

# Holding companies and Leveraged Buy-Outs (LBOs) in the EU after BEPS: beneficial owner, abuse of law and the single taxation principle\* [Working Paper]

Danish Cases C-115/16, 116/16, 117/16, 118/16, 119/16 and 299/16.

Pablo A. Hernández González-Barreda<sup>±</sup>

## 1.- Introduction

Beneficial ownership is a concept originated in Common Law countries widely incorporated to international tax law after the 1977 OECD Model Tax Convention. Since then, many difficulties arise as refers to the interpretation and application of the concept<sup>1</sup>. In addition, in 2003 was included in the Interest and Royalties Directive<sup>2</sup>. Only with the 2014 amendments to the OECD Model Tax Convention the concept was limited again to the object it was originally aimed at: trustees, nominees, conduit corporations hiddenly performing as trustees and other arrangements connecting the accrual of the income to the obligation to pass it to third parties<sup>3</sup>.

---

\* This work is part of the Research Project “Post-BEPS international taxation: are the new rules and proposals suitable for every jurisdiction?” (DER2017-85333-P) funded by the Spanish Ministry of Economy and Competitiveness, and lead by Prof. Dr. Juan Zornoza Pérez (Universidad Carlos III de Madrid).

<sup>±</sup> Assistant professor of Tax Law at Universidad Pontificia Comillas Madrid. Academic Secretary and Coordinator of the Deloitte Chair of Business Taxation. The author can be contacted at pahernandez@icade.comillas.edu

<sup>1</sup> Main works on the topic include Craig Eliffe, ‘The Meaning of “Beneficial Ownership” in Double Tax Agreements’ [2009] British Tax Review 276; Charl Du Toit, *Beneficial Ownership of Royalties in Bilateral Tax Treaties* (IBFD 1999); Angelika Meindl-Ringler, *Beneficial Ownership in International Tax Law* (Kluwer 2016); Sarubh Jain, *Effectiveness of Beneficial Ownership Test in Conduit Companies Cases* (IBFD 2013); David Oliver et al, ‘Beneficial Ownership’ (2000) 54 Bulletin for International Taxation 310; Michael Lang (ed), *Beneficial Owners: Recent Trends* (IBFD 2012); Martín Jiménez, Adolfo, ‘Beneficial Ownership: Current Trends’ (2010) 2 World Tax Journal 35. The author’s forthcoming book also provides a comprehensive and up-to-date analysis of the concept both in domestic and international tax law Pablo Andrés Hernández González-Barreda, *Beneficial Ownership in Tax Law and Tax Treaties* (Hart Publishing 2019).

<sup>2</sup> Arts. 1(1), 1(4) and 1(5) of the Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (Interest and Royalties Directive).

<sup>3</sup> See amendments to Commentaries on arts. 10, 11, and 12 in 2014 Update to the OECD Model Tax Convention, pp.12-21.

In recent decades, the international community and EU put the spotlight on anti-avoidance legislation, putting any controversial transaction under the spotlight of a - sometimes- biased antiabuse analysis<sup>4</sup>. Within those discussions on aggressive tax planning within the BEPS Action Plan, another conflictive principle gained relevance: single taxation<sup>5</sup>.

Parallel to such developments, 2000s saw a sharp increase in Leveraged Buy-Outs investments in Europe by Equity Funds with significant participation of US investors, that reduction of interest rates following the 2008 financial crisis did not stop but encourage to some extent. In addition, reduction in law firms and corporations' turnover during the crisis, jointly with countries incentives to repatriate income, may also have incentivised reorganizations.

At this point, because corporate reorganizations and LBOs planning in EU Markets are largely based on the interaction of the Interest and Royalties and Parent-Subsidiary Directives and Tax Treaties in order to route the investment through the optimal tax shopping way, beneficial ownership, the single tax principle and the BEPS Anti-avoidance principles met at the crossroad. Around 2007, Danish tax authorities started to raise tens of cases involving Directive and treaty shopping concerning corporate finance and corporate reorganizations<sup>6</sup>. The Danish tax authorities took the chance of subsequent years abovementioned debates and framed the cases on abuse

---

<sup>4</sup> OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing 2013) 13, 19; OECD (2015), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report* (OECD Publishing 2015). The leading case on the development of an anti-avoidance principle in tax matters is *Cadbury Schweppes*, on compatibility of domestic anti-abuse rules and Primary law C-196/04, Judgment of the Court (Grand Chamber) of 12 September 2006. Also relevant Case law on abuse in VAT includes *Halifax and Others Case*, C-255/02, Judgment of the Court (Grand Chamber) of 21 February 2006; *Schoenimport "Italmoda" Mariano Previti*, C-131/13, Judgment of the Court (First Chamber), 18 December 2014; *Cussens*, C- 251/16, Judgment of the Court (Fourth Chamber) of 22 November 2017. In Harmonised direct tax matters such as the merger directive *Foggia*, 126/10, Judgment of the Court (Fifth Chamber) of 10 November 2011; *Kofoed*, C-321/05, Judgment of the Court (First Chamber) of 5 July 2007.

<sup>5</sup> OECD (n 6) 10, 13. In the European Union see Commission Recommendation of 6th December 2012 on aggressive tax planning, C(2012) 8806 final. Even though considered by many for decades, was not at the very core of almost any analysis of international taxation as it has been since the BEPS Action Plan discussions, leading academics, tax authorities and courts to struggle with it. See Reuven Avi-Yonah, 'Full Circle? The Single Tax Principle, BEPS, and the New US Model' [2016] *Global Taxation* 12; Reuven S Avi-Yonah, 'Who Invented the Single Tax Principle: An Essay on the History of U.S. Treaty Policy' (2014) 49 *New York Law School Law Review* 305; Daniel Shaviro, 'The Two Faces of the Single Tax Principle' (2016) 41 *Brooklyn Journal of International Law* 1293. On the problems of Double Non Taxation, subject to tax clauses, its distinction with effective taxation and problems related see i.a. Félix Daniel Martínez Laguna, 'Abuse and Aggressive Tax Planning: Between OECD and EU Initiatives – The Dividing Line between Intended and Unintended Double Non-Taxation' (2017) 9 *World Tax Journal* 189; Christoph Marchgraber, 'The Avoidance of Double Non-Taxation in Double Tax Treaty Law: A Critical Analysis of the Subject-To-Tax Clause Recommended by the European Commission' [2014] *EC Tax Review* 293; Michael Lang, *The Application of the Oecd Model Tax Convention To Partnerships, A Critical Analysis of the Report Prepared By the Oecd Committee on Fiscal Affairs* (Kluwer 2000).

<sup>6</sup> Jakob Bundgaard, 'The Notion of Beneficial Ownership in Danish Tax Law: The Creation of a New Legal Order with Uncertainty as a Companion', *Beneficial Ownership: recent trends* (IBFD 2013); Jakob Bundgaard and N Winther-Sorensen, 'Beneficial Ownership in International Financing Structures' (2008) 50 *Tax Notes International* 587.

of law and beneficial ownership. Some of the cases, appealed by the Taxpayers, ultimately reached the Court of Justice of the European Union by reference of the Danish Courts of Appeals involved: the set of Danish Cases C-115/16, 116/16, 117/16, 118/16, 119/16 and 299/16<sup>7</sup>.

## 2.- Facts: Classic Directive Shopping Cases in Reorganisations and Private Equity acquisitions

Abovementioned cases may be plainly summarised as classic Directive Shopping Cases through intermediary conduit companies. In all the cases, corporations or funds residents in third countries held shares or acquired shares in a target company resident in Denmark<sup>8</sup>.

A first group of cases concerned leveraged buyouts or private equity acquisitions of Danish operative corporations. Third countries investment Funds, after several transactions, end up holding debt against a or several Luxembourg vehicles, that in turn held a credit against a Danish holding or the final operative corporation<sup>9</sup>. One of the cases also included two intermediary holding corporations in Sweden between the luxemburg vehicle and the target corporations. Of course the debt structure largely matched the final ownership chain. In addition, one these private equity cases concerned the dividend distribution that followed the leveraged acquisition<sup>10</sup>.

A second group of cases involved the reorganisation of corporate groups ultimately owned by American corporations. In the first case, the result of the reorganization left a Danish operative company held by a set of two successive Swedish holdings, that in turn were owned by a corporation resident in Cayman, that in turn was owned by the American Parent<sup>11</sup>. The second case resulted in the Danish corporation being owned by a Cyprus corporation, that in turn was owned by a Bermudan corporation, which ultimately was owned by the American Parent corporation<sup>12</sup>.

If the debt or capital had been held directly from third countries and interests or dividends were directly payable from Denmark to such third countries -United States, Jersey and other third countries-, dividends or interests paid would have been subject

---

<sup>7</sup> Joined Cases N Luxembourg 1, X Denmark, C Danmark I and Z Danmark, C-115/16, C-118/16, C-119/16 and 299/16, Judgment of the Court (Grand Chamber) of 26 February 2019; and Joined Cases T Danmark and Y Denmark, C-116/16 and 117/16, Judgment of the Court (Grand Chamber) of 26 February 2019. See also Opinion of Advocate General Kokkot on the cases.

<sup>8</sup> See Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-115/16, C-118/16, C-119/16 and 299/16, paras. 30, 46, 58, and 65-66; and Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-116/16 and 117/16, paras. 37 and 49.

<sup>9</sup> Cases N Luxembourg 1, X Denmark and Z Denmark, C-115/16, C-118/16, C-299/16. See corresponding paragraphs mentioned et seq in supra note 8.

<sup>10</sup> Case T Danmark, C-116/16. See corresponding paragraphs mentioned et seq in supra note 8.

<sup>11</sup> Case C Danmark I, C-119/16. See corresponding paragraphs mentioned et seq in supra note 8.

<sup>12</sup> Case Y Denmark, C-117/16. See corresponding paragraphs mentioned et seq in supra note 8.

to statutory Danish withholding tax rate<sup>13</sup>. Following the adopted structure and income being payable to an intermediary European country -Sweden, Luxembourg, Cyprus-, such Directives prevented Denmark from taxing the payments<sup>14</sup>. In addition, intermediary countries were chosen because payments from corporations in those countries to the next level corporations in third countries were not taxable according to applicable domestic legislation or tax treaties<sup>15</sup>. In addition, in the case of Swedish intermediaries, group relief rules enable to off-set certain payments reducing taxation.

### 3.- The Court Ruling: Opening the door to the misinterpretation of beneficial ownership and overriding prohibition of inverse direct effect in abusive cases of harmonised direct tax matters

The Court of Justice summarised the referred questions into four main issues: i) the meaning of beneficial ownership; ii) whether a domestic anti-abuse rule was needed to apply anti-avoidance rules in the Directive; iii) the compatibility of certain Danish provision with EU Freedoms; and iv) whether the exemption of income in the residence country limited the application of the IRD exemption at source. This simplification of the questions was probably due to the complex and confusing way in which the referring courts presented the questions, but also because the solution given by the Court, especially regarding abuse, made some questions irrelevant<sup>16</sup>.

#### 3.1.- Beneficial ownership and the Interest and Royalties and Parent Subsidiary Directives

On the several questions on the meaning of beneficial ownership, the Court directly held that such wording in the Directive means “who actually benefits” or who “benefits economically” and who “accordingly has the power freely to determine the use to which it is put”<sup>17</sup>. This conclusion is grounded on three arguments.

---

<sup>13</sup> See Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-115/16, C-118/16, C-119/16 and 299/16, par. 19 et seq; and Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-116/16 and 117/16, par. 20 et seq.

<sup>14</sup> See art. 1 (1) of the Interest and Royalties Directive and art. 4 of the Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Parent-Subsidiary Directive). See also corresponding paragraphs concerning transposition in Denmark in mentioned judgements.

<sup>15</sup> For instance, Luxembourg charges no withholding tax on interest payments nor on certain dividend payments to holding companies. Luxembourg - Key Features, Country Key Features IBFD (accessed 24 Mar. 2019). The other country involved in the structures, Sweden, neither charges Withholding Tax on interests. Sweden - Key Features, Country Key Features IBFD (accessed 24 Mar. 2019).

<sup>16</sup> See the long, confusing and mixed questions of the referring courts in Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-115/16, C-118/16, C-119/16 and 299/16, par. 45 et seq, 57 et seq, 63 et seq, 79 et seq; and Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-116/16 and 117/16, pars. 48 et seq and 64 et seq.

<sup>17</sup> Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-115/16, C-118/16, C-119/16 and 299/16, pars. 88-89, 122.

First, based on the Scheuten Solar Technology Case, on that income within the scope of the Interest and Royalties Directive is “income from debt-claims of every kind”<sup>18</sup>. Second, because the different translations of the term in the different European languages refer to owner, entitlement, effective, or benefit, so the term has to mean not the formally identified recipient but who benefits economically<sup>19</sup>. And last, because the legislative history of the Directive shows it was based on the OECD 1996 Model Tax Convention -rejecting the argument on lack of democracy in using the OECD Commentaries as a legal instrument<sup>20</sup>-, so the Commentaries lead to conclude conduit companies must be excluded from reduced taxation at source. In this last sense, the Court concluded beneficial owner meaning should be chosen from possible meanings in a way that gives effect at the same time to the objects of avoiding double taxation and preventing evasion and avoidance.

In addition to considering beneficial ownership to be who economically benefits, the Court in the ruling somehow establishes a relationship between beneficial ownership and abuse of law by saying that the fact that a corporation is not the beneficial owner is a relevant factor or element to establish the existence of abuse of law<sup>21</sup>. This, even though logic from the perspective of the Court -if the legal creditor is different from who economically benefits, may mean there is an abuse of the IRD by allocating a formal right to a different person-, and despite the court clarifies there is no absolute direct relationship, fails if beneficial owner is not defined as who economically benefits. If beneficial ownership is who holds the creditor status except in cases of trustees, nominees, and obligation to pass the income, a non-beneficial owner that is taxed on the income can hardly bear any abusive character.

On the Parent-Subsidiary Case, the court dismissed to define beneficial ownership as such question from the referring court was conditional on considering beneficial ownership as a treaty-based anti-avoidance rule implementing the Directive, this question not being answered<sup>22</sup>. Because beneficial ownership was not explicitly included in the PSD, the referring tax authorities could not rely on such condition directly to deny the exemption, as they argued in relation to the IRD. Thus, the question from the referring Court was whether treaty-based beneficial owner was an implementation of the PSD according to its anti-abuse provisions authorisations. But because the Court relied directly on the EU anti-avoidance principle, such anti-avoidance authorisations became irrelevant, so beneficial owner as considered derived from them also became irrelevant. Similarly, the Advocate General’s Opinion stated beneficial ownership in the Parent Subsidiary Directive was irrelevant but actual taxation and the objective of eliminating double taxation was the actual issue<sup>23</sup>.

---

<sup>18</sup> Ibid, pars. 86-87.

<sup>19</sup> Ibid, par. 89

<sup>20</sup> Ibid, par. 90

<sup>21</sup> Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-115/16, C-118/16, C-119/16 and 299/16, pars. 138, 142-143; Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-116/16 and 117/16, pars. 117-118.

<sup>22</sup> Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-116/16 and 117/16, pars. 93-94.

<sup>23</sup> Opinion of Advocate General Kokott delivered on 1 March 2018 on case 117/16, par. 43.

But conversely to such assertions, just some paragraphs later the Court seemingly considers beneficial ownership to be implicit in the Directive as it recognizes the possibility to deny the exemption on grounds of the receiver not being the beneficial owner<sup>24</sup>. Thus, the Court maintained unclear whether beneficial ownership can be applied to the PSD and how shall be interpreted.

### 3.2.- Abuse of law

#### 3.2.1.- The EU Law anti-abuse principle prevails over the prohibition of inverse direct effect: Mangold and Italmoda enters (harmonised) direct taxation

As regards the several questions on whether domestic principles or the exemptions being conditioned upon the PSD and IRD constitute themselves implementation of anti-avoidance rules as authorised by arts. 1(2) of the PSD and art. 5 of the IRD, the Court takes a different path. Considering the long-standing general principle that EU Law cannot be relied on for abusive or fraudulent end – Centros, Cadbury Schweppes, Kofoed, or Italmoda<sup>25</sup>-, the Court states such provisions in the PSD and IRD authorizing domestic anti-avoidance rules to be applicable to cases covered by such Directives, and the provision in the IRD providing for a principal purpose test, cannot be interpreted in a way that precludes the application of the general principle of EU law prohibiting abusive practices<sup>26</sup>. Specifically, the Court held the principle of prevention of abuse cannot be subject to transposition as the rest of the Directive is. In other words, the Court points out that to make Directive anti-avoidance provisions conditional on their transposition, as far as they content largely matches or could match the general principle of prevention of abuse, would mean to subject the application of primary law to the Directive transposition, what of course is not possible<sup>27</sup>. In addition, the Court also argued that to permit avoidance structuring because of non-transposition will be contrary to the objective of the IRD and PSD as would undermine economic cohesion and the effective functioning of the internal market. In addition, it holds in abusive transactions objective conditions of the Directive are not met, so exemptions cannot be granted<sup>28</sup>.

To close its arguments, the Court held following settled case law that to pursue the most favourable tax regime cannot, as such, set up a general presumption of fraud or abuse<sup>29</sup>. But this does not mean that the lack or harmonisation or such right to take advantage of competition between member States prevents the application of a general principle

---

<sup>24</sup> Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-116/16 and 117/16, par. 111.

<sup>25</sup> See references in supra note 4 and references in rulings on the Danish Cases, pars. 95 et seq; and 70 et seq.

<sup>26</sup> Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-115/16, C-118/16, C-119/16 and 299/16, par. 104, 111; Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-116/16 and 117/16, par. 77.

<sup>27</sup> Idem.

<sup>28</sup> Ibidem, pars. 119 and 91 respectively.

<sup>29</sup> Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-115/16, C-118/16, C-119/16 and 299/16, par.109; Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-116/16 and 117/16, par. 81.

that abusive practices are prohibited<sup>30</sup>. Contrarily, it means abusive practices are prohibited and Member States do not only have the possibility but are obliged to deny EU Law favourable effects to them, even though abusive character must be proved and not presumed.

Following such arguments, the Court dismissed the questions on whether any domestic or treaty condition may be considered as a domestic anti-avoidance rule or transposition of it for the purposes of the IRD and PSD, as there was no need to resort to them as simply applying the general EU law anti-avoidance principle may serve to deny Directive shopping in abusive cases<sup>31</sup>.

### 3.2.2.- The constituent elements of abusive transactions in EU Law

After recognizing the existence of a general antiavoidance principle applicable to IRD and PSD, the Court reminds settled-case EU abuse of law principle includes an objective element, comprising to check whether despite formally complying with EU rules, the purpose of those rules has not been achieved; and a second subjective element: the intention to obtain an advantage from EU rules by artificially creating the conditions<sup>32</sup>.

Applying such conditions to the cases, the Court considered that a group of corporations may be considered as artificial if its structure is purely form and its principal objective or one of its principle objectives is to obtain a tax advantage, and then pointed out some facts or indicia that may be indicative of abuse<sup>33</sup>.

First, as is the case, if a conduit entity is interposed between the payer and the beneficial owner enabling to avoid taxation<sup>34</sup>. Second, if the income is very soon after its receipt passed on by the company to other companies that do not fulfil the conditions of the IRD or PSD<sup>35</sup>. Third, if all or almost all the income is passed or the payee has the obligation to pass it to a third party that does not fulfil the conditions of the Directives, very little taxable income is left in the corporation<sup>36</sup>. Fourth, the absence of economic activity other than receiving the income and transmitting it may be indicative of abuse. In this point the Court gives some clues on where to find the absence of activity, such as the management of the company, balance, structure of costs or staff and premises<sup>37</sup>. All these indicia have to be balanced against the specific features of the economic activity<sup>38</sup>. Fifth, an artificial arrangement may also be derived from the legal and capital structure of the corporations and contracts involved. In this regard, transactions within a group - seemingly jointly considered- may be abusive if the various contracts existing between the companies give rise to intra-group flow of funds from commercial companies to shareholding entities to reduce the tax burden. The court points as evidences of that

---

<sup>30</sup> Ibidem, pars. 108 and 80 respectively.

<sup>31</sup> Ibidem, pars. 122 and 95 respectively.

<sup>32</sup> Ibidem, pars. 124 and 97 respectively.

<sup>33</sup> Ibidem, pars. 127 and 100 respectively.

<sup>34</sup> Idem

<sup>35</sup> Ibidem, pars. 128 and 101 respectively.

<sup>36</sup> Ibidem, pars. 130 and 103 respectively.

<sup>37</sup> Ibidem, pars. 131 and 104 respectively.

<sup>38</sup> Idem.

situation how transactions are financed, intermediary companies' equity and intermediary corporation inability to have economic use of income received, either bound by legal or contractual obligation or, without being bound, when in substance the intermediary has no right to use and enjoy the income<sup>39</sup>. In addition, the closeness in time of arrangements to the enacting of new tax legislation in order to circumvent the latter may also be indicative of such abuse. This indicia, however, does not claim holdings are unable to be legitimate. As posed in the OECD commentaries regarding the Principal Purpose Test, if the holding performs actual activities and carries on investment duties, it could perfectly pass an anti-avoidance test without any of its negative results<sup>40</sup>.

In relation to the beneficial owners being residents in third states that have tax treaties in force with the source country, the Court states that abuse is independent from the beneficial owner condition. Only if derived from the facts that the undertakings have carried formal or artificial transactions devoid from any economic or commercial justification with the essential aim of benefiting from the exemption of the IRD or PSD abuse will be found<sup>41</sup>. However, the Court recognized that in the case payments directly made to the beneficial owner exemption would also be applicable because of a tax treaty, there could be evidence that the structure is unconnected to abuse of rights<sup>42</sup>. Also conversely, if the payment is done to a non-beneficial owner, it might be possible that the transaction is not abusive even though the exemption will not be granted under the beneficial owner rule<sup>43</sup>.

But against such clear-cut division made by the Court, both rulings link beneficial ownership and abuse<sup>44</sup>. This is done by saying the prove of the recipient not being beneficial ownership has a particular force in defining abuse. In this regard, is likely the Court was just regarding beneficial ownership as an additional indicia to take into account to consider if abuse of law is present at the case. But as developed in the IRD and PSD rulings, both test are independents even though in some cases may overlap and simultaneously deny exemption.

However, and despite all these indicia, the Court states is to the referring Court to define whether abuse is derived from the facts of the case at stake. What is noteworthy, is at the time the Court gives examples on where to find such facts, it mentions the referring court facts, guiding the latter to a conclusion.

Last, on the burden of proof of abuse, the Court confirms abuse has to be proved by the tax authorities with specific mention to the existence of elements constituting such

---

<sup>39</sup> Ibidem, pars. 132 and 105 respectively.

<sup>40</sup> See Example K in paragraph 182 of the Commentary to art. 29 of the 2017 OECD Model Tax Convention.

<sup>41</sup> Ibidem, pars. 135 and 108 respectively.

<sup>42</sup> Ibidem, pars. 137 and 110 respectively.

<sup>43</sup> Ibidem, pars. 138 and 111 respectively.

<sup>44</sup> Ibidem, pars. 138, 142-143; pars. 117-120, respectively.



abuse<sup>45</sup>. Negatively, the tax authorities do not have the task of identifying beneficial owner but just that the recipient of the payment is not the beneficial owner<sup>46</sup>.

### 3.3.- EU Freedoms and discrimination

On whether European freedoms preclude to establish withholding taxes on cross-border payments to non-residents while the relevant country does not impose any withholding on domestic payments, the Court distinguishes between abusive transactions and non-abusive transactions. On the first group, withholding taxes are fully valid on grounds of the overriding principle of preventing abuse of EU freedoms and legislation<sup>47</sup>.

On the second case, where the IRD and PSD are not available because their requirements –such as beneficial ownership- are not fulfilled, the Court concludes withholding taxes make cross-border loans and capitalization less attractive than the same domestic transactions if there are no withholdings on the latter<sup>48</sup>. However, as has been consistent in previous case law, the Court justifies withholding tax on the need to ensure effective collection of taxes and concludes such measure is appropriate and proportional<sup>49</sup>.

Regarding the first two-year exemption for domestic corporations not being applicable to cross-border transactions, the Court concluded it gave a cash-flow advantage to domestic corporations involved in such transactions that was not available to non-residents in the same transactions, thus constituting a restriction of free movement of capitals that was not justified by the Danish government on any grounds<sup>50</sup>.

Same conclusion was achieved on the fact that withholding agents had to pay higher default interest to tax authorities than in cases of a tax default in a pure domestic transaction, as it rendered domestic transactions in a better tax position in terms of tax risk and financing costs than a cross-border transaction<sup>51</sup>.

The last issue on European freedoms in relation to Interests, and perhaps the most interesting issue on these matters, was the Court concluded that not permitting deduction of interest expenses where a non-resident was subject to limited territorial taxation; while a resident corporation personally liable was able to deduct such cost, is in principle contrary to free movement of capital and prohibited by the TFEU<sup>52</sup>. However, following the Danish government arguments, the Court confirmed it was possible to deny such deduction on grounds of the overriding principle of prevention of abuse according to the requirements of such principle<sup>53</sup>.

---

<sup>45</sup> Ibidem, par. 142; par. 117, respectively.

<sup>46</sup> Ibidem, par. 143; par. 118, respectively.

<sup>47</sup> Ibidem, par. 155; par. 122-123, respectively

<sup>48</sup> Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-115/16, C-118/16, C-119/16 and 299/16, par. 159

<sup>49</sup> Ibidem, par. 160

<sup>50</sup> Ibidem, par. 161-166

<sup>51</sup> Ibidem, par. 170-171

<sup>52</sup> Ibidem, par. 175

<sup>53</sup> Ibidem, pars. 176-178

On the Parent-Subsidiary Directive, last question was whether EU Freedoms prohibited the difference in treatment resulting from denying Directive exemptions based on the prevention of abuse provided in art. 1(2) of the Directive; while similar domestic cases will be considered exempted under domestic participation exemption regimes. The Court ruled that, as such denial is based on the abusive character of the transactions as an overriding principle of general interest, treaty freedoms protection is not applicable<sup>54</sup>.

### 3.4.- Exempted entities and the IRD

The last important issue in the cases was if a specific type of Luxembourgish corporation, a SICAR (*Société d'investissement en capital à risque*), was able to obtain Directive exemptions in the source countries. A SICAR is not actually a specific private law type of corporation but a tax condition applicable to most taxable entities provided they meet certain requirements in line with the object of such type of corporations of serving as vehicles to invest in risk-bearing assets<sup>55</sup>. Thus, SICARs may take the legal form of public limited companies, private limited companies, partnerships limited by shares, cooperatives organised as public limited companies, and limited partnerships<sup>56</sup>. The main consequence of a corporation or partnership obtaining the status of SICAR is income derived from securities, even though the entity remains generally liable to tax<sup>57</sup>.

The concern raised by the Danish government was the source exemption under the IRD being applicable, and the SICAR being exempted in residence, no taxation at all arises. The SICAR in the case was a SCA and was resident of Luxembourg, thus fulfilling the requirements on type of entity and liability of the Directive<sup>58</sup>. The Court relied the issue on whether the subject to tax requirement of the Directive was fulfilled. In this regard, it concluded even though the SICAR was without any doubt generally liable to tax, the exemption on the income from securities made the Directive inapplicable, so the corporation cannot apply exemption at source under the IRD<sup>59</sup>. The Court interpreted the subject to tax requirement as effectively taxed according to the beneficial ownership definition in relation to permanent establishments, which requires subjection of the income; and because in the Court's view, the purpose of the Directive is to ensure interests are subject to tax once in a single Member State<sup>60</sup>.

---

<sup>54</sup> Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-116/16 and 117/16, par. 123

<sup>55</sup> See Loi du 15 juin 2004 relative à la Société d'investissement en capital à risque (SICAR), and subsequent amendments.

<sup>56</sup> Art. 1 (1) de la Loi du 15 juin 2004 relative à la Société d'investissement en capital à risque (SICAR)

<sup>57</sup> Art. 34 (2) Loi du 15 juin 2004 relative à la Société d'investissement en capital à risque (SICAR)

<sup>58</sup> The IRD applies if i) the recipient entity takes one of the forms listed in the IRD annex; ii) the entity is resident of a Member State and not resident in a third country according to a tax treaty; and iii) the corporation is subject to one of the taxes listed in the Directive. See art. 3 of the Interest and Royalties Directive.

<sup>59</sup> Judgment of the Court (Grand Chamber) of 26 February 2019 on cases C-115/16, C-118/16, C-119/16 and 299/16, par. 150-151

<sup>60</sup> *Ibidem*, 152

## 5.- Some final comments

The ruling of the utmost importance because it will certainly lead to reframe structuring of LBOs and holding corporations in the European Union. The ruling may be framed on the Court recent years inclination to counterbalance its early jurisprudence in Tax Law, where the prevailing criterion was to defend EU market and Freedoms, against the needs to prevent tax avoidance and guaranteeing Member States' tax collection. In addition, worldwide movements against tax avoidance or what has been called aggressive tax planning has furthered the move of the Court towards such position. But the consequences of this ruling remain unclear and leaves too many questions open. Has the Court gone too far or has just put the final cornerstone of a coherent EU subsystem balancing two sides of the same coin, i.e. EU Freedoms and prevention of abuse?

### 5.1.- The Court answers beyond the question

First, on the way the Court answers, it is not surprisingly they again go beyond the questions given by the referring Court and present the case in a different way. If this of course might be beyond their competences, it also gives the Court some margin to orientate the development of EU Law. And this case concerning holdings and LBOs was a unique chance the court could not leave. In addition, the confusing questions presented by the referring court justified such approach.

### 5.2.- Beneficial ownership is misinterpreted by the Court

Regarding the beneficial ownership definition, the Court reborn a debate that the OECD closed with a certain degree of success with the modifications included in the 2014 Commentary<sup>61</sup>. To this extent, it seems the court interprets beneficial ownership in the sense of economic allocation of income -for tax treaty purposes- as used for domestic allocation purposes in several countries<sup>62</sup>.

But all the Courts arguments seem to fail as they are full of logic jumps. The Court does not take into account the definition for permanent establishments, it does not properly analyse the commentary to the OECD Model on its last 2014 update but just refer to the conduit case, it uses translations formulated in the 60s with little investigation to derive a legal meaning, and what is worst, it derives an economic meaning from the definition of interest. If only the person holding the creditor position can receive an interest, an economic owner in several cases cannot be considered as receiving interest. And if the meaning is applicable to the person who can claim the interest, several formal owners can be considered beneficial owners. In this regard, the whole reasoning of the court is built up out of the thin air. And the definition is inconsistent with the only definition

---

<sup>61</sup> See supra note 3. Vallada argued the 2014 commentary was far from fully clarifying the issue but added some light. Felipe Vallada, 'Beneficial Ownership under Articles 10, 11 and 12 of the 2014 OECD Model Tax Convention', *The OECD-Model-Convention and its Update 2014*, vol 90 (Linde 2015). See also our work in Hernández González-Barreda (n 3).

<sup>62</sup> Such as recognized in sect. 39 (2) of the German General Tax Code (Abgabenordnung)

provided in the Directive itself in relation to permanent establishments -the permanent establishment is a fiction that, of course, cannot economically benefit from the income-, which relates beneficial ownership and allocation of income, as has been used in Common law countries familiar with the concept<sup>63</sup>.

More accurately and contrarily to the Court, Advocate General Kokkot in her Opinion regarded beneficial ownership in the Directive as the person who can claim under private law the interest, except if the person is acting as trustee -possibly hidden- on its own name but for the benefit of a third person<sup>64</sup>. In this sense, holding corporations can be regarded as beneficial owners as they hold the claim and there is no trustee relationship, plus they benefit from the spread between the interest rates. However, the Opinion leaves open the door for the referring court to define whether a hidden trust exists, and whether the risk is entirely or largely borne by the shareholders of the recipient corporation, case in which beneficial ownership could not be said to be held by the intermediary corporation<sup>65</sup>. Moreover, Advocate General Kokkot clearly denies validity to interpret beneficial ownership in the Directive according to the OECD Model or an international fiscal meaning, as allocation of taxing powers within the European Union should follow its own principles and, seemingly, adapt the term to the special characteristics of the Internal Market<sup>66</sup>. To my view, Advocate General Kokkot's interpretation on beneficial ownership was absolutely the correct one<sup>67</sup>. Only regarding the EU autonomous interpretation I may add this does not render the Commentary irrelevant but has to be adapted to the context.

But the Court's inconsistent outcome may lead States to increasingly deny Directive benefits on the grounds of the beneficial ownership clause as such economic benefit definition opens the door to its application to any case. Economic benefit or actual benefit has no reference upon which any allocation principle could be constructed as economic understanding has as infinite connections as real economic transactions could be, and almost everybody could be excluded from the condition of beneficial ownership

---

<sup>63</sup> Art. 1(5) of the IRD. Unless such definition being interpreted as an exception, what does not seem to me to be the case. See the chapter on the use of beneficial ownership in Domestic tax law in Hernández González-Barreda (n 3).

<sup>64</sup> Opinion of Advocate General Kokott delivered on 1 March 2018 on Case C-115/16, paras. 36-46.

<sup>65</sup> *Ibidem*. 42.

<sup>66</sup> *Ibid*, 55.

<sup>67</sup> Opinion of Advocate General Kokott delivered on 1 March 2018 on Case C-115/16, paras. 36-46. See the author's interpretation of beneficial ownership to include subjects that (i) may have or lack legal ownership and/or record ownership and/or title ownership but always enjoy all powers of control and enjoyment thereof; (ii) receive the income from the legal, record or title owner in their own right and not at the discretion of the legal, record or title owner; (iii) have the full or almost full power to decide on the asset and/or the income; (iv) hold an interest which is quantified in a concrete manner (even if in relation to an undefined credit), so their right can be quantified *ab initio* as soon as the income arises to the intermediary, and not abstractly or conditional; (v) are entitled to enforce the rights pertaining to their ownership against the intermediary and in some cases against third parties; (vi) the right may be derived from the contract or arrangement itself from which the recipient acquired the position in relation to the right from which the income is derived, or might be derived from a different one referred or connecting accrual to the contract upon which the income arises for the recipient. Hernández González-Barreda (n 3).

if interpreted in that sense<sup>68</sup>. Contrarily to the Court's ruling, the intention of the use of the wording in the directive was to limit the exemption to abovementioned specific cases in relation to which it was included, in line with the OECD, and connect it to the objective of the Directive, i.e. connect it to the allocation of the taxing power to a single state, but not to be an expansive general anti-avoidance rule or economic ownership rule<sup>69</sup>.

And what is probably worst, the court leaves unclear whether such unlimited tool can be applicable in a rule where it does not apply: the Parent Subsidiary Directive. In this point, again, the Opinion of Advocate General Kokkot stands differently, by saying that beneficial ownership is irrelevant to the PSD but what is relevant is whether economic and juridical multiple taxation arises<sup>70</sup>. The author does not fully agree with such view – international tax shall be a matter of allocation of taxing powers, and not of multiple taxation to exist. Otherwise we fall within the single taxation principle. But, at least, the Opinion tries to give a reason of such PSD difference.

And the last point regarding beneficial ownership Member States may be considered as obliged, or at least could be tempted, to interpret beneficial ownership in Tax Treaties in accordance with this ruling following the indirect effect or consistent interpretation principle. This is specially important for tax treaties between member states but also with third countries. In any case, the Court stating this interpretation is derived from the OECD Model, many countries may just said is an authoritative confirmation of what already was the correct interpretation.

### 5.3.- The overriding interest principle of abuse of law makes irrelevant inverse direct effect limits to Directive rules preventing avoidance

Regarding abuse of law, this judgment in the set of Danish Cases sets an actual leading case by going a step further from what was considered in Kofoed for harmonised Direct Tax Matters, and in Italmoda for VAT.

In Kofoed, the Court analysed whether the anti-avoidance rule laid down in the Merger Directive was applicable irrespective of its transposition to domestic law. The Court concluded such transposition did not need to be explicit but could derive from a domestic general anti-avoidance principle if the taxpayers may be clearly and precisely be aware of their obligations<sup>71</sup>. In addition, the indirect effect of EU Law would allow States to rely on a domestic anti-avoidance principle or rule to prevent application of

---

<sup>68</sup> A father who is obliged to pay alimony, or just a person who actually pays with part of his salary to the grocery shop owner, could be in an unrestricted interpretation be excluded from the condition of beneficial owner. Baker states if beneficial ownership is tested against who actually pays, non of us will be beneficial owners. Philip Baker, 'The Meaning of "Beneficial Owner" as Applied to Dividends under the OECD Model Tax Convention', *Taxation of Intercompany dividends under Tax Treaties and EU Law* (IBFD 2012) 93.

<sup>69</sup> Juan Lopez Rodriguez, 'Beneficial Ownership and EU Law', *Beneficial ownership: recent trends* (IBFD 2013).

<sup>70</sup> Opinion of Advocate General Kokott delivered on 1 March 2018 on case 116/16, par. 44.

<sup>71</sup> See Kofoed, C-321/05, Judgment of the Court (First Chamber) of 5 July 2007, par. 44.

the Directive<sup>72</sup>. However, the Court still required a domestic rule to exist in order to apply the Directive anti-avoidance principle, even though the rule did not necessarily need to be specifically derived from the transposition of the Directive.

In *Italmoda*, the Court went a step further and applied the anti-avoidance principle in a case where the taxpayer formally complied with the Directive requirements for a full exemption to claim input VAT refund in a fraudulent scheme<sup>73</sup>. In this case, the Court held that irrespective of the Sixth Directive not establishing an anti-avoidance principle, the exemption and refund was not applicable as far as the transactions did not comply with the conditions laid down in the Directive<sup>74</sup>. In other words, it was implicitly recognized that the application of VAT rules in a non-abusive manner was a requirement to apply them, so no domestic anti-avoidance rule was needed to deny the exemption and refund<sup>75</sup>.

Regarding this last case, some scholars considered that the application of an anti-avoidance principle was not dependent on the Directive containing such rule nor domestic rules existing for such purposes because VAT being a European Union own resource and being Member States obliged by primary law to protect EU interests, the principle of prevention of abuse was directly applicable<sup>76</sup>. Conversely, such principle was not applicable to Direct Tax matters, requiring anti-abuse principles to be included in the Directive and transposed, at least - according to Kofoed- in a general manner. The reason was States did not have the obligation to fight against tax avoidance but may opt for it<sup>77</sup>. The argument behind this last approach was inverse direct effect was considered as prohibited because the establishment of obligations directly by Directives opposed to legal certainty<sup>78</sup>. Only in VAT as part of the EU system, but not in direct tax matters, as part of Member States remaining competences, was inverse Direct effect accepted in a first step.

But here, the Danish series of cases made a step further and enable the anti-avoidance principle to be applicable in harmonised Direct Tax matters without conditioning it to the Directive to contain any rule nor to domestic order to transpond it. In other words, the ruling recognizes inverse Direct effect but not based on the relevant rules of the Directive themselves, but on the Directive being interpreted in the light of EU principles preventing abuse. Many points may be considered.

---

<sup>72</sup> *Ibidem*, par. 45.

<sup>73</sup> Schoenimport "*Italmoda*" Mariano Previti, C-131/13, Judgment of the Court (First Chamber), 18 December 2014

<sup>74</sup> *Ibidem*, 58.

<sup>75</sup> *Ibidem*, 59.

<sup>76</sup> Karoline Spies, 'The CJEU's Approach in Direct Tax and VAT Law: Consistencies and Divergences', *CJEU - Recent Developments in Value Added Tax 2015*, vol 99 (Linde 2016) 168–174.

<sup>77</sup> *ibid.*

<sup>78</sup> Lack of publicity of Directives at early stages of the European Communities, the inexistence of difference between regulations and Directives and legal certainty are the three widely accepted arguments against inverse direct effect. However, a more ordinary and political argument, such as the need to maintain the power of the then ECJ against possible uneven direct application of domestic Courts is possibly the actual reason, as the previous three cannot be regarded as absolutely conclusive given nowadays publicity and precise content of nowadays directives. See Derrick Wyatt and Alan Dashwood, *European Union Law* (Bloomsbury 2011) 260 et seq.

The first one, that prohibition of inverse Direct Effect can be overridden by the general provision of prevention of abuse<sup>79</sup>. As already held in *Mangold* in relation to equality in Labour Law, Primary Law principles are considered by the Court in certain cases able to override obligations laid in the Directive and its application directly able to be claimed by taxpayers and tax authorities against each other<sup>80</sup>. This may leave anti abuse provisions in Directives as irrelevant, what makes one wonder if the Parent-Subsidiary anti-avoidance clause included in 2015 or art. 6 of the Anti-Tax Avoidance Directive -in the latter case just for intra-EU cross-border cases- have become completely irrelevant. This opens tax authorities to review PSD cases that took place before 2015 and may also open countries without a domestic GAAR to review other treaty and EU cross-border transactions without resort to the ATAD. In addition, it may expand the possibilities of denying benefits provided by the Merger Directive in abusive cases that previously were interpreted in a limited sense.

In relation to these possibilities, it is also interesting the ruling states Member States must refuse to grant tax advantages derived from the PSD and the IRD, and not merely to have an option to establish measures against it<sup>81</sup>. This change, if turns to be a general move to the whole abuse of law doctrine in VAT and harmonised and non-harmonised direct tax matters, makes an incredible change as it establishes an obligation of Member States and derives direct effect and obligations on subjects that was considered as impossible so far<sup>82</sup>.

What is also extremely interesting is the ruling summarises all the CJEU jurisprudence on abuse of law, apparently presenting it as a single and coherent corpus derived from a single principle. The Court seemingly departs from *Kofoed* and *Italmoda*, latest developments, to apply the overall principle to the PSD and IRD. By doing so, it may be eliminating or eroding argued distinctions on the application of prevention to abuse in different cases such as harmonised v. non-harmonised matters or direct v. indirect taxation that scholars and even the court have justified. What remains unclear is the relation between the two arguments sustaining the application of the abuse principle to the Directive case. This is to say whether the denial of the exemption followed the objective conditions of the Directive not being fulfilled, even though formally complied, and those conditions being interpreted under their purpose as requiring such conditions to apply in substance. In this case, it was plainly the application of the Directive. An alternative would be the main reason to deny the exemption was the direct application of primary law principle against abuse. A third option may consider the Court outcome derives from the interaction of both. Probably the Court ruling derives from the Directive being interpreted through the glass of the principle leads to consider the objective conditions of it were not met.

---

<sup>79</sup> See supra note 78

<sup>80</sup> See the critics to the *Mangold* case, that could be applied, *mutatis mutandis*, to the Danish cases, even though *Italmoda* and the Danish Cases could be considered as confirming the court's position against such views Derrick Wyatt and Alan Dashwood, *European Union Law* (Bloomsbury 2011) 265 et seq.

<sup>81</sup> *Spies* (n 77) 168–174.

<sup>82</sup> *ibid.*

In any case, it seems the Court is moving towards a single general anti-avoidance rule/principle. If the General-Anti-Avoidance Rule of the Anti-Tax Avoidance Directive was already seen as a move towards a Pan-European GAAR even outside corporate taxation, this movement of the CJEU may be seen as another impulse towards it, and now even including harmonised and indirect taxes<sup>83</sup>.

#### 5.4.- The first comprehensive list on indicia of abuse

And if this was not enough to render this Case as an absolute leading case that will be subject to discussions for years, and probably will end up as a milestone, the Court for the first time provides a comprehensive joint list of characteristics to analyse in order to conclude whether an abusive transaction is at stake. Even though previous case law presented indicia of abuse, references were to specific issues and this is the first time the author sees a comprehensive and extensive list of characteristics<sup>84</sup>. And leaving aside the Court is clearly guiding the referring court, what may again exceed their competences, it is unclear if such references are just for LBOs and conduit cases, or if they may apply to other cases.

What the author misses is a distinction between the abusive character of the corporations, and the abusive character of the arrangements, especially regarding intragroup loans. Because if the corporation is not valid, then the arrangement has to be reallocated; while if the former is valid, still is possible the arrangements are abusive. In other words, to put the assessment of all elements altogether leads tax authorities and courts to consider the abusive character of everything at the same time, what often leads to a smell test. This does not mean that the overall assessment of all the transactions together are irrelevant. Contrarily, the assessment of, for instance, the validity of the corporation, has to be done considering the complete picture. But the abusive character of the corporation can only be asserted in relation to it, and not to the whole transaction. Under such approach could be possible also to regard arrangements as abusive, or both corporations and arrangements, but assessing each one on their own step even though taking into account the whole set of transactions.

If the author is right and the CJEU is with this case leading abuse of law jurisprudence to a single set of principles for all EU rules, legal certainty will be improved without any doubt and an incredible step has been set in EU Tax Law. Anti-avoidance tests application in member states will increase their consistency within and between Members States. This would make the freedoms-taxes binomial complete and rebalanced as until now the EU lack of direct tax competences as opposed to full competences in establishing and defending an internal market free of barriers had been

---

<sup>83</sup> Zornoza, Baez, *The GAAR in the ATAD*; in *Combating Tax Avoidance in the EU*, Kluwer, 2019.

<sup>84</sup> Such as those summarised by Spies: the company not carrying a business activity, the Company not holding substance, companies having same directors or shareholders, or the quantification of the tax savings. See *Leur-Bloem*, C-28/95, Judgment of the Court of 17 July 1997, par. 15 and 42; *Cadbury-Schweppes*, C-196/04, Judgment of the Court (Grand Chamber) of 12 September 2006, pars. 67-68; *Foggia*, 126/10, Judgment of the Court (Fifth Chamber) of 10 November 2011; *Kofoed*, C-321/05, Judgment of the Court (First Chamber) of 5 July 2007, pars. 42, 47.



leading to an absolute disbalance of the EU legal tax system<sup>85</sup>. Being true developments were made since Cadbury Schweppes, the path until now has been full of gaps and inconsistencies, so the ruling could be an actual advance, though pending future confirmation and specification of the content and limits of this single set.

However, the different threshold of resistance towards tax avoidance derived from different legal backgrounds, as well as different economies, may lead to a divergent application even if we have a single principle, leaving the door opened to tax planning based on the application of the rules and not on the enacted rules, what would maintain the disbalance between freedoms and taxes. In any case, to have a single set will limit on one of the sides the divergences that now derive from different applications in different countries, but also from the differences in the Court's Case Law.

### 5.5.- The single tax principle and the IRD and PSD

And just in case the reader thought this was enough, the introduction of the principle of single taxation upon which the IRD or PSD exemption may be denied if the income is exempted in the residence country could also be a revolutionary step in EU Tax Law. Following BEPS rationale of single taxation and prevention of double non-taxation, the court interprets the subject to tax test as effective taxation, opposed to the general view adopted for decades in international taxation that international allocation instruments such as tax treaties and Directives work on general liability of the subject, and in some cases subjection of the specific income, but almost never effective taxation<sup>86</sup>. Specifically in relation to the Directive, it was clear subjection to tax was meant to be general liability of the subject, but not the income being subject to tax nor being effectively taxed<sup>87</sup>. This change actually makes a whole difference in EU Tax Law. And being doubtful if this is the correct interpretation of the Directive as based on a specific definition of beneficial owner to Pes that requires liability of the income in general, but not effective taxation, as well as on a general purpose of the Directive, it is unclear the effect this approach will have as it will limit ability of states to establish tax incentives.

Are the Danish Cases rulings a milestone that will change European Union Tax law, or just a deviated case consequence of the obvious shopping nature of the corporations involved in the cases? We have to look forward to forthcoming cases. What is clear for the moment is the beneficial ownership has come again into play, that the single taxation principle has fully entered the European Union, and that the abuse of law principle has expanded its scope of application, but seems to be gaining consistence.

The immediate result until the Court clarifies the issues raised in this paper is empty holdings and conduit companies will be more than ever under the spotlight of European tax authorities that will likely include them in their tax inspection plans. On the other

---

<sup>85</sup> Pablo A Hernández González-Barreda, 'On the European Way to a Financial Transaction Tax under Enhanced Cooperation: Multi-Speed Europe or Shortcut' (2013) 41 Intertax 208, 229.

<sup>86</sup> Lang (n 7).

<sup>87</sup> Argument based on the Commission proposal to include a subject to tax test on the income because the existent wording did not require it. Otherwise such proposal would have been unnecessary. See Lopez Rodriguez (n 70).

side, tax advisors should carefully review their recent LBOs and reorganisations structures, and plan forthcoming ones considering the risks derived from Danish set of cases judgement.