The Danish *Beneficial Owner* Cases: Six EU Rulings with Three Important Consequences for Advising Companies

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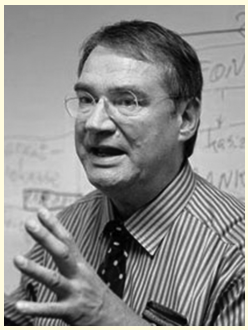

In 2019, the Court of Justice of the European Union decided on six preliminary rulings from Danish courts in tax related cases regarding the structure of cross border groups, partly concerning dividends (C-116/16, C-117/16) and partly concerning interest (C-115/16, C-118/16, C-119/16, C299/16).

These rulings provide us with useful understanding, which can be summarized here in three important doctrines. The rulings relate to the term *beneficial owner*, *BO*, which is why it is natural to address them as 'the danish BO cases'.

First, the rulings show that a twinning partnership between company law and corporate tax law is more important than ever for students, researchers as well as advisors. You cannot understand and advise on the relations and structures of companies without taking the tax-related aspects into account.

Second, the rulings show that EU law in the tax field has developed a great deal since the ECJ gave its first judgments on the field of corporate tax law. Back then (cf. the *avoir fiscal*-ruling, 280/83) it was all about determining that tax law was not exempt from complying with requirements and principles of EC law. National anti-avoidance rules in tax law cannot disproportionally restrict fundamental rights under EU law, especially the right of establishment.

To this day, the development of EU law has reached the point, in which it, through unwritten principles, *demands* from Member States that they have legislative protection from tax abuse.

Third, the judgments in the danish BO cases demonstrate that the determining test concerning whether abuse can be demonstrated, is *economic and objective*, rather than *legal and subjective*.

I thereby refer to the ongoing intense professional discussion that concerns whether demonstrating abuse requires that, (A) a subjective element equivalent to *intent* under criminal law can be demonstrated, or (B) the specific transaction provides a tax advantage which exceeds the commercial advantage gained by the same transaction, the advantage thereby being measured in monetary gain.

If (A) is the correct answer, then the assessment of a transaction will solely rely on a legal decision. If (B) is the correct answer, it will not solely be a legal decision, but instead a decision with considerable economic elements which will make the inclusion of principles from *law & economics* necessary.

Danish tax law researcher *Susi Hjorth Baerentzen* (World Tax Journal 2020, vol. 12, No. 1) has convincingly argued in favour of solution (B). It is quite possible that we will need more preliminary rulings from the ECJ before we can get a definite answer; however, due to the fact that the ECJ has now determined a *duty* for Member States to prevent abuse through legislation, it is to be expected that the ECJ is prepared to define the further elements of the term 'abuse' as well, seemingly resulting in the model described as (B) here.

See an important CPB Discussion Paper: CPB Netherlands Bureau for Economic Policy Analysis: December 2019: *Limitation of holding structures for intra-EU dividends: A blow to tax avoidance? (Susi Hjorth Baerentzen, Arjan Lejour & Maarten van't Riet*).

This is not an academic play on words and concepts. It is guidance for the companies and advisors to take into account that model (B), the *law & economics* solution, will be preferred.

This calls for critical advice to the client, and especially a consistent securing of evidence that the commercial element in any given transaction has outweighed the element of tax advantage, measured in the sum of money.

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