Combatting Abuse by Conduit Companies

The Doctrine of Abuse under EU Law and Its Influence on Tax Treaties

Marres, O.; de Groot, I.

Publication date
2021

Document Version
Final published version

Published in
European Taxation

Citation for published version (APA):
Marres, O., & de Groot, I. (2021). Combatting Abuse by Conduit Companies: The Doctrine of Abuse under EU Law and Its Influence on Tax Treaties. *European Taxation*, *61*(8), 329-342. https://research.ibfd.org/#/doc?url=/collections/et/html/et_2021_08_e2_1.html

European Union

Otto Marres and Isabella de Groot***

Combatting Abuse by Conduit Companies

The Doctrine of Abuse under EU Law and Its Influence on Tax Treaties

In this article, the authors address the consequences of EU anti-abuse provisions and the EU anti-abuse principle on conduit companies and the application of tax treaties. Mainly due to the Danish cases, more guidelines are gradually being derived from case law in order to assess whether there is abuse in conduit situations. Those guidelines will probably also be important in applying tax treaties, for various reasons.

1. Treaty Shopping and Directive Shopping

Treaty shopping has been a well-known phenomenon since at least the 1970s.[1] Since the introduction of the directives on direct taxes, directive shopping has become at least as well known. If withholding taxes are not fully deductible in the investor's country of residence, and there are jurisdictions whose residents are entitled to a greater reduction in withholding tax than in the investor's country of residence, it becomes tempting to have the investment flow through just such a jurisdiction. This has happened on a large scale. In the past, attempts were made to combat the phenomenon of treaty shopping by introducing the requirement of beneficial ownership in the OECD Model (1977). That, however, barely stopped treaty shopping. The international tax system has now, within a span of a few years, been enriched with the Multilateral Convention (MLI)[2] and the OECD Model (2017),[3] with its principal purpose test (PPT) and new preamble; the mandatory anti-abuse provision in the EU Parent-Subsidiary Directive (2015/121);[4] and the ground-breaking and influential[5] decisions of the Court of Justice of the European Union (ECJ) in the "Danish cases" on the EU anti-abuse principle.[6] In this article, the authors address the consequences of these EU law developments on conduit companies, including the application of tax treaties.

2. Combatting Abuse: From Optional to Mandatory

2.1. Denying conduit companies EU law benefits

The EU Parent-Subsidiary Directive (2011/96), the EU Interest and Royalties Directive (2003/49),[7] the freedom of establishment[8] and the free movement of capital[9] are particularly important in the context of conduit companies. The Parent-Subsidiary Directive and the Interest and Royalties Directive contain provisions that enable or combat abuse. To the extent that conduit companies invoke the EU freedoms, it is then possible to justify a restriction on those freedoms by invoking the need to combat abuse or

* **Tax lawyer at Meijburg & Co.; Professor at the Amsterdam Centre for Tax Law (ACTL), University of Amsterdam. The author can be contacted at o.c.r.marres@uva.nl.**

** **Tax lawyer at Meijburg & Co. The author can be contacted at degroot.isabella@kpmg.com.**

This contribution is a translated, revised and updated version of a previous publication by the authors, O.C.R. Marres & I. de Groot, Bestrijding van misbruik door doorstromers, 7358 WFR 209, p. 1423 (2020).

1. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 1*, paras. 8 and 9 (11 Apr. 1977), Treaties & Models IBFD; S. van Weeghel, *The Improper Use of Tax Treaties* pp. 3 and 205 (Kluwer Law International 1998), refers to a Swiss Federal Council Decree (*Bundesratbeschluss*) from 1962 as an early example of combatting this phenomenon.
2. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017), Treaties & Models IBFD.
3. *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Treaties & Models IBFD.
4. Council Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345/8 (2011), Primary Sources IBFD, as amended by Council Directive 2015/121 of 27 January 2015, OJ L 21/1 (28 Jan. 2015), Primary Sources IBFD, art. 1(2) and (3).
5. *See* the following cases: NL: HR [Supreme Court], 10 Jan. 2020, 18/000219, ECLI:NL:HR:2020:21; IT: Cass. [Supreme Court of Cassation], 10 July 2020, 14765, H&I 2020/470 (comments by P. Arginelli & M. Tenore); ES: TEAC [Spanish Central Economic Administrative Court], 8 Oct. 2019, 00-2188-2017, H&I 2020/500 (comments by A. Barba & D. Arribas; *see also* E. Sánchez de Castro Martín-Luengo, *The ECJ's Danish Cases and the Spanish Withholding Tax Exemption in Respect of Interest Payments to EU Lenders: Some Reflections and Practical Implications*, 60 Eur. Taxn. 1, sec. 5. (2020), Journal Articles & Opinion Pieces IBFD (accessed 27 May 2021); FR: CE [Supreme Administrative Court], 5 June 2020, ECLI:FR:CECHR:2020:423809, H&I 2020/372 (comments by O. Teixeira); *see also* L. Stankiewicz, *Eqiom Revisited: The French Supreme Administrative Court Applies the Beneficial Owner Test under the EU Parent Subsidiary Directive*, 61 Eur. Taxn. 2/3 (2021), Journal Articles & Opinion Pieces IBFD (accessed 27 May 2021). *See also* R. Danon & B. Malek, *Swiss Supreme Court Refers to the ECJ "Danish cases" in Outbound Dividend Case Involving the Swiss-EU Savings Agreement*, Kluwer International Tax Blog (23 July 2020), on the interpretation of the Swiss Supreme Court.
6. DK: ECJ (Grand Chamber), 26 Feb. 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg I, X Denmark, C Danmark I and Z Denmark v. Skatteministeriet*, EU:C:2019:134, Case Law IBFD and DK: ECJ, 26 Feb. 2019, Joined Cases C-116/16 and C-117/16, *Skatteministeriet v. T Danmark and Y Denmark Aps*, Case Law IBFD. In the rest of this article we also refer to these cases as the Interest and Royalties Directive decision and the Parent-Subsidiary Directive decision, respectively. All paragraph references in this article are to the Danish cases unless otherwise noted.
7. Council Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Companies of Different Member States, OJ L157 (2003), Primary Sources IBFD.
8. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), Primary Sources IBFD, art. 49 in conjunction with art. 54.
9. Art. 63 TFEU.

tax avoidance. Ultimately, these are all manifestations or expressions of the same principle of EU law.

2.2. The EU anti-abuse principle

Since the "Danish cases" were decided it is clear that not only secondary EU law, but also primary EU law imposes an obligation on states to combat abuse of EU law. Although these conclusions are (largely) in accordance with previous VAT case law, the decisions in the Danish cases were nevertheless surprising. Previous case law on direct taxes gave one the impression that a basis under national law was needed if abuse was to be combatted. In *Kofoed* (Case C-321/05),[10] the ECJ ruled – in short – that the Danish court had to examine whether there was a Danish provision or principle that could be interpreted in accordance with the anti-abuse provision in the Merger Directive (2009/133). In the Danish cases, the defendants therefore argued that, pursuant to article 1(2) of the EU Parent-Subsidiary Directive (this is the abuse provision in (2011/96) (hereinafter old), which was changed to article 1(4) in (2015/121)) and article 5 of the Interest and Royalties Directive (2003/49), Denmark was only allowed to deny the Directive's benefits if there was a separate and specific legal basis for this under national legislation. The ECJ did not accept this argument. It apparently found reason for this based on the fact that the denial of the exemption did not amount to a reverse direct effect (imposing an obligation on the individual concerned) under the Parent-Subsidiary Directive or the Interest and Royalties Directive (which is prohibited under the principle of legal certainty), but was only the consequence of the principle that a taxpayer cannot enjoy a right or advantage arising from EU law in the event of fraud or abuse.[11] The ECJ's reasoning appears to be that the conditions required for obtaining the advantage are not actually met in the event of fraud or abuse.[12]

In *Cussens* (Case C-251/16)[13] the ECJ had already pointed out the essential difference between, on the one hand, the conditions for applying the principle that abusive practices are prohibited (as applied in *Cussens*), and, on the other, the conditions of a specific provision in a directive pursuant to which the Member States may refuse the exemption provided for in the directive in abuse situations (such as in *Kofoed*). If specific anti-abuse provisions in directives are not transposed into national law (and the national law also cannot be interpreted in accordance with a directive), then these directive provisions cannot impose obligations on taxpayers. The anti-abuse principle of EU law, however, can be relied upon against taxpayers. According to settled case law of the ECJ, the EU law principles of legal certainty and legitimate expectations do not alter this. This is because a taxpayer that has created the conditions for obtaining a right through abuse or fraud cannot properly rely on those principles to oppose a refusal to grant the right in question.[14]

In the decisions in the Danish cases, the ECJ, following previous VAT case law,[15] expressly states that the anti-abuse principle can be relied on directly against taxpayers even if national law (or a tax treaty) does not provide for an anti-abuse provision.[16] The fact that personal income tax is less harmonized does not alter this.[17] According to the ECJ, general principles of EU law have constitutional status and the status of primary EU law.[18] Interestingly, national authorities and judicial bodies are not allowed to simply refuse the benefits resulting from the EU Parent-Subsidiary Directive and the EU Interest and Royalties Directive in the event of abuse, but *must* refuse them under the general legal principle of EU law.[19] Since an ECJ decision does not (in principle) have a temporal limitation, the aforementioned principle is considered to have always existed.[20] Therefore this obligation also existed before the EU Parent-Subsidiary Directive contained an obligation to combat abuse (and the obligation thus actually exists in the Interest and Royalties directive, notwithstanding the absence of an explicit provision). At the same time, the burden of proof in combatting abuse, in principle, rests on the tax authorities:[21] they are obliged to combat abuse but may only do so after they have proven there is abuse.

2.3. Anti-abuse provisions in directives

EU directives on direct taxes have always left open the possibility of combatting abuse. Article 1(2) of the EU Parent-Subsidiary Directive (old) and article 5 of the EU Interest and Royalties Directive (2003/49) allow Member States to combat abuse. Article 1(2) of the EU Parent-Subsidiary Directive (old) provided that the Parent-Subsidi-

10. DK: ECJ, 5 July 2007, Case C-321/05, *Hans Markus Kofoed v. Skatteministeriet*, EU:C:2007:408, para. 46, Case Law IBFD.
11. *See*, in particular, para. 91 of the Parent-Subsidiary Directive decision and para. 119 of the Interest and Royalties Directive decision.
12. IE: ECJ, 23 Nov. 2017, Case C-251/16, *Edward Cussens et al. v. T.G. Brosnan*, ECLI:EU:C:2017:881, para. 32, Case Law IBFD and NL: ECJ, 18 Dec. 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Staatssecretaris van Financiën v. Schoenimport 'Italmoda' Mariano Previti vof et al.*, ECLI:EU:C:2014:2455, para. 57, Case Law IBFD.
13. *Cussens* (C-251/16), para. 38.
14. Id., para. 43.
15. *Italmoda* (C-131/13, C-163/13 and C-164/13), para. 49 et seq. and *Cussens* (C-251/16), paras. 33 and 34. S.H. Bærentzen, *Danish Cases on the Use of Holding Companies for Cross-Border Dividends and Interest – A New Test to Disentangle Abuse from Real Economic Activity?*, 12 World Tax J. 1, sec. 3.3. (2020), Journal Articles & Opinion Pieces IBFD (accessed 27 May 2021); Sánchez de Castro Martín-Luengo, *supra* n. 5, at sec. 4.2.
16. J. López Rodríguez, *Some Thoughts to Understand the Court of Justice Recent Case-Law in the Danmark Cases on Tax Abuse*, 29 EC Tax Rev. 2, p. 71, paras. 1.1 and 1.4 (2020).
17. Para. 80 of the Parent-Subsidiary Directive decision and para. 108 of the Interest and Royalties Directive decision.
18. LU: ECJ, 15 Oct. 2009, Case C-101/08, *Audiolux SA e.a. v. Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, para. 63, and R. Szudockzy, *The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation* (IBFD 2014), in particular pp. 55-74, Books IBFD.
19. In particular, paras. 83, 92 and 95 of the Parent-Subsidiary Directive decision and paras. 111, 120 and 122 of the Interest and Royalties Directive decision.
20. *Cussens* (C-251/16), paras. 41-43, in which the ECJ explains that the principle of the prohibition of abuse, as it ensues from the *Halifax* decision (UK: ECJ, 21 Feb. 2006, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v. Commissioners of Customs & Excise, BUPA Hospitals Ltd, Goldsborough Developments Ltd v Commissioners of Customs and Excise and University of Huddersfield Higher Education Corporation v. Commissioners of Customs and Excise*, Case Law IBFD), must also be applied to legal relationships that arose before that decision was given.
21. Paras. 117, 118 and 120 of the Parent-Subsidiary Directive decision and paras. 142, 143 and 145 of the Interest and Royalties Directive decision.

ary Directive does not preclude the application of domestic or agreement-based provisions for the prevention of fraud and abuse. Article 5(1) of the Interest and Royalties Directive does the same. In addition, article 5(1) of the Interest and Royalties Directive also states that a Member State may refuse the benefits of the directive in respect of transactions where the principal reason or one of the principal reasons for the transaction is tax fraud, tax avoidance or abuse.

As of 1 January 2016, article 1(2) of the Parent-Subsidiary Directive (2015/121) contains a general anti-abuse provision (the "GAAR") under which Member States must refuse the benefits of the Parent-Subsidiary Directive in cases of abuse. Unlike the Parent-Subsidiary Directive, the Interest and Royalties Directive does not oblige Member States to combat abuse. The 2011 directive proposal to amend the Interest and Royalties Directive also did not contain such an obligation.[22] A later compromise proposal did, however, include a GAAR similar to that of the Parent-Subsidiary Directive,[23] but the proposal was ultimately not adopted.[24]

Due to the recognition of the anti-abuse principle of EU law in the field of direct taxes, and due to the convergence of the abuse concepts under EU law (*see* section 2.4.), the aforementioned abuse provisions are less relevant. This may be different for article 6 of the EU Anti-Tax Avoidance Directive (ATAD) (2016/1164),[25] because that provision combats abuse in situations that are otherwise not covered by EU law.[26] In deviation from the original commission proposal, the scope of article 6 of the ATAD is limited to corporate tax. In the interim, a compromise text was proposed to expand the scope to "withholding taxes on payments from taxpayers to entities in third countries".[27] After this addition was dropped, the following sentence was added to the preamble: "where withholding taxes are part of the corporate taxation system of a Member State or involving a taxpayer subject to corporate taxation, the GAAR should also cover such taxes". However, this sentence was later deleted because it created more confusion than clarity.[28] If, as in the Netherlands, dividend withholding tax acts as advance corporate income tax, it could nevertheless be argued that article 6 of the ATAD is also relevant in the levying of dividend withholding tax.[29] As far as the authors are concerned, the ATAD does not give sufficient cause to adopt this broader interpretation after the aforementioned sentences were dropped. According to the EU Presidency, without the addition of these sentences, the scope would be limited to corporate income tax.[30] Furthermore, the view that dividend withholding tax is "part of the corporate tax system" is a particularly strong argument insofar as there is indeed an advance tax for corporate tax purposes, and less strong of an argument insofar as it is levied on entities that are not subject to corporate income tax. In the first scenario, applying the GAAR for corporate tax purposes already effectively combats abuse.

Due to the legal certainty principle, the directive provisions discussed cannot in and of themselves – thus without a transposition provision – impose an obligation on taxpayers.[31] After all, directive provisions are addressed to Member States, who are then obliged to adopt all the measures necessary to ensure that the directive is fully effective (article 288 of the TFEU). National courts, however, must interpret national provisions, including a general principle, as much as possible in accordance with a directive, and such an interpretation of national law in accordance with a directive can also be imposed on taxpayers.[32] This applies regardless of whether or not these provisions or principles were introduced with a view to transposing a directive and regardless of whether they are dated before or after the directive. This interpretation in accordance with directives is based on the principle of loyalty (article 4(3) of the Treaty on the European Union (TEU) (2007)),[33] under which national governments (and thus also courts as a part thereof) must ensure fulfilment of the obligations arising from EU law. This interpretation, however, must not result in a contra legem interpretation.[34]

22. 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, COM(2011) 714 final, p. 5 (11 Nov. 2011).
23. Art. 4 in the compromise text of 9 June 2015, 9674/15, FISC 68, 2011/0314 (CNS).
24. Some Member States also proposed taxing interest and royalty payments if these were not subject to a minimum effective tax rate in the recipient state, but for the purposes of a compromise text a minimum rate of 10% was included. The Member States, however, were unable to reach unanimous agreement on this so the compromise text was dropped. *See* the letter from the Deputy Minister of Finance of 2 Nov. 2016, with the subject being: Answers to questions from Member of Parliament Merkies (SP) about the report 'The Netherlands notorious troublemaker in tackling tax avoidance' (sent 19 Sept. 2016), reference no. 2016-0000163149, p. 2.
25. Council Directive 2016/1164 of 12 July 2016 Laying down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, OJ L 193/1 (2016), Primary Sources IBFD [ATAD].
26. Rodríguez, *supra* n. 16 at sec. 1.2.
27. Room document # 4, High Level Working Party on Tax Questions, ATAD, 10 May 2016, in which the EU Presidency noted: "Withholding taxes have been included in the scope of the GAAR, whilst taking into account the scope limitation of Article 1 (reference to 'taxpayers'); the scope of this extension has been limited to situations involving entities in third countries in order not to overlap with the PSD anti-abuse clause (and possible equivalent clauses in other directives in the future)".
28. Room document # 2 – REV1, Fiscal Attaches, ATAD, 13 May 2016, p. 6.
29. According to D.M. Weber, *Enkele EU-aspecten van de antimisbruikbepaling van de inhoudingsvrijstelling dividendbelasting* [Several EU aspects of the anti-abuse provision of the dividend withholding tax exemption], WFR 75, sec. 3 (2018); *see also* D.M. Weber, *De algemene anti-misbruikregel in de Anti-belastingontwijkingsrichtlijn* [The general anti-abuse rule in the Anti-Tax Avoidance Directive], FED 110, sec. 3.3. (2016).
30. 6th Presidency compromise, Room Document # 1 Working Party on Tax Questions – Direct Taxation Anti-Tax Avoidance Directive (ATAD) p. 19 (4 May 2016) in which it is noted: "as currently drafted, the GAAR does not apply to withholding taxes since the text refers to the calculation of corporate tax liability".
31. *See*, for example, DK: ECJ, 5 July 2007, Case C-321/05, *Hans Markus Kofoed v. Skatteministeriet*, para. 42, Case Law IBFD.
32. *See*, among others, ES: ECJ, 13 Nov. 1990, Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, Case Law IBFD and *Kofoed* (C-321/05), at para. 45, Case Law IBFD.
33. Treaty on European Union of 13 December 2007, OJ C 306 (2007), Primary Sources IBFD.
34. *See*, among others, GR: ECJ, 4 July 2006, Case C-212/04, *Konstantinos Adeneler and Others v. Ellinikos Organismos Galaktos (ELOG)*, para. 110.

2.4. Convergence toward a single anti-abuse principle

According to the ECJ, the former article 1(2) of the EU Parent-Subsidiary Directive (now article 1(4)) reflects the general EU law principle that an abuse of rights is prohibited.[35] The ECJ came to the same conclusion regarding article 15 of the Merger Directive (2009/133), although the text of that article differs from that of article 1(2) (old) of the EU Parent-Subsidiary Directive.[36] This will not be different with regard to the other directive provisions discussed. The text of the new paragraphs in article 1 of the EU Parent-Subsidiary Directive (paragraphs 2 and 3) is largely the same as the wording in the ECJ decisions in the Danish cases concerning the anti-abuse principle of EU law.[37] With regard to article 6 of the ATAD, it can also be concluded that the EU legislator expressly intended to align this article with article 1(2) and (3) of the EU Parent-Subsidiary Directive.[38] Moreover, according to the ECJ, the objective of combatting abuse has the same scope under these provisions of the Parent-Subsidiary Directive as when it is invoked to justify a restriction of primary EU law.[39] Furthermore, according to the ECJ, neither the freedom of establishment nor the free movement of capital can be invoked if there is abuse within the meaning of article 1(2) (old) of the EU Parent-Subsidiary Directive, article 5 of the Interest and Royalties Directive or the EU law anti-abuse principle.[40] The ECJ thus interprets anti-abuse provisions in directives in accordance with its anti-abuse doctrine in the context of primary EU law – even if this does not follow directly from the text of these provisions.[41] In textual terms, article 1(2) (new, i.e. the GAAR) of the EU Parent-Subsidiary Directive is aligned better with the formulation of the ECJ than the text of article 1(2) (old) of the EU Parent-Subsidiary Directive and article 15 of the Merger Directive (2009/133) and it is also the intention that this provision remain within the limits set by the ECJ. The authors, therefore, assume that the concept of abuse in this provision is the same as the one that applies in the context of the anti-abuse principle of EU law or under the treaty freedoms. In short, there is a convergence toward one anti-abuse principle of EU law. Furthermore, it is irrelevant whether national law has an anti-abuse principle: even in the absence thereof, the obligation to combat abuse applies if there is abuse within the meaning of EU law. In the absence of abuse, however, the benefits under EU law must be granted, irrespective of anti-abuse provisions or doctrines in national law (*see*, among others, *Deister and Juhler* (Case C-504/16)).[42] There do not appear to be any powers under national law to deviate from this.

2.5. Beneficial owner test under the EU Interest and Royalties Directive (2003/49) (and the EU Parent-Subsidiary Directive?)

2.5.1. The beneficial owner test in the Interest and Royalties Directive

Under article 1(1) of the Interest and Royalties Directive (2003/49), Member States are only required to apply the exemption for interest and royalties if the beneficial owner is a company established in another Member State (or a permanent establishment (PE) situated in another Member State of a company of a Member State). According to article 1(4) of the Interest and Royalties Directive, 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 authorized signatory, for some other person.[43]

In the Interest and Royalties Directive decision, the ECJ first ruled that the concept of "beneficial owner" cannot refer to concepts of national law that vary in scope (paragraph 84). It is thus an autonomous concept. In light of the aim and scope of the EU Interest and Royalties Directive (paragraphs 85-86) and article 1(4), the beneficial owner is the entity that *actually* or *economically* benefits from the interest received (or royalties; paragraphs 88 and 89). Therefore, the beneficial owner must have the power to freely determine how the interest or royalties received are to be used.

Furthermore, the ECJ considered that the "beneficial owner" concept included in the OECD Model and the Commentaries to it was *relevant* – but not necessarily decisive – in interpreting the same concept in the EU Interest and Royalties Directive (paragraph 90). The ECJ based this on the proposal submitted in 1998 to introduce the Interest and Royalties Directive:[44] this shows that the Interest and Royalties Directive builds on article 11 of the OECD Model and that this provision pursues the same objective of avoiding international double taxation. According to the ECJ, it follows from the development of the OECD Model and the commentaries relating thereto that the concept of "beneficial owner" excludes conduit companies (paragraph 92). Also, it must be understood not in a narrow technical sense but as having a meaning that enables double taxation to be avoided and tax evasion

35. BE: ECJ, 26 Oct. 2017, Case C-39/16, *Argenta Spaarbank II*, para. 60, Case Law IBFD and FR: ECJ, 7 Sept. 2017, Case C-6/16, *Eqiom SAS, formerly Holcim France SAS, Enka SA v. Ministre des Finances et des comptes publics*, ECLI:EU:C:2017:641, para. 26, Case Law IBFD. *See also* P.J. Wattel, O. Marres & H. Vermeulen, in *European Tax Law* sec. 15.2 (P. Wattel, O. Marres & H. Vermeulen eds., 7th ed., Kluwer 2018).
36. PT: ECJ, 10 Nov. 2011, Case C-126/10, *Foggia – Sociedade Gestora de Participações Sociais SA v. Secretário de Estado dos Assuntos Fiscais*, Case Law IBFD. At the time, this was art. 11(1)(a) Merger Directive (90/434).
37. *See*, for example, paras. 97-100 of the Parent-Subsidiary Directive decision (and the case law referred to therein) and paras. 124-127 of the Interest and Royalties Directive decision.
38. Room Document # 1 Working Party on Tax Questions – Direct Taxation Anti-Tax Avoidance Directive (ATAD) p. 20 (15 Apr. 2016).
39. *Eqiom* (C 6/16), para. 64 and DE: ECJ, 20 Dec. 2017, *Deister and Juhler Holding v. Bundeszentralamt für Steuern*, Joined Cases C-504/16 and C-613/16, ECLI:EU:C:2017:1009, para. 97, Case Law IBFD with regard to the Parent-Subsidiary Directive (2011/96) and FR: ECJ, 8 Mar. 2017, Case C-14/16, *Euro Park Service*, para. 69, Case Law IBFD, with regard to the Merger Directive (2009/133).
40. Parent-Subsidiary Directive decision, paras. 121-123; Interest and Royalties Directive decision, para. 155.
41. Wattel, Marres & Vermeulen, *supra* n. 36, at pp. 267, 274 and 657 et seq.
42. *Deister and Juhler* (C-504/16).
43. The PE issue covered by art. 1(5) of the EU Interest and Royalties Directive (2003/49) is not discussed herein.
44. 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, COM(1998) 67 final (4 Mar. 1998).

and avoidance to be prevented. The ECJ referred here only to the Commentaries through to the 2003 version (mentioned in paragraphs 4 through 6). This is remarkable because, as from the 2014 update, the Commentaries appear to advocate a more legal approach than the ECJ.[45,46] It is not clear why the ECJ did not refer to the 2014 update. It may have considered a reference to the 2014 Commentary unnecessary.[47] It may also be that the ECJ did not refer to that Commentary because the ECJ advocates a static interpretation of the OECD Commentary and the 2014 Commentary is posterior to the Directive,[48] or because the cases in question date back to before 2014.[49] Another reason could be that the ECJ's interpretation of the "beneficial owner" concept is not aligned with the interpretation in the 2014 Commentary (which appears to advocate the more legal approach noted above).[50]

Lastly, the ECJ makes it clear that the exemption in the Interest and Royalties Directive (2003/49) also applies if the direct recipient of the interest or royalties is not the beneficial owner, but the actual beneficial owner also meets the conditions in the Interest and Royalties Directive (paragraph 94). That would be the case if the actual beneficial owner is an "associated company" as referred to in article 3(b) of the Interest and Royalties Directive. This application of the Interest and Royalties Directive is similar to the application of article 11(2) of the OECD Model (2017). If the actual beneficial owner is established in a third state, it appears to be entitled to an exemption or a reduced withholding tax rate by virtue of a tax treaty concluded between the source state and the third state, provided that the other (treaty) conditions are met.[51] This applies, at least, if the treaty is in accordance with the OECD Model as it reads since the 2014 update.[52]

2.5.2. *Beneficial ownership and the anti-abuse doctrine*

The ECJ appears to apply the requirement of beneficial ownership not (only) as an independent condition, but (also) as part of the abuse test. In the context of abuse, the ECJ uses the term "conduit company". The question that arises is how the terms "beneficial owner" (in article 1(1) of the Interest and Royalties Directive) and "conduit company" relate to one another. According to paragraph 127, an artificial arrangement is present, inter alia, where a conduit entity is interposed. Apparently, conduit structures are mere examples of possible abuse. *See also* paragraph 142, wherein it is noted that the tax inspector must establish the existence of abusive practices on the basis of all relevant factors, *in particular* that the direct recipient is not the beneficial owner. Thus, the fact that the direct recipient is not the beneficial owner appears to be a relevant factor, but not a necessary one. There may also be abuse in other situations. *See* paragraph 145, wherein the ECJ mentions the possibility to refuse to accord the status of beneficial owner *or* to establish the existence of an abuse of rights. The fact that the direct recipient is not the beneficial owner, however, appears to be insufficient to prove abuse (*see* paragraph 137). The ECJ thus appears to regard "not being the beneficial owner" as relevant in the context of abuse but does not equate this with abuse. Other facts and circumstances, other than just being the beneficial owner, also appear to be relevant.

The beneficial owner requirement is not based on the anti-abuse principle of EU law, so that national or bilateral legislation must include a beneficial owner concept that can be interpreted in accordance with a directive. Only then can this requirement be invoked directly against taxpayers, other than in abusive situations.

2.5.3. *Is there an implicit beneficial owner test in the EU Parent-Subsidiary Directive?*

Unlike the EU Interest and Royalties Directive (2003/49), the EU Parent-Subsidiary Directive (2011/96) does not require that the parent company be the beneficial owner of the dividends. It is conceivable – and logical – that the ECJ (only) regards being or not being the beneficial owner as an element of the anti-abuse test (*see*, for example, paragraph 117). However, there are various indications that the ECJ – regardless of the anti-abuse doctrine – considers that an independent beneficial owner requirement must be applied in the Parent-Subsidy Directive. Those indications can be found, in particular, in paragraphs 111 and 113.[53] These considerations are included in the answers

45. *See OECD Model Tax Convention on Income and on Capital: Commentary on Article 11* para. 10.2 (26 July 2014), Treaties & Models IBFD: "Where the recipient of the interest does have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the 'beneficial owner' of that interest".
46. *See also* S.H. Bærentzen, *Danish Cases on the Use of Holding Companies for Cross-Border Dividends and Interest – A New Test to Disentangle Abuse from Real Economic Activity?*, 12 World Tax J., sec. 3.2. (2020), Journal Articles & Opinion Pieces IBFD (accessed 28 May 2021); C. de Pietro, *Beneficial Ownership, Tax Abuse and Legal Pluralism: An Analysis in Light of the ECJ's Judgment Concerning the Danish Cases on Interest*, Intertax 12.1075, sec. 2.1 (2020); and J.M. Janssen & M. Sada Garibay, *What Should Be the Scope of the Beneficial Owner Concept?*, Intertax 12.1087 (2020). C. Hamra & J.J.A.M. Korving, *Beneficial Ownership Interpreted, To What Extent Are the OECD and the EU on the Same Wavelength?*, Intertax 3.254 (2020) claim that both the OECD and the European Union take an economic approach but identify some potential discrepancies (sec. 4.2.4.).
47. In para. 7 it is recalled that the "beneficial owner" and "conduit company" concepts were made more precise in 2014, and that in para. 10.3 *OECD Model: Commentary on Article 11* (2014) it is noted that there are many ways to tackle the issues of conduit companies and treaty shopping, but the definition of abuse is not elaborated on. A reference in para. 92 to para. 7 would thus have no relevant added value.
48. *See* O.C.R. Marres, *Panta rhei: de doorstroomarresten* [Panta rhei: the conduit judgements], NTFR-B 13, sec. 3.1. (2019).
49. *See* L. de Broe & S. Gommers, *Danish Dynamite: The 26 February 2019 ECJ Judgments in the Danish Beneficial Ownership Cases: A New Chapter in the History of Tax Abuse*, 28 EC Tax Rev.6, sec. 5.4.2. (2019). Rodríguez, *supra* n. 16, at sec. 5.2.
50. See CFE ECJ Task Force, *Opinion Statement ECJ-TF 2/2019 on the ECJ Decisions of 26 February 2019 in N Luxembourg I et al. (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16) and T Danmark et al. (Joined Cases C-116/16 and C-117/17), Concerning the "Beneficial Ownership" Requirement and the Anti-Abuse Principle in the Company Tax Directives*, 59 Eur. Taxn. 10, sec. 5.3. (2019), Journal Articles & Opinion Pieces IBFD (accessed 28 May 2021).
51. *See* para. 11 *OECD Model: Commentary on Article 11* (2014).
52. Id. *See*, regarding the changes to the OECD Model and Commentaries: G.F. Patti, *Articles 10 and 11 of the OECD Model and the Commentaries on the OECD Model (2017): When Clarifications Raise Further Doubts*, 75 Bull. Intl. Taxn. 1 (2021), Journal Articles & Opinion Pieces IBFD (accessed 28 May 2021).
53. Another indication can be found in para. 120 (regarding the burden of proof), which mentions the possibility to refuse to accord a company

to the questions from the referring court, which, according to the ECJ, essentially amount to the question of what constitutes an abuse of rights (*see* paragraph 96). In this respect, the ECJ addresses situations in which the beneficial owner is a company resident in a third state and, pursuant to a tax treaty, no tax would be withheld if the dividends were paid directly (*see* paragraph 107). According to the ECJ, in such cases, it cannot be ruled out that there is an abuse of rights (paragraph 108), but neither can it be ruled out that the arrangement is not aimed at any abuse of rights (paragraph 110). Subsequently, in paragraph 111, it is established that if the beneficial owner is resident in a third state, the refusal of the exemption in article 5 of the EU Parent-Subsidy Directive is not dependent on fraud or abuse having been found. This conclusion suggests that if the recipient of the dividend is not the beneficial owner, and (apparently therefore) does not meet the conditions of the directive, the directive's benefits may be refused, even if there is no abuse.[54] Paragraph 113 then notes that the mechanisms of the EU Parent-Subsidiary Directive, and in particular article 5, are not intended to apply if the beneficial owner of the dividends is a company whose tax residence is outside the European Union. This conclusion also appears to confirm that beneficial ownership is a condition for applying the directive.[55]

The ECJ bases itself here, in particular, on the object and purpose of the EU Parent-Subsidy Directive: the creation of a level playing field between *qualifying* operating groups in one Member State and in different Member States. Basing its decision on this object and purpose, the ECJ appears to be "importing" a beneficial owner condition into article 1 of the EU Parent-Subsidiary Directive (2011/96). This is probably based on the motto that there is not an "actual" profit distribution between qualifying parent companies and subsidiaries. That would mean that there would only be an obligation to grant the directive's benefits to taxpayers that are also the beneficial owner.

De Broe and Gommers (2019) assume that no implicit beneficial ownership condition exists and explain paragraph 111 in terms of how the questions in the request for a preliminary ruling were formulated by the referring court.[56] In their opinion, the ECJ only answered the question from the Danish court and the latter was referring to the beneficial owner requirement in the tax treaty. The authors are not convinced by this reasoning. In question 5 of the referring court (which the ECJ answers in paragraph 111), this court does not use the concept of "beneficial owner". In summarizing this question in paragraph 107, the ECJ does, however, use the term "beneficial owner", but it is not convincing that it is referring here to the beneficial owner requirement in the tax treaty. More likely, it seems that the ECJ is referring to the EU concept of this term.[57]

In the authors' view, the ECJ is importing a beneficial owner condition into the EU Parent-Subsidiary Directive without stipulating it as an *additional* condition. The authors believe that imposing an additional condition for granting the benefits of the EU Parent-Subsidiary Directive is contrary to the principle of legal certainty[58] and not in line with other case law in which the ECJ adheres to the conditions in the text of that Directive.[59] In the authors' view, stipulating the condition of beneficial ownership can only be reconciled with that case law if the phrase "distributions of" as referred to in article 1 of the EU Parent-Subsidiary Directive and "distributed to" as referred to in article 5(1) of the EU Parent-Subsidiary Directive are to be considered attribution rules, and should be interpreted as referring to cases where the parent company is the beneficial owner of the dividend. This would mean that – just as in the EU Interest and Royalties Directive (2003/49)[60] – the direct recipient of the income is not required to be the "beneficial owner", but that there should be a "beneficial owner" that fulfils all the applicable conditions. In essence, what this means for both directives is that the exemption only has to be granted to the beneficial owner, whereby in the EU Interest and Royalties Directive (2003/49) this follows from the term "beneficial owner" and in the EU Parent-Subsidiary Directive (2011/96) from (an interpretation of) the term "distributions of".

If the ECJ is indeed importing a beneficial owner requirement into the EU Parent-Subsidy Directive (2011/96) (i.e. independent from the anti-abuse principle), then the authors believe that this does not mean that the withholding exemption must be refused if the recipient is not the

the status of beneficial owner of dividends, or to establish the existence of an abuse of rights.

54. CFE, *supra* n. 50, at p. 494 (para. 4.3) and pp. 498-499 (para. 5.3).
55. FR: Conseil d'État, 5 June 2020, ECLI:FR:CEC HR:2020:423809.20200605, para. 5. Rodríguez, *supra* n. 16, at sec. 5.1 argues that beneficial ownership clauses should be considered as included in the remittance of the EU Parent-Subsidiary Directive (2011/96).
56. *See* de Broe & Gommers, *supra* n. 49, at sec. 5.4.3.
57. De Broe and Gommers subsequently elaborate on this assumption. They appear to infer from this that the ECJ in para. 111 et seq. is addressing a situation in which a direct distribution would have been made by the company in the source state to the beneficial owner in the third state. Then, logically, it would not matter whether there is abuse because the EU Parent-Subsidiary Directive (2011/96) does not apply. However, the question posed by the referring court concerns a situation in which a distribution is made to the conduit company in circumstances in which a direct distribution to the beneficial owner in the third state would not be subject to tax pursuant to a tax treaty. Another reason why their reasoning does not seem convincing is that, in para. 138 of the decision on the Interest and Royalties Directive (which does contain a beneficial owner requirement) the ECJ makes the same point as in para. 111 of the Parent-Subsidiary Directive decision, but then without the detailed explanation about the objective of this Directive. The latter is necessary if the ECJ is to justify, in the context of the EU Parent-Subsidiary Directive, the "importation" of a requirement that does not appear in that Directive.
58. In various decisions the ECJ has concluded, for example, that the effect of the principle of legal certainty means that the intentions of the EU Council, as shown in (unpublished) minutes of Council meetings, have no legal significance if they are not laid down in legal provisions (*see*, for example, DE: ECJ, 17 Oct. 1996, Joined Cases C-283/94, C-291/94 and C-292/94, *Denkavit Internationaal BV, VITIC Amsterdam BV and Voormeer BV v. Bundesamt für Finanzen*, para. 29, Case Law IBFD; PT: ECJ, 8 June 2000, Case C-375/98, *Ministério Público and Fazenda Pública v. Epson Europe BV*, para. 26, Case Law IBFD and FR: ECJ, 13 Feb. 1996, Joined Cases C-197/94 and C-252/94, *Bautiaa and Société Française Maritime*, para. 51, Case Law IBFD.
59. *See Eqiom* (C 6/16), para. 24 with further case law references and *Deister and Juhler* (C-504/16 and C-613/16), para. 72.
60. It follows from para. 94 of the Interest and Royalties Directive decision that the benefit of the Directive (the exemption) may also apply if the recipient is not the beneficial owner.

beneficial owner, except if there is abuse. After all, other than in situations of abuse, Member States are free to grant broader benefits than those prescribed by the directives.[61]

3. What Constitutes Abuse by Conduit Companies?

In accordance with previous case law, the ECJ held, in its decisions in the Danish cases, that it is only possible to speak of abuse if both an objective test (i.e. that the purpose of the directive is not achieved) and a subjective test (in short, that there is an intention to obtain a tax advantage) is met.[62] The GAARs in the EU Parent-Subsidiary Directive (2011/96) and in the ATAD include these tests. As a supplement to these tests, they also explicitly contain a separate artificiality requirement. In the authors' view, this difference is of minor relevance since, according to case law, the artificiality of an arrangement is already important in the context of the subjective and – even more so – objective tests). Furthermore, the ECJ is expected to interpret this provision – and by the same token, the anti-abuse provision in the Interest and Royalties Directive – in accordance with the anti-abuse principle of EU law (*see* section 2.4.).

The subjective test requires that the principal objective or one of the principal objectives of an arrangement or structure be to obtain a tax advantage (resulting from the particular EU directive).[63,64] It is thus not sufficient that the interposition of a company leads to a benefit; after all, it is also possible that obtaining this benefit played no role, or only an incidental one, in the decision to interpose the company.

Of course, in assessing the objective test, account must be taken of the context in which this takes place. In *Cadbury Schweppes* (Case C-196/04)[65] the issue concerned the potential conflict with the objective of the freedom of establishment in the context of the UK full inclusion CFC legislation. It was therefore sufficient to assess whether or not a CFC was a fictitious establishment not carrying out any genuine economic activity (such as a "letterbox" or "front" subsidiary; paragraph 68). This is different in the context of, for example, the EU Parent-Subsidiary Directive (2011/96) and the Interest and Royalties Directive (2003/49). The Parent-Subsidiary Directive aims to eliminate economic double taxation for qualifying groups operating in more than one Member State in order to create a level playing field between qualifying groups operating in different Member States and groups operating in the same Member State.[66] The benefits of the EU Parent-Subsidiary Directive are thus not intended for situations in which a group operates in the European Union only in formal terms.[67] There is also conflict with the object and purpose of the Parent-Subsidy Directive if the relevant entities are not, as such, artificial, but the shares are not held by the qualifying parent company based on valid business considerations that reflect economic reality.[68] The same applies mutatis mutandis to the Interest and Royalties Directive (2003/49), which aims to prevent legal double taxation. Given the object and purpose of the Parent-Subsidiary Directive/the Interest and Royalties Directive, what must be assessed is whether the holding or financing or licensing activity is, in and of itself, an actual economic activity. For example, in this context, personnel are only relevant as an indication of the absence of artificiality if they hold relevant positions for the purposes of the holding activity (Parent-Subsidy Directive), or the financing or licensing activity (Interest and Royalties Directive). Also, an office is only relevant if relevant activities are performed in that office in the context of that activity.

The ECJ provides the following guidelines or indications on the basis of which the referring court must establish whether abuse occurs in the specific case.[69]

First, the ECJ ruled that there is abuse, inter alia,[70] if the tax on dividends or interest is avoided because a "conduit company" is interposed in the group structure between the company paying the dividends or interest and the beneficial owner of the dividends or interest.[71] In this way, the ECJ appears to be applying a beneficial owner test in the Parent-Subsidiary Directive and the Interest and Royalties Directive in the context of the anti-abuse doctrine. The

61. *See also* Sánchez de Castro Martín-Luengo, *supra* n. 5, at sec. 4.3.
62. *See*, for example, paras. 97 and 100 of the Parent-Subsidiary Directive decision (and the case law referred to therein) and paras. 124 and 127 of the Interest and Royalties Directive decision.
63. That obtaining a benefit resulting from the particular EU directive must be the principal or one of the principal objectives follows, in the authors' view, from the *Zwijnenburg* case (NL: ECJ, 20 May 2010, Case C-352/08, *Modehuis A. Zwijnenburg BV v. Staatssecretaris van Financiën*, Case Law IBFD). In this decision, the arrangement was aimed at avoiding transaction tax. According to the ECJ, the arrangement was not aimed at preventing tax avoidance or fraud as referred to in the anti-abuse provision in the Merger Directive (2009/133) because the reorganization tax relief in this Directive did not cover real estate transfer tax (*see*, in particular, para. 50 et seq.).
64. *See* para. 100 in the Parent-Subsidiary Directive decision and para. 127 in the Interest and Royalties Directive decision. The same (or similar terms, depending on the language of the translated version) is used in art. 1(2) of the Parent-Subsidy Directive (2011/96) and art. 6 of the ATAD (2016/1164). *See also* DE: ECJ, 26 Feb. 2019, Case C-135/17, *X-GmbH v. Finanzamt Stuttgart – Körperschaften*, paras. 77 and 84, Case Law IBFD ("primary objective or one of its primary objectives").
65. UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, Case Law IBFD.
66. EU Parent-Subsidiary Directive (2011/96), preambles 3-6 (*see also* Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 219 (2014), Primary Sources IBFD, preamble 2 concerning double non-taxation).
67. *See* EU Parent-Subsidiary Directive (2011/96), preambles 4-6. *See* the Report of the Committee on the Abuse of Law, *Misbruik van recht. Een nationaal, internationaal en Unierechtelijk perspectief* [Abuse of law. From the perspective of national, international and EU law], Geschriften van de Vereniging voor Belastingwetenschap 256, p. 67 (2016).
68. *See* the example regarding the "insofar as approach" in part 8 of the 2015 preamble (Council Directive (2015/121)). In the context of the Interest and Royalties Directive (2003/49), it appears to concern situations in which debts or IP cannot actually be allocated to a taxpayer resident in a Member State given the economic reality (*see* preamble 8 to the compromise text of 9 June 2015, *supra* n. 23).
69. *See* para. 99 in the Parent-Subsidiary Directive decision and para. 126 in the Interest and Royalties Directive decision.
70. This term indicates that the use of a conduit is only an example of abuse; *see also* the French translation "*notamment*", the German translation "*insbesondere*", the Italian translation "*in particolare*" and the Romanian translation "*în special*".
71. Para. 100 in the Parent-Subsidiary Directive decision and para. 127 in the Interest and Royalties Directive decision.

use of a conduit company is an example of abuse, but the concept of abuse is not limited to such situations.

According to the ECJ, a company is a conduit company where its sole activity is the receipt of dividends and their transmission to the beneficial owner or to other conduit companies.[72] The ECJ noted that the absence of an actual economic activity must be inferred from all the relevant factors relating to, in particular, the management of the company, its balance sheet for accounting purposes, its cost structure and the expenditure actually incurred, its employees and its office and premises and equipment. However, this must be assessed in light of the specific characteristics of the economic activity in question. In the authors' view, a holding company activity or financing activity would not require a high level of substance. In principle, it does appear to be required that staff have the economic use of the dividends, interest or royalties.

Given the reference to the balance sheet and the cost structure, it seems relevant, for example, whether the dividends, interest or royalties (more than an incidental part of them) are used for purposes (for example, the acquisition of new participations or other investments or activities) other than channelling them elsewhere. If that is the case, that is, after all, an objective indication that the parent company itself decides what to do with the dividends, interest or royalties. In addition, the ECJ provides several other indicators of abuse. All in all, the presence of substance in the form of, for example, personnel and offices, is one of the indicators in determining whether there is abuse, but their presence does not offer any guarantees.

Other indicators mentioned by the ECJ are as follows:[73]

- The recipient company passes on (almost) all of the dividends or interest very soon after receipt to entities that do not meet the conditions of the Parent-Subsidy Directive or the Interest and Royalties Directive, for example, because they are established outside the European Union.[74] The ECJ does not require that this rapid channelling be based on a contractual or legal obligation.[75] If the actual beneficial owner also meets the conditions of the Parent-Subsidy Directive or the Interest and Royalties Directive there will not be abuse. The arrangement was then not set up in such a way as to obtain the resulting benefits contrary to the object and purpose of the EU Parent-Subsidiary Directive or the EU Interest and Royalties Directive.
- The recipient company must pass those dividends on to a third company that does not fulfil the conditions for the application of the Parent-Subsidiary Directive, with the consequence that it makes only an insignificant taxable profit. For example, Y Cyprus did not realize any positive taxable income in Y Denmark.
- Not only a contractual or legal redistribution requirement will be an indication of abuse, but also the fact that the recipient "in substance" does not have the right to use and enjoy the dividends or interest.[76] What is important in this respect is, among others, the various contracts concluded by companies involved in the financial transactions and giving rise to intra-group flows of funds. Also relevant is the manner in which these transactions are financed, the valuation (what appears to be meant here is value)[77] of the equity of the interposed companies and the conduit companies' inability to have economic use of the dividends received. The ECJ seems to be referring here to the debt that arose from the sale of Y Denmark by Y Bermuda to Y Cyprus. Y Cyprus partly repaid this debt several months later from the dividends distributed by Y Denmark, which repayment, moreover, happened within one day of the receipt of the dividends.

According to the ECJ, the cited indications can be reinforced by the simultaneity or closeness in time of, on the one hand, the entry into force of major new tax legislation that the holding companies sought to avoid (this seems to be referring to the withholding tax on interest and dividends) or the US tax legislation described in paragraph 51.[78] For example, in *Y Denmark*, Y Cyprus was interposed immediately after the US tax legislation took effect, pursuant to which it was temporarily fiscally attractive to move dividends to the United States.

According to the ECJ, there might even be abuse if the beneficial owner of the dividends passed on by the conduit company would have been entitled to a withholding exemption upon a direct distribution pursuant to a tax treaty with the source state. This does not, however, have to be the case (paragraphs 108-110). In the *Y Denmark* case, the interest of the US ultimate shareholder in Y Cyprus (that held Y Denmark) was, for example, held through Y Bermuda. If the dividends were "only" passed on to Bermuda and no further, the comparison with the shares being held directly by the US ultimate shareholder fails.[79]

72. Para. 104 in the Parent-Subsidiary Directive decision and para. 131 in the Interest and Royalties Directive decision.
73. Paras. 101-103 and 105-106 in the Parent-Subsidiary Directive decision and paras. 128-130 and 132-133 in the Interest and Royalties Directive decision. These indications apply mutatis mutandis to royalties.
74. In *Y Denmark* (C 117/16), the parent company (Y Cyprus), resident in Cyprus, passed dividends received from Y Denmark on within one day to the company Y Bermuda resident in Bermuda. Although this did not happen in the case in question, entities may, of course, have other reasons for not meeting the conditions of the EU Parent-Subsidiary Directive or the EU Interest and Royalties Directive, for example due to the legal form requirement (both directives) and the subject-to-tax requirement (only the EU Parent-Subsidiary Directive).
75. Unlike the *OECD Model: Commentary*: *see* para. 12.4 *OECD Model: Commentary on Article 10(2)* (2017); para. 10.2 *OECD Model: Commentary on Article 11(2)* (2017); and para. 4.3 *OECD Model: Commentary on Article 12(1)* (2017).
76. Para. 105 in the Parent-Subsidiary Directive decision and para. 132 in the Interest and Royalties Directive decision.
77. This indication from the ECJ seems to refer to question 1 e) from the Danish court in the Interest and Royalties Directive decision, i.e. the extent to which it is important whether or not equity capital was used to finance the loan.
78. Para. 106 of the Parent-Subsidiary Directive decision and para. 133 of the Interest and Royalties Directive decision.
79. *See also* para. 109 of the Parent-Subsidiary Directive decision in which the ECJ held that it cannot be inferred from the fact that there is a tax treaty that a payment was made to recipients who are residents of the third state with which the treaty was concluded.

But even aside from this, it is still possible – had the US ultimate shareholder been entitled to an exemption from Danish dividend withholding tax – that Y Cyprus was only interposed to avoid Danish dividend withholding tax and that the arrangement opted for was entirely artificial. After all, Y Bermuda may have been interposed to, for example, avoid or defer US tax. Y Cyprus, in turn, might have, as its sole function, the avoidance of Danish tax. In that event, it is not self-evident to use a direct shareholding in Y Denmark by the US company as a benchmark. What the benchmark is (in other words: which companies must be ignored in order to assess whether the group structure is set up for tax avoidance purposes) and the reasons for and function of the chosen arrangement will have to be assessed on a case-by-case basis. If obtaining the benefits ensuing from the Parent-Subsidiary Directive is not one of the main objectives, then the subjective test has not been met.

The decisions in the Danish cases are somewhat difficult to reconcile with the decision in *Deister and Juhler*. It can be deduced from the latter decision that the absence of economic or other substantial reasons justifying the interposition of the non-resident company do not imply abuse.[80] That view is difficult to reconcile with the indicators for abuse in the decisions in the Danish cases. It must be borne in mind, however, that these are only indicators, i.e. – as Douma (2020) expresses it – a "non-exhaustive catalogue of circumstances".[81] Therefore, these circumstances do not necessarily imply[82] abuse. *Deister and Juhler* mainly focused on the question of how much substance or activities the holding company must have or perform to be eligible to apply the EU Parent-Subsidiary Directive (2011/96) or the freedom of establishment. Unlike in *T Danmark and Y Denmark*, the passing on of dividends to underlying companies – and thus the question of whether the holding companies are the beneficial owners – was not at issue in the proceedings before the ECJ. These decisions can, after all, be reconciled with one another. Nevertheless, there is a suggestion here that the ECJ is now taking a tougher stance by making it mandatory to combat abuse and by focusing attention on the positive indicators of abuse. The most important conclusion from the Danish cases and *Deister and Juhler* is that whether or not there is abuse must be assessed on a case-by-case basis. General presumptions of abuse and safe harbours are not acceptable.

In section 5. the authors focus on possible conflicts between EU law and tax treaty law. In this context, what is of relevance is the extent to which the concept of abuse under the principal purpose test (PPT) differs from the concept of abuse as set out above. Some authors have pointed out potential differences, such as the different subjective test and the condition of artificiality in the EU context, which would be absent in the PPT.

De Pietro (2020) suggests that the threshold for abuse under the PPT is lower than the threshold for abuse under ECJ case law because, according to ECJ case law, an arrangement would only be abusive if the objective of obtaining a tax advantage is predominant, whereas for the application of the PPT, obtaining the treaty benefit need not be the dominant purpose.[83] In the authors' view, the PPT does not necessarily deviate from the EU concept of abuse in this respect. De Pietro seems to base her claim on "older" case law, such as *Foggia* (Case C-126/10), in which the ECJ seems to apply stricter terms, such as "predominant" or even "solely".[84] In the more recent Danish cases, however, the ECJ uses the same criterion of "principal objective or one of the principal objectives".[85] De Pietro also refers to paragraph 180 of the Commentary on Article 29 of the OECD Model (2017) in this respect and argues that the example of treaty abuse in the Commentary would not be abuse under EU law. The example in paragraph 180 of the Commentary does not – in the authors' view – clearly demonstrate that the scope of the PPT is broader, since paragraph 180 of the Commentary only deals with the subjective test and not with the objective test.

Furthermore, various authors have suggested that the threshold for abuse under the PPT is lower than the threshold for abuse under ECJ case law because there can only be abuse under ECJ case law if arrangements are artificial,[86] or, in other words, where there is no "genuine economic activity".[87] In this respect, reference is made to the position of the European Commission that a "genuine

80. These cases concerned an anti-abuse provision that denied entitlement to an exemption to a non-resident company if its shareholder(s) would not have been entitled to an exemption had the dividends been received directly ("shareholder test") and one of the following conditions was met ("substance requirements"):
    (1) there are no economic or other substantial reasons for the involvement of the foreign company;
    (2) the foreign company does not earn more than 10% of its entire gross income for the financial year in question from its own economic activity; or
    (3) the foreign company does not take part in general economic commerce with a business establishment suitably equipped for its business purpose. According to the ECJ, those conditions, regardless of whether taken individually or as a whole, cannot per se imply the existence of fraud or abuse (para. 71).
81. Part 9 of the comment in 68 BNB 2, no. 9 (2020) (*Beslissingen in Belastingzaken. Nederlandse Belastingrechtspraak*).
82. The Dutch term is "imply" and the German term "*bedeutet*", but the English term used here is "indicate".
83. C. de Pietro, *Tax Abuse and Legal Pluralism: Towards Concrete Solutions Leading to Coordination Between International Tax Treaty Law and EU Tax Law*, EC Tax Rev. 2.84, sec. 2.2. (2020) and de Pietro, *supra* n. 46, at sec. 2.2.
84. *Foggia* (C-126/10), paras. 35 and 50 and *see also Kofoed* (C-321/05), para. 38.
85. Para. 127 of the Interest and Royalties Directive decision and para. 100 of the Parent-Subsidiary Directive decision.
86. S. van Weeghel, *A Deconstruction of the Principal Purposes Test*, 11 World Tax J. 1, sec. 2 (2019), Journal Articles & Opinion Pieces IBFD (accessed 28 May 2021), points out that the reference to "artificial legal constructions" in *OECD Model: Commentary on Article 1* was deleted in 2017, possibly because the EU concept of abuse was considered to be too narrow or because the de facto control over the interpretation of the term by the ECJ was thought to be undesirable.
87. *See*, inter alia, O. Koriak, *The Principal Purpose Test under BEPS Action 6: Is the OECD Proposal Compliant with EU Law?*, 56 Eur. Taxn. 12, p. 556, at sec. 4.3.2. (2016), Journal Articles & Opinion Pieces IBFD (accessed 28 May 2021); R.J. Danon, *Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups*, 72 Bull. Intl. Taxn. 1, sec. 4.4.1. (2018), Journal Articles & Opinion Pieces IBFD (accessed 28 May 2021); de Pietro, *supra* n. 83 (EC Tax Rev. 2020), at sec. 2 and Baerentzen, *supra* n. 46, at secs. 3.3. and 3.6.

economic activity" test should be included in the PPT in tax treaties concluded between Member States.[88] However, whether artificiality is necessary in applying the PPT is a matter of interpretation. Artificiality is primarily relevant in the context of the objective test.[89] In the authors' view, it is certainly possible to interpret the "object and purpose" test of the PPT such that the PPT only targets artificial arrangements,[90] so that the artificiality test is also (implicitly) present in the PPT.[91] Arguably, pursuant to article 31 of the Vienna Convention (1969),[92] the interpretation of the PPT in tax treaties concluded between EU Member States should take into account primary and secondary EU law as relevant rules of international law applicable in the relations between the parties.[93]

4. Which Benefits Must Be Refused?

In light of case law, the EU law anti-abuse principle can be applied in situations of abuse of rights, benefits or advantages "resulting from", "arising from", "provided for by" or "derived from" EU law (the ECJ uses these terms interchangeably). It is irrelevant whether these have their basis in EU treaties, in a regulation or in a directive.[94] In the event of abuse, the benefits resulting from the EU Parent-Subsidiary Directive (2011/96) and the EU Interest and Royalties Directive (2003/49) must be denied pursuant to the EU law anti-abuse principle and (with regard to the benefits of the EU Parent-Subsidiary Directive) pursuant to article 1(2) of the Parent-Subsidiary Directive. In such instances, the fundamental freedoms cannot be invoked.

The ECJ does not indicate in which cases there are benefits resulting or arising from EU law. Guidelines could be derived from case law on article 51 of the Charter of Fundamental Rights of the European Union.[95] According to that provision, citizens may only invoke the Charter if the issue concerns an action by a Member State implementing EU law. It can be inferred from case law on this provision that "a certain degree of connection [must] exist between the national measure and the EU law" and that the connection must go "above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other".[96] That is why it must be examined whether the intention, nature and objectives of the national legislation and EU law correspond.[97] This is, for example, the case if Member States implement (usually secondary, but sometimes also primary) EU law. Furthermore, it can also be inferred from case law that the ECJ asks the following three questions in determining whether national rules serve to implement EU law:[98]

> (1) Are the rules intended to implement a provision in EU law?;
>
> (2) What is the nature of the rules and do they pursue objectives other than those covered by the EU law, even if the rules may indirectly affect that law?; and
>
> (3) Is there an EU law regulation that specifically covers this matter or can affect it?

Of particular relevance here is which benefits can be regarded as implementing the Parent-Subsidiary Directive. The decisions in the Danish cases do not offer many clues on this. Those cases concerned Danish rules under which a non-resident parent company was not subject to tax on dividends and interest if taxation was waived pursuant to the EU Parent-Subsidiary Directive (2011/96) or the EU Interest and Royalties Directive (2003/49).[99] What was in dispute was thus the direct application of these directives. The question that therefore arises is how far the scope of this decision reaches. In other words: when are there benefits resulting/arising from EU law within the meaning of these decisions? It follows from *Italmoda* (paragraphs 7 and 54 through 59), *Breitsohl* (paragraph 38) and *Cussens* (paragraphs 33 and 34) among others that national implementing legislation benefits may be regarded as benefits arising from EU law, which must be refused in the event of abuse. What is less clear is whether benefits under tax treaties can, under certain conditions, be regarded as benefits resulting/arising from EU law (*see* section 5.2.).

This article now turns to another question, namely whether the benefits of a participation exemption regime (resulting from article 4 of the EU Parent-Subsidiary Directive) must be refused in abuse situations. It may not, however, be possible to directly infer this from the decisions in the Danish cases because they were decided in the context of an exemption at source.[100] In the authors' view, it is conceivable that a participation exemption must be refused, but only in cases where the scope of the participa-

88. Recommendation (EU) 2016/136 of 28 October 2016 on the implementation of measures against tax treaty abuse, OJ L 25/67 (2 Feb. 2016).
89. FR: Opinion of Advocate General Kokott, 7 Sept. 2017, Case C-6/16, *Eqiom SAS, formerly Holcim France SAS, Enka SA v. Ministre des Finances et des comptes publics*, ECLI:EU:C:2017:34, para. 55, Case Law IBFD.
90. *See* example E in para. 182 *OECD Model: Commentary on Article 29* (2017), wherein reference is made to a "genuine" increase in a participation, as well as example G (same paragraph), wherein it is argued that it would not be reasonable to deny treaty benefits (due to substantive economic functions).
91. *See also*, for an interpretation of the PPT in accordance with art. 1(2) of the EU Parent-Subsidiary Directive (2011/96), Wattel, Marres & Vermeulen, *supra* n. 35, at p. 268.
92. *UN Vienna Convention on the Law of Treaties* (23 May 1969), Treaties & Models IBFD.
93. *See also* S.C.W. Douma in his annotation of the IRR case in BNB 2020/9, para. 5.
94. *Cussens* (C-251/16), para. 30. This is reiterated in para. 101 of the Interest and Royalties Directive decision and para. 75 of the Parent-Subsidiary Directive decision.
95. Charter of Fundamental Rights of the European Union, OJ C 326/02, pp. 391-407 (26 Oct. 2012), Primary Sources IBFD.
96. *See* M.M. Julicher, *Het recht op een eerlijk proces in het EVRM, het Handvest en… de Grondwet! Een verrijking voor de individuele rechtsbescherming in Nederland?*, TvCR 1, pp. 36-57, at p. 43 (2018). He derives this from IT: ECJ, 6 Mar. 2014, Case C-206/13, *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, ECLI:EU:C:2014:126, para. 24.
97. Id., para. 25.
98. J. Morijn, A. Pahladsingh & H. Palm, *Vijf jaar bindend Handvest van de Grondrechten: wat heeft het de Rechtzoekende opgeleverd?* [The binding Charter of Fundamental Rights is five years old: what has it achieved for litigants?], NtER 4, p. 125 (June 2015).
99. The Parent-Subsidiary Directive decision, paras. 58-61 and the Interest and Royalties Directive decision, paras. 20 and 27-28.
100. That is why the former State Secretary for Finance, Mr Menno Snel, considered it necessary to further examine the implications of the decisions for the Dutch participation exemption (annex to the letter to Parliament of 14 June 2019, no. 2019-0000095322, *see* answer to question 20 at p. 12).

tion exemption is extended due to the artificial interposition of a holding company established in an EU Member State (where a non-qualifying shareholding is attributed to such a holding company). In that scenario, what is at issue is not the application of the participation exemption at the level of the artificially interposed company, but the application of the participation exemption to dividends distributed by the artificially interposed company (i.e. EU-inbound arrangements).[101] With regard to outbound arrangements (such as in the Danish cases), the company distributing the dividend to the artificially interposed company must refuse the withholding exemption. It is, however, disproportionate to then also refuse the participation exemption at the level of the interposed company (after all, the arrangement was not set up to avoid tax in that Member State).

5. The Effect of EU law on the Application of Tax Treaties

5.1. Abuse of tax treaty provisions by conduit companies; tax treaty law versus EU law

Tax treaties usually only allocate limited taxing rights (if any at all) to the source state with regard to dividends, interest and royalties. The OECD Model limits the tax to a percentage of the gross amount of dividends and interest (5% for participation dividends, 15% for portfolio dividends, 10% for interest), and with regard to royalties, allocates an exclusive taxing right to the state of residence. If the investor is a resident of a state with which the source country has not concluded a (favourable) tax treaty, it is thus tempting to invest via a conduit entity in a state that has concluded a treaty with the source state, which includes a low (or lower) source state tax rate. The phenomenon of treaty shopping has been on the OECD's radar for some time. The beneficial ownership requirement has applied since the OECD Model (1977). This change, however, was insufficient to stop treaty shopping. As part of the BEPS Project, minimum standards to combat treaty shopping were agreed in the Final Report on Action 6:[102] contracting states must, in any event, include a preamble stating that evasion and avoidance, including treaty shopping, must be combatted, as well as include a PPT and a limitation on benefits (LOB) clause, or only a PPT, or a LOB provision with an anti-conduit provision.[103] The preamble, LOB and PPT have now been included in the Multilateral Instrument[104] and in article 29 of the OECD Model (2017). The LOB provision is not discussed further herein.

This brings the authors to the question of what would happen if a conduit company were the beneficial owner of, say, royalties, under a tax treaty identical to the OECD Model, but not the beneficial owner of the income under the EU Parent-Subsidiary Directive, or vice versa? And what if a conduit structure is abusive under the EU anti-abuse principle, but not under the PPT, or vice versa?

As for the beneficial ownership clauses, in the authors' view, no conflict would occur. As pointed out in section 2.5.3., absent abuse, there is no requirement based on an EU directive to deny benefits. The same applies under a tax treaty. EU Member States or states that are party to a tax treaty *may* refuse benefits if the recipient is not the beneficial owner but they are not required to do so. States are (absent abuse) thus free to extend tax treaty or directive benefits to taxpayers who do not qualify for these benefits under the treaty or directive. Consequently, there will be no conflict between the directive and a tax treaty if a treaty benefit is refused (due to lack of beneficial ownership) but a directive benefit is available, or vice versa.

This is different for abusive cases, since EU benefits must be denied in abusive cases (*see* section 2.2.) and one may argue that tax treaty benefits must also be denied in abusive cases. What if there is abuse under EU law but tax treaty benefits would be available, or vice versa? Firstly, it is noted that, in the authors' view, the PPT can be interpreted in accordance with the EU concept of abuse (*see* section 3.) and that under certain circumstances the PPT therefore *must* be interpreted that way (*see* section 5.3.). If so, no conflict occurs. If this were different, and the PPT could not be interpreted in accordance with the EU concept of abuse, and instead would be applicable in cases where abuse under EU law would not arise, the granting of an exemption or a reduction of tax under EU law might conflict with the PPT.[105] This might be so if there is an obligation under the PPT to deny treaty benefits, and if the exemption or reduction of tax under EU law should be considered a treaty benefit in this respect. Firstly, although the wording might suggest that there is an obligation under the PPT to deny treaty benefits ("a benefit under the Convention … shall not be granted"), the Commentary on the OECD Model (2017) is less clear.[106] Even so, in the authors' view, the benefits required under EU directives would not fall under this obligation (i.e. the obligation to deny the benefits). Although, as argued in section 5.2., in abusive cases there may be an obligation to deny tax treaty benefits under the EU anti-abuse principle, the authors would not agree that there is an obligation to deny EU directive benefits under the PPT since – unlike EU law – tax treaties only seek to restrict taxing rights, not to harmonize tax laws. The effect of a PPT should be that the tax treaty cannot be used in order to avoid taxation but not that an arrangement is effectively taxed. Therefore the PPT should have no effect other than the non-eligibility of treaty benefits.

It is unlikely that the PPT should be interpreted in narrower terms than the EU concept of abuse. A PPT may,

101. Wattel, Marres & Vermeulen, *supra* n. 35, at pp. 266 and 267. *See*, for another view, A.W. Ravelli, *Aanpassing deelnemingsvrijstelling niet nodig naar aanleiding van de Deense arresten*, 7347 WFR 150, p. 1037, sec. 3. (2020).
102. OECD/G20, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Action 6: 2015 Final Report* (OECD 2015), Primary Sources IBFD.
103. Id., paras. 22-23.
104. *MLI*, arts. 6 and 7.
105. De Pietro, *supra* n. 83 (2020), argues that a conflict may arise, and offers solutions for this conflict. *See also* de Pietro, *supra* n. 46.
106. *See* para. 169 of the Commentary on Article 29, on the one hand ("the benefits of a tax convention *should* not be available"), and para. 174 of the Commentary on Article 29, on the other ("a Contracting State *may* deny the benefits of a tax convention ...").

however, be absent in treaties and, if so, a question may arise as to whether, in certain circumstances, benefits that must be granted under tax treaties must, at the same time, be denied under the EU anti-abuse principle (this is discussed in more detail in section 5.2.). If so, a conflict would arise. According to the ECJ,[107] if a conflict between EU law and a tax treaty between EU Member states arises, EU law would prevail (although the question may be less clear cut from an international law point of view).[108]

5.2. Can benefits under a tax treaty be benefits arising from EU law?

From an EU law perspective, there is, in principle, no fundamental difference between tax treaties and national laws. Therefore, there is nothing to prevent tax treaties from being used to transpose directives (even tax treaty benefits can be sufficiently specified and clear) and to use treaty treaties to remove restrictions on treaty freedoms. In principle, treaty benefits can therefore also be benefits resulting from EU law.[109] The question of whether benefits under tax treaties can be regarded as benefits resulting from EU law is relevant in abuse situations. After all, in those cases, there is an obligation to combat abuse by virtue of the anti-abuse principle of EU law (and pursuant to article 1(2) of the EU Parent-Subsidiary Directive (2011/96)).[110] If, in such cases, the provisions for transposing the directive benefits are refused, while the equivalent benefits of a tax treaty are granted, the question then arises whether this obligation is being complied with.

Where the directive has already been transposed into national law, it could be argued that equivalent benefits under a treaty do not serve to implement that directive and, to that extent, cannot be referred to as benefits resulting from EU law. In the authors' opinion, there are good grounds for arguing that the decisions in the Danish cases do have implications for taxpayers invoking tax treaties in cases involving the EU Parent-Subsidiary Directive (2011/96) or the Interest and Royalties Directive (2003/49). From an "implementation perspective" there is no relevant difference between national and bilateral provisions. Based on the nature of the treaty provisions and the objective they pursue (*see* the second of the three questions from section 4., to determine whether national rules serve to implement EU law), the authors believe that these provisions should be considered as implementing directive provisions. The purpose of tax treaty provisions on the allocation of taxing rights over dividends, interest and royalties is comparable to those of the EU Parent-Subsidiary Directive and the EU Interest and Royalties Directive and those provisions seek similar objectives. After all, tax treaties and the EU Parent-Subsidiary and the EU Interest and Royalties Directives all aim to avoid double taxation,[111] and the underlying policy objective is also similar, being to encourage the free movement of capital and people among other things.[112] In situations concerning directives, it can thus be argued that the benefits allocated pursuant to treaty provisions result from EU law. These treaty benefits would then have to be refused in abuse situations by virtue of the anti-abuse principle of EU law.[113] In the authors' view, the refusal of treaty benefits (or of an exemption under national law) in abuse situations is not contrary to either the principle of legality or the principle of legal certainty.[114] As stated above, abusers cannot invoke these principles. Granting equivalent benefits to abusers would result in the obligation under EU law to combat abuse being frustrated and would be contrary to the principle of sincere cooperation of EU law (article 4(3) of the TEU).[115]

In situations other than those falling within the scope of the EU Parent-Subsidiary and the EU Interest and Royalties Directives, treaty benefits do not, in principle, seem to qualify as benefits ensuing from EU law. After all, with some exceptions,[116] treaty benefits are not granted in order to avoid a conflict with the fundamental freedoms, despite the fact that, in practice, they may fulfil that function. In the latter case, the question again arises whether, because of that function, the ECJ would prefer to speak of benefits resulting from EU law.

In practice, it will be difficult to indicate where the boundary lies between benefits resulting from EU law (whereby abuse must be combatted) and additional benefits resulting from the policy considerations of a Member State (in respect of which there is, in principle, no obligation to combat abuse). In the field of direct taxes, there is only limited harmonization. Beyond this, Member States have retained their sovereignty and are free to grant tax benefits

107. BE: ECJ, 27 Sept. 1988, Case 235/87, *Annunziata Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, EU:C:1988:460. *See also* Wattel, Marres & Vermeulen, *supra* n. 35, at p. 607 and I. Panzeri, *Tax Treaties versus EU Law: Which Should Prevail?*, 61 Eur. Taxn. 4, sec. 2. (2021), Journal Articles & Opinion Pieces IBFD (accessed 28 May 2021).
108. *See* J. Klabbers, *Treaty Conflict and the European Union* pp. 205-211 (Cambridge University Press 2009).
109. *See* O. Marres & I. de Groot, *The General Anti-Abuse Clause in the EU Parent-Subsidiary Directive*, in *EU Law and the Building of Global Supranational Tax Law: EU BEPS and State Aid* sec. 10.5.3. (D. Weber ed., IBFD 2017) and Wattel, Marres & Vermeulen, *supra* n. 35, at p. 267.
110. Albeit this directive provision, unlike the principle of primary EU law, cannot be used against the taxpayer (*see* sec. 2.2.).
111. It must be acknowledged here that the EU Parent-Subsidiary Directive (2011/96) aims not only to prevent legal but also economic double taxation.
112. *See* preambles 3-6 to the 2011 Parent-Subsidiary Directive, preamble 1 to the Interest and Royalties Directive (2003/49), and para. 54 *OECD Model: Commentary on Article 1* (2017).
113. At least from the perspective of EU law; *see* F.A. Engelen, J. Vleggeert & T.M. Vergouwen, *Belastingverdragen en voorrang van richtlijnen op het gebied van directe belastingen* [Tax treaties and priority of directives in the field of direct taxes], WFR 257, sec. 2.1. (2019).
114. *See*, for a different view, S.C.W. Douma in his annotation of the IRR case in BNB 2020/9, paras. 3-4.
115. *See* I.M. de Groot in NLF 2019/0597 (comment on the Parent-Subsidiary Directive decision); L.C. van Hulten & J.J.A.M. Korving, *Svig og misbrug: de Deense antimisbruikzaken* [Svig og misbrug: the Danish anti-abuse cases], WFR 129, at para. 4.2. (2019); Baerentzen, *supra* n. 46, at sec. 4; and S.H. Bærentzen, A.M. Lejour & M. van 't Riet, *Limitation of Holding Structures for Intra-EU Dividends: An End to Tax Avoidance?*, 12 World Tax J. 2., sec. 3. (2020), Journal Articles & Opinion Pieces IBFD (accessed 28 May 2021). *See* Wattel, Marres & Vermeulen, *supra* n. 35, at p. 267.
116. Consider, for example, the extension of benefits due to the freedom of establishment according to the conclusion reached by the ECJ in the *Saint-Gobain* case (DE: ECJ, 21 Sept. 1999, Case C-307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt*, Case Law IBFD).

– within the framework of the fundamental freedoms and State aid – even to taxpayers with tax avoiding motives.[117]

5.3. Is there an obligation to interpret treaty provisions in accordance with directives?

According to settled case law of the ECJ, courts must interpret national legislation that counts as the transposition of directive provisions as far as possible in accordance with the directive.[118] As stated in section 2.3., this obligation applies regardless of whether or not these provisions were introduced with a view to transposing a directive and regardless of whether they are dated before or after the relevant directive provision took effect. However, that obligation does not go so far as to serve as the basis for an interpretation *contra legem*.[119]

As far as combatting abuse by conduit companies is concerned, what is of particular importance is whether the term "beneficial owner" and the PPT must be interpreted in accordance with the directives in certain scenarios. This may be the case if the restrictions on the source state with regard to taxing dividends, interest and royalties can be regarded as an implementation of the benefits of the directive (article 1 of the EU Interest and Royalties Directive and article 5 of the EU Parent-Subsidiary Directive), at least in cases covered by the directives. In the authors' view, it can be argued that, in these cases, there are provisions that serve "to implement" the obligations under the directives (*see* section 5.2.). Based on this, in situations involving the directives, the PPT must indeed be interpreted, where possible, in accordance with the EU anti-abuse principle. In the authors' view, the concept of abuse in the PPT can be interpreted in accordance with the anti-abuse provisions in the directives (*see* section 3.).[120]

The authors' believe that, in these instances, the beneficial owner requirement in provisions in accordance with articles 11 and 12 of the OECD Model (2017) must also be interpreted, where possible, in accordance with EU law. As argued in section 5.1., no conflict would arise where there are different interpretations of beneficial ownership in tax treaties and directives. There may, however, still be arguments for an interpretation of beneficial ownership, as used in tax treaties, in accordance with directive provisions. For example, absent an anti-abuse provision in the tax treaties, an interpretation in accordance with EU law may prevent a conflict between tax treaties and EU law in abusive situations (as dealt with in section 5.2.). Furthermore, a reconciliatory interpretation may be appropriate where, such as in the case at hand, OECD Model concepts are implemented under EU law. Although the ECJ takes an approach regarding beneficial ownership that is more based on economics than the view taken in the Commentary on the OECD Model (2014 onwards) update (*see* section 2.5.1.),[121] an interpretation in accordance with the beneficial ownership test under the EU Interest and Royalties Directive should, in the authors' view, be feasible. Since the Commentaries are not binding, and since (as argued in section 3. regarding the PPT), pursuant to article 31 of the Vienna Convention (1969), account is to be taken of primary and secondary EU law as relevant rules of international law applicable in relations between the parties,[122] a reconciliatory interpretation should be possible. In situations other than those falling within the scope of the EU Interest and Royalties Directive and the EU Parent-Subsidy Directive (2011/96), however, treaty benefits do not, in principle, seem to qualify as benefits resulting from EU law and, as such, there would be no obligation to apply an interpretation in accordance with EU law. The *Dzodzi/Leur-Bloem* (Case C-28/95)[123] case law is of lesser importance since it is only up to the national court – not the ECJ – to assess the precise scope of the reference to EU law, and as regards beneficial ownership and the PPT, such a reference generally does not appear to be present.

6. Final Observations

In the case law, the concepts of abuse under primary and secondary EU law have converged (with primary EU law referring here to the general anti-abuse principle developed by the ECJ and in the context of combatting abuse as a justification for a restriction of the treaty freedoms and secondary EU law referring here to the anti-abuse provisions in directives). Mainly due to the Danish cases, more guidelines can gradually be derived from case law in order to assess whether there is abuse in conduit situations. Those guidelines will probably also be important in applying tax treaties. First, in the authors' view, Member States have an obligation to combat abuse of treaty benefits if the treaty benefits can be regarded as benefits resulting from EU law. The authors believe that there are good grounds for arguing that this is the case in situations covered by the EU Parent-Subsidiary Directive or the EU Interest and Royalties Directive. Second, there are good arguments for claiming that, in cases falling under the scope of directives, Member States are obliged to interpret the PPT (and arguably beneficial ownership) as much as possible in accordance with the anti-abuse principle of EU law. The PPT thus ensures a proliferation of the abuse doctrine of the ECJ. Third, it could be argued that article 6 of the EU Anti-Tax Avoidance Directive (2016/1164) might also be relevant in the levying of withholding taxes,

117. *See* CFE, *supra* n. 50, at p. 497 (para. 5.2).
118. *Marleasing SA* (C-106/89), para. 8.
119. *Konstantinos Adeneler* (C-212/04), para. 110.
120. A difference may remain for the burden of proof. *See* for the burden of proof in respect of the application of the PPT, van Weeghel, *supra* n. 85, at sec. 3 and S. Landsiedel, *The Principal Purpose Test's Burden of Proof: Should the OECD Commentary on Article 29(9) Specify Which Party Bears the Onus?*, 13 World Tax J. 1 (2021), Journal Articles & Opinion Pieces IBFD (accessed 28 May 2021).
121. *See* for examples of possible deviations, C. Hamra & J.J.A.M. Korving, *Beneficial Ownership Interpreted, To What Extent Are the OECD and the EU on the Same Wavelength?*, 49 Intertax 3, p. 254, sec. 4. (2021) and Janssen & Sada Garibay, *supra* n. 46, at para. 5.
122. *See also* S.C.W. Douma in his annotation of the IRR case in BNB 2020/9, point 5.
123. In NL: ECJ, 17 July 1997, Case C-28/95, *A. Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, paras. 32-34, Case Law IBFD, the ECJ considered itself competent to interpret EU law in a non-directive situation, namely a purely internal situation. This was "in order [...] to avoid [...] any distortion of competition" and given "that in order to forestall future differences of interpretation, provisions or concepts taken from [EU] law should be interpreted uniformly, irrespective of the circumstances in which they are to apply".

although, in the authors' opinion, this is only so insofar as these withholding taxes are advance taxes in respect of corporate income tax.

Even if the case law does not recognize that the abuse concept under EU law is relevant for the application of tax treaties, such case law is likely to effectively influence the application of tax treaties (in the interests of consistent case law, legal certainty and unity of law). In any event, some convergence between the EU abuse tests and the PPT can be expected[124] and this will therefore also become relevant for new treaties with third countries.

124. *See* Baerentzen, Lejour & van 't Riet, *supra* n. 15, at sec. 2.6.

Finally, this case law may also affect courts in third countries, depending on the status that foreign case law has in the particular countries.[125] The conclusion is that, due to the combination of EU developments, the MLI and the OECD Model (2017), not only directive shopping, but also treaty shopping through conduits, will become increasingly obsolete, with the case law of the ECJ playing an important role in this regard.

125. *See*, regarding this issue, D. Ward, *Chapter 7: Use of foreign court decisions in interpreting tax treaties*, in *Courts and Tax Treaty Law*, EC and International Tax Law Series, vol. 3 (G. Maisto ed., IBFD 2007), Books IBFD.

