Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

26 February 2019 (*)

Table of contents

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

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

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

Skatteministeriet

v

T Danmark (C?116/16),

Y Denmark Aps (C?117/16),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, J.-C. Bonichot, A. Arabadjiev, T. von Danwitz, C. Toader and F. Biltgen, Presidents of Chambers, A. Rosas (Rapporteur), M. 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:

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

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

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

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

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

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

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

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

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

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

gives the following

Judgment

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

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

Legal context

OECD Model Tax Convention

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

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

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

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

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

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

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

6 When the commentaries were revised in 2003, comments were added concerning 'conduit companies', that is so say, companies which, though the formal owners of the income, have, in practice, only very narrow powers, rendering them mere fiduciaries or administrators acting on account of the interested parties, so that they are not to be regarded as the beneficial owners of that income. Paragraph 12 of the commentary on Article 10, in the revised version of 2003, states, in particular, that 'the term "beneficial owner" is not used in a narrow technical sense, rather, it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance'. Paragraph 12.1 of the revised version of 2003 states that 'it would be … inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned' and that 'a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties'.

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

Directive 90/435

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

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

...

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

9 Article 1 of Directive 90/435 provides:

‘1. Each Member State shall apply this Directive:

...

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

– ...

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

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

11 Article 3 of Directive 90/435 states:

‘1. For the purposes of applying this Directive:

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

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

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

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

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

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

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

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

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

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

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

Double taxation conventions

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

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

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

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

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

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

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

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

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

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

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

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

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

Danish law

Taxation of dividends

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

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

...

(c) receive dividends falling within Paragraph 16 A(1) and (2) of the Law on the assessment of State income tax ... The tax liability shall not extend to dividends on shares of subsidiaries (see Paragraph 4 A of the Law on the taxation of capital gains) where taxation of the dividends paid by the subsidiary is waived or reduced under the provisions of Directive [90/435] or a tax convention concluded with the Faroe Islands, Greenland or the State where that parent company is resident. The tax liability shall also not extend to dividends on shares of affiliated companies (see Paragraph 4 B of the Law on the taxation of capital gains) which are not shares of subsidiaries when the recipient company which is the member of a group is resident in a Member State of the [European Union/European Economic Area (EEA)] and taxation of the dividends would have been waived or reduced pursuant to the provisions of Directive [90/435] or the tax convention concluded with the State in question if shares of subsidiaries had been involved. The tax liability shall also not extend to dividends received by owners of holdings in parent companies which are included in the list of companies referred to in Article 2(1)(a) of Directive [90/435] but which are regarded, for the purpose of their taxation in Denmark, as transparent entities. This provision is subject to the condition that the owner of a holding in the company is not resident in Denmark.

Withholding tax

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

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

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

…

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

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

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

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

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

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

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

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

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

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

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

Law applicable to fraud and abuse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) If it is assumed in the case:

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

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

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

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

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

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

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

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

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

90/435 or Article 4(3) TEU to state whom the Member State in that case deems to be the beneficial owner?

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

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

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

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

(10) In circumstances where:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

57 On 13 October 2006 the general meeting of the members of Y Denmark approved the payment to Y Cyprus of a dividend in the sum of DKK 92 012 000 (roughly EUR 12.3 million) in respect of the 2005-2006 financial year. Y Denmark stated that that sum formed part (as a dividend to be received) of the total dividend of USD 550 million (roughly EUR 450.82 million) that Y Bermuda had distributed to Y USA on 3 April 2006, a fact which the Ministry of Taxation contested in the absence of supporting documents. Y Denmark transferred DKK 92 012 000 (roughly EUR 12.3 million) to Y Cyprus in 2010.

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

). Directive 90/435 does not lay down an equivalent condition.

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

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

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

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

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

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

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

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

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

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

(3) If Question 2(a) is answered in the affirmative, is it then for the national courts to define what is included in the concept “beneficial owner”, or should the concept, in the application of

Directive 90/435, be interpreted as meaning that a specifically EU law significance should be attached to the concept which is subject to review by the Court of Justice?

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

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

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

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

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

(5) If it is assumed in the case:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(10) In circumstances where:

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

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

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

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

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

Procedure before the Court

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

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

Consideration of the questions referred

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

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

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

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

70 It is settled case-law that there is, in EU law, a general legal principle that EU law cannot be

relied on for abusive or fraudulent ends (judgments of 9 March 1999, *Centros*, C?212/97, EU:C:1999:126, paragraph 24 and the case-law cited; of 21 February 2006, *Halifax and Others*, C?255/02, EU:C:2006:121, paragraph 68; of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C?196/04, EU:C:2006:544, paragraph 35; of 22 November 2017, *Cussens and Others*, C?251/16, EU:C:2017:881, paragraph 27; and of 11 July 2018, *Commission* v *Belgium*, C?356/15, EU:C:2018:555, paragraph 99).

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

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

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

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

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

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

77 Whilst Article 1(2) of Directive 90/435 provides that the directive is not to preclude application of the domestic or agreement-based provisions required for the prevention of fraud or abuse, that provision cannot be interpreted as excluding the application of the general principle of EU law, noted in paragraphs 70 to 72 above, that abusive practices are prohibited. The transactions alleged by SKAT to constitute an abuse of rights fall within the scope of EU law (see, to that effect, judgment of 22 December 2010, *Weald Leasing*, C?103/09, EU:C:2010:804, paragraph 42) and could prove incompatible with the objective pursued by that directive.

78 As is clear from its first and third recitals, Directive 90/435 has the aim of facilitating the grouping together of companies at EU level by introducing tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level.

79 To permit the setting up of financial arrangements whose sole aim is to benefit from the tax advantages resulting from the application of Directive 90/435 would not be consistent with such objectives and, on the contrary, would undermine the effective functioning of the internal market by distorting the conditions of competition. As the Advocate General has, in essence, observed in point 51 of her Opinion in Case C?116/16, that would also be the case even if the transactions at issue do not exclusively pursue such an aim, as the Court has held that the principle that abusive practices are prohibited applies, in tax matters, where the accrual of a tax advantage constitutes the essential aim of the transactions at issue (see, to that effect, judgments of 21 February 2008, *Part Service*, C?425/06, EU:C:2008:108, paragraph 45, and of 22 November 2017, *Cussens and Others*, C?251/16, EU:C:2017:881, paragraph 53).

80 Furthermore, the right of taxpayers to take advantage of competition engaged in by the Member States on account of the lack of harmonisation of taxation of income cannot be raised against the application of the general principle that abusive practices are prohibited. In that regard, it should be noted that Directive 90/435 had the objective of harmonisation in respect of direct taxation by the introduction of tax rules which were neutral from the point of view of competition and that it did not seek to preclude Member States from taking the necessary measures to combat fraud or abuse.

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

82 It is apparent from these factors that it is incumbent upon the national authorities and courts to refuse to grant entitlement to the rights provided for by Directive 90/435 where they are invoked for fraudulent or abusive ends.

83 Thus, in the light of the general principle of EU law that abusive practices are prohibited and of the need to ensure observance of that principle when EU law is implemented, the absence of domestic or agreement-based anti-abuse provisions does not affect the national authorities' obligation to refuse to grant entitlement to rights provided for by Directive 90/435 where they are invoked for fraudulent or abusive ends.

84 The defendants in the main proceedings rely on the judgment of 5 July 2007, *Kofoed* (C?321/05, EU:C:2007:408) — which concerned entitlement to an exemption provided for by Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1) — in order to contend that, on account of Article 1(2) of Directive 90/435, entitlement to the advantages provided for by that directive can be refused by the Member State concerned only where the national legislation contains a distinct and specific legal basis in that regard.

85 However, that line of argument cannot be upheld.

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

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

88 It was on the basis of those considerations that the Court invited the referring court to ascertain whether there was, in Danish law, a provision or general principle prohibiting abuse of rights or other provisions on tax evasion or tax avoidance which might be interpreted in accordance with the provision of Directive 90/434 under which, in essence, a Member State may refuse the right of deduction provided for by that directive where a transaction is essentially directed at such evasion or avoidance, and, if so, then to determine whether the conditions for the application of those national provisions were satisfied in the main proceedings (see, to that effect,

judgment of 5 July 2007, *Kofoed*, C?321/05, EU:C:2007:408, paragraphs 46 and 47).

89 Nevertheless, even if it were to transpire, in the main actions, that national law does not contain rules which may be interpreted in compliance with Article 1(2) of Directive 90/435, this — notwithstanding what the Court held in the judgment of 5 July 2007, *Kofoed* (C?321/05, EU:C:2007:408) — could not be taken to mean that the national authorities and courts would be prevented from refusing to grant the advantage derived from the right of exemption provided for in Article 5 of the directive in the event of fraud or abuse of rights (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C?131/13, C?163/13 and C?164/13, EU:C:2014:2455, paragraph 54).

90 A refusal given to a taxpayer in such circumstances is not covered by the situation referred to in paragraph 86 above since it reflects the general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C?131/13, C?163/13 and C?164/13, EU:C:2014:2455, paragraphs 55 and 56 and the case-law cited).

91 Accordingly, since, as has been noted in paragraph 70 above, abusive or fraudulent acts cannot found a right provided for by EU law, the refusal of an advantage under a directive, such as Directive 90/435, does not amount to imposing an obligation on the individual concerned under that directive, but is merely the consequence of the finding that the objective conditions required for obtaining the advantage sought, prescribed by the directive as regards that right, are met only formally (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C?131/13, C?163/13 and C?164/13, EU:C:2014:2455, paragraph 57 and the case-law cited).

92 In such circumstances, the Member States must, therefore, refuse to grant the advantage resulting from Directive 90/435, in accordance with the general principle that abusive practices are prohibited, under which EU law cannot cover abusive practices of economic operators (see, to that effect, judgment of 11 July 2018, *Commission* v *Belgium*, C?356/15, EU:C:2018:555, paragraph 99 and the case-law cited).

93 Having regard to the finding made in paragraph 72 above, there is no need to answer Question 2 asked by the referring court in the main actions, relating in essence to whether a provision of a bilateral double taxation convention that refers to the concept of 'beneficial owner' can constitute a legal basis for combating fraudulent and abusive practices in the context of Directive 90/435.

94 Accordingly, there is also no need to answer Questions 3 and 4(a) to (c), relating to the interpretation of that concept of 'beneficial owner', as they have been asked only if Question 2 is answered in the affirmative.

95 In the light of all those matters, the answer to Question 1 is that the general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends must be interpreted as meaning that, where there is a fraudulent or abusive practice, the national authorities and courts are to refuse a taxpayer the exemption from withholding tax on profits distributed by a subsidiary to its parent company, provided for in Article 5 of Directive 90/435, even if there are no domestic or agreement-based provisions providing for such a refusal.

Questions 4(d) and (e), 5 and 8 in the main actions

96 By Questions 4(d) and (e) and 5 in the main actions, the referring court asks, in essence, what the constituent elements of an abuse of rights are and how those elements may be

established. In that regard, it is unsure in particular whether a company may be regarded as having really received dividends from its subsidiary when it is bound by a contractual or legal obligation to pass those dividends on to a third party or when it is apparent from the factual circumstances that, ‘in substance’, that company, without being bound by such an obligation, does not have the right to ‘use and enjoy the dividend’ within the meaning of the commentaries on the OECD 1977 Model Tax Convention that were adopted in 2014. It is also unsure whether there can be an abuse of rights where the beneficial owner of the dividends, transferred by conduit companies, is ultimately a company whose seat is in a third State with which the Member State concerned has concluded a tax convention. By Question 8, the referring court further asks, in essence, whether a Member State which refuses to accord a company of another Member State the status of beneficial owner of the dividends is required to identify the company which it regards, as the case may be, as being the beneficial owner.

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

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

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

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

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

101 Thus, it is an indication of the existence of an arrangement intended to obtain improper entitlement to the exemption provided for in Article 5 of Directive 90/435 that all or almost all of the aforesaid dividends are, very soon after their receipt, passed on by the company that has received them to entities which do not fulfil the conditions for the application of Directive 90/435, either because they are not established in any Member State, or because they are not incorporated in one of the forms covered by the directive, or because they are not subject to one of the taxes listed in Article 2(c) of the directive, or because they do not have the status of ‘parent company’

and do not meet the conditions laid down in Article 3 of the directive.

102 The conditions for the application of Directive 90/435 are not met by entities resident for tax purposes outside the European Union, such as, it seems, the companies at issue in Case C?117/16 or the investment funds at issue in Case C?116/16. In those cases, if the dividends had been paid directly by the Danish debtor company to the entities which, according to the Ministry of Taxation, were their beneficial owners, the Kingdom of Denmark could have levied withholding tax.

103 Likewise, the artificiality of an arrangement is capable of being borne out by the fact that the relevant group of companies is structured in such a way that the company which receives the dividends paid by the debtor company must itself pass those dividends on to a third company which does not fulfil the conditions for the application of Directive 90/435, with the consequence that it makes only an insignificant taxable profit when it acts as a conduit company in order to enable the flow of funds from the debtor company to the entity which is the beneficial owner of the sums paid.

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

105 Indications of an artificial arrangement may also be constituted by the various contracts existing between the companies involved in the financial transactions at issue, giving rise to intragroup flows of funds, by the way in which the transactions are financed, by the valuation of the intermediary companies' equity and by the conduit companies' inability to have economic use of the dividends received. In this connection, such indications are capable of being constituted not only by a contractual or legal obligation of the parent company receiving the dividends to pass them on to a third party but also by the fact that, 'in substance', as the referring court states, that company, without being bound by such a contractual or legal obligation, does not have the right to use and enjoy those dividends.

106 Moreover, such indications may be reinforced by the simultaneity or closeness in time of, on the one hand, the entry into force of major new tax legislation, such as the Danish legislation at issue in the main actions or the United States legislation referred to in paragraph 51 above, and, on the other hand, the setting up of complex financial transactions and the grant of intragroup loans.

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

108 In that regard, when examining the structure of the group it is immaterial that some of the beneficial owners of the dividends paid by the conduit company are resident for tax purposes in a third State which has concluded a double taxation convention with the source Member State. The existence of such a convention cannot in itself rule out an abuse of rights. Thus, a convention of that kind cannot call into question that there is an abuse of rights where its existence is duly established on the basis of a set of facts showing that economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the

essential aim of benefiting improperly from the exemption from withholding tax, provided for in Article 5 of Directive 90/435.

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

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

111 Furthermore, where the beneficial owner of dividends paid is resident for tax purposes in a third State, refusal of the exemption provided for in Article 5 of Directive 90/435 is not in any way subject to fraud or an abuse of rights being found.

112 Indeed, Directive 90/435, as is apparent in particular from its third recital, seeks to eliminate, by the introduction of a common tax system, any disadvantage to cooperation between companies of different Member States as compared with cooperation between companies of the same Member State and thereby to facilitate the grouping together of companies at EU level (judgment of 8 March 2017, *Wereldhave Belgium and Others*, C?448/15, EU:C:2017:180, paragraph 25 and the case-law cited). As has been stated in paragraph 78 above, the directive is thus designed to ensure the neutrality, from the tax point of view, of the distribution of profits by a subsidiary established in one Member State to its parent company established in another Member State since it is clear from Article 1 that the directive applies only to distributions received by companies of one Member State from their subsidiaries with a seat in other Member States (see, to that effect, order of 4 June 2009, *KBC Bank and Beleggen, Risicokapitaal, Beheer*, C?439/07 and C?499/07, EU:C:2009:339, paragraph 62 and the case-law cited).

113 The mechanisms of Directive 90/435, in particular Article 5, are therefore intended for situations in which, if they were not applied, the exercise by the Member States of their powers of taxation might lead to the profits distributed by the subsidiary to its parent company being subject to double taxation (judgment of 8 March 2017, *Wereldhave Belgium and Others*, C?448/15, EU:C:2017:180, paragraph 39). Such mechanisms are not, on the other hand, intended to apply when the beneficial owner of the dividends is a company resident for tax purposes outside the European Union since, in such a case, exemption of those dividends from withholding tax in the Member State from which they are paid could well result in them not actually being taxed in the European Union.

114 In the light of all those matters, the answer to Question 4(d) and (e) in the main actions is that proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans.

The burden of proving the abuse of rights

115 Directive 90/435 does not contain provisions relating to the burden of proving that there is an abuse of rights.

116 However, as the Danish and German Governments contend, it is in principle for the companies which seek entitlement to the exemption from withholding tax on dividends that is provided for in Article 5 of Directive 90/435 to establish that they fulfil the objective conditions imposed by the directive. Indeed, there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need for a concrete assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied (judgment of 28 February 2013, *Petersen and Petersen*, C?544/11, EU:C:2013:124, paragraph 51 and the case-law cited).

117 On the other hand, where a tax authority of the source Member State seeks, on a ground relating to the existence of an abusive practice, to refuse to grant the exemption provided for in Article 5 of Directive 90/435 to a company that has paid dividends to a company established in another Member State, it has the task of establishing the existence of elements constituting such an abusive practice while taking account of all the relevant factors, in particular the fact that the company to which the dividends have been paid is not their beneficial owner.

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

119 Furthermore, even if the potential beneficial owners are known, it is not necessarily established which of them are or will be the actual beneficial owners. Thus, in this instance, in Case C?117/16 the referring court states that, while the parent company of Y Cyprus is Y Bermuda, whose seat is in Bermuda, the parent company of Y Bermuda is Y USA, established in the United States. If the referring court were to hold that Y Cyprus is not the beneficial owner of the dividends, the tax authorities and courts of the dividends’ source Member State would, in all probability, be unable to determine which of those two parent companies is or will be the beneficial owner of those dividends. In particular, the allocation of those dividends may have been decided upon after the tax authority’s findings relating to the conduit company.

120 Consequently, the answer to Question 8 in the main actions is that, in order to refuse to accord a company the status of beneficial owner of dividends, or to establish the existence of an abuse of rights, a national authority is not required to identify the entity or entities which it regards as being the beneficial owner(s) of those dividends.

Questions 6, 7, 9 and 10 in the main actions

121 By Questions 6, 7, 9 and 10 in the main actions, the referring court seeks, in essence, to ascertain, should the system, laid down in Article 5(1) of Directive 90/435, of exemption from withholding tax on dividends paid by a company resident in a Member State to a company resident in another Member State not be applicable, whether Articles 49 and 54 TFEU or Article 63 TFEU must be interpreted as precluding various aspects of the legislation of the first Member State, such

as that at issue in the main proceedings, relating to the taxation of those dividends.

122 It must be stated at the outset that these questions are based on the premiss that the inapplicability of that system of exemption arises from the finding that there is fraud or abuse, within the meaning of Article 1(2) of Directive 90/435. However, in such a situation, a company resident in a Member State cannot, in the light of the case-law recalled in paragraph 70 above, claim the benefit of the freedoms enshrined in the FEU Treaty in order to call into question the national legislation governing the taxation of dividends paid to a company resident in another Member State.

123 Consequently, the answer to Questions 6, 7, 9 and 10 in the main actions is that, in a situation where the system, laid down by Directive 90/435, of exemption from withholding tax on dividends paid by a company resident in a Member State to a company resident in another Member State is not applicable because there is found to be fraud or abuse, within the meaning of Article 1(2) of that directive, application of the freedoms enshrined in the FEU Treaty cannot be relied on in order to call into question the legislation of the first Member State governing the taxation of those dividends.

Costs

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

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

1. Cases C-116/16 and C-117/16 are joined for the purposes of the judgment.

2. The general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends must be interpreted as meaning that, where there is a fraudulent or abusive practice, the national authorities and courts are to refuse a taxpayer the exemption from withholding tax on profits distributed by a subsidiary to its parent company, provided for in Article 5 of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, as amended by Council Directive 2003/123/EC of 22 December 2003, even if there are no domestic or agreement-based provisions providing for such a refusal.

3. Proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans.

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

5. In a situation where the system, laid down by Directive 90/435, as amended by Directive 2003/123, of exemption from withholding tax on dividends paid by a company resident in a Member State to a company resident in another Member State is not

applicable because there is found to be fraud or abuse, within the meaning of Article 1(2) of that directive, application of the freedoms enshrined in the FEU Treaty cannot be relied on in order to call into question the legislation of the first Member State governing the taxation of those dividends.

[Signatures]

*   Language of the case: Danish.