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INFORMATIVE NOTE

TAX

The CJEU's interpretation of the concepts of abuse of rights and beneficial owner

Two important judgments of the Court of Justice of the European Union ("CJEU") were published on 26 February 2019. In these judgments, the CJEU interprets the concepts of "beneficial owner" and "abuse of rights" in the light of the Parent-Subsidiary Directive (Cases C-116/16 and C-117/16), and the Interest and Royalties Directive (Cases C-115/16, C-118/16, C-119/16 and C-229/16).

The CJEU has often been called upon to analyse the concept of "abuse of rights" and the understanding of this concept has been evolving to keep pace with the main trends in international taxation, in particular, in the context of the BEPS (Base Erosion and Profit Shifting) project.

Furthermore, for the first time, the CJEU has interpreted the concept of "beneficial owner". In doing so, it has established a connection with the commentaries of the OECD Model Tax Convention on Income and on Capital and opened the door to the future adoption of dynamic interpretations of this concept.

The main point here is that the CJEU's understanding seems to be evolving towards a broader interpretation of the concept of abuse of rights. It has held to be abusive not only wholly artificial arrangements (see judgments C-504/16 and C-613/16), but also all those where the main objective, or as one of the main objectives, is to benefit from a tax advantage. This approach has already been expressed in the Portuguese legal system, in article 14 of the Corporate Income Tax (CIT) Code, which limits the application of the exemption from withholding tax to the distribution of profits and reserves, and to the payment of interest and royalties.

It is becoming increasingly clear that taxpayers need to demonstrate what were, or what are, the economic reasons underlying the setting-up of their investment structures. In particular, they have to demonstrate they are engaged in a real economic activity based on adequate human resources and materials. However, the new judgments have the advantage of defining a set of objective and subjective indications to make it possible to validate these structures in light of the EU Directives and conventions to avoid double taxation.

It is also important to be aware that this exercise of assessing whether structures are lawful or whether they are unlawful or abusive will soon face new challenges, when Council Directive (EU) 2016/1164 of 12 July 2016 comes into force. This directive is usually referred to as the ATAD Directive, the acronym of Anti-Tax Avoidance Directive, and it has been amended in the meantime by Council Directive 2017/902 (EU) of 29 May 2017. The ATAD Directive establishes a set of anti-abuse mechanisms, in particular regarding the redefinition of the general anti-abuse rule provided for in Article 38(2) of the General Tax Law.

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The considerations set out below seek to summarise the legislative framework relevant to understanding the cases examined by the CJEU and the conclusions drawn in the new judgments.

1. PARENT-SUBSIDIARY DIRECTIVE

Council Directive2011/96/EU of 30 November (which repealed the original Directive 90/435/EEC of 23 July 1990) establishes the common taxation system applicable to parent companies and subsidiaries from different Member States. The directive is commonly referred to as the Parent-Subsidiary Directive and its objective is to exempt from withholding tax the dividends and other types of distribution of profits or reserves paid by subsidiary companies to their parent companies, and to eliminate double taxation of this income at the level of the parent company.

The rules of the Parent-Subsidiary Directive have been implemented in the Portuguese legal system and they are currently set out in article 14(3-11) and (17-19) of the IRC Code.

Currently, profits and reserves made available or paid by a company resident in Portugal to a non-resident company are subject to CIT taxation in Portuguese the rate of 25%. This rate can be reduced by applying the reduced withholding tax rates provided for in the double taxation conventions entered into by Portugal, provided the administrative procedures set out in the national legislation are complied with first.

However, there is an exemption from CIT for profits and reserves that an entity resident in Portugal – subject to and not exempt from CIT or the tax referred to in article 7 and not covered by the rules in article 6 of the CIT Code – makes available to an entity that:

a) Is resident:
   - In another Member State of the European Union;
   - In a Member State of the European Economic Area that is bound by administrative cooperation in the field of taxation equivalent to that established in the European Union;
   - In a state with which a convention to avoid double taxation, which provides for the exchange of information, has been signed and has come into force.

b) Is subject to and not exempt from a tax on profits listed in the Directive, or a tax that is identical or similar to CIT, provided that the rate legally applicable to the entity is not be less than 60% of the CIT rate;

c) Holds directly or directly and indirectly a shareholding of not less than 10% of the share capital or voting rights of the entity that distributes the profits or reserves;

d) Has held the shareholding referred to in the previous paragraph uninterruptedly during the year leading up to the profits or reserves being made available.

> **"Currently, profits and reserves made available, or paid, by a company resident in Portugal to a non-resident company are subject to CIT taxation in Portugal at the rate of 25%."**

When, on the date of the profits or reserves being made available or paid, the holding period of one year has not yet been completed, the domestic withholding tax rate (25%) or the reduced withholding tax rate provided for in double taxation conventions concluded by Portugal, will apply. The beneficiary entity may request the refund of the tax paid as soon as this requirement has been met, and this request must be made under the conditions set out in Article 95 of the CIT Code.

However, even if all the conditions referred to above are met, the exemption from CIT will not apply:

- To the profits and reserves distributed when there is an arrangement or series of arrangements, devoid of valid economic reasons and not reflecting economic substance, implemented to obtain a tax advantage that defeats the object and purpose of eliminating the double taxation of that income, and these arrangements are not considered genuine in light of all relevant facts and circumstances;
- When (i) the entity paying the profits or reserves has not met the reporting obligations set out in the Legal Rules of the Central Register of the Beneficial Owner, and (ii) when the beneficial owner has, or some of the beneficial owners have, declared under those rules, that they have their residence or domicile in a country, territory or region subject to a clearly more favourable tax regime contained in list approved by ministerial order of the member of the Government responsible for the area of finance. However, the CIT exemption may apply if the taxable person proves that the company receiving such income is not part of an arrangement or series of arrangements in the terms set out above.

2. INTEREST AND ROYALTIES DIRECTIVE

Council Directive 2003/49/EC of 3 June 2003 establishes a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States. It is known as the Interest and Royalties Directive and its aim is to eliminate juridical double taxation of this income, to ensure that transactions between companies of different Member States are not subject to less favourable tax conditions than the conditions applicable to the same transactions when carried out between companies of the same Member State.

Until the entry into force of this Directive, and its subsequent implementation into Portuguese law, this requirement was not met as regards interest and royalty payments.

In fact, and until then, national tax laws, coupled, in some cases, with bilateral or multilateral agreements, did not always ensure the elimination of juridical double taxation. Indeed, in many cases, the elimination of juridical double taxation frequently meant cumbersome administrative formalities and cash-flow problems for the companies involved.

In this context, and as a result of the entry into force of the Interest and Royalties Directive, payments of interest and royalties will be subject to a single layer of taxation in the state of residence of the recipient of the income. Taxation at source, either through the levy of a withholding tax or through the obligation to pay the tax that is due in the end, is abolished.

The rules of the Interest and Royalties Directive have been implemented in the Portuguese legal system and they are currently set out in article 14(12-16) of the IRC Code.

Currently, interest and royalties made available or paid by a company resident in Portugal to a non-resident company are subject to CIT taxation in Portugal at the rate of 25%. This rate can be reduced by applying the lower withholding tax rates provided for in the double taxation conventions entered into by Portugal, provided the administrative procedures set out in the national legislation are complied with first.

However, when the interest or royalties are paid to a company of another Member State of the European Union or a company with its registered office in Switzerland (or to a permanent establishment of a company of a Member State located in another Member State or in Switzerland), the income will be exempt from CIT, provided that, for this purpose, it meets the following conditions, among others:

- Both entities are subject to and not exempt from one of the taxes on profits listed in the Interest and Royalties Directive;
- Both entities take one of the legal forms set out in the list annexed to the Interest and Royalties Directive;
- Both entities are considered resident in a Member State of the European Union and, under the conventions to avoid double taxation, they are not considered, for tax purposes, to be resident outside the European Union;
- Both entities are considered "associated companies". This which will occur when: (i) the beneficiary entity holds a direct shareholding of not less than 25%, in the company paying the income; (ii) the paying entity holds a direct shareholding of not less than 25%, in the company that benefits from the income; or (iii) both entities (payer and beneficiary) are held, directly, as to at least 25%, by the same company;
- The direct shareholding of 25%, in any one of the forms referred to above, is held continuously for at least two years before the interest or royalties are made available or paid;
- The company to which the payment of the interest or royalties is made is the beneficial owner of that income. This requirement is deemed to be met when it earns this income on its own account and not as an intermediary, whether as representative, trustee or authorised signatory for third parties. For a permanent establishment to be considered the beneficial owner of the income, it will be necessary for the income to actually relate to the activity carried on by its intermediary and to constitute income that is taxable in the Member State in which that establishment is located.

When the holding period of two years has not been completed on the date the interest or royalties are paid or made available, the withholding tax rate (25%), or the reduced withholding tax rate provided for in double taxation conventions concluded by Portugal, will apply. The beneficiary entity may request the refund of the tax paid as soon as this requirement has been met and this request must be made under the conditions set out in Article 95 of the CIT Code.

However, even if all the conditions referred to above are met, the exemption from CIT will not apply to:

- Interest and royalties obtained in Portugal by a company from another Member State or with its registered office in Switzerland (or by a permanent establishment located in another Member State or in Switzerland of a company of a Member State), when the majority of the capital or of the voting rights of this company are held, directly or indirectly, by one or several residents of third countries. However, the exemption will apply if it can be proved that the main objective or one of the main objectives of the chain of shareholdings is something other than to benefit from a reduction in the withholding tax rate;
- If there is a special relationship between the payer or the debtor and the beneficial owner of the interest or royalties, or between them both and a third party, the excess over the amount of interest or royalties that, in the absence of such relationships, would have been agreed between the payer and the beneficial owner.

3. ANALYSIS OF THE JUDGMENTS OF THE CJEU – PARENT-SUBSIDIARY DIRECTIVE

3.1. CASE C-116/16

With a view to the acquisition of T Danmark (a Danish services provider), several private equity funds not resident in the European Union or in a country with which Denmark had concluded a convention to avoid double taxation, incorporated a Danish company, N Danmark 1 (Diagram 1).

The remaining shares of T Danmark were dispersed between multiple shareholders.

Then, after the acquisition of 80% of the capital of T Danmark, the domicile of the company N Danmark 1 was moved to Luxembourg and it changed its name to N Luxembourg 1.

At the same time, the private equity funds incorporated the company C Luxembourg, which, after a series of exchanges of shares, came to be the parent company of N Danmark 1, which had been domiciled in the meantime in Luxembourg (N Luxembourg 1).

Finally, the same funds incorporated the company A Luxembourg Holding, also established in Luxembourg, which came to be, first, the indirect owner and then the direct owner of C Luxembourg (Diagram 2).

Graphically, the evolution of the holding structure can be represented as follows:

Diagram 1

Diagram 2

In accordance with its policy on distribution of dividends, T Danmark distributed dividends to its shareholders in 2011. For this purpose, it requested the Danish tax authorities to issue a binding information to assess whether the dividends paid to N Luxembourg 1 were exempt from withholding tax.

At the request of the Danish authorities, the Luxembourg tax authorities issued a *certificat de résidence* (certificate of residence), certifying that N Luxembourg 1 was subject to the *impôt sur le revenu des collectivités* (corporate income tax) and that it was the beneficial owner of all the dividends paid on the shareholding it held in T Danmark or any other income derived from this shareholding.

In the request for binding information, T Danmark stated that the N Luxembourg 1 was an independent entity with its own management and decision-making powers. Therefore, T Danmark did could not determine how N Luxembourg 1 would dispose of these dividends. Even so, in its request, T Danmark emphasised that a significant number of the ultimate investors were resident in the United States of America.

In a subsequent exchange of correspondence, T Danmark informed the Danish tax authorities that they should assume that the dividends to be paid to N Luxembourg 1 would subsequently be distributed to the parent company (C Luxembourg). In this context, it could be presumed that N Luxembourg 1 would distribute a portion of the profits to companies controlled by different private equity funds.

3.2. CASE C-117/16

Initially, the company Y Inc. established in the United States of America (Y USA) held – through the intermediary company Y Global Ltd, with its registered office in Bermuda (Y Bermuda) – the Danish company Y Danmark (Diagram 3).

In the meantime, the European part of group Y was subject to a corporate restructuring, with the Cypriot company Y Cyprus having been interposed between Y Denmark, and Y Bermuda (Diagram 4).

Graphically, the evolution of the holding structure can be represented as follows:

Diagram 3

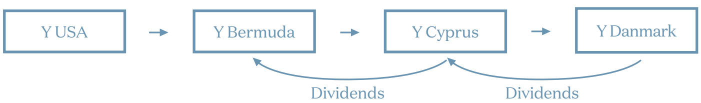

Diagram 4

3.3. ISSUES CONSIDERED BY THE CJEU

In both cases appearing in the two judgments described above, the issue was whether or not the dividends paid by the Danish companies were exempt from taxation in Denmark under the Parent-Subsidiary Directive.

In the opinion of the Danish tax authorities, the dividends should actually have been taxed in Denmark. However, in the opinion of the Danish National Tax Commission, the dividends should not have been subject to taxation. This was because, at that time, Denmark had not yet internally adopted any anti-abuse measures as expressly authorised (but not imposed on Member States) by article 12 of the Parent-Subsidiary Directive, in its original version.

The questions referred to the CJEU by the Danish court can be broken down into two main topics:

- The first question was whether or not there was a legal basis for a Member State, even when its domestic legislation was silent, to refuse to grant the exemption from withholding tax provided for in the Parent-Subsidiary Directive on the basis of an abuse of rights;

To the extent that the CJEU considers there is a legal basis for rejecting the above-mentioned exemption, the second issue raised was to determine what the constituent elements of a possible abuse of rights and the corresponding forms of proof are.

3.3.1 As to the lawfulness of a Member State refusing to apply the withholding tax exemption under the Parent-Subsidiary Directive when there is a situation of abuse of rights

In the opinion of the CJEU, and in the light of the consistent case law of the court, there is, in EU law, a general principle of law according to which individuals may not fraudulently or abusively invoke the rules of EU law.

Although article 1(2) of the Parent-Subsidiary Directive (in the version of Directive 90/435) provides that this policy does not preclude the application of the domestic or agreement-based provisions required to prevent fraud and abuse, in the opinion of the CJEU, this provision cannot be interpreted as meaning it excludes the application of the general principle of EU law prohibiting abusive practices, when they are materially incompatible with the objective pursued by this Directive.

Indeed, as the CJEU pointed out in the judgments under analysis, the Parent-Subsidiary Directive is intended to facilitate arrangements for groups of companies on a European Union scale. It does this by establishing neutral tax rules to strengthen their competitive position on the international level. However, the CJEU made it clear that this principle cannot, and should not, be applied in absolute terms.

As the CJEU underlined, to authorise the creation of financial arrangements with the sole purpose of benefiting from tax advantages resulting from the Directive in question would not be consistent with those objectives. On the contrary, if this situation were permitted, it would impede the smooth functioning of the internal market, distorting the conditions of competition.

In light of the above – and this is one of the most innovative points of the new EU case law – the CJEU held that the rejection of the withholding tax exemption on profits and reserves is justified, even when the operations in question do not pursue exclusively tax objectives, in view of the principle of prohibition of abusive practices (on this, see the judgments of the CJEU in cases C-425/06 and C-251/16.

In addition, the right for taxpayers to take advantage of the tax competition that exists between Member States due to the lack of harmonisation of income taxation cannot be invoked against the application of the general principle of the prohibition of abusive practices. This is so even when the Member States have not internally adopted appropriate measures to combat fraud and abuse.

The fact that a taxpayer seeks out the tax regime that is most advantageous for it cannot, in itself, constitute a general presumption of fraud or abuse. However, it is no less true, in the opinion of the CJEU, that the taxpayer may not benefit from a right or a benefit deriving from EU law when the operation in question is purely artificial in economic terms and seeks to evade the application of the domestic legislation of a Member State.

In conclusion, the CJEU noted the general principle of EU law according to which individuals may not fraudulently or abusively invoke the rules of EU law of the Union. As a result of this principle, the court went on to conclude that the Member States and national courts must reject the application of an exemption from withholding tax on dividends paid by a subsidiary to its parent company, whenever it is proved they are faced with a fraudulent or abusive practice. Furthermore, this is the case even when there are no provisions of national law or of a convention that provide for this refusal.

3.3.2 The determination of the essential elements of a situation of abuse of rights and their means of proof

The CJEU held that proof of an abusive practice requires (i) the identification of a set of objective circumstances which, despite formal compliance with the requirements laid down in EU legislation, result in the objective pursued by that legislation not being achieved, and (ii) the presence of a subjective element that consists in the desire to obtain an advantage resulting from the regulations of the European Union, through the artificial creation of the requirements that must be met to obtain it.

In this regard, the CJEU listed as indications to be taken into account to identify the artificial character of a given structure as follows:

- In any given group of companies, when a third company is inserted between the company paying the dividends and the company benefiting from them, in order to avoid the payment of tax on the dividends distributed between those companies;
- When a given group of companies is structured in such a way that (i) the intermediary company that receives the dividends must transfer those same dividends to a third company that does not meet the requirements laid down for the purpose of the application of the Parent-Subsidiary Directive, and (ii) the consequence is that the intermediary company only makes an insignificant taxable profit when it acts in the capacity of intermediary company with a view to allowing only the passage of financial flows from the company paying the profits to the entity that, in the end, is the beneficial owner of the amounts paid;
- When it is possible to demonstrate that the sole activity of the intermediary company is to collect the dividends and transfer them to the beneficial owner or to other intermediary companies. In this respect, the absence of actual economic activity should, in the light of the specific characteristics of the economic activity in question, be decided by analysing a set of relevant elements. These include the management of the company, the balance sheet, the structure of costs and expenses, and the human and material resources allocated to its activity;
- When, in the light of the different contracts existing between the companies involved, which give rise to intra-group financial flows, it is possible to infer that the intermediary company has no powers economically to have or enjoy the dividends received. In this context, particular weight should be given to the instances when the organisation of complex financial operations and the granting of loans within the same group occur at the same time as or close to the entry into force of new tax laws.

Above all, the CJEU held that, in assessing possible abuses, it will make no difference if the beneficial owner of the dividends transferred by intermediary companies is a company with its registered office in a third state with which the EU Member State of source has entered into a tax convention, under which the dividends would not have been subject to withholding tax if they had been paid directly to the company with its registered office in that third state.

In other words, in the opinion of the CJEU, the fact that some of the beneficial owners of the dividends paid by the intermediary company are domiciled for tax purposes in a third state which has concluded a convention for the avoidance of double taxation with the Member State of source is not relevant. Indeed, the existence of such a convention cannot, by itself, exclude an abuse of rights. Thus, a convention of this nature cannot exclude the possibility of an abuse of rights duly established based on a set of facts demonstrating that the economic operators performed purely formal or artificial operations devoid of any economic and commercial justification with the essential purpose of unduly benefiting from the withholding tax exemption provided for in the Parent-Subsidiary Directive.

Finally, the CJEU held that it is not for the national authority to identify the beneficial owner of the dividends. Instead, it has to demonstrate that the supposed beneficial owner is only an intermediary for the company that committed an abuse of rights.

4. ANALYSIS OF THE JUDGMENTS OF THE CJEU – INTEREST AND ROYALTIES DIRECTIVE

4.1. CASE C-115/16

Case C-115/16 is based on the same facts as Case C-116/16 referred to above.

As explained, with a view to acquiring T Danmark, several private equity funds not resident in the European Union incorporated a Danish company, N Danmark 1, which was capitalised through loans (in the form of Preferred Equity Certificates) and capital increases originating from these funds (Diagram 5).

After the restructuring of the group, a back-to-back set up was created under which the company N Danmark 1 (which was later domiciled in Luxembourg, changing its name to N Luxembourg 1) paid interest to the company C Luxembourg which, in turn, paid interest to the Luxembourg Holding which, in turn, paid it to the funds (Diagram 6).

Graphically, the evolution of the holding structure can be represented as follows:

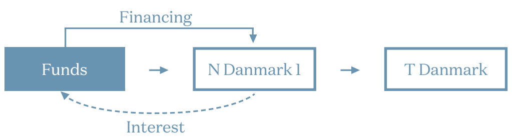

Diagram 5

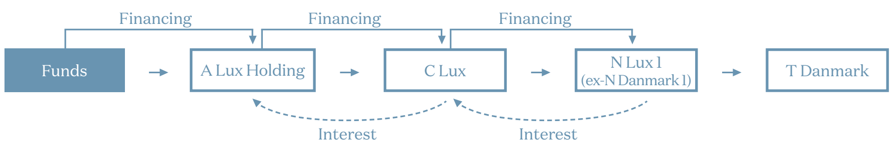

Diagram 6

4.2. CASE C-118/16

In 2015, Group X was purchased by private equity funds, and X SCA SICAR was incorporated and domiciled in Luxembourg. The latter company was operated as a société en commandite par actions (SCA) with the capacity of société d'investissement en capital à risque (SICAR).

X SCA held as assets: (i) 100% of the share capital of the Swedish company X Sweden Holding AB; and (ii) a position as creditor of the same entity resulting from a loan granted to it. Besides holding these assets, X SCA SICAR did not engage in any activity.

In turn, X Sweden Holding AB held 97.5% of the capital of another Swedish subsidiary, X Sweden, whose activity consisted in registering products and carrying out administrative tasks concerning clinical trials (Diagram 7).

Graphically, the evolution of the holding structure can be represented as follows:

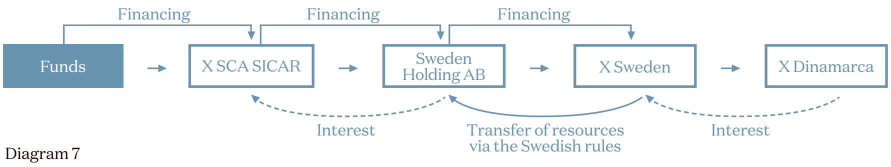

Diagram 7

According to the data reported in the judgment, X Sweden's financial statements for the financial years 2007 to 2009 showed two main items of revenue. These were "interest income and similar profit items" and "other income" . In the case of interest earned, X Sweden's sole source of income was the interest paid by the company X Danmark as the result of a loan granted to it by X Sweden.

In 2007, 2008 and 2009, the interest constituted 98.1%, 97.8% and 98% respectively of X Sweden's overall income, other income amounting to 1.9%, 2.2% and 2%. The interest recorded in respect of the loan to X Danmark was taken into account when calculating X Sweden's taxable income for those years. In those years, X Sweden — in accordance with the specific rules applicable in Sweden in respect of adjusting earnings for tax purposes within a group — made transfers of the income originating in Denmark to its parent company, X Sweden Holding AB, thus giving X Sweden a right of deduction of those amounts for tax purposes.

4.3. CASE C-119/16

According to the preliminary ruling, C USA, domiciled in the United States of America, holds C Cayman Islands, which, until the end of 2004, held the company C Danmark II, established in Denmark, and the parent company of a group of companies (Diagram 8).

In the meantime, the group carried out a restructuring under which two Swedish companies, C Sverige I and C Sverige II, and a Danish company, C Danmark I, were introduced between the Cayman Islands and C Danmark II. From 1 January 2005, C Danmark I became the top parent company of the Danish part of the American group, whose top company is C USA.

In the context of this restructuring, the company C Cayman Islands granted two loans to C Sverige I, which, in turn, granted two other loans to C Sverige II, which passed them on to C Danmark I. However, and as a guarantee of financing, guarantees were taken out among the various entities for similar amounts and conditions (Diagram 9).

Diagram 8

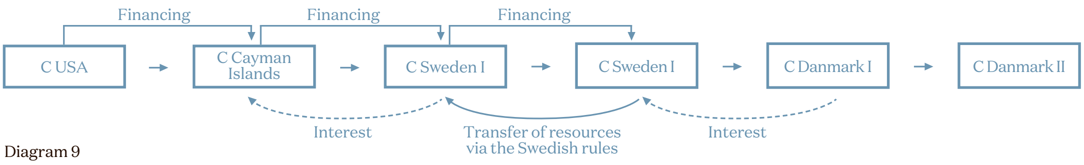

Diagram 9

As a result of the above, the company C Sverige II transferred the interest received from C Danmark I to C Sverige I, using the Swedish rules on intra-group transfers, while C Sverige I re-transferred the funds to C Cayman Islands. As there was no taxation of net taxable income in Sweden, the interest payments that C Danmark I was responsible for were thus fully transferred to the C Cayman Islands through the Swedish companies.

4.4. CASE C-299/16

In 2005, part of the share capital of the Danish industrial company Z Denmark was acquired by five private equity funds, based in Jersey. The investors were resident in a number of countries within and outside the European Union as well as within and outside countries with which Denmark has entered into a DTC.

After the acquisition, but still in 2005, one of the funds (referred to as "Fund no. 5") financed Z Denmark, through a paid interest rate of 9% per year (Diagram 10).

On 28 April 2006, "Fund no. 5" assigned the whole of its credit over Z Denmark in to the company Z Luxembourg, a company created by it on the same day in Luxembourg. The assignment operation was completed with the granting by "Fund no. 5" to Z Luxembourg of a loan of the same amount, but remunerated at the rate of 9.875%.

On 21 June 2006, "Fund no. 5" assigned its shares in Z Denmark to Z Luxembourg (Diagram 11).

According to the available data, Z Luxembourg's only activity was to hold she shares in the company Z Denmark.

On 1 November 2007, Z Denmark repaid the loan granted by "Fund no. 5", plus the interest due. On the same day, Z Luxembourg paid its debt, made up of capital and interest, to "Fund no. 5".

Graphically, the evolution of the holding structure can be represented as follows:

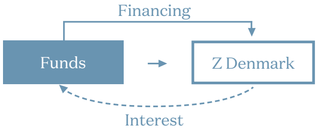

Diagram 10

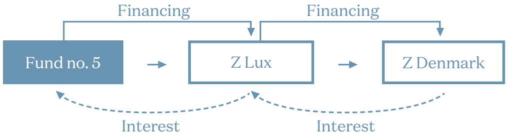

Diagram 11

4.5. ISSUES CONSIDERED BY THE ECJ

The questions submitted by the national courts involved in each of the cases address two major issues:

- The first relates to the concept of "beneficial owner" within the meaning of the Interest and Royalties Directive. It also relates to the existence of a legal basis that would enable a Member State to refuse, based on the commission of an abuse of rights, the benefit of the exemption from taxation, to a company that pays interest to an entity established in another Member State.

To the extent that legal base exists, the second topic is the constituent elements of a possible abuse of rights and the corresponding means of proof.

The CJEU held that the concept of beneficial owner of the interest, within the meaning of the Interest and Royalties Directive, must be interpreted as designating an entity that really benefits from the loan interest of any nature that is paid to it.

In this context, the recipient of the interest or royalties can only be the entity that receives them on its own account and not as a representative, for example, as a trustee or authorised signatory of another person.

Above all, as the CJEU indicates, discounting the different linguistic versions adopted by Member States in their national legislation, the concept of "beneficiary" is not intended to characterise any formal recipient of income. Instead, it is intended to characterise the entity that benefits economically from the interest earned and thus has the option to freely determine its imputation.

The CJEU highlighted the fact that the initial draft of the Interest and Royalties Directive was based on article 11 of the OECD Model Tax Convention of 1996, and it pursues the same objective, which is to avoid international juridical double taxation. Therefore, the concept of "beneficial owner" should be interpreted and completed on the basis of the bilateral conventions based on this model, and on the successive amendments made to this model and the applicable commentaries. At this point, we would like to point out that the CJEU adopted a different understanding to the one set out by Advocate General Kokott. She took the position that the OECD Model Tax Convention and its commentaries should not be relevant to interpreting the concept of "beneficial owner".

In the wake of the position of the CJEU, and as a result of the evolution of the OECD Model Tax Convention and its commentaries, the consideration of the legitimate use of intermediary companies in light of the concept of "beneficial owner" should be pursued, not literally, but to ensure the fight against fraud and tax evasion when the issue is the non-double taxation of income.

In this context, the CJEU was careful to clarify that the mere fact that the company that receives the interest in a Member State is not the "beneficial owner" of this interest does not necessarily mean that the withholding tax exemption provided for in the Directive is not applicable. Indeed, it is conceivable that this interest is exempt on this basis in the source state, when the company that receives it transfers the amount in question to a beneficial owner, provided the latter is established in the European Union and that it meets all the requirements laid down in the Interest and Royalties Directive.

> **"In this context, the recipient of the interest or royalties can only be the entity that receives them on its own account and not as a representative."**