

# A step towards more clear and uniform rules for beneficial ownership

**On 1 March 2018, Advocate General Kokott issued her opinion in the Danish beneficial owner cases currently pending before the Court of Justice of the European Union (CJEU). The cases concern whether dividend and interest payments from Danish companies to their parent companies in other EU Member States should be exempt from Danish withholding tax with reference to the EU Interest and Royalties Directive and the EU Parent-Subsidiary Directive.**

In the said cases, the Danish tax authorities have denied such exemption arguing that the parent companies are not the beneficial owners of the payments, but rather conduit companies. The High Court of Eastern Denmark has referred a number of requests for preliminary rulings to the CJEU containing multiple questions pertaining to the understanding and extent of the notion of beneficial owner and abuse under EU law.

## Beneficial owner

In the dividend cases, the Advocate General finds that the Parent-Subsidiary Directive does not contain a beneficial owner requirement and that this is in line with the object of the Directive. In addition, the Advocate General finds that the Parent-Subsidiary Directive must be interpreted under EU law without regard to the OECD Commentaries, just as the Directive must be interpreted independently from the Interest and Royalties Directive as the latter takes a different approach with regard to the beneficial owner requirement.

In the interest cases, the Advocate General initially engages the notion of beneficial owner under EU law and, based on the CJEU case law, concludes that a person who, in his own name, has a claim to interest according to civil law is the beneficial owner under the Interest and Royalties Directive. The Advocate General acknowledges the exception as the person does not draw said interest in his own name and on his own account but rather on behalf of a third party.

In the opinion of the Advocate General, this will be the case if the alleged conduit company has a binding obligation to pay interest in advance to its parent company, and such obligation is substantiated by the facts that a) the interest is not to cover the expenses of the company, and thus b) the amount of interest paid in advance is identical to the amount of interest received. The Advocate General finds that it is for the referring court to decide whether that is the case.

In the interest cases, the Advocate General finds, as in the dividend cases, that the Interest and Royalties Directive must be interpreted pursuant to EU law



**Anders Oreby Hansen**  
Partner  
Copenhagen  
P +45 72273602  
M +45 25263602  
E  
aoh@bechbruun.com



**Kaspar Bastian**  
Partner  
Copenhagen  
P +45 72273424  
M +45 25263424  
E  
kba@bechbruun.com

without regard to the OECD Commentaries.

### Abuse

As regards the concept of abuse found in both directives the Advocate General finds that abuse is to be determined by the referring court based on an overall assessment of the facts and circumstances of each case. However, the Advocate General finds that wholly artificial arrangements not reflecting economic reality or arrangements with the aim to avoid tax may be considered abuse under EU law.

### Anti-abuse provisions

Both the Interest and Royalties Directive and the Parent-Subsidiary Directive contain provisions allowing EU Member States to implement anti-avoidance provisions. According to the Advocate General's opinions, an EU Member State cannot rely on such Directive provisions if said Member State has not transposed these provisions.

Denmark had not implemented anti-abuse provisions in the relevant income years. In addition, the Advocate General finds that neither the specific provisions in the Danish Corporation Tax Act (*selskabsskatteloven*) nor the relevant tax treaties are to be regarded as sufficient transposition in this regard.

### Bech-Bruun's comments

Although relying on the referring court to decide whether the structures in question are to be considered abuse, the Advocate General's opinion provides useful guidance on the interpretation of the beneficial owner concept. CJEU's preliminary rulings are expected to be delivered later this year. It will be interesting to see whether the CJEU will follow the Advocate General's opinions.

### Tags

[Taxes and duties](#)  
[EU law](#)

---

#### COPENHAGEN

Langelinie Allé 35  
2100 Copenhagen

#### AARHUS

Værkmestergade 2  
8000 Aarhus C

#### SHANGHAI REPRESENTATIVE OFFICE

No.1440 Yan'an Middle Road,  
Suite 2H08  
Jing'an District, 200040  
Shanghai, P.R. China

#### BECH-BRUUN LAW FIRM P/S

P +45 72270000  
F +45 72270027  
E [info@bechbruun.com](mailto:info@bechbruun.com)  
VAT number 38 53 80 71