and other liberal tax systems) favour the inflow of foreign investments into many SCs across the globe. The Ministries of Finance and the tax administrations in many SCs should consider the above nuanced approach to treaty shopping and, accordingly, to directive shopping. This may be prompted by a frank dialogue with tax advisors and investor representatives based on trust. A further increase of foreign investments into many of SCs, and all the related economic and reputational benefits, may significantly outweigh the reduction of WHT revenues in total. Taking a long-term perspective often pays off.

3. *This book's perspective: a neutral perception of treaty shopping and directive shopping* in abstracto *and the need for examination of abuse* ad casum

1.085 Contrary to the views of the CFA in the Conduits Report, leading tax scholars have a much more balanced and nuanced approach to defining treaty shopping (by analogy: directive shopping). David Rosenbloom says that treaty shopping 'connotes a premediated effort to take advantage of the international tax treaty network, and careful selection of the most favourable treaty for a specific purpose'. He adds that '[t]he terms thus focus on a state of mind – namely, a deliberate choice among treaty jurisdictions'.[120] Klaus Vogel, in turn, links treaty shopping with conducting transactions or establishing arrangements in other states 'solely for the purpose of enjoying the benefit of particular treaty rules existing between the State involved and a third State that otherwise would not be applicable, e.g., because the person claiming the benefit is not a resident of one of the contracting States'.[121] Finally, Stef van Weeghel denotes treaty

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119 *Union of India and another v. Azadi Bachao Andolan and another*, 2003-(263)-ITR-0706-SC, 6 ITLR, 2003, 233.

120 Rosenbloom, H. David, 'Tax Treaty Abuse: Problems and Issues', (1983) 15 *Law and Policy in International Business* 1983, 766–767.

121 Vogel, Klaus, 'Introduction', in: Vogel, K. (ed.), *Klaus Vogel on Double Taxation Conventions: A Commentary to the OECD-, UN- and US Model Conventions for the Avoidance of Double Taxation on Income and Capital*, (1997) Kluwer Law International, para. 110.

shopping as 'a situation in which a person who is not entitled to the benefits of a tax treaty makes use – in the widest meaning of the word – of an individual or legal person in order to obtain those treaty benefits that are not available directly'.[122]

1.086 Despite some differences, all the scholars quoted above perceive treaty shopping neutrally, as a thoughtful practice of indirectly obtaining access to tax treaty benefits. In the same vein, and by endorsing the perception of treaty shopping presented by van Weeghel, a neutral approach to treaty shopping is expressed by scholars in the contemporary research on international tax avoidance.[123] Consequently, treaty shopping in the science of tax law is a holistically neutral concept. It turns into an abusive practice only if a careful assessment of the facts and the law on a case-by-case basis leads to such conclusions.

1.087 A similar approach to understanding treaty shopping has been taken by the Ad Hoc Group of Experts on International Cooperation in Tax Matters (hereinafter the 'Group of Experts') of the United Nations (hereinafter the 'UN') under the chairmanship of Garcia Prats. In particular, they distinguished the concept of 'treaty abuse' from that of 'treaty shopping' by stating that:

> the term 'treaty shopping' — in other words, searching for a more favourable treaty — should not be equated with treaty abuse. The conclusion that a situation is abusive — or that an individual is benefiting from the application of a double taxation treaty in an abusive fashion — requires and implies verification of the occurrence of an indirect, rather than a direct, breach of a provision through a violation of its object, spirit or purpose, something that is difficult to determine *a priori*.[124]

1.088 The above view, whereby the concept of treaty abuse should not be mixed with that of treaty shopping, and that the qualification of treaty shopping as treaty abuse requires *ad casum* assessment rather than *a priori* presumption, has been endorsed by the UN Economic and Social Council.[125] This is clearly in line with the presented views of the leading scholarship and the above cited landmark judgment of the Indian Supreme Court.[126]

1.089 In BEPS Action 6, the OECD begins by describing treaty shopping in very general and illustrative terms as 'a number of arrangements through which a person who is not a resident of a Contracting State may attempt to obtain benefits that a tax treaty grants to a resident of that State'.[127] No link is made between treaty shopping and treaty abuse. The OECD's considerations take treaty shopping closer to treaty abuse only in the informal summary of the BEPS on the OECD's website in the form of short answers to the 'frequently asked questions'. There, the OECD first quotes the above-mentioned definition of treaty shopping in a neutral

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122 Van Weeghel, Stef, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States*, (1998) Kluwer Law International, 96, 119.

123 Baerentzen, Susi, Lejour, Arjan, Van't Riet, Maarten, 'Limitation of Holding Structures for Intra-EU Dividends: An End to Tax Avoidance?', (2020) 12 *World Tax Journal* 263 et seq.

124 Prats, Garcia, 'Abuse of tax treaties and treaty shopping', in: *Ad Hoc Group of Experts on International Cooperation in Tax Matters of the UN*, Eleventh Meeting, Geneva, ST/SG/AC.8/2003/L.3, 15–19 December 2003, para. 19, 6, https://digitallibrary.un.org/record/501522?ln=en.

125 UN Economic and Social Council, 'Abuse of tax treaties and treaty shopping', in: *Committee of Experts on International Cooperation in Tax Matters Second session Geneva*, E/C.18/2006/2, 30 October–3 November 2006, para. 24, 9, https://www.un.org/esa/ffd/wp-content/uploads/2014/10/1STM_abuse-of-tax-treaties-E-C18–2005–2.pdf.

126 India, The Indian Supreme Court, *Azadi Bachao Andolan*, 7 October 2003. Cf. *supra* 1.IV.C.2.

127 BEPS Action 6, para. 17, 17.

and illustrative way, and then indicates that treaty shopping 'strategies are often implemented by establishing companies in States with desirable tax treaties that are often qualified as "letterboxes" "shell companies" or "conduits", because these companies exist on paper, but have no or hardly any substance in reality'.[128] In the context of BEPS Action 6, such treaty shopping 'can be addressed through changes to bilateral tax treaties in line with the minimum standard agreed'.[129]

1.090 This implies that the more recent approach of the OECD is to perceive treaty shopping as a neutral phenomenon, which *often* becomes treaty abusive. Treaty shopping abuses may exist – following the OECD's threat – when a taxpayer establishes companies that 'exist only on paper' (letterbox/shell/conduits) in order to indirectly obtain benefits under a tax treaty. Plainly, the identification of such companies in a cross-border arrangement, and their abusive role under tax treaties, always requires close examination.

1.091 Moreover, the last sentence of the OECD text quoted above indicates that the best suited to target abusive treaty shopping are changes to tax treaties in line with the minimum standard under BEPS Action 6, i.e., the new preamble and the PPT or/and a comprehensive LOB clause.[130] The preamble has only a limited interpretative role, while the real anti-abusive role is played by the PPT and/or the LOB clause.[131] This important guidance from the OECD in respect of the current approach to combating abusive treaty shopping will be further examined in the final sections of Chapter 3 below. Here, it is enough to say that the concept of BO is not mentioned by the OECD in BEPS Action 6 as a principal tool to prevent abusive treaty shopping. Rather, the OECD recognised the very limited role of the concept of BO in addressing abusive treaty shopping, not going beyond 'simple treaty shopping situations where income is paid to an intermediary resident of a treaty country who is not treated as the owner of that income for tax purposes (such as an agent or nominee)'.[132]

1.092 To see the whole picture, it is worth noting that treaty shopping effect is granted explicitly in many tax treaties worldwide through the most favoured nation clause (hereinafter 'MFN') with respect to dividend, interest or royalty payments.[133] In general, the MFN clause forges a link between all the tax treaties in a given tax treaty network, by ensuring that the CSs of one treaty provide each other with treatment no less favourable than the treatment it provides under other

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128 OECD, 'What is treaty shopping and how can it be addressed?', in: *Bitesize BEPS. Explore some of the frequently asked questions on BEPS and the package of 15 measures*, http://www.oecd.org/tax/beps/bitesize-beps/#Action6.

129 Ibid.

130 BEPS Action 6, para. 22.

131 Schwarz, Jonathan 'The Impact of the New Preamble on the Interpretation of Old and New Treaties and on the Policy of Abuse Prevention' (2020) 74 *Bulletin for International Taxation*, sec. 5.3 and Chapter 6. Michael Lang went so far to say that the PPT 'does not represent a legal basis for denying treaty benefits. The provision merely emphasizes the necessity for an interpretation based on object and purpose in those cases in which one of the principal purposes of a transaction was to obtain a benefit.' Lang, Michael, 'The Signalling Function of Article 29(9) of the OECD Model - The "Principal Purpose Test"' (2020) 74 *Bulletin for International Taxation*, Chapter 5.

132 BEPS Action 6, para. 18.

133 MFN clauses are most often added to tax treaties via the protocols. For an impressive list of such clauses applicable in tax treaties see Haslehner, Werner, 'Art. 10', para. 83, 832 and 'Art. 11', para. 79, 922 and Valta, Matthias, 'Art. 12', para. 62, 991, in: Rust, Alexander, Reimer, Ekkehart (eds), *Klaus Vogel on Double Taxation Conventions*, *Fourth Edition*, Vol. 1, (2015) Wolters Kluwer Law & Business.

treaties in areas covered by the MFN clause. As a result, the CSs deliberately open up access to benefits under its single tax treaty with the MFN clause to non-residents of the CSs of that treaty. To the extent of application of the MFN clauses, this creates a kind of multilateral tax treaty. A similar outcome stems from a taxpayer's self-help via treaty shopping.[134] Therefore, a predetermined recognition of treaty shopping as an abusive practice under tax treaties would be contrary not only to the above-mentioned views of the doctrine and practice of tax law, but also with the tax treaty policy of many countries across the world, as expressed in their treaties via MFN clauses.[135]

1.093 In addition to achieving tax benefits (a neutral perception), including through abusive tax avoidance (a pejorative perception), treaty shopping is a term associated with benefits for investors under international investment treaties. It concerns obtaining the best possible legal protection for foreign investments on the basis of bilateral (BITs) and multilateral agreements on the promotion and mutual protection of investments.[136] For this purpose, foreign investors typically set up intermediary entities in the jurisdictions that have concluded the most favourable international investments agreements (usually BITs) with the host states of the investment (the equivalent of the SCs in tax law). The leading scholars in international investment law do not attribute value judgment to the term treaty shopping. Instead they use that term interchangeably with the terms 'nationality planning' or 'strategic use or change of nationality'.[137] To use an apt classification offered by Jorun Baumgartner, treaty shopping includes 'all legal operations aimed at invoking or creating a qualifying nationality and/or a qualifying investment, for example by structuring or restructuring an investment or by otherwise conferring an entitlement or property right to an investment, with a view to benefitting from a particular

134 Cf. Van Weeghel, Stef, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States*, (1998) Kluwer Law International, 122.

135 The same holds true in relation to international investment treaties (hereinafter 'IIAs'). Rodriguez, Alejandro Faya, 'The Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?' (2008) 25 *Journal of International Arbitration* 89; Radi, Yannick, 'The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the "Trojan Horse"', (2007) 18 *The European Journal of International Law* 757.

136 These include bilateral investment treaties (BITs) and multilateral investment protection agreements (treaties) that include arbitration clauses such as: the *Energy Charter Treaty* (hereinafter 'ECT') of 17 December 1994, entered into force on 24 April 1998, https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/; Association of Southeast Asian Nations (hereinafter 'ASEAN') Comprehensive Investment Agreement (hereinafter 'ACIA'), http://investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf; The United States-Mexico-Canada Agreement (hereinafter 'USMCA'), https://ustr.gov/usmca; the Canada–EU Comprehensive Economic and Trade Agreement (hereinafter 'CETA'), https://ec.europa.eu/trade/policy/in-focus/ceta/. In particular, these international agreements regulate the issue of dispute resolution between the foreign investor and the state on the basis of recourse to international arbitration, creating conditions for investors to assert their rights against the host state (SC) before an independent judicial body appointed *ad hoc* in accordance with the agreed procedural rules on arbitration, typically International Centre for Settlement of Investment Disputes (hereinafter 'ICSID') Convention, https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview or United Nations Commission on International Trade Law (hereinafter 'UNCITRAL') Arbitration Rules, https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration. Salacuse, Jeswald W., *The Law of Investment Treaties, Third Edition*, (2021) Oxford Scholarly Authorities on International Law, vii–x. Among other things, these agreements protect against arbitrary and discriminatory decisions by government officials, including tax authorities. Chaisse, Julien, 'Investor-State Arbitration in International Tax Dispute Resolution – A Cut above Dedicated Tax Dispute Resolution?', (2016) 41 *Virginia Law Review* 149–222.

137 Baumgartner, Jorun, *Treaty Shopping in International Investment Law, First Edition*, (2016) Oxford University Press, 10–12.

international investment agreement'.[138] Thus, just as in international tax law, treaty shopping in international investment law has a neutral meaning, unless an analysis of the relevant law and facts of a particular case leads to a finding of abuse.[139]

1.094 The considerations demonstrate an aptness in a neutral understanding of treaty shopping and directive shopping on many levels – legal, economic and policy. Only after a close examination of the relevant legal provisions and facts one may attribute a negative value judgment to these terms, if that examination finds evidence of abuse in a particular case. This holistic and neutral approach to understanding treaty shopping and directive shopping appears to contribute to balance the interests of the SCs of income (host states) and the RCs of foreign investors, thereby benefiting the international community as a whole, including the *acquis* of international and EU law and the need for the sustainable development of states and societies.[140] Such an approach is taken in this book for the purposes of further analysis, thereby giving treaty shopping and directive shopping the following meaning: 'a situation in which an entity that is not entitled to the benefits of a tax treaty or EU directive makes use – in the widest meaning of the word – of a legal entity in order to obtain those benefits that are not available directly'.[141]

V. OUTLINE OF THE BOOK

1.095 The book consists of seven chapters (1–7), each of which is sub-divided into sections (I, II, III, etc.) and as many as two levels of subsections (the first level: A, B, C and the second level A.1., B.2. and C.3., etc.). The deep analytical structure of the book is illustrated by the Extended Contents, providing a systemic outlook on all the issues analysed in the book.

1.096 This Chapter 1 sets out the purpose and the scope of the book, indicating the significance of the problem concerning the concept of BO in a multifaceted way. This chapter pays particular attention to various interests and perspectives that arise around the concept of BO and the terminological issues. The lack of terminological rigour regarding the indirect access to benefits under tax treaties and EU directives would incapacitate an appropriate division between the

138 Ibid., 13.

139 Ibid., Chapter 2.

140 To use Bräutigam's words:

> without the ability to raise revenues effectively, states are limited in the extent to which they provide security, meet basic needs or foster economic development. *Yet the political importance of taxation extends beyond the raising of revenue* (...) [, as] taxation may play the central role in building and sustaining the power of states, and shaping their ties to society (...) *by enhanc[ing] accountability between states and their citizens.*

Bräutigam, Deborah, 'Introduction: Taxation and State-Building in Developing Countries', in: Fjeldstad, Odd-Helge, Moore, Mick, (eds), *Taxation and State-Building in Developing Countries. Capacity and Content,* (2008) Cambridge University Press, 1. Cf. 1987 Brundtland Report, *Report of the World Commission on Environment and Development: Our Common Future,* UN Documents, http://www.un-documents.net/our-common-future.pdf; Richardson, Dick, 'The Politics of Sustainable Development', in: Baker, Susan, Kousis, Maria, Young, Stephen (eds), *The Politics of Sustainable Development: Theory, Policy and Practice Within the European Union*, (1997) Routledge 1997, 46 et seq.

141 Clearly, this definition is heavily inspired by the definition of treaty shopping provided more than 20 years ago by Stef van Weeghel and cited at the beginning of this subsection. Van Weeghel, Stef, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States*, (1998) Kluwer Law International, 117.

practices that the concept of BO is suitable to address and the practices targeted by other legal measures. This discussion constitutes the starting point of the analyses to follow.

1.097 Chapter 2 presents and discusses the canons of interpretation that are relevant to an appropriate understanding of the concept of BO. It introduces the further methodological order accompanying the analysis in Chapter 3 and the subsequent chapters. The interpretative guidance in Chapter 2 consists of fundamental principles of interpretation that every professional-interpreter (a person with a certain level of legal communicative competence who does not select arguments supporting a preconceived thesis, but strives to determine the proper meaning of the law), in particular judge-interpreter should know and be guided by. Despite its fundamental importance, unfortunately, the proper methodology of understanding and applying the concept of BO is often omitted or neglected by tax authorities, and even some courts. Therefore, Chapter 2, apart from its theoretical and legal value, is of significant practical importance. It will constitute the methodological interpretative background against which the appropriateness and persuasiveness of case law on BO in Chapters 5 and 6 will be assessed.

1.098 Chapter 3, in turn, takes an in-depth analysis of the origin and evolution of the concept of BO in international tax law from the 1960s to the present day. This chapter mainly analyses the OECD's views on BO, as set out in the Commentaries on the OECD MC and the OECD reports. Chapter 3 also refers to the work of the UN Expert Committees.

1.099 Chapter 4 presents the general themes of tax jurisprudence on the concept of BO, before taking a deep dive into the analysis of that jurisprudence in Chapters 5 and 6.

1.100 Chapter 5 discusses in detail and offers critical analysis of the key international jurisprudence on the concept of BO in a long period of 1971–2019, i.e., pre-CJEU Danish BO era of the origin and evolution of BO.

1.101 Chapter 6 continues the discussion and the analysis from Chapter 5, but with a major difference. The CJEU Danish BO judgments are analysed first in order to discover the meaning of the concept of BO under EU law and its usefulness in conduit cases. Afterwards, selected cases in the EU MSs are analysed for the purposes of reaching conclusions about the influence of the CJEU's approach to the concept of BO. In other words, Chapter 5 is more about international matters, while Chapter 6 is more about the EU tax jurisprudence on the concept of BO.

1.102 Summaries and conclusions are appended to each of these chapters. The conclusions of the book as a whole, however, are provided in the final Chapter 7. This chapter ties up the various methodological strands and conclusions, and undertakes a final evaluation of the concept of BO under the tax jurisprudence. Chapter 7 answers the main research question and a number of accompanying questions, including not only an understanding of the concept of BO as of today, but also an attempt to anticipate the future fate of this concept. Finally, Chapter 7 touches upon biosemantics as a source of behavioural explanation for the perception of the concept of BO by the tax authorities and the role of the courts in changing that perception.

ECLI:EU:C:2019:134

JUDGMENT OF THE COURT (Grand Chamber)

26 February 2019 (*)

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(Reference for a preliminary ruling — Approximation of laws — Common system of taxation applicable to interest and royalty payments made between associated companies of different Member States — Directive 2003/49/EC — Beneficial owner of the interest and royalties — Article 5 — Abuse of rights — Company established in a Member State and paying to an associated company established in another Member State interest all or almost all of which is then transferred outside the European Union — Subsidiary subject to an obligation to withhold tax on the interest at source)

In Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Østre Landsret (High Court of Eastern Denmark, Denmark) (C-115/16, C-118/16 and C-119/16), made by decisions of 19 February 2016, received at the Court on 25 February 2016, and from the Vestre Landsret (High Court of Eastern Denmark, Denmark) (C-299/16), made by decision of 24 May 2016, received at the Court on 26 May 2016, in the proceedings

N Luxembourg 1 (C-115/16),

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

C Danmark I (C-119/16),

Z Denmark ApS (C-299/16)

v

Skatteministeriet,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, J.-C. Bonichot, A. Arabadjiev, T. von Danwitz, C. Toader and F. Biltgen, Presidents of Chambers, A. Rosas (Rapporteur), M. Ilešič, L. Bay Larsen, M. Safjan, C.G. Fernlund, C. Vajda and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 10 October 2017,

after considering the observations submitted on behalf of:

– N Luxembourg 1 and C Danmark I, by A.M. Ottosen and S. Andersen, advokater,

– X Denmark A/S and Z Denmark ApS, by L.E. Christensen and H.S. Hansen, advokater,

– the Danish Government, by C. Thorning, J. Nymann-Lindegren and M.S. Wolff, acting as Agents, and J.S. Horsbøl Jensen, advokat,

– the German Government, by T. Henze and R. Kanitz, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and G. De Socio, avvocato dello Stato,

– the Luxembourg Government, by D. Holderer, acting as Agent, and P.-E. Partsch and T. Lesage, avocats,

– the Netherlands Government, by M.K. Bulterman and C.S. Schillemans, acting as Agents,

– the Austrian Government, by G. Eberhard, acting as Agent,

– the Swedish Government, by A. Falk, C. Meyer-Seitz, H. Shev, U. Persson, N. Otte Widgren and F. Bergius, acting as Agents,

– the European Commission, by W. Roels, R. Lyal and L. Grønfeldt, acting as Agents, and H. Peytz, avocat,

after hearing the Opinion of the Advocate General at the sitting on 1 March 2018,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49) and of Articles 49, 54 and 63 TFEU.

2 The requests have been made in proceedings brought by N Luxembourg 1, X Denmark A/S, C Danmark I and Z Denmark ApS against the Skatteministeriet (Ministry of Taxation, Denmark) relating to the obligation imposed on those companies to pay withholding tax by reason of the payment by them of interest to non-resident companies regarded by the tax authority as not being the beneficial owners of that interest and, accordingly, as incapable of being entitled to the exemption from any taxes that is provided for by Directive 2003/49.

Legal context

OECD Model Tax Convention

3 On 30 July 1963 the Council of the Organisation for Economic Cooperation and Development (OECD) adopted a recommendation concerning the avoidance of double taxation and called on the governments of the member countries, when concluding or revising bilateral conventions, to conform to a 'model convention for the avoidance of double taxation with respect to taxes on income and capital' that had been drawn up by the Fiscal Committee of the OECD and was annexed to that recommendation ('the OECD Model Tax Convention'). That model tax convention is re-examined and amended regularly. It is the subject of commentaries approved by the OECD Council.

4 Paragraphs 7 to 10 of the commentary on Article 1 of the OECD Model Tax Convention as amended in 1977 ('the OECD 1977 Model Tax Convention') — a provision which states that this convention is to apply to persons who are residents of one or both of the Contracting States — draw attention to the fact that the convention could be used improperly, with the objective of tax avoidance, by means of artificial legal constructions. The text of those paragraphs of the commentary underlines the importance of the concept of 'beneficial owner' introduced, in particular, in Article 10 (taxation of dividends) and Article 11 (taxation of interest) of the model convention and the need to combat tax evasion.

5 Article 11(1) and (2) of the OECD 1977 Model Tax Convention is worded as follows:

'1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 per cent of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.'

6 When the commentaries were revised in 2003, comments were added concerning 'conduit companies', that is so say, companies which, though the formal owners of the income, have, in practice, only very narrow powers, rendering them mere fiduciaries or administrators acting on account of the interested parties, so that they are not to be regarded as the beneficial owners of that income. Paragraph 8 of the commentary on Article 11, in the revised version of 2003, states, in particular, that 'the term "beneficial owner" is not 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'. Paragraph 8.1 of the revised version of 2003 states that 'it would be … inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned' and 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'.

7 A further revised version of the commentaries in 2014 provided explanation of the concepts of 'beneficial owner' and 'conduit company'. Paragraph 10.3 of this version of the commentaries states that 'there are many ways of addressing conduit company and, more generally, treaty shopping situations. These include specific anti-abuse provisions in treaties, general anti-abuse rules and substance-over-form or economic substance approaches'.

Directive 2003/49

8 Recitals 1 to 6 of Directive 2003/49 are worded as follows:

'(1) In a Single Market having the characteristics of a domestic market, transactions between companies of different Member States should not be subject to less favourable tax conditions than those applicable to the same transactions carried out between companies of the same Member State.

(2) This requirement is not currently met as regards interest and royalty payments; national tax laws coupled, where applicable, with bilateral or multilateral agreements may not always ensure that double taxation is eliminated, and their application often entails burdensome administrative formalities and cash-flow problems for the companies concerned.

(3) It is necessary to ensure that interest and royalty payments are subject to tax once in a Member State.

(4) The abolition of taxation on interest and royalty payments in the Member State where they arise, whether collected by deduction at source or by assessment, is the most appropriate means of eliminating the aforementioned formalities and problems and of ensuring the equality of tax treatment as between national and cross-border transactions; it is particularly necessary to abolish such taxes in respect of such payments made between associated companies of different Member States as well as between permanent establishments of such companies.

(5) The arrangements should only apply to the amount, if any, of interest or royalty payments which would have been agreed by the payer and the beneficial owner in the absence of a special relationship.

(6) It is moreover necessary not to preclude Member States from taking appropriate measures to combat fraud or abuse.'

9 Article 1 of Directive 2003/49 provides:

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

…

4. 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.

5. A permanent establishment shall be treated as the beneficial owner of interest or royalties:

…

(b) if the interest or royalty payments represent income in respect of which that permanent establishment is subject in the Member State in which it is situated to one of the taxes mentioned in Article 3(a)(iii) or in the case of Belgium to the “impôt des non-résidents/belasting der niet-verblijfhouders” or in the case of Spain to the “Impuesto sobre la Renta de no Residentes” or to a tax which is identical or substantially similar and which is imposed after the date of entry into force of this Directive in addition to, or in place of, those existing taxes.

…

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

…

11. The source State may require that fulfilment of the requirements laid down in this Article and in Article 3 be substantiated at the time of payment of the interest or royalties by an attestation. If fulfilment of the requirements laid down in this Article has not been attested at the time of payment, the Member State shall be free to require deduction of tax at source.

12. The source State may make it a condition for exemption under this Directive that it has issued a decision currently granting the exemption following an attestation certifying the fulfilment of the requirements laid down in this Article and in Article 3. A decision on exemption shall be given within three months at most after the attestation and such supporting information as the source State may reasonably ask for have been provided, and shall be valid for a period of at least one year after it has been issued.

13. For the purposes of paragraphs 11 and 12, the attestation to be given shall, in respect of each contract for the payment, be valid for at least one year but for not more than three years from the date of issue and shall contain the following information:

…

(b) beneficial ownership by the receiving company in accordance with paragraph 4 or the existence of conditions in accordance with paragraph 5 where a permanent establishment is the recipient of the payment; …’

10 The term used in Article 1(1) of Directive 2003/49 is, depending on the language version, the ‘beneficiary’/‘recipient’ (in Bulgarian (*бенефициерът*), French (*bénéficiaire*), Latvian (*beneficiārs*) and Romanian (*beneficiarul*)), the ‘beneficial owner’/‘actual beneficiary’ (in Spanish (*beneficiario efectivo*), Czech (*skutečný vlastník*), Estonian (*tulusaaja*), English (*beneficial owner*), Italian (*beneficiario effettivo*), Lithuanian (*tikrasis savininkas*), Maltese (*sid benefiċjarju*), Portuguese (*beneficiário efectivo*) and Finnish (*tosiasiallinen edunsaaja*)), the ‘owner’/‘person entitled to use’ (in German (*der Nutzungsberechtigte*), Danish (*retmæssige ejer*), Greek (*ο δικαιούχος*), Croat (*ovlašteni korisnik*), Hungarian (*haszonhúzó*), Polish (*właściciel*), Slovak

(*vlastník požitkov*), Slovenian (*upravičeni lastnik*) and Swedish (*den som har rätt till*)), or the 'person entitled in the end' (in Dutch (*de uiteindelijk gerechtigde*)).

11 Article 2 of Directive 2003/49 provides:

'For the purposes of this Directive:

(a) the term "interest" means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; …

…'

12 Article 3 of Directive 2003/49 provides:

'For the purposes of this Directive:

(a) the term "company of a Member State" means any company:

(i) taking one of the forms listed in the Annex hereto; and

(ii) which in accordance with the tax laws of a Member State is considered to be resident in that Member State and is not, within the meaning of a Double Taxation Convention on Income concluded with a third State, considered to be resident for tax purposes outside the Community; and

(iii) which is subject to one of the following taxes without being exempt, or to a tax which is identical or substantially similar and which is imposed after the date of entry into force of this Directive in addition to, or in place of, those existing taxes:

…

— selskabsskat in Denmark,

…

— impôt sur le revenu des collectivités in Luxembourg,

…

(b) a company is an "associated company" of a second company if, at least:

(i) the first company has a direct minimum holding of 25% in the capital of the second company, or

(ii) the second company has a direct minimum holding of 25% in the capital of the first company, or

(iii) a third company has a direct minimum holding of 25% both in the capital of the first company and in the capital of the second company.

Holdings must involve only companies resident in Community territory.

…'

13 The companies covered by Article 3(a) of Directive 2003/49, listed in the annex thereto, include 'companies under Luxembourg law known as: "société anonyme, société en commandite par actions and société à responsabilité limitée"'.

14 Article 4 of Directive 2003/49, headed ‘Exclusion of payments as interest or royalties’, states in paragraph 1:

‘The source State shall not be obliged to ensure the benefits of this Directive in the following cases:

(a) payments which are treated as a distribution of profits or as a repayment of capital under the law of the source State;

(b) payments from debt-claims which carry a right to participate in the debtor's profits;

…’

15 Article 5 of Directive 2003/49, headed ‘Fraud and abuse’, is worded as follows:

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

2. Member States may, in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse, withdraw the benefits of this Directive or refuse to apply this Directive.’

Double taxation conventions

16 Article 11(1) of the Convention between the Government of the Grand Duchy of Luxembourg and the Government of the Kingdom of Denmark for the avoidance of double taxation and the establishment of rules relating to mutual administrative assistance with respect to taxes on income and on capital, signed in Luxembourg on 17 November 1980 (‘the Luxembourg-Denmark Tax Convention’), allocates the power to tax interest between those two Member States and is worded as follows:

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

17 Article 11(1) of the Convention between the Nordic Countries for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, signed in Helsinki on 23 September 1996, in the version relevant to the main proceedings (‘the Nordic Tax Convention’), has identical wording.

18 It is apparent from those conventions that the source State, that is to say, in the main proceedings, the Kingdom of Denmark, may tax interest paid to a person resident in another Member State if that person is not the beneficial owner of the interest. Neither convention, however, defines the concept of ‘beneficial owner’.

Danish law

Taxation of interest

19 Paragraph 2(1)(d) of the selskabsskattelov (Law on corporation tax) provides:

‘… companies, associations and so forth within the meaning of Paragraph 1(1) having their seat abroad are liable for tax under this Law inasmuch as they

…

(d) receive interest from sources in Denmark in relation to a liability which a [company registered in Denmark] or a [permanent establishment of a foreign company] has towards legal entities which are listed in Paragraph 3 B of the Law on tax control) (controlled liability). … The tax liability does not apply to interest which is not taxed or is subject to reduced taxation under Directive [2003/49] or a double taxation convention with the Faroe Islands, Greenland or the State in which the recipient company and so forth has its seat. However, that applies only if the paying company and the recipient company are associated within the meaning of that directive for a continuous period of at least one year, which must include the payment date. ...’

Withholding tax

20 If, by virtue of Paragraph 2(1)(d) of the Law on corporation tax, there is a limited tax liability in respect of interest income arising in Denmark, the Danish payer of the interest has to withhold the tax at source pursuant to Paragraph 65 D of the kildeskattelov (Law on tax at source). The interest payer is liable to the State for payment of those sums of withholding tax.

21 As is apparent, inter alia, from the order for reference in Case C-115/16, for 2006 to 2008 the rate of tax on interest received by a company resident in a Member State other than the Kingdom of Denmark was higher than the rate of tax paid by a Danish company. The Ministry of Taxation acknowledged, however, in the main action that that difference in rate infringed the provisions of the EC Treaty relating to freedom of establishment. It conceded that the amount of withholding tax owed in respect of those years should be reduced.

22 The tax withheld at source falls due when the interest is paid, whereas the chargeability of the tax payable by a Danish company on its projected income is governed by more flexible rules. Furthermore, in the event of late payment of the tax withheld at source, the rate of default interest is higher than the rate payable in the event of late payment of corporation tax by a Danish company.

23 Pursuant to Paragraph 65 C(1) of the Law on tax at source, a person paying royalties whose source is in Denmark is in principle required to withhold tax at source, whether or not the payee is resident in Denmark.

Law applicable to fraud and abuse

24 Until the adoption of Law No 540 of 29 April 2015, no general statutory rule to combat abuse existed in Denmark. However, case-law developed the 'reality' principle, under which taxation must be determined on the basis of a specific assessment of the facts. This means in particular that artificial tax arrangements may, depending on the circumstances, be set aside so that taxation takes account of reality, under the principle of substance over form.

25 It is clear from the orders for reference that, in each of the main actions, the parties are in agreement that the reality principle is not sufficient to justify setting aside the arrangements at issue in those actions.

26 As is apparent from the orders for reference, case-law has also developed the 'rightful income recipient' (*rette indkomstmodtager*) principle. This principle is based on the fundamental provisions relating to taxation of income, set out in Paragraph 4 of the statsskatteloven (Law on State tax), which have the effect that the tax authorities are not obliged to accept an artificial separation between the income-generating undertaking or activity and the allocation of the income deriving therefrom. This principle is therefore intended to determine the person who — regardless of formal appearances — is the real recipient of certain income and thus the person who is liable for tax on it.

The disputes in the main proceedings and the questions referred for a preliminary ruling

27 In the four main actions, a Luxembourg company which has assumed the obligations of a Danish company (Case C-115/16) and three Danish companies (Cases C-118/16, C-119/16 and C-299/16) contest the decisions of SKAT (tax authority, Denmark) ('SKAT') that refused to grant them the exemption from corporation tax provided for by Directive 2003/49 in respect of interest paid to entities established in another Member State, on the ground that those entities were not the beneficial owners of the interest and were mere conduit companies.

28 In order to enjoy the tax advantages provided for by Directive 2003/49, the entity that receives the interest must meet the conditions that the directive lays down. However, as the Danish Government states in its observations, groups of companies not satisfying those conditions may in some cases create, between the company which pays the interest and the entity which is intended actually to have the use of it, one or more artificial companies meeting the formal conditions of the directive. The referring courts' questions concerning abuse of rights and the concept of 'beneficial owner' relate to such financial constructions.

29 The facts as set out by the referring courts and illustrated, in the orders for reference, by a number of diagrams of the structure of the company groups concerned are 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.

(1) Case C-115/16, N Luxembourg 1

30 According to the order for reference, five private equity funds, none of which is a company resident in a Member State or in a country with which the Kingdom of Denmark has signed a double taxation convention, established in 2005 a group consisting of a number of companies with the aim of purchasing T Danmark, a large Danish service provider.

31 In its observations, the Danish Government stated that Case C-115/16 concerns the same group of companies as the group at issue in Case C-116/16, which relates to the taxation of dividends and is decided by today's judgment in *T Danmark and Y Denmark Aps* (C-116/16 and C-117/16).

32 As explained by the referring court, the private equity funds set up companies in Luxembourg, inter alia A Luxembourg Holding, and companies in Denmark, including N Danmark 1. The acquisition of T Danmark was financed, inter alia, by loans granted by the private equity funds to N Danmark 1 and by increases in that company's capital. In 2009 N Danmark 1 merged with another Danish company, which was dissolved in 2010 when a cross-border merger with C Luxembourg took place. C Luxembourg subsequently changed its name and was liquidated with transfer of the claim at issue to N Luxembourg 1, which is pursuing the main proceedings in N Danmark 1's place.

33 One of the Danish companies set up by the private equity funds, N Danmark 5, acquired T Danmark. In the spring of 2006, N Danmark 5 transferred its shares in T Danmark to C Luxembourg, which thus became the parent company of T Danmark.

34 On 27 April 2006, the debt securities relating to the loans granted by the private equity funds were transferred by those funds to A Luxembourg Holding, which itself transferred them on the same day to C Luxembourg, T Danmark's parent company.

35 From that date, C Luxembourg was indebted to A Luxembourg Holding in an amount equal to that payable by N Danmark 1 to C Luxembourg. According to the referring court, interest at a rate of 10% was payable on the debt of N Danmark 1, whereas the debts of C Luxembourg and A Luxembourg Holding were at a rate of 9.96875%. On 9 July 2008, the yield on the loans between C Luxembourg and A Luxembourg Holding increased to 10%. On the other hand, the yield on the loans between A Luxembourg Holding and the private equity funds was kept at 9.96875%.

36 In 2006, C Luxembourg bore expenses in respect of 'other external charges' of EUR 8 701, including EUR 7 810 for salaries. In addition, that company bore expenses in respect of 'other operating charges' of EUR 209 349.

37 In the same year, A Luxembourg Holding likewise bore expenses in respect of 'other external charges' of EUR 3 337, including EUR 2 996 for salaries. In addition, that company bore expenses in respect of 'other operating charges' of EUR 127 031.

38 According to the order for reference, C Luxembourg's annual accounts for 2007 and 2008 indicate that it had on average two part-time employees during those years. A Luxembourg Holding's annual accounts for the same period reveal that it had on average one part-time employee during those years.

39 Apart from the holding of stakes in N Danmark 1, C Luxembourg's activity is stated to be limited to the holding of debt issued by that company.

40 C Luxembourg and A Luxembourg Holding are both registered at the same address. That address is also used by companies that have direct links with one of the investment funds.

41 The referring court states that in 2011 SKAT issued a notice of assessment in respect of interest for the years 2006 to 2008, in an amount totalling 925 764 961 Danish krone (DKK) (roughly EUR 124 million). SKAT took

the view that C Luxembourg and A Luxembourg Holding were not the beneficial owners of the interest, but operated as mere conduits, and that the interest was transferred from the Danish part of the group to the private equity funds through those two Luxembourg companies. SKAT drew the conclusion that the applicant in the main proceedings was subject to the obligation to withhold at source tax on the interest paid and recorded and that it was liable for payment of the withholding tax that had not been levied.

42 The notice of assessment was contested by the applicant in the main proceedings before the Danish courts.

43 N Luxembourg 1 contests the fact that the situation in the main proceedings represents fraud or abuse. It contends that, in any event, even where there is fraud or abuse, the benefits of Directive 2003/49 can be withdrawn, under Article 5(1) thereof, only if there is a corresponding legal basis in national law. However, there is, it submits, no such basis in Danish law.

44 Should C Luxembourg not be regarded as being the beneficial owner of the interest, the applicant in the main proceedings contends that the Danish rules concerning the withholding of tax at source and its levying, and the liability relating thereto, infringe the freedom of establishment guaranteed in EU law and, in the alternative, the free movement of capital, in particular for the following reasons: (i) tax withheld at source is paid earlier than similar corporation tax; (ii) default interest on tax withheld at source is much higher than default interest in respect of corporation tax; (iii) the debtor must withhold the tax at source; and (iv) the debtor must assume liability for the tax withheld deducted at source in accordance with the Law on tax at source.

45 In that context, the Østre Landsret (High Court of Eastern Denmark, Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) (a) Is Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted as meaning that a company resident in a Member State that is covered by Article 3 of the directive and, in circumstances such as those of the present case, receives interest from a subsidiary in another Member State, is the “beneficial owner” of that interest for the purposes of the directive?

(b) Is the concept “beneficial owner” in Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted in accordance with the corresponding concept in Article 11 of the OECD 1977 Model Tax Convention?

(c) If Question 1(b) is answered in the affirmative, should the concept then be interpreted solely in the light of the commentary on Article 11 of the [OECD] 1977 Model Tax Convention (paragraph 8), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding “conduit companies” (paragraph 8.1, now paragraph 10.1), and the additions made in 2014 regarding “contractual or legal obligations” (paragraph 10.2)?

(d) If the 2003 commentaries can be incorporated into the interpretation, is it then a condition for deeming a company not to be a “beneficial owner” for the purposes of Directive 2003/49 that there actually has been a channelling of funds to those persons who are deemed by the State in which the interest payer is resident to be “the beneficial owners” of the interest in question, and — if so — is it then a further condition that the actual passing take place at a point close in time to the payment of the interest and/or take place as a payment of interest?

(e) Of what significance is it in that connection if equity capital is used for the loan, if the interest in question is entered on the principal (“rolled up”), if the interest recipient has subsequently made an intragroup transfer to its parent company resident in the same State with a view to adjusting earnings for tax purposes under the prevailing rules in the State in question, if the interest in question is subsequently converted into equity in the borrowing company, if the interest recipient has had a contractual or legal obligation to pass the interest to another person, and if most of the persons deemed by the State where the person paying the interest is resident to be the “beneficial owners” of the interest are resident in other Member States or other States with which Denmark has entered into a double taxation convention, so that under the Danish taxation legislation there would not have been a basis for levying tax at source had those persons been lenders and thereby received the interest directly?

(f) What significance does it have for the assessment of the issue whether the interest recipient must be deemed to be a “beneficial owner” for the purposes of the directive if the referring court,

following an assessment of the facts of the case, concludes that the recipient — without having been contractually or legally bound to pass the interest received to another person — "in substance" did not have the right to "use and enjoy" the interest as referred to in the 2014 commentaries on the [OECD] 1977 Model Tax Convention?

(2) (a) Does a Member State's reliance on Article 5(1) of the directive on the application of national provisions for the prevention of fraud or abuse, or Article 5(2) of the directive, presuppose that the Member State in question has adopted a specific domestic provision implementing Article 5 of the directive, or that national law contains general provisions or principles on fraud, abuse and tax evasion that can be interpreted in accordance with Article 5?

(b) If Question 2(a) is answered in the affirmative, can Paragraph 2(2)(d) of the Law on corporation tax, which provides that the limited tax liability on interest income does not include "interest which is tax-exempt … under Directive 2003/49 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States", then be deemed to be a specific domestic provision as referred to in Article 5 of the directive?

(3) Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with [the OECD] Model Tax Convention, under which taxation of interest is contingent on whether the interest recipient is deemed to be the beneficial owner of the interest, an agreement-based anti-abuse provision covered by Article 5 of the directive?

(4) Is it abuse etc. under Directive 2003/49 if, in the Member State where the interest payer is resident, tax deductions are allowed for interest, whilst interest in the Member State where the interest recipient is resident is not taxed?

(5) Is a Member State which does not wish to recognise that a company in another Member State is the beneficial owner of interest, and claims that the company in the other Member State is an "artificial conduit company", bound under Directive 2003/49 or Article 10 EC to state whom the Member State in that case deems to be the beneficial owner?

(6) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems that parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC, preclude legislation under which the latter Member State requires the company liable for withholding the tax at source (subsidiary) to pay default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims (including, inter alia, interest income) lodged against a company resident in the same Member State?

(7) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems the parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC (in the alternative Article 56 EC), viewed separately or as a whole, preclude legislation under which:

– the latter Member State requires the person paying the interest to withhold tax at source on the interest and makes that person liable to the authorities for the non-withheld tax at source, where there is no such duty to withhold tax at source when the interest recipient is resident in the latter Member State?

– a parent company in the latter Member State would not have been required to make advance payments of corporation tax in the first two fiscal years, but would only have begun to pay corporation tax at a much later time than the due date for tax at source?

The Court of Justice is requested to take the answer to Question 6 into account in its answer to Question 7.'

(2) Case C-118/16, X Denmark

46 It is apparent from the order for reference that the X Group is a worldwide group of businesses, of which the applicant in the main proceedings forms part. That group was purchased by private equity funds in 2005, the year in which the applicant in the main proceedings had been founded.

47 Those funds are direct shareholders of the group's ultimate parent, namely X SCA, SICAR, established in Luxembourg, which is operated as a *société en commandite par actions* (SCA) (limited partnership with share capital) and has the status of *société d'investissement en capital à risque* (SICAR) (risk capital investment company).

48 The Danish tax authority took the view that X SCA, SICAR was a transparent entity under Danish law, that is to say, that it was not a separate taxpayer for the purposes of Danish law.

49 According to the order for reference, the portfolio of X SCA, SICAR consisted of a 100% holding in the capital of X Sweden Holding AB established in Sweden and a loan granted to that company. Apart from that holding and loan, X SCA, SICAR did not engage in any activity.

50 The sole activity of X Sweden Holding is being the holding company of X Sweden, established in Sweden, which is the parent company of X Denmark, the applicant in the main proceedings. On 27 December 2006 X Sweden Holding took out from its own parent company, X SCA, SICAR, the loan referred to in the preceding paragraph, in the sum of EUR 498 500 000. When calculating its taxable income, X Sweden Holding deducted the interest paid to X SCA, SICAR.

51 X Sweden is 97.5% owned by X Sweden Holding and 2.5% owned by the X Group's management. During the period at issue in the main proceedings, X Sweden had the same board as X Sweden Holding and did not own shares in companies other than X Denmark.

52 The referring court states that at the beginning of 2007 X Sweden took on the activities of another company — X AB, established in Sweden — which consisted in product registration with the authorities and various administrative tasks relating to clinical trials. X Sweden then had around 10 employees and leased a part of the offices at X AB's headquarters, where the staff covered by the transfer continued to work.

53 According to the order for reference, it is apparent from the annual reports in respect of the years 2007 to 2009 that X Sweden had two income items, namely 'Interest income and similar profit items' and 'Other income'. X Sweden did not receive interest income other than interest received from X Denmark pursuant to a loan for EUR 501 million taken out, like the loan referred to in paragraph 50 above, on 27 December 2006. In 2007, 2008 and 2009, the interest constituted 98.1%, 97.8% and 98% respectively of X Sweden's overall income, other income amounting to 1.9%, 2.2% and 2%. The interest recorded in respect of the loan to X Denmark was taken into account when calculating X Sweden's taxable income for those years. In those years, X Sweden — in accordance with the specific rules applicable in Sweden in respect of adjusting earnings for tax purposes within a group, as laid down in Chapter 35 of the Law on income tax — made transfers to its parent company, X Sweden Holding, amounting to EUR 60 468 000, EUR 75 621 000 and EUR 60 353 294 respectively. That intragroup transfer gave X Sweden a right of deduction, whereas the sums transferred were taxable in the hands of X Sweden Holding.

54 X Denmark, when calculating its taxable income, deducted the interest paid to X Sweden pursuant to the EUR 501 million loan taken out with that company on 27 December 2006. As it took the view that X Sweden was the beneficial owner of the interest, it did not withhold tax at source in respect of the interest.

55 In its decision of 13 December 2010, SKAT took the view that X Sweden, X Sweden Holding and X SCA, SICAR did not have the status of beneficial owners of the interest, within the meaning of Directive 2003/49 and of the Luxembourg-Denmark Tax Convention and the Nordic Tax Convention, and that the beneficial owners of the interest were the owners of X SCA, SICAR. According to the Ministry of Taxation, X SCA, SICAR is incorporated as a form of company that is not included in the list, referred to in Article 3(a)(i) of Directive 2003/49, of companies falling within the scope of that directive, and moreover does not satisfy the condition laid down in Article 3(a)(iii) that the company must not be exempt from tax. It is exempt from tax on income in the form of interest, profits and dividends. In any event, X SCA, SICAR cannot be the beneficial owner of the interest since

it is transparent under Danish law. In that context, the Ministry of Taxation took the view that X Denmark had not produced documentation showing that a majority of the investors in the private equity funds that own X SCA, SICAR are resident for tax purposes in other countries of the European Union or in countries with which the Kingdom of Denmark has concluded a double taxation convention. SKAT accordingly considered that X Denmark should have withheld tax at source on the interest paid to X Sweden.

56 SKAT's decision of 13 December 2010 was contested by X Denmark before the Danish courts.

57 In that context, the Østre Landsret (High Court of Eastern Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Is Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted as meaning that a company resident in a Member State that is covered by Article 3 of the directive and, in circumstances such as those of the present case, receives interest from a subsidiary in another Member State is the "beneficial owner" of that interest for the purposes of the directive?

(b) Is the concept "beneficial owner" in Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted in accordance with the corresponding concept in Article 11 of the OECD 1977 Model Tax Convention?

(c) If Question 1(b) is answered in the affirmative, should the concept then be interpreted solely in the light of the commentary on Article 11 of the [OECD] 1977 Model Tax Convention (paragraph 8), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding "conduit companies" (paragraph 8.1, now paragraph 10.1), and the additions made in 2014 regarding "contractual or legal obligations" (paragraph 10.2)?

(d) If the 2003 commentaries can be incorporated into the interpretation, is it then a condition for deeming a company not to be a "beneficial owner" for the purposes of Directive 2003/49 that there actually has been a channelling of funds to those persons who are deemed by the State in which the interest payer is resident to be "the beneficial owners" of the interest in question, and — if so — is it then a further condition that the actual passing take place at a point close in time to the payment of the interest and/or take place as a payment of interest?

(e) Of what significance is it in that connection if equity capital is used for the loan, if the interest in question is entered on the principal ("rolled up"), if the interest recipient has subsequently made an intragroup transfer to its parent company resident in the same State with a view to adjusting earnings for tax purposes under the prevailing rules in the State in question, if the interest in question is subsequently converted into equity in the borrowing company, if the interest recipient has had a contractual or legal obligation to pass the interest to another person, and if most of the persons deemed by the State where the person paying the interest is resident to be the "beneficial owners" of the interest are resident in other Member States or other States with which Denmark has entered into a double taxation convention, so that under the Danish taxation legislation there would not have been a basis for levying tax at source had those persons been lenders and thereby received the interest directly?

(f) What significance does it have for the assessment of the issue whether the interest recipient must be deemed to be a "beneficial owner" for the purposes of the directive if the referring court, following an assessment of the facts of the case, concludes that the recipient — without having been contractually or legally bound to pass the interest received to another person — "in substance" did not have the right to "use and enjoy" the interest as referred to in the 2014 commentaries on the [OECD] 1977 Model Tax Convention?

(2) (a) Does a Member State's reliance on Article 5(1) of the directive on the application of national provisions for the prevention of fraud or abuse, or Article 5(2) of the directive, presuppose that the Member State in question has adopted a specific domestic provision implementing Article 5 of the directive, or that national law contains general provisions or principles on fraud, abuse and tax evasion that can be interpreted in accordance with Article 5?

(b) If Question 2(a) is answered in the affirmative, can Paragraph 2(2)(d) of the Law on corporation tax, which provides that the limited tax liability on interest income does not include "interest which is tax-exempt … under Directive 2003/49 on a common system of taxation applicable to interest

and royalty payments made between associated companies of different Member States", then be deemed to be a specific domestic provision as referred to in Article 5 of the directive?

(3) Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with [the OECD] Model Tax Convention, under which taxation of interest is contingent on whether the interest recipient is deemed to be the beneficial owner of the interest, an agreement-based anti-abuse provision covered by Article 5 of the directive?

(4) Is it abuse etc. under Directive 2003/49 if, in the Member State where the interest payer is resident, tax deductions are allowed for interest, whilst interest in the Member State where the interest recipient is resident is not taxed?

(5) (a) Is a company resident in Luxembourg, established and registered under Luxembourg company law as a "société en commandite par actions" (SCA) and also classified as a "société d'investissement en capital à risqué" (SICAR) under the Luxembourg law of 15 June 2004 relating to the investment company in risk capital (SICAR), covered by Directive 2003/49?

(b) If Question 5(a) is answered in the affirmative, can a Luxembourg "SCA/SICAR" then be "beneficial owner" of interest under Directive 2003/49, even though the Member State in which the interest-paying company is resident deems the company in question to be a tax-transparent entity under its domestic law?

(c) If Question 1(a) is answered in the negative, so that the company receiving the interest is deemed not to be the "beneficial owner" of the interest in question: can the SCA/SICAR then, in circumstances such as those of the present case, be deemed to be the "beneficial owner" of the interest at issue herein for the purposes of the directive?

(6) Is a Member State which does not wish to recognise that a company in another Member State is the beneficial owner of interest, and claims that the company in the other Member State is an "artificial conduit company", bound under Directive 2003/49 or Article 10 EC to state whom the Member State in that case deems to be the beneficial owner?

(7) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems that parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC, then preclude legislation under which the latter Member State requires the company liable for withholding the tax at source (subsidiary) to pay default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims (including, inter alia, interest income) lodged against a company resident in the same Member State?

(8) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems the parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC (in the alternative Article 56 EC), viewed separately or as a whole, preclude legislation under which:

– the latter Member State requires the person paying the interest to withhold tax at source on the interest and makes that person liable to the authorities for the non-withheld tax at source, where there is no such duty to withhold tax at source when the interest recipient is resident in the latter Member State?

– a parent company in the latter Member State would not have been required to make advance payments of corporation tax in the first two fiscal years, but would only have begun to pay corporation tax at a much later time than the due date for tax at source?

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

(3) Case C-119/16, C Danmark I

58 As is apparent from the order for reference, C USA, established in the United States, owns C Cayman Islands, established in the Cayman Islands, which until the end of 2004 was the owner of C Danmark II, established in Denmark, the ultimate parent company of a group of companies. At the end of 2004 the group carried out a restructuring in which two Swedish companies, C Sverige I and C Sverige II, and a Danish company, C Danmark I, were interposed between C Cayman Islands and C Danmark II. From 1 January 2005, C Danmark I became the ultimate parent company of the Danish part of the American group, whose ultimate parent company is C USA.

59 The reasons for the restructuring of the European part of the group were described by C Danmark I in a note entitled '2004 European Restructuring Process', which states in particular:

'During 2004, … Group reviewed its organisational structure and decided to introduce additional holding companies and leverage into its European structure. The additional holding companies permit the company to more freely access the capital within Europe and to more efficiently move capital within the … Group family of companies. Furthermore, the financial statements for the new holding companies reflect fair market valuations for the European Group which may assist the company prospectively in obtaining third party financing. Finally, and perhaps most importantly, the introduction of leverage into the structure helps minimise business risk by reducing the amount of equity at stake within business operations.

Given the favourable holding company regime currently operating in Sweden, … Group decided to establish its new European holding companies in Sweden in order to benefit from this regime.'

60 The Ministry of Taxation took the view that the interposing of two Swedish companies above the Danish part of the group had been driven by tax considerations. On 30 October 2009, SKAT adopted a decision according to which C Sverige II and C Sverige I could not be regarded as being the beneficial owners of the interest paid by C Danmark I, within the meaning of Directive 2003/49 and the Nordic Tax Convention.

61 By order of 25 May 2011, the Landskatteretten (National Tax Appeals Commission, Denmark) confirmed SKAT's decision, holding that the Swedish companies were mere conduits. That order stated inter alia as follows:

'Until the restructuring carried out at the end of 2004/beginning of 2005, it was the overarching company in the Danish part of the group, [C Danmark II], that was directly owned by [C Cayman Islands].

With the restructuring, three newly created companies were interposed between [C Cayman Islands] and [C Danmark II], so that [C Cayman Islands] then owned a Swedish holding company, which owned another Swedish holding company, which owned [C Danmark I], which became the overarching parent company in the Danish part of the group. The group structure was achieved inter alia through a number of intragroup sales of companies involving two loans of EUR 75 million and EUR 825 million respectively between [C Cayman Islands] and [C Sverige I] and two loans of EUR 75 million and EUR 825 million respectively between [C Sverige II] and [C Danmark I].

The debt instrument of EUR 75 million between [C Cayman Islands] and [C Sverige I] was concluded on terms completely identical to those stated in the debt instrument of EUR 75 million between [C Sverige II] and [C Danmark I]. The same is true of the debt instruments of EUR 825 million … Through the implemented restructuring and the resulting debt relationship reflecting transactions between parties with common interests, [C Sverige II], making use of the Swedish rules on intragroup transfers, transferred the interest income received from [C Danmark I] to [C Sverige I], whilst [C Sverige I] transferred the amounts onwards to [C Cayman Islands] as interest expenses.

Since under the then-prevailing Swedish tax rules, there was no taxable net income to be taxed in Sweden, the interest payments owed by [C Danmark I] were therefore transferred in full to [C Cayman Islands] through the Swedish companies.

None of the companies set up in the restructuring carried out activities other than holding-company activities and for that reason their foreseeable revenue was solely revenue inherently linked to the holding-company activity. When the debt relationships linked to the restructuring were established, it was therefore a necessary

presupposition, if the debtor companies were to be able to meet their obligations relating thereto, that they received funds from other companies in the group. That had to be a precondition from the beginning.

[C Sverige II] is therefore regarded as a conduit company with so few powers over the sums received that it cannot be regarded as the beneficial owner of the interest received from [C Danmark I], either under the [Nordic Tax Convention] or under Directive 2003/49. It is irrelevant in this regard that the transfers between the Swedish companies were in the form of intragroup transfers and not interest payments.'

62 The applicant in the main proceedings, C Danmark I, takes the view that C Sverige II and C Sverige I were established in Sweden in connection with the restructuring of the group in Europe, which was driven by general and commercial considerations. According to the applicant in the main proceedings, C Sverige II is the 'beneficial owner', within the meaning of Directive 2003/49, of the interest which it paid to it.

63 In that context, the Østre Landsret (High Court of Eastern Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Is Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted as meaning that a company resident in a Member State that is covered by Article 3 of the directive and, in circumstances such as those of the present case, receives interest from a subsidiary in another Member State is the "beneficial owner" of that interest for the purposes of the directive?

(b) Is the concept "beneficial owner" in Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted in accordance with the corresponding concept in Article 11 of the OECD 1977 Model Tax Convention?

(c) If Question 1(b) is answered in the affirmative, should the concept then be interpreted solely in the light of the commentary on Article 11 of the [OECD] 1977 Model Tax Convention (paragraph 8), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding "conduit companies" (paragraph 8.1, now paragraph 10.1), and the additions made in 2014 regarding "contractual or legal obligations" (paragraph 10.2)?

(d) If the 2003 commentaries can be incorporated into the interpretation, is it then a condition for deeming a company not to be a "beneficial owner" for the purposes of Directive 2003/49 that there actually has been a channelling of funds to those persons who are deemed by the State in which the interest payer is resident to be "the beneficial owners" of the interest in question, and — if so — is it then a further condition that the actual passing take place at a point close in time to the payment of the interest and/or take place as a payment of interest?

(e) Of what significance is it in that connection if equity capital is used for the loan, if the interest in question is entered on the principal ("rolled up"), if the interest recipient has subsequently made an intragroup transfer to its parent company resident in the same State with a view to adjusting earnings for tax purposes under the prevailing rules in the State in question, if the interest in question is subsequently converted into equity in the borrowing company, if the interest recipient has had a contractual or legal obligation to pass the interest to another person, and if most of the persons deemed by the State where the person paying the interest is resident to be the "beneficial owners" of the interest are resident in other Member States or other States with which Denmark has entered into a double taxation convention, so that under the Danish taxation legislation there would not have been a basis for levying tax at source had those persons been lenders and thereby received the interest directly?

(f) What significance does it have for the assessment of the issue whether the interest recipient must be deemed to be a "beneficial owner" for the purposes of the directive if the referring court, following an assessment of the facts of the case, concludes that the recipient — without having been contractually or legally bound to pass the interest received to another person — "in substance" did not have the right to "use and enjoy" the interest as referred to in the 2014 commentaries on the [OECD] 1977 Model Tax Convention?

(2) (a) Does a Member State's reliance on Article 5(1) of the directive on the application of national provisions for the prevention of fraud or abuse, or Article 5(2) of the directive, presuppose that the Member State in question has

adopted a specific domestic provision implementing Article 5 of the directive, or that national law contains general provisions or principles on fraud, abuse and tax evasion that can be interpreted in accordance with Article 5?

(b) If Question 2(a) is answered in the affirmative, can Paragraph 2(2)(d) of the Law on corporation tax, which provides that the limited tax liability on interest income does not include "interest which is tax-exempt … under Directive 2003/49 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States", then be deemed to be a specific domestic provision as referred to in Article 5 of the directive?

(3) Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with [the OECD] Model Tax Convention, under which taxation of interest is contingent on whether the interest recipient is deemed to be the beneficial owner of the interest, an agreement-based anti-abuse provision covered by Article 5 of the directive?

(4) Is a Member State which does not wish to recognise that a company in another Member State is the beneficial owner of interest, and claims that the company in the other Member State is an "artificial conduit company", bound under Directive 2003/49 or Article 10 EC to state whom the Member State in that case deems to be the beneficial owner?

(5) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems that parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC, preclude legislation under which the latter Member State requires the company liable for withholding the tax at source (subsidiary) to pay default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims (including, inter alia, interest income) lodged against a company resident in the same Member State?

(6) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems the parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC (in the alternative Article 56 EC), viewed separately or as a whole, preclude legislation under which:

– the latter Member State requires the person paying the interest to withhold tax at source on the interest and makes that person liable to the authorities for the non-withheld tax at source, where there is no such duty to withhold tax at source when the interest recipient is resident in the latter Member State?

– a parent company in the latter Member State would not have been required to make advance payments of corporation tax in the first two fiscal years, but would only have begun to pay corporation tax at a much later time than the due date for tax at source?

The Court of Justice is requested to take the answer to Question 5 into account in its answer to Question 6.'

(4) Case C-299/16, Z Denmark

64 It is apparent from the order for reference that Z Denmark is a Danish industrial undertaking.

65 In August 2005, A Fund, a private equity fund, acquired roughly 66% of that company's Class A shares (representing approximately 64% of the voting rights) from their previous owners, that is to say, private equity fund B and Danish financial institution C, whilst D retained the remaining Class A shares. In addition, a number of Z Denmark's senior managers held Class B shares.

66 A Fund consists of five funds, four of which were set up in the form of limited partnerships in Jersey, that is to say, in a tax-transparent form according to Danish tax law. The final fund, A Fund (No. 5) Limited, Jersey, takes the form of a non-tax-transparent company and owns roughly 0.5% of A Fund. According to the information

provided by the referring court, the investors in the first four funds are resident for tax purposes in a large number of countries, inside or outside the European Union.

67 In the context of the acquisition referred to in paragraph 65 above, on 27 September 2005 A Fund granted Z Denmark a loan in the sum of DKK 146 010 341 (roughly EUR 19.6 million). Interest at 9% per annum was payable on the loan.

68 On 28 April 2006, A Fund transferred its entire debt claim against Z Denmark for a total of DKK 146 010 341 (roughly EUR 19.6 million) to Z Luxembourg, a company set up by it in Luxembourg on the same day.

69 The transfer transaction was supplemented by the grant by A Fund to Z Luxembourg of a loan which likewise amounted to DKK 146 010 341 (roughly EUR 19.6 million). The interest payable on the loan was 9.875% and it had to be recorded in the accounts at the year end.

70 On 21 June 2006 A Fund transferred its shares in Z Denmark to Z Luxembourg.

71 According to Z Luxembourg's accounts for 2007 (the accounts for 2006 disclose comparable items), that company had no activity other than that of owning shares in Z Denmark. Those accounts also reveal that Z Luxembourg's loss of EUR 23 588 in 2006 became a profit of EUR 15 587 in 2007. It is also apparent from those accounts that the interest income in those years amounted to EUR 1 497 208 and EUR 1 192 881 respectively, while the interest expenses were EUR 1 473 675 and EUR 1 195 124 respectively. The item 'Tax on profit' showed an amount of EUR 3 733 for 2006 and nil for 2007.

72 On 1 November 2007 Z Denmark repaid the loan granted by A Fund, the accumulated interest amounting on that date to DKK 21 241 619 (roughly EUR 2.85 million). On the same day Z Luxembourg paid A Fund its debt, consisting of the capital and interest.

73 In its decision of 10 December 2010, SKAT did not accord Z Luxembourg the status of beneficial owner of the interest paid to it by Z Denmark, within the meaning of Directive 2003/49 and the Luxembourg-Denmark Tax Convention.

74 By decision of 31 January 2012, the National Tax Appeals Commission confirmed SKAT's decision. The decision contained the following passages:

'[Z Luxembourg] is not regarded here as "beneficial owner" either under the [Luxembourg-Denmark Tax Convention] or under [Directive 2003/49].

Regard must be had to the actual structure set up between the parties within the group, under which [Z Luxembourg] transfers the interest income received from [Z Denmark] to the private equity fund, from where it is transferred on to the fund's investors.

With [Z Luxembourg's] acquisition of the private equity fund's debt claim against [Z Denmark], and the company's simultaneous acquisition of the shares in [Z Denmark] through a loan from the private equity fund of almost the same amount and on almost the same terms as the debt claim against the company, [Z Luxembourg's] tax on interest payments from the Danish company would be offset by the company's interest payments to the private equity fund, which is why there would not be taxable net income on the overall transactions falling to be taxed in the hands of the company. The Luxembourg company is therefore regarded as a conduit company without any real powers or opportunities to take decisions on disposals of the transferred amounts received.

[Z Luxembourg] is accordingly refused the benefit of the [Luxembourg-Denmark Tax Convention] and/or [Directive 2003/49] with regard to waiver of Danish tax at source.

It has been explained that the interest transferred from [Z Luxembourg] to the private equity fund, which should be regarded as transparent, was transferred onwards to the fund's investors. The question arises therefore whether tax on the interest should possibly not be levied by virtue of a double taxation convention covering the investors. In the light of the way in which the case has been presented, a decision on this issue is not warranted, for the simple reason that the lists produced do not constitute documentation sufficient to establish that double taxation occurred.'

75 That decision of the National Tax Appeals Commission was contested by Z Denmark before the Danish courts.

76 Before the referring court, Z Denmark submits, in particular, that the concept of 'beneficial owner' within the meaning of Directive 2003/49 is a concept of EU law that must be given its own interpretation and not an interpretation in the light of the OECD Model Tax Convention. In any event, it can be interpreted only in the light of the OECD 1977 Model Tax Convention and the commentaries relating thereto. A dynamic interpretation would be contrary to the principle of legal certainty. In addition, Z Denmark disputes that in this instance there has been abuse within the meaning of Directive 2003/49.

77 Finally, Z Denmark criticises the difference in treatment in this instance, contrary to Article 43 EC, in particular Z Luxembourg's inability to deduct the interest paid on a loan entered into with its shareholder in order to be able to grant the loan to Z Denmark. If Z Luxembourg had been a Danish company, it would have been able to deduct that expenditure and would not have had taxable interest income.

78 In respect of taxation at source, Z Denmark submits that there are a number of fundamental differences compared with taxation of resident companies. First, tax at source is payable earlier than corporation tax. Second, default interest payable on tax at source is much higher than in the case of corporation tax. Third, it is for the borrower to withhold tax at source. Fourth, it is also the borrower who is bound to pay the tax at source.

79 In those circumstances, the Vestre Landsret (High Court of Western Denmark, Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Is Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted as meaning that a company resident in a Member State that is covered by Article 3 of the directive and, in circumstances such as those of the present case, receives interest from a subsidiary in another Member State is the "beneficial owner" of that interest for the purposes of the directive?

(b) Is the concept "beneficial owner" in Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted in accordance with the corresponding concept in Article 11 of the OECD 1977 Model Tax Convention?

(c) If Question 1(b) is answered in the affirmative, should the concept then be interpreted solely in the light of the commentary on Article 11 of the [OECD] 1977 Model Tax Convention (paragraph 8), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding "conduit companies" (paragraph 8.1, now paragraph 10.1), and the additions made in 2014 regarding "contractual or legal obligations" (paragraph 10.2)?

(d) If the 2003 commentaries can be incorporated into the interpretation, in that case of what significance is it in the assessment of whether a company can be deemed not to be a "beneficial owner" for the purposes of Directive 2003/49 if the interest in question is entered on the principal ("rolled up"), if the interest recipient has had a contractual or legal obligation to pass the interest to another person and if most of the persons to whom the interest is credited or passed on and who are deemed by the State where the person paying the interest is resident to be the "beneficial owners" of the interest are resident in other Member States or other States with which Denmark has entered into a double taxation convention, so that under domestic law there would not have been a basis for levying tax at source had those persons been lenders and thereby received the interest directly?

(e) What significance does it have for the assessment of the issue whether the interest recipient must be deemed to be a "beneficial owner" for the purposes of the directive if the referring court, following an assessment of the facts of the case, concludes that the recipient — without having been contractually or legally bound to pass the interest received to another person — "in substance" did not have the right to "use and enjoy" the interest as referred to in the 2014 commentaries on the [OECD] 1977 Model Tax Convention?

(2) (a) Does a Member State's reliance on Article 5(1) of the directive on the application of national provisions for the prevention of fraud or abuse, or Article 5(2) of the directive, presuppose that the Member State in question has adopted a specific domestic provision implementing Article 5 of the directive, or that national law contains general provisions or principles on fraud, abuse and tax evasion that can be interpreted in accordance with Article 5?

(b) If Question 2(a) is answered in the affirmative, can Paragraph 2(2)(d) of the Law on corporation tax, which provides that the limited tax liability on interest income does not include "interest which is tax-exempt … under Directive 2003/49 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States", be deemed to be a specific domestic provision as referred to in Article 5 of the directive?

(3) Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with [the OECD] Model Tax Convention, under which taxation of interest is contingent on whether the interest recipient is deemed to be the beneficial owner of the interest, an agreement-based anti-abuse provision covered by Article 5 of the directive?

(4) Is a Member State which does not wish to recognise that a company in another Member State is the beneficial owner of interest, and claims that the company in the other Member State is an "artificial conduit company", bound under Directive 2003/49 or Article 10 EC to state whom the Member State in that case deems to be the beneficial owner?

(5) In a case where an interest payer is resident in one Member State and the interest recipient is resident in another Member State and where the interest recipient is deemed by the first Member State not to be the "beneficial owner" of the interest in question under Directive 2003/49 and is therefore deemed to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC, preclude legislation under which the first Member State, in the taxation of the non-resident interest recipient, does not take account of expenses in the form of interest expenses that the interest recipient has had in circumstances such as those of the present case, whilst interest expenses are generally deductible under that Member State's legislation and can therefore be deducted from taxable income by a resident interest recipient?

(6) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems the parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC, preclude legislation under which the latter Member State requires the company liable for withholding the tax at source (subsidiary) to pay default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims (including, inter alia, interest income) lodged against a company resident in the same Member State?

(7) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems that parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC (in the alternative Article 56 EC), viewed separately or as a whole, preclude legislation under which:

– the latter Member State requires the person paying the interest to withhold tax at source on the interest and makes that person liable to the authorities for the non-withheld tax at source, where there is no such duty to withhold tax at source when the interest recipient is resident in the latter Member State?

– a parent company in the latter Member State would not have been required to make advance payments of corporation tax in the first two fiscal years, but would only have begun to pay corporation tax at a much later time than the due date for tax at source?

The Court is requested to take the answer to Question 6 into account in its answer to this question.'

Procedure before the Court

80 On account of the connection between the four main actions, which all relate to the interpretation of Directive 2003/49 and of the fundamental freedoms enshrined in the Treaties, the cases should be joined for the purposes of the judgment.

81 By letter of 2 March 2017, the Danish Government requested, in accordance with the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, that these cases be heard by the Grand Chamber of the Court. Furthermore, in the light of the similarities between these cases and Cases C-116/16 and C-117/16, which are the subject of today's judgment in *T Danmark and Y Denmark Aps* (C-116/16 and C-117/16), the Danish Government also suggested that the Court, pursuant to Article 77 of its Rules of Procedure, organise a joint hearing of all the cases. The Court granted the Danish Government's requests.

Consideration of the questions referred

82 The questions referred by the national courts concern three topics. The first topic relates to the concept of 'beneficial owner' within the meaning of Directive 2003/49 and to the existence of a legal basis enabling a Member State to refuse, on account of the commission of an abuse of rights, to grant the exemption from any taxes that is provided for in Article 1(1) of the directive to a company that has paid interest to an entity established in another Member State. In so far as such a legal basis exists, the second topic addressed by the questions concerns the constituent elements of any abuse of rights and the conditions for proving it. Finally, the third topic of the questions, likewise in the event that it is possible for a Member State to refuse such a company the benefits of Directive 2003/49, concerns the interpretation of the provisions of the FEU Treaty relating to freedom of establishment and the free movement of capital, in order to enable the referring courts to establish whether the Danish legislation infringes those freedoms.

Question 1(a) to (c), Question 2(a) and (b) and Question 3 in Cases C-115/16, C-118/16, C-119/16 and C-299/16

83 First, by Question 1(a) to (c) in Cases C-115/16, C-118/16, C-119/16 and C-299/16, the referring courts ask how the concept of 'beneficial owner of the interest', for the purposes of Article 1(1) and (4) of Directive 2003/49, is to be interpreted. Second, by Question 2(a) and (b) and Question 3 in Cases C-115/16, C-118/16, C-119/16 and C-299/16, the referring courts ask, in essence, whether the combating of fraud or abuse, as permitted by Article 5 of Directive 2003/49, requires there to be a domestic or agreement-based anti-abuse provision as referred to in Article 5(1). They ask in particular whether a domestic or agreement-based provision containing the concept of 'beneficial owner' may be regarded as constituting a legal basis enabling fraud or abuse of rights to be combated.

The concept of 'beneficial owner of the interest'

84 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.

85 It has been held, in this regard, that it is apparent from recitals 2 to 4 of Directive 2003/49 that the aim of the directive is that double taxation should be eliminated with respect to interest and royalty payments between associated companies of different Member States and that such payments should be subject to tax once in a single Member State, the abolition of all taxation of those payments in the Member State where they arise being the most appropriate means of ensuring equality of tax treatment as between national and cross-border transactions (judgment of 21 July 2011, *Scheuten Solar Technology*, C-397/09, EU:C:2011:499, paragraph 24).

86 The scope of Directive 2003/49, as defined in Article 1(1) of the directive, thus concerns the exemption of interest and royalty payments in their source Member State, provided that the beneficial owner is a company established in another Member State or a permanent establishment situated in another Member State belonging to a company of a Member State (judgment of 21 July 2011, *Scheuten Solar Technology*, C-397/09, EU:C:2011:499, paragraph 25).

87 The Court has, furthermore, stated that, since Article 2(a) of Directive 2003/49 defines interest as 'income from debt-claims of every kind', only the actual beneficial owner can receive interest which constitutes income from such claims (see, to that effect, judgment of 21 July 2011, *Scheuten Solar Technology*, C-397/09, EU:C:2011:499, paragraph 27).

88 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 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.

89 As is apparent from paragraph 10 above, whilst some language versions of Article 1(1) of Directive 2003/49, such as the Bulgarian, French, Latvian and Romanian versions, use the term 'beneficiary'/'recipient', the other versions have recourse to expressions such as 'beneficial owner'/'actual beneficiary' (the Spanish, Czech, Estonian, English, Italian, Lithuanian, Maltese, Portuguese and Finnish versions), 'owner'/'person entitled to use' (the German, Danish, Greek, Croat, Hungarian, Polish, Slovak, Slovenian and Swedish versions) or 'person entitled in the end' (the Dutch version). 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 accordingly has the power freely to determine the use to which it is put. In accordance with what has been recalled in paragraph 86 above, only an entity established in the European Union can be a beneficial owner of interest, capable of being entitled to the exemption provided for in Article 1(1) of Directive 2003/49.

90 Furthermore, as is apparent from the Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, which was submitted on 6 March 1998 (document COM(1998) 67 final) and formed the basis for Directive 2003/49, the directive draws upon Article 11 of the OECD 1996 Model Tax Convention and pursues the same objective, namely avoiding international double taxation. The concept of 'beneficial owner', which appears in the bilateral conventions based on that model, and the successive amendments of that model and of the commentaries relating thereto are, therefore, *relevant* when interpreting Directive 2003/49.

91 The applicants in the main proceedings submit that, if the concept of 'beneficial owner of the interest or royalties', within the meaning of Article 1(1) of Directive 2003/49, were interpreted in the light of the OECD Model Tax Convention and of the commentaries relating thereto, that interpretation would not be acceptable as it would lack any democratic legitimacy whatsoever. That argument cannot, however, be upheld as such an interpretation, even if it draws on the OECD's documents, has its basis, as is clear from paragraphs 85 to 90 above, in the directive itself and in its legislative history reflecting the democratic process of the European Union.

92 It is clear from the development — as set out in paragraphs 4 to 6 above — of the OECD Model Tax Convention and the commentaries relating thereto that the concept of 'beneficial owner' excludes conduit companies and must be understood not in a narrow technical sense but as having a meaning that enables double taxation to be avoided and tax evasion and avoidance to be prevented.

93 The bilateral conventions, such as the Nordic Tax Convention, concluded by Member States with other Member States on the basis of the OECD Model Tax Convention also attest to that development. Those conventions, cited in paragraphs 16 to 18 above, all contain the term 'beneficial owner' as referred to in that model.

94 It should also be stated that the mere fact that the company which receives the interest in a Member State is not its 'beneficial owner' does not necessarily mean that the exemption provided for in Article 1(1) of Directive 2003/49 is not applicable. It is conceivable that such interest will be exempt on that basis in the source State when the company which receives it transfers the amount thereof to a beneficial owner who is established in the European Union and furthermore satisfies all the conditions laid down by Directive 2003/49 for entitlement to such an exemption.

The need for a specific domestic or agreement-based provision implementing Article 5 of Directive 2003/49

95 The referring courts seek to ascertain whether, in order to combat an abuse of rights in the context of applying Directive 2003/49, a Member State must have adopted a specific domestic provision transposing that directive or whether it may refer to domestic or agreement-based anti-abuse principles or provisions.

96 It is settled case-law that there is, in EU law, a general legal principle that EU law cannot be relied on for abusive or fraudulent ends (judgments of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 24 and the case-law cited; of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 68; of

12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 35; of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 27; and of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99).

97 That general principle of law must be complied with by individuals. Indeed, the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law (see, to that effect, judgments of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraph 38; of 22 November 2017, *Cussens and Others,* C-251/16, EU:C:2017:881, paragraph 27; and of 11 July 2018, *Commission v Belgium*, C-356/15, EU:C:2018:555, paragraph 99).

98 It thus 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 formally.

99 That is so, for example, where the completion of customs formalities does not fall within the context of normal commercial transactions but is purely formal and is designed solely to obtain wrongfully the grant of compensatory amounts (see, to that effect, judgments of 27 October 1981, *Schumacher and Others*, 250/80, EU:C:1981:246, paragraph 16, and of 3 March 1993, *General Milk Products*, C-8/92, EU:C:1993:82, paragraph 21) or export refunds (see, to that effect, judgment of 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 59).

100 Furthermore, the principle of prohibition of abuse of rights is applicable in fields as varied as the free movement of goods (judgment of 10 January 1985, *Association des Centres distributeurs Leclerc and Thouars Distribution*, 229/83, EU:C:1985:1, paragraph 27), freedom to provide services (judgment of 3 February 1993, *Veronica Omroep Organisatie*, C-148/91, EU:C:1993:45, paragraph 13), public service contracts (judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 62), freedom of establishment (judgment of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 24), company law (judgment of 23 March 2000, *Diamantis*, C-373/97, EU:C:2000:150, paragraph 33), social security (judgments of 2 May 1996, *Paletta*, C-206/94, EU:C:1996:182, paragraph 24; of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 48; and of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99), transport (judgment of 6 April 2006, *Agip Petroli*, C-456/04, EU:C:2006:241, paragraphs 19 to 25), social policy (judgment of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraphs 37 to 41), restrictive measures (judgment of 21 December 2011, *Afrasiabi and Others*, C-72/11, EU:C:2011:874, paragraph 62) and value added tax (VAT) (judgment of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 74).

101 As regards that last field, the Court has observed on a number of occasions that, whilst preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), the principle that abusive practices are prohibited nonetheless constitutes a general principle of EU law which applies irrespective of whether the rights and advantages that are abused have their basis in the Treaties, in a regulation or in a directive (see, to that effect, judgment of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraphs 30 and 31).

102 It follows that the general principle that abusive practices are prohibited must be relied on against a person where that person invokes certain rules of EU law providing for an advantage in a manner which is not consistent with the objectives of those rules. The Court has thus held that that principle may be relied on against a taxable person in order to refuse him, inter alia, the right to exemption from VAT, even in the absence of provisions of national law providing for such refusal (see, to that effect, judgments of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 62, and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 33).

103 In the main proceedings, the rules that are claimed by SKAT to have been abused are the provisions of Directive 2003/49, which was adopted in order to foster the development of a single market having the characteristics of a domestic market and provides for an exemption, in the source Member State, of interest paid to an associated company established in another Member State. As is apparent from the proposal for a directive referred to in paragraph 90 above, certain definitions set out in Directive 2003/49 are based on the definitions in Article 11 of the OECD 1996 Model Tax Convention.

104 Whilst Article 5(1) of Directive 2003/49 provides that the directive is not to preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse, that provision cannot be interpreted as excluding the application of the general principle of EU law, noted in paragraphs 96 to 98 above, that abusive practices are prohibited. The transactions alleged by SKAT to constitute an abuse of rights fall within the scope of EU law (see, to that effect, judgment of 22 December 2010, *Weald Leasing*, C-103/09, EU:C:2010:804, paragraph 42) and could prove incompatible with the objective pursued by that directive.

105 Furthermore, whilst Article 5(2) of Directive 2003/49 provides that Member States may, in the event of evasion, avoidance or abuse, withdraw the benefits of the directive or refuse to apply it, that provision likewise cannot be interpreted as excluding the application of the principle of EU law that abusive practices are prohibited, since the application of that principle is not — as the provisions of the directive are — subject to a requirement of transposition (see, to that effect, judgment of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraphs 28 and 31).

106 As has been pointed out in paragraph 85 above, it is apparent from recitals 2 to 4 of Directive 2003/49 that the directive has the aim of eliminating double taxation of interest and royalty payments between associated companies of different Member States and between permanent establishments of such companies in order, first, to spare them burdensome administrative formalities and cash-flow problems and, second, to ensure equality of tax treatment as between national and cross-border transactions.

107 To permit the setting up of financial arrangements whose sole aim is to benefit from the tax advantages resulting from the application of Directive 2003/49 would not be consistent with such objectives and, on the contrary, would undermine economic cohesion and the effective functioning of the internal market by distorting the conditions of competition. As the Advocate General has, in essence, observed in point 63 of her Opinion in Case C-115/16, that would also be the case even if the transactions at issue do not exclusively pursue such an aim, as the Court has held that the principle that abusive practices are prohibited applies, in tax matters, where the accrual of a tax advantage constitutes the essential aim of the transactions at issue (see, to that effect, judgments of 21 February 2008, *Part Service*, C-425/06, EU:C:2008:108, paragraph 45, and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 53).

108 Furthermore, the right of taxpayers to take advantage of competition engaged in by the Member States on account of the lack of harmonisation of taxation of income cannot be raised against the application of the general principle that abusive practices are prohibited. In that regard, it should be noted that Directive 2003/49 has the objective of harmonisation in respect of direct taxation in order to enable economic operators to benefit from the internal market, by abolishing double taxation, and that, more specifically, recital 6 of the directive states that it is necessary not to preclude Member States from taking appropriate measures to combat fraud or abuse.

109 Whilst 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 (see, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 50; of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 84; and of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 60), the fact remains that such a taxpayer cannot enjoy a right or advantage arising from EU law where the transaction at issue is purely artificial economically and is designed to circumvent the application of the legislation of the Member State concerned (see, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 51; of 7 November 2013, *K*, C-322/11, EU:C:2013:716, paragraph 61; and of 25 October 2017, *Polbud — Wykonawstwo*, C-106/16, EU:C:2017:804, paragraphs 61 to 63).

110 It is apparent from these factors that it is incumbent upon the national authorities and courts to refuse to grant entitlement to rights provided for by Directive 2003/49 where they are invoked for fraudulent or abusive ends.

111 Thus, in the light of the general principle of EU law that abusive practices are prohibited and of the need to ensure observance of that principle when EU law is implemented, the absence of domestic or agreement-based anti-abuse provisions does not affect the national authorities' obligation to refuse to grant entitlement to rights provided for by Directive 2003/49 where they are invoked for fraudulent or abusive ends.

112 The applicants in the main proceedings rely on the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408) — which concerned entitlement to an exemption provided for by Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1) — in order to

contend that, on account of Article 5(1) of Directive 2003/49, entitlement to the advantages provided for by that directive can be refused by the Member State concerned only where the national legislation contains a distinct and specific legal basis in that regard.

113 However, that line of argument cannot be upheld.

114 It is true that the Court noted in paragraph 42 of the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408), that the principle of legal certainty precludes directives from being able by themselves to create obligations for individuals and therefore from being capable of being relied upon per se by the Member State as against individuals.

115 It also noted that such a finding is without prejudice to the requirement for all authorities of a Member State, in applying national law, to interpret it as far as possible in the light of the wording and purpose of directives in order to achieve the result pursued by those directives, and that those authorities are thus able to rely on a directive-compliant interpretation of national law against individuals (see, to that effect, judgment of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraph 45 and the case-law cited).

116 It was on the basis of those considerations that the Court invited the referring court to ascertain whether there was, in Danish law, a provision or general principle prohibiting abuse of rights or other provisions on tax evasion or tax avoidance which might be interpreted in accordance with the provision of Directive 90/434 under which, in essence, a Member State may refuse the right of deduction provided for by that directive where a transaction is essentially directed at such evasion or avoidance, and, if so, then to determine whether the conditions for the application of those national provisions were satisfied in the main proceedings (see, to that effect, judgment of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraphs 46 and 47).

117 Nevertheless, even if it were to transpire, in the main proceedings, that national law does not contain rules which may be interpreted in compliance with Article 5 of Directive 2003/49, this — notwithstanding what the Court held in the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408) — could not be taken to mean that the national authorities and courts would be prevented from refusing to grant the advantage derived from the right of exemption provided for in Article 1(1) of the directive in the event of fraud or abuse of rights (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 54).

118 A refusal given to a taxpayer in such circumstances is not covered by the situation referred to in paragraph 114 above since it reflects the general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraphs 55 and 56 and the case-law cited).

119 Accordingly, since, as has been noted in paragraph 96 above, abusive or fraudulent acts cannot found a right provided for by EU law, the refusal of an advantage under a directive, in this instance Directive 2003/49, 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 (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 57 and the case-law cited).

120 In such circumstances, the Member States must, therefore, refuse to grant the advantage resulting from Directive 2003/49, in accordance with the general principle that abusive practices are prohibited, under which EU law cannot cover abusive practices of economic operators (see, to that effect, judgment of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99 and the case-law cited).

121 Having regard to the finding made in paragraph 111 above, there is no need to answer Question 3 asked by the referring courts, relating in essence to whether a provision of a bilateral double taxation convention that refers to the concept of 'beneficial owner' can constitute a legal basis for combating fraudulent and abusive practices in the context of Directive 2003/49.

122 In the light of all those matters, the answer to Question 1(a) to (c) and Question 2(a) and (b) in Cases C-115/16, C-118/16, C-119/16 and C-299/16 is as follows:

– Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, must be interpreted as meaning that the exemption of interest payments from any taxes that is provided for by it is restricted solely to the beneficial owners of such interest, that is to say, the entities which actually benefit from that interest economically and accordingly have the power freely to determine the use to which it is put.

– The general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends must be interpreted as meaning that, where there is a fraudulent or abusive practice, the national authorities and courts are to refuse a taxpayer the exemption of interest payments from any taxes that is provided for in Article 1(1) of Directive 2003/49, even if there are no domestic or agreement-based provisions providing for such a refusal.

Question 1(d) to (f) in Cases C-115/16, C-118/16 and C-119/16, Question 1(d) and (e) in Case C-299/16, Question 4 in Cases C-115/16 and C-118/16, Question 5 in Case C-115/16, Question 6 in Case C-118/16 and Question 4 in Cases C-119/16 and C-299/16

123 By Question 1(d) to (f) in Cases C-115/16, C-118/16 and C-119/16, Question 1(d) and (e) in Case C-299/16 and Question 4 in Cases C-115/16 and C-118/16, the referring courts ask, in essence, what the constituent elements of an abuse of rights are and how those elements may be established. They are unsure in particular, in this context, whether there can be an abuse of rights where the beneficial owner of interest transferred by conduit companies is ultimately a company whose seat is in a third State with which the Member State concerned has concluded a double taxation convention. By Question 5 in Case C-115/16, Question 6 in Case C-118/16 and Question 4 in Cases C-119/16 and C-299/16, the referring courts ask, in essence, whether a Member State which refuses to accord a company of another Member State the status of beneficial owner of the interest is required to identify the company which it regards, as the case may be, as being the beneficial owner.

The constituent elements of an abuse of rights and the relevant evidence

124 As is clear from the Court's case-law, proof of an abusive practice requires, first, 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, second, 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 (judgments of 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraphs 52 and 53, and of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 58).

125 Examination of a set of facts is therefore needed to establish whether the constituent elements of an abusive practice are present, and in particular 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 (see, to that effect, judgments of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, paragraphs 47 to 49; of 13 March 2014, *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 33; and of 14 April 2016, *Cervati and Malvi*, C-131/14, EU:C:2016:255, paragraph 47).

126 It is not for the Court to assess the facts in the main proceedings. However, when giving preliminary rulings, the Court may, if appropriate, specify indicia in order to guide national courts in the assessment of the cases that they have 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 courts to establish whether those indications are objective and consistent, and whether the applicants in the main proceedings have had the opportunity to adduce evidence to the contrary.

127 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 is purely one of form and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law. That is so **inter alia where**, on account of a conduit entity interposed in the structure of the group between the company that pays interest and the entity which is its beneficial owner, payment of the tax on the interest is avoided.

128 **Thus,** it is an indication of the existence of an arrangement intended to obtain improper entitlement to the exemption provided for in Article 1(1) of Directive 2003/49 that all or almost all of the aforesaid interest is, very

soon after its receipt, passed on by the company that has received it to entities which do not fulfil the conditions for the application of Directive 2003/49, either because those entities are not established in any Member State, or because they are not incorporated in one of the forms referred to in the annex to the directive, or because they are not subject to one of the taxes listed in Article 3(a)(iii) of the directive without being exempt, or because they do not have the status of associated company within the meaning of Article 3(b) of the directive.

129 The conditions for the application of Directive 2003/49 are not met by entities resident for tax purposes outside the European Union, such as the companies at issue in Cases C-119/16 and C-299/16 or the investment funds at issue in Cases C-115/16 and C-299/16. In those cases, if the interest had been paid directly by the Danish debtor undertaking to the recipient entities which, according to the Ministry of Taxation, were its beneficial owners, the Kingdom of Denmark could have levied withholding tax.

130 Likewise, the artificiality of an arrangement is capable of being borne out by the fact that the relevant group of companies is structured in such a way that the company which receives the interest paid by the debtor company must itself pass that interest on to a third company which does not fulfil the conditions for the application of Directive 2003/49, with the consequence that it makes only an insignificant taxable profit when it acts as a conduit company in order to enable the flow of funds from the debtor company to the entity which is the beneficial owner of the sums paid.

131 The fact that a company acts as a conduit company may be established where its sole activity is the receipt of interest and its transmission 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 has.

132 Indications of an artificial arrangement may also be constituted by the various contracts existing between the companies involved in the financial transactions at issue, giving rise to intragroup flows of funds which, as is mentioned in Article 4 of Directive 2003/49, may have the aim of transferring profits from a profit-making commercial company to shareholding entities in order to avoid the tax burden or reduce it as much as possible. The way in which the transactions are financed, the valuation of the intermediary companies' equity and the conduit companies' inability to have economic use of the interest received may also be used as indications of such an arrangement. In this connection, such indications are capable of being constituted not only by a contractual or legal obligation of the company receiving interest to pass it on to a third party but also by the fact that, 'in substance', as the referring court states in Cases C-115/16, C-118/16 and C-119/16, that company, without being bound by such a contractual or legal obligation, does not have the right to use and enjoy those sums.

133 Moreover, such indications may be reinforced by the simultaneity or closeness in time of, on the one hand, the entry into force of major new tax legislation, such as the Danish legislation at issue in the main proceedings, which some of the groups of companies strive to circumvent and, on the other hand, the setting up of complex financial transactions and the grant of intragroup loans.

134 The referring courts are also unsure, in essence, whether there can be an abuse of rights where the beneficial owner of interest transferred by conduit companies is ultimately a company whose seat is in a third State with which the source Member State has concluded a tax convention under which no tax would have been withheld on the interest if the interest had been paid directly to the company having its seat in that third State.

135 In that regard, when examining the structure of the group it is immaterial that some of the beneficial owners of the interest paid by the conduit company are resident for tax purposes in a third State which has concluded a double taxation convention with the source Member State. The existence of such a convention cannot in itself rule out an abuse of rights. Thus, a convention of that kind cannot call into question that there is an abuse of rights where its existence is duly established on the basis of a set of facts showing that economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting improperly from the exemption from any taxes that is provided for in Article 1(1) of Directive 2003/49.

136 It should be added that, whilst taxation must correspond to economic reality, the existence of a double taxation convention is not, as such, capable of establishing that a payment was really made to recipients resident in the third State with which that convention has been concluded. If the company owing the interest wishes to benefit

from the advantages of such a convention, it is open to it to pay the interest directly to the entities that are resident for tax purposes in a State which has concluded a double taxation convention with the source State.

137 That said, it remains possible, in a situation where the interest would have been exempt had it been paid directly to the company having its seat in a third State, that the aim of the group's structure is unconnected with any abuse of rights. In such a case, the group cannot be reproached for having chosen such a structure rather than direct payment of the interest to that company.

138 Furthermore, where the beneficial owner of interest paid is resident for tax purposes in a third State, refusal of the exemption provided for in Article 1(1) of Directive 2003/49 is not in any way subject to fraud or an abuse of rights being found. As has been stated, in essence, in paragraph 86 above, that provision is designed to exempt interest payments in the source Member State only where the beneficial owner of the interest is a company established in another Member State or a permanent establishment situated in another Member State belonging to a company of a Member State.

139 In the light of all those matters, the answer to Question 1(d) to (f) in Cases C-115/16, C-118/16 and C-119/16, Question 1(d) and (e) in Case C-299/16 and Question 4 in Cases C-115/16 and C-118/16 is that proof of an abusive practice requires, first, 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, second, 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. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans. The fact that the Member State where the interest arises has concluded a convention with the third State in which the company that is the beneficial owner of the interest is resident has no bearing on any finding of an abuse of rights.

The burden of proving the abuse of rights

140 As is apparent from Article 1(11) and (12) and Article 1(13)(b) of Directive 2003/49, the source Member State may require the company which has received interest to establish that it is its beneficial owner, within the meaning specified for that concept in the first indent of paragraph 122 above.

141 The Court has moreover held, more generally, that there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need for a concrete assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied (see, to that effect, judgment of 28 February 2013, *Petersen and Petersen*, C-544/11, EU:C:2013:124, paragraph 51 and the case-law cited).

142 On the other hand, where a tax authority of the source Member State seeks, on a ground relating to the existence of an abusive practice, to refuse to grant the exemption provided for in Article 1(1) of Directive 2003/49 to a company that has paid interest to a company established in another Member State, it has the task of establishing the existence of elements constituting such an abusive practice while taking account of all the relevant factors, in particular the fact that the company to which the interest has been paid is not its beneficial owner.

143 Such an authority has the task not of identifying the beneficial owners of that interest but of establishing that the supposed beneficial owner is merely a conduit company through which an abuse of rights has been committed. Indeed, identification of that kind may prove impossible, in particular because the potential beneficial owners are unknown. Given the complexity of certain financial arrangements and the possibility that the intermediary companies involved in the arrangements are established outside the European Union, the national tax authority does not necessarily have information enabling it to identify those owners. That authority cannot be required to furnish evidence that would be impossible for it to provide.

144 Furthermore, even if the potential beneficial owners are known, it is not necessarily established which of them are or will be the actual beneficial owners. Thus, where a company receiving interest has a parent company, which itself has a parent company, the tax authorities and courts of the source Member State are, in all probability, unable to determine which of those two parent companies is or will be the beneficial owner of the

interest. Moreover, the allocation of that interest may have been decided upon after the tax authority's findings relating to the conduit company.

145 Consequently, the answer to Question 5 in Case C-115/16, Question 6 in Case C-118/16 and Question 4 in Cases C-119/16 and C-299/16 is that, in order to refuse to accord a company the status of beneficial owner of interest, or to establish the existence of an abuse of rights, a national authority is not required to identify the entity or entities which it regards as being the beneficial owner(s) of that interest.

Question 5(a) to (c) in Case C-118/16

146 By Question 5(a) to (c) in Case C-118/16, the referring court asks, in essence, whether an SCA authorised as a SICAR governed by Luxembourg law may benefit from the provisions of Directive 2003/49. It must be stated that this question is of interest only if X SCA, SICAR should be regarded as being the beneficial owner of the interest paid to it by X Denmark, a matter which is for the referring court alone to determine.

147 That having been explained, it should be noted, as the Commission and several of the governments that submitted observations have done, that under Article 3(a) of Directive 2003/49 three conditions must be met in order for a company to have the status of a 'company of a Member State' capable of benefiting from advantages provided for pursuant to the directive. First, that company must have one of the forms listed in the annex to the directive. Second, it must, in accordance with the tax laws of a Member State, be considered to be resident in that Member State and not be considered, within the meaning of a double taxation convention, to be resident for tax purposes outside the European Union. Third, it must be subject to one of the taxes listed in Article 3(a)(iii) of Directive 2003/49 without being exempt, or to a tax which is identical or substantially similar and which is imposed after the date of entry into force of the directive in addition to, or in place of, those existing taxes.

148 The first condition must, subject to verification by the referring court, be considered fulfilled in the case of X SCA, SICAR, since, as the Luxembourg Government stated at the hearing, an SCA authorised as a SICAR is a company taking one of the forms listed in the annex to Directive 2003/49.

149 The second condition also appears, subject to the same reservation, to be fulfilled as X SCA, SICAR is resident for tax purposes in Luxembourg.

150 As regards the third condition, it is not disputed that X SCA, SICAR is subject to *impôt sur les revenus des collectivités* (corporate income tax) in Luxembourg, which is one of the taxes listed in Article 3(a)(iii) of Directive 2003/49.

151 However, should it have to be found that, as SKAT contends in the main proceedings in Case C-118/16, the interest received by X SCA, SICAR is in fact exempt in that respect from corporate income tax in Luxembourg, it would then have to be stated that that company does not satisfy the third condition referred to in paragraph 147 above and that it cannot therefore be regarded as being a 'company of a Member State' within the meaning of Directive 2003/49. It is, however, for the referring court alone to make, if appropriate, the necessary checks in that regard.

152 That interpretation of the scope of the third condition referred to in paragraph 147 above is supported, first, by Article 1(5)(b) of Directive 2003/49, from which it is apparent that a permanent establishment can be regarded as being the beneficial owner of interest, within the meaning of the directive, only 'if the interest … payments [which it receives] represent income in respect of which that permanent establishment is subject in the Member State in which it is situated to one of the taxes mentioned in Article 3(a)(iii) …', and second, by the objective of Directive 2003/49, which, as has been recalled, in essence, in paragraph 85 above, is to ensure that such interest payments are subject to tax once in a single Member State.

153 Therefore, the answer to Question 5(a) to (c) in Case C-118/16 is that Article 3(a) of Directive 2003/49 must be interpreted as meaning that an SCA authorised as a SICAR governed by Luxembourg law cannot be classified as a company of a Member State, within the meaning of that directive, capable of being entitled to the exemption provided for in Article 1(1) of the directive if, a matter which is for the referring court to ascertain, the interest received by that SICAR, in a situation such as that at issue in the main proceedings, is exempt from corporate income tax in Luxembourg.

Questions 6 and 7 in Case C-115/16, Questions 7 and 8 in Case C-118/16, Questions 5 and 6 in Case C-119/16 and Questions 5 to 7 in Case C-299/16

154 By Questions 6 and 7 in Case C-115/16, Questions 7 and 8 in Case C-118/16, Questions 5 and 6 in Case C-119/16 and Questions 5 to 7 in Case C-299/16, the referring courts seek to ascertain, should the system, laid down in Article 1 of Directive 2003/49, of exemption from withholding tax on interest paid by a company resident in a Member State to a company resident in another Member State not be applicable, whether Articles 49 and 54 TFEU or Article 63 TFEU must be interpreted as precluding various aspects of the legislation of the first Member State, such as that at issue in the main proceedings, relating to the taxation of that interest.

155 In that regard, two situations must be distinguished at the outset. The first situation is where the inapplicability of the system, laid down by Directive 2003/49, of exemption from withholding tax arises from a finding that there is fraud or abuse, within the meaning of Article 5 of the directive. In such a situation, a company resident in a Member State cannot, in the light of the case-law recalled in paragraph 96 above, claim the benefit of the freedoms enshrined in the FEU Treaty in order to call into question the national legislation governing the taxation of interest paid to a company resident in another Member State.

156 The second situation is where the inapplicability of the system, laid down by Directive 2003/49, of exemption from withholding tax arises from the fact that the conditions for the application of that system of exemption are not fulfilled, but without a finding having been made that there is fraud or abuse, within the meaning of Article 5 of the directive. In such a situation, it should be determined whether the articles of the FEU Treaty referred to in paragraph 154 above must be interpreted as precluding national legislation, such as that at issue in the main proceedings, relating to the taxation of the aforesaid interest.

157 In this regard, in the first place, by Question 7 in Case C-115/16, Question 8 in Case C-118/16, Question 6 in Case C-119/16 and Question 7 in Case C-299/16, the referring courts ask, in essence, whether Articles 49 and 54 TFEU or Article 63 TFEU must be interpreted as precluding national legislation under which a resident company which pays interest to a non-resident company is required to withhold tax on that interest at source whilst such an obligation is not owed by that resident company when the company which receives the interest is also a resident company. They ask, in addition, whether those articles must be interpreted as precluding national legislation under which a resident company that receives interest from another resident company is not subject to the obligation to make an advance payment of corporation tax during the first two tax years and is therefore not required to pay corporation tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source where interest is paid by a resident company to a non-resident company.

158 First of all, as the Commission has stated, the payment of interest connected with a loan concerning two companies resident in different Member States falls within the provisions relating to the free movement of capital, as referred to in Article 63 TFEU (see, to that effect, judgments of 3 October 2006, *Fidium Finanz*, C-452/04, EU:C:2006:631, paragraphs 41 and 42, and of 3 October 2013, *Itelcar*, C-282/12, EU:C:2013:629, paragraph 14). These questions must therefore be examined in the light of that article.

159 In that regard, and irrespective of the effects that the withholding of tax at source may have on the tax situation of the company that receives the interest, the obligation on the company paying the interest to withhold tax at source when that payment is made to a non-resident company may, inasmuch as it results in an additional administrative burden and risks concerning liability which would not exist if the loan had been taken out with a resident company, render cross-border loans less attractive than domestic loans (see, to that effect, judgment of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraphs 28 and 32). Such an obligation therefore constitutes a restriction on the free movement of capital, within the meaning of Article 63 TFEU.

160 However, the need to ensure the effective collection of tax constitutes an overriding reason in the public interest capable of justifying such a restriction. The procedure for withholding tax at source and the liability rules supporting it constitute a legitimate and appropriate means of ensuring tax treatment of the income of a company resident outside the State of taxation. Nor does such a measure go beyond what is necessary for the purpose of attaining that objective (see, to that effect, judgments of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraphs 39 and 43 to 52, and of 13 July 2016, *Brisal and KBC Finance Ireland*, C-18/15, EU:C:2016:549, paragraphs 21 and 22).

161 As to the fact that the national legislation at issue in the main proceedings provides that a resident company which receives interest from another resident company is not subject to the obligation to make an advance

payment of corporation tax during the first two tax years and is therefore not required to pay corporation tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source where interest is paid by a resident company to a non-resident company, it follows therefrom that, whilst interest paid by a resident company to a non-resident company is subject to immediate and definitive taxation, interest paid by a resident company to another resident company is not subject to the making of any advance payment during the first two tax years, thereby procuring a cash-flow advantage for the latter company (see, to that effect, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 28).

162 The exclusion of a cash-flow advantage in a cross-border situation when it is granted in an equivalent situation on national territory constitutes a restriction on the free movement of capital (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 29 and the case-law cited).

163 The Danish Government nevertheless asserts, referring to the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), that national legislation which provides solely for arrangements for the levying of tax that differ depending on where the company receiving the interest has its seat concerns situations which are not objectively comparable.

164 However, whilst it is admittedly apparent from paragraphs 41 and 46 of the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), that a difference in treatment consisting in the application of methods or arrangements for the levying of tax that differ depending on the place of residence of the company receiving the income at issue relates to situations which are not objectively comparable, the Court nevertheless made clear, in paragraphs 43 and 44 of that judgment, that the income at issue in the case which gave rise to the judgment was, in any event, subject to tax, irrespective of whether it was received by a resident company or by a non-resident company (see, to that effect, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 51). The Court pointed out in particular, in paragraph 49 of the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), that resident companies were obliged to make advance payments of corporation tax in connection with interest received from another resident company.

165 In the present instance, the national legislation at issue in the main proceedings does not merely lay down arrangements for the levying of tax that differ depending on the place of residence of the company which receives interest paid by a resident company, but exempts a resident company which receives interest from another resident company from the obligation to make an advance payment relating to that interest during the first two tax years, so that that first company is not required to pay tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source where interest is paid by a resident company to a non-resident company. The assessment of whether there is any disadvantageous treatment of interest paid to non-resident companies must be undertaken for each tax year, taken individually (see, to that effect, judgments of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 41, and of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraphs 30 and 52).

166 Therefore, and as the Danish Government has not set out any overriding reason in the public interest capable of justifying the restriction on the free movement of capital established in paragraph 162 above, that restriction must be considered to be contrary to Article 63 TFEU.

167 In the light of the considerations set out in paragraphs 158 to 166 above, Article 63 TFEU must be interpreted as not precluding, in principle, national legislation under which a resident company which pays interest to a non-resident company is required to withhold tax on that interest at source whilst such an obligation is not owed by that resident company when the company which receives the interest is also a resident company. That article precludes, however, national legislation which prescribes such withholding of tax at source if interest is paid by a resident company to a non-resident company whilst a resident company that receives interest from another resident company is not subject to the obligation to make an advance payment of corporation tax during the first two tax years and is therefore not required to pay corporation tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source.

168 In the second place, by Question 6 in Case C-115/16, Question 7 in Case C-118/16, Question 5 in Case C-119/16 and Question 6 in Case C-299/16, the referring courts ask, in essence, whether Articles 49 and 54 TFEU must be interpreted as precluding national legislation under which the resident company that owes an obligation to withhold tax at source on interest paid by it to a non-resident company is obliged, if the tax withheld is paid late, to pay default interest at a higher rate than the rate which is applicable in the event of late payment

of corporation tax that is charged, inter alia, on interest received by a resident company from another resident company.

169 As has been explained in paragraph 158 above, these questions should be answered in the light of Article 63 TFEU.

170 National legislation such as that referred to in paragraph 168 above establishes a difference in treatment as regards rates of default interest, according to whether the late payment of the tax due on the interest paid by a resident company relates to a loan granted by a non-resident company or by another resident company. The application of a higher rate of default interest in the event of late payment of the withholding tax that is due on interest paid by a resident company to a non-resident company than in the event of late payment of the corporation tax due on interest received by a resident company from another resident company thus results in cross-border loans being less attractive than domestic loans. This constitutes a restriction on the free movement of capital.

171 As the Commission has observed, such a restriction cannot be justified by the fact, put forward by the Danish Government, that the taxation of interest relating to a loan obtained from a resident company and that of interest relating to a loan obtained from a non-resident company is a matter of different methods and arrangements for levying tax. That being so, and as the Danish Government has not set out any overriding reason in the public interest capable of justifying that restriction, it must be considered to be contrary to Article 63 TFEU.

172 In the light of the considerations set out in paragraphs 169 to 171 above, Article 63 TFEU must be interpreted as precluding national legislation under which the resident company that owes the obligation to withhold tax at source on interest paid by it to a non-resident company is obliged, if the tax withheld is paid late, to pay default interest at a higher rate than the rate which is applicable in the event of late payment of corporation tax that is charged, inter alia, on interest received by a resident company from another resident company.

173 In the third place, by Question 5 in Case C-299/16, the referring court asks, in essence, whether Articles 49 and 54 TFEU must be interpreted as precluding national legislation providing that, where a resident company is subject to an obligation to withhold tax at source on the interest which it pays to a non-resident company, account is not taken of the expenditure in the form of interest which the latter has incurred whereas, under that national legislation, such expenditure may be deducted by a resident company which receives interest from another resident company for the purpose of establishing its taxable income.

174 As has been explained in paragraph 158 above, this question should also be answered in the light of Article 63 TFEU.

175 As the Commission has observed, and as, according to the information provided by the Danish Government, the Ministry of Taxation acknowledged after Case C-299/16 was brought before the Court, it follows from the judgment of 13 July 2016, *Brisal and KBC Finance Ireland* (C-18/15, EU:C:2016:549, paragraphs 23 to 55), that national legislation under which a non-resident company is taxed, by means of tax withheld at source by a resident company, on the interest which it is paid by the latter without it being possible to deduct business expenses, such as interest expenditure, that are directly related to the lending at issue, whereas such a possibility of deduction is accorded to resident companies receiving interest from another resident company, constitutes a restriction on the free movement of capital that is prohibited, in principle, by the FEU Treaty.

176 The Danish Government nevertheless maintains that such a restriction is justified for the purpose of combating the abuses resulting from the fact that, whilst the non-resident company receiving the interest is admittedly subject to tax thereon in its Member State of residence, it will, however, ultimately never be taxed because that interest will be cancelled out by corresponding interest expenditure or by deductible intragroup transfers.

177 In that regard, it should be pointed out that, as is clear from paragraph 155 above, any finding that there is an abusive or fraudulent arrangement, justifying the inapplicability of Directive 2003/49, would also result in the fundamental freedoms guaranteed by the FEU Treaty being inapplicable.

178 On the other hand, in the absence of such a finding, the restriction referred to in paragraph 175 above cannot be justified by the considerations put forward by the Danish Government, so that it must be considered to be contrary to Article 63 TFEU. Interest expenditure or intragroup transfers are also liable to result in the reduction

or even cancelling out of the tax payable when a resident company receives interest from another resident company.

179 It follows that Article 63 TFEU must be interpreted as precluding, except where fraud or abuse is found, national legislation providing that, where a resident company is subject to an obligation to withhold tax at source on the interest which it pays to a non-resident company, account is not taken of the expenditure in the form of interest, directly related to the lending at issue, which the latter company has incurred whereas, under that national legislation, such expenditure may be deducted by a resident company which receives interest from another resident company for the purpose of establishing its taxable income.

180 In the light of all the foregoing considerations, the answer to Questions 6 and 7 in Case C-115/16, Questions 7 and 8 in Case C-118/16, Questions 5 and 6 in Case C-119/16 and Questions 5 to 7 in Case C-299/16 is as follows:

– In a situation where the system, laid down by Directive 2003/49, of exemption from withholding tax on interest paid by a company resident in a Member State to a company resident in another Member State is not applicable because there is found to be fraud or abuse, within the meaning of Article 5 of that directive, application of the freedoms enshrined in the FEU Treaty cannot be relied on in order to call into question the legislation of the first Member State governing the taxation of that interest.

– Outside such a situation, Article 63 TFEU must be interpreted as:

  – not precluding, in principle, national legislation under which a resident company which pays interest to a non-resident company is required to withhold tax on that interest at source whilst such an obligation is not owed by that resident company when the company which receives the interest is also a resident company, but as precluding national legislation that prescribes such withholding of tax at source if interest is paid by a resident company to a non-resident company whilst a resident company that receives interest from another resident company is not subject to the obligation to make an advance payment of corporation tax during the first two tax years and is therefore not required to pay corporation tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source;

  – precluding national legislation under which the resident company that owes the obligation to withhold tax at source on interest paid by it to a non-resident company is obliged, if the tax withheld is paid late, to pay default interest at a higher rate than the rate which is applicable in the event of late payment of corporation tax that is charged, inter alia, on interest received by a resident company from another resident company;

  – precluding national legislation providing that, where a resident company is subject to an obligation to withhold tax at source on the interest which it pays to a non-resident company, account is not taken of the expenditure in the form of interest, directly related to the lending at issue, which the latter company has incurred whereas, under that national legislation, such expenditure may be deducted by a resident company which receives interest from another resident company for the purpose of establishing its taxable income.

Costs

181 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Cases C-115/16, C-118/16, C-119/16 and C-299/16 are joined for the purposes of the judgment.**

2. **Article 1(1) of Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different**

Member States, read in conjunction with Article 1(4) thereof, must be interpreted as meaning that the exemption of interest payments from any taxes that is provided for by it is restricted solely to the beneficial owners of such interest, that is to say, the entities which actually benefit from that interest economically and accordingly have the power freely to determine the use to which it is put.

The general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends must be interpreted as meaning that, where there is a fraudulent or abusive practice, the national authorities and courts are to refuse a taxpayer the exemption of interest payments from any taxes that is provided for in Article 1(1) of Directive 2003/49, even if there are no domestic or agreement-based provisions providing for such a refusal.

3. **Proof of an abusive practice requires, first, 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, second, 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. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans. The fact that the Member State where the interest arises has concluded a convention with the third State in which the company that is the beneficial owner of the interest is resident has no bearing on any finding of an abuse of rights.**

4. **In order to refuse to accord a company the status of beneficial owner of interest, or to establish the existence of an abuse of rights, a national authority is not required to identify the entity or entities which it regards as being the beneficial owner(s) of that interest.**

5. **Article 3(a) of Directive 2003/49 must be interpreted as meaning that a *société en commandite par actions* (SCA) (limited partnership with share capital) authorised as a *société d'investissement en capital à risque* (SICAR) (risk capital investment company) governed by Luxembourg law cannot be classified as a company of a Member State, within the meaning of that directive, capable of being entitled to the exemption provided for in Article 1(1) of the directive if, a matter which is for the referring court to ascertain, the interest received by that SICAR, in a situation such as that at issue in the main proceedings, is exempt from *impôt sur les revenus des collectivités* (corporate income tax) in Luxembourg.**

6. **In a situation where the system, laid down by Directive 2003/49, of exemption from withholding tax on interest paid by a company resident in a Member State to a company resident in another Member State is not applicable because there is found to be fraud or abuse, within the meaning of Article 5 of that directive, application of the freedoms enshrined in the FEU Treaty cannot be relied on in order to call into question the legislation of the first Member State governing the taxation of that interest.**

Outside such a situation, Article 63 TFEU must be interpreted as:

– **not precluding, in principle, national legislation under which a resident company which pays interest to a non-resident company is required to withhold tax on that interest at source whilst such an obligation is not owed by that resident company when the company which receives the interest is also a resident company, but as precluding national legislation that prescribes such withholding of tax at source if interest is paid by a resident company to a non-resident company whilst a resident company that receives interest from another resident company is not subject to the obligation to make an advance payment of corporation tax during the first two tax years and is therefore not required to pay corporation tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source;**

– **precluding national legislation under which the resident company that owes the obligation to withhold tax at source on interest paid by it to a non-resident company is obliged, if the tax withheld is paid late, to pay default interest at a higher rate than the rate which is applicable in the event of late payment of corporation tax that is charged, inter alia, on interest received by a resident company from another resident company;**

– **precluding national legislation providing that, where a resident company is subject to an obligation to withhold tax at source on the interest which it pays to a non-resident company, account is not taken of the expenditure in the form of interest, directly related to the lending at issue, which the latter company has incurred whereas, under that national legislation, such expenditure may be deducted by a resident company which receives interest from another resident company for the purpose of establishing its taxable income.**

[Signatures]

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* Language of the case: Danish.

ECLI:EU:C:2019:135

JUDGMENT OF THE COURT (Grand Chamber)

26 February 2019 (*)

Table of contents

(Reference for a preliminary ruling — Approximation of laws — Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States — Directive 90/435/EEC — Exemption of the profits distributed by companies of a Member State to companies of other Member States — Beneficial owner of the distributed profits — Abuse of rights — Company established in a Member State and paying to an associated company established in another Member State dividends all or almost all of which are then transferred outside the European Union — Subsidiary subject to an obligation to withhold tax on the profits at source)

In Joined Cases C-116/16 and C-117/16,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Østre Landsret (High Court of Eastern Denmark, Denmark), made by decisions of 19 February 2016, received at the Court on 25 February 2016, in the proceedings

Skatteministeriet

v

T Danmark (C-116/16),

Y Denmark Aps (C-117/16),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, J.-C. Bonichot, A. Arabadjiev, T. von Danwitz, C. Toader and F. Biltgen, Presidents of Chambers, A. Rosas (Rapporteur), M. Ilešič, L. Bay Larsen, M. Safjan, C.G. Fernlund, C. Vajda and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 10 October 2017,

after considering the observations submitted on behalf of:

– T Danmark, by A.M. Ottosen and S. Andersen, advokater,

– Y Denmark Aps, by L.E. Christensen and H.S. Hansen, advokater,

– the Danish Government, by C. Thorning, J. Nymann-Lindegren and M.S. Wolff, acting as Agents, and J.S. Horsbøl Jensen, advokat,

– the German Government, by T. Henze and R. Kanitz, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and G. De Socio, avvocato dello Stato,

– the Luxembourg Government, by D. Holderer, acting as Agent, and P.-E. Partsch and T. Lesage, avocats,

– the Netherlands Government, by M.K. Bulterman and C.S. Schillemans, acting as Agents,

– the Swedish Government, by A. Falk, C. Meyer-Seitz, H. Shev, U. Persson, N. Otte Widgren and F. Bergius, acting as Agents,

– the European Commission, by W. Roels, R. Lyal and L. Grønfeldt, acting as Agents, and H. Peytz, avocat,

after hearing the Opinion of the Advocate General at the sitting on 1 March 2018,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), as amended by Council Directive 2003/123/EC of 22 December 2003 (OJ 2004 L 7, p. 41) ('Directive 90/435'), and of Articles 49, 54 and 63 TFEU.

2 The requests have been made in proceedings brought by the Skatteministeriet (Ministry of Taxation, Denmark) against T Danmark and Y Denmark Aps relating to the obligation imposed on those companies to pay withholding tax by reason of the payment by them of dividends to non-resident companies regarded by the tax authority as not being the beneficial owners of those dividends and, accordingly, as incapable of being entitled to the exemption from withholding tax provided for by Directive 90/435.

Legal context

OECD Model Tax Convention

3 On 30 July 1963 the Council of the Organisation for Economic Cooperation and Development (OECD) adopted a recommendation concerning the avoidance of double taxation and called on the governments of the member countries, when concluding or revising bilateral conventions, to conform to a 'model convention for the avoidance of double taxation with respect to taxes on income and capital' that had been drawn up by the Fiscal Committee of the OECD and was annexed to that recommendation ('the OECD Model Tax Convention'). That model tax convention is re-examined and amended regularly. It is the subject of commentaries approved by the OECD Council.

4 Paragraphs 7 to 10 of the commentary on Article 1 of the OECD Model Tax Convention as amended in 1977 ('the OECD 1977 Model Tax Convention') — a provision which states that this convention is to apply to persons who are residents of one or both of the Contracting States — draw attention to the fact that the convention could be used improperly, with the objective of tax avoidance, by means of artificial legal constructions. The text of those paragraphs of the commentary underlines the importance of the concept of 'beneficial owner' introduced, in particular, in Article 10 (taxation of dividends) and Article 11 (taxation of interest) of the model convention and the need to combat tax evasion.

5 Article 10(1) and (2) of the OECD 1977 Model Tax Convention is worded as follows:

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

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

(a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;

(b) 15 per cent of the gross amount of the dividends in all other cases.’

6 When the commentaries were revised in 2003, comments were added concerning ‘conduit companies’, that is so say, companies which, though the formal owners of the income, have, in practice, only very narrow powers, rendering them mere fiduciaries or administrators acting on account of the interested parties, so that they are not to be regarded as the beneficial owners of that income. Paragraph 12 of the commentary on Article 10, in the revised version of 2003, states, in particular, that ‘the term “beneficial owner” is not 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’. Paragraph 12.1 of the revised version of 2003 states that ‘it would be … inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned’ and 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’.

7 A further revised version of the commentaries in 2014 provided explanation of the concepts of ‘beneficial owner’ and ‘conduit company’. Paragraph 10.3 of this version of the commentaries states that ‘there are many ways of addressing conduit company and, more generally, treaty shopping situations. These include specific anti-abuse provisions in treaties, general anti-abuse rules and substance-over-form or economic substance approaches’.

Directive 90/435

8 The first and third recitals of Directive 90/435 are worded as follows:

‘… the grouping together of companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; … such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; … it is therefore necessary to introduce with respect to such grouping together of companies of different Member States, tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level;

…

… the existing tax provisions which govern the relations between parent companies and subsidiaries of different Member States vary appreciably from one Member State to another and are generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State; … cooperation between companies of different Member States is thereby disadvantaged in comparison with cooperation between companies of the same Member State; … it is necessary to eliminate this disadvantage by the introduction of a common system in order to facilitate the grouping together of companies.’

9 Article 1 of Directive 90/435 provides:

‘1. Each Member State shall apply this Directive:

…

– to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries,

– …

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

10 Article 2 of Directive 90/435 sets out the conditions relating to a company's form, to residence for tax purposes and to liability to tax that must be met in order to benefit from the directive.

11 Article 3 of Directive 90/435 states:

'1. For the purposes of applying this Directive:

(a) the status of parent company shall be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 20% in the capital of a company of another Member State fulfilling the same conditions;

such status shall also be attributed, under the same conditions, to a company of a Member State which has a minimum holding of 20% in the capital of a company of the same Member State, held in whole or in part by a permanent establishment of the former company situated in another Member State;

from 1 January 2007 the minimum holding percentage shall be 15%;

from 1 January 2009 the minimum holding percentage shall be 10%;

(b) "subsidiary" shall mean that company the capital of which includes the holding referred to in (a).

2. By way of derogation from paragraph 1, Member States shall have the option of:

– replacing, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights,

– not applying this Directive to companies of that Member State which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years.'

12 Article 4(1) of Directive 90/435 allows the Member States to choose between two systems, namely a system of exemption or one of imputation.

13 Article 5 of Directive 90/435 is worded as follows:

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

Double taxation conventions

14 Article 10(1) and (2) of the Convention between the Government of the Grand Duchy of Luxembourg and the Government of the Kingdom of Denmark for the avoidance of double taxation and the establishment of rules relating to mutual administrative assistance with respect to taxes on income and on capital, signed in Luxembourg on 17 November 1980 ('the Luxembourg-Denmark Tax Convention'), allocates the power to tax dividends between those two Member States and is worded as follows:

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

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

(a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;

(b) 15 per cent of the gross amount of the dividends in all other cases.’

15 Article 10(1) and (2) of the Convention between the Government of the Kingdom of Denmark and the Government of the Republic of Cyprus for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, signed on 26 May 1981, allocated the power of taxation in respect of dividends and provided as follows:

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

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

(a) 10 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;

(b) 15 per cent of the gross amount of the dividends in all other cases.’

16 Under Article 10(2) of the Convention between the Government of the United States of America and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed in Washington on 19 August 1999, the Contracting State of which the company paying the dividends is a resident may tax dividends distributed to a company which is resident in the other State and is their ‘beneficial owner’ at the rate of 5% of their gross amount.

17 There is no tax convention between the Kingdom of Denmark and Bermuda.

18 It is apparent from those bilateral conventions that the source State, that is to say, in the main actions, the Kingdom of Denmark, may tax dividends paid to a company established in another Member State, if that company is not the beneficial owner of the dividends, at a rate higher than that prescribed by those conventions. None of the conventions, however, defines the concept of ‘beneficial owner’.

Danish law

Taxation of dividends

19 Paragraph 2(1)(c) of the selskabsskattelov (Law on corporation tax) provides:

‘… companies, associations and so forth within the meaning of Paragraph 1(1) having their seat abroad are liable for tax under this Law inasmuch as they

…

(c) receive dividends falling within Paragraph 16 A(1) and (2) of the Law on the assessment of State income tax … The tax liability shall not extend to dividends on shares of subsidiaries (see Paragraph 4 A of the Law on the taxation of capital gains) where taxation of the dividends paid by the subsidiary is waived or reduced under the provisions of Directive [90/435] or a tax convention concluded with the Faroe Islands, Greenland or the State where that parent company is resident. The tax liability shall also not extend to dividends on shares of affiliated companies (see Paragraph 4 B of the Law on the taxation of capital gains) which are not shares of

subsidiaries when the recipient company which is the member of a group is resident in a Member State of the [European Union/European Economic Area (EEA)] and taxation of the dividends would have been waived or reduced pursuant to the provisions of Directive [90/435] or the tax convention concluded with the State in question if shares of subsidiaries had been involved. The tax liability shall also not extend to dividends received by owners of holdings in parent companies which are included in the list of companies referred to in Article 2(1)(a) of Directive [90/435] but which are regarded, for the purpose of their taxation in Denmark, as transparent entities. This provision is subject to the condition that the owner of a holding in the company is not resident in Denmark.

Withholding tax

20 If, pursuant to Paragraph 2(1)(c) of the Law on corporation tax, limited tax liability arises on account of dividends from Denmark, Paragraph 65 of the kildeskattelov (Law on tax at source) obliges the Danish company distributing the dividends to withhold tax at source at the rate of 28%.

21 Paragraph 65(1) and (5) of the Law on tax at source, in the version at the material time, stated:

'1. For any adoption of, or decision to distribute or credit, dividends on shares in companies, associations and so forth referred to in Paragraph 1(1), points 1, 2, 2e and 4 of the Law on corporation tax, those companies, associations and so forth must withhold 28% of the total distributed, save where otherwise provided in subparagraph 4 or pursuant to subparagraphs 5 to 8. … The sum thus withheld shall be called "tax on dividends".

…

5. No tax shall be withheld on dividends received by a company resident abroad from a company resident in Denmark where those dividends do not give rise to tax liability (see Paragraph 2(1)(c) of the Law on corporation tax).'

22 It is clear from Paragraph 2(2), point 2, of the Law on corporation tax that the tax liability resulting from Paragraph 2(1)(c) of that law is definitively met when the tax withheld at source, prescribed in Paragraph 65 of the Law on tax at source, is levied. In addition, the rate of tax on profits was 28% during the period at issue in the main proceedings.

23 Danish parent companies are entitled to an exemption from tax on dividends received from Danish subsidiaries, under Paragraph 13(1), point 2, of the Law on corporation tax. Furthermore, it is clear from Paragraph 31(1), point 2, of the kildeskattebekendtgørelsen (Order on tax at source) that, when such dividends are distributed, the distributing Danish company does not have to withhold tax at source.

24 On the other hand, in so far as a Danish company is liable to tax on dividends distributed by another Danish company, the latter has to withhold tax at source pursuant to Paragraph 65(1) of the Law on tax at source.

25 The Ministry of Taxation acknowledged before the national court, in particular in the main action in Case C-116/16, that the Kingdom of Denmark infringed the FEU Treaty in levying, in 2011, on dividends received by a company of another Member State tax at a higher rate than the rate of corporation tax applicable at that time. Consequently, the Ministry of Taxation reduced the amount claimed to 25%, that is to say, a rate equal to the rate of corporation tax applicable at the time.

26 The date on which tax withheld at source is chargeable is specified in the second sentence of Paragraph 66(1) of the Law on tax at source, which is worded as follows:

'Tax withheld at source is chargeable from adoption of a dividend, or from a decision to distribute or credit a dividend, and must be paid no later than the following month, on the due date for payment by the company of the taxes collectable at source [known as "A-skat"] and the special workers' contribution that have been withheld.'

27 The payer of dividends is liable to the State for payment of the sums withheld.

28 In the event of late payment of the tax withheld at source, the rate of default interest is higher than the rate laid down in the event of late payment of corporation tax payable by a Danish company. However, the national court states that, under a legislative amendment that took effect on 1 August 2013, default interest is set at the same rate for both tax withheld at source and corporation tax.

29 The obligation to pay default interest is owed by the person required to withhold tax at source. For a company subject to unlimited tax liability in Denmark, taxable dividends form part of taxable income. It is the company distributing the dividends that must withhold tax at source and pay the tax withheld to the Treasury as well as default interest in the event of late payment.

30 Pursuant to Paragraph 65 C(1) of the Law on tax at source, a person paying royalties whose source is in Denmark is in principle required to withhold tax at source, whether or not the payee is resident in Denmark.

Law applicable to fraud and abuse

31 Until the adoption of Law No 540 of 29 April 2015, no general statutory rule to combat abuse existed in Denmark. However, case-law developed the 'reality' principle, under which taxation must be determined on the basis of a specific assessment of the facts. This means in particular that artificial tax arrangements may, depending on the circumstances, be set aside so that taxation takes account of reality, under the principle of substance over form.

32 It is clear from the orders for reference that, in both of the main actions, the parties are in agreement that the reality principle is not sufficient to justify setting aside the arrangements at issue in those actions.

33 As is apparent from the orders for reference, case-law has also developed the 'rightful income recipient' (*rette indkomstmodtager*) principle. This principle is based on the fundamental provisions relating to taxation of income, set out in Paragraph 4 of the statsskatteloven (Law on State tax), which have the effect that the tax authorities are not obliged to accept an artificial separation between the income-generating undertaking or activity and the allocation of the income deriving therefrom. This principle is therefore intended to determine the person who — regardless of formal appearances — is the real recipient of certain income and thus the person who is liable for tax on it.

The disputes in the main proceedings and the questions referred for a preliminary ruling

34 In both main actions, the Ministry of Taxation contests the decisions by which the Landsskatteret (National Tax Appeals Commission, Denmark) found that T Danmark (Case C-116/16) and Y Denmark (Case C-117/16) had to be entitled to the exemption from withholding tax, provided for by Directive 90/435, on dividends paid to entities established in another Member State.

35 In order to enjoy the tax advantages provided for by Directive 90/435, the entity that receives the dividends must meet the conditions that the directive lays down. However, as the Danish Government states in its observations, groups of companies not satisfying those conditions may in some cases create, between the company which distributes the dividends and the entity which is intended actually to have the use of them, one or more artificial companies meeting the formal conditions of the directive. The referring court's questions concerning abuse of rights and the concept of 'beneficial owner' relate to such financial constructions.

36 The facts as set out by the referring court and illustrated, in the orders for reference, by a number of diagrams of the structure of the company groups concerned are 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.

(1) Case C-116/16, T Danmark

37 It is apparent from the order for reference that five private equity funds, none of which is a company resident in a Member State or in a country with which the Kingdom of Denmark has signed a double taxation convention,

established in 2005 a group consisting of a number of companies with the aim of purchasing T Danmark, a large Danish service provider.

38 In its observations, the Danish Government stated that Case C-116/16 concerns the same group of companies as the group at issue in Case C-115/16, which relates to the taxation of interest and is decided by today's judgment in *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16).

39 As explained by the referring court, the private equity funds set up companies in Luxembourg. In 2010 one of them, N Luxembourg 2, acquired a large holding in the capital of T Danmark, and it thus held more than 50% of T Danmark's shares during the period at issue in the main proceedings. T Danmark's remaining shares were held by thousands of shareholders.

40 At the request of the Danish authorities, the Luxembourg tax authorities drew up in the spring of 2011 a 'residence certificate' certifying in particular that N Luxembourg 2 was subject to corporate income tax and was the beneficial owner of all the dividends paid on the shares that it owned in T Danmark and of any other income derived from them. The Danish Government notes in its observations that that certificate does not specify the factual information on the basis of which it was drawn up.

41 In accordance with its dividend policy, T Danmark paid its shareholders in the summer of 2011 dividends totalling roughly 1.8 billion Danish krone (DKK) (roughly EUR 241.4 million). Dividends were also paid in the spring of 2012.

42 In 2011 T Danmark submitted an application to SKAT (tax authority, Denmark) for a binding answer in order to ascertain whether the dividends that it was distributing to N Luxembourg 2 were exempt under the third sentence of Paragraph 2(1)(c) of the Law on corporation tax and, accordingly, whether they escaped withholding tax.

43 It was indicated in the request for a binding answer that in the third quarter of 2011 it was proposed to distribute dividends to N Luxembourg 2 amounting to roughly DKK 6 billion (roughly EUR 805 million). It was also stated that N Luxembourg 2 was an independent entity with its own management and own decision-making powers, so that it clearly was not possible to ascertain in advance and with certainty whether and in what way the management of N Luxembourg 2 would in fact decide to use those dividends. Finally, it was explained that a significant proportion of the ultimate investors were resident in the United States.

44 The Ministry of Taxation replied that an answer could not be given to the request if it was not known how N Luxembourg 2 would use the dividends paid by T Danmark.

45 T Danmark replied that it could be taken as established, for the purpose of the binding answer, that the dividends would be paid by T Danmark to N Luxembourg 2, which would itself distribute dividends to its own parent company. According to these details, it could be assumed that the latter would distribute part of those sums (as dividends and/or interest and/or debt repayment) to companies controlled by the various private equity funds or by its creditors. T Danmark also assumed that the sums paid by the parent company of N Luxembourg 2 to companies controlled by the various private equity funds would be transferred to the ultimate investors in the private equity funds, but T Danmark stated that it did not know how those transfers would be made or be treated for tax purposes.

46 The Skatterådet (Tax Commission, Denmark) answered the request for a binding answer in the negative.

47 The National Tax Appeals Commission, before which T Danmark lodged an appeal against that decision, took the view, on the other hand, that the dividends distributed by T Danmark to N Luxembourg 2 were exempt from tax. It held that limited tax liability was precluded pursuant to Directive 90/435, as the Kingdom of Denmark had not adopted legislative provisions to prevent fraud or abuse, as provided for by Article 1(2) of that directive, and consequently could not tax the dividends under Paragraph 2(1)(c) of the Law on corporation tax. The Ministry of Taxation brought legal proceedings against that decision of the National Tax Appeals Commission.

48 In that context, the Østre Landsret (High Court of Eastern Denmark, Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) (a) Does a Member State’s reliance on Article 1(2) of [Directive 90/435] on the application of domestic provisions required for the prevention of fraud or abuse presuppose that the Member State in question has adopted a specific domestic provision implementing Article 1(2) of the directive, or that national law contains general provisions or principles on fraud and abuse that can be interpreted in accordance with Article 1(2)?

(b) If Question 1(a) is answered in the affirmative, can Paragraph 2(1)(c) of the Law on corporation tax, which provides that “it is a precondition that taxation of the dividends be waived … under the provisions of [Directive 90/435]”, then be deemed to be a specific domestic provision as referred to in Article 1(2) of the directive?

(2) Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with [the OECD] Model Tax Convention, under which taxation of distributed dividends is contingent on whether the dividends recipient is deemed to be the beneficial owner of the dividends, an agreement-based anti-abuse provision covered by Article 1(2) of [Directive 90/435]?

(3) If Question 2 is answered in the affirmative, is it then for the national courts to define what is included in the concept “beneficial owner”, or should the concept, in the application of Directive 90/435, be interpreted as meaning that a specifically EU law significance should be attached to the concept which is subject to review by the Court of Justice?

(4) (a) If Question 2 is answered in the affirmative and the answer to Question 3 is that it is not for the national courts to define what is included in the concept of “beneficial owner”, is the concept then to be interpreted as meaning that a company resident in a Member State which, in circumstances such as those of the present case, receives dividends from a subsidiary in another Member State, is the “beneficial owner” of those dividends as that concept is to be interpreted under EU law?

(b) Is the concept “beneficial owner” to be interpreted in accordance with the corresponding concept in Article 1(1) of [Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49)], read in conjunction with Article 1(4) thereof?

(c) Should the concept be interpreted solely in the light of the commentary on Article 10 of the OECD 1977 Model Tax Convention (paragraph 12), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding “conduit companies”, and the additions made in 2014 regarding “contractual or legal obligations”?

(d) What significance does it have for the assessment of the issue whether the dividends recipient must be deemed to be a “beneficial owner” if the dividends recipient has had a contractual or legal obligation to pass the dividends to another person?

(e) What significance does it have for the assessment of the issue whether the dividends recipient must be deemed to be a “beneficial owner” that the referring court, following an assessment of the facts of the case, concludes that the recipient — without having been contractually or legally bound to pass the dividends received to another person — “in substance” did not have the right to “use and enjoy” the dividends as referred to in the 2014 Commentaries on the [OECD] 1977 Model Tax Convention?

(5) If it is assumed in the case:

– that there are “domestic or agreement-based provisions required for the prevention of fraud or abuse” (see Article 1(2) of Directive 90/435),

– that dividends have been distributed from a company (A) resident in a Member State to a parent company (B) in another Member State and from there passed to that company’s parent company (C), resident outside the EU/EEA, which in turn has distributed the funds to its parent company (D), also resident outside the EU/EEA,

– that no double taxation convention has been entered into between the first-mentioned State and the State where C is resident,

– that a double taxation convention has been entered into between the first-mentioned State and the State where D is resident, and

– that the first-mentioned State, under its legislation, would therefore not have had a claim to tax at source on dividends distributed from A to D, had D been the direct owner of A,

is there abuse under the directive so that B is not protected thereunder?

(6) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), does Article 49 TFEU, read in conjunction with Article 54 TFEU, preclude legislation under which the latter Member State taxes the parent company resident in the other Member State on the dividends, when the Member State in question deems resident parent companies in otherwise similar circumstances to be exempt from tax on such dividends?

(7) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), and the parent company is deemed by the latter Member State to have limited tax liability in that Member State on the dividends in question, does Article 49 TFEU, read in conjunction with Article 54 TFEU, preclude legislation under which the latter Member State requires the company liable for withholding the tax at source (subsidiary) to pay default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims lodged against a company resident in the same Member State?

(8) If Question 2 is answered in the affirmative and the answer to Question 3 is that it is not for the national courts to define what is included in the concept "beneficial owner", and if a company (parent company) resident in a Member State cannot, on that basis, be deemed exempt from tax at source pursuant to Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), is the latter Member State then bound pursuant to Directive 90/435 or Article 4(3) TEU to state whom the Member State in that case deems to be the beneficial owner?

(9) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), does Article 49 TFEU, read in conjunction with Article 54 TFEU (in the alternative Article 63 TFEU), viewed separately or as a whole, preclude legislation under which:

– the latter Member State requires the subsidiary to withhold tax at source on the dividends and makes that person liable to the authorities for the non-withheld tax at source, where there is no such duty to withhold tax at source when the parent company is resident in the Member State?

– the latter Member State calculates default interest on the tax at source owing?

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

(10) In circumstances where:

– a company (parent company) resident in a Member State fulfils the requirement in Directive 90/435 of owning (in 2011) at least 10% of the share capital of a company (subsidiary) resident in another Member State,

– the parent company is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 in respect of dividends distributed by the subsidiary,

– the parent company's (direct or indirect) shareholder(s), resident in a non-EU/EEA country, are deemed to be the beneficial owner(s) of the dividends in question,

– the aforementioned (direct or indirect) shareholder(s) also fulfil the aforementioned capital requirement,

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

(2) Case C-117/16, Y Denmark

49 As is apparent from the order for reference, Y Inc., established in the United States ('Y USA'), which is the ultimate parent company of the Y Group, is listed on the stock exchange. Its subsidiaries established abroad are held through Y Global Ltd, established in Bermuda ('Y Bermuda'), whose sole activity, apart from the holding of shares in its subsidiaries, is the holding of intellectual property rights over the group's products. Its administrative operations are conducted by an independent management company.

50 Y Denmark, which was incorporated in 2000 by Y USA in Denmark and has always had around 20 employees, has sales and support services as its object and reports to Y BV, a company established in the Netherlands ('Y Holland'), which has operational responsibility for the group's sales outside the United States, Canada and Mexico. Y Denmark is also the parent company for the European part of the Y Group.

51 Following the enactment in the United States of the American Jobs Creation Act of 2004, companies established in the United States had the temporary ability to repatriate dividends of foreign subsidiaries on particularly favourable tax terms in return for an undertaking to use the resulting income for specific purposes in the United States, inter alia research and development. It was in those circumstances that Y USA decided to repatriate as large a dividend as possible from Y Bermuda in the financial year from 1 May 2005 to 30 April 2006. The total contribution, which was to come inter alia from dividends paid by Y Bermuda's subsidiaries, was set at 550 million United States dollars (USD) (roughly EUR 450.82 million).

52 Before those distributions were made, the European part of the Y Group was restructured. In this context, on 9 May 2005 Y Bermuda incorporated in Cyprus the company Y Cyprus with an initial share capital of USD 20 000 (roughly EUR 16 400), of which USD 2 000 (roughly EUR 1 640) was paid in. By agreement of 16 September 2005, Y Bermuda sold the holding in Y Denmark to Y Cyprus for EUR 90 million. The price was paid by means of a debt instrument.

53 As is apparent from the order for reference, Y Cyprus is a holding company which also carries out certain treasury management activities, such as the grant of loans to subsidiaries. It is clear from the management reports in its annual accounts for the financial years 2005-2006 and 2006-2007 that its main activity was the management of holdings. Furthermore, the company paid directors' fees of USD 571 (roughly EUR 468) and USD 915 (roughly EUR 750) respectively. According to the annual accounts, the company was not taxed as it did not make a taxable profit.

54 The referring court explains that on 26 September 2005 Y Holland decided to distribute a dividend of EUR 76 million to Y Denmark in respect of the 2004-2005 financial year. That dividend was paid to Y Denmark on 25 October 2005. On 28 September 2005 the general meeting of the members of Y Denmark approved, in respect of the same financial year, the payment of a dividend to Y Cyprus, also of EUR 76 million. That sum was paid to Y Cyprus on 27 October 2005. On 28 October 2005 Y Cyprus transferred the same sum to Y Bermuda in partial repayment of the loan granted when Y Denmark was acquired.

55 On 21 October 2005, Y Cyprus incorporated a company in the Netherlands named Y Holding BV. By agreement of 25 October 2005, Y Denmark sold its holding in Y Holland to Y Holding for EUR 14 million.

56 On 3 April 2006 Y Bermuda distributed a dividend of USD 550 million (roughly EUR 450.82 million) to Y USA. Payment of that dividend was financed from its own funds and by a bank loan.

57 On 13 October 2006 the general meeting of the members of Y Denmark approved the payment to Y Cyprus of a dividend in the sum of DKK 92 012 000 (roughly EUR 12.3 million) in respect of the 2005-2006 financial year. Y Denmark stated that that sum formed part (as a dividend to be received) of the total dividend of USD 550

million (roughly EUR 450.82 million) that Y Bermuda had distributed to Y USA on 3 April 2006, a fact which the Ministry of Taxation contested in the absence of supporting documents. Y Denmark transferred DKK 92 012 000 (roughly EUR 12.3 million) to Y Cyprus in 2010.

58 According to the referring court, the main question that arises in the case in point is whether Y Cyprus has limited tax liability in Denmark in respect of the dividends in question. Under national law, a foreign parent company does not, in principle, have limited tax liability in Denmark on account of dividends. The exemption of the dividends or their reduced taxation is, however, contingent on either Directive 90/435 or a double taxation convention applying. Most of the tax conventions concluded by the Kingdom of Denmark lay down as a condition for exemption from tax or its reduction that the entity which has received the dividends is their 'beneficial owner' (*retmæssig ejer*). Directive 90/435 does not lay down an equivalent condition.

59 SKAT takes the view that Y Cyprus has limited tax liability in Denmark in respect of the dividends in question, because it cannot be regarded as the beneficial owner of those dividends, within the meaning of the tax convention between the Kingdom of Denmark and the Republic of Cyprus. Nor is it covered by the provisions of Directive 90/435 that relate to exemption from withholding tax.

60 By decision of 17 September 2010, SKAT found that Y Denmark should have withheld tax at source on two dividend payments made in 2005 and 2006 to its parent company, Y Cyprus, and that Y Denmark had to be regarded as being liable for payment of that withholding tax.

61 An appeal was lodged against that decision before the National Tax Appeals Commission. On 16 December 2011 it found, like SKAT, that Y Cyprus was not the beneficial owner of the dividends within the meaning of the tax convention between the Kingdom of Denmark and the Republic of Cyprus, but it upheld the plea put forward by Y Denmark that tax should not be withheld at source on the ground that Y Cyprus had to benefit from the rules on exemption provided for by Directive 90/435.

62 The Ministry of Taxation brought an action before the referring court challenging the decision of the National Tax Appeals Commission.

63 In the order for reference, the referring court observes that the parties to the dispute are in agreement that the 'reality' principle does not enable the arrangements implemented to be set aside and that the company which has received the dividends, in this instance Y Cyprus, is the rightful income recipient within the meaning of Danish law.

Questions

64 In that context, the Østre Landsret (High Court of Eastern Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Does a Member State's reliance on Article 1(2) of [Directive 90/435] on the application of domestic provisions required for the prevention of fraud or abuse presuppose that the Member State in question has adopted a specific domestic provision implementing Article 1(2) of the directive, or that national law contains general provisions or principles on fraud and abuse that can be interpreted in accordance with Article 1(2)?

(b) If Question 1(a) is answered in the affirmative, can Paragraph 2(1)(c) of the Law on corporation tax, which provides that "it is a precondition that taxation of the dividends be waived … under the provisions of [Directive 90/435]", then be deemed to be a specific domestic provision as referred to in Article 1(2) of the directive?

(2) (a) Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with [the OECD] Model Tax Convention, under which taxation of distributed dividends is contingent on whether the dividends recipient is deemed to be the beneficial owner of the dividends, an agreement-based anti-abuse provision covered by Article 1(2) of [Directive 90/435]?

(b) If so, is the term "agreement" in Article 1(2) of the directive then to be construed as presupposing that the Member State may, under its domestic law, rely on the double taxation convention, to the detriment of the taxpayer?

(3) If Question 2(a) is answered in the affirmative, is it then for the national courts to define what is included in the concept "beneficial owner", or should the concept, in the application of Directive 90/435, be interpreted as meaning that a specifically EU law significance should be attached to the concept which is subject to review by the Court of Justice?

(4) (a) If Question 2(a) is answered in the affirmative and the answer to Question 3 is that it is not for the national courts to define what is included in the concept of "beneficial owner", is the concept then to be interpreted as meaning that a company resident in a Member State which, in circumstances such as those of the present case, receives dividends from a subsidiary in another Member State, is the "beneficial owner" of those dividends as that concept is to be interpreted under EU law?

(b) Is the concept "beneficial owner" to be interpreted in accordance with the corresponding concept in Article 1(1) of [Directive 2003/49], read in conjunction with Article 1(4) thereof?

(c) Should the concept be interpreted solely in the light of the commentary on Article 10 of the OECD 1977 Model Tax Convention (paragraph 12), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding "conduit companies", and the additions made in 2014 regarding "contractual or legal obligations"?

(d) What significance does it have for the assessment of the issue whether the dividends recipient must be deemed to be a "beneficial owner" if the dividends recipient has had a contractual or legal obligation to pass the dividends to another person?

(e) What significance does it have for the assessment of the issue whether the dividends recipient must be deemed to be a "beneficial owner" that the referring court, following an assessment of the facts of the case, concludes that the recipient — without having been contractually or legally bound to pass the dividends received to another person — "in substance" did not have the right to "use and enjoy" the dividends as referred to in the 2014 Commentaries on the [OECD] 1977 Model Tax Convention?

(5) If it is assumed in the case:

– that there are "domestic or agreement-based provisions required for the prevention of fraud or abuse" (see Article 1(2) of Directive 90/435),

– that dividends have been distributed from a company (A) resident in a Member State to a parent company (B) in another Member State and from there passed to that company's parent company (C), resident outside the EU/EEA, which in turn has distributed the funds to its parent company (D), also resident outside the EU/EEA,

– that no double taxation convention has been entered into between the first-mentioned State and the State where C is resident,

– that a double taxation convention has been entered into between the first-mentioned State and the State where D is resident, and

– that the first-mentioned State, under its legislation, would therefore not have had a claim to tax at source on dividends distributed from A to D, had D been the direct owner of A,

is there abuse under the directive so that B is not protected thereunder?

(6) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), does Article 43 EC, read in conjunction with Article 48 EC (and/or Article 56 EC), preclude legislation under which the latter Member State taxes the parent

company resident in the other Member State on the dividends, when the Member State in question deems resident parent companies in otherwise similar circumstances to be exempt from tax on such dividends?

(7) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), and the parent company is deemed by the latter Member State to have limited tax liability in that Member State on the dividends in question, does Article 43 EC, read in conjunction with Article 48 EC (and/or Article 56 EC), preclude legislation under which the latter Member State requires the company liable for withholding the tax at source (subsidiary) to pay default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims lodged against a company resident in the same Member State?

(8) If Question 2(a) is answered in the affirmative and the answer to Question 3 is that it is not for the national courts to define what is included in the concept "beneficial owner", and if a company (parent company) resident in a Member State cannot, on that basis, be deemed exempt from tax at source pursuant to Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), is the latter Member State then bound pursuant to Directive 90/435 or Article 10 EC to state whom the Member State in that case deems to be the beneficial owner?

(9) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), does Article 43 EC, read in conjunction with Article 48 EC (in the alternative Article 56 EC), viewed separately or as a whole, preclude legislation under which:

– the latter Member State requires the subsidiary to withhold tax at source on the dividends and makes that person liable to the authorities for the non-withheld tax at source, where there is no such duty to withhold tax at source when the parent company is resident in the Member State?

– the latter Member State calculates default interest on the tax at source owing?

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

(10) In circumstances where:

– a company (parent company) resident in a Member State fulfils the requirement in Directive 90/435 of owning (in 2005 and 2006) at least 20% of the share capital of a company (subsidiary) resident in another Member State,

– the parent company is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 in respect of dividends distributed by the subsidiary,

– the parent company's (direct or indirect) shareholder(s), resident in a non-EU/EEA country, are deemed to be the beneficial owner(s) of the dividends in question,

– the aforementioned (direct or indirect) shareholder(s) also fulfil the aforementioned capital requirement,

does Article 56 EC then preclude legislation under which the Member State where the subsidiary is situated taxes the dividends in question when the Member State in question deems resident companies fulfilling the capital requirement in Directive 90/435, that is to say, in fiscal years 2005 and 2006 they own at least 20% of the share capital in the dividend-distributing company (15% in 2007 and 2008 and 10% thereafter), to be exempt from tax on such dividends?'

Procedure before the Court

65 On account of the connection between the two main actions, which both relate to the interpretation of Directive 90/435 and of the fundamental freedoms enshrined in the Treaties, the cases should be joined for the purposes of the judgment.

66 By letter of 2 March 2017, the Danish Government requested, in accordance with the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, that these cases be heard by the Grand Chamber of the Court. Furthermore, in the light of the similarities between these cases and Cases C-115/16, C-118/16, C-119/16 and C-299/16, which are the subject of today's judgment in *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16), the Danish Government also suggested that the Court decide, pursuant to Article 77 of its Rules of Procedure, to organise a joint hearing of all the cases. The Court granted the Danish Government's requests.

Consideration of the questions referred

67 The questions referred by the national court concern three topics. The first topic relates to the existence of a legal basis enabling a Member State to refuse, on account of the commission of an abuse of rights, to grant the exemption provided for in Article 5 of Directive 90/435 to a company that has distributed profits to a company of another Member State, of which it is the subsidiary. In so far as such a legal basis exists, the second topic addressed by the questions concerns the constituent elements of any abuse of rights and the conditions for proving it. Finally, the third topic of the questions, likewise in the event that it is possible for a Member State to refuse such a company the benefits of Directive 90/435, concerns the interpretation of the provisions of the FEU Treaty relating to freedom of establishment and the free movement of capital, in order to enable the referring court to establish whether the Danish legislation infringes those freedoms.

Questions 1 to 3 and 4(a) to (c) in the main actions

68 By Questions 1 to 3 and 4(a) to (c) in the main actions, the referring court asks, in essence, first, whether the combating of fraud or abuse, as permitted by Article 1(2) of Directive 90/435, requires there to be a domestic or agreement-based anti-abuse provision as referred to in that article. Second, it asks whether a convention drafted in accordance with the OECD Model Tax Convention and containing the concept of 'beneficial owner' may constitute an agreement-based anti-abuse provision as referred to in Article 1(2) of Directive 90/435. Third, it seeks to ascertain whether that concept of 'beneficial owner' is a concept of EU law and must be understood in the same sense as the concept of 'beneficial owner' in Article 1(1) of Directive 2003/49 and whether it is possible, when interpreting that provision, to take account of Article 10 of the OECD 1977 Model Tax Convention. It asks in particular whether a provision containing the concept of 'beneficial owner' may be regarded as constituting a legal basis enabling abuse of rights to be combated.

69 It is appropriate to begin by examining Question 1 in the main actions, by which the referring court asks whether, in order to combat an abuse of rights in the context of applying Directive 90/435, a Member State must have adopted a specific domestic provision transposing that directive or whether it may refer to domestic or agreement-based anti-abuse principles or provisions.

70 It is settled case-law that there is, in EU law, a general legal principle that EU law cannot be relied on for abusive or fraudulent ends (judgments of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 24 and the case-law cited; of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 68; of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 35; of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 27; and of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99).

71 That general principle of law must be complied with by individuals. Indeed, the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law (see, to that effect, judgments of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraph 38; of 22 November 2017, *Cussens and Others,* C-251/16, EU:C:2017:881, paragraph 27; and of 11 July 2018, *Commission v Belgium*, C-356/15, EU:C:2018:555, paragraph 99).

72 It thus 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 formally.

73 That is so, for example, where the completion of customs formalities does not fall within the context of normal commercial transactions but is purely formal and is designed solely to obtain wrongfully the grant of compensatory amounts (see, to that effect, judgments of 27 October 1981, *Schumacher and Others*, 250/80, EU:C:1981:246, paragraph 16, and of 3 March 1993, *General Milk Products*, C-8/92, EU:C:1993:82, paragraph 21) or export refunds (see, to that effect, judgment of 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 59).

74 Furthermore, the principle of prohibition of abuse of rights is applicable in fields as varied as the free movement of goods (judgment of 10 January 1985, *Association des Centres distributeurs Leclerc and Thouars Distribution*, 229/83, EU:C:1985:1, paragraph 27), freedom to provide services (judgment of 3 February 1993, *Veronica Omroep Organisatie*, C-148/91, EU:C:1993:45, paragraph 13), public service contracts (judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 62), freedom of establishment (judgment of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 24), company law (judgment of 23 March 2000, *Diamantis*, C-373/97, EU:C:2000:150, paragraph 33), social security (judgments of 2 May 1996, *Paletta*, C-206/94, EU:C:1996:182, paragraph 24; of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 48; and of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99), transport (judgment of 6 April 2006, *Agip Petroli*, C-456/04, EU:C:2006:241, paragraphs 19 to 25), social policy (judgment of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraphs 37 to 41), restrictive measures (judgment of 21 December 2011, *Afrasiabi and Others*, C-72/11, EU:C:2011:874, paragraph 62) and value added tax (VAT) (judgment of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 74).

75 As regards that last field, the Court has observed on a number of occasions that, whilst preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), the principle that abusive practices are prohibited nonetheless constitutes a general principle of EU law which applies irrespective of whether the rights and advantages that are abused have their basis in the Treaties, in a regulation or in a directive (see, to that effect, judgment of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraphs 30 and 31).

76 It follows that the general principle that abusive practices are prohibited must be relied on against a person where that person invokes certain rules of EU law providing for an advantage in a manner which is not consistent with the objectives of those rules. The Court has thus held that that principle may be relied on against a taxable person in order to refuse him, inter alia, the right to exemption from VAT, even in the absence of provisions of national law providing for such refusal (see, to that effect, judgments of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 62, and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 33).

77 Whilst Article 1(2) of Directive 90/435 provides that the directive is not to preclude application of the domestic or agreement-based provisions required for the prevention of fraud or abuse, that provision cannot be interpreted as excluding the application of the general principle of EU law, noted in paragraphs 70 to 72 above, that abusive practices are prohibited. The transactions alleged by SKAT to constitute an abuse of rights fall within the scope of EU law (see, to that effect, judgment of 22 December 2010, *Weald Leasing*, C-103/09, EU:C:2010:804, paragraph 42) and could prove incompatible with the objective pursued by that directive.

78 As is clear from its first and third recitals, Directive 90/435 has the aim of facilitating the grouping together of companies at EU level by introducing tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level.

79 To permit the setting up of financial arrangements whose sole aim is to benefit from the tax advantages resulting from the application of Directive 90/435 would not be consistent with such objectives and, on the contrary, would undermine the effective functioning of the internal market by distorting the conditions of competition. As the Advocate General has, in essence, observed in point 51 of her Opinion in Case C-116/16, that would also be the case even if the transactions at issue do not exclusively pursue such an aim, as the Court has held that the principle that abusive practices are prohibited applies, in tax matters, where the accrual of a tax advantage

constitutes the essential aim of the transactions at issue (see, to that effect, judgments of 21 February 2008, *Part Service*, C-425/06, EU:C:2008:108, paragraph 45, and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 53).

80 Furthermore, the right of taxpayers to take advantage of competition engaged in by the Member States on account of the lack of harmonisation of taxation of income cannot be raised against the application of the general principle that abusive practices are prohibited. In that regard, it should be noted that Directive 90/435 had the objective of harmonisation in respect of direct taxation by the introduction of tax rules which were neutral from the point of view of competition and that it did not seek to preclude Member States from taking the necessary measures to combat fraud or abuse.

81 Whilst 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 (see, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 50; of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 84; and of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 60), the fact remains that such a taxpayer cannot enjoy a right or advantage arising from EU law where the transaction at issue is purely artificial economically and is designed to circumvent the application of the legislation of the Member State concerned (see, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 51; of 7 November 2013, *K*, C-322/11, EU:C:2013:716, paragraph 61; and of 25 October 2017, *Polbud — Wykonawstwo*, C-106/16, EU:C:2017:804, paragraphs 61 to 63).

82 It is apparent from these factors that it is incumbent upon the national authorities and courts to refuse to grant entitlement to the rights provided for by Directive 90/435 where they are invoked for fraudulent or abusive ends.

83 Thus, in the light of the general principle of EU law that abusive practices are prohibited and of the need to ensure observance of that principle when EU law is implemented, the absence of domestic or agreement-based anti-abuse provisions does not affect the national authorities' obligation to refuse to grant entitlement to rights provided for by Directive 90/435 where they are invoked for fraudulent or abusive ends.

84 The defendants in the main proceedings rely on the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408) — which concerned entitlement to an exemption provided for by Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1) — in order to contend that, on account of Article 1(2) of Directive 90/435, entitlement to the advantages provided for by that directive can be refused by the Member State concerned only where the national legislation contains a distinct and specific legal basis in that regard.

85 However, that line of argument cannot be upheld.

86 It is true that the Court noted in paragraph 42 of the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408), that the principle of legal certainty precludes directives from being able by themselves to create obligations for individuals and therefore from being capable of being relied upon per se by the Member State as against individuals.

87 It also noted that such a finding is without prejudice to the requirement for all authorities of a Member State, in applying national law, to interpret it as far as possible in the light of the wording and purpose of directives in order to achieve the result pursued by those directives, and that those authorities are thus able to rely on a directive-compliant interpretation of national law against individuals (see, to that effect, judgment of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraph 45 and the case-law cited).

88 It was on the basis of those considerations that the Court invited the referring court to ascertain whether there was, in Danish law, a provision or general principle prohibiting abuse of rights or other provisions on tax evasion or tax avoidance which might be interpreted in accordance with the provision of Directive 90/434 under which, in essence, a Member State may refuse the right of deduction provided for by that directive where a transaction is essentially directed at such evasion or avoidance, and, if so, then to determine whether the conditions for the application of those national provisions were satisfied in the main proceedings (see, to that effect, judgment of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraphs 46 and 47).

89 Nevertheless, even if it were to transpire, in the main actions, that national law does not contain rules which may be interpreted in compliance with Article 1(2) of Directive 90/435, this — notwithstanding what the Court held in the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408) — could not be taken to mean that the national authorities and courts would be prevented from refusing to grant the advantage derived from the right of exemption provided for in Article 5 of the directive in the event of fraud or abuse of rights (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 54).

90 A refusal given to a taxpayer in such circumstances is not covered by the situation referred to in paragraph 86 above since it reflects the general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraphs 55 and 56 and the case-law cited).

91 Accordingly, since, as has been noted in paragraph 70 above, 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 (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 57 and the case-law cited).

92 In such circumstances, the Member States must, therefore, refuse to grant the advantage resulting from Directive 90/435, in accordance with the general principle that abusive practices are prohibited, under which EU law cannot cover abusive practices of economic operators (see, to that effect, judgment of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99 and the case-law cited).

93 Having regard to the finding made in paragraph 72 above, there is no need to answer Question 2 asked by the referring court in the main actions, relating in essence to whether a provision of a bilateral double taxation convention that refers to the concept of 'beneficial owner' can constitute a legal basis for combating fraudulent and abusive practices in the context of Directive 90/435.

94 Accordingly, there is also no need to answer Questions 3 and 4(a) to (c), relating to the interpretation of that concept of 'beneficial owner', as they have been asked only if Question 2 is answered in the affirmative.

95 In the light of all those matters, the answer to Question 1 is that the general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends must be interpreted as meaning that, where there is a fraudulent or abusive practice, the national authorities and courts are to refuse a taxpayer the exemption from withholding tax on profits distributed by a subsidiary to its parent company, provided for in Article 5 of Directive 90/435, even if there are no domestic or agreement-based provisions providing for such a refusal.

Questions 4(d) and (e), 5 and 8 in the main actions

96 By Questions 4(d) and (e) and 5 in the main actions, the referring court asks, in essence, what the constituent elements of an abuse of rights are and how those elements may be established. In that regard, it is unsure in particular whether a company may be regarded as having really received dividends from its subsidiary when it is bound by a contractual or legal obligation to pass those dividends on to a third party or when it is apparent from the factual circumstances that, 'in substance', that company, without being bound by such an obligation, does not have the right to 'use and enjoy the dividend' within the meaning of the commentaries on the OECD 1977 Model Tax Convention that were adopted in 2014. It is also unsure whether there can be an abuse of rights where the beneficial owner of the dividends, transferred by conduit companies, is ultimately a company whose seat is in a third State with which the Member State concerned has concluded a tax convention. By Question 8, the referring court further asks, in essence, whether a Member State which refuses to accord a company of another Member State the status of beneficial owner of the dividends is required to identify the company which it regards, as the case may be, as being the beneficial owner.

The constituent elements of an abuse of rights and the relevant evidence

97 As is clear from the Court's case-law, proof of an abusive practice requires, first, 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, second, 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 (judgments of 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraphs 52 and 53, and of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 58).

98 Examination of a set of facts is therefore needed to establish whether the constituent elements of an abusive practice are present, and in particular 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 (see, to that effect, judgments of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, paragraphs 47 to 49; of 13 March 2014, *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 33; and of 14 April 2016, *Cervati and Malvi*, C-131/14, EU:C:2016:255, paragraph 47).

99 It is not for the Court to assess the facts in the main proceedings. However, when giving a preliminary ruling, the Court may, if appropriate, 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 defendants in the main proceedings have had the opportunity to adduce evidence to the contrary.

100 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 is purely one of form and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law. That is so inter alia 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 which is their beneficial owner, payment of tax on the dividends is avoided.

101 Thus, it is an indication of the existence of an arrangement intended to obtain improper entitlement to the exemption provided for in Article 5 of Directive 90/435 that all or almost all of the aforesaid dividends are, very soon after their receipt, passed on by the company that has received them to entities which do not fulfil the conditions for the application of Directive 90/435, either because they are not established in any Member State, or because they are not incorporated in one of the forms covered by the directive, or because they are not subject to one of the taxes listed in Article 2(c) of the directive, or because they do not have the status of 'parent company' and do not meet the conditions laid down in Article 3 of the directive.

102 The conditions for the application of Directive 90/435 are not met by entities resident for tax purposes outside the European Union, such as, it seems, the companies at issue in Case C-117/16 or the investment funds at issue in Case C-116/16. In those cases, if the dividends had been paid directly by the Danish debtor company to the entities which, according to the Ministry of Taxation, were their beneficial owners, the Kingdom of Denmark could have levied withholding tax.

103 Likewise, the artificiality of an arrangement is capable of being borne out by the fact that the relevant group of companies is structured in such a way that the company which receives the dividends paid by the debtor company must itself pass those dividends on to a third company which does not fulfil the conditions for the application of Directive 90/435, with the consequence that it makes only an insignificant taxable profit when it acts as a conduit company in order to enable the flow of funds from the debtor company to the entity which is the beneficial owner of the sums paid.

104 The fact that a company acts as a conduit company may be established where its sole activity is the receipt of dividends and their transmission 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 has.

105 Indications of an artificial arrangement may also be constituted by the various contracts existing between the companies involved in the financial transactions at issue, giving rise to intragroup flows of funds, by the way in which the transactions are financed, by the valuation of the intermediary companies' equity and by the conduit companies' inability to have economic use of the dividends received. In this connection, such indications are capable of being constituted not only by a contractual or legal obligation of the parent company receiving the dividends to pass them on to a third party but also by the fact that, 'in substance', as the referring court states, that company, without being bound by such a contractual or legal obligation, does not have the right to use and enjoy those dividends.

106 Moreover, such indications may be reinforced by the simultaneity or closeness in time of, on the one hand, the entry into force of major new tax legislation, such as the Danish legislation at issue in the main actions or the United States legislation referred to in paragraph 51 above, and, on the other hand, the setting up of complex financial transactions and the grant of intragroup loans.

107 The referring court is also unsure, in essence, whether there can be an abuse of rights where the beneficial owner of dividends transferred by conduit companies is ultimately a company whose seat is in a third State with which the source Member State has concluded a tax convention under which no tax would have been withheld on the dividends if they had been paid directly to the company having its seat in that third State.

108 In that regard, when examining the structure of the group it is immaterial that some of the beneficial owners of the dividends paid by the conduit company are resident for tax purposes in a third State which has concluded a double taxation convention with the source Member State. The existence of such a convention cannot in itself rule out an abuse of rights. Thus, a convention of that kind cannot call into question that there is an abuse of rights where its existence is duly established on the basis of a set of facts showing that economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting improperly from the exemption from withholding tax, provided for in Article 5 of Directive 90/435.

109 It should be added that, whilst taxation must correspond to economic reality, the existence of a double taxation convention is not, as such, capable of establishing that a payment was really made to recipients resident in the third State with which that convention has been concluded. If the company owing the dividends wishes to benefit from the advantages of such a convention, it is open to it to pay the dividends directly to the entities that are resident for tax purposes in a State which has concluded a double taxation convention with the source State.

110 That said, it remains possible, in a situation where the dividends would have been exempt had they been paid directly to the company having its seat in a third State, that the aim of the group's structure is unconnected with any abuse of rights. In such a case, the group cannot be reproached for having chosen such a structure rather than direct payment of the dividends to that company.

111 Furthermore, where the beneficial owner of dividends paid is resident for tax purposes in a third State, refusal of the exemption provided for in Article 5 of Directive 90/435 is not in any way subject to fraud or an abuse of rights being found.

112 Indeed, Directive 90/435, as is apparent in particular from its third recital, seeks to eliminate, by the introduction of a common tax system, any disadvantage to cooperation between companies of different Member States as compared with cooperation between companies of the same Member State and thereby to facilitate the grouping together of companies at EU level (judgment of 8 March 2017, *Wereldhave Belgium and Others*, C-448/15, EU:C:2017:180, paragraph 25 and the case-law cited). As has been stated in paragraph 78 above, the directive is thus designed to ensure the neutrality, from the tax point of view, of the distribution of profits by a subsidiary established in one Member State to its parent company established in another Member State since it is clear from Article 1 that the directive applies only to distributions received by companies of one Member State from their subsidiaries with a seat in other Member States (see, to that effect, order of 4 June 2009, *KBC Bank and Beleggen, Risicokapitaal, Beheer*, C-439/07 and C-499/07, EU:C:2009:339, paragraph 62 and the case-law cited).

113 The mechanisms of Directive 90/435, in particular Article 5, are therefore intended for situations in which, if they were not applied, the exercise by the Member States of their powers of taxation might lead to the profits distributed by the subsidiary to its parent company being subject to double taxation (judgment of 8 March 2017, *Wereldhave Belgium and Others*, C-448/15, EU:C:2017:180, paragraph 39). Such mechanisms are not, on the other hand, intended to apply when the beneficial owner of the dividends is a company resident for tax

purposes outside the European Union since, in such a case, exemption of those dividends from withholding tax in the Member State from which they are paid could well result in them not actually being taxed in the European Union.

114 In the light of all those matters, the answer to Question 4(d) and (e) in the main actions is that proof of an abusive practice requires, first, 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, second, 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. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans.

The burden of proving the abuse of rights

115 Directive 90/435 does not contain provisions relating to the burden of proving that there is an abuse of rights.

116 However, as the Danish and German Governments contend, it is in principle for the companies which seek entitlement to the exemption from withholding tax on dividends that is provided for in Article 5 of Directive 90/435 to establish that they fulfil the objective conditions imposed by the directive. Indeed, there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need for a concrete assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied (judgment of 28 February 2013, *Petersen and Petersen*, C-544/11, EU:C:2013:124, paragraph 51 and the case-law cited).

117 On the other hand, where a tax authority of the source Member State seeks, on a ground relating to the existence of an abusive practice, to refuse to grant the exemption provided for in Article 5 of Directive 90/435 to a company that has paid dividends to a company established in another Member State, it has the task of establishing the existence of elements constituting such an abusive practice while taking account of all the relevant factors, in particular the fact that the company to which the dividends have been paid is not their beneficial owner.

118 Such an authority has the task not of identifying the beneficial owners of those dividends but of establishing that the supposed beneficial owner is merely a conduit company through which an abuse of rights has been committed. Indeed, identification of that kind may prove impossible, in particular because the potential beneficial owners are unknown. Given the complexity of certain financial arrangements and the possibility that the intermediary companies involved in the arrangements are established outside the European Union, the national tax authority does not necessarily have information enabling it to identify those owners. That authority cannot be required to furnish evidence that would be impossible for it to provide.

119 Furthermore, even if the potential beneficial owners are known, it is not necessarily established which of them are or will be the actual beneficial owners. Thus, in this instance, in Case C-117/16 the referring court states that, while the parent company of Y Cyprus is Y Bermuda, whose seat is in Bermuda, the parent company of Y Bermuda is Y USA, established in the United States. If the referring court were to hold that Y Cyprus is not the beneficial owner of the dividends, the tax authorities and courts of the dividends' source Member State would, in all probability, be unable to determine which of those two parent companies is or will be the beneficial owner of those dividends. In particular, the allocation of those dividends may have been decided upon after the tax authority's findings relating to the conduit company.

120 Consequently, the answer to Question 8 in the main actions is that, in order to refuse to accord a company the status of beneficial owner of dividends, or to establish the existence of an abuse of rights, a national authority is not required to identify the entity or entities which it regards as being the beneficial owner(s) of those dividends.

Questions 6, 7, 9 and 10 in the main actions

121 By Questions 6, 7, 9 and 10 in the main actions, the referring court seeks, in essence, to ascertain, should the system, laid down in Article 5(1) of Directive 90/435, of exemption from withholding tax on dividends paid by a company resident in a Member State to a company resident in another Member State not be applicable, whether Articles 49 and 54 TFEU or Article 63 TFEU must be interpreted as precluding various aspects of the legislation

of the first Member State, such as that at issue in the main proceedings, relating to the taxation of those dividends.

122 It must be stated at the outset that these questions are based on the premiss that the inapplicability of that system of exemption arises from the finding that there is fraud or abuse, within the meaning of Article 1(2) of Directive 90/435. However, in such a situation, a company resident in a Member State cannot, in the light of the case-law recalled in paragraph 70 above, claim the benefit of the freedoms enshrined in the FEU Treaty in order to call into question the national legislation governing the taxation of dividends paid to a company resident in another Member State.

123 Consequently, the answer to Questions 6, 7, 9 and 10 in the main actions is that, in a situation where the system, laid down by Directive 90/435, of exemption from withholding tax on dividends paid by a company resident in a Member State to a company resident in another Member State is not applicable because there is found to be fraud or abuse, within the meaning of Article 1(2) of that directive, application of the freedoms enshrined in the FEU Treaty cannot be relied on in order to call into question the legislation of the first Member State governing the taxation of those dividends.

Costs

124 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Cases C-116/16 and C-117/16 are joined for the purposes of the judgment.**

2. **The general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends must be interpreted as meaning that, where there is a fraudulent or abusive practice, the national authorities and courts are to refuse a taxpayer the exemption from withholding tax on profits distributed by a subsidiary to its parent company, provided for in Article 5 of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, as amended by Council Directive 2003/123/EC of 22 December 2003, even if there are no domestic or agreement-based provisions providing for such a refusal.**

3. **Proof of an abusive practice requires, first, 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, second, 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. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans.**

4. **In order to refuse to accord a company the status of beneficial owner of dividends, or to establish the existence of an abuse of rights, a national authority is not required to identify the entity or entities which it regards as being the beneficial owner(s) of those dividends.**

5. **In a situation where the system, laid down by Directive 90/435, as amended by Directive 2003/123, of exemption from withholding tax on dividends paid by a company resident in a Member State to a company resident in another Member State is not applicable because there is found to be fraud or abuse, within the meaning of Article 1(2) of that directive, application of the freedoms enshrined in the FEU Treaty cannot be relied on in order to call into question the legislation of the first Member State governing the taxation of those dividends.**

[Signatures]

* Language of the case: Danish.

Bundesgericht
Tribunal fédéral
Tribunale federale
Tribunal federal

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Federal Supreme
Court Tribunal fédéral
Tribunale federale
Tribunal federal

9C_635/2023

Judgment of 3 October 2024

III. Public Law Division

Composition Federal Judge Parrino, President, Federal Judge Stadelmann, Federal Judge Moser-Szeless, Federal Judge Beusch, Federal Judge Scherrer Reber, Court Clerk Seiler.

Parties to the proceedings
A._____,
represented by Dr. Thomas Meister and/or Maurus Winzap, Rechtsanwälte,
Appellant,

against

Federal Tax Administration, Department of Direct Federal Tax, Withholding Tax, Stamp Duties, Eigerstrasse 65, 3003 Bern.

subject withholding tax, tax period 2015,

Appeal against the judgment of the Federal Administrative Court of 4 September 2023 (A-2121/2020).

Facts:

A.
The A._____, based in Denmark, is a so-called "special credit institution" in the legal form of a Danish association, which was founded in the year ttt. It is subject to profit tax and pursues the purpose of granting its customers - (...) - financing loans that are as cost-effective as possible (...).

A.A. In 2013 and 2014, A._____ acquired five tranches of two German government bonds on the following terms (amounts in CHF): German government bond, bearing interest at 2%, maturity 2005 - 9 November 2014 (ISIN: uuu; hereinafter: bond 1)

Acquisition	Value date	Nominal	Course	Market value	Marchzins	Purchase

price 15.04.2013 18.04.2013 75'000'000.00 103.470 77'602'500.00 662'500.00 78'265'000.00
16.04.2013 18.04.2013 30'000'000.00 103.510 31'053'000.00 265'000.00 31'318'000.00

German government bond, bearing interest at 3.75 %, maturity 2001 - 10 June 2015 (ISIN: vvv; hereinafter: Bond 2)

Acquisition Value Nominal Price Market Value March Interest Purchase Price 11.06.2013
14.06.2013 40'000'000.00 107.680 43'072'000.00 16'666.67 43'088'666.67 22.05.2014
27.05.2014 75'000'000.00 104.015 78'011'250.00 2'710'937.50 80'722'187.50 03.06.2014
10.06.2014 40'000'000.00 103.940 41'576'000.00 0.00

Together with each bond purchase, the A._____ entered into a so-called "cross-currency rate swap" (hereinafter referred to as the swap(s)) with an investment bank (Bank B._____ [hereinafter referred to as B._____] and Bank C._____ [hereinafter referred to as the C._____]), the maturity of which coincided exactly with the remaining maturity of the German government bond. Under the swaps, the A._____ received from the Investment Bank an amount in CHF corresponding to the nominal value of the tranche of the German government bond in Swiss francs ("Notional") plus a mark-up payment equal to the difference between the nominal value of the tranche purchased and its market value plus accrued interest. The A._____ had to pay interest on the amount in Swiss francs at the same rate as it received on the corresponding federal bond. In return, at the beginning of the term of the swap, the A._____ paid the Investment Bank the equivalent of the nominal value of the relevant tranche of bonds in U.S. dollars (USD) and received the USD Libor variable interest rate plus a "spread" on that amount. Presented in tabular form, the swaps were therefore subject to the following conditions (Art. 105 para. 2 BGG): Cross-currency rate swaps (CHF exchanged for USD; CHF pays interest at [fixed] 2 %, USD pays interest at the [variable] USD-LIBOR interest rate plus spread of 0.04 %) :

Start End Counterparty "Notional" (CHF) Equivalent in USD Markup (CHF) 15.04.2013
09.11.2014 C._____ 75'000'000.00 80'601'827.00 3'265'000.00 16.04.2013 09.11.2014
C._____ 30'000'000.00 32'222'000.00 1'318'000.00

Cross-Currency Rate Swaps (CHF exchanged for USD; CHF pays interest at [fixed] 3.75 %, USD pays interest at the [variable] USD-LIBOR interest rate plus spread of 0.03 %) :

Start	End	Counterparty	"Notional" (CHF)	Equivalent in USD	Markup (CHF)
11.06.2013	10.06.2015	C._____	40'000'000.00	42'928'000.00	3'088'666.67
22.05.2014	10.06.2015	B._____	75'000'000.00	83'939'563.51	5'722'187.50
03.06.2014	10.06.2015	B._____	40'000'000.00	44'518'642.18	1'576'000.00

With regard to the first tranche of Bond 1, the following cash flows and withholding tax deductions resulted for the A._____ from these conditions, which are reproduced here in the form of an example (Art. 105 para. 2 BGG):

Date	Value date	Type/Source	1 Inflows / Outflows CHF	USD	VST
15.04.2013	18.04.2013	Purchase price of Bond 1, Tranche	-78'265'000.00		
		Swap Capital	75'000'000.00	-80'601'827.00	
Swap markup	18.07.2013	18.07.2013	3'265'000.00		
		Swap interest rate		64'607.07	
18.10.2013	18.10.2013	Swap interest rate		63'071.83	525'000.00
09.11.2013	11.11.2013	Interest Bond 1, Tranche 1	975'000.00		
09.11.2013	11.11.2013	Swap interest rate	-1'500'000.00		
18.01.2014	21.01.2014	Swap interest rate		60'842.62	

18.04.2014	22.04.2014 Swap interest rate		56'355.45	
18.07.2014	18.07.2014 Swap interest rate		52'173.90	
18.10.2014	20.10.2014 Swap interest rate		57'581.95	
09.11.2014	10.11.2014 Capital Repayment Bond 1, Tranche 1	75'000'000.00		
09.11.2014	10.11.2014 Interest Bond 1, Tranche 1	975'000.00		525'000.00
09.11.2014	10.11.2014 Swap Capital	-75'000'000.00	80'601'827.00	
09.11.2014	10.11.2014 Swap interest rate	-1'500'000.00	8'542.65	
	Total	-1'050'000.00	363'175.47	1'050.000.00

A.b. On 31 August 2015, the A._____ submitted a (first) application to the Federal Tax Administration (FTA) on Form 89 for a full refund of the withholding tax that had been deducted in 2015 in the amount of CHF 2,034,375 from the interest payments to the A._____ from Bond 2 (refund application no. www). By letter of 17 September 2015, the FTA requested various information and documents from the A._____ in relation to this refund application. It asked for a detailed list of all purchases and sales of the federal bonds (a), the annual accounts for the years 2013 to 2015 (b), a statement on the economic reasons that led to the purchase of the federal bonds (c), information as to whether hedging transactions had been carried out in this context (d), whether the federal bonds had been the subject of "securities lending" and "borrowing transactions" (e) and whether the interest had been passed on or whether intended to pass them on (f). On 20 October 2015, the A._____ sent the FTA a detailed list of all three purchases totalling CHF 155 million (a) and excerpts from the 2013 and 2014 annual financial statements (b). In addition, it explained that the economic reason for purchasing the German government bonds was to invest in a bond with a high rating and a good yield as part of the investment strategy (c). Three "asset swaps" had been concluded in order to "convert the fixed interest rate in Swiss francs into a variable interest rate in USD", which had begun to run on the day of the purchase of the government bonds and ended on the day of repayment of the government bonds (d). The Bunds were not part of securities lending and borrowing transactions (e) and the interest was not passed on, nor was it intended to be passed on (f).

A.c. In a letter dated 4 December 2015, the FTA requested a copy of all contracts relating to the asset swaps, including related transactions (a1), information on whether any other contractual agreements had been concluded with regard to the Bunds (b1) and more detailed explanations of the economic reasons for the purchase of the Bunds (c1). It then insisted on a disclosure of the sellers of the government bonds (d1) and a compilation of the overall success of the investment, including the calculation of profits (f1). Finally, it inquired whether the government bonds were purchased via the general ledger of the stock exchange or over-the-counter (e1).

A.d. On 6 January 2016, the A._____ submitted three further applications to the FTA for a full refund of withholding tax by means of Form 89:

- Refund application no. xxx in the amount of Fr. 921,984 for withholding tax on the interest payments received in 2013 from Bond 1 (later corrected to Fr. 735,000 by letter of 20 July 2016, i.e. 35% of the gross interest payments of Fr. 2,100,000; see below A.g);

- Refund application no. yyy in the amount of Fr. 1,509,375 for withholding tax on the gross interest payments of Fr. 4,312,500 received in 2014 from Bond 2; and
- Refund application no. zzz in the amount of Fr. 735,000 for withholding tax on the gross interest payments of Fr. 2,100,000 received in 2014 from Bond 1.

The total amount of withholding tax reclaimed with the four applications thus amounted to Fr. 5,013,750 (after the correction of 20 July 2016; previously: Fr. 5,200,734).

A.e. By letter of 18 January 2016, the A._____ sent the FTA copies of the swap contracts and a detailed list of all related movements (a1). In addition, it informed the FTA that there had been no further contractual agreements

regarding the federal bonds (b1) and that it was part of its business to invest the freely available capital at the best interest rate with the lowest risk (c1). All three purchases of the German government bonds were made via the D._____ (d1), three of which were over-the-counter purchases (e1). The detailed profit calculation of the A._____ showed that it had incurred a total loss of CHF 261,854.17 on the government bonds, but this was offset by a profit of the same amount from the swaps. The exchanged USD resulted in a profit of USD 597,854.65 (f1).

A.f. In a letter dated 24 June 2016, the FTA again requested information from the A._____ on all four applications submitted. It asked for an exact calculation model for the swaps including all data used, a detailed explanation of the fixed swap interest rate of 3.75% in CHF and the mark-up payments paid by the counterparty to the swaps, and a step-by-step explanation of the investment process, including a timeline and the decision-making process. In addition, the FTA demanded that the criteria for selecting the counterparty (for the German government bonds and swaps) be specified, information on how the A._____ had become aware of the investment opportunities (actively sought them out or received unsolicited offers), and the disclosure of the counterparties of the D._____ (for the purchase of the German government bonds) and B._____ and C._____ (for the conclusion of the swaps). In this regard, the FTA pointed out that, from its point of view, these counterparties acted as intermediaries (brokers) and therefore insisted on full disclosure of the entire transaction chain.

S.A. In a letter dated 20 July 2016, the A._____ informed the FTA as follows: It was granting loans to (...). It finances its lending by borrowing money on the money and capital markets, including financial instruments. Their surplus financing is subject to their investment guidelines, which are very restrictive and only allow investments in bonds (with a minimum credit rating of AA-) or "parking in a bank account". Derivatives can only be concluded as hedging transactions with counterparties that have a minimum rating of A-. Risks from foreign currencies (all currencies except Danish kroner [DKK] and euro) are limited to a maximum of DKK 100 million. She had too much liquidity in USD and was therefore looking for an investment opportunity that was allowed according to her investment guidelines. Therefore, it decided to finance in CHF and commissioned the broker E._____ whom it had selected on the basis of a due diligence review to purchase a package of government bonds and swaps ("the purchase of the bonds and the swap transactions were traded as a 'package' with the investment broker". In order to pay for the bonds, it had to exchange an amount corresponding to the purchase price of the federal bonds (plus interest) in USD into CHF, which created a currency risk in CHF. The swaps would have served to eliminate this currency risk in CHF. "The cash flows exchanged in each cross currency swap transaction meant that [A._____] paid, to the swap counterparty, a USD amount corresponding to the CHF purchase price of the bonds together with a fixed interest rate exactly matching the fixed interest rate on the bonds. [A._____] received the CHF notional amount corresponding to the CHF purchase price of the bonds together with a floating interest rate tied to USD LIBOR"; "the CHF fixed swap rate at 3.75 % corresponds to the fixed interest rate of 3.75 % on the bond"). It (the A._____) had to pass on the full amount of interest received in CHF (from the bonds) to the swap counterparty, from which it suffered a loss equal to the amount of withholding tax ("in accordance with the terms of the swap confirmations [A._____] had to pay the full CHF coupon amounts to the swap counterparties [...] and thereby suffered an aggregate loss of CHF 5'013'750.- corresponding to the withholding tax [...] in exchange for the CHF coupon amounts [A._____] received USD amounts from the swap counterparties"). The disclosure of the entire transaction chain was not possible for it (the A._____) because it had only E._____Kontakt with the broker and not with D._____. However, the latter is noted as a counterparty on the "trade tickets". In addition, the A._____ corrected the refund application no. xxx (concerning interest from bond 1 in 2013) from Fr. 921,984 to Fr. 735,000 (see A.d above).

A.h. After the FTA had informed the A._____ in a letter of 19 October 2016 that it intended to reject its four applications totalling CHF 5,013,750 on the grounds of lack of right of use, abuse of the agreement and violation of the duty to cooperate, a meeting with the representation of the A._____ took place at the FTA on 12 December 2016. In addition to the factual elements already presented, the A._____ asserted through its representation that a risk diversification from USD debtors to CHF debtors (Confederation) had been sought. The transactions made economic sense. The swaps had been concluded exclusively to hedge the exchange rate risk and not to finance them. Then all risks remained with the A._____. The swaps at issue were not comparable to "total return swaps" or futures. No short-term transactions or transactions in the immediate vicinity of interest payment dates had been made. By letter of 15 December 2016, the A._____ requested that its applications for a full refund of withholding tax be granted and that interest be paid on the amount of the refund at 5% from the date of the FTA's decision.

A.i. In a decision of 5 March 2020, the FTA rejected the four applications for a refund of withholding tax in their entirety. It justified the rejection by stating that A._____ was not to be regarded as a beneficial owner of the interest from the

federal bonds. It did not bear any significant bond-specific risks. The purchase of the German government bonds and the simultaneous conclusion of the swaps were an indivisible overall transaction; one transaction would not have come about without the other. Thus, there was a mutual dependence between the receipt of the income from the federal bonds and the obligation to pass it on via the swaps. In addition, the A._____ had violated its duty to cooperate.

B.
On 20 April 2020, the A._____ lodged an appeal against this decision with the Federal Administrative Court and applied for a full refund of the withholding tax. In the course of the proceedings before the Federal Administrative Court, several exchanges of correspondence took place. In its reply, the A._____ filed a contingent application for a reduction of the refund by the withholding tax attributable to the accrued interest, i.e. from a total of CHF 5,013,750 by CHF 1,279,286 to CHF 3,734,464.

In a judgment of 4 September 2023, the Federal Administrative Court dismissed the appeal in its entirety. It justified the rejection on the grounds that the A._____ was not entitled to use the interest from the federal bonds. Consequently, the Federal Administrative Court did not examine in more detail whether the A._____ was accused of an abuse of the agreement. It also left open whether the A._____ had violated its duty to cooperate and what consequences would follow from such a violation.

C.
In an appeal in public law matters of 9 October 2023, the A._____ requested that the judgment of the Federal Administrative Court of 4 September 2023 be set aside and that the withholding tax be refunded in accordance with the refund requests nos. www, no. xxx, no. yyy and no. zzz in the total amount of Fr. 5,013,750.

The FTA requests that the appeal be dismissed. The Federal Administrative Court refers to its ruling.
The A._____ comments again in a letter dated 14 December 2023.

Considerations:

I. Procedural aspects

1.
The challenge is a final decision of the Federal Administrative Court in a withholding tax dispute, i.e. in a matter of public law (Art. 82 lit. a, Art. 86 para. 1 lit. a and Art. 90 BGG). The complaint in matters of public law is admissible, especially since there are no grounds for exclusion under Art.
83 BGG. The complaint filed in due time and in due form (Art. 42 and Art. 100 para. 1 BGG) of the complainant, who is entitled under Art. 89 para. 1 BGG, must be upheld.

2.

2.1. The Federal Supreme Court bases its judgment on the facts established by the lower court (Art. 105 para. 1 BGG). A correction or supplement of the findings of the lower court is possible ex officio (Art. 105 para. 2 BGG) or upon complaint (Art. 97 para. 1 BGG). However, the Federal Supreme Court only deviates from the factual basis of the judgment of the lower court if these are manifestly incorrect or are based on a violation of rights within the meaning of Art. 95 BGG and the remedy of the defect can also be decisive for the outcome of the proceedings (Art. 97 para. 1 BGG; **BGE 142 I 135** E.

1.6). "Manifestly incorrect" means "arbitrary" **(BGE 140 III 115** E. 2). A corresponding complaint must be sufficiently substantiated (Art. 106 para. 2 BGG; cf. **BGE 147 I 73** at 2.2).

2.2. The complaint in public law matters may allege, inter alia, a violation of rights under Art. 95 et seq. BGG. The Federal Supreme Court applies the law ex officio (Art. 106 para. 1 BGG), but only examines the arguments put forward if further legal deficiencies are not downright obvious **(BGE 142 I 135** at 1.5), taking into account the general obligation to complain and state reasons (Art. 42 paras. 1 and 2 BGG). With regard to the violation of constitutional rights, a qualified duty to complain and substantiate applies under Art. 106 para. 2 BGG **(BGE 147 I 73** at 2.1; **143 II 283** at 1.2.2; **139 I 229** E. 2.2; **138 I 274** at 1.6).

II. Subject matter of the dispute

3.
The present dispute concerns the refund of withholding tax levied by the Confederation, inter alia, on interest on bonds issued by residents (Art. 4 para. 1 lit. a of the Federal Act of
13. 1965 on withholding tax [VStG; SR 642.21]).

3.1. In the case of foreign recipients, withholding tax generally leads to a final tax burden levied at source (Art. 22 para. 1 and Art. 24 para. 2 VStG). However, persons resident abroad can claim relief insofar as international law - namely a double taxation agreement (DTA) - gives them the right to do so (cf. on the analogous situation in the case of

Dividends **BGE 141 II 447** E. 2.2 with references; Judgments 2C_880/2018 of 19 May 2020 at 2.1; 2C_209/2017 of 16 December 2019 at 3.1, not published in: **BGE 146 I 105).**

3.2 The complainant submits that the Convention of 23 November 1973 between the Swiss Confederation and the Kingdom of Denmark for the Avoidance of Double Taxation in the Field of Taxes on Income and Capital (DBA CH-DK; SR 0.672.931.41). Pursuant to Art. 11 para. 1 DBA CH-DK, interest originating from a Contracting State (source State) and the beneficial owner of which is a person resident in the other Contracting State (State of residence) may only be taxed in the State of residence. Under these conditions under treaty law, the levying of withholding tax must therefore be reversed at least under Art. 26 DBA CH-DK by refunding the tax, unless the conditions for relief at source have already been met (see, for example, Art. 1 para. 2 of the Ordinance of 22 December 2004 on the tax relief of Swiss dividends from significant shareholdings of foreign companies [SR 672.203]).

3.3. The lower court and the FTA deny that the complainant is entitled to relief from withholding tax. They do not doubt that the complainant is a resident of Denmark. However, it is disputed whether the complainant was the beneficial owner of the interest from the federal bonds. This question must be clarified by way of interpretation of the DBA CH-DK. If it is to be answered in the affirmative - contrary to the lower court - it must also be answered whether the refund is to be refused on the grounds of abuse of the agreement and what consequences the violation of the duty to cooperate, which the FTA accuses the complainant of, entails.

III. Claim to relief under treaty law

4.

4.1. The interpretation of DTAs and other international treaties is governed by the Vienna Convention on the Law of Treaties of 23 May 1969 (PRC; SR 0.111), in particular the rules of interpretation of Art. 31 et seq. of the VRK **(BGE 149 II 400** at 7.1; **147 V 402** at 9.2.1; **147 V 387** at 3.3). At least to the extent relevant in the present case, the principles of the Vienna Convention on the Interpretation of Treaties constitute codified customary international law **(BGE 149 II 400** at 7.1; **147 V 387** E. 3.3; **146 II 150** E. 5.3.1; Opinion of the International Court of Justice [ICJ] of 9 July 2004, *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé,* C.I.J. Recueil 2004 p. 174 § 94).

4.2. Elements of the general rule of interpretation of Article 31(1) of the VRK are the wording of the contractual provision in accordance with its ordinary meaning, the object and purpose of the contract, good faith and context. According to case law, these four elements are of equal rank **(BGE 149 II 400** at 7.2; **147 V 387** at 3.3). The starting point for interpretation is the wording of the contractual provision. The text of the contractual provision is therefore to be interpreted in itself according to its ordinary meaning. This ordinary meaning must be determined in accordance with its context, the aim and purpose of the contract and in good faith **(BGE 149 II 400** at 7.2; **147 V 387** E. 3.3 with further references). The aim and purpose of the contract is what the contract was intended to achieve (**BGE 149 II 400** at 7.2; **147 V 387** E. 3.3; **147 II 13** E. 3.3; **146 II 150** E. 5.3.2). The rules of interpretation under international law are based on the intention of the contracting parties only to the extent that this is reflected in the agreement itself. Admittedly, according to Art. 31 sec. 4 VRK, a clearly manifested, consensual intention of the parties to use an expression not in the usual but in a special sense remains reserved **(BGE 149 II 400** at 7.2; **147 V 387** E. 3.3 with further references). According to Art. 32 of the CRC, the preparatory work and the circumstances of the conclusion of the contract are then supplementary means of interpretation and can - only, but at least - be used to confirm the meaning determined under Art. 31 of the CRC or to determine it if the interpretation under Art. 31 of the CRC leaves the meaning ambiguous or obscure (Art. 32 lit. a CRC) or leads to a manifestly absurd or unreasonable result (Art. 32 lit. b CRC; cf. **BGE 149 II 400** at 7.2; **147 V 387** E. 3.3; **147 II 13** E. 3.3; **146 II 150** E. 5.3.2). In this case, among several possible interpretations, the provision to be interpreted must be given the meaning which ensures its effective application and does not lead to a result contrary to the aim and purpose of the commitments entered into ("effet utile"; cf. **BGE 149 II 400** at 7.2; **147 V 387** E. 3.3; **147 II 13** E. 3.3; **146 II 150** E. 5.3.2).

4.3. According to established practice, the Federal Supreme Court takes into account the Model Tax Convention of the OECD (OECD-MA) and the associated Commentary (OECD-MK) when interpreting DTAs insofar as they are based on this standard (cf. **BGE 149 II 400** at 7.3; **144 II 130** at 8.2.3; **143 II 257** at 6.5; **141 II 447** at 4.4.3). Since DTAs are generally to be interpreted statically, the Federal Supreme Court recently clarified its practice to the effect that, in principle, only the version of the OECD-MK that was available to the contracting parties at the time the DTA was concluded can express the ordinary or, at most, a special meaning of a DTA provision under Article 31 (1) and (4) of the CPR. An exception to this rule may be considered if open terms are used in a DTA, the meaning of which will be recognisably subject to change over time for the parties. However, such a dynamic interpretation of an international treaty carries the risk that the application of the law will depart from the

consensus of the contracting states and undermine the will of the contracting states. Therefore, in any case, it can only be assumed with the greatest restraint that the contracting states wanted to see a certain term interpreted dynamically. If the requirements for a dynamic interpretation are not met, later versions of the OECD MC can still be consulted as interpretative aids. However, they do not have the status of an important means of interpretation within the meaning of Article 31 of the PRC and can - similar to other legal literature or court judgments (cf. in this regard Article 38 (1) (d) of the Statute of the International Court of Justice of 26 June 1945 [ICJ Statute; SR 0.193.501]) - can only gain persuasiveness from the validity of their argumentation (cf. **BGE 149 II 400** at 7.4, 9.4.3 and 9.5, with numerous references; see also MICHAEL LANG, Swiss Federal Supreme Court on the Significance of the OECD Commentary, SWI 2023 p. 423 et seq., who points out that the OECD regularly does not substantiate its positions in the OECD Commentary, which underscores the value of later versions of the OECD Commentary as an aid to interpretation; DANIEL BLUM, The Significance of the OECD Model Commentary for the Interpretation of Double Taxation Agreements, IStR 2023 p. 929; OESTERHELT/OPEL, Case Law in Tax Law 2023/4, Forum für Steuerrecht [FStR] 2023 p. 364).

5.
In its case law, the Federal Supreme Court has already dealt with the concept of beneficial owner (or "bénéficiaire effectif" and "beneficial owner") on several occasions.

5.1. In **BGE 141 II 447**, the Federal Supreme Court considered, with reference to Art. 10 DBA CH-DK, that a beneficiary of a dividend is a person who is able to use the dividend in full and enjoys it in full. If the recipient is restricted in this use by a contractual or legal obligation because he has to pass on the dividend to another person by contract or law, he is not the beneficiary. The larger the share of the dividend that the recipient resident in the DTA country must pass on, the more likely it is that he or she will be denied the right to use it. The right of use can already be lost if the recipient does not have to pass on the unrestricted entirety of the dividend, but is only allowed to keep a small percentage of it, which is to be classified as remuneration or remuneration for the forwarding **(BGE 141 II 447** at 5.2.4).

5.2. Subsequently, in a judgment concerning Article 10(2)(b) of the Agreement of 8 December 1977 between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation in the Field of Taxes on Income (DBA CH-GB; SR 0.672.936.712) to the effect that only legal - i.e. contractual or statutory - forwarding obligations can impair the right of use under treaty law. Purely factual or economic constraints on the basis of which the recipient passes on a dividend in whole or to a large extent ("de facto" or "actual forwarding obligations"; cf. **BGE 141 II 447** at 5.2.2, 6.3 and 6.4.2; cf. also NORDIN/SCHUDEL, Financial Products and Withholding Tax Refund - Selected Aspects, FStR 2016 p. 50 et seq.), do not dispense with the right of use. However, taking into account the current version of the OECD-MK on Art. 10 OECD-MA (i.e. the version as amended on 15 July 2014), the Federal Supreme Court held that a contractual or statutory obligation to pass on the data can be inferred not only from contractual documents, but also from the circumstances - including economic and factual constraints - which is why there is no "factual difference" between **BGE 141 II 447** and the current version of the OECD-MK (judgment 2C_880/2018 of 19 May 2020 at 4.4). The Federal Supreme Court justified the consideration of the current version of the OECD-MK by stating that the term "bénéficiaire effectif" or "beneficial owner" was new at the time of the conclusion of the DBA CH-GB at the end of the 1970s and that it was already recognisable to the contracting states at that time that its significance would be subject to change in the following years, which would be reflected in particular in the work of the OECD. From this, the Federal Supreme Court concluded that a dynamic interpretation was justified (see judgment 2C_880/2018 of 19 May 2020 at 4.1).

6.
For the interpretation of Art. 11 sec. 1 DBA CH-DK, it must first be clarified which language versions of this provision are relevant (Art. 33 VRK).

6.1. In principle, only German and Danish are authentic treaty languages of the DBA CH-DK (cf. closing formula of the DBA CH-DK). However, the Contracting States did not include the term 'beneficial owner' (or 'retmæssige ejer') in the text of the Treaty until the amendment of 21 August 2009 (see Article I(1) and Article II(1) and (3) of the Protocol of 21 August 2009 [AS 2010 5939]; in force since 22 November 2010; but see **BGE 141 II 447** at 5.1, according to which the "effective right of use" had already been an unwritten prerequisite for claiming treaty benefits [with regard to dividends] before this amendment). The amendment protocol in question is also written in English. The English version is not only equally authentic, but also takes precedence over the German and Danish versions in the event of a conflict (see the final formula of the minutes of 21 August 2009; Art. 33 para. 1 VRK). Accordingly, it is also necessary to consult interpretative aids that provide information on the meaning of the English term "beneficial owner" and the phrase "beneficially owned" (cf. Art. 11 para. 1 DBA CH-DK in the English version according to the minutes of 21 August 2009).

6.2. Art. 11 para. 1 DBA CH-DK reads as follows in the three authentic language versions (cf. FTA, media release of 21 August 2009, <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-28555.html> [visited on 24 October 2024]):

'Interest originating in a Contracting State and the beneficial owner of which is a resident of the other Contracting State may be taxed only in that other State.'
"Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State."
"Renter, der hidrører fra én af de kontraherende stater, og hvis retmæssige ejer er hjemmehørende i den anden kontraherende stat, kan kun beskattes i denne anden stat."

7.
In view of the most recent case law, where the Federal Supreme Court has emphasised the principle of the static interpretation of DTAs (cf. E. 4.3 above; **BGE 149 II 400** at 9.5), one can ask whether the interpretation of the term "beneficial owner" - as in the judgment 2C_880/2018 of 19 May 2020 - can be based on the meaning of this term at the time of application. This question is accentuated in the special case of the DBA CH-DK, because the Contracting States did not include this term in the text of the treaty until 2009, about three decades after its first use in the OECD MA. Nevertheless, it can be left open because a look at the historical development on the basis of the commentaries in the OECD-MK shows that the usual meaning of the term "beneficial owner" and "retmæssige ejer") has not changed since the amendment of the DBA CH-DK in 2009.

7.1. First of all, it should be noted that Art. 11 para. 1 DBA CH-DK (as amended by the Protocol of 21 August 2009) is based on Art. 11 paras. 1 and 2 OECD Model Convention. The differing wording is due to the fact that the Contracting States obviously did not merely intend to restrict the source State's right of taxation, but to exclude it altogether if the conditions for relief were met (cf. OECD-MK, N. 3 on Article 11 of the OECD Model Convention [as amended since 11 April 1977]).

7.2. In the 1977 version of the OECD-MK on the articles on dividends, interest and royalties, which for the first time included the requirement of entitlement, the OECD stated that the agreement advantage should not be obtainable if an intermediary, such as an agent or other agent (French "agent" or "autre mandataire"), is interposed between the beneficiary: except where the beneficial owner is resident in the other Contracting State (OECD-MK, N. 12 on Art. 10, N. 8 on Art. 11 and No. 4 on Art. 12 OECD-MA [as amended on 19 October 1977]). As has been pointed out in the literature, this addition is due, at least in part, to efforts by the United Kingdom, which had already provided for this requirement in some of its DTAs. In doing so, it intended to exclude treaty advantages for agents and other agents who, although subjectively liable to tax under domestic law and thus in principle entitled to treaty, were exempt from tax in respect of inflows in favour of foreign beneficiaries (see JOHN F. AVERY JONES and others, The Origins of Concepts and Expressions Used in the OECD Model and their Adoption by States, Bulletin for International Taxation 2006, pp. 246 et seq.; RICHARD COLLIER, Clarity, Opacity and Beneficial Ownership, British Tax Review 2011, pp. 686 et seq.; BLAZEJ KUZNIACKI, Beneficial Ownership in International Taxation and Biosemantics - Why a Redundant, Paradoxical and Harmful Concept Can Be a Potent Weapon in the Hands of the Tax Authorities, Bulletin for International Taxation 2023 p. 44 f.; ANGELIKA MEINDL-RINGLER, Beneficial Ownership in International Tax Law, 2016, pp. 26 et seq.; CHARL DU TOIT, The Evolution of the Term "Beneficial Ownership" in Relation to International Taxation over the Past 45 Years, Bulletin for International Taxation 2010 para. 3.3; RICHARD VANN, Beneficial Ownership: What Does History [and Maybe Policy] Tell Us, in: Beneficial Ownership: Recent Trends, 2013, p. 285). It is not entirely clear whether the requirement of the right of use was intended to regulate the attribution of income (especially with regard to Anglo-Saxon trusts) or was directed against the abuse of the agreement, although more recent studies on the basis of the historical materials tend to point to the former (cf. BLAZEJ KUZNIACKI, Beneficial Ownership in International Taxation, 2022, para. 3.034; ADOLFO MARTÍN JIMÉNEZ, Beneficial Ownership: Current Trends, World Tax Journal 2010, p. 52 f.; MEINDL-RINGLER, loc. cit., p. 31 et seq.; VANN, loc. cit., pp. 287 et seq. and 296).

7.3. The commentary in the OECD-MK of 28 January 2003, on the other hand, emphasised that the term beneficial owner in the OECD MA was not to be understood in a "narrow technical sense", but rather in its context and in the light of the aim and purpose of the DTA (including the avoidance of double taxation and the prevention of tax evasion and avoidance). Referring to a 1986 report on the use of conduit companies; 'sociétés de relais'), the OECD considered that not only 'agents' and other agents, but also other persons should not be regarded as beneficial owners if they enter into contracts or enter into obligations on the basis of which they perform a similar function. For this reason, a conduit company cannot normally be regarded as a beneficial owner if, despite having formal entitlement to certain assets, it has only very limited powers which make it appear to be a mere trustee or administrator acting on behalf of the interested parties (see OECD Model Convention, N. 8 and 8.1 on Article 11 of

the OECD Model Convention [as amended on 28 January 2003]; OECD, Double Taxation Conventions and the Use of Conduit Companies, 1986, n. 14b).

7.4. This amendment to the OECD-MK gave rise to some uncertainty in practice (cf. COLLIER, loc. cit., p. 690; JOHANN HATTINGH, The Relevance of BEPS Materials for Tax Treaty Interpretation, Bulletin for International Taxation 2020, pp. 188 et seq.). In any case, it is striking that in the case-law of the various states until the end of the 2000s, varying understandings of the term "beneficial owner" came to light. The same was true of national and international literature. Roughly speaking, two camps could be distinguished:

7.4.1. One of them understood "beneficial ownership" more as a (civil) law concept. According to this view, the assessment of whether the recipient of a payment is its "beneficial owner" was therefore primarily based on the legal obligations entered into by the recipient in relation to the payment (see, in this regard, judgments of the Tax Court of Canada of 22 April 2008, *Prévost Car Inc. v. The Queen,* 2008 TCC 231 para. 103 et seq. [confirmed by judgment of the Canadian Federal Court of Appeal of 26 February 2009, *Prévost Car Inc. v. Canada,* 2009 FCA 57]; of the Dutch Hoge Raad of 6 April 1994, BNB 1994/217 para. 3.2 [cf. DANIEL S. SMIT, The Concept of Beneficial Ownership and Possible Alternative Remedies in Netherlands Case Law, in: Beneficial Ownership: Recent Trends, 2013, pp. 65 et seq.]; from the literature, for example, LUC DE BROE, International Tax Planning and Prevention of Abuse, 2008, pp. 686 et seq. and 720 et seq.; COLLIER, loc. cit., pp. 690 and 699; MARTÍN JIMÉNEZ, loc. cit., pp. 51 et seq.; RENÉ MATTEOTTI, Der Durchgriff bei von Inländer beherrschten Auslandsgesellschaften im Gewinnsteuerrecht, 2003 [hereinafter: MATTEOTTI, Diss.], pp. 278 et seq.; DU TOIT, loc. cit., no. 3.2.5 and 4).

7.4.2. Other courts and authors understood "beneficial ownership" more as an economic concept. They considered it not so much the legal position of the recipient in the context of an arrangement or transaction to be decisive, but above all the economic substance. In this context, a clear distinction was not always made between this concept and the more general concept of abuse of the agreement, and sometimes subjective elements (intention to save tax, etc.) were also included in the assessment (see, in this regard, for example, judgments of the Court of Appeal of England and Wales (Civil Division) of 2 March 2006, *Indofood International Finance Ltd. v. JP Morgan Chase Bank N.A. London Br anch,* [2006] EWCA Civ 158 para. 42 et seq.; of the French Conseil d'Etat of 29 December 2006, *Royal Bank of Scotland,* No. 283314; cf. from the literature above all KLAUS VOGEL, in: Double Taxation Treaties of the Federal Republic of Germany in the Field of Taxes on Income and Capital, 5th ed. 2008, n. 17 et seq. on Before Art. 10-12 OECD-MA; following this author, BEAT BAUMGARTNER, The Concept of the Beneficial Owner in Switzerland's International Tax Law, 2010, p. 150; ROBERT DANON, Le concept de bénéficiaire effectif dans le cadre du MC OCDE, FStR 2007 pp. 43 f. and 48 f.; XAVIER OBERSON, La notion bénéficiaire effectif en droit fiscal international, in: Festschrift SRK, 2004, p. 226 et seq.; see also the references to judicial and administrative practice in various Länder in COLLIER, loc. cit., pp. 693 et seq. and MEINDL-RINGLER, loc. cit., pp. 95 et seq. and p. 288).

7.4.3. In the 2000s, the Federal Supreme Court also dealt with a case in which the question of the right of use had been raised. Specifically, it concerned an application by a Danish company for a refund of withholding tax under the DBA CH-DK. However, after the Federal Tax Appeals Commission had affirmed the Danish company's right of use, the Federal Supreme Court left the question open because the application had to be rejected on the grounds of abuse of the treaty, even if the right of use was accepted (judgment 2A.239/2005 of 28 November 2005 at 3.2 and 3.5.3, in: StR 61/2006 p. 217).

7.5. To sum up, it can therefore be stated that the OECD-MK in the version of 28 January 2003 was unclear with regard to the concept of the right to use, but that even at the time of the amendment of Art. 11 para. 1 DBA CH-DK in the Protocol of 21 August 2009, the narrower, legal understanding of the right of use, which was subsequently reflected in the amendment of the OECD-MK of 15 July 2014 and to which the Federal Supreme Court adopted at the latest in the judgment 2C_880/2018 of 19 May 2020, had in any case been prominently - although not exclusively - represented in foreign jurisprudence and literature. This is therefore not a new or changed meaning of the term "right of use" that would have developed only after 2009. On the contrary, this understanding is even more likely to go back to the meaning that was originally attached to the term. Against this background, the amendment to the OECD-MK of 15 July 2014 does not appear to be a further development of the concept of the right of use, but rather an attempt to clarify it (cf. on the process of drafting the amendment COLLIER, loc. cit., pp. 699 et seq.; ROBERT DANON, Clarification of the Meaning of "Beneficial Owner" in the OECD Model Tax Convention - Comment on the April 2011 Discussion Draft, Bulletin for International Taxation 2011 p. 438 et seq.).

8.
Since the time of application does not differ from the meaning given to the concept of the right of use at the time of the amendment of the DBA CH-DK in 2009, it must in any case be maintained in the present case that only a contractual or

statutory obligation to pass on, but not purely factual incentives or constraints, can call into question the recipient's right to use income subject to withholding tax.

8.1. First of all, the usual meaning of the terms "beneficially owned" and "beneficial owner" in Art. 11 para. 1 DBA CH-DK speaks in favour of this narrower legal concept, at least in tendency. Even if, according to the OECD, the term should not be understood in a narrow technical sense (OECD-MK, n. 8 on Article 11 of the OECD Model Convention as amended on 28 January 2003), it is nevertheless not entirely irrelevant in view of the legislative history (cf. in particular E. 7.2 above) that "beneficial ownership" has its roots in the Anglo-Saxon legal system. There it describes the situation in which a person does not have formal ownership ("title"), but the right to use and enjoy the fruit, which he or she can enforce in court. A typical example is the legal status of the beneficiaries of certain trusts (see DU TOIT, loc. cit., points 3.2.2 - 3.2.5, with references to judgments of the English and US Supreme Courts and to Black's Law Dictionary; see also recently judgment of the Court of Appeal of England and Wales of 15 April 2024, *Hargreaves Property Holding Ltd v Revenue and Customs,* [2024] EWCA Civ 365, para. 49 et seq.). The German term "right of use" also implies that the person concerned has a right to use and is not dependent on merely actual incentives and constraints in order to enjoy the income. It can be concluded from this that the recipient of an income is to be regarded as its beneficiary according to common parlance as long as he is not contractually or legally obliged to surrender or deliver this income to another person.

8.2. In addition, an extensive economic understanding of the right of use runs the risk of producing results in judicial and administrative practice that are hardly compatible with the treaty's objective of avoiding double taxation (cf. COLLIER, loc. cit., pp. 693 et seq. and 703; cf. also ROBERT DANON and others, The Prohibition of Abuse of Rights After the ECJ Danish Cases, Intertax 49/2021 p. 514 et seq.; KUZNIACKI, loc. cit., Bulletin for International Taxation 2023, p. 53). This is particularly true with regard to complex financial transactions such as those at issue in the present case.

8.3. The foregoing is not altered by the fact that the Court of Justice of the European Union (ECJ) and, following it, the Danish Supreme Court have recently taken a more economic approach to the right of use. judgments of the Danish Supreme Court and the ECJ, at least to the extent that they bind or influence Denmark in the application of its DTAs (cf. on this question VALENTIN BENDLINGER, Der Einfluss von Unionsrecht auf Abvertragssmissbrauch, SWI 2024 pp. 490 et seq.; DANON and others, loc. cit., Intertax 49/2021 p. 489), can be taken into account in the interpretation of the DBA CH-DK in order to ensure that the parties to the contract apply it as uniformly as possible and to minimise conflicts (so-called decision-making harmony; cf. judgments 2C_354/2018 of 20 April 2020 at 3.4.1; 2C_344/2018 of 4 February 2020 at 3.4.5; 2C_707/2016 of 23 March 2018 at 2.4.3; MICHAEL BEUSCH, Decision Harmony in International Tax Law from a Swiss Perspective, in: νόμοις πείθου - obeying the laws, Liber amicorum for Hansjörg Seiler, 2022, pp. 95 et seq.; see, on the rank of those judgments in the context of Article 31(3)(b) and Article 32 of the PRC, UN International Law Commission, Projet de conclusions sur les accords et la pratique ultérieurs dans le contexte de l'interprétation des traités et commentaires y relatifs [UN Doc. A/73/10], 2018, N. 19 on Conclusion 7; GUGLIELMO MAISTO, Interpretation of Tax Treaties and the Decisions of Foreign Tax Courts as a "Subsequent Practice" under Articles 31 and 32 of the Vienna Convention on the Law of Treaties [1969], Bulletin for International Taxation 2021, p. 677). However, the above-mentioned judgments concerned the right of use of conduit companies, in respect of which there was at least also the allegation that they had been controlled by funds, group parent companies or other persons and artificially interposed between them and the Danish companies liable to pay interest in order to obtain certain treaty advantages or advantages under Union law (cf. judgment of the CJEU of 26 February 2019 C-115/16, C-118/16, C-119/16 and C-299/16 *N Luxembourg 1 and Others,* ECLI:EU:C:2019:134, para. 30 et seq.; Judgment of the Danish Højesterets dom No. 116/2021 and 117/2021 of 4 May 2023, *Takeda A/S and NTC Parent S.à.r.l.* p. 3 ff.). The situation of a large financial institution to be assessed here differs considerably with regard to the question of the right of use from the situation of a mere conduit company, which is artificially placed between the interest debtor and a third party, has no decision-making autonomy and in which it is predetermined that it will pass on the income to the third party controlling it. In addition, the Danish Supreme Court and the ECJ did not make a strict distinction between the concepts of the right of use and the abuse of rights or agreements or the abuse of EU law in their reasons for the judgment, and also took subjective elements into account. Therefore, it is not entirely clear from these judgments whether, in the opinion of these two courts, the advantages under treaty or EU law would also have to be denied if it were established that the arrangement was not based on abusive motives (cf. judgment of the CJEU of 26 February 2019 C-115/16, C-118/16, C-119/16 and C-299/16 *N Luxembourg 1 and others,* ECLI:EU:C:2019:134, para. 95 et seq., esp. 132 and 143; Judgment of the Danish Højesterets dom No 116/2021 and 117/2021 of 4 May 2023, *Takeda A/S and NTC Parent S.à.r.l.,* p. 13 et seq.; see also, differently, Opinion of Advocate General KOKOTT of 1 March 2018, C-115/16 *N Luxembourg 1 v Skatteministeriet,* ECLI:EU:C:2018:143, paragraph 60, which had drawn a clear distinction between right of use and abuse).

9.

9.1. The lower court essentially based its assessment on the narrower legal understanding of the right of use, as expressed in the judgment 2C_880/2018 of 19 May 2020 and which, in the light of what has been said, must be upheld here. However, in some places it nevertheless invoked a "de facto obligation to forward". It then concluded from the "circumstances" - namely from the amounts mentioned in the contract documentation, which corresponded exactly to the purchase prices, interest and principal payments from the federal bonds - that the complainant had been subject to an "(indirect) legal obligation" to pass on the interest payments from the federal bonds. In the opinion of the lower court, this obligation was detrimental to the complainant's right of use because, on the one hand, the generation of income was dependent on the obligation to pass it on and, on the other hand, the obligation to pass it on depended on the achievement of this income (mutual dependence or interdependence; see also BAUMGARTNER, loc. cit., p. 145). The fact that the obligation to pass on the interest income from the federal bonds depended on their achievement was deduced by the lower court from an analysis of the distribution of risk between the complainant and its counterparties under the swap agreements. The swap contracts had relieved the complainant of the interest rate risk and of currency and exchange rate risks on the federal bonds, whereas the risk of default had been "extremely low and only theoretical" from the outset in view of the excellent creditworthiness of the Confederation.

9.2. As already mentioned (cf. E. 5.2 above), the Federal Supreme Court considered in its judgment 2C_880/2018 of 19 May 2020 that contractual and statutory forwarding obligations can be substantiated not only by the written contractual documentation, but also by circumstantial evidence such as factual constraints (cf. judgment 2C_880/2018 of 19 May 2020 at 4.4 and 4.5; cf. similarly also judgment of the Italian Corte Suprema di Cassazione no. 14756/2020 of 14756/2020 10 July 2020 at 1.10). Similarly, in an earlier judgment, it had taken into account circumstances outside the text of the contract in order to conclude that there was a harmful obligation to pass on (e.g. short holding period of the securities; see judgment 2C_895/2012 of 5 May 2015 at 8.5).

9.2.1. In this regard, it has been argued in the literature that the boundary between a more legal and a more economic understanding of the right of use is blurred in practice, even if a contractual or statutory obligation can be inferred from the circumstances (see DANON and others, loc. cit., Intertax 59/2021 p. 510 et seq.). Regardless of whether this assessment is generally correct, it must be noted in any case that it is a question of the facts on the one hand and of the specifically applicable contract law on the other hand whether there is a specific contractual obligation between the recipient of income and another party. In contrast, the applicable DTA determines whether a particular contractual obligation, alone or in combination with other contractual or statutory obligations, is to be characterised as an obligation on the part of the recipient to pass on the data, which deprives him of the right of use. Only for this second question of treaty law can the OECD-MK be consulted at all as an actual aid to interpretation. If the (final) written contractual documentation does not result in an obligation to forward, the conclusion of a contractual obligation to forward can only be considered if the applicable contract law permits the establishment or supplementation of contractual obligations in other than written form (e.g. Art. 11 para. 1 CO).

9.2.2. In its judgment 2C_880/2018 of 19 May 2020, the Federal Supreme Court appeared to consider the determination of contractual obligations on the sole basis of the circumstances without this restriction, but subsequently assessed only the contractual documents and the resulting incentives and constraints (see judgment 2C_880/2018 of 19 May 2020 at 4.5.2; similarly also judgment 2C_209/2017 of 16 December 2019 at 3.4.3, not publ. in: **BGE 146 I 105).** To the extent that it can be inferred from this judgment and earlier judgments that there is a real practice on the significance of circumstances for the establishment of a contractual obligation, it would have to be specified in the above-mentioned sense.

9.3 The lower court did not examine whether the contract law applicable between the complainant and its counterparties allowed the establishment of a contractual obligation to pass on outside the text of the contract. In the end, however, it did not need to do so in the present case because, on closer inspection (similar to the Federal Supreme Court in its judgment 2C_880/2018 of 19 May 2020 at 4.5.2), it did not base its assessment on the circumstances outside the written contract documentation, but only on the text of the contract documentation.

9.4. However, the classification of the complainant's contractual position under treaty law by the lower court is not convincing.

9.4.1. As a preliminary point, it should be noted with the lower court that the contractual documents did not in any case literally oblige the complainant to deliver or forward the interest income from the federal bonds to another person - namely the counterparties. However, this does not rule out the possibility that the complainant's contractual obligations could be

characterised under treaty law as a harmful obligation to pass on according to their content or in their interaction (cf. **BGE 141 II 447** at 6.4 [with slightly different terminology]; cf. also MARTÍN JIMÉNEZ, loc. cit., p. 51).

9.4.2. Like the lower court, the Federal Supreme Court also **mentioned the concept of interdependence in BGE 141 II 447**. However, if the right of use is understood more narrowly, it is questionable whether the right of use can really depend on whether the recipient would have earned the income subject to withholding tax even if he had not entered into the payment obligation in question. In its more recent case law on the right of use, the Federal Supreme Court no longer referred to this first dependency (see E. 9.1 above) (see judgments 2C_880/2018 of 19 May 2020 at 4.5.1; 2C_209/2017 of 16 December 2019 at 3.4.3, not publ. in: **BGE 146 I 105).**
However, the second dependency remains essential for the right of use: payment obligations on the part of the recipient can only constitute an obligation to pass on income subject to withholding tax that is detrimental to the right of use if the payment, or at least its amount, depends on the recipient earning the income subject to withholding tax (cf. **BGE 141 II 447** at 5.3; Judgments 2C_880/2018 of 19 May 2020 at 4.5.1; 2C_209/2017 of 16 December 2019 at 3.4.3, not publ. in: **BGE 146 I 105).** At least since the amendment of 15 July 2014, the OECD-MK has also been based on this second dependency. It expressly designates obligations that do not depend on the receipt of the income subject to withholding tax as harmless and cites as an example obligations that the recipient bears as a debtor or party to a financial transaction (OECD-MK, N. 10.2 on Art. 11 OECD-MK [as amended on 21 November 2017; unchanged in this respect since 15 July 2014]).

9.4.3. Certain authors have specifically addressed the question of whether obligations arising from interest rate and currency swaps constitute harmful passing on obligations. BAUMGARTNER, on which the Federal Supreme Court referred in its relevant case law (cf. e.g. **BGE 141 II 447** at 5.2.2 and 5.3) and the lower court, holds that in the case of interest rate swaps, the obligation to pay does not depend on the interest income on the underlying asset; there was no harmful obligation to forward (BAUMGARTNER, loc. cit., p. 373). NORDIN/SCHUDEL come to the same conclusion, but point out that such transactions must be examined from the point of view of the abuse of the agreement (NORDIN/SCHUDEL, loc. cit., p. 609; similarly NILS HARBEKE, Zur Debatte "Nutzungsberechtigung und Finanzinstrumente", FStR 2024 p. 163 et seq.).

9.4.4. Under the swap agreements at issue, the Appellant would have been obliged to pay to its counterparties even if the Confederation had not fulfilled its interest obligations on the Bunds or had not fulfilled them in full. If the recipient of an interest payment bears at least this investment-specific default or credit risk, the transfer of interest rate risk, currency or exchange rate risk and other market risks does not make the payment obligation to the counterparty appear to be a harmful passing on obligation, which is not changed by the very high creditworthiness of the Confederation. In this respect, there is a significant difference between the swap agreements at issue here and the financial transactions assessed by the Federal Supreme Court (certain total return swaps and similar transactions as well as securities lending), in which the recipient would not have owed any payment in each case if the income subject to withholding tax had been lost (cf. **BGE 141 II 447** at 6.4.1; Judgment 2C_209/2017 of 16 December 2019 at 3.4.3, not publ. in: **BGE 146 I 105)** or the amount of the payment expressly depended on the refund of withholding tax, which in turn presupposed the actual receipt of the taxed income (see judgment 2C_880/2018 of 19 May 2020 at 4.5.1).

9.5. It follows from the above that the Appellant was not subject to any obligation to forward it that would have excluded its right of use within the meaning of Art. 11 para. 1 DBA CH-DK. Thus, the complainant fulfils all the requirements for discharge under Art. 11 para. 1 DBA CH-DK, which are expressed in the text of the agreement. At least if the provision of the Convention is interpreted in accordance with its ordinary meaning, the complainant's claim to relief is thus demonstrated.

10.
The aim and purpose of the agreement do not change this result of interpretation and subsumption.

10.1. In concluding the DTA CH-DK, the Contracting States intended, in accordance with the title and preamble of this Agreement, to avoid double taxation in the area of taxes on income and capital (cf. on the aim and purpose of DTAs in general, OECD-MK, N. 54 on Art. 1 OECD-MA [as amended on 21 November 2017]). Specifically, with regard to interest income, the Contracting States have provided that double taxation of persons entitled to treaties with a withholding tax in the source State and profit or income tax in the State of residence is avoided by assigning the sole right of taxation to the State of residence. While the object and purpose of the agreement do not necessarily presuppose that the State of residence effectively taxes the interest income, it should at least have the possibility of taxation. This is particularly lacking if the interest income - including the treaty advantage in the form of the withholding tax not levied or the (anticipated) withholding tax refund - is passed on to a person who is not himself entitled to the treaty (see also OECD-MK, N. 10 on Art. 11 OECD-MA [as amended on 17 July 2008, which was available to the contracting states when Art. 11 DBA CH-DK was amended]).

10.2 The payments which the Appellant promised under the swaps and which it then actually made were obviously closely related to the interest income from the Bunds from a factual point of view, even though the Appellant had not undertaken to pass them on. This connection already follows from the fact that the complainant's payments corresponded exactly to the gross interest income that it would receive from the federal bonds if it were granted the refund of withholding tax. The connection was never disputed by the complainant (see the recapitulation of the correspondence between the complainant and the FTA, above facts of the case letter A.b et seq.). The payments under the swaps therefore did not represent a purely accidental use of the interest income, but are to be regarded as an effective forwarding of the bond interest, including the anticipated withholding tax refunds. The direct recipients of that transfer were investment banks that were not established in Denmark. While it is likely that the investment banks in turn passed on the interest and the associated benefits of the agreement, there is nothing to suggest that the final recipients could have been resident in Denmark and themselves eligible for the agreement.

10.3. It is therefore clear that the granting of the benefits of the agreement in the present case is not in accordance with the objective of the agreement. However, it would go too far to interpret additional requirements in this agreement provision in addition to the right of use that have not been reflected in its wording. If, according to what has been said, the actual forwarding of the interest income (including anticipated withholding tax refunds) alone is not sufficient to deny the complainant the right of use, it is not acceptable to declare the non-forwarding to be an independent, unwritten prerequisite in the context of a teleological interpretation of the contract that is detached from the text of the agreement.

IV. Prohibition of abuse of rights under international law

11.
However, if the complainant's right of use cannot be denied and it thus fulfils the requirements of Art. 11 sec. 1 DBA CH-DK for relief from withholding tax, this does not mean that Switzerland is absolutely obliged under international law to grant the complainant the relief from withholding tax applied for. The question arises as to whether the discharge is to be refused on the grounds of an abuse of the agreement. The lower court left this question open.

12.

12.1. As already mentioned (cf. E. 7.4.3 above), the Federal Supreme Court ruled in 2005 that benefits from the DBA CH-DK are subject to a general reservation of abuse (judgment 2A.239/2005 of 28 November 2005 at 3.4.6, in: StR 61/2006 p. 217; see also judgment 2C_354/2018 of 20 April 2020
E. 4.3.1). In doing so, it relied in particular on the principle of good faith under customary international law codified in Article 26 of the VRK (cf. **BGE 146 II 150** at 7.1; **143 II 224** at 6.2, each with references), which must also be taken into account when interpreting the contract (cf. Art. 31 para. 1 VRK; Judgment 2A.239/2005 of 28 November 2005 at 3.4.3, in: StR 61/2006 p. 217). However, it is not entirely clear from this judgment whether this general reservation of abuse of the agreement is inherent in every DTA and results from the (teleological) interpretation or whether it is a plea within the meaning of a general principle of international law (Art. 38 para. 1 lit. c ICJ Statute) or customary international law (Art. 38 para. 1 lit. b ICJ Statute), which the party bound by an international treaty can only invoke at the level of application of the DTA in the individual case (see judgment 2A.239/2005 of 28 November 2005 at 3.4.6, in: StR 61/2006 p. 217; see also judgment 2C_354/2018 of 20 April 2020 at 4.3.1). In the previous case law in the field of international tax law, the Federal Supreme Court had also not clearly distinguished between the levels of contract interpretation and its application with regard to the reservation of abuse of law or agreement (cf. **BGE 113 Ib 195** E. 4c; **94 I 659** at 4; cf. MATTEOTTI/KRENGER, in: Internationales Steuerrecht, Kommentar zum Schweizerischen Steuerrecht, 2015, N. 342 et seq. on Art. 1 OECD-MA).

12.2. In the local literature, the proviso of treaty abuse according to judgment 2A.239/2005 of 28 November 2005 is partly used as a principle of interpretation (see, for example, MARCEL R. JUNG, Trends and developments in combating treaty abuse in international tax law of Switzerland, StR 2011, p. 20 et seq.; RENÉ MATTEOTTI, The Refusal of Relief from Withholding Tax on Account of Treaty Shoppings, ASA 75 pp. 791 et seq.; MATTEOTTI/KRENGER, loc. cit., N. 351 et seq. on Article 1 of the OECD Model Convention; XAVIER OBERSON, Précis de droit fiscal international, 5th ed. 2022, p. 306 et seq.; cf. also OECD-MK, N. 9.3 on Art. 1 OECD-MA [as amended on 28 January 2003]), has been interpreted in part as a general principle of law under Art. 38 para. 1 lit. c ICJ Statute (see, for example, OESTERHELT/WINZAP, Denmark Decision on Treaty Shopping, Schweizer Treuhänder 2006, pp. 3 et seq.; see also PETER HONGLER, Justice in International Tax Law, 2019, pp. 198 et seq.). In the international literature on treaty abuse, some authors assume that the abuse can be sufficiently dealt with by means of teleological interpretation (see, for example, MICHAEL LANG, The

Signalling Function of Article 29 (9) of the OECD Model - The "Principal Purpose Test", Bulletin for International Taxation 2020 p. 265), while other authors see in the text of the agreement a limit that may not be exceeded by means of teleological interpretation, which is why an additional corrective is necessary to combat the abuse of the agreement (see, for example, DANON and others, loc. cit., Intertax 49/2021 p. 488; FRANK ENGELEN, Interpretation of Tax Treaties under International Law, 2004, pp. 427 and 429; WOLFGANG SCHÖN, The Role of "Commercial Reasons" and "Economic Reality" in the Principal Purpose Test under Article 29 (9) of the 2017 OECD Model, in: Building Global International Tax Law: Essays in Honour of Guglielmo Maisto, 2022, p. 253 et seq.).

13.
Recently, the Federal Supreme Court has described the prohibition of abuse of rights in the area of investment arbitration not only as part of Swiss public policy (as already **BGE 138 III 322** at 4; **132 III 389** at 2.2.1; cf. also **BGE 143 III 666** at 4.2), but also an internationally recognised general principle ("un principe général reconnu internationalement"; **BGE 148 III 330** at 5.2.2; **146 III 142** E. 3.4.2.8; Judgment 4A_492/2021 of 24 August 2022 at 8.1, not publ. in: **BGE 149 III 131)** or a general principle of international law, if not a rule of customary international law ("un principe général du droit international, voire une règle du droit international coutumier"; Judgment 4A_80/2018 of 7 February 2020 at 4.8). In these judgments, it held that the prohibition of abuse of rights under international law was also applicable in relation to investors, even though they themselves are generally not states and are not parties to the investment protection agreement invoked.

14.
There is no convincing reason to deviate from this published case law of the Federal Supreme Court on investment arbitration and not to adopt it for international tax law.

14.1. From a general point of view of international law, the fact that the International Court of Justice has recently also considered the plea of abuse of rights if convincing evidence is presented that the party allegedly acting abusively seeks to exercise a right granted by international treaty for a purpose and to the detriment of the other party speaks in favour of, or at least not against, the case-law of the Federal Supreme Court (cf. ICJ judgment of 30 March 2023 *Certains actifs iraniens* [Islamic Republic of Iran v. USA], § 88 et seq. and 93 ["La Cour ne pourrait retenir en l'espèce le moyen de défense au fond tiré de l'abus de droit que s'il était démontré par le défendeur, sur la base de preuves convaincantes, que le demandeur revendique l'exercice des droits qui lui sont conférés par le traité d'amitié à des fins différentes de celles pour lesquelles les droits en cause ont été établis, et ce au détriment du défendeur."]; see also the Dissenting Opinion of Judge SEBUTINDE (para. 8) and the Separate Opinion of Ad Hoc Judge BARKETT (para. 3 et seq.) in the same case). The International Court of Justice and its predecessor institution, the Permanent International Court of Justice (StIGH), had already treated the prohibition of abuse of rights as part of unwritten international law, at least to some extent (see judgment of the ICJ of 17 July 2019 *Jadhav* [India v. Pakistan], C.I.J. Recueil 2019 p. 418, § 121 et seq.; Interim decision of the ICJ of 6 June 2018, *Immunités et procédures pénales* [Equatorial Guinea v. France], C.I.J. Recueil 2018, p. 292, p. 335 et seq., § 144 et seq.; Judgments of the ICJ of 7 June 1932*, Affaire des zones franches de la Haute-Savoie et du Pays de Gex* (Switzerland v. France), 1932 C.P.I.J. Recueil (Série A/B) No 46, p. 167; 25 May 1926 *Certains intérêts allemands en Haute-Silésie polonaise* [Germany v. Poland], 1925 C.P.I.J. Recueil [Série A] No. 7, p. 30). In line with this, the prohibition of abuse of rights is probably predominantly characterized in the general international legal literature today as a general principle of international law that is anchored in the legal systems of most states and is closely linked to the principle of good faith (see in particular ROBERT KOLB, Good Faith in International Law, 2017, pp. 133 et seq. with references to arguments of the opposing side; see also SAMANTHA BESSON, Droit international public, 2nd ed. 2024, para. 1279; ALEXANDRE KISS, Abuse of Rights, in: Max Planck Encyclopedia of Public International Law [MPEPIL], 2006, paras. 8 et seq.; HERSCH LAUTERPACHT, The Development of International Law by the International Court, 1958 [reprint 2010], p. 164; VERDROSS/SIMMA, Universal International Law, 3rd ed. 1984 [reprint 2010], § 62 and 461; critically, on the other hand, see e.g. RUPERT K. NEUHAUS, The Prohibition of Legal Abuse in Today's International Law, 1984, 35 et seq.; also JAMES CRAWFORD, Brownlie's Principles of Public International Law, 9th ed. 2019, pp. 544 et seq.).

14.2. As regards tax law in particular, the principle that tax advantages do not have to be granted in the event of abuse has been reflected in most, if not all, national and supranational tax systems and, in the meantime, also at international level.

14.2.1. In some places, the national legislature has codified general anti-avoidance rules (GAARs), while in other places the courts have established rules and principles to counter abuse and circumvention (see, for example, DE BROE, loc. cit., pp. 309 et seq.; RICHARD KREVER, General Report, in: GAARs - A Key Element of Tax Systems in the Post-BEPS World, 2016, pp. 1 et seq.; CHRISTINE OSTERLOH-KONRAD, Die Steuerumgehung, 2019, pp. 1 et seq. and 690 et seq. [with a focus on Germany, France, Great Britain and the USA]; ROSENBLATT/TRON, General Report,

in: Anti-avoidance measures of general nature and scope - GAAR and other rules, Cahiers de droit fiscal international [CDFI], vol. 103a, 2018 [CDFI vol. 103a], pp. 31 et seq.; cf. on the legal situation in the European Union, judgment of the ECJ of 26 February 2019 C-115/16, C-118/16, C-119/16 and C-299/16 *N Luxembourg 1 and others,* ECLI:EU:C:2019:134, para. 117 et seq.; Article 6 of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules to combat tax avoidance practices directly affecting the functioning of the internal market [Anti Tax Avoidance Directive, ATAD 1; OJ L OJ L 193, 2016, p. 1]; on the legal situation in Denmark, see SUSI BAERENTZEN, The Effectiveness of General Anti-Avoidance Rules, 2022, p. 234 et seq.; MADSEN & NØRGAARD LAURSEN, Denmark, in: CDFI vol. 103a, pp. 282 ff.).

14.2.2. Various states also use their anti-abuse mechanisms under national law to combat the abuse of DTAs (cf. OECD-MK, N. 9.1-9.3 on Art. 1 OECD-MA [as amended on 28 January 2003]; United Nations, Model Double Taxation Convention between Developed and Developing Countries [UN-MA], 2017 Update, Commentary [UN-MK], N. 19, 38 and 41 et seq. on Art. 1 UN-MA; Judgment of the Supreme Court of Canada of 26 November 2021, *Canada v. Alta Energy Luxembourg S.A.R.L.,* 2021 SCC 49 paras. 30 and 37; ROSENBLATT/TRON, loc. cit., p. 30 f.; STEF VAN WEEGHEL, General Report, in: Tax Treaties and tax avoidance: application of anti-avoidance provisions, CDFI, vol. 95a, 2010, pp. 22 and 26 et seq.; critical of the application of Land law anti-avoidance rules in the DTA context VIKRAM CHAND, The Interaction of Domestic Anti-Avoidance Rules with Tax Treaties, 2018, para. 819). In contrast, it is rather unusual for courts to expressly base the denial of treaty benefits in the event of abuse on international law and in particular on the prohibition of abuse of rights under international law (see VAN WEEGHEL, loc. cit., p. 35). In dualistic legal systems, this is often not necessary at all, because the courts can or must give preference to anti-abuse provisions of Land law, for example on the basis of the principle of "lex posterior derogat legi priori", over the DTA implementation provisions that are also subject to Land law (see judgment of the German Federal Constitutional Court 2 BvL 1/12 of 15 December 2015 para. 50 et seq., in: BVerfGE 141, 1; on so-called treaty overrides in dualistic legal systems, see also DOUMA/ELLIFFE, General Report, in: Good faith in domestic and international law, CDFI, vol. 107b, 2023, pp. 16 and 22). In addition, in the OECD's view, it is at least in tendency compatible with the treaty obligations if a state reclassifies a situation on the basis of a domestic anti-abuse regulation, because the provisions of the agreement are then only applicable to the fictitious situation (cf. OECD-MK, N. 79 on Art. 1 OECD-MA [as amended on 21 November 2017] and N. 22.1 on Art. 1 OECD-MA [as amended on 28 January 2003]; see, however, Switzerland's original reservation in this regard in N. 27.9 on Art. 1 OECD Model Tax Convention [as amended on 28 January 2003]; ANDRÉS BÁEZ MORENO, GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test. What Have We Gained from BEPS Action 6, Intertax 45/2017 p. 433 et seq.; DE BROE, loc. cit., p. 387; JONATHAN SCHWARZ, Schwarz on Tax Treaties, 6th ed. 2021, p. 479).

14.2.3. Notwithstanding the partly different dogmatic bases, the above statements testify to a globally largely consistent practice of refusing tax advantages if arrangements and transactions are found to be abusive, even and especially if the requirements of the law or the agreement for the granting of the tax advantage would actually be met. Incidentally, this international consensus has also been reflected in the BEPS project (Base Erosion and Profit Shifting; Base Erosion and Profit Shifting) of the OECD and the G20. Within the framework of this agreement, the participating states have committed themselves to "creating a minimum level of protection against treaty shopping" in the sense of a minimum standard (cf. OECD, Prevention of the granting of treaty benefits in inappropriate cases, Action Item 6 - Final Report 2015, 2018, p. 10). In view of this agreement and the resulting Art. 29 para. 9 OECD MA ("principal purpose test"; as amended on 21 November 2017) and Art. 7 para. 1 of the Multilateral Convention of 24 November 2016 on the Implementation of Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting (MLI; SR 0.671.1), the opinion has already been expressed in the literature: the reservation of abuse has become a rule of customary international law within the meaning of Art. 38 (1) (b) of the ICJ Statute (see IRMA JOHANNA MOSQUERA VALDERRAMA, BEPS principal purpose test and customary international law, Leiden Journal of International Law 33/2020 p. 758 et seq.).

14.3. Irrespective of these recent developments at international level, in view of the deep roots of the prohibition of abuse of rights and the reservation of circumvention in most tax systems, the assumption of a general principle that even in international tax law a person who seeks to exercise it for a purpose and to the detriment of the obligated party cannot invoke a legal position under international law (cf. to this effect already decades ago KLAUS VOGEL, Abkommensbindung und Missbrauchsabwehr, in: Steuerrecht, Festschrift Höhn, 1995, p. 472; DAVID A. WARD, Abuse of Tax Treaties, Intertax 23/1995, pp. 180 et seq.; most recently also HONGLER, loc. cit., pp. 201 and 498; on the other hand, DE BROE, loc. cit., p. 315; MATTEOTTI, Diss., pp. 296 et seq.).

14.4. As in the area of international investment law (see E. 13 above), there is no convincing reason in international tax law to deny the objection under international law to the Contracting State bound by a DTA simply because it is not the other Contracting State itself but a person belonging to it who invokes the law under the international treaty. Because

on the one hand, the Federal Supreme Court must observe and apply not only international treaty law, but also international law as a whole, including customary international law and the general rules of international law (cf. **BGE 133 II 450** at 6.1; Judgment 2C_203/2023 of 1 July 2024 at 3.2). On the other hand, it is not clear why the general principle of international law of the prohibition of abuse of rights should apply only to states and not to anyone who improperly invokes a legal position under international law. For this reason, it is also irrelevant here whether, in view of the recently provided for international dispute settlement mechanisms in DTAs (see, for example, Art. 25 sec. 5 DBA CH-DK), individual rights under international law have matured from the DTA relief provisions, or whether the legal position of the individual is derived solely from that of his or her state of residence, i.e. whether he or she is only favoured under international law and not justified (cf. on this distinction VERDROSS/SIMMA, loc. cit., § 423; see also BESSON, loc. cit., para. 697 et seq.; VOLKER EPPING, in: Völkerrecht, 8th ed. 2024, § 9 para. 3). In both cases, the person resident in the other Contracting State must accept the plea of abuse of rights against him (see also VOGEL, loc. cit., N. 190 on Introduction; critically DE BROE, loc. cit., p. 307, but primarily with reference to Article 26 of the VRK, which can only bind the Contracting States).

15.
Thus, if the plea of abuse of rights or agreement can be invoked against a claim for relief under a DTA, the prerequisites for this objection must be defined.

15.1. Both the Federal Supreme Court in the area of investment arbitration and the International Court of Justice and the Permanent International Court of Justice have always emphasised that the plea of abuse of rights is an exception corrective. It is therefore only cautious to assume that there is an abuse of rights (cf. also **BGE 144 III 407**

E. 4.2.3; **143 III 279** at 3.1). Such a situation cannot be taken lightly; it is incumbent on the party invoking the abuse of rights to prove the prerequisites of the objection (cf. **BGE 148 III 330**
E. 5.2.4; Judgments of the ICJ of 30 March 2023 *Certains actifs iraniens* [Islamic Republic of Iran v. USA], § 92 et seq.; of the ICJ of 25 May 1926 *Certains intérêts allemands en Haute-Silésie polonaise* [Germany v. Poland], 1925 C.P.I.J. Recueil [Série A] No. 7, p. 30). According to the International Court of Justice, the plea of abuse of rights can only be considered if a party seeks to exercise rights for purposes other than those for which the rights in question were created and does so to the detriment of the obligated party (judgment of the ICJ of 30 March 2023 *Certains actifs iraniens* [Islamic Republic of Iran v. USA], § 93). According to the case-law of the Federal Supreme Court, an abuse of an investment protection agreement is to be presumed if an investor enters the scope of the agreement through a restructuring of his investment and the legal dispute was already foreseeable for a reasonable investor in the same situation at the time of the restructuring (cf. **BGE**

148 III 330 at 5.2.4).

15.2. According to the OECD-MK, an abuse of an agreement is not to be assumed lightly in international tax law either, although the statements in the OECD-MK refer more to the interpretation of the OECD-MA or the DTAs based on it. A guiding principle ("guiding principle", "principe directeur") is to be that treaty advantages should not be available if the acquisition of a more tax-advantageous position was one of the main purposes of the transaction or arrangement in question and the granting of the treaty advantage would run counter to the aim and purpose of the relevant provisions (cf. OECD-MK, N. 61 [as amended on 21 November 2017] and N. 9.5 [as amended on 28 January 2003] on Art. 1 OECD-MA; see also Art. 29 para. 9 OECD-MA [as amended on 21 November 2017] and Art. 7 para. 1 MLI).

15.3. National general anti-abuse regulations use different criteria to identify the abuses to be corrected. Certain states base their calculations on whether a design or transaction objectively appears artificial or unusual, while others take into account whether the persons involved were solely or mainly tax-motivated. An essential component of any general anti-abuse provision is then the tax advantage resulting from the arrangement or transaction, which is usually determined by comparing the tax position with and without the abusive arrangement and transaction (see ROSENBLATT/TRON, loc. cit., pp. 18 et seq.; see also KREVER, loc. cit., pp. 4 et seq.).

15.4. As OSTERLOH-KONRAD has pointed out with reference to four representative legal systems (Germany, France, Great Britain and the USA), general anti-abuse regulations generally have two things in common: First, they are aimed at arrangements and transactions that meet the requirements of a statutory or international law provision for a tax advantage, as determined by interpretation, even though the granting of this advantage is incompatible with the purpose of the provision (cf. OSTERLOH-KONRAD, loc. cit., pp. 580 et seq. and 644 et seq., which speaks of a divergence between the meaning of the word and the telos or purpose of the norm and accordingly describes the abuse of the structure or the tax avoidance as a phenomenon of divergence). Secondly, general anti-abuse provisions are generally not satisfied with the divergence between the meaning of the word and the purpose of the provision alone, but require the addition of special characteristics for a correction (e.g. particularly large deviation from the purpose of the provision, artificiality of the design, tax motivation; cf. OSTERLOH-KONRAD, loc. cit., pp. 650 et seq.).

15.5. This pattern can also be seen in the above descriptions of the prerequisites for the prohibition of abuse of rights or treaties under international law, which, in addition to the improper exercise of a legal position, are primarily based on the motivation of the entitled party and call for restraint in the assumption of an abuse of rights. In all cases, it is ultimately a matter of ensuring that the expectations arising from the text of the law or contract are only to be disappointed for qualified reasons, even if the provision is invoked for an inappropriate purpose, i.e. a balancing of the interests of legal certainty on the one hand and the enforcement of the provision in accordance with the purpose on the other (see also OSTERLOH-KONRAD, loc. cit., p. 613).
These two elements are also expressed in the definition given by the Federal Supreme Court to abuse of an agreement in its published case law on international tax law: it defined an abuse of an agreement as a situation in which a) the sought-after treaty advantage benefits a person who is not entitled to an agreement under circumstances in which the parties to the international treaty did not want to agree on relief from withholding tax and b) the state of residence may not expect this relief from its contractual partner in accordance with the principle of good faith (cf. **BGE 113 Ib 195** E. 4c; cf. also **BGE 94 I 659** E. 4). Accordingly, on the one hand, it is generally necessary to use the relief provision for a purpose other than that, in particular to pass on the benefits of the agreement to persons who are not to benefit from the agreement (see also **BGE 94 I 659** at 4). On the other hand, the refusal to comply with the obligation under international law must be compatible with good faith, and this second condition must be applied strictly in the light of the function of the defence of abuse of rights as a last resort.

15.6. In the context of the interpretation of Art. 11 para. 1 DTA CH-DK, it has become apparent that the granting of the agreement advantages in the present case would be alien to the objective of the Agreement in general and to the specific relief provision in particular (see E. 10.2 above). However, according to what has been said, this does not yet allow Switzerland, as an obligated party, to refuse the agreement advantage on the basis of the plea of abuse of rights or treaty abuse. It is also necessary that the refusal of the agreement benefit is in accordance with the principle of good faith. In particular, it would generally be incompatible with this principle if the contracting state bound by an international treaty - in this case Switzerland - were to grant the same tax advantage to a person belonging to it in a comparable situation, i.e. in particular if it did not consider a comparable arrangement or transaction by a resident person to be abusive. In this case, the obligated Contracting State would not be able to assert in good faith vis-à-vis the entitled Contracting State and the person belonging to it that their invocation of the relief provision of a DTA would be an abuse of rights. Such an examination of the international situation in the light of the domestic anti-abuse regulations is also in line with the practice of many states, even if the dogmatic basis for it varies (see E. 14.2.2 above).

16.
The arrangement or transaction must therefore be examined to what extent it would be denied the tax advantage under the national anti-abuse regulations. The prohibition of tax avoidance can be considered as such a provision here.

16.1. In connection with the refund of withholding tax, this prohibition is expressly laid down in Article 21.2 of the VStG (see also previously Article 7.2 of the Bundesrat Decision of 1 September 1943 on withholding tax [BS 6 326]), but applies as a general principle of law throughout tax law even without an express provision (cf. **BGE 149 II 462** at 2.2.4 [Emission tax]; **149 II 53** at 3.6.3 [Value added tax]; **148 II 189** E. 3.4.5 [direct federal tax]). To the extent that it is compatible with international law, it is also applicable to the refund of withholding tax in international relations (cf. on the congruence of the general principle of law with Art. 21 sec. 2 VStG, judgment 2C_354/2018 of 20 April 2020 at 4.2.1; cf. also JUNG, loc. cit., StR 66/2011 pp. 17 et seq. and 20 et seq.).

16.2. Tax avoidance occurs if (a) a legal structure chosen by the parties appears to be unusual ("insolite"), improper or peculiar, at least completely inappropriate to the economic circumstances (so-called objective element), if (b) it can also be assumed that the chosen legal structure was abusively made solely in order to save taxes that would be due if the circumstances had been properly regulated (so-called subjective element), and if (c) the chosen course of action would actually lead to significant tax savings, provided that it was accepted by the tax authority (so-called effective element). Whether these requirements are met must be examined on the basis of the specific circumstances of the individual case. If the requirements for tax avoidance are met, the taxation must be based on the legal structure that would have been appropriate to achieve the desired economic purpose. Tax avoidance is only possible in very exceptional situations, namely if the chosen legal structure (objective element) - apart from the tax aspects - is beyond what is economically reasonable. The subjective element proves to be decisive insofar as the assumption of tax avoidance remains excluded if reasons other than mere tax savings play a relevant role in the legal structure **(BGE 149 II 53** at 5.2.1; **148 II 233** E. 5.2; **146 II 97** E.
2.6.2).

16.3.

16.3.1. In any event, the structure to be assessed here fulfils the effective element of tax avoidance. The full refund of the withholding tax requested by the complainant would, by definition, mean a considerable tax saving if the refund had not been available under another, appropriate legal arrangement (see also Art. 21 sec. 2 VStG).

16.3.2. The situation is less clear, however, with regard to the other two elements, especially since the lower court did not examine the question of abuse of the agreement. From its findings on the right of use and the files (Art. 105 para. 2 BGG), there are at least certain indications that the arrangements at issue could have been unusual and motivated by the tax savings or the advantage of the agreement.

16.3.3. It has already been stated that the payments under the swaps were closely linked to the interest income from the German government bonds (see E. 10.2 above). Whether the arrangements were unusual must therefore be examined on the basis of an overall assessment.

16.3.4. It should be noted with the lower court that the payments in Swiss francs which the Appellant received from the counterparties at the beginning of the term of the swap agreements financed the purchase of the Federal Bonds to the extent of the mark-up payments (the difference between the nominal value of the purchased bond tranche and their market value plus accrued interest; see Facts A.a). It is at least probable that the interest rate and exchange rate risks on the German government bonds could have been hedged differently - i.e. without this advance. In any case, the partial financing raises doubts as to whether the complainant was really interested in investing surplus liquidity and whether it would have acquired the individual bond tranches - and thus the interest income subject to withholding tax, including any tax refund claim - even without the corresponding, possibly unusually advantageous swap agreement.

16.3.5. According to the complainant, the size of the spread which the complainant received from the counterparties in addition to the USD LIBOR interest rate is almost exclusively due to the particularly high liquidity of the Swiss franc in the market at that time. However, the complainant thereby contradicts the explanations of a Danish bank, which it itself obtained and to which it refers in its complaint. The latter stated in essence that the liquidity of the currencies or the supply and demand thereafter in the market determine the pricing in the case of a pure currency swap. In the case of an interest rate swap, meanwhile, the spread depends not least on the coupon. In the case of combined cross-currency rate swaps, such as those at issue here, the spread is influenced by both (and other) factors. Against the background of these explanations, it is at least probable that the spreads would have been different - i.e. less favourable for the complainant - if, for example, not the gross but the net coupon (i.e. after deduction of withholding tax) had been calculated, i.e. the anticipated agreement benefits had not been passed on.

16.3.6. In any case, it is not absolutely necessary for the assumption of tax avoidance that the complainant itself derived or sought a direct advantage from the unusual arrangement. In the case of the refund of withholding tax, it is almost typical that the alleged person entitled to a refund or the applicant is not the sole and rarely the main beneficiary of the circumvention (cf. **BGE 147 II 338** at 3.3; Judgments 2C_359/2022 of 13 September 2022 at 6.2; 2C_470/2018 of 5 October 2018 at 6.3.2). Consequently, it cannot depend solely on his motivation. Incidentally, this also follows from the wording of Art. 21 sec. 2 VStG. This does not refer to the intention of the person entitled to a refund to evade, but generally excludes the refund if "it would lead to tax avoidance" (even more strictly the Romansh language versions: "[...] il *pourrait permettre* d'éluder un impôt"; "[...] la sua concessione *consentirebbe* d'eludere un'imposta"). Against this background, it would be sufficient for the assumption of the subjective characteristic of tax avoidance if the tax advantage - the refund of withholding tax based on Art. 11 para. 1 DBA CH-DK - had motivated at least the person to whom it ultimately accrued indirectly via the swap counterparties to participate in the structuring. In any case, the tax avoidance can be held against the complainant as the applicant if it had relevant knowledge of it or participated in it (see judgment 2A.660/2006 of 8 June 2007 at 5.3, 5.4.3 and 5.6, in: ASA 77 p. 554, StR 63/2008 p. 643).

16.4. Despite these indications, the findings of the lower court and the files as a whole do not yet allow a conclusive assessment of the question of tax avoidance. Further clarifications are required for this, namely on the following points.

16.4.1. With regard to the objective criterion of tax avoidance (unusual arrangement), it is necessary to examine in more detail whether the terms of the swaps were atypical or particularly favourable compared to the market and whether they differed

from the terms that would have been available from offerors who, firstly, would themselves have been entitled to a full refund and, secondly, whether the interest on the swaps wasBunds would not have been forwarded again. Furthermore, it must be clarified what economic benefit the complainant derived from the investment in the federal bonds, whether it could have achieved this or a similar benefit in other ways and whether it could have hedged the risks incurred by acquiring the federal bonds in such a way that the (anticipated) advantages of the agreement would not have been passed on.

16.4.2. With regard to the question of the intention to circumvent, it is then of interest whether the counterparties to the swaps themselves passed on the cash flows from the German government bonds and, in particular, the anticipated agreement benefits, and whether the possible final recipients of the cash flows are identical to the persons from whom the complainant had purchased the five tranches of the German government bonds via the broker(s). In addition, the business reasons put forward by the complainant for the purchase of the federal bonds must be examined more closely.

16.4.3. With regard to these investigations, it should be recalled that the Federal Supreme Court has so far left open the question of whether a breach of the duty to cooperate entails the forfeiture of the claim for reimbursement by analogy with Article 48 (2) of the VStG, even though the Ordinance of 18 December 1974 on the Swiss-Danish Double Taxation Agreement (VO DTA CH-DK; SR 672.931.41) does not provide for this legal consequence (cf. on other DTAs, judgments 2C_936/2017 of 22 August 2019 at 8.4 and 9.10; 2C_964/2016 of 5 April 2017 at 5.4 and 6.3). Nevertheless, the Federal Supreme Court considered it permissible to assess the non-disclosure of the opposing parties to the detriment of the applicant. The fact that the broker refused to hand over the information was the applicant's own fault, as it had itself intervened with the broker (judgment 2C_895/2012 of 5 May 2015 at 8.3.3, 8.3.4 and 8.4.3). It is true that, under normal circumstances, the lack of cooperation in the refund procedure in itself is unlikely to lead to the conclusion with a probability bordering on certainty that the arrangement or transaction in question was motivated by an intention to circumvent it. However, experience has shown that it is particularly difficult for the tax authorities to prove this point in complex financial structures. In the present case, it would therefore be sufficient if the tax motivation appears to be predominantly probable in view of all the circumstances - including participation in the refund procedure (see judgment 9C_591/2023 of 2 April 2024 at 3.6.4, to be published).

17.
In summary, it is not possible to conclusively assess on the basis of the findings of the lower court whether the arrangement meets the requirements of tax avoidance. It is foreseeable that the investigation and answers to these questions will cause a certain amount of effort. It is possible that some of the questions raised will have to be examined by a financial expert so that the lower court can conclusively determine whether the design was peculiar and based on an intention to circumvent or abuse. Consequently, the matter must be referred back to the lower court so that it can carry out the necessary investigations (Art. 107 para. 2 BGG). If the lower court comes to the conclusion that the requirements for tax avoidance are not met, Switzerland would not be able to accuse the complainant of an abuse of rights or an agreement in good faith and the requested refund would therefore have to be granted. If, on the other hand, the requirements for tax avoidance were met, it would then have to be examined, in the light of the function of the prohibition of abuse of rights as a last resort, whether other reasons arise from the conduct of the Contracting States or the motivation of the complainant which could exclude Switzerland's objection of abuse of rights. Although the institution of tax avoidance covers at least a large part of the conditions under which states generally refuse treaty benefits (see E. 15.3 above), it is not excluded a priori that there could be further arguments in individual cases that could refute the plea of abuse of rights, for example by making Switzerland's invocation of the prohibition of abuse of rights appear to be contrary to good faith.

V. Outcome of the proceedings, costs and compensation

18.
In view of what has been said, the appeal proves to be well-founded insofar as it asserts that the lower court should not have refused reimbursement on the grounds of lack of entitlement to use. The judgment under appeal is to be set aside and the matter is to be referred back to the lower court so that it can examine whether there has been an abuse of the agreement, taking into account the above considerations. This rejection is deemed to be the full success of the complainant for the transfer of the court costs, although it cannot be ruled out that it will one day lose in this case. Accordingly, the court costs are to be imposed on the FTA, as it pursues financial interests (Art. 66 paras. 1 and 4 BGG). The FTA must pay the complainant appropriate party compensation (Art. 68 para. 1 BGG).

Accordingly, the Federal Supreme Court recognises:

1.
The appeal is upheld. The judgment of the Federal Administrative Court of 4 September 2023 is set aside. The proceedings are referred back to the Federal Administrative Court for a supplementary determination of the facts and a reassessment.

2.
The court costs of CHF 25,000 are imposed on the Federal Tax Administration.

3.
The Federal Tax Administration must pay the complainant party compensation of CHF 20,000.

4.
This judgment will be notified in writing to the complainant, the Federal Tax Administration and the Federal Administrative Court, Section I.

Lucerne, 3 October 2024

On behalf of the IIIrd Public Law Division of the
Swiss Federal Supreme Court

President: Parrino

The court clerk: Seiler

Bundesgericht
Tribunal fédéral
Tribunale federale
Tribunal federal

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Bundesgericht
Tribunal fédéral
Tribunale federale
Tribunal federal

9C_635/2023

Urteil vom 3. Oktober 2024

III. öffentlich-rechtliche Abteilung

Besetzung
Bundesrichter Parrino, Präsident,
Bundesrichter Stadelmann,
Bundesrichterin Moser-Szeless, Bundesrichter Beusch, Bundesrichterin Scherrer Reber,
Gerichtsschreiber Seiler.

Verfahrensbeteiligte
A._____,
vertreten durch Rechtsanwälte Dr. Thomas Meister und/oder Maurus Winzap,
Beschwerdeführerin,

gegen

Eidgenössische Steuerverwaltung, Hauptabteilung Direkte Bundessteuer, Verrechnungssteuer, Stempelabgaben,
Eigerstrasse 65, 3003 Bern.

Gegenstand
Verrechnungssteuer, Steuerperiode 2015,

Beschwerde gegen das Urteil des Bundesverwaltungsgerichts vom 4. September 2023 (A-2121/2020).

Sachverhalt:

A.
Die A._____ mit Sitz in Dänemark ist ein sogenanntes "spezielles Kreditinstitut" in der Rechtsform eines dänischen Vereins, das im Jahr ttt gegründet wurde. Sie ist gewinnsteuerpflichtig und verfolgt den Zweck, ihren Kundinnen und Kunden - (...) - möglichst kostengünstige Finanzierungskredite zu gewähren (...).

A.a. In den Jahren 2013 und 2014 erwarb die A._____ fünf Tranchen an zwei Bundesanleihen zu folgenden Bedingungen (Beträge in CHF) :
Bundesanleihe, verzinst zu 2 %, Laufzeit 2005 - 9. November 2014 (ISIN: uuu; nachfolgend: Anleihe 1)

Erwerb	Valuta	Nominal	Kurs	Marktwert	Marchzins	Kaufpreis

15.04.2013	18.04.2013	75'000'000.00	103.470	77'602'500.00	662'500.00	78'265'000.00
16.04.2013	18.04.2013	30'000'000.00	103.510	31'053'000.00	265'000.00	31'318'000.00

Bundesanleihe, verzinst zu 3.75 %, Laufzeit 2001 - 10. Juni 2015 (ISIN: vvv; nachfolgend: Anleihe 2)

Erwerb	Valuta	Nominal	Kurs	Marktwert	Marchzins	Kaufpreis
11.06.2013	14.06.2013	40'000'000.00	107.680	43'072'000.00	16'666.67	43'088'666.67
22.05.2014	27.05.2014	75'000'000.00	104.015	78'011'250.00	2'710'937.50	80'722'187.50
03.06.2014	10.06.2014	40'000'000.00	103.940	41'576'000.00	0.00	41'576'000.00

Zusammen mit jedem Anleihenkauf schloss die A._____ einen sogenannten "Cross-Currency Rate Swap" (nachfolgend: der Swap bzw. die Swaps) mit einer Investmentbank (Bank B._____ [nachfolgend: B._____] und Bank C._____ [nachfolgend: C._____]) ab, dessen Laufzeit exakt mit der Restlaufzeit der Bundesanleihe übereinstimmte. Unter den Swaps erhielt die A._____ von der Investmentbank einen Betrag in CHF entsprechend dem Nominalwert der Tranche der Bundesanleihe in Schweizer Franken ("Notional") zuzüglich einer Aufschlagszahlung, die der Differenz zwischen dem Nominalwert der erworbenen Tranche und ihrem Marktwert zuzüglich Marchzins entsprach. Die A._____ hatte den Betrag in Schweizer Franken zum selben Satz zu verzinsen, den sie auf der entsprechenden Bundesanleihe erhielt. Als Gegenleistung bezahlte die A._____ der Investmentbank zu Beginn der Laufzeit des Swaps den Gegenwert des Nominalwerts der betreffenden Anleihenstranche in U.S. Dollar (USD) und sie erhielt auf diesem Betrag den variablen USD-Libor-Zins zuzüglich eines "Spreads". Tabellarisch dargestellt unterlagen die Swaps also folgenden Konditionen (Art. 105 Abs. 2 BGG) :
Cross-Currency Rate Swaps (CHF gegen USD getauscht; CHF verzinst zu [fix] 2 %, USD verzinst zum [variablen] USD-Libor-Zins zzgl. Spread von 0.04 %) :

Beginn	Ende	Gegenpartei	"Notional" (CHF)	Gegenwert in USD	Aufschlag (CHF)
15.04.2013	09.11.2014	C._____	75'000'000.00	80'601'827.00	3'265'000.00
16.04.2013	09.11.2014	C._____	30'000'000.00	32'222'000.00	1'318'000.00

Cross-Currency Rate Swaps (CHF gegen USD getauscht; CHF verzinst zu [fix] 3.75 %, USD verzinst zum [variablen] USD-Libor-Zins zzgl. Spread von 0.03 %) :

Beginn	Ende	Gegenpartei	"Notional" (CHF)	Gegenwert in USD	Aufschlag (CHF)
11.06.2013	10.06.2015	C._____	40'000'000.00	42'928'000.00	3'088'666.67
22.05.2014	10.06.2015	B._____	75'000'000.00	83'939'563.51	5'722'187.50
03.06.2014	10.06.2015	B._____	40'000'000.00	44'518'642.18	1'576'000.00

In Bezug auf die erste Tranche der Anleihe 1 ergaben sich für die A._____ aus diesen Konditionen folgende Mittelflüsse und folgende Verrechnungssteuerabzüge, die hier im Sinne eines Beispiels wiedergegeben werden (Art. 105 Abs. 2 BGG) :

Datum	Valuta	Art/Quelle	Zuflüsse / Abflüsse		VST
			CHF	USD	
15.04.2013	18.04.2013	Kaufpreis Anleihe 1, Tranche 1	-78'265'000.00		
		Swap Kapital	75'000'000.00	-80'601'827.00	
		Swap Aufschlag	3'265'000.00		
18.07.2013	18.07.2013	Swap Zins		64'607.07	
18.10.2013	18.10.2013	Swap Zins		63'071.83	
09.11.2013	11.11.2013	Zins Anleihe 1, Tranche 1	975'000.00		525'000.00
09.11.2013	11.11.2013	Swap Zins	-1'500'000.00		
18.01.2014	21.01.2014	Swap Zins		60'842.62	

18.04.2014	22.04.2014	Swap Zins		56'355.45	
18.07.2014	18.07.2014	Swap Zins		52'173.90	
18.10.2014	20.10.2014	Swap Zins		57'581.95	
09.11.2014	10.11.2014	Kapitalrückzahlung Anleihe 1, Tranche 1	75'000'000.00		
09.11.2014	10.11.2014	Zins Anleihe 1, Tranche 1	975'000.00		525'000.00
09.11.2014	10.11.2014	Swap Kapital	-75'000'000.00	80'601'827.00	
09.11.2014	10.11.2014	Swap Zins	-1'500'000.00	8'542.65	
		Total	-1'050'000.00	363'175.47	1'050.000.00

A.b. Am 31. August 2015 stellte die A._____ mit Formular 89 einen (ersten) Antrag bei der Eidgenössischen Steuerverwaltung (ESTV) auf volle Rückerstattung der Verrechnungssteuer, die im Jahr 2015 in der Höhe von Fr. 2'034'375.- von den Zinszahlungen an die A._____ aus der Anleihe 2 abgezogen worden war (Rückerstattungsantrag Nr. www). Mit Schreiben vom 17. September 2015 verlangte die ESTV von der A._____ diverse Auskünfte und Unterlagen zu diesem Rückerstattungsantrag. Sie bat um eine detaillierte Aufstellung sämtlicher Käufe und Verkäufe der Bundesanleihen (a), die Jahresrechnungen für die Jahre 2013 bis 2015 (b), eine Erklärung zu den wirtschaftlichen Gründen, die zum Erwerb der Bundesanleihen geführt hätten (c), eine Auskunft, ob in diesem Zusammenhang Absicherungsgeschäfte getätigt worden seien (d), ob die Bundesanleihen Gegenstand von "Securities Lending" und "Borrowing Transaktionen" gewesen seien (e) und ob die Zinsen weitergeleitet worden seien oder ob beabsichtigt sei, diese weiterzugeben (f). Die A._____ liess der ESTV am 20. Oktober 2015 eine detaillierte Aufstellung aller drei Käufe in Höhe von insgesamt Fr. 155 Mio. (a) und Auszüge aus den Jahresrechnungen 2013 und 2014 zukommen (b). Ausserdem erklärte sie, der wirtschaftliche Grund für den Erwerb der Bundesanleihen sei gewesen, im Rahmen der Investmentstrategie in eine Anleihe mit hohem Rating und einer guten Rendite zu investieren (c). Es seien drei "Asset Swaps" abgeschlossen worden, um "den fixen Zins in Schweizer Franken in einen variablen Zins in USD umzuwandeln", welche jeweils am Tag des Erwerbs der Bundesanleihen zu laufen begonnen und am Tag der Rückzahlung der Bundesanleihen geendet hätten (d). Die Bundesanleihen seien nicht Teil von "Securities Lending" und "Borrowing Transaktionen" gewesen (e) und die Zinsen seien nicht weitergeleitet worden, wobei auch nicht beabsichtigt sei, diese weiterzuleiten (f).

A.c. Mit Schreiben vom 4. Dezember 2015 verlangte die ESTV eine Kopie sämtlicher Verträge im Zusammenhang mit den "Asset Swaps" inklusive diesbezüglicher Transaktionen (a1), eine Auskunft darüber, ob noch weitere vertragliche Vereinbarungen bezüglich der Bundesanleihen abgeschlossen worden seien (b1) und ausführlichere Erklärungen zu den wirtschaftlichen Gründen für den Erwerb der Bundesanleihen (c1). Sodann bestand sie auf einer Offenlegung der Verkäufer der Bundesanleihen (d1) und eine Zusammenstellung des Gesamterfolgs der Investition inkl. Gewinnberechnung (f1). Schliesslich erkundigte sie sich, ob die Bundesanleihen über das Hauptbuch der Börse oder ausserbörslich erworben wurden (e1).

A.d. Am 6. Januar 2016 stellte die A._____ mit Formular 89 bei der ESTV drei weitere Anträge auf volle Rückerstattung der Verrechnungssteuer:

- Rückerstattungsantrag Nr. xxx in der Höhe von Fr. 921'984.- für die Verrechnungssteuer auf den im Jahr 2013 aus der Anleihe 1 erhaltenen Zinszahlungen (später mit Schreiben vom 20. Juli 2016 korrigiert auf Fr. 735'000.-, mithin 35 % der Bruttozinszahlungen von Fr. 2'100'000.-; vgl. unten A.g);
- Rückerstattungsantrag Nr. yyy in der Höhe von Fr. 1'509'375.- für die Verrechnungssteuer auf den im Jahr 2014 aus der Anleihe 2 erhaltenen Zinszahlungen von brutto Fr. 4'312'500.-; und
- Rückerstattungsantrag Nr. zzz in der Höhe von Fr. 735'000.- für die Verrechnungssteuer auf den im Jahr 2014 aus der Anleihe 1 erhaltenen Zinszahlungen von brutto Fr. 2'100'000.-.

Die Gesamtsumme der mit den vier Anträgen zurückgeforderten Verrechnungssteuer betrug somit Fr. 5'013'750.- (nach der Korrektur vom 20. Juli 2016; zuvor: Fr. 5'200'734.-).

A.e. Mit Schreiben vom 18. Januar 2016 liess die A._____ der ESTV Kopien der Swap-Verträge und eine detaillierte Aufstellung aller dazugehöriger Bewegungen zukommen (a1). Ausserdem liess sie die ESTV wissen, dass es keine weiteren vertraglichen Abmachungen bezüglich der Bundesanleihen gegeben

habe (b1) und es Teil ihres Geschäfts sei, das frei verfügbare Kapital zum besten Zinssatz mit dem kleinsten Risiko zu investieren (c1). Alle drei Käufe der Bundesanleihen seien über die D._____ getätigt worden (d1), wobei es sich um drei ausserbörsliche Käufe gehandelt habe (e1). Aus der detaillierten Gewinnberechnung der A._____ ergab sich, dass ihr auf den Bundesanleihen insgesamt ein Verlust von Fr. 261'854.17 entstanden war, der aber durch einen Gewinn in gleicher Höhe aus den Swaps ausgeglichen wurde. Auf den getauschten USD resultierte ein Gewinn von USD 597'854.65 (f1).

A.f. Mit Schreiben vom 24. Juni 2016 verlangte die ESTV von der A._____ abermals Auskunft zu allen vier gestellten Anträgen. Sie bat um ein exaktes Berechnungsmodell für die Swaps inklusive aller verwendeten Daten, eine ausführliche Erklärung zum fixen Swap-Zinssatz von 3.75 % in CHF und den Aufschlagszahlungen, die von der Gegenpartei der Swaps bezahlt wurden, und eine schrittweise Darlegung des Investitionsprozesses inklusive eines Zeitablaufplans und des Entscheidfindungsprozesses. Überdies forderte die ESTV die Nennung der Kriterien zur Auswahl der Gegenpartei (für die Bundesanleihen und die Swaps), eine Auskunft darüber, wie die A._____ auf die Investitionsmöglichkeiten aufmerksam geworden war (aktiv danach gesucht oder unaufgefordert angeboten erhalten), und die Offenlegung der Gegenparteien der D._____ (für den Erwerb der Bundesanleihen) bzw. von B._____ und C._____ (für den Abschluss der Swaps). Diesbezüglich wies die ESTV darauf hin, dass diese Gegenparteien aus ihrer Sicht als Vermittler (Broker) agiert hätten, weshalb sie auf der vollständigen Offenlegung der ganzen Transaktionskette bestehe.

A.g. Mit Schreiben vom 20. Juli 2016 teilte die A._____ der ESTV Folgendes mit: Sie gewähre Darlehen an (...). Sie finanziere ihre Kreditvergabe durch Aufnahme von Geldern auf den Geld- und Kapitalmärkten, einschliesslich Finanzinstrumente. Ihre Überschussfinanzierung unterliege hierbei ihren Investitionsrichtlinien, welche sehr restriktiv seien und nur Investitionen in Anleihen (mit einer Mindestbonität von AA-) oder "das Parkieren auf einem Bankkonto" erlaubten. Derivate könnten nur als Absicherungsgeschäfte mit Gegenparteien, die ein Minimumrating von A- hätten, abgeschlossen werden. Risiken aus Fremdwährungen (alle Währungen ausser dänischen Kronen [DKK] und Euro) seien auf maximal DKK 100 Mio. beschränkt. Sie habe zu viel Liquidität in USD gehabt und daher nach einer Anlagemöglichkeit gesucht, die gemäss ihren Investitionsrichtlinien erlaubt war. Daher habe sie beschlossen, in CHF zu finanzieren und habe dem Broker E._____ den sie aufgrund einer durchgeführten Due-Diligence-Prüfung ausgewählt habe, den Erwerb eines Pakets aus Bundesanleihen und Swaps in Auftrag gegeben ("the purchase of the bonds and the swap transactions were traded as a 'package' with the investment broker"). Um die Anleihen zu bezahlen, habe sie einen dem Kaufpreis der Bundesanleihen (zuzüglich Zins) entsprechenden Betrag in USD in CHF umtauschen müssen, wodurch ein Währungsrisiko in CHF entstanden sei. Die Swaps hätten dazu gedient, dieses Währungsrisiko in CHF zu eliminieren. Hierbei seien "die Swap-Zinsen von den Zinszahlungen der Bundesanleihen abgeleitet" worden ("The cash flows exchanged in each cross currency swap transaction meant that [A._____] paid, to the swap counterparty, a USD amount corresponding to the CHF purchase price of the bonds together with a fixed interest rate exactly matching the fixed interest rate on the bonds. [A._____] received the CHF notional amount corresponding to the CHF purchase price of the bonds together with a floating interest rate tied to USD LIBOR"; "the CHF fixed swap rate at 3.75 % corresponds to the fixed interest rate of 3.75 % on the bond"). Sie (die A._____) habe den vollständig in CHF erhaltenen Zinsbetrag (aus den Anleihen) an die Swap-Gegenpartei weiterleiten müssen, woraus sie einen Verlust im Umfang der Höhe der Verrechnungssteuer erlitten habe ("in accordance with the terms of the swap confirmations [A._____] had to pay the full CHF coupon amounts to the swap counterparties [...] and thereby suffered an aggregate loss of CHF 5'013'750.- corresponding to the withholding tax [...] in exchange for the CHF coupon amounts [A._____] received USD amounts from the swap counterparties"). Die Offenlegung der gesamten Transaktionskette sei für sie (die A._____) nicht möglich, da sie nur mit dem Broker E._____Kontakt gehabt habe und nicht mit D._____. Auf den "trade tickets" sei Letztere aber als Gegenpartei vermerkt. Ausserdem korrigierte die A._____ den Rückerstattungsantrag Nr. xxx (betreffend Zinsen aus der Anleihe 1 im Jahr 2013) von Fr. 921'984.- auf Fr. 735'000.- (vgl. oben A.d).

A.h. Nachdem die ESTV der A._____ mit Schreiben vom 19. Oktober 2016 mitgeteilt hatte, dass sie ihre vier Anträge im Betrag von total Fr. 5'013'750.- wegen fehlenden Nutzungsrechts, Abkommensmissbrauchs und der Verletzung der Mitwirkungspflicht abzuweisen gedenke, fand am 12. Dezember 2016 bei der ESTV eine Besprechung mit der Vertretung der A._____ statt. Neben bereits vorgebrachten Sachverhaltselementen machte die A._____ durch ihre Vertretung neu geltend, dass eine Risikodiversifikation von USD-Schuldnern zu CHF-Schuldnern (Eidgenossenschaft) angestrebt worden sei. Die Transaktionen seien ökonomisch sinnvoll gewesen. Die Swaps seien ausschliesslich zur Absicherung des Wechselkursrisikos und nicht zur Finanzierung abgeschlossen worden. Sodann seien alle Risiken bei der A._____ verblieben. Die streitbetroffenen Swaps seien nicht mit "Total Return Swaps" oder Futures vergleichbar. Es seien keine kurzfristigen Transaktionen oder Transaktionen in unmittelbarer zeitlicher Nähe zu Zinszahlungsterminen getätigt worden. Mit Schreiben vom 15. Dezember 2016 beantragte die A._____, ihren Anträgen auf volle Rückerstattung der Verrechnungssteuer sei stattzugeben und der Betrag der Rückerstattung sei ab Datum des Entscheids der ESTV zu 5 % zu verzinsen.

A.i. Mit Entscheid vom 5. März 2020 wies die ESTV die vier Anträge auf Rückerstattung der Verrechnungssteuer in vollem Umfang ab. Sie begründete die Abweisung damit, dass A._____ nicht als Nutzungsberechtigte an den Zinsen aus den Bundesanleihen zu betrachten sei. Sie habe nämlich keine

nennenswerten anleihensspezifische Risiken getragen. Beim Kauf der Bundesanleihen und dem gleichzeitigen Abschluss der Swaps habe es sich um eine unteilbare Gesamttransaktion gehandelt; das eine Geschäft wäre ohne das jeweilig andere nicht zustande gekommen. Somit habe zwischen der Erzielung der Einkünfte aus den Bundesanleihen und der Pflicht zu deren Weiterleitung über die Swaps eine gegenseitige Abhängigkeit bestanden. Ausserdem habe die A._____ ihre Mitwirkungspflicht verletzt.

B.
Die A._____ erhob hiergegen am 20. April 2020 Beschwerde beim Bundesverwaltungsgericht und beantragte die vollständige Rückerstattung der Verrechnungssteuer. Im Verlauf des Verfahrens vor Bundesverwaltungsgericht fanden mehrere Schriftenwechsel statt. In ihrer Replik stellte die A._____ einen Eventualantrag auf Kürzung der Rückerstattung um die Verrechnungssteuer, die auf die Marchzinsen entfiel, mithin von total Fr. 5'013'750.- um Fr. 1'279'286.- auf Fr. 3'734'464.-.
Mit Urteil vom 4. September 2023 wies das Bundesverwaltungsgericht die Beschwerde vollumfänglich ab. Es begründete die Abweisung damit, dass die A._____ an den Zinsen aus den Bundesanleihen nicht nutzungsberechtigt gewesen sei. Folgerichtig untersuchte das Bundesverwaltungsgericht nicht näher, ob der A._____ ein Abkommensmissbrauch vorzuwerfen war. Es liess auch offen, ob die A._____ ihre Mitwirkungspflicht verletzt hatte und welche Konsequenzen aus einer solchen Verletzung folgen würden.

C.
Mit Beschwerde in öffentlich-rechtlichen Angelegenheiten vom 9. Oktober 2023 beantragt die A._____ die Aufhebung des Urteils des Bundesverwaltungsgerichts vom 4. September 2023 und die Rückerstattung der Verrechnungssteuer gemäss den Rückerstattungsbegehren Nr. www, Nr. xxx, Nr. yyy und Nr. zzz in der Höhe von gesamthaft Fr. 5'013'750.-.
Die ESTV beantragt die Abweisung der Beschwerde. Das Bundesverwaltungsgericht verweist auf sein Urteil. Die A._____ nimmt mit Schreiben vom 14. Dezember 2023 erneut Stellung.

Erwägungen:

I. Prozessuales

1.
Angefochten ist ein Endentscheid des Bundesverwaltungsgerichts in einem Verrechnungssteuerstreit, mithin in einer Angelegenheit des öffentlichen Rechts (Art. 82 lit. a, Art. 86 Abs. 1 lit. a und Art. 90 BGG). Die Beschwerde in öffentlich-rechtlichen Angelegenheiten ist zulässig, zumal keine Ausschlussgründe nach Art. 83 BGG vorliegen. Auf die frist- und formgerecht eingereichte Beschwerde (Art. 42 und Art. 100 Abs. 1 BGG) der nach Art. 89 Abs. 1 BGG legitimierten Beschwerdeführerin ist einzutreten.

2.

2.1. Das Bundesgericht legt seinem Urteil den Sachverhalt zugrunde, den die Vorinstanz festgestellt hat (Art. 105 Abs. 1 BGG). Eine Berichtigung oder Ergänzung der vorinstanzlichen Feststellungen ist von Amtes wegen (Art. 105 Abs. 2 BGG) oder auf Rüge hin (Art. 97 Abs. 1 BGG) möglich. Von den tatsächlichen Grundlagen des vorinstanzlichen Urteils weicht das Bundesgericht jedoch nur ab, wenn diese offensichtlich unrichtig sind oder auf einer Rechtsverletzung im Sinne von Art. 95 BGG beruhen und die Behebung des Mangels für den Verfahrensausgang zudem entscheidend sein kann (Art. 97 Abs. 1 BGG; **BGE 142 I 135** E. 1.6). "Offensichtlich unrichtig" bedeutet "willkürlich" (**BGE 140 III 115** E. 2). Eine entsprechende Rüge ist hinreichend zu substanziieren (Art. 106 Abs. 2 BGG; vgl. **BGE 147 I 73** E. 2.2).

2.2. Mit der Beschwerde in öffentlich-rechtlichen Angelegenheiten kann unter anderem eine Rechtsverletzung nach Art. 95 f. BGG gerügt werden. Das Bundesgericht wendet das Recht von Amtes wegen an (Art. 106 Abs. 1 BGG), prüft jedoch unter Berücksichtigung der allgemeinen Rüge- und Begründungspflicht (Art. 42 Abs. 1 und 2 BGG) nur die vorgebrachten Argumente, falls weitere rechtliche Mängel nicht geradezu offensichtlich sind (**BGE 142 I 135** E. 1.5). In Bezug auf die Verletzung der verfassungsmässigen Rechte gilt nach Art. 106 Abs. 2 BGG eine qualifizierte Rüge- und Substanziierungspflicht (**BGE 147 I 73** E. 2.1; **143 II 283** E. 1.2.2; **139 I 229** E. 2.2; **138 I 274** E. 1.6).

II. Streitgegenstand

3.
Der vorliegende Streit betrifft die Rückerstattung der Verrechnungssteuer, die der Bund unter anderem auf Zinsen aus von Inländern ausgegebenen Obligationen erhebt (Art. 4 Abs. 1 lit. a des Bundesgesetzes vom 13. Oktober 1965 über die Verrechnungssteuer [VStG; SR 642.21]).

3.1. Bei ausländischen Empfängern führt die Verrechnungssteuer grundsätzlich zu einer endgültigen, an der Quelle erhobenen steuerlichen Belastung (Art. 22 Abs. 1 und Art. 24 Abs. 2 VStG). Im Ausland ansässige Personen können aber Entlastung verlangen, soweit ihnen das Völkerrecht - namentlich ein Doppelbesteuerungsabkommen (DBA) - Anspruch hierauf vermittelt (vgl. zur analogen Situation bei

Dividenden **BGE 141 II 447** E. 2.2 mit Hinweisen; Urteile 2C_880/2018 vom 19. Mai 2020 E. 2.1; 2C_209/2017 vom 16. Dezember 2019 E. 3.1, nicht publ. in: **BGE 146 I 105**).

3.2. Die Beschwerdeführerin macht geltend, dass ihr aus dem Abkommen vom 23. November 1973 zwischen der Schweizerischen Eidgenossenschaft und dem Königreich Dänemark zur Vermeidung der Doppelbesteuerung auf dem Gebiete der Steuern vom Einkommen und vom Vermögen (DBA CH-DK; SR 0.672.931.41) ein solcher Entlastungsanspruch zustehe. Gemäss Art. 11 Abs. 1 DBA CH-DK können Zinsen, die aus einem Vertragsstaat (Quellenstaat) stammen und deren Nutzungsberechtigte eine im anderen Vertragsstaat (Ansässigkeitsstaat) ansässige Person ist, nur im Ansässigkeitsstaat besteuert werden. Die Erhebung der Verrechnungssteuer ist unter diesen abkommensrechtlichen Voraussetzungen also zumindest nach Art. 26 DBA CH-DK rückgängig zu machen, indem die Steuer zurückerstattet wird, sofern nicht bereits die Voraussetzungen für eine Entlastung an der Quelle erfüllt sind (vgl. dazu etwa Art. 1 Abs. 2 der Verordnung vom 22. Dezember 2004 über die Steuerentlastung schweizerischer Dividenden aus wesentlichen Beteiligungen ausländischer Gesellschaften [SR 672.203]).

3.3. Die Vorinstanz und die ESTV verneinen einen Anspruch der Beschwerdeführerin auf Entlastung von der Verrechnungssteuer. Sie ziehen nicht in Zweifel, dass es sich bei der Beschwerdeführerin um eine in Dänemark ansässige Person handelt. Streitig ist hingegen, ob die Beschwerdeführerin die Nutzungsberechtigte ("beneficial owner") der Zinsen aus den Bundesanleihen war. Diese Frage ist auf dem Wege der Auslegung des DBA CH-DK zu klären. Falls sie - entgegen der Vorinstanz - zu bejahen ist, muss ausserdem beantwortet werden, ob die Rückerstattung wegen Abkommensmissbrauch zu verweigern ist und welche Konsequenzen die Verletzung der Mitwirkungspflicht, welche die ESTV der Beschwerdeführerin vorwirft, nach sich zieht.

III. Abkommensrechtlicher Entlastungsanspruch

4.

4.1. Die Auslegung von DBA und anderen völkerrechtlichen Verträgen richtet sich nach dem Wiener Übereinkommen vom 23. Mai 1969 über das Recht der Verträge (VRK; SR 0.111), insbesondere den Auslegungsregeln von Art. 31 ff. VRK (**BGE 149 II 400** E. 7.1; **147 V 402** E. 9.2.1; **147 V 387** E. 3.3). Jedenfalls soweit vorliegend relevant, stellen die Grundsätze des Wiener Übereinkommens zur Vertragsauslegung kodifiziertes Völkergewohnheitsrecht dar (**BGE 149 II 400** E. 7.1; **147 V 387** E. 3.3; **146 II 150** E. 5.3.1; Gutachten des Internationalen Gerichtshofs [IGH] vom 9. Juli 2004, *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, C.I.J. Recueil 2004 S. 174 § 94).

4.2. Elemente der allgemeinen Auslegungsregel von Art. 31 Abs. 1 VRK sind der Wortlaut der vertraglichen Bestimmung gemäss seiner gewöhnlichen Bedeutung, Ziel und Zweck des Vertrags, Treu und Glauben sowie der Zusammenhang. Gemäss der Rechtsprechung sind diese vier Elemente gleichrangig (**BGE 149 II 400** E. 7.2; **147 V 387** E. 3.3). Den Ausgangspunkt der Auslegung bildet der Wortlaut der vertraglichen Bestimmung. Der Text der Vertragsbestimmung ist demnach aus sich selbst heraus gemäss seiner gewöhnlichen Bedeutung zu interpretieren. Diese gewöhnliche Bedeutung ist in Übereinstimmung mit ihrem Zusammenhang, dem Ziel und Zweck des Vertrags und gemäss Treu und Glauben zu eruieren (**BGE 149 II 400** E. 7.2; **147 V 387** E. 3.3 m.w.H.). Ziel und Zweck des Vertrags ist dabei, was mit dem Vertrag erreicht werden sollte (**BGE 149 II 400** E. 7.2; **147 V 387** E. 3.3; **147 II 13** E. 3.3; **146 II 150** E. 5.3.2). Auf den Vertragswillen der Vertragspartner stellen die völkerrechtlichen Auslegungsregeln nur insoweit ab, als dieser seinen Niederschlag im Abkommen selbst gefunden hat. Vorbehalten bleibt freilich nach Art. 31 Abs. 4 VRK eine klar manifestierte, einvernehmliche Absicht der Parteien, einen Ausdruck nicht im üblichen, sondern in einem besonderen Sinn zu verwenden (**BGE 149 II 400** E. 7.2; **147 V 387** E. 3.3 m.w.H.). Die vorbereitenden Arbeiten und die Umstände des Vertragsabschlusses sind nach Art. 32 VRK sodann ergänzende Auslegungsmittel und können - nur, aber immerhin - herangezogen werden, um die nach Art. 31 VRK ermittelte Bedeutung zu bestätigen oder diese zu bestimmen, wenn die Auslegung nach Art. 31 VRK die Bedeutung mehrdeutig oder dunkel lässt (Art. 32 lit. a VRK) oder zu einem offensichtlich sinnwidrigen oder unvernünftigen Ergebnis führt (Art. 32 lit. b VRK; vgl. **BGE 149 II 400** E. 7.2; **147 V 387** E. 3.3; **147 II 13** E. 3.3; **146 II 150** E. 5.3.2). Diesfalls ist der auszulegenden Bestimmung unter mehreren möglichen Interpretationen derjenige Sinn beizumessen, welcher ihre effektive Anwendung gewährleistet und nicht zu einem Ergebnis führt, das dem Ziel und Zweck der eingegangenen Verpflichtungen widerspricht ("effet utile"; vgl. **BGE 149 II 400** E. 7.2; **147 V 387** E. 3.3; **147 II 13** E. 3.3; **146 II 150** E. 5.3.2).

4.3. Nach ständiger Praxis berücksichtigt das Bundesgericht das Musterabkommen der OECD (OECD-MA) und den zugehörigen Kommentar (OECD-MK) bei der Auslegung von DBA, soweit sie auf diesem Standard beruhen (vgl. **BGE 149 II 400** E. 7.3; **144 II 130** E. 8.2.3; **143 II 257** E. 6.5; **141 II 447** E. 4.4.3). Da DBA grundsätzlich statisch auszulegen sind, hat das Bundesgericht kürzlich seine Praxis dahingehend präzisiert, dass grundsätzlich nur diejenige Fassung des OECD-MK, die den Vertragsparteien bei Abschluss des DBA vorgelegen hat, die gewöhnliche oder allenfalls eine besondere Bedeutung einer DBA-Bestimmung nach Art. 31 Abs. 1 und 4 VRK zum Ausdruck bringen kann. Eine Ausnahme von dieser Regel kommt in Betracht, wenn in einem DBA offene Begriffe verwendet werden, deren Bedeutung für die Parteien erkennbar einem zeitlichen Wandel unterliegen wird. Eine solche dynamische Auslegung eines völkerrechtlichen Vertrags

birgt jedoch die Gefahr, dass sich die Rechtsanwendung vom Konsens der Vertragsstaaten entfernt und der Wille der Vertragsstaaten untergraben wird. Deshalb ist auf jeden Fall nur mit grösster Zurückhaltung anzunehmen, dass die Vertragsstaaten einen bestimmten Begriff dynamisch ausgelegt sehen wollten. Sind die Voraussetzungen für eine dynamische Auslegung nicht erfüllt, können spätere Fassungen des OECD-MK zwar immer noch als Auslegungshilfen konsultiert werden. Sie haben dann aber nicht den Status eines wichtigen Auslegungsmittels im Sinne von Art. 31 VRK und können - ähnlich wie anderes Schrifttum oder Gerichtsurteile (vgl. dazu Art. 38 Abs. 1 lit. d des Statuts des Internationalen Gerichtshofs vom 26. Juni 1945 [IGH-Statut; SR 0.193.501]) - nur aus der Stichhaltigkeit ihrer Argumentation Überzeugungskraft gewinnen (vgl. **BGE 149 II 400** E. 7.4, 9.4.3 und 9.5, mit zahlreichen Hinweisen; vgl. dazu auch MICHAEL LANG, Schweizer Bundesgericht zur Bedeutung des OECD-Kommentars, SWI 2023 S. 423 f., der darauf hinweist, dass die OECD ihre Standpunkte im OECD-MK regelmässig nicht näher begründe, was den Wert von späteren Fassungen des OECD-MK als Auslegungshilfe unterminiere; ihm zustimmend DANIEL BLUM, Die Bedeutung des OECD-Musterkommentars für die Auslegung von Doppelbesteuerungsabkommen, IStR 2023 S. 929; OESTERHELT/OPEL, Rechtsprechung im Steuerrecht 2023/4, Forum für Steuerrecht [FStR] 2023 S. 364).

5.
Das Bundesgericht hat sich in seiner Rechtsprechung bereits verschiedentlich mit dem Begriff des Nutzungsberechtigten (bzw. "bénéficiaire effectif" und "beneficial owner") beschäftigt.

5.1. In **BGE 141 II 447** erwog das Bundesgericht mit Bezug auf Art. 10 DBA CH-DK, dass als Nutzungsberechtigter einer Dividende gilt, wer die Dividende voll verwenden kann und daran vollen Genuss hat. Ist der Empfänger durch eine vertragliche oder gesetzliche Verpflichtung in dieser Verwendung eingeschränkt, weil er die Dividende von Vertrags oder Gesetzes wegen an eine andere Person weiterleiten muss, ist er nicht Nutzungsberechtigter. Je grösser der Anteil der Dividende ist, den der im DBA-Staat ansässige Empfänger weiterleiten muss, desto eher ist ihm die Nutzungsberechtigung abzusprechen. Die Nutzungsberechtigung kann bereits verloren gehen, wenn der Empfänger zwar nicht die uneingeschränkte Gesamtheit der Dividende weiterleiten muss, aber lediglich einen kleinen Prozentsatz davon behalten darf, der als Vergütung oder Entlohnung für die Weiterleitung einzustufen ist (**BGE 141 II 447** E. 5.2.4).

5.2. Später präzisierte das Bundesgericht in einem Urteil betreffend Art. 10 Abs. 2 lit. b des Abkommens vom 8. Dezember 1977 zwischen der Schweizerischen Eidgenossenschaft und dem Vereinigten Königreich von Grossbritannien und Nordirland zur Vermeidung der Doppelbesteuerung auf dem Gebiet der Steuern vom Einkommen (DBA CH-GB; SR 0.672.936.712) seine Rechtsprechung dahingehend, dass nur rechtliche - d.h. vertragliche oder gesetzliche - Weiterleitungspflichten die abkommensrechtliche Nutzungsberechtigung beeinträchtigen können. Rein faktische bzw. ökonomische Zwänge, aufgrund derer die Empfängerin eine Dividende ganz oder weitestgehend weiterleitet ("faktische" oder "tatsächliche Weiterleitungsverpflichtungen"; vgl. **BGE 141 II 447** E. 5.2.2, 6.3 und 6.4.2; vgl. dazu auch NORDIN/SCHUDEL, Finanzprodukte und Verrechnungssteuerrückerstattung - ausgewählte Aspekte, FStR 2016 S. 50 f.), lassen die Nutzungsberechtigung nicht entfallen. Allerdings hielt das Bundesgericht unter Berücksichtigung der aktuellen Fassung des OECD-MK zu Art. 10 OECD-MA (d.h. die Fassung gem. Änderung vom 15. Juli 2014) dafür, dass nicht nur aus Vertragsdokumenten, sondern auch aus den Umständen - einschliesslich ökonomischer und tatsächlicher Zwänge - auf eine vertragliche oder gesetzliche Weiterleitungspflicht geschlossen werden kann, weswegen es keine "sachliche Differenz" zwischen **BGE 141 II 447** und der aktuellen Fassung des OECD-MK erkannte (Urteil 2C_880/2018 vom 19. Mai 2020 E. 4.4). Die Berücksichtigung der aktuellen Fassung des OECD-MK begründete das Bundesgericht damit, dass der Begriff des "bénéficiaire effectif" bzw. "beneficial owner" zum Zeitpunkt des Abschlusses des DBA CH-GB Ende der 1970er-Jahre neu und für die Vertragsstaaten schon damals erkennbar war, dass seine Bedeutung in den nachfolgenden Jahren einem Wandel unterliegen würde, der sich insbesondere in den Arbeiten der OECD widerspiegeln würde. Daraus schloss das Bundesgericht, dass eine dynamische Auslegung gerechtfertigt war (vgl. Urteil 2C_880/2018 vom 19. Mai 2020 E. 4.1).

6.
Für die Auslegung von Art. 11 Abs. 1 DBA CH-DK ist vorab zu klären, welche Sprachfassungen dieser Bestimmung massgeblich sind (Art. 33 VRK).

6.1. Authentische Abkommenssprachen des DBA CH-DK sind zwar grundsätzlich nur Deutsch und Dänisch (vgl. Schlussformel des DBA CH-DK). Den Begriff des Nutzungsberechtigten (bzw. "retmæssige ejer") haben die Vertragsstaaten jedoch erst mit der Änderung vom 21. August 2009 in den Vertragstext aufgenommen (vgl. Art. I Abs. 1 und Art. II Abs. 1 und 3 des Protokolls vom 21. August 2009 [AS 2010 5939]; in Kraft seit dem 22. November 2010; vgl. aber **BGE 141 II 447** E. 5.1, wonach die "effektive Nutzungsberechtigung" bereits vor dieser Änderung eine ungeschriebene Anspruchsvoraussetzung für die Geltendmachung von Abkommensvorteilen [betreffend Dividenden] gewesen war). Das betreffende Änderungsprotokoll ist zusätzlich in englischer Sprache abgefasst. Die englische Fassung ist nicht nur gleichermassen verbindlich, sondern geht der deutschen und der dänischen Fassung im Konfliktfall vor (vgl. Schlussformel des Protokolls vom 21. August 2009; Art. 33 Abs. 1 VRK). Es sind demnach auch Auslegungshilfen zu Rate zu ziehen, die Aufschlüsse über die Bedeutung des englischen Begriffs des "beneficial owner" und der Wendung "beneficially owned" (vgl. Art. 11 Abs. 1 DBA CH-DK in der englischen Fassung gem. Protokoll vom 21. August 2009) geben.

6.2. Art. 11 Abs. 1 DBA CH-DK lautet in den drei authentischen Sprachfassungen wie folgt (vgl. ESTV, Medienmitteilung vom 21. August 2009, <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-28555.html> [besucht am 24. Oktober 2024]) :

"Zinsen, die aus einem Vertragsstaat stammen und deren Nutzungsberechtigte eine im anderen Vertragsstaat ansässige Person ist, können nur in diesem anderen Staat besteuert werden."
"Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State."
"Renter, der hidrører fra én af de kontraherende stater, og hvis retmæssige ejer er hjemmehørende i den anden kontraherende stat, kan kun beskattes i denne anden stat."

7.
In Anbetracht der jüngsten Rechtsprechung, wo das Bundesgericht den Grundsatz der statischen Auslegung von DBA betont hat (vgl. oben E. 4.3; **BGE 149 II 400** E. 9.5), kann man sich fragen, ob bei der Auslegung des Begriffs des Nutzungsberechtigten - wie im Urteil 2C_880/2018 vom 19. Mai 2020 - auf die anwendungszeitliche Bedeutung dieses Begriffs abgestellt werden kann. Diese Frage akzentuiert sich im speziellen Fall des DBA CH-DK, weil die Vertragsstaaten diesen Begriff erst 2009 und damit rund drei Jahrzehnte nach seiner erstmaligen Verwendung im OECD-MA in den Vertragstext aufgenommen haben. Sie kann gleichwohl offenbleiben, weil ein Blick auf die geschichtliche Entwicklung anhand der Kommentierungen im OECD-MK zeigt, dass sich die gewöhnliche Bedeutung des Begriffs des Nutzungsberechtigten (bzw. "beneficial owner" und "retmæssige ejer") jedenfalls seit der Änderung des DBA CH-DK im Jahr 2009 nicht mehr verändert hat.

7.1. Zunächst ist festzuhalten, dass Art. 11 Abs. 1 DBA CH-DK (i.d.F. des Protokolls vom 21. August 2009) auf Art. 11 Abs. 1 und 2 OECD-MA beruht. Der abweichende Wortlaut ist darauf zurückzuführen, dass die Vertragsstaaten das Besteuerungsrecht des Quellenstaats offenkundig nicht bloss beschränken, sondern ganz ausschliessen wollten, wenn die Entlastungsvoraussetzungen gegeben waren (vgl. OECD-MK, N. 3 zu Art. 11 OECD-MA [i.d.F. seit 11. April 1977]).

7.2. In der Fassung des OECD-MK von 1977 zu den Artikeln über Dividenden, Zinsen und Lizenzgebühren, die erstmals das Erfordernis der Nutzungsberechtigung enthielten, hielt die OECD fest, dass der Abkommensvorteil nicht erhältlich sein solle, wenn eine Mittelsperson, wie ein Vertreter oder sonstiger Beauftragter (engl. "agent" oder "nominee", frz. "agent" oder "autre mandataire"), zwischen die begünstigte Person geschaltet werde, ausser wenn der Nutzungsberechtigte im anderen Vertragsstaat ansässig sei (OECD-MK, N. 12 zu Art. 10, N. 8 zu Art. 11 und N. 4 zu Art. 12 OECD-MA [i.d.F. vom 19. Oktober 1977]). Wie in der Literatur herausgearbeitet worden ist, geht diese Ergänzung zumindest zum Teil auf Bemühungen des Vereinigten Königreichs zurück, das in einigen seiner DBA dieses Erfordernis bereits vorgesehen hatte. Es wollte damit Abkommensvorteile ausschliessen für Vertreter und andere Beauftragte, die nach internem Recht zwar subjektiv steuerpflichtig und damit grundsätzlich abkommensberechtigt, aber bei denen Zuflüsse zugunsten ausländischer Begünstigter von der Steuer ausgenommen waren (vgl. JOHN F. AVERY JONES und andere, The Origins of Concepts and Expressions Used in the OECD Model and their Adoption by States, Bulletin for International Taxation 2006 S. 246 ff.; RICHARD COLLIER, Clarity, Opacity and Beneficial Ownership, British Tax Review 2011 S. 686 ff.; BLAZEJ KUZNIACKI, Beneficial Ownership in International Taxation and Biosemantics - Why a Redundant, Paradoxical and Harmful Concept Can Be a Potent Weapon in the Hands of the Tax Authorities, Bulletin for International Taxation 2023 S. 44 f.; ANGELIKA MEINDL-RINGLER, Beneficial Ownership in International Tax Law, 2016, S. 26 ff.; CHARL DU TOIT, The Evolution of the Term "Beneficial Ownership" in Relation to International Taxation over the Past 45 Years, Bulletin for International Taxation 2010 Ziff. 3.3; RICHARD VANN, Beneficial Ownership: What Does History [and Maybe Policy] Tell Us, in: Beneficial Ownership: Recent Trends, 2013, S. 285). Es ist nicht völlig klar, ob die Voraussetzung der Nutzungsberechtigung die Einkünftezurechnung (vor allem in Bezug auf angelsächsische Trusts) regeln sollte oder gegen den Abkommensmissbrauch gerichtet war, wobei jüngere Studien auf der Basis der historischen Materialien eher auf ersteres deuten (vgl. BLAZEJ KUZNIACKI, Beneficial Ownership in International Taxation, 2022, Rz. 3.034; ADOLFO MARTÍN JIMÉNEZ, Beneficial Ownership: Current Trends, World Tax Journal 2010 S. 52 f.; MEINDL-RINGLER, a.a.O., S. 31 f.; VANN, a.a.O., S. 287 f. und 296).

7.3. Die Kommentierung im OECD-MK vom 28. Januar 2003 betonte demgegenüber, dass der Begriff des Nutzungsberechtigten im OECD-MA nicht in einem "engen technischen Sinn", sondern vielmehr in seinem Zusammenhang und im Lichte von Ziel und Zweck des DBA (darunter die Vermeidung der Doppelbesteuerung und die Verhinderung von Steuerhinterziehung und -umgehung) zu verstehen sei. Unter Bezugnahme auf einen Bericht aus dem Jahr 1986 über den Gebrauch von Durchleitungsgesellschaften ("conduit companies"; "sociétés de relais") erwog die OECD, dass nicht nur "Agenten" und andere Beauftragte, sondern auch andere Personen nicht als Nutzungsberechtigte anzusehen seien, wenn sie Verträge abschlössen oder Verpflichtungen eingingen, aufgrund derer sie eine ähnliche Funktion einnähmen. Deshalb könne eine Durchleitungsgesellschaft normalerweise nicht als Nutzungsberechtigte betrachtet werden, wenn sie, trotz formeller Berechtigung an bestimmten Vermögenswerten, nur über sehr beschränkte Befugnisse verfüge, die sie als eine blosse Treuhänderin oder Verwalterin erscheinen liessen,

die auf Rechnung der interessierten Parteien tätig werde (vgl. OECD-MK, N. 8 und 8.1 zu Art. 11 OECD-MA [i.d.F. vom 28. Januar 2003]; OECD, Double Taxation Conventions and the Use of Conduit Companies, 1986, N. 14b).

7.4. Diese Änderung des OECD-MK sorgte in der Praxis für einige Ungewissheit (vgl. COLLIER, a.a.O., S. 690; JOHANN HATTINGH, The Relevance of BEPS Materials for Tax Treaty Interpretation, Bulletin for International Taxation 2020 S. 188 f.). Jedenfalls fällt auf, dass in der Rechtsprechung der verschiedenen Staaten bis zum Ende der 2000er-Jahre variierende Verständnisse des Begriffs "beneficial owner" zu Tage traten. Dasselbe galt für das nationale und internationale Schrifttum. Grob liessen sich dabei zwei Lager unterscheiden:

7.4.1. Eines davon verstand die "beneficial ownership" eher als (zivil-) rechtliches Konzept. Nach dieser Auffassung richtete sich die Beurteilung, ob der Empfänger einer Zahlung ihr "beneficial owner" ist, also primär danach, welche rechtlichen Verpflichtungen der Empfänger in Bezug auf die Zahlung eingegangen war (vgl. in diese Richtung Urteile des Tax Court of Canada vom 22. April 2008, *Prévost Car Inc. v. The Queen*, 2008 TCC 231 Rz. 103 ff. [bestätigt durch Urteil des kanadischen Federal Court of Appeal vom 26. Februar 2009, *Prévost Car Inc. v. Canada*, 2009 FCA 57]; des holländischen Hoge Raad vom 6. April 1994, BNB 1994/217 Rz. 3.2 [vgl. dazu DANIEL S. SMIT, The Concept of Beneficial Ownership and Possible Alternative Remedies in Netherlands Case Law, in: Beneficial Ownership: Recent Trends, 2013, S. 65 ff.]; aus der Literatur etwa LUC DE BROE, International Tax Planning and Prevention of Abuse, 2008, S. 686 ff. und 720 f.; COLLIER, a.a.O., S. 690 und 699; MARTÍN JIMÉNEZ, a.a.O., S. 51 ff.; RENÉ MATTEOTTI, Der Durchgriff bei von Inländern beherrschten Auslandsgesellschaften im Gewinnsteuerrecht, 2003 [nachfolgend: MATTEOTTI, Diss.], S. 278 f.; DU TOIT, a.a.O., Ziff. 3.2.5 und 4).

7.4.2. Andere Gerichte und Autoren begriffen die "beneficial ownership" eher als wirtschaftliches Konzept. Sie hielten nicht so sehr die rechtliche Stellung des Empfängers im Rahmen einer Gestaltung oder Transaktion für massgebend, sondern vor allem die wirtschaftliche Substanz. Dabei wurde nicht immer trennscharf zwischen diesem Konzept und dem allgemeineren Konzept des Abkommensmissbrauchs unterschieden und es wurden zuweilen auch subjektive Elemente (Absicht der Steuerersparnis u.Ä.) in die Beurteilung miteinbezogen (vgl. in diese Richtung etwa Urteile des Court of Appeal of England and Wales [Civil Division] vom 2. März 2006, *Indofood International Finance Ltd. v. JP Morgan Chase Bank N.A. London Br anch*, [2006] EWCA Civ 158 Rz. 42 ff.; des französischen Conseil d'Etat vom 29. Dezember 2006, *Royal Bank of Scotland*, Nr. 283314; vgl. aus der Literatur allen voran KLAUS VOGEL, in: Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen, 5. Aufl. 2008, N. 17 ff. zu Vor Art. 10-12 OECD-MA; diesem Autor folgend BEAT BAUMGARTNER, Das Konzept des beneficial owner im internationalen Steuerrecht der Schweiz, 2010, S. 150; ROBERT DANON, Le concept de bénéficiaire effectif dans le cadre du MC OCDE, FStR 2007 S. 43 f. und 48 f.; XAVIER OBERSON, La notion bénéficiaire effectif en droit fiscal international, in: Festschrift SRK, 2004, S. 226 f.; vgl. ausserdem die Hinweise auf die Gerichts- und Verwaltungspraxis in diversen Ländern bei COLLIER, a.a.O., S. 693 ff. und MEINDL-RINGLER, a.a.O., S. 95 ff. und S. 288).

7.4.3. Auch das Bundesgericht beschäftigte sich in den 2000er-Jahren mit einem Fall, in welchem die Frage der Nutzungsberechtigung aufgeworfen worden war. Konkret ging es um einen Antrag einer dänischen Gesellschaft auf Rückerstattung der Verrechnungssteuer nach dem DBA CH-DK. Nachdem die Eidgenössische Steuerrekurskommission die Nutzungsberechtigung der dänischen Gesellschaft noch bejaht hatte, liess das Bundesgericht die Frage allerdings offen, weil der Antrag auch bei Annahme der Nutzungsberechtigung wegen Abkommensmissbrauchs abzuweisen war (Urteil 2A.239/2005 vom 28. November 2005 E. 3.2 und 3.5.3, in: StR 61/2006 S. 217).

7.5. Zusammenfassend lässt sich also festhalten, dass der OECD-MK in der Fassung vom 28. Januar 2003 in Bezug auf den Begriff der Nutzungsberechtigung unklar war, aber schon zum Zeitpunkt der Änderung von Art. 11 Abs. 1 DBA CH-DK mit dem Protokoll vom 21. August 2009 das engere, rechtliche Verständnis der Nutzungsberechtigung, das anschliessend in der Änderung des OECD-MK vom 15. Juli 2014 Niederschlag fand und dem sich das Bundesgericht spätestens mit dem Urteil 2C_880/2018 vom 19. Mai 2020 angeschlossen hat, in der ausländischen Rechtsprechung und der Literatur jedenfalls prominent - wenn auch nicht ausschliesslich - vertreten worden war. Es handelt sich dabei also nicht um eine neue respektive gewandelte Bedeutung des Begriffs der Nutzungsberechtigung, die sich erst nach 2009 entwickelt hätte. Im Gegenteil geht dieses Verständnis sogar eher auf die Bedeutung zurück, die dem Begriff ursprünglich beigemessen worden war. Vor diesem Hintergrund erscheint die Änderung des OECD-MK vom 15. Juli 2014 jedenfalls nicht als Weiterentwicklung des Begriffs der Nutzungsberechtigung, sondern eher als der Versuch einer Klarstellung (vgl. zum Entstehungsprozess der Änderung COLLIER, a.a.O., S. 699 ff.; ROBERT DANON, Clarification of the Meaning of "Beneficial Owner" in the OECD Model Tax Convention - Comment on the April 2011 Discussion Draft, Bulletin for International Taxation 2011 S. 438 ff.).

8.
Da sich die anwendungszeitliche nicht von der Bedeutung unterscheidet, die dem Begriff der Nutzungsberechtigung zum Zeitpunkt der Änderung des DBA CH-DK im Jahr 2009 zukam, ist vorliegend auf jeden Fall daran festzuhalten, dass nur eine vertragliche oder gesetzliche Weiterleitungsverpflichtung, nicht

aber rein faktische Anreize oder Zwänge die Nutzungsberechtigung des Empfängers an einer verrechnungssteuerbelasteten Einkunft infrage stellen können.

8.1. Für dieses engere, rechtliche Konzept spricht zunächst zumindest in der Tendenz die gewöhnliche Bedeutung der Begriffe "beneficially owned" und "Nutzungsberechtigter" in Art. 11 Abs. 1 DBA CH-DK. Auch wenn der Begriff laut OECD nicht in einem engen technischen Sinn verstanden werden sollte (OECD-MK, N. 8 zu Art. 11 OECD-MA i.d.F. vom 28. Januar 2003), ist doch mit Blick auf die Entstehungsgeschichte (vgl. insb. oben E. 7.2) nicht völlig unerheblich, dass die "beneficial ownership" ihre Wurzeln im angelsächsischen Rechtskreis hat. Dort umschreibt sie die Situation, in der eine Person zwar nicht formelles Eigentum ("title"), aber das Recht zum Gebrauch und zum Genuss der Früchte hat, das sie gerichtlich durchsetzen kann. Ein typisches Beispiel ist etwa die Rechtsstellung der Begünstigten gewisser Trusts (vgl. DU TOIT, a.a.O., Ziff. 3.2.2 - 3.2.5, mit Hinweisen auf Urteile der englischen und US-amerikanischen Höchstgerichte und auf Black's Law Dictionary; vgl. jüngst auch Urteil des Court of Appeal of England and Wales vom 15. April 2024, *Hargreaves Property Holding Ltd v Revenue and Customs*, [2024] EWCA Civ 365, Rz. 49 ff.). Auch der deutsche Begriff "Nutzungsberechtigung" impliziert, dass die betreffende Person ein Recht zur Nutzung hat und sie nicht auf bloss tatsächliche Anreize und Zwänge angewiesen ist, um in den Genuss der Einkunft zu gelangen. Daraus kann geschlossen werden, dass der Empfänger einer Einkunft nach gewöhnlichem Sprachgebrauch solange als ihr Nutzungsberechtigter zu betrachten ist, als er nicht selbst vertraglich oder gesetzlich zur Herausgabe oder Ablieferung dieser Einkunft an eine andere Person verpflichtet ist.

8.2. Hinzu kommt, dass ein extensives wirtschaftliches Verständnis der Nutzungsberechtigung Gefahr läuft, in der Gerichts- und Verwaltungspraxis Ergebnisse zu produzieren, die mit dem Abkommensziel der Vermeidung der Doppelbesteuerung kaum mehr in Einklang stehen (vgl. COLLIER, a.a.O., S. 693 ff. und 703; vgl. aus der jüngeren Literatur auch ROBERT DANON und andere, The Prohibition of Abuse of Rights After the ECJ Danish Cases, Intertax 49/2021 S. 514 f.; KUZNIACKI, a.a.O., Bulletin for International Taxation 2023 S. 53). Dies gilt ganz besonders in Bezug auf komplexe Finanztransaktionen, wie sie vorliegend zur Diskussion stehen.

8.3. Am Vorstehenden ändert nichts, dass der Gerichtshof der Europäischen Union (EuGH) und ihm folgend das dänische Höchstgericht kürzlich eine eher wirtschaftliche Konzeption der Nutzungsberechtigung vertreten haben. Urteile des dänischen Höchstgerichts und des EuGH, jedenfalls soweit sie Dänemark in der Anwendung seiner DBA binden oder beeinflussen (vgl. zu dieser Frage VALENTIN BENDLINGER, Der Einfluss von Unionsrecht auf Abkommensmissbrauch, SWI 2024 S. 490 ff.; DANON und andere, a.a.O., Intertax 49/2021 S. 489), können zwar bei der Auslegung des DBA CH-DK berücksichtigt werden, um eine möglichst einheitliche Anwendung durch die Vertragspartner sicherzustellen und Konflikte zu minimieren (sog. Entscheidungsharmonie; vgl. Urteile 2C_354/2018 vom 20. April 2020 E. 3.4.1; 2C_344/2018 vom 4. Februar 2020 E. 3.4.5; 2C_707/2016 vom 23. März 2018 E. 2.4.3; MICHAEL BEUSCH, Entscheidungsharmonie im internationalen Steuerrecht aus einer schweizerischen Perspektive, in: νόμοις πείθου - gehorche den Gesetzen, Liber amicorum für Hansjörg Seiler, 2022, S. 95 ff.; vgl. zum Rang dieser Urteile im Gefüge von Art. 31 Abs. 3 lit. b und Art. 32 VRK UN-Völkerrechtskommission, Projet de conclusions sur les accords et la pratique ultérieurs dans le contexte de l'interprétation des traités et commentaires y relatifs [UN Doc. A/73/10], 2018, N. 19 zu Conclusion 7; GUGLIELMO MAISTO, Interpretation of Tax Treaties and the Decisions of Foreign Tax Courts as a "Subsequent Practice" under Articles 31 and 32 of the Vienna Convention on the Law of Treaties [1969], Bulletin for International Taxation 2021 S. 677). Die erwähnten Urteile betrafen indessen die Nutzungsberechtigung von Durchleitungsgesellschaften, bei denen zumindest auch der Vorwurf im Raum stand, dass sie von Fonds, Konzernobergesellschaften oder anderen Personen kontrolliert und künstlich zwischen diese und die zinspflichtigen dänischen Gesellschaften geschaltet worden seien, um bestimmte Abkommensvorteile bzw. Vorteile aus dem Unionsrecht zu erlangen (vgl. Urteil des EuGH vom 26. Februar 2019 C-115/16, C-118/16, C-119/16 und C-299/16 *N Luxembourg 1 und andere*, ECLI:EU:C:2019:134 Randnr. 30 ff.; Urteil des dänischen Højesterets dom Nr. 116/2021 und 117/2021 vom 4. Mai 2023, *Takeda A/S und NTC Parent S.à.r.l.* S. 3 ff.). Die hier zu beurteilende Situation eines grossen Finanzinstituts unterscheidet sich in Bezug auf die Frage der Nutzungsberechtigung erheblich von der Situation einer blossen Durchleitungsgesellschaft, die künstlich zwischen den Zinsschuldner und eine Drittperson geschaltet wird, über keine Entscheidungsautonomie verfügt und bei der vorbestimmt ist, dass sie die Einkunft an die sie kontrollierende Drittperson weiterleiten wird. Hinzu kommt, dass das dänische Höchstgericht und der EuGH in ihren Urteilsbegründungen nicht streng zwischen den Konzepten der Nutzungsberechtigung und des Rechts- bzw. Abkommensmissbrauchs bzw. des Missbrauchs des Unionsrechts unterschieden und auch subjektive Elemente berücksichtigt haben. Deshalb wird aus diesen Urteilen nicht vollkommen klar, ob nach der Auffassung dieser beiden Gerichte die Vorteile aus dem Abkommens- bzw. aus dem Unionsrecht auch zu versagen wären, falls erstellt wäre, dass der Gestaltung keine missbräuchlichen Motive zugrunde lagen (vgl. Urteil des EuGH vom 26. Februar 2019 C-115/16, C-118/16, C-119/16 und C-299/16 *N Luxembourg 1 und andere*, ECLI:EU:C:2019:134 Randnr. 95 ff., insb. 132 und 143; Urteil des dänischen Højesterets dom Nr. 116/2021 und 117/2021 vom 4. Mai 2023, *Takeda A/S und NTC Parent S.à.r.l.,* S. 13 ff.; vgl. anders noch Schlussanträge der Generalanwältin KOKOTT vom 1. März 2018 C-115/16 *N Luxembourg 1 gegen Skatteministeriet*, ECLI:EU:C:2018:143 Randnr. 60, die klar zwischen Nutzungsberechtigung und Missbrauch unterschieden hatte).

9.

9.1. Die Vorinstanz hat ihrer Beurteilung im Wesentlichen das engere, rechtliche Verständnis der Nutzungsberechtigung zugrunde gelegt, wie es im Urteil 2C_880/2018 vom 19. Mai 2020 zum Ausdruck gekommen war und an dem hier nach dem Gesagten festzuhalten ist. Sie hat sich aber stellenweise gleichwohl auf eine "faktische Weiterleitungspflicht" berufen. Sie hat alsdann aus den "Umständen" - namentlich aus den in der Vertragsdokumentation genannten Beträgen, die exakt mit den Kaufpreisen, Zins- und Kapitalzahlungen aus den Bundesanleihen übereinstimmten - darauf geschlossen, dass die Beschwerdeführerin einer " (indirekten) rechtlichen Pflicht" zur Weiterleitung der Zinszahlungen aus den Bundesanleihen unterstanden habe. Diese Verpflichtung war nach Ansicht der Vorinstanz der Nutzungsberechtigung der Beschwerdeführerin schädlich, weil zum einen die Erzielung von Einkünften von der Pflicht zu deren Weiterleitung abhängig gewesen sei und zum anderen die Pflicht zur Weiterleitung von der Erzielung dieser Einkünfte abgehangen habe (gegenseitige Abhängigkeit bzw. Interdependenz; vgl. hierzu auch BAUMGARTNER, a.a.O., S. 145). Dass die Pflicht zur Weiterleitung der Zinseinkünfte aus den Bundesanleihen von ihrer Erzielung abhing, leitete die Vorinstanz aus einer Analyse der Risikoverteilung zwischen der Beschwerdeführerin und ihren Gegenparteien unter den Swap-Verträgen ab. Die Swap-Verträge hätten die Beschwerdeführerin vom Zinsänderungsrisiko und von Währungs- und Wechselkursrisiken auf den Bundesanleihen entbunden, während das Ausfallrisiko angesichts der ausgezeichneten Bonität der Eidgenossenschaft von vornherein "äusserst gering und nur theoretischer Natur" gewesen sei.

9.2. Wie bereits erwähnt (vgl. oben E. 5.2), hat das Bundesgericht im Urteil 2C_880/2018 vom 19. Mai 2020 erwogen, dass vertragliche und gesetzliche Weiterleitungspflichten nicht nur durch die schriftliche Vertragsdokumentation, sondern allenfalls auch durch Indizien wie faktische Zwänge belegt werden können (vgl. Urteil 2C_880/2018 vom 19. Mai 2020 E. 4.4 und 4.5; vgl. in Anlehnung an den OECD-MK ähnlich auch Urteil der italienischen Corte Suprema di Cassazione Nr. 14756/2020 vom 10. Juli 2020 E. 1.10). In ähnlicher Weise hatte es in einem früheren Urteil Umstände ausserhalb des Vertragstexts berücksichtigt, um auf eine schädliche Weiterleitungsverpflichtung zu schliessen (z.B. kurze Haltedauer der Wertpapiere; vgl. Urteil 2C_895/2012 vom 5. Mai 2015 E. 8.5).

9.2.1. In der Literatur ist hierzu vorgebracht worden, dass die Grenze zwischen einem eher rechtlichen und einem eher wirtschaftlichen Verständnis der Nutzungsberechtigung in der Praxis verschwimme, wenn auch aus den Umständen auf eine vertragliche oder gesetzliche Verpflichtung geschlossen werden könne (vgl. DANON und andere, a.a.O., Intertax 59/2021 S. 510 f.). Unabhängig davon, ob diese Einschätzung im Allgemeinen zutrifft, ist auf jeden Fall zu beachten, dass es eine Frage einerseits des Sachverhalts und andererseits des konkret anwendbaren Vertragsrechts ist, ob zwischen dem Empfänger einer Einkunft und einer anderen Partei eine bestimmte vertragliche Pflicht besteht. Demgegenüber bestimmt das anwendbare DBA, ob eine bestimmte vertragliche Pflicht allein oder im Zusammenspiel mit weiteren vertraglichen oder gesetzlichen Pflichten als Weiterleitungsverpflichtung des Empfängers zu charakterisieren ist, die ihn der Nutzungsberechtigung beraubt. Nur für diese zweite abkommensrechtliche Frage kann der OECD-MK überhaupt als eigentliche Auslegungshilfe beigezogen werden. Wenn sich aus der (abschliessenden) schriftlichen Vertragsdokumentation keine Weiterleitungsverpflichtung ergibt, kommt der Schluss auf eine vertragliche Weiterleitungsverpflichtung nur in Betracht, wenn das anwendbare Vertragsrecht die Begründung oder Ergänzung vertraglicher Pflichten in anderer als Schriftform zulässt (so z.B. Art. 11 Abs. 1 OR).

9.2.2. Das Bundesgericht hat im Urteil 2C_880/2018 vom 19. Mai 2020 zwar scheinbar die Feststellung vertraglicher Pflichten auf der alleinigen Basis der Umstände ohne diese Einschränkung in Betracht gezogen, anschliessend aber gleichwohl nur die Vertragsdokumente und die daraus resultierenden Anreize und Zwänge gewürdigt (vgl. Urteil 2C_880/2018 vom 19. Mai 2020 E. 4.5.2; ähnlich auch schon Urteil 2C_209/2017 vom 16. Dezember 2019 E. 3.4.3, nicht publ. in: **BGE 146 I 105**). Soweit sich diesem Urteil und früheren Urteilen eine eigentliche Praxis zum Stellenwert der Umstände für die Begründung einer vertraglichen Pflicht entnehmen lässt, wäre sie im vorgenannten Sinn zu präzisieren.

9.3. Ob das zwischen der Beschwerdeführerin und ihren Gegenparteien anwendbare Vertragsrecht die Begründung einer vertraglichen Weiterleitungspflicht ausserhalb des Vertragstexts zuliess, hat die Vorinstanz nicht untersucht. Dies brauchte sie hier letztlich aber auch gar nicht zu tun, weil sie ihrer Würdigung bei genauer Betrachtung (ähnlich wie das Bundesgericht im Urteil 2C_880/2018 vom 19. Mai 2020 E. 4.5.2) nicht die Umstände ausserhalb der schriftlichen Vertragsdokumentation, sondern nur den Text der Vertragsdokumentation zugrunde gelegt hat.

9.4. Die abkommensrechtliche Qualifikation der Vertragsposition der Beschwerdeführerin durch die Vorinstanz vermag indessen nicht zu überzeugen.

9.4.1. Vorab ist mit der Vorinstanz festzuhalten, dass die Vertragsdokumente die Beschwerdeführerin jedenfalls nicht wörtlich dazu verpflichteten, die Zinseinkünfte aus den Bundesanleihen an eine andere Person - namentlich die Gegenparteien - abzuliefern bzw. weiterzuleiten. Dies schliesst aber nicht aus, dass die vertraglichen Pflichten der Beschwerdeführerin nach ihrem Gehalt respektive in ihrem Zusammenspiel

abkommensrechtlich als schädliche Weiterleitungsverpflichtung charakterisiert werden könnten (vgl. **BGE 141 II 447** E. 6.4 [mit etwas anderer Terminologie]; vgl. auch MARTÍN JIMÉNEZ, a.a.O., S. 51).

9.4.2. Wie die Vorinstanz hat auch das Bundesgericht in **BGE 141 II 447** das Konzept der Interdependenz erwähnt. Bei einem engeren, rechtlichen Verständnis der Nutzungsberechtigung ist indessen fraglich, ob es für die Nutzungsberechtigung wirklich darauf ankommen kann, ob der Empfänger die verrechnungssteuerbelastete Einkunft auch dann erzielt hätte, wenn er die fragliche Zahlungspflicht nicht eingegangen wäre. Das Bundesgericht hat sich denn in seiner jüngeren Rechtsprechung zur Nutzungsberechtigung auch nicht mehr auf diese erste Abhängigkeit (vgl. oben E. 9.1) berufen (vgl. Urteile 2C_880/2018 vom 19. Mai 2020 E. 4.5.1; 2C_209/2017 vom 16. Dezember 2019 E. 3.4.3, nicht publ. in: **BGE 146 I 105**).
Für die Nutzungsberechtigung wesentlich bleibt aber die zweite Abhängigkeit: Zahlungspflichten des Empfängers können nur dann eine für die Nutzungsberechtigung schädliche Verpflichtung zur Weiterleitung einer verrechnungssteuerbelasteten Einkunft darstellen, wenn die Zahlung oder zumindest ihre Höhe davon abhängt, dass der Empfänger die verrechnungssteuerbelastete Einkunft erzielt (vgl. **BGE 141 II 447** E. 5.3; Urteile 2C_880/2018 vom 19. Mai 2020 E. 4.5.1; 2C_209/2017 vom 16. Dezember 2019 E. 3.4.3, nicht publ. in: **BGE 146 I 105**). Auch der OECD-MK stellt jedenfalls seit der Änderung vom 15. Juli 2014 auf diese zweite Abhängigkeit ab. Er bezeichnet Verpflichtungen, die nicht vom Empfang der quellensteuerbelasteten Einkunft abhängen, ausdrücklich als unschädlich und nennt als Beispiel Verpflichtungen, die der Empfänger als Schuldner oder Partei einer Finanztransaktion trägt (OECD-MK, N. 10.2 zu Art. 11 OECD-MK [i.d.F. vom 21. November 2017; insoweit unverändert seit dem 15. Juli 2014]).

9.4.3. Gewisse Autoren haben sich konkret mit der Frage beschäftigt, ob Verpflichtungen aus Zins- und Währungsswaps schädliche Weiterleitungspflichten darstellen. BAUMGARTNER, auf den sich das Bundesgericht in seiner einschlägigen Rechtsprechung (vgl. z.B. **BGE 141 II 447** E. 5.2.2 und 5.3) und die Vorinstanz wiederholt berufen haben, hält fest, dass bei Zinsswaps die Zahlungspflicht nicht von den Zinseinkünften auf dem Basiswert abhänge; es liege keine schädliche Weiterleitungsverpflichtung vor (BAUMGARTNER, a.a.O., S. 373). Zum selben Schluss gelangen NORDIN/SCHUDEL, die jedoch darauf hinweisen, dass solche Geschäfte unter dem Aspekt des Abkommensmissbrauchs zu prüfen seien (NORDIN/SCHUDEL, a.a.O., S. 609; ähnlich jüngst auch NILS HARBEKE, Zur Debatte "Nutzungsberechtigung und Finanzinstrumente", FStR 2024 S. 163 f.).

9.4.4. Unter den streitbetroffenen Swap-Verträgen wäre die Beschwerdeführerin auch dann zur Zahlung an ihre Gegenparteien verpflichtet gewesen, wenn die Eidgenossenschaft ihre Zinspflichten auf den Bundesanleihen nicht oder nicht vollständig erfüllt hätte. Wenn die Empfängerin einer Zinszahlung zumindest dieses anlagespezifische Ausfall- bzw. Kreditrisiko trägt, lässt die Übertragung des Zinsänderungs-, des Währungs- bzw. Wechselkursrisikos und anderer Marktrisiken die Zahlungspflicht gegenüber der Gegenpartei noch nicht als schädliche Weiterleitungsverpflichtung erscheinen, woran auch die sehr hohe Bonität der Eidgenossenschaft nichts ändert. Es besteht in diesem Punkt ein wesentlicher Unterschied zwischen den hier streitbetroffenen Swap-Verträgen und den vom Bundesgericht beurteilten Finanztransaktionen (bestimmte Total Return Swaps und ähnliche Geschäfte sowie Securities Lending), bei denen der Empfänger bei Ausfall der verrechnungssteuerbelasteten Einkunft jeweils keine Zahlung geschuldet hätte (vgl. **BGE 141 II 447** E. 6.4.1; Urteil 2C_209/2017 vom 16. Dezember 2019 E. 3.4.3, nicht publ. in: **BGE 146 I 105**) oder die Höhe der Zahlung ausdrücklich von der Rückerstattung der Verrechnungssteuer abhing, die ihrerseits den effektiven Empfang der belasteten Einkunft voraussetzte (vgl. Urteil 2C_880/2018 vom 19. Mai 2020 E. 4.5.1).

9.5. Aus dem Gesagten folgt, dass die Beschwerdeführerin keiner Weiterleitungsverpflichtung unterlag, die ihre Nutzungsberechtigung im Sinne von Art. 11 Abs. 1 DBA CH-DK ausgeschlossen hätte. Damit erfüllt die Beschwerdeführerin alle Voraussetzungen für die Entlastung nach Art. 11 Abs. 1 DBA CH-DK, die im Abkommenstext zum Ausdruck kommen. Jedenfalls bei einer an der gewöhnlichen Bedeutung orientierten Auslegung der Abkommensnorm ist der Entlastungsanspruch der Beschwerdeführerin also ausgewiesen.

10.
An diesem Auslegungs- und Subsumtionsergebnis ändern auch Ziel und Zweck des Abkommens nichts.

10.1. Mit dem Abschluss des DBA CH-DK bezweckten die Vertragsstaaten gemäss Titel und Präambel dieses Abkommens, die Doppelbesteuerung auf dem Gebiete der Steuern vom Einkommen und Vermögen zu vermeiden (vgl. zu Ziel und Zweck von DBA im Allgemeinen OECD-MK, N. 54 zu Art. 1 OECD-MA [i.d.F. vom 21. November 2017]). Konkret bezogen auf Zinseinkünfte haben die Vertragsstaaten vorgesehen, dass Doppelbelastungen von abkommensberechtigten Personen mit einer Quellensteuer im Quellenstaat und der Gewinn- oder Einkommenssteuer im Ansässigkeitsstaat vermieden werden, indem dem Ansässigkeitsstaat das alleinige Besteuerungsrecht zugewiesen wird. Während Ziel und Zweck des Abkommens nicht unbedingt voraussetzen, dass der Ansässigkeitsstaat die Zinseinkunft effektiv besteuert, so müsste er doch wenigstens die Möglichkeit zur Besteuerung haben. Daran fehlt es insbesondere dann, wenn die Zinseinkunft - einschliesslich des Abkommensvorteils in Form der nicht erhobenen Quellensteuer oder der (antizipierten) Quellensteuerrückerstattung - an eine Person weitergeleitet wird, die selbst nicht abkommensberechtigt ist (vgl. auch OECD-MK, N. 10 zu Art. 11 OECD-MA [i.d.F. vom 17. Juli 2008, die den Vertragsstaaten bei Änderung von Art. 11 DBA CH-DK vorlag]).

10.2. Die Zahlungen, welche die Beschwerdeführerin unter den Swaps versprach und sodann auch effektiv leistete, standen mit den Zinseinkünften aus den Bundesanleihen in tatsächlicher Hinsicht offensichtlich in einem engen Zusammenhang, auch wenn sich die Beschwerdeführerin nicht zur Weiterleitung verpflichtet hatte. Dieser Zusammenhang folgt bereits daraus, dass die Zahlungen der Beschwerdeführerin exakt den Bruttozinseinkünften entsprachen, die sie aus den Bundesanleihen erhalten würde, falls ihr die Rückerstattung der Verrechnungssteuer gewährt würde. Der Zusammenhang wurde denn auch von der Beschwerdeführerin nie bestritten (vgl. die Rekapitulation der Korrespondenz zwischen der Beschwerdeführerin und der ESTV, oben Sachverhalt Bst. A.b ff.). Die Zahlungen unter den Swaps stellten also nicht eine rein zufällige Verwendung der Zinseinkünfte dar, sondern sind als effektive Weiterleitung der Anleihenszinsen einschliesslich der antizipierten Verrechnungssteuerrückerstattungen zu betrachten. Die unmittelbaren Empfänger dieser Weiterleitung waren Investmentbanken, die nicht in Dänemark ansässig waren. Es ist zwar wahrscheinlich, dass die Investmentbanken die Zinsen und die damit zusammenhängenden Abkommensvorteile ihrerseits wiederum weiterleiteten, doch bestehen keine Anhaltspunkte dafür, dass die Letztempfänger in Dänemark ansässig und ihrerseits abkommensberechtigt gewesen sein könnten.

10.3. Damit steht fest, dass die Gewährung der Abkommensvorteile vorliegend nicht im Einklang mit der Zielsetzung des Abkommens steht. Es ginge jedoch zu weit, neben der Nutzungsberechtigung zusätzliche Voraussetzungen in diese Abkommensnorm hinein zu interpretieren, die in ihrem Wortlaut keinen Niederschlag gefunden haben. Wenn die tatsächliche Weiterleitung der Zinseinkünfte (inklusive antizipierter Verrechnungssteuerrückerstattungen) alleine nach dem Gesagten noch nicht genügt, um der Beschwerdeführerin die Nutzungsberechtigung abzusprechen, geht es nicht an, die Nicht-Weiterleitung im Rahmen einer vom Abkommenstext losgelösten teleologischen Vertragsauslegung zu einer eigenständigen, ungeschriebenen Voraussetzung zu erklären.

IV. Völkerrechtliches Rechtsmissbrauchsverbot

11.
Wenn der Beschwerdeführerin die Nutzungsberechtigung nicht abgesprochen werden kann und sie die Voraussetzungen von Art. 11 Abs. 1 DBA CH-DK für die Entlastung von der Verrechnungssteuer damit erfüllt, bedeutet dies indessen noch nicht, dass die Schweiz völkerrechtlich absolut verpflichtet ist, der Beschwerdeführerin die beantragte Entlastung von der Verrechnungssteuer zu gewähren. Es stellt sich nämlich die Frage, ob die Entlastung wegen eines Abkommensmissbrauchs zu verweigern ist. Die Vorinstanz hat diese Frage offengelassen.

12.

12.1. Wie bereits erwähnt (vgl. oben E. 7.4.3), hat das Bundesgericht im Jahr 2005 entschieden, dass Vorteile aus dem DBA CH-DK unter einem allgemeinen Missbrauchsvorbehalt stehen (Urteil 2A.239/2005 vom 28. November 2005 E. 3.4.6, in: StR 61/2006 S. 217; vgl. auch Urteil 2C_354/2018 vom 20. April 2020 E. 4.3.1). Es stützte sich dabei insbesondere auf den völkergewohnheitsrechtlichen, in Art. 26 VRK kodifizierten Grundsatz von Treu und Glauben (vgl. dazu **BGE 146 II 150** E. 7.1; **143 II 224** E. 6.2, je mit Hinweisen), der auch bei der Vertragsauslegung zu beachten ist (vgl. Art. 31 Abs. 1 VRK; Urteil 2A.239/2005 vom 28. November 2005 E. 3.4.3, in: StR 61/2006 S. 217). Aus diesem Urteil wird jedoch nicht völlig klar, ob dieser allgemeine Vorbehalt des Abkommensmissbrauchs jedem DBA inhärent ist und sich aus der (teleologischen) Auslegung ergibt oder es sich dabei um eine Einrede im Sinne eines allgemeinen Grundsatzes des Völkerrechts (Art. 38 Abs. 1 lit. c IGH-Statut) oder des Völkergewohnheitsrechts (Art. 38 Abs. 1 lit. b IGH-Statut) handelt, auf den sich die völkervertraglich verpflichtete Partei erst auf der Ebene der Anwendung des DBA im Einzelfall berufen kann (vgl. Urteil 2A.239/2005 vom 28. November 2005 E. 3.4.6, in: StR 61/2006 S. 217; vgl. auch Urteil 2C_354/2018 vom 20. April 2020 E. 4.3.1). Auch in der zuvor ergangenen Rechtsprechung im Bereich des internationalen Steuerrechts hatte das Bundesgericht nicht klar zwischen den Ebenen der Vertragsauslegung und seiner Anwendung unterschieden, was den Vorbehalt des Rechts- bzw. Abkommensmissbrauchs angeht (vgl. **BGE 113 Ib 195** E. 4c; **94 I 659** E. 4; vgl. dazu MATTEOTTI/KRENGER, in: Internationales Steuerrecht, Kommentar zum Schweizerischen Steuerrecht, 2015, N. 342 ff. zu Art. 1 OECD-MA).

12.2. In der hiesigen Literatur ist der Vorbehalt des Abkommensmissbrauchs gemäss Urteil 2A.239/2005 vom 28. November 2005 teils als Auslegungsgrundsatz (vgl. etwa MARCEL R. JUNG, Trends und Entwicklungen bei der Bekämpfung des Abkommensmissbrauchs im internationalen Steuerrecht der Schweiz, StR 2011 S. 20 f.; RENÉ MATTEOTTI, Die Verweigerung der Entlastung von der Verrechnungssteuer wegen Treaty Shoppings, ASA 75 S. 791 ff.; MATTEOTTI/KRENGER, a.a.O., N. 351 ff. zu Art. 1 OECD-MA; XAVIER OBERSON, Précis de droit fiscal international, 5. Aufl. 2022, S. 306 f.; vgl. auch OECD-MK, N. 9.3 zu Art. 1 OECD-MA [i.d.F. vom 28. Januar 2003]), teils als allgemeiner Rechtsgrundsatz nach Art. 38 Abs. 1 lit. c IGH-Statut gedeutet worden (vgl. etwa OESTERHELT/WINZAP, Dänemark-Entscheid zum Treaty-Shopping, Schweizer Treuhänder 2006 S. 3 f.; vgl. auch PETER HONGLER, Justice in International Tax Law, 2019, S. 198 f.). In der internationalen Literatur zum Abkommensmissbrauch gehen manche Autoren davon aus, dass dem Missbrauch mittels teleologischer Auslegung genügend beigekommen werden könne (vgl. etwa MICHAEL LANG, The Signalling Function of

Article 29 (9) of the OECD Model - The "Principal Purpose Test", Bulletin for International Taxation 2020 S. 265), während andere Autoren im Abkommenstext eine Grenze sehen, die mittels teleologischer Auslegung nicht überschritten werden dürfe, weswegen für die Bekämpfung des Abkommensmissbrauchs ein zusätzliches Korrektiv erforderlich sei (vgl. etwa DANON und andere, a.a.O., Intertax 49/2021 S. 488; FRANK ENGELEN, Interpretation of Tax Treaties under International Law, 2004, S. 427 und 429; WOLFGANG SCHÖN, The Role of "Commercial Reasons" and "Economic Reality" in the Principal Purpose Test under Article 29 (9) of the 2017 OECD Model, in: Building Global International Tax Law: Essays in Honour of Guglielmo Maisto, 2022, S. 253 f.).

13.
Vor kurzem hat das Bundesgericht im Bereich der Investitionsschiedsgerichtsbarkeit das Rechtsmissbrauchsverbot nicht nur als Teil des schweizerischen Ordre Public bezeichnet (so bereits **BGE 138 III 322** E. 4; **132 III 389** E. 2.2.1; vgl. auch **BGE 143 III 666** E. 4.2), sondern darin zudem einen international anerkannten allgemeinen Grundsatz ("un principe général reconnu internationalement"; **BGE 148 III 330** E. 5.2.2; **146 III 142** E. 3.4.2.8; Urteil 4A_492/2021 vom 24. August 2022 E. 8.1, nicht publ. in: **BGE 149 III 131**) respektive einen allgemeinen Grundsatz des Völkerrechts, wenn nicht sogar eine Regel des Völkergewohnheitsrechts gesehen ("un principe général du droit international, voire une règle du droit international coutumier"; Urteil 4A_80/2018 vom 7. Februar 2020 E. 4.8). Es hat das völkerrechtliche Rechtsmissbrauchsverbot in diesen Urteilen auch im Verhältnis zu Investoren für anwendbar gehalten, obschon diese selbst regelmässig keine Staaten und nicht Partei des angerufenen Investitionsschutzabkommens sind.

14.
Es gibt keinen überzeugenden Grund, hier von dieser publizierten Rechtsprechung des Bundesgerichts zur Investitionsschiedsgerichtsbarkeit abzuweichen und sie nicht auch für das internationale Steuerrecht zu übernehmen.

14.1. Aus allgemeiner völkerrechtlicher Sicht spricht für oder zumindest nicht gegen die bundesgerichtliche Rechtsprechung, dass jüngst auch der Internationale Gerichtshof die Einrede des Rechtsmissbrauchs in Betracht gezogen hat, falls überzeugende Beweise dafür vorgelegt werden, dass die angeblich missbräuchlich handelnde Partei ein völkervertraglich eingeräumtes Recht zweckfremd und zum Nachteil der anderen Partei auszuüben sucht (vgl. Urteil des IGH vom 30. März 2023 *Certains actifs iraniens* [Islamische Republik Iran gegen USA], § 88 ff. und 93 ["La Cour ne pourrait retenir en l'espèce le moyen de défense au fond tiré de l'abus de droit que s'il était démontré par le défendeur, sur la base de preuves convaincantes, que le demandeur revendique l'exercice des droits qui lui sont conférés par le traité d'amitié à des fins différentes de celles pour lesquelles les droits en cause ont été établis, et ce au détriment du défendeur."]; vgl. auch die Dissenting Opinion des Richters SEBUTINDE [Rz. 8] und die Separate Opinion der ad hoc Richterin BARKETT [Rz. 3 ff.] in derselben Sache). Auch früher schon hatten der Internationale Gerichtshof und seine Vorgängerinstitution, der Ständige Internationale Gerichtshof (StIGH), das Rechtsmissbrauchsverbot zumindest ansatzweise als Teil des ungeschriebenen Völkerrechts behandelt (vgl. Urteil des IGH vom 17. Juli 2019 *Jadhav* [Indien gegen Pakistan], C.I.J. Recueil 2019 S. 418, § 121 ff.; Zwischenentscheid des IGH vom 6. Juni 2018 *Immunités et procédures pénales* [Äquatorialguinea gegen Frankreich], C.I.J. Recueil 2018 S. 292, S. 335 ff. § 144 ff.; Urteile des StIGH vom 7. Juni 1932 *Affaire des zones franches de la Haute-Savoie et du Pays de Gex* [Schweiz gegen Frankreich], 1932 C.P.I.J. Recueil [Série A/B] Nr. 46, S. 167; 25. Mai 1926 *Certains intérêts allemands en Haute-Silésie polonaise* [Deutschland gegen Polen], 1925 C.P.I.J. Recueil [Série A] Nr. 7, S. 30). Im Einklang hiermit wird das Rechtsmissbrauchsverbot in der allgemeinen völkerrechtlichen Literatur heute wohl überwiegend als allgemeiner Rechtsgrundsatz des Völkerrechts charakterisiert, der in den Rechtsordnungen der meisten Staaten verankert und eng mit dem Grundsatz von Treu und Glauben verbunden sei (vgl. insbesondere ROBERT KOLB, Good Faith in International Law, 2017, S. 133 ff. mit Hinweisen auf Argumente der Gegenseite; vgl. auch SAMANTHA BESSON, Droit international public, 2. Aufl. 2024, Rz. 1279; ALEXANDRE KISS, Abuse of Rights, in: Max Planck Encyclopedia of Public International Law [MPEPIL], 2006, Rz. 8 ff.; HERSCH LAUTERPACHT, The Development of International Law by the International Court, 1958 [Nachdruck 2010], S. 164; VERDROSS/SIMMA, Universelles Völkerrecht, 3. Aufl. 1984 [Nachdruck 2010], § 62 und 461; kritisch dagegen etwa RUPERT K. NEUHAUS, Das Rechtsmissbrauchsverbot im heutigen Völkerrecht, 1984, 35 ff.; tendenziell auch JAMES CRAWFORD, Brownlie's Principles of Public International Law, 9. Aufl. 2019, S. 544 ff.).

14.2. Was sodann das Steuerrecht im Speziellen angeht, hat sich der Grundsatz, wonach steuerliche Vorteile bei Missbrauch nicht gewährt werden müssen, in den meisten, wenn nicht sogar in allen nationalen und supranationalen Steuerrechtsordnungen und zwischenzeitlich auch auf internationaler Ebene niedergeschlagen.

14.2.1. Manchenorts hat der nationale Gesetzgeber allgemeine Anti-Missbrauchs- und Anti-Umgehungsvorschriften ("General Anti-Avoidance [z.T. auch: Anti-Abuse] Rules" [GAARs]) kodifiziert, andernorts haben die Gerichte Regeln und Grundsätze aufgestellt, um Missbrauch und Umgehung zu begegnen (vgl. etwa DE BROE, a.a.O., S. 309 f.; RICHARD KREVER, General Report, in: GAARs - A Key Element of Tax Systems in the Post-BEPS World, 2016, S. 1 ff.; CHRISTINE OSTERLOH-KONRAD, Die Steuerumgehung, 2019, S. 1 ff. und 690 f. [mit Fokus auf Deutschland, Frankreich, Grossbritannien und

USA]; ROSENBLATT/TRON, General Report, in: Anti-avoidance measures of general nature and scope - GAAR and other rules, Cahiers de droit fiscal international [CDFI], Bd. 103a, 2018 [CDFI Bd. 103a], S. 31 ff.; vgl. zur Rechtslage in der Europäischen Union Urteil des EuGH vom 26. Februar 2019 C-115/16, C-118/16, C-119/16 und C-299/16 *N Luxembourg 1 und andere*, ECLI:EU:C:2019:134 Randnr. 117 f.; Art. 6 der Richtlinie [EU] 2016/1164 des Rates vom 12. Juli 2016 mit Vorschriften zur Bekämpfung von Steuervermeidungspraktiken mit unmittelbaren Auswirkungen auf das Funktionieren des Binnenmarkts ["Anti Tax Avoidance Directive", ATAD 1; ABl. L 193, 2016, S. 1]; vgl. zur Rechtslage in Dänemark SUSI BAERENTZEN, The Effectiveness of General Anti-Avoidance Rules, 2022, S. 234 f.; MADSEN & NØRGAARD LAURSEN, Denmark, in: CDFI Bd. 103a, S. 282 ff.).

14.2.2. Diverse Staaten setzen ihre landesrechtlichen Missbrauchsabwehrdispositive auch ein, um den Missbrauch von DBA zu bekämpfen (vgl. OECD-MK, N. 9.1-9.3 zu Art. 1 OECD-MA [i.d.F. vom 28. Januar 2003]; United Nations, Model Double Taxation Convention between Developed and Developing Countries [UN-MA], 2017 Update, Kommentar [UN-MK], N. 19, 38 und 41 ff. zu Art. 1 UN-MA; Urteil des Supreme Court of Canada vom 26. November 2021, *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 Rz. 30 und 37; ROSENBLATT/TRON, a.a.O., S. 30 f.; STEF VAN WEEGHEL, General Report, in: Tax Treaties and tax avoidance: application of anti-avoidance provisions, CDFI, Bd. 95a, 2010, S. 22 und 26 ff.; kritisch zur Anwendung landesrechtlicher Missbrauchsbekämpfungsvorschriften im DBA-Kontext VIKRAM CHAND, The Interaction of Domestic Anti-Avoidance Rules with Tax Treaties, 2018, Rz. 819). Demgegenüber ist es eher unüblich, dass Gerichte die Verweigerung von Abkommensvorteilen bei Missbrauch ausdrücklich auf das Völkerrecht und insbesondere auf das völkerrechtliche Rechtsmissbrauchsverbot stützen (vgl. VAN WEEGHEL, a.a.O., S. 35). In dualistischen Rechtsordnungen ist dies oft gar nicht erforderlich, weil die Gerichte landesrechtlichen Anti-Missbrauchsregelungen etwa gestützt auf den Grundsatz "lex posterior derogat legi priori" den Vorzug vor den ebenfalls landesrechtlichen DBA-Umsetzungsvorschriften geben können bzw. müssen (vgl. Urteil des deutschen Bundesverfassungsgerichts 2 BvL 1/12 vom 15. Dezember 2015 Rz. 50 ff., in: BVerfGE 141, 1; zu sog. Treaty Overrides in dualistischen Rechtsordnungen auch DOUMA/ELLIFFE, General Report, in: Good faith in domestic and international law, CDFI, Bd. 107b, 2023, S. 16 und 22). Ausserdem ist es nach der Ansicht der OECD zumindest in der Tendenz mit den Abkommensverpflichtungen vereinbar, wenn ein Staat einen Sachverhalt gestützt auf eine innerstaatliche Anti-Missbrauchsregelung umqualifiziert, weil die Abkommensbestimmungen dann erst auf den fingierten Sachverhalt anzuwenden seien (vgl. OECD-MK, N. 79 zu Art. 1 OECD-MA [i.d.F. vom 21. November 2017] sowie N. 22.1 zu Art. 1 OECD-MA [i.d.F. vom 28. Januar 2003]; vgl. aber den ursprünglichen Vorbehalt der Schweiz hierzu in N. 27.9 zu Art. 1 OECD-MA [i.d.F. vom 28. Januar 2003]; kritisch auch ANDRÉS BÁEZ MORENO, GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test. What Have We Gained from BEPS Action 6, Intertax 45/2017 S. 433 f.; DE BROE, a.a.O., S. 387; JONATHAN SCHWARZ, Schwarz on Tax Treaties, 6. Aufl. 2021, S. 479).

14.2.3. Ungeachtet der teilweise unterschiedlichen dogmatischen Grundlagen zeugen die vorstehenden Ausführungen von einer global weitgehend übereinstimmenden Praxis, steuerliche Vorteile zu verweigern, wenn Gestaltungen und Transaktionen als missbräuchlich erkannt werden, und dies auch und gerade dann, wenn die Voraussetzungen des Gesetzes oder des Abkommens für die Gewährung des steuerlichen Vorteils eigentlich erfüllt wären. Dieser internationale Konsens hat sich im Übrigen auch im 2013 initiierten und 2015 abgeschlossenen BEPS-Projekt (Base Erosion and Profit Shifting; Gewinnverkürzung und Gewinnverlagerung) der OECD und der G20 manifestiert. In dessen Rahmen haben sich die beteiligten Staaten im Sinne eines Mindeststandards verpflichtet, "ein Mindestmass an Schutz vor Treaty-Shopping zu schaffen" (vgl. OECD, Verhinderung der Gewährung von Abkommensvergünstigungen in unangemessenen Fällen, Aktionspunkt 6 - Abschlussbericht 2015, 2018, S. 10). Mit Blick auf diese Einigung und den daraus hervorgegangenen Art. 29 Abs. 9 OECD-MA ("principal purpose test"; i.d.F. vom 21. November 2017) sowie Art. 7 Abs. 1 des Multilateralen Übereinkommens vom 24. November 2016 zur Umsetzung steuerabkommensbezogener Massnahmen zur Verhinderung der Gewinnverkürzung und Gewinnverlagerung (MLI; SR 0.671.1) ist in der Literatur bereits die Meinung geäussert worden, der Missbrauchsvorbehalt habe sich zu einer Regel des Völkergewohnheitsrechts im Sinne von Art. 38 Abs. 1 lit. b IGH-Statut verfestigt (vgl. IRMA JOHANNA MOSQUERA VALDERRAMA, BEPS principal purpose test and customary international law, Leiden Journal of International Law 33/2020 S. 758 ff.).

14.3. Unabhängig von diesen jüngsten Entwicklungen auf internationaler Ebene rechtfertigt sich in Anbetracht der tiefen Verankerung von Rechtsmissbrauchsverbot und Umgehungsvorbehalten in den meisten Steuerrechtsordnungen auf jeden Fall die Annahme eines allgemeinen Grundsatzes, dass sich auch im internationalen Steuerrecht nicht auf eine völkerrechtliche Rechtsposition berufen kann, wer sie zweckfremd und zum Nachteil der verpflichteten Partei auszuüben sucht (vgl. in diesem Sinn bereits vor Jahrzehnten KLAUS VOGEL, Abkommensbindung und Missbrauchsabwehr, in: Steuerrecht, Festschrift Höhn, 1995, S. 472; DAVID A. WARD, Abuse of Tax Treaties, Intertax 23/1995 S. 180 f.; jüngst auch HONGLER, a.a.O., S. 201 und 498; eher kritisch dagegen etwa DE BROE, a.a.O., S. 315; MATTEOTTI, Diss., S. 296 ff.).

14.4. Gleich wie im Bereich des internationalen Investmentrechts (vgl. oben E. 13) gibt es sodann auch im internationalen Steuerrecht keinen überzeugenden Grund dafür, die Einrede aus dem Völkerrecht dem aus einem DBA verpflichteten Vertragsstaat zu verwehren, bloss weil sich nicht der andere Vertragsstaat selbst, sondern eine ihm zugehörige Person auf das Recht aus dem völkerrechtlichen Vertrag beruft. Denn

einerseits hat das Bundesgericht nicht nur das Völkervertragsrecht, sondern das gesamte Völkerrecht zu beachten und anzuwenden, einschliesslich des Völkergewohnheitsrechts und der allgemeinen Regeln des Völkerrechts (vgl. **BGE 133 II 450** E. 6.1; Urteil 2C_203/2023 vom 1. Juli 2024 E. 3.2). Andererseits ist nicht einzusehen, weswegen der allgemeine völkerrechtliche Grundsatz des Rechtsmissbrauchsverbots nur gegenüber Staaten und nicht gegenüber jedermann gelten sollte, der sich missbräuchlich auf eine völkerrechtliche Rechtsposition beruft. Deshalb spielt es hier auch keine Rolle, ob in Anbetracht der neuerdings vorgesehenen völkerrechtlichen Streitbeilegungsmechanismen in DBA (vgl. etwa Art. 25 Abs. 5 DBA CH-DK) aus den DBA-Entlastungsnormen völkerrechtliche Individualrechte gereift sind oder sich die Rechtsposition der einzelnen Person alleine von jener ihres Ansässigkeitsstaats ableitet, sie also völkerrechtlich nur begünstigt und nicht berechtigt ist (vgl. zu dieser Unterscheidung VERDROSS/SIMMA, a.a.O., § 423; vgl. auch BESSON, a.a.O., Rz. 697 ff.; VOLKER EPPING, in: Völkerrecht, 8. Aufl. 2024, § 9 Rz. 3). In beiden Fällen hat die im anderen Vertragsstaat ansässige Person die Einrede des Rechtsmissbrauchs gegen sich gelten zu lassen (vgl. auch VOGEL, a.a.O., N. 190 zu Einleitung; kritisch DE BROE, a.a.O., S. 307, allerdings primär mit Bezug auf Art. 26 VRK, der nur die Vertragsstaaten binden könne).

15.
Wenn also die Einrede des Rechts- bzw. Abkommensmissbrauchs einem Anspruch auf Entlastung aus einem DBA entgegen gehalten werden kann, müssen die Voraussetzungen dieser Einrede definiert werden.

15.1. Sowohl das Bundesgericht im Bereich der Investitionsschiedsgerichtsbarkeit als auch der Internationale Gerichtshof und der Ständige Internationale Gerichtshof haben stets betont, dass es sich bei der Einrede des Rechtsmissbrauchs um ein Ausnahmekorrektiv handelt. Es ist deshalb nur zurückhaltend von einem Rechtsmissbrauch auszugehen (vgl. zum internen Recht gleichermassen auch **BGE 144 III 407** E. 4.2.3; **143 III 279** E. 3.1). Ein solcher kann nicht leichthin angenommen werden; es obliegt der Partei, die sich auf den Rechtsmissbrauch beruft, die Voraussetzungen der Einrede zu beweisen (vgl. **BGE 148 III 330** E. 5.2.4; Urteile des IGH vom 30. März 2023 *Certains actifs iraniens* [Islamische Republik Iran gegen USA], § 92 f.; des StIGH vom 25. Mai 1926 *Certains intérêts allemands en Haute-Silésie polonaise* [Deutschland gegen Polen], 1925 C.P.I.J. Recueil [Série A] Nr. 7, S. 30). Die Einrede des Rechtsmissbrauchs kommt laut dem Internationalen Gerichtshof nur in Betracht, wenn eine Partei versucht, Rechte zu anderen Zwecken als denjenigen auszuüben, für welche die fraglichen Rechte begründet wurden, und dass sie dies zum Nachteil der verpflichteten Partei tut (Urteil des IGH vom 30. März 2023 *Certains actifs iraniens* [Islamische Republik Iran gegen USA], § 93). Nach der Rechtsprechung des Bundesgerichts ist ein Missbrauch eines Investitionsschutzabkommens zu vermuten, wenn ein Investor durch eine Umstrukturierung seiner Investition in den Anwendungsbereich des Abkommens gelangt und zum Zeitpunkt der Umstrukturierung für einen vernünftigen Investor in der gleichen Situation der Rechtsstreit bereits vorhersehbar war (vgl. **BGE 148 III 330** E. 5.2.4).

15.2. Laut dem OECD-MK ist ein Abkommensmissbrauch auch im internationalen Steuerrecht nicht leichthin anzunehmen, wobei sich die Ausführungen im OECD-MK seiner Funktion gemäss eher auf die Auslegung des OECD-MA bzw. der darauf basierenden DBA beziehen. Ein Leitprinzip ("guiding principle", "principe directeur") soll dabei sein, dass Abkommensvorteile nicht verfügbar sein sollen, wenn das Erlangen einer steuergünstigeren Position einer der Hauptzwecke der betroffenen Transaktion oder Gestaltung war und die Gewährung des Abkommensvorteils Ziel und Zweck der einschlägigen Bestimmungen zuwiderlaufen würde (vgl. OECD-MK, N. 61 [i.d.F. vom 21. November 2017] bzw. N. 9.5 [i.d.F. vom 28. Januar 2003] zu Art. 1 OECD-MA; vgl. auch Art. 29 Abs. 9 OECD-MA [i.d.F. vom 21. November 2017] und Art. 7 Abs. 1 MLI).

15.3. Nationale allgemeine Anti-Missbrauchsregelungen setzen unterschiedliche Kriterien ein, um die zu korrigierenden Missbräuche zu identifizieren. Gewisse Staaten stützen darauf ab, ob eine Gestaltung oder Transaktion objektiv als künstlich oder ungewöhnlich erscheint, während andere stattdessen oder zusätzlich berücksichtigen, ob die involvierten Personen ausschliesslich oder hauptsächlich steuerlich motiviert waren. Ein essenzieller Bestandteil jeder allgemeinen Anti-Missbrauchsregelung ist sodann der steuerliche Vorteil, der aus der Gestaltung oder Transaktion resultiert und der üblicherweise mit einem Vergleich der steuerlichen Position mit und ohne die missbräuchliche Gestaltung und Transaktion ermittelt wird (vgl. ROSENBLATT/TRON, a.a.O., S. 18 ff.; vgl. auch KREVER, a.a.O., S. 4 ff.).

15.4. Wie OSTERLOH-KONRAD mit Bezug auf vier repräsentative Rechtsordnungen (Deutschland, Frankreich, Grossbritannien und USA) aufgezeigt hat, haben allgemeine Anti-Missbrauchsregelungen im Kern regelmässig zweierlei gemeinsam: Erstens zielen sie auf Gestaltungen und Transaktionen, welche die auslegungsweise ermittelten Voraussetzungen einer gesetzlichen oder völkerrechtlichen Norm für einen steuerlichen Vorteil erfüllen, obgleich die Gewährung dieses Vorteils mit dem Normzweck nicht vereinbar ist (vgl. OSTERLOH-KONRAD, a.a.O., S. 580 f. und 644 ff., die von einer Divergenz zwischen Wortsinn und Telos bzw. Normzweck spricht und den Gestaltungsmissbrauch bzw. die Steuerumgehung dementsprechend als Divergenzphänomen bezeichnet). Zweitens begnügen sich allgemeine Anti-Missbrauchsregelungen regelmässig nicht mit der Divergenz zwischen Wortsinn und Normzweck alleine, sondern fordern für eine Korrektur das Hinzutreten besonderer Merkmale (z.B. besonders grosse Abweichung zum Normzweck, Künstlichkeit der Gestaltung, steuerliche Motivation; vgl. OSTERLOH-KONRAD, a.a.O., S. 650 ff.).

15.5. Dieses Muster lässt sich auch in den vorstehenden Umschreibungen der Voraussetzungen des völkerrechtlichen Rechts- bzw. Abkommensmissbrauchsverbots erkennen, die zusätzlich zur zweckfremden Ausübung einer Rechtsposition vor allem auf die Motivation der berechtigten Partei abstellen und bei der Annahme eines Rechtsmissbrauchs zur Zurückhaltung mahnen. Überall geht es letztlich darum sicherzustellen, dass die aus dem Gesetzes- oder Vertragstext fliessenden Erwartungen auch bei einer zweckfremden Berufung auf die Norm nur aus qualifizierten Gründen enttäuscht werden sollen, mithin um eine Abwägung der Interessen an der Rechtssicherheit einerseits und an der zweckkonformen Durchsetzung der Norm andererseits (vgl. auch OSTERLOH-KONRAD, a.a.O., S. 613).
Diese zwei Elemente kommen denn auch in der Definition zum Ausdruck, die das Bundesgericht dem Abkommensmissbrauch in seiner publizierten Rechtsprechung zum internationalen Steuerrecht gegeben hat: Es hat den Abkommensmissbrauch als Situation definiert, in welcher a) der begehrte Abkommensvorteil einer nicht abkommensberechtigten Person unter Umständen zugute kommt, unter denen die Staatsvertragsparteien die Entlastung von der Quellensteuer nicht vereinbaren wollten und b) der Ansässigkeitsstaat nach dem Grundsatz von Treu und Glauben diese Entlastung von seinem Vertragspartner nicht erwarten darf (vgl. **BGE 113 Ib 195** E. 4c; vgl. auch **BGE 94 I 659** E. 4). Erforderlich ist danach also regelmässig einerseits eine zweckfremde Verwendung der Entlastungsnorm, insbesondere die Weiterleitung von Abkommensvorteilen an Personen, die nicht vom Abkommen profitieren sollen (vgl. auch **BGE 94 I 659** E. 4). Andererseits muss die Verweigerung der Erfüllung der völkerrechtlichen Pflicht mit Treu und Glauben vereinbar sein, wobei diese zweite Bedingung im Lichte der Funktion der Rechtsmissbrauchseinrede als ultima ratio streng zu handhaben ist.

15.6. Im Rahmen der Auslegung von Art. 11 Abs. 1 DBA CH-DK hat sich gezeigt, dass die Gewährung der Abkommensvorteile im vorliegenden Fall der Zielsetzung des Abkommens im Allgemeinen und der konkreten Entlastungsnorm im Besonderen fremd wäre (vgl. oben E. 10.2). Dies erlaubt der Schweiz als verpflichteter Partei indes nach dem Gesagten noch nicht, den Abkommensvorteil gestützt auf die Einrede des Rechts- bzw. Abkommensmissbrauchs zu verweigern. Erforderlich ist zusätzlich, dass die Verweigerung des Abkommensvorteils mit dem Grundsatz von Treu und Glauben in Einklang steht. Mit diesem Grundsatz wäre es namentlich regelmässig nicht vereinbar, wenn der völkervertraglich verpflichtete Vertragsstaat - hier die Schweiz - einer ihm zugehörigen Person in einer vergleichbaren Situation den gleichen steuerlichen Vorteil gewähren würde, also insbesondere eine vergleichbare Gestaltung oder Transaktion einer ansässigen Person nicht für missbräuchlich halten würde. Denn in diesem Fall könnte der verpflichtete Vertragsstaat seinerseits gegenüber dem berechtigten Vertragsstaat und der ihm zugehörigen Person nicht in guten Treuen geltend machen, deren Berufung auf die Entlastungsnorm eines DBA sei rechtsmissbräuchlich. Eine solche Prüfung des internationalen Sachverhalts anhand der innerstaatlichen Anti-Missbrauchsregelungen stimmt im Übrigen auch mit der Praxis vieler Staaten überein, auch wenn die dogmatischen Grundlagen dafür variieren (vgl. dazu oben E. 14.2.2).

16.
Die Gestaltung oder Transaktion ist also darauf zu prüfen, inwieweit ihr nach den innerstaatlichen Anti-Missbrauchsregelungen der steuerliche Vorteil versagt bliebe. Als solche Regelung kommt hier das Verbot der Steuerumgehung in Betracht.

16.1. Dieses Verbot ist im Zusammenhang mit der Rückerstattung der Verrechnungssteuer ausdrücklich in Art. 21 Abs. 2 VStG niedergelegt (vgl. zuvor ebenso bereits Art. 7 Abs. 2 des Bundesratsbeschlusses vom 1. September 1943 über die Verrechnungssteuer [BS 6 326]), findet aber als allgemeiner Rechtsgrundsatz im ganzen Steuerrecht auch ohne ausdrückliche Vorschrift Anwendung (vgl. **BGE 149 II 462** E. 2.2.4 [Emissionsabgabe]; **149 II 53** E. 3.6.3 [Mehrwertsteuer]; **148 II 189** E. 3.4.5 [direkte Bundessteuer]). Soweit mit dem Völkerrecht vereinbar, ist er auch auf die Rückerstattung der Verrechnungssteuer im internationalen Verhältnis anwendbar (vgl. zur Kongruenz des allgemeinen Rechtsgrundsatzes mit Art. 21 Abs. 2 VStG Urteil 2C_354/2018 vom 20. April 2020 E. 4.2.1; vgl. auch JUNG, a.a.O., StR 66/2011 S. 17 f. und 20 f.).

16.2. Eine Steuerumgehung liegt vor, wenn (a) eine von den Beteiligten gewählte Rechtsgestaltung als ungewöhnlich ("insolite"), sachwidrig oder absonderlich, jedenfalls den wirtschaftlichen Gegebenheiten völlig unangemessen erscheint (sog. objektives Element), wenn zudem (b) anzunehmen ist, dass die gewählte Rechtsgestaltung missbräuchlich lediglich deshalb getroffen wurde, um Steuern einzusparen, die bei sachgemässer Ordnung der Verhältnisse geschuldet wären (sog. subjektives Element), und wenn (c) das gewählte Vorgehen tatsächlich zu einer erheblichen Steuerersparnis führen würde, sofern es von der Steuerbehörde hingenommen würde (sog. effektives Element). Ob diese Voraussetzungen erfüllt sind, ist aufgrund der konkreten Umstände des Einzelfalls zu prüfen. Sind die Voraussetzungen der Steuerumgehung erfüllt, so ist der Besteuerung diejenige Rechtsgestaltung zugrunde zu legen, die sachgerecht gewesen wäre, um den angestrebten wirtschaftlichen Zweck zu erreichen. Eine Steuerumgehung kommt nur in ganz ausserordentlichen Situationen infrage, namentlich wenn die gewählte Rechtsgestaltung (objektives Element) - abgesehen von den steuerlichen Aspekten - jenseits des wirtschaftlich Vernünftigen liegt. Das subjektive Element erweist sich insofern als entscheidend, als die Annahme einer Steuerumgehung ausgeschlossen bleibt, wenn andere als blosse Steuerersparnisgründe bei der Rechtsgestaltung eine relevante Rolle spielen (**BGE 149 II 53** E. 5.2.1; **148 II 233** E. 5.2; **146 II 97** E. 2.6.2).

16.3.

16.3.1. Die hier zu beurteilende Gestaltung erfüllt jedenfalls das effektive Element der Steuerumgehung. Die von der Beschwerdeführerin beantragte vollständige Rückerstattung der Verrechnungssteuer würde begriffsnotwendig eine erhebliche Steuerersparnis bedeuten, wenn die Rückerstattung bei einer anderen, sachgerechten Rechtsgestaltung nicht erhältlich gewesen wäre (vgl. auch Art. 21 Abs. 2 VStG).

16.3.2. Weniger klar ist die Situation hingegen in Bezug auf die anderen beiden Elemente, zumal die Vorinstanz die Frage des Abkommensmissbrauchs nicht geprüft hat. Aus ihren Feststellungen zur Nutzungsberechtigung und den Akten (Art. 105 Abs. 2 BGG) ergeben sich immerhin gewisse Anhaltspunkte dafür, dass die streitbetroffenen Gestaltungen ungewöhnlich und durch die Steuerersparnis bzw. durch den Abkommensvorteil motiviert gewesen sein könnten.

16.3.3. Es wurde bereits festgehalten, dass die Zahlungen unter den Swaps eng mit den Zinseinkünften aus den Bundesanleihen zusammenhingen (vgl. oben E. 10.2). Ob die Gestaltungen ungewöhnlich waren, ist folglich anhand einer Gesamtbetrachtung zu prüfen.

16.3.4. Mit der Vorinstanz ist festzuhalten, dass die Zahlungen in Schweizer Franken, welche die Beschwerdeführerin von den Gegenparteien zu Beginn der Laufzeit der Swap-Verträge erhielt, den Erwerb der Bundesanleihen im Umfang der Aufschlagszahlungen (Differenz zwischen dem Nominalwert der erworbenen Anleihenstranche und ihrem Marktwert zuzüglich Marchzins; vgl. Sachverhalt A.a) finanzierten. Es ist zumindest wahrscheinlich, dass sich die Zinsänderungs- und Wechselkursrisiken auf den Bundesanleihen auch anders - d.h. ohne diese Bevorschussung - hätten absichern lassen. Jedenfalls weckt die teilweise Finanzierung Zweifel daran, dass es der Beschwerdeführerin wirklich um die Anlage überschüssiger Liquidität ging und sie die einzelnen Anleihenstranchen - und damit die verrechnungssteuerbelasteten Zinseinkünfte einschliesslich des allfälligen Steuerrückerstattungsanspruchs - auch ohne den korrespondierenden, möglicherweise ungewöhnlich vorteilhaften Swap-Vertrag erworben hätte.

16.3.5. Nach der Darstellung der Beschwerdeführerin soll die Höhe des Spreads, den die Beschwerdeführerin von den Gegenparteien zusätzlich zum USD-Libor-Zins erhielt, praktisch ausschliesslich auf die damals besonders hohe Liquidität des Schweizer Frankens im Markt zurückzuführen sein. Die Beschwerdeführerin setzt sich damit jedoch in Widerspruch zu den Erläuterungen einer dänischen Bank, die sie selbst eingeholt hat und auf die sie in ihrer Beschwerde verweist. Diese hat sinngemäss ausgeführt, dass die Liquidität der Währungen bzw. Angebot und Nachfrage danach im Markt das Pricing bei einem reinen Währungsswap bestimme. Bei einem Zinsswap hänge der Spread derweil nicht zuletzt vom Coupon ab. Bei kombinierten Cross-Currency Rate Swaps, wie sie hier im Streit liegen, werde der Spread von beiden (und weiteren) Faktoren beeinflusst. Vor dem Hintergrund dieser Erläuterungen ist es zumindest wahrscheinlich, dass die Spreads anders - d.h. für die Beschwerdeführerin weniger günstig - ausgefallen wären, wenn beispielsweise nicht mit dem Brutto-, sondern mit dem Netto-Coupon (d.h. unter Abzug der Verrechnungssteuer) gerechnet worden wäre, die antizipierten Abkommensvorteile also nicht weitergeleitet worden wären.

16.3.6. Für die Annahme der Steuerumgehung ist es aber ohnehin nicht zwingend erforderlich, dass die Beschwerdeführerin selbst aus der ungewöhnlichen Gestaltung einen direkten Vorteil gezogen bzw. angestrebt hat. Bei der Rückerstattung der Verrechnungssteuer ist es geradezu typisch, dass der vermeintliche Rückerstattungsberechtigte bzw. der Antragsteller nicht der alleinige und selten der hauptsächliche Profiteur der Umgehung ist (vgl. **BGE 147 II 338** E. 3.3; Urteile 2C_359/2022 vom 13. September 2022 E. 6.2; 2C_470/2018 vom 5. Oktober 2018 E. 6.3.2). Folglich kann es nicht alleine auf seine Motivationslage ankommen. Das ergibt sich im Übrigen auch aus dem Wortlaut von Art. 21 Abs. 2 VStG. Dieser stellt nicht auf die Umgehungsabsicht des Rückerstattungsberechtigten ab, sondern schliesst die Rückerstattung generell aus, wenn "sie zu einer Steuerumgehung führen würde" (noch strenger die romanischen Sprachfassungen: "[...] il *pourrait permettre* d'éluder un impôt"; "[...] la sua concessione *consentirebbe* d'eludere un'imposta"). Vor diesem Hintergrund würde es hier für die Annahme des subjektiven Merkmals der Steuerumgehung bereits genügen, wenn der Steuervorteil - die Rückerstattung der Verrechnungssteuer gestützt auf Art. 11 Abs. 1 DBA CH-DK - wenigstens diejenige Person zur Mitwirkung an der Gestaltung motiviert hatte, der er schliesslich indirekt via die Swap-Gegenparteien zugeflossen ist. Der Beschwerdeführerin als Antragstellerin kann die Steuerumgehung jedenfalls dann entgegen gehalten werden, wenn sie in relevanter Weise davon Kenntnis hatte oder daran mitgewirkt hat (vgl. Urteil 2A.660/2006 vom 8. Juni 2007 E. 5.3, 5.4.3 und 5.6, in: ASA 77 S. 554, StR 63/2008 S. 643).

16.4. Trotz dieser Anhaltspunkte lassen die Feststellungen der Vorinstanz und die Akten insgesamt noch keine abschliessende Beurteilung der Frage der Steuerumgehung zu. Es sind dafür weitere Abklärungen erforderlich, namentlich zu folgenden Punkten.

16.4.1. In Bezug auf das objektive Merkmal der Steuerumgehung (Ungewöhnlichkeit der Gestaltung) ist näher zu untersuchen, ob die Konditionen der Swaps im Marktvergleich untypisch bzw. besonders günstig waren und sie von den Konditionen abwichen, die von Anbietern erhältlich gewesen wären, die erstens

selbst zur vollen Rückerstattung berechtigt gewesen wären und zweitens die Zinsen aus den Bundesanleihen nicht erneut weitergeleitet hätten. Ferner ist zu klären, welchen wirtschaftlichen Nutzen die Beschwerdeführerin aus der Anlage in die Bundesanleihen zog, ob sie diesen oder einen ähnlichen Nutzen auch auf andere Weise hätte erzielen können und ob sie die durch den Erwerb der Bundesanleihen eingegangenen Risiken so hätte absichern können, dass es nicht zu einer Weiterleitung der (antizipierten) Abkommensvorteile gekommen wäre.

16.4.2. Für die Frage der Umgehungsabsicht ist es sodann von Interesse, ob die Gegenparteien der Swaps ihrerseits die Zahlungsströme aus den Bundesanleihen und insbesondere die antizipierten Abkommensvorteile weitergeleitet haben und ob die allfälligen Endempfänger der Zahlungsströme mit den Personen identisch sind, von denen die Beschwerdeführerin über den bzw. über die Broker die fünf Tranchen an den Bundesanleihen gekauft hatte. Zudem sind die von der Beschwerdeführerin vorgebrachten geschäftlichen Gründe für den Erwerb der Bundesanleihen näher zu prüfen.

16.4.3. Im Hinblick auf diese Untersuchungen ist daran zu erinnern, dass das Bundesgericht betreffend das DBA CH-DK bislang offengelassen hat, ob eine Verletzung der Mitwirkungspflicht die Verwirkung des Rückerstattungsanspruchs analog Art. 48 Abs. 2 VStG nach sich zieht, obschon die Verordnung vom 18. Dezember 1974 zum schweizerisch-dänischen Doppelbesteuerungsabkommen (VO DBA CH-DK; SR 672.931.41) diese Rechtsfolge nicht vorsieht (vgl. zu anderen DBA Urteile 2C_936/2017 vom 22. August 2019 E. 8.4 und 9.10; 2C_964/2016 vom 5. April 2017 E. 5.4 und 6.3). Immerhin hat es das Bundesgericht aber für zulässig gehalten, die Nichtoffenlegung der Gegenparteien zum Nachteil der Antragstellerin zu würdigen. Dass der Broker die Herausgabe der Information verweigerte, hatte sich die Antragstellerin selbst zuzuschreiben, da sie selbst den Broker dazwischen geschaltet hatte (Urteil 2C_895/2012 vom 5. Mai 2015 E. 8.3.3, 8.3.4 und 8.4.3). Die ungenügende Mitwirkung im Rückerstattungsverfahren dürfte zwar für sich genommen unter gewöhnlichen Umständen nur selten mit an Sicherheit grenzender Wahrscheinlichkeit den Schluss zulassen, dass die fragliche Gestaltung oder Transaktion von einer Umgehungsabsicht getragen war. Allerdings ist die Beweisführung über diesen Punkt für die Steuerbehörde bei komplexen Finanzstrukturen erfahrungsgemäss besonders schwierig. Es würde vorliegend deshalb bereits genügen, wenn die steuerliche Motivation in Anbetracht der gesamten Umstände - einschliesslich der Mitwirkung im Rückerstattungsverfahren - als überwiegend wahrscheinlich erscheint (vgl. Urteil 9C_591/2023 vom 2. April 2024 E. 3.6.4, zur Publikation vorgesehen).

17.
Zusammengefasst lässt sich anhand der Feststellungen der Vorinstanz nicht abschliessend beurteilen, ob die Gestaltung die Voraussetzungen der Steuerumgehung erfüllt. Es ist absehbar, dass die Untersuchung und Beantwortung dieser Fragen einen gewissen Aufwand verursachen wird. Möglicherweise müssen gewisse der aufgeworfenen Fragen von einer Finanzexpertin oder einem Finanzexperten begutachtet werden, damit die Vorinstanz abschliessend feststellen kann, ob die Gestaltung absonderlich und von einer Umgehungs- bzw. Missbrauchsabsicht getragen war. Die Sache ist folglich an die Vorinstanz zurückzuweisen, damit sie die erforderlichen Untersuchungen vornimmt (Art. 107 Abs. 2 BGG). Falls die Vorinstanz zum Schluss kommt, dass die Voraussetzungen der Steuerumgehung nicht erfüllt sind, könnte die Schweiz der Beschwerdeführerin nicht in guten Treuen einen Rechts- bzw. Abkommensmissbrauch vorwerfen und müsste die beantragte Rückerstattung folglich gewährt werden. Falls die Voraussetzungen der Steuerumgehung hingegen erfüllt sein sollten, müsste sodann im Lichte der Funktion des Rechtsmissbrauchsverbots als ultima ratio geprüft werden, ob sich etwa aus dem Verhalten der Vertragsstaaten oder der Motivation der Beschwerdeführerin andere Gründe ergeben, welche die Rechtsmissbrauchseinrede der Schweiz ausschliessen könnten. Obschon das Institut der Steuerumgehung zumindest einen Grossteil der Voraussetzungen abdeckt, unter denen Staaten gemeinhin Abkommensvorteile verweigern (vgl. oben E. 15.3), ist nicht a priori ausgeschlossen, dass es im Einzelfall weitere Argumente geben könnte, welche die Einrede des Rechtsmissbrauchs entkräften könnten, beispielsweise indem sie die Berufung auf das Rechtsmissbrauchsverbot seitens der Schweiz als treuwidrig erscheinen lassen.

V. Verfahrensausgang, Kosten und Entschädigung

18.
Nach dem Gesagten erweist sich die Beschwerde als begründet, soweit darin geltend gemacht wird, dass die Vorinstanz die Rückerstattung nicht wegen fehlender Nutzungsberechtigung hätte verweigern dürfen. Das angefochtene Urteil ist aufzuheben und die Sache ist an die Vorinstanz zurückzuweisen, damit diese unter Berücksichtigung der vorstehenden Erwägungen prüft, ob ein Abkommensmissbrauch vorliegt. Diese Rückweisung gilt für die Verlegung der Gerichtskosten als volles Obsiegen der Beschwerdeführerin, obschon nicht ausgeschlossen ist, dass sie dereinst in dieser Sache unterliegen wird. Die Gerichtskosten sind demnach der ESTV aufzuerlegen, da diese Vermögensinteressen verfolgt (Art. 66 Abs. 1 und 4 BGG). Die ESTV hat der Beschwerdeführerin eine angemessene Parteientschädigung zu entrichten (Art. 68 Abs. 1 BGG).

Demnach erkennt das Bundesgericht:

1.
Die Beschwerde wird gutgeheissen. Das Urteil des Bundesverwaltungsgerichts vom 4. September 2023 wird aufgehoben. Das Verfahren wird zur ergänzenden Sachverhaltsfeststellung und Neubeurteilung an das Bundesverwaltungsgericht zurückgewiesen.

2.
Die Gerichtskosten von Fr. 25'000.- werden der Eidgenössischen Steuerverwaltung auferlegt.

3.
Die Eidgenössische Steuerverwaltung hat der Beschwerdeführerin eine Parteientschädigung von Fr. 20'000.- zu bezahlen.

4.
Dieses Urteil wird der Beschwerdeführerin, der Eidgenössischen Steuerverwaltung und dem Bundesverwaltungsgericht, Abteilung I, schriftlich mitgeteilt.

Luzern, 3. Oktober 2024

Im Namen der III. öffentlich-rechtlichen Abteilung
des Schweizerischen Bundesgerichts

Der Präsident: Parrino

Der Gerichtsschreiber: Seiler