Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

26 February 2019 (*)

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

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

N Luxembourg 1 (C?115/16),

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

C Danmark I (C?119/16),

Z Denmark ApS (C?299/16)

v

Skatteministeriet,

THE COURT (Grand Chamber),

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

Advocate General: J. Kokott,

Registrar: R. ?ere?, Administrator,

having regard to the written procedure and further to the hearing on 10 October 2017, after considering the observations submitted on behalf of:

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

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

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

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

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

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

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

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

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

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

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

gives the following

Judgment

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

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

Legal context

OECD Model Tax Convention

3 On 30 July 1963 the Council of the Organisation for Economic Cooperation and Development (OECD) adopted a recommendation concerning the avoidance of double taxation and called on the governments of the member countries, when concluding or revising bilateral conventions, to conform to a ‘model convention for the avoidance of double taxation with respect to taxes on income and capital’ that had been drawn up by the Fiscal Committee of the OECD and

was annexed to that recommendation ('the OECD Model Tax Convention'). That model tax convention is re-examined and amended regularly. It is the subject of commentaries approved by the OECD Council.

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

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

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

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

6 When the commentaries were revised in 2003, comments were added concerning 'conduit companies', that is so say, companies which, though the formal owners of the income, have, in practice, only very narrow powers, rendering them mere fiduciaries or administrators acting on account of the interested parties, so that they are not to be regarded as the beneficial owners of that income. Paragraph 8 of the commentary on Article 11, in the revised version of 2003, states, in particular, that 'the term "beneficial owner" is not used in a narrow technical sense, rather, it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance'. Paragraph 8.1 of the revised version of 2003 states that 'it would be … inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned' and that 'a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties'.

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

Directive 2003/49

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

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

State.

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

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

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

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

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

9 Article 1 of Directive 2003/49 provides:

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

...

4. A company of a Member State shall be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person.

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

...

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

...

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

beneficial owner, of that interest or those royalties.

...

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

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

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

…

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

10 The term used in Article 1(1) of Directive 2003/49 is, depending on the language version, the 'beneficiary'/'recipient' (in Bulgarian (*????????????*), French (*bénéficiaire*), Latvian (*benefici?rs*) and Romanian (*beneficiarul*)), the 'beneficial owner'/'actual beneficiary' (in Spanish (*beneficiario efectivo*), Czech (*skute?ný vlastník*), Estonian (*tulusaaja*), English (*beneficial owner*), Italian (*beneficiario effettivo*), Lithuanian (*tikrasis savininkas*), Maltese (*sid benefi?jarju*), Portuguese (*beneficiário efectivo*) and Finnish (*tosiasiallinen edunsaaja*)), the 'owner'/'person entitled to use' (in German (*der Nutzungsberechtigte*), Danish (*retmæssige ejer*), Greek (*? ?????????*), Croat (*ovlašteni korisnik*), Hungarian (*haszonhúzó*), Polish (*w?a?ciciel*), Slovak (*vlastník požitkov*), Slovenian (*upravi?eni lastnik*) and Swedish (*den som har rätt till*)), or the 'person entitled in the end' (in Dutch (*de uiteindel?k gerechtigde*)).

11 Article 2 of Directive 2003/49 provides:

'For the purposes of this Directive:

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

…'

12 Article 3 of Directive 2003/49 provides:

'For the purposes of this Directive:

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

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

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

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

...

— selskabsskat in Denmark,

...

— impôt sur le revenu des collectivités in Luxembourg,

...

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

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

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

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

Holdings must involve only companies resident in Community territory.

...’

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

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

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

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

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

...’

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

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

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

Double taxation conventions

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

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

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

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

Danish law

Taxation of interest

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

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

...

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

Withholding tax

20 If, by virtue of Paragraph 2(1)(d) of the Law on corporation tax, there is a limited tax liability in respect of interest income arising in Denmark, the Danish payer of the interest has to withhold

the tax at source pursuant to Paragraph 65 D of the kildeskattelov (Law on tax at source). The interest payer is liable to the State for payment of those sums of withholding tax.

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

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

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

Law applicable to fraud and abuse

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

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

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

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

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

28 In order to enjoy the tax advantages provided for by Directive 2003/49, the entity that receives the interest must meet the conditions that the directive lays down. However, as the Danish Government states in its observations, groups of companies not satisfying those conditions

may in some cases create, between the company which pays the interest and the entity which is intended actually to have the use of it, one or more artificial companies meeting the formal conditions of the directive. The referring courts' questions concerning abuse of rights and the concept of 'beneficial owner' relate to such financial constructions.

29 The facts as set out by the referring courts and illustrated, in the orders for reference, by a number of diagrams of the structure of the company groups concerned are particularly complex and detailed. Only the matters necessary for the answers to be given to the questions referred for a preliminary ruling will be noted.

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

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

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

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

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

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

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

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

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

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

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

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

41 The referring court states that in 2011 SKAT issued a notice of assessment in respect of interest for the years 2006 to 2008, in an amount totalling 925 764 961 Danish krone (DKK) (roughly EUR 124 million). SKAT took the view that C Luxembourg and A Luxembourg Holding were not the beneficial owners of the interest, but operated as mere conduits, and that the interest was transferred from the Danish part of the group to the private equity funds through those two Luxembourg companies. SKAT drew the conclusion that the applicant in the main proceedings was subject to the obligation to withhold at source tax on the interest paid and recorded and that it was liable for payment of the withholding tax that had not been levied.

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) Is it abuse etc. under Directive 2003/49 if, in the Member State where the interest payer is

resident, tax deductions are allowed for interest, whilst interest in the Member State where the interest recipient is resident is not taxed?

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

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

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

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

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

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

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

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

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

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

49 According to the order for reference, the portfolio of X SCA, SICAR consisted of a 100%

holding in the capital of X Sweden Holding AB established in Sweden and a loan granted to that company. Apart from that holding and loan, X SCA, SICAR did not engage in any activity.

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

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

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

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

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

55 In its decision of 13 December 2010, SKAT took the view that X Sweden, X Sweden Holding and X SCA, SICAR did not have the status of beneficial owners of the interest, within the meaning of Directive 2003/49 and of the Luxembourg-Denmark Tax Convention and the Nordic Tax Convention, and that the beneficial owners of the interest were the owners of X SCA, SICAR. According to the Ministry of Taxation, X SCA, SICAR is incorporated as a form of company that is not included in the list, referred to in Article 3(a)(i) of Directive 2003/49, of companies falling within the scope of that directive, and moreover does not satisfy the condition laid down in Article 3(a)(iii) that the company must not be exempt from tax. It is exempt from tax on income in the form of interest, profits and dividends. In any event, X SCA, SICAR cannot be the beneficial owner of the interest since it is transparent under Danish law. In that context, the Ministry of Taxation took the view that X Denmark had not produced documentation showing that a majority of the investors in the private equity funds that own X SCA, SICAR are resident for tax purposes in other countries of the European Union or in countries with which the Kingdom of Denmark has concluded a double taxation convention. SKAT accordingly considered that X Denmark should have withheld tax at

source on the interest paid to X Sweden.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(8) If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems the parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read

in conjunction with Article 48 EC (in the alternative Article 56 EC), viewed separately or as a whole, preclude legislation under which:

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

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

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

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

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

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

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

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

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

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

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

Islands].

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

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

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

None of the companies set up in the restructuring carried out activities other than holding-company activities and for that reason their foreseeable revenue was solely revenue inherently linked to the holding-company activity. When the debt relationships linked to the restructuring were established, it was therefore a necessary presupposition, if the debtor companies were to be able to meet their obligations relating thereto, that they received funds from other companies in the group. That had to be a precondition from the beginning.

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

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

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

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

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

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

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

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

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

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

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

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

(4) Is a Member State which does not wish to recognise that a company in another Member

State is the beneficial owner of interest, and claims that the company in the other Member State is an “artificial conduit company”, bound under Directive 2003/49 or Article 10 EC to state whom the Member State in that case deems to be the beneficial owner?

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

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

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

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

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

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

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

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

66 A Fund consists of five funds, four of which were set up in the form of limited partnerships in Jersey, that is to say, in a tax-transparent form according to Danish tax law. The final fund, A Fund (No. 5) Limited, Jersey, takes the form of a non-tax-transparent company and owns roughly 0.5% of A Fund. According to the information provided by the referring court, the investors in the first four funds are resident for tax purposes in a large number of countries, inside or outside the European Union.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

requires the company liable for withholding the tax at source (subsidiary) to pay default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims (including, inter alia, interest income) lodged against a company resident in the same Member State?

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

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

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

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

Procedure before the Court

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

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

Consideration of the questions referred

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

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

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

The concept of 'beneficial owner of the interest'

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

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

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

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

88 The concept of 'beneficial owner of the interest', within the meaning of Directive 2003/49, must therefore be interpreted as designating an entity which actually benefits from the interest that is paid to it. Article 1(4) of the directive confirms that reference to economic reality by stating that a company of a Member State is to be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person.

89 As is apparent from paragraph 10 above, whilst some language versions of Article 1(1) of Directive 2003/49, such as the Bulgarian, French, Latvian and Romanian versions, use the term 'beneficiary'/'recipient', the other versions have recourse to expressions such as 'beneficial owner'/'actual beneficiary' (the Spanish, Czech, Estonian, English, Italian, Lithuanian, Maltese, Portuguese and Finnish versions), 'owner'/'person entitled to use' (the German, Danish, Greek, Croat, Hungarian, Polish, Slovak, Slovenian and Swedish versions) or 'person entitled in the end' (the Dutch version). The use of those various expressions underscores that the term 'beneficial

owner’ concerns not a formally identified recipient but rather the entity which benefits economically from the interest received and accordingly has the power freely to determine the use to which it is put. In accordance with what has been recalled in paragraph 86above, only an entity established in the European Union can be a beneficial owner of interest, capable of being entitled to the exemption provided for in Article 1(1) of Directive 2003/49.

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

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

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

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

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

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

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

96 It is settled case-law that there is, in EU law, a general legal principle that EU law cannot be relied on for abusive or fraudulent ends (judgments of 9 March 1999, *Centros*, C?212/97, EU:C:1999:126, paragraph 24 and the case-law cited; of 21 February 2006, *Halifax and Others*, C?255/02, EU:C:2006:121, paragraph 68; of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*

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

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

98 It thus follows from that principle that a Member State must refuse to grant the benefit of the provisions of EU law where they are relied upon not with a view to achieving the objectives of those provisions but with the aim of benefiting from an advantage in EU law although the conditions for benefiting from that advantage are fulfilled only formally.

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

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

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

102 It follows that the general principle that abusive practices are prohibited must be relied on against a person where that person invokes certain rules of EU law providing for an advantage in a manner which is not consistent with the objectives of those rules. The Court has thus held that that

principle may be relied on against a taxable person in order to refuse him, inter alia, the right to exemption from VAT, even in the absence of provisions of national law providing for such refusal (see, to that effect, judgments of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C?131/13, C?163/13 and C?164/13, EU:C:2014:2455, paragraph 62, and of 22 November 2017, *Cussens and Others*, C?251/16, EU:C:2017:881, paragraph 33).

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

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

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

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

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

108 Furthermore, the right of taxpayers to take advantage of competition engaged in by the Member States on account of the lack of harmonisation of taxation of income cannot be raised against the application of the general principle that abusive practices are prohibited. In that regard, it should be noted that Directive 2003/49 has the objective of harmonisation in respect of direct taxation in order to enable economic operators to benefit from the internal market, by abolishing

double taxation, and that, more specifically, recital 6 of the directive states that it is necessary not to preclude Member States from taking appropriate measures to combat fraud or abuse.

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

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

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

112 The applicants in the main proceedings rely on the judgment of 5 July 2007, *Kofoed* (C?321/05, EU:C:2007:408) — which concerned entitlement to an exemption provided for by Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1) — in order to contend that, on account of Article 5(1) of Directive 2003/49, entitlement to the advantages provided for by that directive can be refused by the Member State concerned only where the national legislation contains a distinct and specific legal basis in that regard.

113 However, that line of argument cannot be upheld.

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

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

116 It was on the basis of those considerations that the Court invited the referring court to ascertain whether there was, in Danish law, a provision or general principle prohibiting abuse of rights or other provisions on tax evasion or tax avoidance which might be interpreted in accordance with the provision of Directive 90/434 under which, in essence, a Member State may refuse the right of deduction provided for by that directive where a transaction is essentially

directed at such evasion or avoidance, and, if so, then to determine whether the conditions for the application of those national provisions were satisfied in the main proceedings (see, to that effect, judgment of 5 July 2007, *Kofoed*, C?321/05, EU:C:2007:408, paragraphs 46 and 47).

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

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

119 Accordingly, since, as has been noted in paragraph 96 above, abusive or fraudulent acts cannot found a right provided for by EU law, the refusal of an advantage under a directive, in this instance Directive 2003/49, does not amount to imposing an obligation on the individual concerned under that directive, but is merely the consequence of the finding that the objective conditions required for obtaining the advantage sought, prescribed by the directive as regards that right, are met only formally (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C?131/13, C?163/13 and C?164/13, EU:C:2014:2455, paragraph 57 and the case-law cited).

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

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

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

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

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

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

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

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

124 As is clear from the Court’s case-law, proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it (judgments of 14 December 2000, *Emsland-Stärke*, C?110/99, EU:C:2000:695, paragraphs 52 and 53, and of 12 March 2014, *O. and B.*, C?456/12, EU:C:2014:135, paragraph 58).

125 Examination of a set of facts is therefore needed to establish whether the constituent elements of an abusive practice are present, and in particular whether economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting from an improper advantage (see, to that effect, judgments of 20 June 2013, *Newey*, C?653/11, EU:C:2013:409, paragraphs 47 to 49; of 13 March 2014, *SICES and Others*, C?155/13, EU:C:2014:145, paragraph 33; and of 14 April 2016, *Cervati and Malvi*, C?131/14, EU:C:2016:255, paragraph 47).

126 It is not for the Court to assess the facts in the main proceedings. However, when giving preliminary rulings, the Court may, if appropriate, specify indicia in order to guide national courts in the assessment of the cases that they have to decide. In the main proceedings, whilst the presence of a number of such indications could lead to the conclusion that there is an abuse of rights, it is nevertheless for the referring courts to establish whether those indications are objective and consistent, and whether the applicants in the main proceedings have had the opportunity to adduce evidence to the contrary.

127 A group of companies may be regarded as being an artificial arrangement where it is not set up for reasons that reflect economic reality, its structure is purely one of form and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law. That is so inter alia where, on account of a conduit entity

interposed in the structure of the group between the company that pays interest and the entity which is its beneficial owner, payment of the tax on the interest is avoided.

128 Thus, it is an indication of the existence of an arrangement intended to obtain improper entitlement to the exemption provided for in Article 1(1) of Directive 2003/49 that all or almost all of the aforesaid interest is, very soon after its receipt, passed on by the company that has received it to entities which do not fulfil the conditions for the application of Directive 2003/49, either because those entities are not established in any Member State, or because they are not incorporated in one of the forms referred to in the annex to the directive, or because they are not subject to one of the taxes listed in Article 3(a)(iii) of the directive without being exempt, or because they do not have the status of associated company within the meaning of Article 3(b) of the directive.

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

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

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

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

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

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

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

136 It should be added that, whilst taxation must correspond to economic reality, the existence of a double taxation convention is not, as such, capable of establishing that a payment was really made to recipients resident in the third State with which that convention has been concluded. If the company owing the interest wishes to benefit from the advantages of such a convention, it is open to it to pay the interest directly to the entities that are resident for tax purposes in a State which has concluded a double taxation convention with the source State.

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

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

139 In the light of all those matters, the answer to Question 1(d) to (f) in Cases C?115/16, C?118/16 and C?119/16, Question 1(d) and (e) in Case C?299/16 and Question 4 in Cases C?115/16 and C?118/16 is that proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans. The fact that the Member State where the interest arises has concluded a convention with the third State in which the company that is the beneficial owner of the interest is resident has no bearing on any finding of an abuse of rights.

The burden of proving the abuse of rights

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

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

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

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

144 Furthermore, even if the potential beneficial owners are known, it is not necessarily established which of them are or will be the actual beneficial owners. Thus, where a company receiving interest has a parent company, which itself has a parent company, the tax authorities and courts of the source Member State are, in all probability, unable to determine which of those two parent companies is or will be the beneficial owner of the interest. Moreover, the allocation of that interest may have been decided upon after the tax authority's findings relating to the conduit company.

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

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

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

147 That having been explained, it should be noted, as the Commission and several of the governments that submitted observations have done, that under Article 3(a) of Directive 2003/49

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

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

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

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

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

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

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

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

154 By Questions 6 and 7 in Case C?115/16, Questions 7 and 8 in Case C?118/16, Questions 5 and 6 in Case C?119/16 and Questions 5 to 7 in Case C?299/16, the referring courts seek to ascertain, should the system, laid down in Article 1 of Directive 2003/49, of exemption from withholding tax on interest paid by a company resident in a Member State to a company resident

in another Member State not be applicable, whether Articles 49 and 54 TFEU or Article 63 TFEU must be interpreted as precluding various aspects of the legislation of the first Member State, such as that at issue in the main proceedings, relating to the taxation of that interest.

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

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

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

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

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

160 However, the need to ensure the effective collection of tax constitutes an overriding reason in the public interest capable of justifying such a restriction. The procedure for withholding tax at source and the liability rules supporting it constitute a legitimate and appropriate means of ensuring tax treatment of the income of a company resident outside the State of taxation. Nor does

such a measure go beyond what is necessary for the purpose of attaining that objective (see, to that effect, judgments of 18 October 2012, *X*, C?498/10, EU:C:2012:635, paragraphs 39 and 43 to 52, and of 13 July 2016, *Brisal and KBC Finance Ireland*, C?18/15, EU:C:2016:549, paragraphs 21 and 22).

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

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

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

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

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

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

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

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

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

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

171 As the Commission has observed, such a restriction cannot be justified by the fact, put forward by the Danish Government, that the taxation of interest relating to a loan obtained from a

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

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

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

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

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

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

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

178 On the other hand, in the absence of such a finding, the restriction referred to in paragraph 175 above cannot be justified by the considerations put forward by the Danish Government, so that it must be considered to be contrary to Article 63 TFEU. Interest expenditure or intragroup transfers are also liable to result in the reduction or even cancelling out of the tax payable when a resident company receives interest from another resident company.

179 It follows that Article 63 TFEU must be interpreted as precluding, except where fraud or abuse is found, national legislation providing that, where a resident company is subject to an

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

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

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

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

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

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

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

Costs

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

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

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

2. Article 1(1) of Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, read in conjunction with Article 1(4) thereof, must be interpreted as meaning that the exemption of interest payments from any taxes that is provided for by it is restricted solely to the beneficial owners of such interest, that is to say, the entities which actually benefit from that interest economically and accordingly have the power freely to determine the use to which it is put.

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

3. Proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans. The fact that the Member State where the interest arises has concluded a convention with the third State in which the company that is the beneficial owner of the interest is resident has no bearing on any finding of an abuse of rights.

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

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

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

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

– **not precluding, in principle, national legislation under which a resident company which pays interest to a non-resident company is required to withhold tax on that interest at source whilst such an obligation is not owed by that resident company when the company which receives the interest is also a resident company, but as precluding national legislation that prescribes such withholding of tax at source if interest is paid by a resident**

company to a non-resident company whilst a resident company that receives interest from another resident company is not subject to the obligation to make an advance payment of corporation tax during the first two tax years and is therefore not required to pay corporation tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source;

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

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

[Signatures]

* Language of the case: Danish.