A DANISH PERSPECTIVE ON THE CONCEPT OF BENEFICIAL OWNERSHIP

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Part I: Introductory paragraphs

1 Introduction

The overall topic of this article is the interpretation of the term 'beneficial owner', which is a tax concept found in OECD's Model Tax Convention and in double tax conventions based upon this model. Additionally, the concept is found in the Interest- and Royalty Directive and certain other EU instruments.

Ever since the beneficial ownership criterion was introduced in the articles regulating the taxation of passive income in the OECD Model Tax Convention in 1977, its precise meaning and scope has been debated in the law journals and generally in international finance- and tax circles.

Due to an increase in the use of cross border finance structures and in the number of holding structures linking to more than one tax jurisdiction[2] there has been even more focus on the concept in recent years.

Under the OECD auspices the focus resulted in updated Commentaries to the Model Tax Convention in 2003 and more recently in the release of a ten-paged discussion draft on the meaning of beneficial ownership in April 2011[3]. The draft proposes a new Commentary text for articles 10, 11 and 12, the three articles regulating the allocation of taxing rights for dividends, interest and royalties respectively. The

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2 Jakob Bundgaard and Niels Winther Soerensen, 'Beneficial Ownership in International Financing Structures', (2008) 7 Tax Notes International 50.

3 Released on 29 April 2011, available at http://www.oecd.org/dataoecd/49/35/47643872.pdf (last visited 13 November 2011)

deadline for submitting comments to the draft was 15 July 2011[4]. Work is also being done at UN level, related to the UN Model Tax Convention[5].

In a specific Danish context the beneficial ownership concept has been discussed since the introduction of withholding tax on outbound dividends, royalties, interest and "deemed" gains on debt-claims paid to a group related company[6]. The withholding tax is limited to situations where the beneficial owner of the income is resident for tax purposes outside EU and outside the countries Denmark has entered into double tax conventions with.

Since it is against Danish policy to conclude double tax conventions with so called tax heavens, an ultimate recipient resident in such a country will generally not be able to benefit from the limitations in the Danish withholding tax rules on these income types. For this reason, holding structures with an ultimate owner in a tax heaven will often seek to 'channel' the income through an interposed holding company in another EU member state or a country that Denmark has concluded a double tax convention with. The purpose of this planning scheme is to avoid the Danish withholding tax, benefitting the group structure seen as a whole. It is however not immaterial through which country the income is channeled. The scheme will only be beneficial for the group, if the chosen country does not have withholding tax rules on these income types, or imposes a lower rate of withholding tax. The tax planning must take all three levels of tax law into account, the domestic tax law, the EU tax law (if the planning involves another EU country) and the specific content of any relevant double tax convention.

This sort of tax planning will only be recognized by the Danish Tax Authority[7] if the interposed company fulfills the beneficial ownership test.

The arbitrary cross border allocation of taxable income with the sole aim of circumventing Danish withholding tax rules is clearly against the interests of the country since it results in loss of revenue. For this reason SKAT is currently paying much attention to the tax planning in private equity structures and multinational group structures with ultimate owners outside EU/the Danish DTC network[8]. SKAT has imposed withholding tax on outbound dividend- and interest flows in a number of cases, arguing that the beneficial ownership criterion was not fulfilled. Three of

4 The discussion draft may be re-proposed in response to the hearing answers received, Lee A. Shepard, 'New Analysis: Defenders of the Faith: OECD Update', (2011) WTD 180-2.

5 Adolfo Martin Jiminéz, ´Beneficial Owner: Current Trends´, (2010) W.T.J., 35

6 It will be explained in para 5 what is meant by "deemed" gain

7 Hereafter referred to as SKAT (the Danish title).

8 The press release from the Ministry of Taxation from 1 April 2011, available at http://www.skm.dk/presse/pressemeddelelser/skatteministeriets/8455.html (last visited 13 November 2011)

these cases were tried on appeal by the Danish Tax Tribunal[9] in 2010[10]. Additionally, one case was decided by the Tribunal as late as 13 July 2011[11]. All together the decisions are concerned with millions of Euros in non-withheld taxes as described in the above mentioned press release.

Some of the Tribunal decisions are expected to reach the Danish courts, ultimately perhaps even the Supreme Court[12].

2 The problem

When choosing the topic for the article, several factors were taken into account, including that the topic had to be theoretically and practically relevant both now and in the future. The beneficial ownership discussion, and the tax adjustments that the authorities can make when it is not fulfilled, is an important international tax law issue. Despite the scholarly attention ever since the introduction of the concept, the discussion cannot be considered exhausted.

Since it is far from possible, within the scope of the LLM article, to analyse all aspects of treaty shopping and the policies that can be chosen to solve the problem, focus will primarily be on some specific aspects of the anti-treaty-shopping measure beneficial ownership. Other anti avoidance measures are not analysed.

The aim of this article is to some extend twofold. First and foremost, it endeavors to analyse the concept beneficial ownership in the light of the recent jurisprudence of the Danish Tax Tribunal, where the criterion has been scrutinised. With regards to these first four Tribunal decisions it will be analysed which specific elements the Tribunal focused on in the 'beneficial ownership' test, and whether the decisions are in line with the (limited) case law from other jurisdictions on the topic, and how the notion has been interpreted so far in EU tax law and international tax law.

Secondly, the content of the draft proposal from OECD on the meaning of the beneficial ownership notion will be described and included in the analysis. This part of the article is mostly included to add perspective to the main analysis.

The thesis advanced in this paper is that the Danish understanding of beneficial ownership has been made clearer via the recent Tribunal decisions and that they are generally in line with the interpretation of the concept in International - and EU Tax Law. There are, however, also some aspects of the decisions that lack legal basis.

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9 The superior administrative appeal body

10 SKM2010.268LSR, SKM2010.729LSR and SKM2011.57LSR.

11 SKM2011.485LSR

12 Anders Oreby Hansen and others, 'Danish Tax Authorities Prevail in New Remarkable Beneficial Ownership Ruling' (2011) 13 (3) Practical European Tax Strategies 6

If the draft proposal is implemented in the Commentary text this will further clarify the meaning of the notion. The proposal does, however, contain a very broad beneficial owner definition which can give rise to further disputes and interpretational problems.

When evaluating whether or not a recipient of passive income is to be considered the beneficial owner of this income, a case-by-case evaluation will always have to be made, taking all concrete factors into consideration. As will be elaborated on in connection with the analysis in Part III, the planning schemes can be complex and tax planners will evidently continue to come up with new group- and finance-structures to avoid or mitigate the withholding tax burden. For this reason, the meaning of the concept can never be determined conclusively if a broad substance-over-form approach is taken. At this point the beneficial ownership concept has already given rise to a string of differing interpretations in different jurisdictions, some of which will be included in the analysis.

3 Structure and limitations

In addition to these introductory paragraphs and the conclusion in Part IV, the article will be divided into two parts. Part II will be descriptive, aimed at giving a brief overview of the taxation of outbound dividend, interest and royalty payments under domestic Danish tax law. To limit the descriptive parts of the article the OECD Model Tax Convention and the EU Directives are not described in the same way. With these internationally available instruments focus will be only on the beneficial ownership concept and the general anti avoidance provisions.

The third part will contain the main part of the article, where the first four Danish Tax Tribunal decisions are analysed in light of international tax law and EU tax law. These four decisions were chosen for the analysis because their outcome was different. In two of the cases the Tribunal agreed with the taxpayer, whereas the other two cases where decided to the detriment of the taxpayer. An additional reason for including these four cases is that they concern different income types. This makes it possible to analyse the concept in connection with both dividend flows and interest payments. None of the cases were concerned with royalties.

Even though the fundamental EU freedom rights are important to parts of the analysis in Part III, the thesis will not include a basic description thereof. The analysis of Directive based beneficial ownership test focuses on the Interest and Royalty Directive and the Parent-/Subsidiary Directive[13] [14]. At this point it should only be mentioned that the general EU law principles are binding on the Member

13 Council Directive of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (90/435/EEC) (as amended).

14 That is, no analysis of the Savings Directive 2003/48 EC. For example, Jiminez, supra note 7, 36 has stated that the function of the term in this context is completely different from in the other Directives

States both within – and outside the scope of the Directives[15].

Denmark has a domestic Danish anti avoidance provision in the Act on Capital Gains Tax on Shares[16]. This look through provision is only mentioned below for comparative purposes, since it contains a widely debated 'substance' requirement. This requirement appears to have been included in the Tribunal decisions as well. An interesting question in this connection is, whether such a requirement is compliant with the Directive based 'beneficial ownership' concept and the concept found in the DTC's.

Neither this specific domestic anti avoidance measure, nor the domestic case law based 'rightful recipient' doctrine nor 'principle of reality' will be subject to any analysis in their own right[17]. First and for most, because these rules are domestic rules. Furthermore, the above mentioned statutory provision only applies to inbound dividends, which also makes it less relevant in an analysis of the beneficial owner concept.

The footnotes are kept free of quotes and summaries of cases. Instead there will be indentation of paragraphs with longer quotes or summaries, and they will be in italic.

Whereas the regulation of withholding tax on all the different passive income types will be described briefly and the beneficial ownership notion analysed in cases concerning different income types, the definitional problems with these income types will not be analysed.

Only tax rules applicable to companies and other legal entities governed by the Cooperation Tax Act[18] will be included in the description of domestic withholding tax rules. Issues related to taxation of individuals and permanent establishments will be left out.

The domestic Danish tax legislation will play only a limited role in the article. Danish case law on beneficial owner was chosen as the starting point for the analysis due to the recent development. The main focus will however be on international- and EU tax aspects of the cases.

An interesting part of SKAT's control of intra group transactions is whether these are carried out at 'arm's length terms' and whether the 'thin cap rules' are complied with[19]. Due to the very complex nature of these tests and lack of relevance for an

15 Case C-417/04 Finanzamt Offenbach am Main-Land v Keller Holding GmbH

16 Aktieavancebeskatningsloven, LBK nb 89, 25/01/2010 § 4a. Hereafter ABL

17 Supra at 5, 607 for an English analysis of these cases.

18 Selskabsskatteloven, Lbk nb. 1376/7/12/2010. Hereafter SEL

19 SEL §§ 11-11C.

article on beneficial ownership these topics will not be included. These rules play an important role limiting how aggressive the tax planning can be even before the beneficial ownership condition come into play.

Another less clear limitation is that the historical angle of the beneficial ownership discussion will only be included sporadically.

There have been some legislative developments in the beneficial ownership discussion in other countries recently[20]. These will however not be included in this article. The only domestic tax rules included will be the Danish.

In a recent ruling from the Bombay High Court[21] the beneficial ownership criterion was applied in a case concerning capital gains tax under art. 13 of the relevant DTC. Since the test is normally used in connection with income tax as opposed to capital gains tax, this case will not be included in the analysis.

In cases involving the tax subjects from different countries, situations can arise where the tax authorities from different countries disagree on the interpretation of provisions contained in the DTC's between them. If the authorities disagree on whether the payments is governed by a specific allocation rule in the DTC that can result in double taxation (or in some cases double non taxation). These double taxation conflicts and the solutions thereof will not be included in the article[22].

The research deadline for this article was chosen to be 13 November 2011, any new cases or material after this deadline will as a starting point not be included.

4 Methodology and material

Since the purpose of the article is to describe and analyse the beneficial ownership notion as it is currently interpreted, the article will be based on the dogmatic juridical method. The de lege ferenda approach will not be taken.

The use of domestic Danish tax law will be sought limited in the analysis. In addition to the Tribunal decisions and the few provisions mentioned above, only a few Danish journal articles will be included in the analysis.

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20 For example in Italy, where the withholding tax rules has recently been changed, cf. Gianluca Queiroli, 'Italy Amends Beneficial Ownership Rules', (2011) Tax Analyst 1 August.

21 Shrikant S. Kamath, (2011) Tax Analyst, 2 August

22 The conflicts are solved, for example, via mutual assistance procedure if such a clause is included in the DTC between Denmark and the other country. Double Tax Conflicts between two EU countries can be solved via the Arbitration Convention, cf. in Danish law LBK. Nb. 111, 21/2/2006. Conflicts about the interpretation of directives can also be referred to ECJ.

Since Denmark is a civil law jurisdiction, and since it is directly stated in the Danish Constitution[23] that legislation is the central source of law within the tax area, an article in tax would normally heavily rely on legislation. The relevant parts of the provisions analysed in this article is however either of a vague nature or with an uncertain scope. For this reason the analysis must be based on other sources.

In addition to the Tribunal decisions, the primary sources of law included will be from EU tax law and international tax law.

Within EU law the focus will be on the Parent-/Subsidiary Directive, the Interest- and Royalty Directive, the jurisprudence of the Court of Justice of the European Union[24] and on relevant contributions from the Commission.

When the international tax law angle of beneficial ownership is described and analysed, focus will be made on OECD's Model Tax Convention and the Commentaries thereto. Denmark has entered more than 80 DTC's[25], a majority of which are based on OECD's Model Tax Convention of 1977[26]. In addition to the DTC's a Nordic multilateral tax convention was concluded in 1998.

In the analysis of the DTC concept, case law from other jurisdictions will be included.

Even though the legal source value of tax literature is debatable[27], it will be included in the article. Academic contributions will however be held against the other sources of law before conclusions are made.

Part II: The taxation of outbound dividend, interest and royalty payments – an overview

5 The Danish withholding tax rules

A foreign company is only subject to tax in Denmark on the income types listed in the Cooperation Tax Act, SEL § 2. Pursuant to this article, outbound dividends,

23 Danmarks Riges Grundlov, Law nb. 169/05/06/1953 § 43 (the Danish written constitution)

24 Hereafter ECJ.

25 Niels Winther Sørensen and others, *'Skatteretten 3*', (5th edn. Thomson Reuters, Copenhagen, 2009) 29

26 Mads Severin Hansen, 'Beneficial Owner' (2010) TfS 3, 5 (In Danish reference would be TfS 2010,3)

27 Aage Michelsen and others, *'Lærebog om indkomstskat'*, (14th edn. DJØF, Copenhagen,2011) 90

interest and royalty payments are as a starting point subject to Danish withholding tax.

The same applies to outbound payments that are "deemed" to be gains on debt-claims[28]. The withholding tax on these "deemed" gains is a tax levied in connection with outbound payments from debt-claims when the two group related companies agreed from the beginning that the debt should be repaid at a premium compared to what the claim was actually worth at the time the agreement was made. It is a tax rule aimed at preventing circumvention of the withholding tax on interest. Amongst group related companies the withholding tax on interest could otherwise be avoided by instead of interest agreeing from the beginning that the claim is repaid at a premium.

It is for interest payments and "deemed" gains on debt-claims a requirement that the payer and recipient are group related companies[29].

The tax rate for dividends is now 27 % whereas it is 25 % for both interest, "deemed" gains on claims and royalties[30].

The withholding tax on all these income types is limited or waivered in certain situations that are listed in § 2.

Outbound dividends are mainly exempted from the withholding tax, if Denmark is obliged to exempt under the Parent-/Subsidiary Directive or a DTC[31].

For interest and royalties the Danish withholding tax is waivered, if the income is either governed by a DTC or by the Interest and Royalty Directive[32].

There are a number of other exemptions to the withholding tax, but since these situations are irrelevant to the determination of the beneficial ownership concept, it is beyond the scope of this article to describe them. Some of the limitations were mentioned in the Tribunal decisions analysed below, but these parts of the decisions will not be elaborated.

If the outbound payment is subject to Danish source tax, the Danish subsidiary is obliged to withhold the tax[33]. The subsidiary is jointly liable with the recipient

28 SEL § 2,1,h

29 Skattekontrolloven, Lbk nb 819/27/06/2011, § 3 B (the tax control law). Herafter SKL

30 SEL § 2, 2.

31 SEL § 2, 1, c.

32 SEL § 2,1,d.

33 Kildeskatteloven, LbK nb. 1403/07/2010 (The law on source taxation). Hereafter KSL. §§ 65 a, 65 C and 65D.

company for non-withheld tax, or tax withheld at a too low rate, unless it can be ascertained that the subsidiary did not act with negligence when it was omitting to withhold tax[34].

Part III: The Beneficial Ownership Condition

6 Introduction

The beneficial ownership condition is as mentioned above contained in the Interest – and Royalty Directive as well as the OECD Model Tax Convention. Whereas the notion is a well-established part of the common law tradition, it has until recent years been almost completely unknown in many civil law jurisdictions – in tax law as well as in other areas of law[35].

In common law, the concept is mostly used within the law of trusts[36], where it is recognized that legal ownership and economic ownership can be divided and held by different individuals/entities. The concept is in the UK not statutorily defined, but developed via case law. The legal owner is the entity or individual with the formal legal rights to the asset. Economic ownership is *"the right at least to some extent to deal with the property as your own"*[37] . The concept is not conclusively defined, but at least the concept has been developed into a working definition in the trust law.
The interplay between this common law concept and the DTC/Directive concept has been debated in the literature[38]. When the **Indofood decision**[39] was rendered in 2006 it gave basis for the idea that the beneficial ownership tax concept should be interpreted as having an overarching International tax law meaning. This main part of the article endeavors to analyze this International - and EU Tax law meaning of

the concept and how recent Danish cases contribute to – and fit with the interpretation.

7 Recent Danish cases regarding beneficial ownership

The first Danish decision on the -concept was published in March 2010[40]. This decision had been awaited in anticipation, since it was the first decision to lay down the Danish tax meaning of the notion.

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34 KSL § 69.

35 P. Radcliffe, 'Beneficial Ownership in Esperanto', (2010) 993 Tax Journal 9

36 D.J. Hayton and others, *'The Law of Trusts',* (18th edn Lexis Nexis, London 2010) 6

37 Wood Preservation Ltd v Prior (1968) 45 TC 112, CA

38 Discussed below at para 13.5

39 Indofood International Finance Ltd v JP Morgan Chase Bank [2006] 8 ITLR 653

40 SKM2010.268.LSR

Since 2007 there has been an intense focus in Denmark on controlling certain foreign equity fund's acquisitions of Danish companies, leading to adjustments of taxable income in what is estimated to be 50 cases[41]. The adjustments were based on the liability for withholding tax on outbound dividends- and interest payments.

Some of these adjustment started reaching the Tribunal on appeal in 2010, and it is expected that more cases will be tried at Tribunal level or before the Danish courts[42].

The purpose of paragraph 7 is to outline the facts and holdings of the first Tribunal cases. Focus will be on the elements that are relevant for the further analysis of the beneficial ownership notion. Since there are similarities in some of the fact patterns and decisions, they will not all be summarized fully.

The most recent Tribunal decision until date was published 13 July 2011[43]. In addition to the Tribunal decisions, three decisions from the Danish Assessment Board have been published[44]. Since this is a lower administrative authority than the Tax Tribunal, they will not be analysed separately.

Before analysing the key elements of the Danish cases in paragraph 13 the beneficial ownership concept is presented from an EU - and international tax law angle in paragraph 8-11. Since reference is in the Danish cases made to the beneficial ownership concept in *both* the Directives and in OECD's Model Tax Convention, the interplay between these sources will be described in paragraph 12.

7.1 The facts and holding in SKM2010.268.LSR and SKM 2010.729 LSR

The first Tax Tribunal decision regarding beneficial ownership concerned withholding tax on a dividend distribution from a Danish subsidiary (S) to its parent company in Luxembourg (P)

Prior to this dividend distribution the group had been restructured in several steps resulting in a double-Danish holding structure being established.

Afterwards the double Danish holding structure was put into another double holding structure in Luxembourg.

41 Lytken and Bjoernholm, (2010) Tax Notes International 15 March, 977

42 Jakob Bundgaard, 'Nyt Nederlag og skærpede regler på vej' (2010) 387 SU 910 (In Denmark refered to as SU 2010,387)

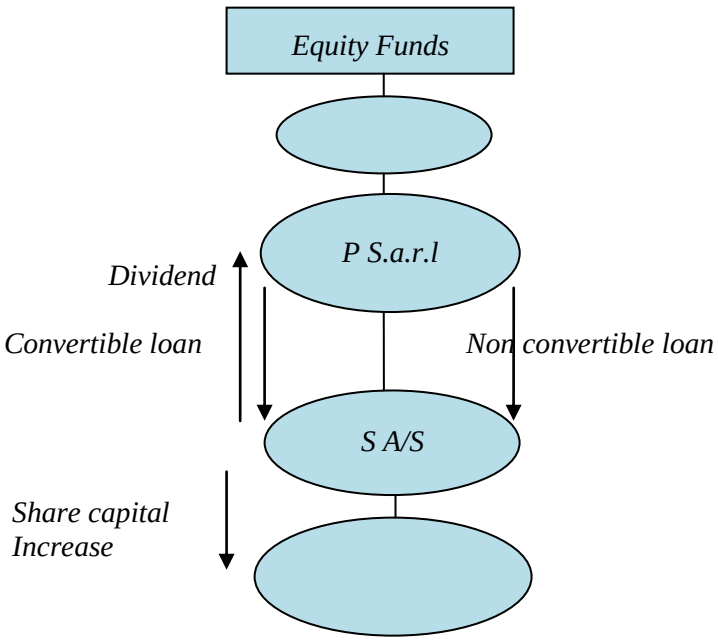
43 SKM2011.485 LSR

44 SKM2011.441 SR, SKM2011.142 SR and SKM2011.47 SR

It applied to all the holding companies involved that they had no other activities than the activities related to the shareholding and financing of the subsidiaries.

Right after this structure had been established, the upper level Danish company (S) decided to make a distribution to the parent company in Luxembourg. Immediately following the distribution, (P) granted two loans to (S). These two loans, one convertible and one non-convertible, were almost exactly for the same amount as the distribution.

Within the same day as the distribution and the granting of the two loans (S) carried out a share capital increase in the lower level Danish subsidiary. The convertible loan was later converted to shares.



It was given as a fact in the Tribunal case that the received dividends were never passed on to the equity funds or to the top-level holding company in Luxembourg.

SKAT adjusted the taxable income in (S) because it was held to be liable for withholding tax on the distribution made to (P)[45]. (P) was considered not to fulfill the beneficial ownership condition and could for this reason not benefit of the tax exemption in the Danish-Luxembourg DTC. In the administrative decision emphasis was placed on the interposed holding company's limited powers to decide how to

45 KSL § 65, litra 1 and 5, cf. SEL § 2, 1, c

invest the dividends received. The flow of the funds was found to be predetermined and fully decided by the ultimate owners.

In line with the claimant's arguments, the Tribunal held that (P) did not constitute a 'conduit company' and that the beneficial ownership criterion was fulfilled. Clearly it was decisive that the funds did not flow through to the ultimate owners. Instead the funds were directly lend back to (S) and then used to increase the capital in the lower level Danish company.

The second time the beneficial ownership concept was scrutinized in a Danish context was in a decision published 17 November 2010[46] . This time the subject matter of the case was an outbound interest payment from a Danish company to its parent company in Luxembourg.

As noted by Bundgaard[47], the published summary of this decision is far less comprehensive than the summary of the first decision.

Since both the taxpayer and the facts were the same as in **SKM2010.268 LSR**[48], this second Tribunal decision will not be summarised. Most of the claimant's arguments also appear to be repeated from the first decision, where the summary was more comprehensive.

It was in this case specifically stressed by the Tribunal that the beneficial ownership criterion in the DTC, was identical to the criterion in the Interest and Royalty directive[49].

The Tribunal holding in these first two cases will be analysed in more details after a short presentation of the other recent Danish cases and the beneficial ownership concept in the directives and the OECD Model Tax Convention. It should already at this point be mentioned that the cases have been appealed to the High Court and might ultimately end up in the Supreme Court[50].

46 SKM2010.729 LSR

47 Supra at 45, 912

48 Soren Jesper Hansen and Natia Adamia, 'Highest administrative tax authority decision on 'beneficial ownership' of interest', (2011) Euro. T.S., Feb, 9, available at http://www.pwc.com/gx/en/eu-tax-news/pdf/pwc-eudtg-newsletter-2011-002.pdf (last visited 13 November 2011)

49 See more on this discussion below, para. 9.1

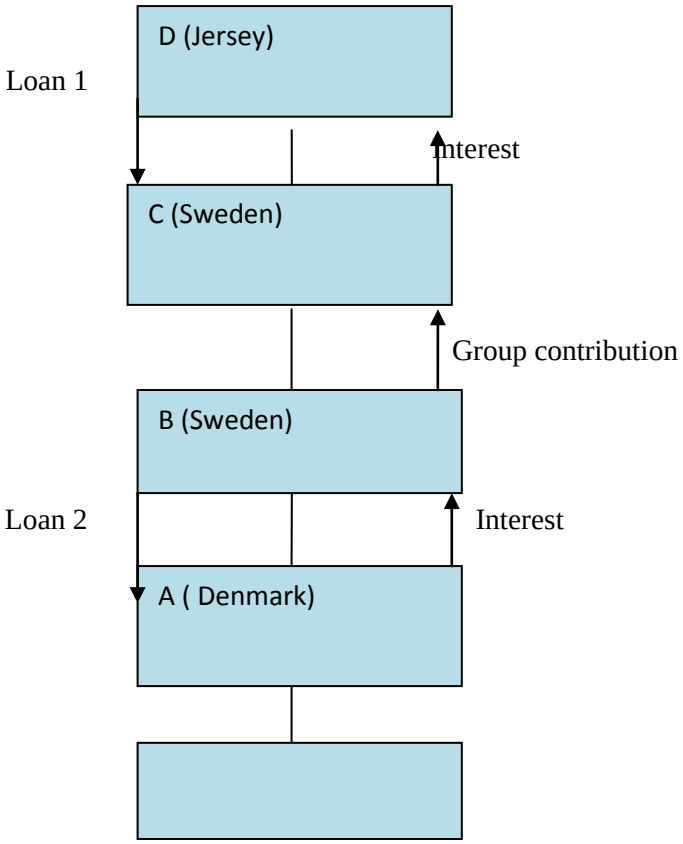
50 http://www.bechbruun.com/en/Publications/News/2010/Taxpayer+wins+another+beneficial+ownership+case.htm (last visited July 18 2011)

7.2 The facts and holding in SKM 2011, 57 LSR and SKM 2011,485 LSR

On 27 January 2011 a Tax Tribunal decision was published where the Tribunal for the first time decided in favor of SKAT in a case concerning the beneficial ownership concept – this time in the context of an interest payment. The impact of this decision was that the concept could now be considered a real part of Danish tax law[51] rather than a mere theoretical concept; something that equity funds and companies had feared for some time. The decision was significant for a number of other reasons that will be analysed in paragraph 13.

> *The third case concerned an interest payment from a Danish company (A) to its Swedish parent company (B) and the essential question was, whether SKAT was hindered from imposing the withholding tax – either by virtue of the Interest- and Royalty Directive or under the multilateral Nordic Tax Treaty.*
>
> *A Danish group of companies was acquired by (D) a Jersey based holding company, in 2002. The shares in the group were the following year transferred to a double Swedish holding structure, (B) and (C). During this transaction a loan document (loan 1) was concluded between (D) and the top level holding company in Sweden, (C).*
>
> *Another loan document (loan 2) was concluded between (A) and (B).*
> *These two loans were for the same amount and carried the same interest. They were both without predetermined repayment plan.*
>
> *Just as in the first two Tribunal cases it was given as a fact that the only activity in (A) and (B) was related to the shareholding. There were no employees and the management was undertaken by a Swedish administration company.*
>
> *The interest payments from(C) to (D) were financed via a group contribution from (B) to (C) corresponding to the interest payment received in (B) from (A). Such a contribution is tax deductible for the transferring company and taxable in the recipient company under Swedish tax rules. There was a close temporal link between all transactions.*

51 Jakob Bundgaard, 'Beneficial ownership nu en reel bestanddel af dansk skatteret', (2011) SU 31, 91



Based on liability for withholding tax on the interest payment from (A) to (B) the taxable income of (A) was adjusted by SKAT. It was held that the two Swedish companies were mere 'conduit companies', and that they did not fulfill the beneficial ownership criterion in neither the Nordic Tax Convention nor the Interest- and Royalty Directive.

When the Tribunal decided against the taxpayer, it was stressed as a preliminary point that the beneficial ownership concept originated in common law tradition and that the Danish 'rightful recipient'-test does not necessarily include the same factors. The latter test has been a part of Danish tax law for decades[52] even though the legal basis for the test has been disputed in the literature[53]. The claimant argued before the Tribunal, that withholding tax could not be imposed in a situation where the interposed holding company would have been considered 'rightful recipient' had the case been decided under domestic law. As stated in the limitation paragraph above, the 'rightful recipient' test will not be analysed in this article.

52 At least since the Supreme Court case U. 60.535H (the so-called "Havnemoelle-case")

53 The term 'rightful recipient' is taken from Henrik Dam, 'Rette indkomstmodtager-allokering og fiksering' (1st edn DJØF, Copenhagen 2005), English summary, 794.

This preliminary statement was however significant for the beneficial ownership discussion as well, since it has been debated in Danish tax literature whether the tests were overlapping – or even identical. The statement can furthermore be read as an indication that the Tribunal applied an autonomous interpretation. When interpreting the international tax law concept beneficial ownership the Tribunal mentioned the importance of reaching a harmonized interpretation. In this connection not only the legal ownership was considered, the Tribunal also explicitly mentioned that economic right was considered.

In reaching its decision the Tribunal stated that the actual predetermined flow of funds through (B) and (C) was decisive rather than the fact that part of the flow happened via the group contribution regime. As pointed out by SKAT, circumventing the beneficial ownership test would be far too easy if the replacement of one interest payment with another form of transfer would be sufficient to fulfill the test.

Additionally it was stressed that (C) had no possibilities of making the interest payment to (D) had the company not received the group contribution.
It was also stated that even though the whole arrangement took place prior to the introduction of withholding tax on interests in Danish tax law, its introduction was inevitable when the Interest and Royalty Directive was due to be implemented[54]. Under these circumstances it was found immaterial that the planning predated the new rules.

The Tribunal decision has been criticized[55] and it is possible that this decision will be brought before the Danish courts – just as it is expected with the above listed cases.

The facts in the fourth Tribunal decision, **SKM2011.485 LSR**, are almost similar to **SKM.2011.57 LSR** and will for this reason not be summarized. This, most recent, Tax Tribunal decision, was rendered on 25 May and published 13 July 2011. For the second time the Tribunal upheld the tax authorities' decision in a case concerning withholding tax on an outbound interest payment.

It was emphasized in this case that there was no tax levied in Sweden due to the combination of interest payments and group contributions. The result of the planning scheme was thus that the flow from the Danish taxpayer to the recipient, this time at Cayman Island, was tax free.

In both cases it was stressed that the Swedish companies had no activity and no expected future income.

54 Supra at 54, 93

55 Supra at 15, 6

8 The Parent-/Subsidiary Directive – no beneficial ownership condition

As mentioned above, the first Tribunal decision concerned an outbound dividend payment. The majority of the Tribunal judges found, that Denmark was hindered from imposing withholding tax on the dividend payment both under the relevant DTC and under the Parent-/Subsidiary Directive art. 5.

Since the Parent-/Subsidiary Directive does not contain a beneficial ownership test, it has been debated whether such a criterion could be read into the general anti avoidance provision in art. 1,2:

> *"This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse"*

As emphasized by the Tribunal, Danish domestic tax law does not contain a statute based general anti avoidance provision. Legal basis for denying tax benefits in situations of fraud and abuse is however, according to the Tribunal, found in Danish case law. In this case the parent company in Luxembourg was held to fulfill the domestic case-law based test of 'rightful recipient'. Furthermore, the Tribunal did not find sufficient lack of substance to deny acknowledgement of the arrangement via the case law based substance over form principle.

Despite the fact that there is no beneficial ownership criterion in the Parent-/Subsidiary Directive, SKAT's arguments in the first decision can be read as containing the presumption that a beneficial ownership criterion can still be interpreted into the general anti avoidance provision. The Minister for Taxation seems to express the same view[56] in an answer to a question posed during a hearing process for a legislative amendment in 2006[57]. In this answer the Minister stated that the Directive did not oblige SKAT to recognise dividend payments through 'conduit companies'. The Minister has previously used the 'conduit company' term to describe a company that automatically does not fulfill the beneficial ownership criterion[58].

When the case was heard on appeal, the taxpayer claimed that the dividend distribution was exempt from withholding tax under the Directive. It was argued that the shareholding percentage as well as the required holding period was fulfilled, and that this gave the taxpayer an unconditional right to exemption.

The Tribunal did not positively address the question whether a beneficial ownership criterion could be interpreted into the Directive. Even though the argument was thus

56 For the same interpretation of the Tax Minister answer, see Mads Severin Hansen, Supra at 29, 27

57 L 213 (2006/2007), exhibit 26, 20

58 Supra at 29, 11.

not explicitly rejected, the fact that it was not mentioned when 'substance over form' and 'rightful recipient' was mentioned in connection with art. 1,2 can be seen as supporting the claimant's argument, that such a criterion is not part of the Parent/Subsidiary Directive.

When reading the text of the Parent-/Subsidiary Directive, there is nothing to support the Minister's interpretation, except from the general anti avoidance provision.

Furthermore, there is no mentioning of the beneficial ownership criterion in the preamble to the Directive. The criterion was neither mentioned in the original preamble, nor in the preamble to the 2003 amendment. In the latter preamble the situation with chains of companies through which dividend is distributed is mentioned. If beneficial ownership was required for the companies involved in such a chain of companies, it would have seemed natural to mention the requirement directly. Before the 2003 amendment to the Parent-/Subsidiary Directive the Interest and Royalty Directive had been adopted. The beneficial ownership criterion was included in the latter directive and still not included in the Parent-/Subsidiary Directive via the amendment, which further suggest that the criterion was not found necessary to include in both directives.

Finally, I could not find support for the existence of an unwritten beneficial ownership in the tax literature. Contrarily it is rejected by some authors[59].
Considering the lack of support for SKAT's interpretation of a beneficial ownership criterion in the Parent-/Subsidiary Directive and the purpose of this Directive, the taxpayer's contra argument must be correct. The purpose of the Directive is to remove tax barriers, so additional conditions cannot be interpreted into the Directive.

9 Beneficial ownership in the Interest- and Royalty Directive

As mentioned immediately above, the tax benefits of the Parent-/Subsidiary Directive are extended to chains of companies without making this extension subject to a beneficial ownership condition. In contrast, the Interest and Royalty Directive contains an explicit beneficial ownership condition. This condition is for cooperate taxpayers defined in the following way:

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

59 Otmar Thömmes and Katja Nakhai, '*Commentary on the Parent-Subsidiary Directive'*, (2007), 6

It should be noted, that the definition for beneficial ownership in connection with permanent establishments is slightly different, cf. art. 1,6. PE recipients are however not included in the article.

When the concept is interpreted in an EU Tax law context, the ECJ will have the final saying. As opposed to international tax law, where there is no common judicial institution, the decisions from ECJ in preliminary rulings, or in infringement procedures against Member States, are binding for the Member States[60].

If any of the recent Danish Tax Tribunal decisions are appealed, it is not unlikely that preliminary questions regarding ECJ the interpretation of the beneficial ownership concept are referred to the ECJ. In the second case it could for example be relevant for SKAT to get answered from ECJ whether it is possible to deny Directive-benefits based on the non-fulfillment of the beneficial ownership criterion in a situation where the funds have not been passed on to the ultimate owners of the company receiving the interest. There are other aspects of the Tribunal decisions that could possibly lead to preliminary questions being referred to ECJ, some of these will be analysed below.

The Directive based definition of beneficial ownership in art. 1,4 makes it clear that agents, trustees and authorized signatories for other persons cannot be considered the beneficial owner of an interest – or royalty payment. This is clear and in line with the OECD Commentaries even though the specific words deviate slightly[61]. It is however far less clear, what it means when the article requires the payment to be for the recipients "own benefit". Can the recipient in the third and fourth Danish Tribunal decisions[62] for example fulfill this requirement when the interest payments were immediately passed on as group contributions to the immediate parent company?

When ECJ interprets Directives and Treaty provisions in preliminary rulings, it relies heavily on previous jurisprudence of the Court. If any of the Danish decisions are referred to the ECJ, it will however be necessary to answer the preliminary questions based on other legal sources. To date there has been no ECJ case scrutinizing the beneficial ownership concept.

Even though the ECJ can, in principle, include all the same measures of interpretation as the national courts, there are, as noted by the ECJ in the **CILFIT**

60 The principle of direct effect, cf. Case C-26/62 NV Algemene Transporten Exspeditie Ondernemling van Gend en Loos v Nederlandse Administratis der Belastingen and the principle of supremacy, Case C-6/64 Flaminio Costa v E.N.E.L

61 The Commentaries to the OECD Model Tax Convention, para 12.1-12.2.

62 SKM 2011,57 LSR and SKM 2011, 485 LSR

case[63], some aspects that are special to interpretation of Directives and other EU texts.

First of all, EU law is different from domestic law because it is written in more than one language[64]. All these language versions are equally authentic – at least officially[65]. This regime of multilingual texts creates some challenges in the interpretation process. The proliferation of languages, however, also can be viewed as a positive part of EU law, since it can be used by ECJ to assist in the interpretation process[66].

In a specific beneficial ownership context it is noteworthy how the words "payments for its own benefit" are translated into Danish. In the Danish Directive text, art. 1,4 lists as one of the factors in the beneficial ownership definition that the payments are for the recipient's own use ("eget brug"). As noted by Mads Severin Hansen[67], "use" and "benefit" does not necessarily cover the same in this context. A requirement that the funds must be for the recipient to use, could possibly set a higher threshold for the beneficial ownership criterion. I will elaborate on this below, when some specific elements of the recent Tribunal decisions are analysed.

When the linguistic versions deviate the ECJ will generally accept the understanding that is most common when comparing all the different versions, and at the same time focus on whether this version corresponds with the purpose of the Directive[68]. Fidelity to legislative purpose is generally an essential goal when ECJ is interpreting[69]. There are many examples of cases where ECJ refers to purpose or legislative intend when interpreting Directive concepts[70].

The purpose of the Interest and Royalty Directive was to eliminate the imposition of double taxation on cross border royalty and interest transactions between the taxpayers governed by the Directive. To achieve this, the Directive sets up a

63 Case C-283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health

64 Ibid, para 18

65 Theodor Schilling, 'Language Rights in the European Union', (2008) 9 German L.J. 1219, 1232-1234

66 Lawrence M. Solan 'The interpretation of multilingual statutes by the European Court of Justice', (2009) VOL 34:2, Brook.J.INT'L.L.,277

67 Supra at 29,28

68 CILFIT-case, para 20

69 Ian McLeod, 'Literal and Purposive Techniques of Legislative Interpretation: Some European Community and English Common Law Perspectives', (2004) 29 Brook.J.INTL.L.,1109,1125

70 For instance, see Case C-13/05 – Sonia Chacon Navas v. Eurest Colectividades SA where an employment law directive was construed with reference to both intent and purpose

common system of taxation applicable to interest and royalty payments between associated companies.

Taking this purpose into account, the interpretation that entails fewer restrictions on the governed companies should be chosen[71]. This means that the English version "payments for its own benefits" must be applied as a part of the beneficial ownership test rather than the Danish version "payments for its own use". When studying how the other linguistic versions translated these words, there is support for requiring only that the interposed company is, to some extent, 'benefiting' economically from the payment[72]. In the third and fourth Tribunal decision it was, as mentioned above, argued by the authorities that the 'benefit' requirement was not fulfilled. The interposed holding company was held to be 'wholly artificial' arrangements without any economic benefits deriving from the interest payments.

9.1 - Extrinsic aids to the interpretation of the Directive concept

In addition to basing the interpretation on the jurisprudence of the Court itself, comparing the different linguistic versions and holding this against the purpose of the Directive, ECJ will in some instances refer to extrinsic aids in the interpretation process.

When interpreting the beneficial ownership criterion in art. 1,4 of the Directive, it seems relevant to consider the interplay between this provision and the general anti avoidance provision in art.5 of the same Directive. There must be a reason for having both provisions in the Interest and Royalty Directive, as opposed to the Parent-/Subsidiary Directive where there is only a general anti avoidance provision. Having both provisions could suggest that the specific beneficial ownership criterion is meant to exclude something *else* than what is excluded by art. 5. It has been argued that the beneficial ownership criterion in the EU context targets mainly nominees[73].

One interesting consequence of including art. 5 in the analysis of art. 1,4 and suggesting that art. 1,4, *because* of art. 5, does not cover actual abuse and fraud, is that the scope of the beneficial ownership criterion in the Interest and Royalty Directive will be narrower than the same criterion in the OECD Model[74]. This is because the OECD Model does not contain a general anti abuse provision. The

71 Observation 13 in the Council proposal for the Interest- and Royalty Directive, COM (1998), 67

72 Marcello Distaso and Raffaele Russo 'The EC Interest and Royalty Directive – A comment', (2004) 4 European Taxation, 148

73 Xénia Legendre and Hicham Kabbaj, 'Substance over Form in France and the Bank of Scotland Decision',(2007) Tax Notes International, 9 April, 171

74 Lee A. Sheppard, 'Indofood and Bank of Scotland: Who is the Beneficial Owner?', (2007) Tax Notes International, 5 Feb.,406

specific DTC articles containing the beneficial ownership notion could thus be expected to be construed broader – governing also fraud and abuse[75].

As argued by Christiana HJI Panayi[76], it cannot however be concluded readily that the beneficial ownership criterion in the Interest- and Royalty Directive and other EU instruments is in fact always narrower than the concept is interpreted in the OECD MTC. The Danish Tax Tribunal agreed on this point in the second beneficial ownership decision. In fact the Tribunal took the conclusion further and stated explicitly that the concept in the Interest and Royalty Directive was *identical* to the OECD concept. The validity of this statement will be analysed below, in this same paragraph.

If preliminary questions are referred to the ECJ in any of the pending Danish beneficial ownership cases, or in cases from other jurisdictions, it will furthermore be interesting to see, whether ECJ will rely on OECD's Model Tax Convention and, in particular, on the Commentaries for the interpretation of the Directive concept. Taking into account how similar the two concepts are formulated and the similar specific contexts the notions are used in; it seems relevant for ECJ to include the OECD Commentaries as possible extrinsic aid in the interpretation[77]. The specific purpose of the beneficial ownership test in both tax areas is to limit the favorable tax treatment to situations where the payment is made to the entity benefitting there from.

The Directive based beneficial ownership notion was inserted long time after the concept was included in the OECD Model. It is therefore fair to assume that the OECD concept was known and considered when the Directive was drafted. The lack of reference in the Directive preamble can be seen both as an indication that the drafters did not want to positively distance the EU concept from the OECD Model concept[78], but it can also be viewed as indication of the opposite. The lack of reference to the OECD concept in the preamble to the Interest and Royalty Directive could actually be viewed as a deliberate indication that the two concepts are not necessarily identical[79].

Even if it seems relevant at first glance for ECJ to include OECD's Model Tax Convention – and especially the commentaries thereto when interpreting the beneficial ownership criterion in the Interest and Royalty Directive, the Danish Tax Tribunal's statement in **SKM 2010,729 LSR** about the two concepts being *identical*

75 Supra at 5, 610

76 Christiana HJI Panayi, 'Recent Developments to the OECD Model Tax Treaty and EC Law', (2007) 47 European Taxation, 452,460

77 Brent Springael, 'Securitization of Receivables – a Tax Analysis', (2004) 6 (2),DFI,282

78 Since it does not mention any *differences* between the concepts

79 J. D. B. Oliver and others, 'Beneficial ownership', [2000] 54 B.I.F.D.,310,324

appears unfounded. The Directive and the OECD Model Tax Convention are created in different legal orders. The EU is resting on a much wider foundation than OECD. Even though the Interest and Royalty Directive has as purpose to eliminate double taxation, the purpose also behind DTC's, it cannot be concluded readily that the concepts are necessarily identical[80]. Neither is it certain that ECJ will even construe the EU concept in light of the International Tax Law concept.

There are many cases were ECJ refers to DTCs, in particular based on the OECD Model Tax Convention[81]. References are also made to the Commentaries in some cases[82]. The Model Tax Convention, with Commentaries, is however not used in these cases to *interpret* EU concepts; in these cases ECJ is merely expressing respect for the DTC's as the method to avoid double taxation.

From the **Gilly-case** and onwards the Court has expressed the mantra that

> *"Member States remain at liberty to determine the connection factors for the allocation of fiscal jurisdiction by means of bilateral agreements"*.

This respect for the DTC network to solve double taxation issues does, however, not indicate that the Directive based beneficial ownership test will be interpreted as identical to the OECD concept in all circumstances. Neither does it indicate that the Commentaries and other material from OECD will necessarily be included in the interpretation process.

It could also be possible for ECJ to include domestic tax law from the Member States when interpreting the EU beneficial ownership concept[83]. ECJ could refer to the domestic understanding of the concept. The Interest and Royalty Directive, including art.1,4, has however been implemented in a variety of ways in the Member States as concluded by IBFD (International Bureau of Fiscal Documentation):

> *"In many instances, however, the definition of the beneficial owner has been transposed with deviations, has not been incorporated into the law or has not been incorporated because the existing domestic law concepts applies[84]"*

80 Thomas Rønfeldt, 'Retmæssig ejer, beneficial owner og rent kunstige arrangementer' (2011) TfS 403 (In Denmark refered to as TfS 2011,403) Ander Nørgaard Laursen, 'Dobbeltbeskatningsoverenskomsterne og EU-retten', SU 2010, 70; Klaus Eicker and Fabio Aramini, (2004) ECTR,135

81 Case C-336/96- Gilly v Directeur des Services Fiscaux du Bas-Rhin, para 24 and 30;Case C-414/06 – Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn, para 22

82 Case C-265/04 – Margareta Bouanich v Skatteverket, para 44

83 Joanna Wheeler, 'Conflicts in the attribution of income to a person – General Report',(2007) Vol. 92b,Cashier de droid fiscal international,24

84 IBFD, Survey on the Implementation of the EC Interest and Royalty Directive, 7,www.ibfd.org (last visited 20 July 2011)

Due to this inconsistency in the implementation of the concept in domestic tax law, it is limited how much inclusion of the domestic Directive based tax law can contribute with when the beneficial ownership concept is interpreted. The legal value of the domestic case law interpreting beneficial ownership is further more limited, since decisions, such as the new Danish cases, are not automatically EU compliant. The ECJ will therefore not always accept the domestic interpretation in cases scrutinizing the notion[85].

10 The anti avoidance provisions in the two Directives:

Both of the directives discussed in this article, the Parent-/Subsidiary Directive and the Interest- and Royalty Directive, contain general anti avoidance provisions. By virtue of these articles the Member States are not precluded from applying *"domestic or agreement-based provisions required for the prevention of fraud or abuse"*[86].

In the first Danish Tribunal decision SKAT seems to suggest that there is sufficient legal basis within the EU law itself to deny beneficial tax treatment under the Parent- Subsidiary Directive. This was not accepted in the Tribunal's reasoning.
It should be emphasized in this connection, that art. 1,2 of this Directive only leaves room for applying domestic or agreement-based anti avoidance provisions, it does not in itself constitute the legal basis for denying the Directive benefit. There is no specific beneficial ownership criterion in this Directive, and as concluded in paragraph 8 such a criterion cannot be interpreted into the general anti avoidance provision in the Parent-/Subsidiary Directive. It would be against the principle of legal certainty if directives were being used to create obligations directly for individuals[87].

The legal basis for disregarding the transactions that would otherwise fall under the Parent-/Subsidiary Directive must be found in domestic tax law. In Danish tax law an anti avoidance provision in a DTC would not in itself be enough to disregard a transaction and impose tax, there must also be domestic legal basis. This is called the "golden rule"[88] and has in Danish tax law been considered important[89].

As the ECJ made clear in the **Kofoed-case**[90] the legal basis does not necessarily have to be in domestic legislation, it can be domestic doctrines targeted at abuse and

85 Supra at 5, 604

86 Art. 1, 2 in the Parent-/Subsidiary Directive; art. 5,1 in the Interest- and Royalty Directive

87 C-321/05 – Hans Markus Kofoed v Skatteministeriet, para 42

88 Gustaf Lindencrona, *'Dubbelbeskattningsavtalsrätt'*, (1st edn Norstedtts Juridik AB,Sverige,1994)24

89 Supra at 28,32

90 C-321/05, Kofoed,para 44

fraud. In Danish domestic tax law there is no general anti avoidance provision found in the legislation.

In the Interest and Royalty Directive art. 5 there is an additional sentence which is not found in the Parent-/Subsidiary Directive.

> *"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 the Directive"*

It can be considered whether this sentence has any specific impact or merely refers to general EU principles for abuse of EU rights? As envisaged in the **Kofoed case**, regarding an identical provision found in the Mergers-Directive, the sentence merely reflects the general EU principles that abusive practices cannot be regarded under EU law. For this reason it should not make a difference that the sentence is only in one of the two Directives examined in this article.

11 The beneficial ownership concept in the OECD Model Tax Convention

11.1 Introduction

When countries conclude tax conventions the purpose is to avoid or mitigate taxation or double non-taxation, by allocating the right to tax certain income types amongst the convention parties. At the same time they seek to prevent fiscal evasion. The intention is to give the taxpayers of each country the best possible opportunity to trade and invest in the Convention Countries without deterrent and unrelieved double taxation. An important goal set out in the preambles to many DTCs is at the same time, to combat taxpayers' exploitation of the terms of the DTCs via avoidance schemes[91]. Typically tax conventions are bilateral, which means they are concluded amongst only two countries. The Nordic Tax Convention, which was the convention regulating the allocation of taxing rights in the two most recent Danish Tribunal decisions, is however a multilateral convention.

The DTC's are binding for the states and governed by principles of international law, including the Vienna Convention[92].

Legal basis for imposing tax on an individual or legal entity cannot, as stated above, be found in a DTC, it must be found in domestic tax law[93]. This legal basis is, as

91 H M Revenue & Customs, Technical Note, Tax Treaties and Anti Avoidance, Tax Analyst 1 August 2011,.4

92 The Vienna Convention on the Law of Treaties of May 23, 1969. It is generally accepted that DTC's are governed by this convention, cf. Sir Ian Sinclair, 'Interpretation of Tax Treaties', 1986 Bull. I.B.F.D, 75.

93 The Golden Rule

described above, found in the Danish Cooperation Tax Act § 2, when it comes to interest, royalties and dividends. I will elaborate on the role of the Vienna Convention immediately below.

As mentioned in the introduction, the vast majority of the Danish DTC's, as well as the Nordic Multilateral Convention, are based on OECD's Model Tax Convention. The analysis in this article is therefore based only on this model.

It is important to emphasise that the OECD Model is not a binding convention for the Countries in itself. It is, as the name suggests, merely a model for the countries to base their DTC's with other countries on. Another model for DTCs is the UN Model Tax Convention. Since many DTCs are based on the OECD Model it is nevertheless an important means of interpretation when specific DTC's are interpreted. In this interpretation process the domestic courts must take into account whether the specific DTC being scrutinized deviate from the Model.

Since the Danish domestic tax provision in SEL § 2 contains a limitation linked directly to the DTC network it is very important for the taxpayers how these DTC's are construed. For dividends, interest and royalties, the beneficial ownership condition is essential, since it is a condition for benefitting from being governed by these allocation rules. If the condition is not fulfilled it can result in double taxation of the income.

The first version of the OECD Model Tax Convention is from 1963. It was, however, not until 1977 that the criterion beneficial ownership was inserted in the articles regulating the allocation of taxing rights for dividends, interest and royalties. Some DTC's did contain the requirement even before that time[94].

11.2 The Model Tax Convention and the Commentaries

When the beneficial ownership condition was inserted in the 1977 model, the interpretation guidance provided in the Commentaries was very limited. In 1987 a rapport from The Committee on Fiscal Affairs, titled "Double Taxation Conventions and the Use of Conduit Companies"[95] was published, providing further guidance for the interpretation. The 1987 rapport showed that there were several interpretation issues with the beneficial ownership concept. Clear consensus was, however, found for the interpretation that nominees and agents were not governed by the beneficial ownership criterion.

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94 Luc De Broe, *'International Tax Planning and prevention of abuse: a study under domestic tax law, tax treaties and EC law in relation to conduit and base companies'*, (Vol. 14 Doctoral Series, IBFD,2009),663; Supra at 81,310

95 Committee on Fiscal Affairs, 'International Tax Avoidance and evasion: Four related Studies', 1987, 93 (hereafter CFA Rapport 1987)

Whereas there is still no attempted positive definition of beneficial ownership in the OECD Model Tax Convention itself, such as the one found in the Interest- and Royalty Directive art. 1,4, the 1987 rapport and the Commentaries to the OECD Model as amended in 2003 and 2005 do provide some guidance on how the notion should be interpreted. If the draft proposal from OECD on the beneficial ownership condition is implemented in the Commentaries, this will include a negative definition as well as a positive definition[96].

The Commentaries to OECD's Model Tax Convention have been accepted broadly as an important aid in the interpretation of DTC's[97]. There are certain open questions related to the use of Commentaries in the interpretation process, including the exact legal basis for reference[98] , but there is nevertheless clear judicial authority for using them for interpretation purposes and it is beyond the scope of this article to enter into the discussion of especially the legal basis for using the Commentaries.
In the, to date, most recently adopted version of the Commentaries it is states in the paragraphs commenting on art. 10 (dividends) that the beneficial ownership criterion was inserted to make it clear that the source state is not obligated to give up the taxing rights to a dividend payment merely because it is immediately received by a resident in the other DTC party state[99]. Additionally it is stated, that

> *"the term "beneficial owner" is not used in a narrow technical sense, rather, it should be understood in its context and in the light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance"*[100]

Taking these purposes into account it is further stated in the Commentaries, that the source state should not grant relief or exemption to an immediate recipient acting as agent or nominee for the actual beneficiary[101]. The same applies to situations where the immediate recipient is acting as a *"conduit".* It can be seen in the contributions from the Committee on Fiscal Affairs, the few cases dealing with beneficial ownership and the tax literature on this topic that the most difficult aspect of the beneficial ownership test is, to determine what a 'conduit' is. I will return to this aspect under paragraph 13.1 and 13.2.

96 Supra 6, para 12.4

97 Philip Baker, 'Double Taxation Conventions', (11th edn Sweet &Maxwell's Tax Library, London 2011) para E.10

98 Supra at 100, para E.11

99 In the new draft this is suggested changed to 'directly received'

100 The Commentaries to art. 10, para 12

101 Para 12.1

In 1995 it was added to the commentaries, that the benefits of limited source taxation is also extended to situations where some kind of intermediary is imposed, either in the other DTC state or in a third country, but the taxpayer fulfilling the beneficiary owner criterion is resident in this other DTC state. As long as the payer and the recipient that fulfills the beneficial ownership conditions are resident for tax purposes in the two countries governed by the DTC in question, the source state must grant the treaty benefit[102].

One interesting aspect of using the Commentaries to interpret a specific DTC is which *version* the interpretation should be based on. When the Commentaries have been amended, which is as mentioned immediately above the case with the Commentaries to art. 10[103], it is relevant to consider whether a DTC concluded before the amendment should be interpreted in the light of the amended version. This is traditionally referred to as the discussion of 'static' or 'dynamic' treaty interpretation'[104]. In the introduction to the Model, the OECD Committee for Fiscal Affairs has stated that the revised version should be used as far as possible, unless the articles to which the specific comment is linked has been substantially amended since the relevant DTC was concluded. Some academics have argued against this view[105]

The recent Danish decisions all support a dynamic interpretation of the beneficial ownership concept. Reference is made to the 2003 commentaries, even though the relevant DTC in the first two cases is from 1980 and the Multilateral Nordic Tax Convention was drafted in 1998. Various other courts around the world have adopted the same approach and in a Danish setting there is support in the Supreme Court case **Texaco Denmark**[106].

With regards to the interpretation of the beneficial ownership condition based on the OECD Model Tax Convention, there seems to be good reason to include the updated Commentaries[107]. The wording of the concept in the DTCs has not changed and the amended Commentaries can be categorised as elaboration on the concept, not substantial changes.

It can, however, be discussed whether an amendment of the Commentaries affecting the companies adversely should still be applied. One Danish tax case, the **Casino**

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102 This para is not suggested changed in the draft (supra at 6)

103 And also the Commentaries to art. 11 and 12

104 Michael P. Van Alstine, 'Dynamic Treaty Interpretation' (1998) 146 (3), University of Pennsylvania Law Review, 687

105 Michael Lang, 'Later Commentaries of the OECD Committee on Fiscal Affairs, Not to Affect the Interpretation of Previously Concluded Tax Treaties', (1997) 7 Intertax, 9

106 Texaco Denmark Inc v Ministry of Taxation, Dec. 19, 1992; (1993) 7 TfS 34

107 Including the recent draft if implemented

Copenhagen case[108], suggests that such an amendment should not be applied[109]. Since the case was settled, and the reason for such settlements are not published, it is, however, not certain that the case can be interpreted this way.

In addition to the guidance in the Commentaries, courts from different jurisdictions have rendered decisions on the beneficial ownership concept in recent years. Just ten years ago there were *"remarkable few cases on the tax treaty meaning of the term"*[110] . Other jurisdictions than Denmark have however also contributed with cases on beneficial ownership recently. Some of the cases will be included in the analysis in paragraph 13 below.

As mentioned in the introduction the notion has further received much attention in the tax literature, some of these contributions will be included.

Whereas the purpose of this paragraph was merely to describe some basic features of the beneficial ownership concept, the origin of the concept and the main aids for the interpretation of the concept, paragraph 13 will contain a closer analysis of some specific aspects of the recent Danish decisions.

12 The interplay between the OECD Model Tax Convention, the Parent/Subsidiary Directive and the Interest and Royalty Directive

Both the OECD Model Tax Convention and the Interest and Royalty Directive operate with a beneficial ownership condition, and as concluded in the preceding paragraphs it cannot be concluded readily that the two concepts are necessarily overlapping. Since there is still no case law on the criterion in an EU setting the further analysis in this article will mainly be based on OECD sources.

Some comments on the interplay between the Directives and the DTC's should be made at this point, since reference is in the cases made to both set of rules.

If dividend is distributed or interest paid to another EU country, the taxpayer will get the most favorable tax treatment under the Directives. When the payment falls under the EU directives, Denmark is obliged to fully exempt the income from Danish source tax. Under the OECD Model Tax Convention, the countries can agree to allocate a part of the taxing right to the source country.

When payments are made to immediate recipients in Non-EU countries the DTC network is evidently important – the Directive benefits are not extended outside EU,

108 Casino Copenhagen K/S v Ministry of Taxation, Danish High Court, Eastern Division, Court Settlement from 3 Feb. 2000, (2000) 3 I.T.L.R 447 (Full text SU 2000.241)

109 Supra at 100, para E.15

110 Supra at 82, 31

they are not part of the free movement of capital[111], which is the only EU right extended to third countries.

Within EU it could be considered, whether the DTC's are even necessary, when more beneficial tax treatment is already provided under the Directives[112]. Due to the limited scope of the Directives this question can be answered in the affirmative. The DTC's are relevant when the control requirements are not met. For interest and royalties the required shareholding is 25 %, whereas it has been lowered to 10 % under the currently applicable directive for dividend payments.

13 Some Interesting elements of the first Danish cases – in light of the Beneficial Ownership concept in EU Tax Law and International Tax Law

13.1 Flow of funds

Since the CFA Rapport from 1987 "Double Taxation Conventions and the Use of Conduit Companies" and the inclusion of the 'conduit company' concept in the OECD Model Tax Convention there has been much focus on trying to define this concept. Conduit companies can be used to channel income through a specific country before reaching the ultimate owner, so the group as a whole is ensured the lightest possible tax burden on its transaction.

When reading the two first Danish Tax Tribunal cases, where the Tribunal held against SKAT, it appears decisive that the funds did not actually flow through to the ultimate owners of the company but was reinvested by the intermediary. SKAT argued that the interposed holding company was irrespectively not beneficial ownership of the income, since the reinvestment of the money was determined by the ultimate owners.

It should firstly be emphasised that the mere fact that the company in Luxembourg was a holding company cannot deem it a 'conduit company'. Holding companies are as a starting point entitled to both DTC benefits and Directive benefits just as other types of companies. With regards to the EU freedom rights the acceptance of holding companies was expressed in **SGI**[113]. With regards to DTC rights the principle can be seen in **Prevóst**[114].

Holding companies are established for a variety of reasons. Even though tax considerations are definitely an important part of determining how to structure a

111 Art. 63 of TFEU

112 Peter Loft, 'Har vi behov for dobbeltbeskatningsoverenskomster', SU 2000.325.

113 Case C-311/08 – Société de Gestion Industrielle SA v État belge

114 Prevóst Car Inc. V. The Queen [2008] TCC 231.

group, this does not automatically disqualify the holding company from fulfilling the beneficial ownership criterion. Structuring the group in a tax efficient way is neither against the EU law nor is it unacceptable under the DTC's. I will return to the question whether it can be required that there is any substance in the holding company. At this point it is sufficient to stress that holding companies are accepted for treaty benefit purposes.

When studying the international tax literature on beneficial ownership the situation where the funds are reinvested in the intermediary instead of being passed on to the ultimate owners does not appear to have been discussed directly. It is surprising that SKAT chose *these* two cases as the first Danish cases dealing with beneficial ownership. The cases were clearly different from other 'B.O' cases and the situations mostly discussed in the literature.

When the funds were reinvested in the interposed holding company the value remained a part of the equity in the interposed holding.

SKAT found it decisive that the intermediary lacked powers to decide how the funds should be reinvested, and argued that the actual flow of funds to the ultimate owners were not decisive. As support, reference was made to a specific passage in the CFA rapport 1987:

> *"… Thus, a conduit company can normally not be regarded as beneficial owner if, though the formal owner of certain assets, it has* ***very narrow powers*** *which render it a mere fiduciary or an administrator…*[115]*"*
> (emphasis added)

Even though the "*very narrow powers*" are clearly a part of the beneficial ownership definition, there does not appear to be basis for interpreting the passage as more than one factor amongst many – and not a factor that can on its *own* disqualify the company from being beneficial ownership even in cases where the funds were not channeled through the entity. This would indicate that the beneficial ownership concept was a very broad anti avoidance clause, instead of merely a limiting factor introduced to counter treaty shopping via flow through entities. *A*pplying such a broad definition, where the channeling through of income is not necessary at all, would effectively mean that all 100 % owned intermediaries could be disregarded under the beneficial ownership criterion when receiving income from the lower level subsidiaries.

The beneficial ownership criterion cannot be extended into a general anti avoidance clause this way. The test must be reserved for denying tax advantages only in clear cases[116]. The Tribunal agreed with the taxpayer that actual channeling of the funds

115 Supra at 98, 93

116 Philip Baker, 'Beneficial owner: After Indofood',(2007)Vol VI, No1, Grays Inn Tax ChambersReview,17

was a precondition for deeming it a 'conduit company' and that the other factors did not come into play until this precondition was fulfilled. As argued immediately above, this conclusion appears to be justified based on the current status of the beneficial ownership concept. The cases have however been appealed and it will be interesting to see the higher courts' position on this aspect. If the new OECD Draft is implemented into the Commentaries in their current form, there is a vague support for SKAT's claim in the new para 12.4 excusing from the beneficial ownership concept situations where the direct recipient is obliged to pass the received income "to **another person**" (emphasis added). The argument is vague, but at least the draft does not specify which person the income should be passed on to, it could thus be argued that it does not have to be to the ultimate owner.

One unresolved aspect of these first two decisions is how *much* actual flow of funds is then required? Does all the received income have to flow through the interposed holding company, or can it be deemed a 'conduit company' in a case were only a part flows through?

In some connected Spanish cases from 2006-2007 analysed by Jiminéz[117], the recipients were held to be 'conduit companies' that did not fulfill the beneficial ownership criterion even though a part of the income – a "spread" was retained in the interposed holding companies. In these cases almost all the income was channeled through, so they cannot be used to determine whether a situation at the opposite end of the scale can be categorised as a 'conduit company'- if, for example, only 10 % is channeled through.

If it were enough for the group structure to reinvest a certain percentage of the income to avoid the 'conduit company' category, then it would become relatively easy for the group to plan around the beneficial ownership criterion. For this reason retaining a small "spread" cannot in *itself* be enough to escape the 'conduit company category'.

On the other hand, the compromise could be that the Tax Authorities recognise the interposed holding company as beneficial ownership of the specific part of the income that is reinvested and then imposed withholding tax for the income that *was* channeled through[118].

13.2 The rights for the foreign company to dispose of the funds received

If income has actually been channeled through the interposed holding company it becomes relevant to consider how much power the conduit company actually has to reinvest-/dispose of the income received. In other words, does the recipient have economic rights in reality?

117 Supra at 7,38

118 After considering the other aspects of the B.O. concept of course

As argued above even very limited powers are not enough to fail the beneficial ownership test when there has been no channeling through of funds, but when this precondition has been fulfilled the evaluation of the intermediary's economic rights becomes relevant[119]. But is it possible to determine what constitute "very narrow powers" and the weight this criterion has in the cases?

In the two most recent Danish Tribunal decisions it was explicitly mentioned that the (lacking) powers in the interposed holding company was decisive for the outcome. In both cases the Tribunal found it decisive that the group contributions were predetermined and that the upper level Swedish companies could not have paid the interest to the holding companies on Guernsey/Cayman Island had they not received the group contributions from the lower level Swedish companies.

When reading the third and fourth Tribunal decisions it is difficult to see, what the Tribunal based this part of the analysis on[120]. The premises are not clear on this point. It is not specified which concrete factual circumstances led to the conclusion that the interposed holding company could not decide how to invest the funds.

It should be noted in this connection, that it is very common for reinvestment decisions to be taken at the owner level. The Tribunal decisions seem to suggest that the decisions should be made within the company instead – by the board or the managing directors. At least it is unclear what the decisions are based on with regards to the lack of powers in the intermediary.

When reading the new draft proposal from OECD on the beneficial ownership concept there does not appear to be much specific guidance on this aspect of the beneficial ownership test. On the other hand, attempting to give a very specific guidance to a broad economic substance aspect of the beneficial ownership concept would perhaps be impossible.

In the draft there is a negative and a positive definition of the concept, but it is as argued by several commentators[121] very broad:

> "*where he has the full right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass the payment received to another person."*[122]

119 Supra at 98, 93

120 Regarding the third decision Jakob Bundgaard supra at 54,31

121 Oliver R Hoor, 'OECD releases discussion draft on the meaning of 'beneficial owner in the OECD Model Tax Convention' June edn. Of AGEFI, available at http://www.hoor.de/beneficial_owner.html (last visited 13 November 2011), 28.

122 Para 12.4.

In a response to the draft proposal John Avery Jones, Richard Vann and Joanna Wheeler[123] criticised this broad definition and how the draft text fails to address the essential factors:

> "*This text appears to look for full ownership of the income, whereas the beneficial ownership of income is a primarily an issue in situations at the opposite end of the scale, in which a person has only very limited rights over income. There is a wide range of possibilities between full ownership of income and rights that are too limited to qualify as beneficial ownership, and it is the latter end of the scale that should be the focus of the Commentaries."*[124]

Some guidance relevant also for the borderline cases is, however, found in the draft. The new para 12.4 emphasised that the constrains on the powers will normally be derived from legally binding documents. They may also be '*found to exist on the basis of facts and circumstances'* which was the case in the two most recent Danish cases. To indicate something about the tipping point of the scale, it is stressed that the facts and circumstances must 'clearly' show.

Since there is little guidance in the currently adopted Commentaries as well as in this new draft proposal, it is relevant to examine case law.

As mentioned above there is still no ECJ-cases to compare the decisions to. But there are several international tax law cases to include in the analysis.

As early as in 2000 the concept of beneficial owner was tested in a Spanish case[125].

> *The case concerned royalty payments to foreign organizations managing copyrights and authors rights. Since these organizations only managed the IP rights on behalf of the holders of the rights as intermediaries or agents they were held not to fulfill the beneficial owner criterion. With regards to the royalties it was stated that it was received only on behalf of the authors without any right to dispose of them.*

The Spanish case can be seen as an example of the situations that are excluded in the draft proposals positive definition of beneficial ownership, a situation that appears to be far from the tipping point of the scale.

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123 John Avery Jones, Richard Vann and Joanna Wheeler, 'OECD Discussion Draft "Clarification of the Meaning of „Beneficial Owner" in the OECD Model Tax Convention', Tax Analyst 22 July 2011

124 P. 2.

125 Tribunal Económico-Administrativo Central of 22 September 2000 – included in Jiminez, supra at 7,37.

One interesting aspect of the 'power to dispose of the funds' test is, which law it should be evaluated after? In this case it was based on Spanish rules regulating the authors' rights. In the Danish Tribunal cases reference was made only to the contracts and circumstances, not rights determined by legislation.
A more well known case was the **Indofood-case**[126].

> *This case was decided in a UK Court because the parties had chosen this forum, but it evolved around what an Indonesian court would have done, had it been brought there instead. To reduce the withholding tax on interest payments the Indonesian parent company channeled the funds through a Mauritian company. The tax benefits with this arrangement was derived from a DTC between Indonesia and Mauritius.*
>
> *When the parent company learned that this DTC would be cancelled it sought to redeem the notes. There was basis for such an early redemption in the notes if, for example, the tax burden increased, unless an alternative solution could be found via "reasonable measures".*
>
> *The note holders referred to this exception, claiming that the higher tax burden could be avoided if an intermediary in Holland was set up. For such a new interposed holding to be a "reasonable measure" it would have to fulfill the beneficial ownership concept in that DTC.*
>
> *With regards to this paragraph of the article, it was especially relevant that the interposed company was tied by the clauses in the contract. It could not decide to reinvest or even to pay the interest to its parent company with its own funds. The loans carried the same interest rates.*

In Indofood the Court found that the beneficial ownership concept excluded formal owners who did not have "*the full privilege to directly benefit from the income"*[127].
In comparison to the Danish cases, it is clearer when reading Indofood, that the interposed holding company was tied by the contract clauses. The two latter Danish cases also concerned loans carrying the same interest and the temporal link can also be taken as indicator that the flow was predetermined. However, when only reading the available public material on the Danish cases, there is no indication of the interposed holding companies being *legally* or *contractually* bound to make the group contributions. The two latter decisions are apparently based on factual patterns of obligations, indicating a substance-over-form perception of the beneficial ownership concept. Focus in apparently on economic reality rather than legal obligations.

126 Indofood, supra at 42.

127 Para 42

Taking a substance- over form approach has especially been criticized by Jiminéz[128]. There is however support in, for example, Indofood for this criterion: *"Regard is to be had to the substance of the matter"*[129].

Another international tax case regarding the beneficial ownership concept was the **Bank of Scotland case**[130]. This case supports the emphasis on 'economic reality' taken in the Danish cases.

> *The case concerned an American company who sold the rights to receive dividends from its French subsidiary to RBS. The Bank bought the rights to receive dividends for three years, and it was determined from the beginning how much dividend should be received, if the distribution was less than this amount, the American company would pay the rest.*
>
> *The withholding tax in France would be less if this arrangement was accepted for tax purposes than if the dividend was paid to America directly. When the case was brought before the French Supreme Court it applied a substance over form approach and held that the contract between RBS and the American company was in reality a loan arrangement instead, since RBS was guaranteed a certain amount. The beneficial owner of the dividends from the French subsidiary was therefore held to be the American parent company.*

It is clear from these cases, that the 'economic ownership' is determinative rather than the formal ownership.

As stated above the focus on economic reality is maintained in the draft proposal. The Danish Tribunal cases are thus on this basic point in line with the draft.

This has been criticized by Avery Jones and others[131]. In this response to the draft it is argued that the crucial point should only be whether the intermediary is bound by legally enforceable obligations to pass the income on, and such obligations should be attached to specific income items. These legal obligations could be based on either law of obligations or the law of property[132].

One additional aspect of the draft that should be mentioned at this point is that it settles the previous discussion whether the beneficial owner's economic right should

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128 Supra at 7,35

129 Para 42

130 Conseil d'État, 29 December 2006 No. 283314/Sté Bank of Scotland

131 Supra at 126, 5

132 For instance, see trust law.

be to the income or to the underlying asset as well. In the draft it is stated that economic right to the income is sufficient.

13.3 Is a spread required?

In the Danish cases it was clearly taken into account, that the interposed holding did not retain any "spread" but passed the whole amount on via group contributions. For this reason there was no taxable income in the lower level Swedish companies. This part of the Tribunals reasoning has been criticised[133], but nevertheless this was also a factor in Indofood[134]. A factor that some authors have supported in international tax literature[135]

Whereas the retaining of a spread in the interposed holding company can be included in the economic reality test, there does not appear to be support for taking into account whether there is any *taxable* income in the intermediary.

When the concept was introduced into the OECD Model Tax Convention in 1977 UK suggested adopting a subject-to-tax-test as part of the rules regulating taxation of passive income[136]. If such a test is included in a DTC it is a requirement for obtaining treaty benefits that effective tax is imposed in the state of residence.
The suggestion from UK was rejected, and the beneficial ownership condition was inserted into the DTC. Since 'subject-to-tax' is an *alternative* answer to the treaty shopping concern dealt with when the beneficial ownership concept was inserted into the DTC, it cannot be considered a part of the beneficial ownership test.

13.4 Substance in the intermediary

The four Tribunal decisions all contained a 'substance' analysis of the interposed holding companies, including the lack of employees etc.

With regard to the beneficial owner concept in the DTC's there does not appear to be clear basis for imposing such a requirement. At least the substance test can only be a part of the overall 'real economic rights test'. And as stated above the new Commentary test requires that constrains on the right to benefit and enjoy the income must be clearly envisaged if looking at fact patters.

The cases included above focused on analysing the rights to received income, rather than the substance of the interposed holding company.

133 Supra at 15,7.

134 Supra at 42, Para 40.

135 Supra at 119,25; L. De Broe, "International Tax Planning and Prevention of Abuse", IBFD Doctoral Series14 (2008), p. 712.

136 Supra at 126,2

One of the cases where the substance requirement was excluded was **Prevóst**[137]. The intermediary had no employees or premises in the Netherlands but was still held to be the beneficial owner of dividends.

As mentioned above both the Parent-/Subsidiary Directive and the Interest and Royalty Directive contain general anti avoidance provisions, stating that the Member States are not precluded from denying Directive benefits in cases of abuse and fraud. These provisions must however fulfill the important proportionality test. As mentioned above it is beyond the scope of this article to include the general EU cases dealing with tax avoidance and abuse, it should however be noticed that the proportionality test in cases dealing with the EU compatibility of restrictive tax measures aimed at combating tax avoidance is mainly focused on the concept of 'wholly artificial arrangements'[138]. In this connection the substance in the interposed holding company becomes essential[139]

13.5 Autonomous interpretation or inclusion of domestic tax law in the interpretation?

One interesting aspect of treaty interpretation is whether the concepts found therein are to be interpreted autonomously or if they should be given the meaning they have in domestic tax law. The OECD Model Tax Convention art. 3(2) provides that undefined concepts found in the convention must take their meaning from domestic law *"unless the context requires otherwise".* This last part of art. 3(2) is obviously nebulous and has in connection with the beneficial owner concept been intensely debated in the literature[140].

Autonomous interpretation has the advantage that the interpretation of the concept will hopefully be more similar from one jurisdiction to another, mitigating the risk of double taxation or double non taxation.

Even when countries acknowledge, and seek to apply, the autonomous treaty interpretation method, there are however always the risk of disparities in the interpretation. In an EU setting disputes related to the interpretation of EU concepts can be decided conclusively by the ECJ, but in International Tax Law this same possibility does not exist.

As suggested by Jakob Bundgaard and Niels Winther Sørensen[141], there has been some reluctance in the Danish court rooms to interpret DTC concepts autonomously.

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137 Supra at 117

138 Case C-264/96 Imperial Chemical Industries plc v K. Hall Colmer [Her Majesty's Inspector of Taxes]

139 Case C-196/04 Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue

140 See for a comprehensive overview of these different contributions the example, supra at 29.

141 Supra at 5,609

At least in instances of relatively unclear DTC concepts, there has been a tendency to include domestic law in the interpretation process. Especially the two most recent Tribunal decisions do, however, clearly rely on autonomous interpretation of beneficial ownership.

Whereas it is possible to find both supporters and opponents of the autonomous interpretation in the international tax literature, especially the **Indofood case** clearly supports autonomous interpretation[142].

This discussion of autonomous interpretation was however not finalised with Indofood, since the Canadian **Prevóst case**[143] supports inclusion of domestic law in the interpretation process. The Court rejected the purely autonomous interpretation approach[144], and included domestic law understanding of the concept:

> *"In his search for the meaning of these terms (hereunder beneficial owner), the Judge closely examined their originary meaning and the meaning they might have in common law, in Québec's civil law, in Dutch law and in international law."*[145]

The new Draft from OECD further contribute to holding this debate alive. Whilst it is stated initially that the term was intended to be interpreted in its context instead of being based on any technical meaning that it would have under domestic law, the draft text also acknowledges that domestic contributions to the interpretation are not automatically irrelevant. The domestic contributions must be consistent with the beneficial ownership concept in the model.

Part IV: Conclusion

14 Conclusion and perspectives

Whilst the Beneficial Ownership concept is far from being a new condition in DTC's based on the OECD Model Tax Convention, it remains one of the central topics in International Tax Law. In 2003 the condition was also adopted in the EU Interest- and Royalty Directive, and the discussion of the concept has therefore spread to the EU Tax Law circles. Its precise meaning and scope has been subject to much debate and analysis but the discussion cannot be considered exhausted.

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142 Indofood, Supra at 42, Para 42

143 Prevost, supra at 117

144 Catherine Snowdon, 'Canadian tax courts issues Prevóst ruling on beneficial ownership',(2008) June International Tax Review,98

145 Para 8.

In Denmark the first four Tax Tribunal Cases on the Beneficial Ownership criterion was decided in 2010 and 2011. More cases are in the pipeline and some of the first cases are expected to be appealed.

After analysing the cases in light of EU Law and International Tax Law it can be concluded that most aspects of the cases are in line with how the concept has been interpreted until this date. The cases are furthermore generally in line with the OECD draft proposal on the meaning of Beneficial Ownership. This proposal was published 15 July 2011 and comments to the draft are currently being published.
There are still no cases on the beneficial ownership concept from ECJ, but within International Tax Law a string of cases has appeared from different jurisdictions. It can be concluded from these cases, the Commentaries to the OECD Model, the draft proposal and contributions in the tax literature that Beneficial Ownership must be understood as a broad concept where focus is on 'economic reality' rather than formalities. The concept is considered to have an overarching international fiscal meaning.

As envisaged in this analysis the concept is relevant in a variety of tax planning situations, including complex group structures and advanced finance schemes. For this reason searching for a more precise definition will frequently be in vain. The cases must be decided on a case by case basis, and even though the Draft text as well as the Danish Tribunal Cases contribute to illuminating the concept, there are open ended questions. The rendering of higher level decisions in Denmark on the concept must be welcomed and the practical impact of the Draft remains to be seen.

One remarkable issue in the recent Danish cases is the liability issue and how taxpayers can best avoid being held liable for non-withheld tax on outbound income flows, via careful planning and clearance answers. It is however beyond the scope of this article to engage in this, otherwise, very practically relevant discussion.