SPECIAL REPORT

COLLECTIVE INVESTMENT SCHEMES & EU HOLDING COMPANIES: A MULTIJURISDICTIONAL ANALYSIS IN LIGHT OF THE CJEU DANISH CASES

July 11, 2019

McDermott Will & Emery

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For more information, please contact your regular McDermott lawyer, or:

CARLO MARIA PAOLELLA
PARTNER, MILAN

cpaolella@mwe.com
+39 02 365 75701

ANDREA TEMPESTINI
PARTNER, MILAN

atempestini@mwe.com
+39 02 365 75701

EMIDIO CACCIAPUOTI
PARTNER, MILAN

ecacciapuoti@mwe.com
+39 02 365 75701

ALESSIO PERSIANI
COUNSEL, MILAN

apersiani@mwe.com
+39 02 365 75701

DAVIDE MASSIGLIA
ASSOCIATE, MILAN

dmassiglia@mwe.com
+39 02 365 75701

LUCA ANGELINI
ASSOCIATE, MILAN

langelini@mwe.com
+39 02 365 75701

ENRICO SPINELLI
ASSOCIATE, MILAN

espinelli@mwe.com
+39 02 365 75701

For more information about McDermott Will & Emery visit mwe.com

1. BACKGROUND AND SCOPE OF THE ANALYSIS

On 26 February 2019, the Court of Justice of the European Union (CJEU) issued long-awaited judgments in a group of cases concerning the Danish government withholding tax on dividends and interest paid by Danish companies to companies in other EU Member States (CJEU Joined Cases C-115/16, C-118/16, C-119/16 and 299/16; and Cases C-116/16 and C-117/16) (Danish Cases).

The judgments dealt with the interpretation of the anti-abuse clauses laid down under Art. 1, para. 2 of the Parent-Subsidiary Directive (2011/96/EU) (PSD) and Art. 5 of the Interest and Royalties Directive (2003/49/EC) (IRD).

In a nutshell, the CJEU ruled on the following topics:

- **The concept of "beneficial owner" in the IRD**. The CJEU established that the definition included in the IRD should be interpreted as designating the entity that actually benefits from the interest paid, based on the economic reality of the payment structure, in accordance with the interpretative rules under Article 11 of the OECD Model Convention and the relevant commentaries.

- **The anti-abuse provision in the PSD and IRD.** The CJEU stated that, even in the absence of domestic or agreement-based anti-abuse provisions implementing the anti-abuse clauses laid down under the PSD and IRD, national authorities and courts are to refuse a taxpayer the exemption from withholding tax on dividend and interest payments, based on the general principle of EU law that such law cannot be relied on for abusive or fraudulent ends. Therefore, for the purposes of the PSD, there is no need to interpret the notion of beneficial owner.

- **Denial of application.** The CJEU stated that Member States are allowed to deny the application of the PSD and IRD where exemption has been claimed within a purely artificial scheme aimed (mainly) at benefiting from otherwise undue tax advantages. In this regard, the CJEU provided some general guidance (for the national Courts to consider) on the main elements that should be taken into account to assess whether an investment structure may be regarded as "abusive". For example:

  » Whether "all or almost all" of the dividends/interest paid "are, very soon after their receipt, passed on by the company that has received them to entities which do not fulfil the conditions for the application of" the PSD/IRD, regardless of whether the recipient is legally bound to make such transfer or simply lacks of the economic ability to dispose of the dividends/interest received, under a *de facto* arrangement.

   » Lack of actual economic activity by the recipient to be ascertained from an analysis of all the relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to the expenditure actually incurred, to the staff it employs, and to the premises and equipment at disposal.

- **The applicability of the notion of "beneficial owner" in cases involving third countries.** The CJEU stated that when the beneficial owner of the dividends is resident in a non-EU state, refusal of the withholding tax exemption regime provided under the PSD is not in any way subject to a finding of fraud or an abuse of rights.

- **The burden of proof of abuse.** In accordance with the judgments of the CJEU, the burden stays on the tax authorities, which have "the task of establishing the existence of elements constituting such an abusive practice". In this regard, the CJEU further ruled that the tax authorities are not required to identify the beneficial owner of the income; it is sufficient to demonstrate that the foreign recipient is a conduit vehicle.

All the cases brought before the CJEU on the application of the PSD/IRD related to a Danish company distributing dividends or making interest payments to multiple EU holding intermediate vehicles, in which either EU or non-EU alternative investment funds not entitled to the PSD/IRD provisions ultimately participated. In the course of their audit, the Danish tax authorities assessed that in all cases, the dividend/interest payments flowed entirely (or for the great part of their amount) through the intermediate investment structure up to the investment funds. No verification has been made on the qualification of the investors of the funds in relation to the PSD/IRD requirements.

This special report aims to provide, in light of the Danish Cases judgments, a comprehensive and high-level multijurisdictional analysis on the current risks involved in structures that are put in place under the most common market practice, specifically collective investment schemes and EU holding companies.

This report draws a comparison between a number of EU jurisdictions—Italy, France, Luxembourg, Netherlands, Spain and United Kingdom—based on two different case studies.

The analysis has been conceived and written by **McDermott Will & Emery Italy**, and prepared with the fundamental cooperation of McDermott European colleagues and correspondents:

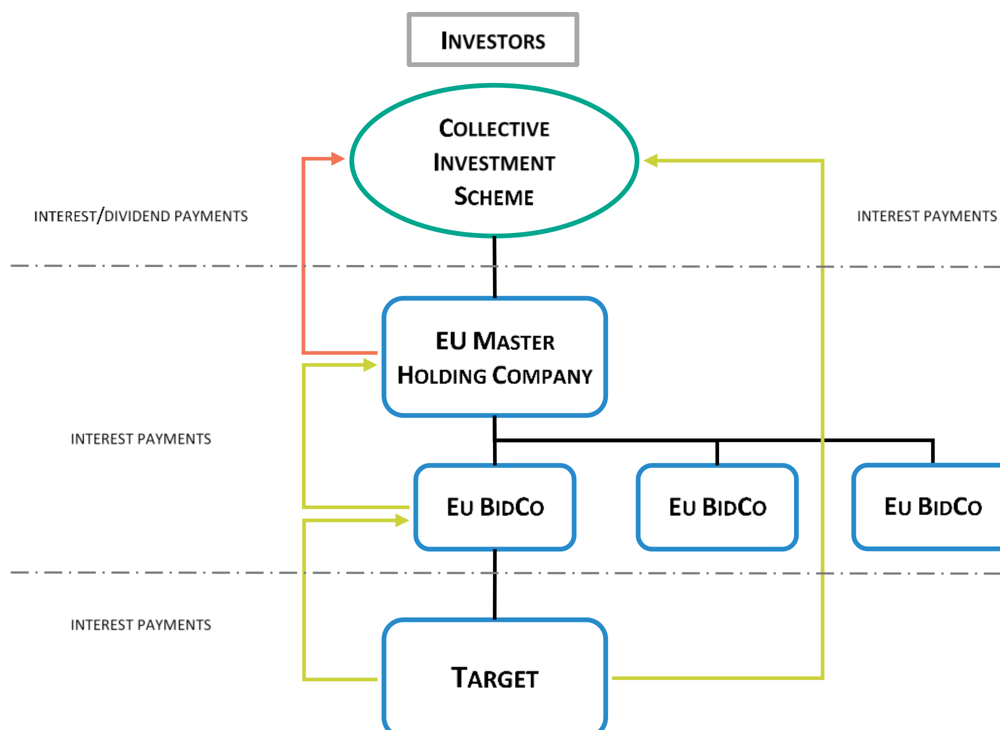
- For France, **Antoine Vergnat** – McDermott Will & Emery AARPI;
- For Luxembourg, **Pieter Stalman**, **Martine Merten** and **Pierre-Antoine Klethi** – Loyens & Loeff Luxembourg;
- For the Netherlands, **Michiel Beudeker** and **Erik Kastrop** – Loyens & Loeff N.V.;
- For Spain, **Pedro Amat Méndez**, **Diego Arribas Plaza** and **Andrea Gorgé Planas** – Cuatrecasas;
- For the United Kingdom, **James Ross** – McDermott Will & Emery UK LLP.

Sections 2 and 3 below illustrate the factual scenario underlying the two case studies, along with the main aspects of the analysis specific to various jurisdictions (that has been carried out by McDermott European colleagues and correspondents in the jurisdictions involved). Section 2 deals with the case study regarding the collective investment schemes, while Section 3 focuses on the case study regarding European holding companies.

The Appendix includes a table with a questionnaire that has been submitted to McDermott European colleagues and correspondents for their input, as well as the full analysis for each country.

2. FIRST CASE STUDY: COLLECTIVE INVESTMENT SCHEMES

The following represents a sample scheme for investment that is usually structured by collective investment schemes to carry on acquisition in the target operating company.



The Collective Investment Scheme may be set up in either an EU or non-EU jurisdiction.

The EU Master Holding Company has an operational structure which is adequate and coherent with its activities, *i.e.*, mainly accounting and administration. Its structure may include, for example, one full-time and one part-time accountant, office space and external consultants. EU BidCo, on the other hand, has no significant operational structure.

EU BidCo realises a small profit (to cover operational expenses) as the difference between the interest rate on the financing granted to Target and the rate applied to the shareholder's loan granted by EU Master Holding Company.

EU Master Holding Company pays interest and/or dividends to the Collective Investment Scheme as soon as practicable after receipt of the amounts from EU BidCo.

Under an alternative structure, the acquisition of Target may be carried out through a combination of equity/debt, whereby the debt is provided directly by the Collective Investment Scheme through the subscription of bonds issued by the Target.

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On the basis of this case study, the following issues will be addressed:

1. What is the risk that EU BidCo may not be regarded as the beneficial owner of the interest payments made by Target under the IRD? What are the main elements substantiating such risk? Would the relevant conclusion change in respect to the application of the relevant Treaty provision?

2. Would it be possible to disregard EU BidCo and sustain that EU Master Holding Company is the beneficial owner for IRD purposes?

3. Would the tax authorities' challenge (if any) be based only on the beneficial owner test, or could it be grounded on a more general anti-abuse provision/practice?

4. What are the main elements on which an intermediate EU vehicle may claim to have sufficient substance and avoid the application of the anti-abuse rule (if any)?

5. Would it be possible, under a look-through approach, to apply the tax regime available to the ultimate investors of the Collective Investment Scheme?

6. Is there any risk that the financing granted by EU BidCo may qualify as equity contribution and the related payments be regarded as dividends rather than interest?

2.1 LEGAL FRAMEWORK

2.1.1 Withholding Tax on Outbound Interest

Among the countries included in the analysis, only Italy, Spain and the United Kingdom (limited to interest on loans having a term of less than a year) levy a WHT on outbound interest. In France, WHTs are levied only on interest payments to Non-Cooperative States and Territories. Ordinary rates vary from 19% (Spain) to 26% (Italy).

In Italy, Spain and the United Kingdom, there are also domestic special exemption regimes other than the one introduced in accordance to the IRD. In Spain, the domestic exemption regime has wider scope of application than that of the IRD.

2.1.2 Domestic Provisions Implementing the IRD

Both UK and Italian domestic provisions implementing the IRD include a beneficial ownership clause. Italian law requires that the interest received by the beneficial owner be actually subject to tax in its country of residency.

The UK domestic provisions also include a specific anti-abuse clause, which denies the relief under the IRD where the main purpose, or one of the main purposes, of any person concerned with the creation or assignment of the debt claim in respect of which the interest is paid is to get relief under the IRD.

By contrast, the Spanish domestic interest exemption regime applies to interest paid to residents in an EU country, as long as such interest is not obtained through a tax haven (no beneficial ownership clause).

Spanish tax authorities have not issued clear guidelines on the scope of the provision "obtained through a tax haven". However, we believe that, in principle, the exemption from WHT would not apply if any of the parties intervening in the transaction was resident in a tax haven or the transaction itself was connected to it.

France implemented the IRD and introduced a beneficial ownership provision but it has no effect

since interest payments are in principle exempt from WHT.

From a procedural standpoint, in Italy, Spain and the United Kingdom, the IRD regime can be alternatively applied at two different stages: a) directly, when interest is paid, or b) at a subsequent time by means of a refund request. In Spain, the latter procedure is available to the taxpayer but rarely applied.

In Italy and Spain, the direct application of the exemption is granted by the payor upon reception of documentary evidence (e.g., tax residency certificates, affidavits) to be submitted by the recipient of the interest. In the United Kingdom, the IRD relief is only available upon obtaining an exemption notice from the UK tax authorities (HMRC) (silence after three months from the filing of the relevant forms means consent to the exemption).

2.1.3 The Concept of "Beneficial Owner"

Italian domestic provisions include a legal definition, although generic, of beneficial owner (*i.e.*, reference is made to the person receiving the payment as the "final" beneficiary and not as another person's intermediary, agent, delegate or fiduciary). In general, in defining such concept, administrative practice and case law make reference to the broad concept of "economic substance", thus denying interest exemption in case of "light" organisational structures or financial "conduit" structures.

In the United Kingdom, in the absence of a legal definition, reference is made to a case law beneficial ownership test, under which a person is deemed to be the beneficial owner where that person "enjoy[s] the full privilege to directly benefit from the income". Based on HMRC's guidance, the beneficial ownership definition is only raised in cases of abuse (such as treaty shopping).

In Spain, the Spanish High Court confirmed that the domestic interest exemption does not contain a beneficial ownership test as such, being instead subject to the general anti-abuse provision (GAAR).

2.1.4 General Anti-Abuse Provision

Italy, Spain and United Kingdom provide for GAARs that aim to contrast inappropriate and artificial use of tax rules.

Spanish and UK domestic interest exemption regimes fall within the scope of GAAR provisions. However, in practice, the assessment of UK exemption under the IRD by the HMRC is more likely to rely on concepts of beneficial ownership or specific anti-avoidance provisions when challenging what is regarded as an abusive transaction.

In theory, the Italian tax authorities also should limit their analysis to beneficial ownership. Nevertheless, the kind of analyses performed under such circumstances may resemble, to a great extent, those carried out where general abuse of law is challenged.

2.2 ISSUES

2.2.1 Tax Authorities Approach and Potential Challenges

The application of the exemption on interest payment in the structure depicted in the case study is likely to be challenged by the tax authorities of Italy (ITA) and Spain (STA).

In particular, the ITA would likely deny the IRD benefit, sustaining that EU BidCo lacks the beneficial ownership requirement because of its insignificant operational structure, and because its financial inflows almost mirror the outflows.

The STA, on the other hand, may rely on the application of the GAAR (there is no beneficial ownership clause in the Spanish interest exemption regime), claiming that EU BidCo is part of an artificial arrangement. The absence of "substance" of the company (*i.e.*, human and material means used by that company to carry out the activity) and of sound business reasons (*i.e.*, the economic rationale behind the setting up of the company) may weaken the position of the EU BidCo. As of the date of this drafting, we are not aware of any precedent in this regard.

From a UK perspective, the risk of challenge by the HMRC is low, considering that EU Master Holding Company would have been entitled to the benefit of the IRD exemption, had it been the direct grantor of the loan. As the beneficial ownership definition (and test) is only raised in cases of abuse (such as treaty shopping), it would have no application here.

2.2.2 Look-Through Approach

Under the present structure, Italy may in principle grant, under a look-through approach, Double Tax Treaty (DTT) protection to the ultimate investors of the Collective Investment Scheme (it should be noted, however, that the administrative practice available on the matter relates to dividends only).

In particular, such regime may be applicable where the intermediate entities qualify as "transparent" for either tax or economic purposes. Since such qualification is merely based on interpretative practice, however, it is generally advisable to obtain an advance clearance by filing a request for a tax ruling from the ITA.

In Spain, it should be possible to take a look-through approach where the intermediate entities qualify as "transparent" for tax purposes, which in principle it is not the case. Otherwise, it is possible to sustain the direct application of the exemption regime, arguing that no abuse exists, if the Collective Investment Scheme is the actual taxable person that has derived income in Spain.

On the assumption that EU BidCo and EU Master Holding Company are regarded as opaque for UK tax purposes, it will not be possible to treat the investors as the recipients of the interest (even if they could be characterised as the beneficial owner). It would therefore not be possible to make a treaty/IRD relief claim on their behalf.

2.2.3 Requalification of the Financing Granted to Target

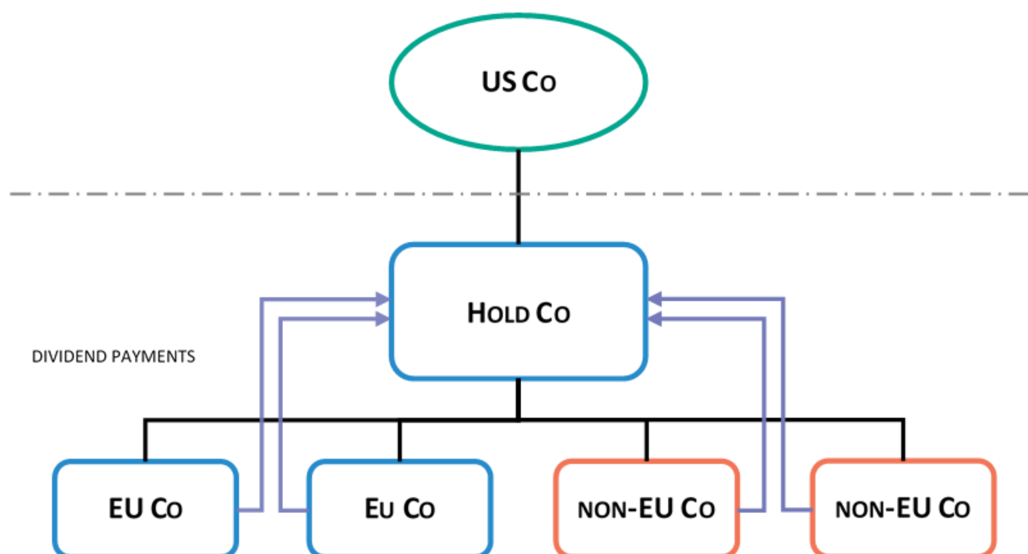
In all countries included in this analysis, there are some provisions and/or administrative practices under which a loan may be requalified into equity and/or the related interest considered as dividends.

In Italy and Luxembourg, loans may be requalified based on their terms and conditions and compliance with the arm's length principle. Recent Italian case law has narrowed the scope of application of the requalification to abusive situations only, however.

In Spain, the Netherlands, Luxembourg and the United Kingdom, where the amount of interest is dependent on payor's performance, the loan may be considered an equity instrument, and therefore the related interest payments may be treated as dividends.

3. SECOND CASE STUDY: EU HOLDING COMPANIES

The following is a sample structure, which is often applied in the context of US-based multinational groups.



The EU-based subholding company (HOLDCO) was incorporated in 1992, after the adoption of the PSD but before its implementation in EU Member States.

HOLDCO used dividends distributed by its subsidiaries to acquire the participations in other Member-State-resident subsidiaries (EUCOs) and non-EU resident subsidiaries (non-EUCOs).

HOLDCO's personnel is made up of two skilled managers, one treasurer and one corporate officer. Its offices comprise some dedicated space inside the premises of an operating subsidiary that is resident in the same EU State as HOLDCO and is totally owned by the latter.

Apart from the cost of personnel, the other expenses incurred by HOLDCO and recorded in its P&L account include IT (both hardware and software used by HOLDCO's personnel), some legal fees and interest expenses (even if the latter are by far offset by interest income generated by intercompany lending—see below).

HOLDCO has never on-paid dividends to its US-resident shareholder.

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On the basis of this case study, the following issues will be addressed:

1. If EUCO decides to distribute dividends to HOLDCO, is it possible/likely that the tax authorities of its residence country could challenge the WHT exemption regime provided under PSD on the basis of an anti-abuse clause?

2. Is it possible/likely that the tax authorities of the country where EUCO is resident qualify HOLDCO as a wholly artificial arrangement in the sense

clarified by the CJEU in the Danish Cases, and/or as a conduit company (*i.e.*, not the beneficial owner of the dividends distributed by the subsidiary)?

3. Does the fact that HOLDCO was incorporated before the implementation of the PSD in EU Member States constitute a relevant aspect for (ruling out) the qualification of HOLDCO as a wholly artificial arrangement/conduit company?

4. Are the conclusions on the potential challenge above affected by the fact that HOLDCO's personnel is composed of full-time employees or, as an alternative, by managers who act as directors of other companies of the group?

5.Are the conclusions on the potential challenge above affected by the fact that HOLDCO (which would still be a subholding company) is included in a group which also has a headquarter company located in another EU Member State (different from the one where HOLDCO is resident) from where the business is coordinated? HOLDCO clearly is a holding not a principal; it manages the participations but has no say in the operations and business of the subsidiaries. Alternatively, what would be the outcome if HOLDCO instead acted both as a subholding and as a headquarter company of the group?

6. Would the conclusions on the potential challenge above be affected if HOLDCO, rather than using all the cash resources deriving from the dividends distributed from its subsidiaries for the acquisition of participations, instead used such resources as follows:

a) 33% for the acquisition of new participations, for equity injections in the subsidiaries and for intra-group financing activities

b) 67% to pay back the loan entered into with its US parent company for the acquisition of participations or to distribute dividends to its US parent company

7. Would the conclusions on the potential challenge above be affected if HOLDCO, rather than using cash resources deriving from the dividends distributed from its subsidiaries for the acquisition of participations, instead used such cash resources in the group cash pooling or intercompany lending?

8. Are the conclusions on the potential challenge above affected by the fact that HOLDCO's shareholder is (rather than USCO) an individual resident in an EU Member State?

3.1 LEGAL FRAMEWORK

3.1.1 Withholding Tax on Outbound Dividends

Except for the United Kingdom, all the countries included in the analysis generally levy a WHT on outbound dividends.

Ordinary rates vary from 15% (Luxembourg and Netherlands) up to 30% (France).

Without taking into consideration the case of WHT rate reduction due to the application of Double Tax Treaties, most of the jurisdictions also provide for a domestic special exemption regime other than the one introduced in accordance with the PSD. Furthermore, in many of the relevant countries (*i.e.*, France, Luxembourg and the Netherlands) a WHT exemption regime has been introduced for dividend

distributions to residents of specific non-EU countries[1].

Differently, in the United Kingdom, only distributions made by companies that have elected into the so-called real estate investment trust (REIT) regime are taxed and, accordingly, the United Kingdom has not implemented the PSD regime into its domestic legislation (being a dividend WHT not levied). For this reason, the United Kingdom has been excluded from the scope of the present case study.

3.1.2 Domestic Provisions Implementing the PSD

All the relevant countries have introduced a specific anti-abuse clause in the domestic provisions implementing the PSD.

A common element of these anti-abuse clauses is that they tend to test the arrangement (or the series of arrangements) related to the group structure and, more precisely, the economic substance of the entity that qualifies as the recipient of the dividends. The general idea is that a particular structure should not be exclusively tax driven (*i.e.*, its main purpose should not be to obtain a tax advantage through the WHT exemption regime), and must be characterised by sound economic purposes.

While in Italy, France, Luxembourg[2] and the Netherlands[3] the burden of proof regarding the existence of an abuse is on the tax authorities, Spanish domestic legislation still provides for an anti-abuse rule that introduces a presumption of abuse if the majority of voting rights in the EU company that benefits from the PSD Regime are held, directly or indirectly, by a company or an individual that does not reside within EU or an European Economic Area (EEA) State with an effective exchange of tax information with the STA. Moreover, the WHT exemption is always denied if the parent company is resident in a tax haven.

The Spanish approach seems not to be in line with CJEU case law (in particular, *Eqiom* C-6/16, *Deister Holding* and *Juhler Holding* joint cases C-504/16 and C-613/16, and also with the Danish Cases judgments), which clarified that the burden of proof regarding the existence of an abuse should be on the tax authorities.

In the case of intermediate holding companies that perform a linking function between a Dutch company and an active and operational indirect shareholder, the Netherlands also provides, as per 1 April 2018, for specific requirements to be taken into account at the level of the intermediate holding company, which include:

- The "Salary Requirement", according to which the company needs to generally incur EUR 100,000 (although this amount may be lower for specific countries to take into account local income standards) in annual salary costs for its intermediate holding functionality.
- The "Office Space Requirement", that impose on the holding to have its own office space at its disposal for at least 24 months, to be used to carry out the intermediate holding functions[4].

[1] In the case of France, the domestic special exemption regime applies only to dividend distributions to EEA countries (provided that the relevant jurisdiction entered into a Tax Information Exchange Agreement with France).

[2] The Luxembourg tax authorities are, however, not obliged to concretely prove the impossibility of an economic reason of the structure used. Therefore, the burden of proof shifts from the tax authorities to the taxpayer as soon as the tax authorities have shown, on the basis of a body of evidence, that the four conditions of abuse are likely met.

[3] If the taxpayer has sufficient arguments to make the application of the dividend withholding tax exemption plausible, the burden of proof rests with the Dutch tax authorities to support its claim that the structure should be seen as abusive.

[4] On 14 June 2019, the Dutch State Secretary of Finance announced that he will propose legislation amending the rules for foreign intermediate holding companies with "relevant substance" that qualify for the Dutch WHT exemption. Currently, satisfying the substance criteria functions as a safe harbour for foreign intermediate holding companies in business structures. Under the expected proposals, the Dutch tax

Finally, the PSD regime can be alternatively applied at two different stages: a) directly, when dividends are paid, or b) at a subsequent time by means of a refund request.

3.1.3 General Anti-Abuse Provision

All the jurisdictions included in the analysis also provide for one or more general anti-abuse provisions aimed at preventing the inappropriate and artificial use of tax regimes. Such anti-abuse clauses are generally structured in a way to attribute relevance to the purpose of the relevant tax provisions, denying the WHT exemption regime to those arrangements which, even if based on a literal application of the tax provisions, are not in line with their object and purpose.

Where both the specific PSD anti-abuse provisions and the general tax avoidance rules are applicable[5], the specific PSD provisions should prevail on the latter[6]. In Spain, where a presumption of abuse of the WHT exemption regime is laid down if some requirements are met, a waiver from the general anti-abuse provision should apply if the taxpayer is in the position to prove that the parent company's incorporation and activity are based on sound economic and business reasons (and hence is in the position to prove the non-applicability of the specific presumption of abuse of the WHT exemption regime).

3.2 ISSUES

3.2.1 Tax Authorities Approach and Potential Challenges

The group structure represented in the case study is likely to be contested by the tax authorities of most of the countries involved (not taking into account the United Kingdom, where a WHT on outbound dividends is generally not levied).

While the risk that the application of the WHT exemption regime laid down under the PSD on the dividends paid by EUCO to HOLDCO is subject to challenge is quite high in Italy, it is only moderate in France, as the French tax authorities would attribute relevance to the facts that HOLDCO was formed before the implementation of the PSD, acts as holding for several subsidiaries located in and out of the European Union, uses (at least partially) the dividends to finance its shareholdings and has substance in its jurisdiction of incorporation. Moreover, it also must be considered that in France, direct dividend distributions to USCO would be exempt from WHT under the DTT between France and the United States).

Such a risk is further reduced in the Netherlands, one of the reason being the fact that USCO, the US ultimate parent company, could be itself eligible for the Dutch domestic wider WHT exemption and, consequently, there would be no reason to have an artificial holding company between the US and the other EU entities. The risk is almost absent in Luxembourg, where the domestic WHT exemption provides for a solid fall-back in case the PSD regime is deemed as not applicable, and therefore, similarly to the Netherlands, there is no need for an interposed EU holding.

As regards the approach that is likely to be adopted by the Italian and French tax authorities, in both cases the authorities would investigate the substance of HOLDCO to test its role as an intermediate holding company. The Italy tax authorities would carry out different tests on the intermediate holding

authorities would have the opportunity to demonstrate that a structure is abusive, even if the relevant substance criteria are satisfied. This amendment should enter into force on 1 January 2020.

[5] In the case of Italy, the specific PSD anti-abuse clause refers to the general anti-tax avoidance rule in so making the general rule directly applicable.

[6] Please note that in the Netherlands, the WHT exemption and corresponding specific anti-abuse rule for intra-EU and extra-EU situations is the same test.

company that somewhat resemble the functional analysis of functions, assets and risks (FAR), and would also try to identify the effective holder of controlling powers on HOLDCO. The French Authorities would test the "commercial reasons" (to be interpreted, according to the French tax authorities, in a wider sense as including the holding of assets, financial activities and organisational purposes) related to the interposition of HOLDCO in the European group structure.

In both countries, tax authorities would eventually challenge that HOLDCO is not the beneficial owner of the dividends paid by the EUCOs and that, in this regard, the EU holding company is acting as a mere conduit entity with reference to the dividend transactions (*i.e.*, its only function is to be an intermediate entity that can benefit from the PSD regime).

A different line of intervention would be followed in Spain where the tax authorities, on the contrary, would directly apply the domestic anti-tax avoidance rule. This rule, as explained in previous para. 3.1.2, requires the taxpayer to prove the absence of an abuse provided that certain conditions are met (*i.e.*, the existence of an abuse is presumed under certain circumstances): because USCO is not resident in the European Union or in an EEA country, HOLDCO would need to demonstrate that it is not part of an artificial arrangement in order to obtain the PSD exemption.

3.2.2 Relevance of Certain Elements in Relation to the Tax Authorities' Potential Challenges

It must be noted that, since the analysis regarding the existence of an abuse is heavily fact-based, certain items could have a relevant impact on the assessment that the tax authorities of the relevant countries would carry out to determine if the group structure constitutes an abuse. This applies both to countries where there is a risk that tax authorities challenge such a structure and also to those States where this risk is particularly reduced.

» **A. Time of Incorporation**

In the countries where there is a high (Italy) or moderate (France) risk that the group structure will be challenged by the tax authorities, the fact that HOLDCO was incorporated before the implementation of the PSD by the relevant EU Member State, *i.e.*, when the PSD regime was not yet applicable, should represent a significant element of evaluation. In fact, as stated by the CJEU in the Danish Cases judgments, the proof of an abusive practice requires the presence of a subjective element along with objective circumstances. The former has been identified in the "intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it". Where HOLDCO was incorporated before the implementation of the PSD, it would be harder to affirm that it was included in the EU group structure in order to obtain a tax advantage under the PSD regime.

The element at hand should also be relevant in Spain (where, as noted, the burden of proof would directly fall on HOLDCO). STA have however explicitly ruled in favour of the taxpayer only taking into account the circumstance that the EU holding company was incorporated before the PSD entered into force (and not when the PSD was already adopted but not yet implemented).

The time of incorporation of HOLDCO seems to be irrelevant in the Netherlands,

where there is a consolidated opinion that an abuse must be tested at the time of the relevant transaction (in this case, at the time of the dividend distribution) on the basis of the rules and guidance applicable at that time.

» B. HOLDCO's personnel

The presence at HOLDCO of full-time employees may also constitute an element of evaluation for tax authorities.

In Italy, France and Spain (and, to a certain extent, in the Netherlands) a certain number of employees on the payroll of the EU holding would be considered as an evidence of HOLDCO's economic substance[7]. To this end, the personnel at hand must be sufficient to HOLDCO's activity: a holding activity does not generally require the hiring of many employees, and the presence of a minimum number of employees shall not have the same relevance as for an operating company. However, it is crucial that the employees are actually in charge of the activities falling within the proper object of a holding company.

On the contrary, where the personnel of HOLDCO is represented only by managers who are directors of other group companies, it would be more difficult to support the conclusion that HOLDCO has economic substance (this does not apply to Spain, where the STA attributed crucial relevance to the actual engagement in the holding company's activity rather than to the qualification of the personnel of the holding company).

» C. EU Group Headquarters

In the countries where there is a high or moderate risk that tax authorities would challenge the existence of an artificial group structure (Italy and France, respectively), the fact that HOLDCO does not also act as the headquarter company should not constitute a decisive element in the qualification of an artificial arrangement, *i.e.*, it should not *per se* allow to conclude that the holding represents an artificial arrangement. The same applies to Spain, where the STA expressly admitted the application of the PSD regime even in a case where the EU parent entity was a letter-box company controlled by another EU company, based on the fact that the latter EU company, despite being owned by a non-EU shareholder, had itself business substance and rationale and also had headquarter functions.

The main scope of a pure holding company should not be, in fact, to have also a role on the group business decisions having an impact on the specific activity carried out by its subsidiaries.

However, where the role of HOLDCO is extended to the management of its subsidiaries, such an element would reduce the risk that the holding company is qualified as an artificial arrangement as it would reinforce its economic substance.

[7] As anticipated under para. 3.1.2, in the Netherlands, intermediate holding companies also must meet as per 1 April 2018 one specific substance requirement according to which such companies generally need to incur EUR 100,000 in annual salary costs for their intermediate holding company functions (the so-called Salary Requirement).

» D. Use of the Dividends Distributed to HOLDCO

The use of the dividends distributed to HOLDCO by the EU subsidiaries could assume an important (if not central) role in the assessment of an abuse.

The CJEU also clarified this point in the Danish Cases judgments, which stated that an indication of an arrangement intended to obtain improper entitlement to the PSD depends also on the fact that "all or almost all of the aforesaid dividends are, very soon after their receipt, passed on by the company that has received them to entities which do not fulfil the conditions" (para. 101 of the decision).

For this reason, particular attention should be paid to the fact that HOLDCO, rather than using all the cash resources deriving from the dividend distributed by its subsidiaries for activities that pertain to the EU group (such as the acquisition of new participations, equity injections in the subsidiaries and intra-group financing), allocates only one-third of such dividends to the mentioned activities while the remaining two-thirds are used to pay back the loan entered into with USCO for the acquisition of participations or are re-distributed to the latter.

In jurisdictions such as Italy and France, HOLDCO's use of the dividends distributed by its subsidiaries is a relevant part of the abuse assessment. Therefore, where the related resources are for the most part redistributed (in the form of dividends or under a loan payback) outside of the EU, there are sound elements to argue that "all or almost all" of the dividends are transferred to an entity that does not fulfil the conditions of the PSD, thus in so demonstrating the existence of an abuse.

The same considerations also apply to Spain, where, in the case of HOLDCO, tax authorities would directly presume the existence of an abuse.

By contrast, in Luxembourg and the Netherlands, HOLDCO's use of the cash resources derived from the receipt of the dividends should be less relevant for the assessment of an artificial arrangement, since in these two countries the risk that tax authorities could challenge an abuse is significantly reduced because of the domestic WHT exemptions whose scope of application is wider than the PSD.

Finally, the above-mentioned conclusions should not be affected by the fact that HOLDCO, instead of investing the cash resources deriving from the dividends distribution for the acquisition of participations, injects them in the group cash pooling or uses them for intercompany lending.

» E. HOLDCO's Shareholder

All previous considerations are based on the premise that HOLDCO's shareholder is USCO, a US-resident company.

If the shareholder of HOLDCO were an individual resident in an EU Member State (different from HOLDCO's State of residency), the conclusions of the present analysis could be different.

While this different scenario should in principle not be relevant in some of the countries included in the scope of this analysis, such as Italy or Spain (*i.e.*, where

the group structure could still be deemed part of a tax-avoidance scheme), the fact that the ultimate owner of the group structure corresponds to an individual resident in the European Union could assume importance in France (where such a circumstance could lead to the assumption that the interposition of HOLDCO does not represent an artificial arrangement) and in the Netherlands (where, on the contrary, the WHT exemption could not apply, as the overall structure might be seen in principle as set up with the main purpose of avoiding Dutch WHT for the individual indirect shareholder).

If EUCO is resident in Luxembourg and HOLDCO is resident in a jurisdiction that does not levy WHT on profit distributions to individuals, the Luxembourg tax authorities could argue that the interposition of HOLDCO is wholly artificial and has the sole purpose of circumventing the 15% dividend WHT. However, if the set-up can be justified by commercial or business reasons—for example, that EUCO is not the only target company in which HOLDCO invests as it has multiple subsidiaries, or it was incorporated in order to benefit from the limited liability—then the risk of denying the WHT exemption on dividend payments made by EUCO to HOLDCO is lower.

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4. APPENDIX – QUESTIONNAIRE: COMPARATIVE TABLE

COUNTRY / QUESTION	ITALY	FRANCE	LUXEMBOURG	NETHERLANDS	SPAIN	UNITED KINGDOM
LEGAL FRAMEWORK						
1. Does the country of reference apply any withholding tax on dividends/interest paid by domestic entities to non-resident persons?	<u>DIVIDENDS</u> Yes. Italy levies a 26% WHT on dividend distributions to non-residents. Non-residents, that are different from savings shareholders, EU and EEA States (which entered into a TIEA with Italy) pension funds (subject to an 11% WHT) and entities already benefitting from a reduced WHT rate (see question no. 2) can also claim a partial refund (up to 11/26 of the WHT) of the final tax paid in the State of residence if they prove that it has been paid on the same income (and so basically reducing the effective WHT to 15%). <u>INTEREST</u> Yes. In general, a 26% WHT is applicable on outbound interests.	<u>DIVIDENDS</u> Yes. France levies a 12.8% WHT on dividend distributions to non-resident individuals and a 30% WHT on distributions to non-resident legal entities. A 75% rate applies to distributions made to Non-Cooperative States and Territories (subject to a safe harbour clause). <u>INTEREST</u> No. France does not levy tax on outbound interest, unless it is paid to Non-Cooperative States and Territories[8]. In such a case, France applies a 75% rate (subject to a safe harbour clause). In case of a disallowed interest deduction (e.g., under French transfer pricing regulations or interest deduction limitations), such disallowed deduction would give rise to a constructive dividend subject to withholding tax (as any dividend).	<u>DIVIDENDS</u> Yes. Dividend distributions made by a Luxembourg tax resident company are in principle subject to dividend withholding tax at a rate of 15%. However, no tax should be withheld if the Luxembourg domestic dividend withholding tax exemption is applicable. In certain circumstances, the exemption may be challenged under anti-abuse rules (see below). <u>INTEREST</u> No. Currently, no withholding tax is levied on interest payments in Luxembourg. However, if a loan is requalified into equity (see question no. 15) the compensation should be seen as a dividend payment and withholding tax may be due.	<u>DIVIDENDS</u> Yes. Dividend distributions made by a Dutch tax resident entity are in principle subject to dividend withholding tax at a rate of 15%, insofar as there are profits. However, no tax should be withheld if the Dutch domestic dividend withholding tax exemption is applicable. This exemption is subject to the domestic anti-abuse rule (see below). <u>INTEREST</u> No. Currently, no withholding tax is levied on interest payments. However, if a loan is requalified into equity (see question no. 15) the compensation should be seen as a dividend payment and withholding tax may be due. Moreover, the Dutch Government proposed to introduce a conditional withholding tax as per 2021, which should (only) apply on intra-group interest payments made directly or indirectly to low-tax jurisdictions. No legislative proposal has yet been issued on this topic.	<u>DIVIDENDS AND INTEREST</u> Yes. Spanish domestic legislation sets forth a 19% withholding tax on dividends and interest paid to non-resident companies and individuals.	<u>DIVIDENDS</u> No. The United Kingdom does not impose a withholding tax on dividends paid by UK companies, except for distributions by companies that have elected into the real estate investment trust (REIT) regime. REITs should not, as a general matter, have any 10% shareholders who would be able to claim the benefits of the PSD directive on their distributions, as in such circumstances the REIT will lose the benefits of the REIT regime (which provide tax transparency at the level of the company) to the extent of the excess. <u>INTEREST</u> Yes. Withholding tax is imposed on payments of "yearly interest" which have a UK source at a rate of 20%.
2. Does the domestic law provide for any special exemption regimes other than the PSD/IRD?	<u>DIVIDENDS</u> Yes. Italy applies a reduced 1.2% WHT (corresponding to 5%, *i.e.*, the domestic taxable amount of dividends, of the 24% corporate tax) on dividends distributed to entities (subject to corporate tax) that are resident in EU and EEA (which entered into a TIEA with Italy) Countries. <u>INTEREST</u> Yes.	<u>DIVIDENDS</u> Yes. France does not levy tax if the European parent company owns at least 5% of the subsidiary, meets the PSD conditions and cannot credit the WHT against its corporate tax liability. France also extended the benefit of the PSD to dividends paid to parent companies that are resident in the EEA (provided that the relevant jurisdiction entered into a TIEA with France). <u>INTEREST</u> NA	<u>DIVIDENDS</u> The Luxembourg domestic dividend withholding tax exemption is broader than the PSD because it does not apply only to shareholders that are resident in the European Union but also to shareholders that are resident in a jurisdiction with which Luxembourg has concluded a double tax treaty, provided in such case that the shareholder is subject to a tax comparable to the Luxembourg Corporate Income Tax (CIT). For a tax to be comparable to the Luxembourg CIT, it must be mandatorily levied at a rate of at least half the Luxembourg CIT rate and on a similar tax base. <u>INTEREST</u> NA	<u>DIVIDENDS</u> The Dutch domestic dividend withholding tax exemption (based on the PSD) has as per 1 January 2018 been extended to all countries with which the Netherlands has concluded a full-fledged bilateral tax treaty that contains an article on dividends. Currently the same test (and anti-abuse rule) is applied for intra-EU and extra-EU situations. <u>INTEREST</u> NA	<u>DIVIDENDS</u> In addition to the PSD, the following domestic distributions are exempt, subject to certain conditions: – Dividends and other participations in profits obtained in Spain by pension funds that are comparable to Spanish pension funds and resident in another EU Member State, or by permanent establishments (PEs) of such pension funds located in another EU Member State, provided that such dividends/ profits are not obtained through a PE in Spain. – Dividends obtained in Spain without a PE by collective investment institutions regulated by EU Directive 2009/65. – Dividends derived from securities issued in Spain by non-resident entities without a PE in Spain. <u>INTEREST</u> All interest paid to companies and individuals resident in the European Union, as well as to	<u>DIVIDENDS</u> NA <u>INTEREST</u> Yes.

[8] The list of Non-Cooperative States and Territories includes as from December 2018 American Samoa, Botswana, Brunei, Guam, Guatemala, the Marshall Islands, Nauru, Niue, Panama, Samoa, Trinidad and Tobago, and the US Virgin Islands.

COUNTRY / QUESTION	ITALY	FRANCE	LUXEMBOURG	NETHERLANDS	SPAIN	UNITED KINGDOM
	Interests arising from medium/long term loans (maturity of 18+ months) paid to EU banks, EU insurance companies and foreign "institutional investors" are exempt from WHT. Interest on bonds subscribed by and circulating only between "institutional investors" are exempt from WHT as well.				their PEs located in the European Union, are tax exempt provided they are not obtained through a tax haven. The scope of the Spanish exemption on interest is wider than the regime provided by the IRD and has been in force since long before the IRD was adopted. In addition, the following types of interest are exempt: – Interest on bank deposits. – Interest on government bonds, not obtained through a PE in Spain. – Interest on certain listed debt instruments issued by Spanish resident entities. – Interest arising from securities issued in Spain by non-resident entities without a PE in Spain.	Interest payable on loans which have a term of less than a year will not be regarded as "yearly interest" and as such will not be subject to the withholding tax charge. Exemptions apply to: – Interest payable on loans listed on a recognised stock exchange or EEA-regulated multilateral trading facility (the quoted Eurobond exemption). – Interest payable on qualifying private placements (which are unlisted loans in amounts of at least £10 million with a term of no more than 50 years), provided the lender is not connected to the borrower and is resident in a treaty territory. Specific exemptions apply to certain interest payments made to or by banks and other financial institutions.
3. Do the domestic provisions implementing the PSD provide for a specific anti-abuse clause?	Yes Italy provides for a specific anti-abuse clause in the domestic provision implementing the PSD. In the past, such a clause set forth the non-applicability of the PSD exemption in case of an EU parent company that was directly or indirectly controlled by one or more non-EU residents unless it was proved that the participation in the EU parent was not owned for the sole or primary purpose of benefitting from the PSD regime (note that the clause was substantially similar to the domestic French anti-abuse provision that was declared in violation of EU law by the CJEU in case C-6/16, *Eqiom*). As of today, instead, the clause at hand specifically and directly refers to the Italian anti-abuse general rule (the amendment at hand was entailed by the Italian legislator in 2016 to implement Council Directive 2015/121/EU). According to the Italian anti-abuse general provision, transactions which lack economic substance and, even if formally respecting Italian tax law, essentially achieve undue tax advantages, are deemed abusive. As a consequence, a transaction qualifies as abusive if: (i) it lacks economic substance; (ii) it achieves undue tax advantages, in the sense that these advantages are in contrast with the purpose of specific tax provisions or with general principles of the tax system; (iii) the achievement of these advantages constitutes the essential aim of the transaction. However, transactions that are based on sound and non-marginal non-tax reasons (including organisational and managerial purposes) and that are devoted to a structural or functional improvement cannot be considered abusive by the Italian Tax Authorities (ITA). To this end, in case of an audit there is a specific procedure, where: – the burden of proof in relation to the existence of the abuse of law is on the ITA; – the ITA are required to submit a request for clarification to the taxpayer before issuing a tax notice of assessment;	Yes. France implemented for fiscal years opened as from 2016 the PSD anti-abuse clause provided for by Council Directive 2015/121/EU by adopting the same wording as the Directive. Consequently, the French anti-abuse clause states that (i) the WHT exemption is not granted to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the WHT exemption, are not genuine having regard to all relevant facts and circumstances; (ii) an arrangement may comprise more than one step or part; and (iii) an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality. The French tax authorities (FTA) consider that the assessment of the main purpose results from a factual assessment, taking into account in particular the assessment of the tax advantage that would be obtained against the purpose of the withholding tax exemption, compared to all non-tax advantages of any kind obtained by the arrangement at stake. Furthermore, the FTA consider that the concept of "commercial reasons" is not limited to commercial activities: asset holding structures, financial activities and structures having an organisational purpose are therefore likely to be considered as having valid commercial reasons. In case of a tax audit, no specific procedure rules apply for the anti-abuse rule to be applied: the burden of proof lies upon the FTA. However, the burden of proof may be shifted to the taxpayer if the FTA gather enough compelling evidence of an artificial arrangement/lack of commercial purpose.	Yes. The dividend withholding tax exemption provision includes a specific anti-abuse rule if only the PSD applies. This is in line with the PSD's anti-abuse rule. The general anti-abuse rule (GAAR; see question no. 9) may apply also in the other cases (*i.e.*, domestic WHT exemptions not derived from the PSD).	Yes. The Dutch domestic dividend withholding tax exemption is denied if cumulatively: – the shares or membership rights in the Dutch company are held with the main purpose, or one of the main purposes, to avoid Dutch dividend withholding tax due by another individual or entity (Avoidance Test); and – the holding of the shares or membership rights in the Dutch company is part of an artificial arrangement or transaction (or a series of artificial arrangements or composite transactions), which will be the case if there are no valid business reasons reflecting economic reality (Artificial Arrangement Test). **Avoidance Test** For purposes of the Avoidance Test, it must be determined whether Dutch dividend withholding tax would be due, without the interposition of the non-resident shareholder. As a main rule, one must disregard all intermediate companies between the ultimate shareholders and the Dutch company. However, this look-through approach is applied differently if an (in)direct shareholder (not necessarily the ultimate shareholder) is engaged in an active business enterprise. If so, the Avoidance Test may be applied to that entity. **Artificial Arrangement Test** The Artificial Arrangement Test resembles the wording of the General Anti Abuse Rule (GAAR) in the EU Parent-Subsidiary Directive. According to the parliamentary proceedings, an arrangement should not be regarded artificial if: – the foreign corporate shareholder has real business activities and the shares in the Dutch resident company are allocable to these business activities; or – the foreign corporate shareholder functions as a top holding company with substantial functions (e.g., managerial, policy making and financial functions) for the business activities of the group; or	Yes. The exemption does not apply if the majority of voting rights in the parent company are held, directly or indirectly, by a company or and individual not residing in (i) an EU Member State or (ii) a State of the European Economic Area that has an effective exchange of tax information with the Spanish tax authorities. There is a waiver to this specific anti-abuse clause if it can be proved that the parent company's incorporation and activity are based on sound economic and substantial business reasons. Additionally, the exemption does not apply if the parent company is resident in a tax haven.	NA As there is no dividend withholding tax, the PSD has not been implemented into UK law.

COUNTRY / QUESTION	ITALY	FRANCE	LUXEMBOURG	NETHERLANDS	SPAIN	UNITED KINGDOM
	– the taxpayer is required to provide evidence of the relevant non-tax reasons for the transaction/structure challenged.			– the foreign corporate shareholder is an intermediate holding company with a linking function between the business activities or top holding activities of its direct or indirect shareholder and the business activities of the Dutch resident company or its direct or indirect subsidiaries. ○ As per 1 April 2018, and in addition to the standard Dutch substance requirements, intermediate holding companies are obliged to meet the following two additional substance requirements: ▪ the intermediate holding company needs to incur EUR 100,000 (main rule, but may be less dependent on the jurisdiction at hand) in annual salary costs in relation to its intermediate holding company functionality (Salary Requirement); and ▪ the intermediate holding company has its own office space at its disposal for a period of at least 24 months, which is in fact used to carry out its intermediate holding functions (Office Space Requirement). ○ On 14 June 2019, the Dutch State Secretary of Finance announced that he will propose legislation amending the rules for foreign intermediate holding companies with "relevant substance" that qualify for the Dutch WHT exemption. Currently, satisfying the substance criteria functions as safe harbour for foreign intermediate holding companies in business structures. Under the expected proposals however, the Dutch tax authorities would have the possibility to demonstrate that a structure is abusive, even if the relevant substance criteria are satisfied. This amendment should enter into force on 1 January 2020.		
4. Please briefly summarise the procedure (e.g., burden of proof, request for supporting documentation) required for the application of the PSD	The PSD regime can be alternatively applied: i. at the moment dividends are paid; ii. subsequently, by means of a refund request. In both cases, the related burden of proof falls on the non-resident taxpayer and the following documents are required: a) a certification issued by the foreign Tax Authorities stating that the EU parent fulfils the criteria set forth by Article 2(a) of Council Directive 2011/96/EU; b) a declaration by the non-resident entity that the participation qualifying for the PSD regime has been maintained for an uninterrupted period of at least one year before the relevant payment of dividends. Under case (i), the aforementioned documentation must be provided to the Italian subsidiary (that acts as the WHT agent) within the date of the dividend payment together with a written request for the application of the PSD regime.	The PSD regime can be alternatively applied: i. at the moment dividends are paid; ii. subsequently, by means of a refund request. In the first case (i), the parent company must provide the paying agent of the dividend, or the subsidiary if it directly pays the dividend, with both: a) a certificate of residence issued by the tax authorities of the country of which the parent company is a resident; and b) a certificate issued by the parent company certifying that the conditions to benefit from the withholding tax exemption provided for by the PSD as implemented into French law are met by the parent company. Both documents must be sent each year to the paying agent or to the subsidiary if it directly pays the dividend at the latest when the dividends are paid. If the participation qualifying for the PSD regime has not been held	In order to benefit from the withholding tax exemption, the beneficiary must complete and file Form 900 and prove that all the conditions are met. If the participation is not yet held for 12 months (which is the minimum holding period requirement), the shareholder should provide a letter in which it commits to hold the shares in the Luxembourg company for at least 12 months without interruption.	The Dutch company (as withholding agent) is responsible to assess whether or not it may apply the above withholding exemption. If it applies the withholding exemption (in relation to foreign shareholders), a (simple) notification form must be filed with the Dutch tax authorities indicating that a tax-free dividend was distributed with a specification per recipient. The notification form should be filed within one month after the dividend distribution. The Dutch tax authorities in principle do not respond to this notification (*i.e.*, there is no formal approval or denial, unless they decide to ask further questions or challenge the position taken). If the taxpayer has sufficient arguments to make the application of the dividend withholding tax exemption plausible, the burden of proof rests with the tax authorities to support their claim that the structure should be seen as abusive.	There is no particular procedural aspect for the application of the PSD. Under the general rules, Spanish withholding agents are obliged to submit an individual declaration (form 216) and an annual summary (form 296) before the Spanish Tax Authorities (STA). In such forms, it is also mandatory to include any income that is not subject to withholding tax, for example, because of the application of an exemption (such as the withholding exemption of the PSD). The Spanish withholding agent shall maintain the certificate of tax residence of the dividends recipient in the EU/EEA at the disposal of the STA. In the event of a tax audit, the STA could challenge the application of the exemption	NA As there is no dividend withholding tax, the PSD has not been implemented into UK law.

COUNTRY / QUESTION	ITALY	FRANCE	LUXEMBOURG	NETHERLANDS	SPAIN	UNITED KINGDOM
	Under case (ii), additional documentation proving the entitlement to the reimbursement (e.g., participation requirements, copy of the Italian company's Meeting Minutes stating the distribution of dividends, *etc.*) must be filed with the reimbursement request. For both case (i) and (ii), ITA have approved specific non-mandatory forms: please note that, although being not provided for by the Italian rules implementing the PSD regime, on the basis of those forms the EU parent company shall also state that it is the beneficial owner of the dividends paid.	for at least two years, the parent company must commit to hold such participation for at least two years, and appoint a representative responsible for the payment of the withholding tax if such commitment is not observed. In the second case (ii), the refund request may be filed with the paying agent, or the company if it pays the dividend directly before the end of the year following the WHT payment, along with a certificate of residence of the parent company (form 5000) and a refund request (form 5001). Following the repayment, the paying agent, or the subsidiary if it pays the dividend directly, must file a form 2777 with the FTA to obtain the refund of the repayment it made to the parent company before the end of the second year following the WHT payment. Alternatively, the refund request may be filed directly with the FTA before the end of the year following the WHT payment.				
5. Do the domestic provisions implementing the IRD provide for a definition of beneficial owner?	Yes. Within the Italian provisions implementing the IRD, reference is made to the person receiving the payment as "final" beneficiary and not as another person's intermediary, agent, delegate or fiduciary.	The French statute implementing the IRD does not provide for a definition of beneficial ownership. Such definition is however provided for by FTA guidelines, which define the beneficial owner as the person receiving the payment as the "final" beneficiary and not as another person's intermediary or paying agent.	NA Luxembourg currently does not levy a withholding tax on interest payments.	NA The Netherlands currently does not levy a withholding tax on interest payments.	Interest paid to EU residents for tax purposes (both companies and individuals) are tax exempt, provided they are not obtained through tax havens, but it is not required that the beneficial owner of the interest be an EU resident company or PE based in another EU Member State. The Spanish High Court confirmed that the Spanish interest exemption does not contain a beneficial ownership test as such, although it is subject to the General Anti Abuse Rule (GAAR). In any case, Spanish legislation does not provide for a definition of the beneficial owner concept.	No. The implementing legislation contains no definition of beneficial owner.
6. Do the domestic provisions implementing the IRD provide for a specific anti-abuse clause?	No. There is no specific anti abuse provision. In case of an audit, the ITA will focus, *inter alia*, on payee's: – ties with entities, belonging to the same group as the payee, non-entitled to benefit from the IRD; – operational structure in relation to the activities performed (e.g., assets owned, employees); – power to dispose of the income realised. In any case, under ordinary procedural rules, the ITA is required to specify the evidences based on which the notice of assessment is issued and to take into consideration the observations made by the taxpayer.	In practice, a withholding tax on interest is rarely applied (see question no. 1).	NA Luxembourg currently does not levy a withholding tax on interest payments.	NA The Netherlands currently does not levy a withholding tax on interest payments.	The withholding exemption on interest is not subject to any specific anti-abuse clause but the GAAR.	Yes. Section 765 of the Income Tax (Trading and Other Income) Act 2005 provides that relief under the IRD will not apply where the main purpose, or one of the main purposes, of any person concerned with the creation or assignment of the debt claim in respect of which the interest is paid is to get relief under the IRD.
7. Please briefly summarise the procedure (e.g., burden of proof, request for supporting documentation) required for the application of the IRD.	The IRD regime can be alternatively applied: i. at the moment interests are paid; ii. subsequently, by means of a refund request. In both cases the related burden of proof falls on the non-resident taxpayer and the following documents are required: a) a certification issued by the foreign tax authorities stating that the EU payee fulfils the criteria set forth by Article 1, para. 13 (a) of Council Directive 2003/49/EC; b) a declaration by the non-resident entity that it fulfils the requirements under the Italian implementing provisions of article 3 of Council Directive 2003/49/EC.	In practice, a withholding tax on interest is rarely applied (see question no. 1).	NA Luxembourg currently does not levy a withholding tax on interest payments.	NA The Netherlands currently does not levy a withholding tax on interest payments.	See question no. 4.	Relief under the IRD can be obtained either at source when the interest is paid, or subsequently, by means of a refund request. Relief is only available when HMRC has issued an exemption notice. The non-resident entity must make a claim for relief in the form specified by HMRC, with a copy of the relevant loan agreement. HMRC will then seek a certificate of the lender's residency from the relevant Member State's tax authority. HMRC guidance states that the completed form, loan agreement and residency certificate is normally sufficient for it to reach a conclusion on a claim, but

COUNTRY / QUESTION	ITALY	FRANCE	LUXEMBOURG	NETHERLANDS	SPAIN	UNITED KINGDOM
	Under case (i), the aforementioned documentation must be provided to the Italian subsidiary (that acts as the WHT agent) within the date of the interests payment together with a written request for the application of the IRD regime. Under case (ii), additional documentation proving the entitlement to the reimbursement must be filed with the reimbursement request. For both case (i) and (ii), ITA have approved specific non-mandatory forms: please note that, although being not provided for by the IRD, such forms (and the Italian implementing rules of IRD) require the payee to state that the interest received is actually subject to tax in its country of residency.					reserves the right to request additional supporting documentation where necessary. HMRC has three months in which to determine whether to issue an exemption notice, and must explain its reasons for any refusal. If HMRC fails to respond within the three-month deadline, the company can make payments of interest without deduction of tax.
8. Please, briefly summarise how the concept of beneficial owner has been interpreted in your jurisdiction under administrative practice as well as by the jurisprudence, having regard to both the IRD provisions as well as to the OECD rules (Article 11 of the OECD Model Tax Convention).	No specific definition of beneficial ownership exists under Italian tax law. However, based on ITA's clarifications, in order to ascertain whether non-resident entities may claim Double Tax Treaty (DTT) protection on capital gains or the application of PSD and IRD, reference shall be made to the concept of "economic substance". Accordingly, no DTT/PSD/IRD protection shall be granted to foreign entities having one of the following: – "light" organisational structure (*i.e.*, (i) lack of any effective activity, which means having no effective operations (such as personnel, premises and structures) in the country of establishment and, (ii) lack of any actual power of disposal with regard to the Italian investments, so that such entities simply execute investment decisions carried out by other persons); or – financial "conduit" structure (*i.e.*, interests, dividends and capital gains from the targets received are paid, in the same amounts, to investors and other lenders), aiming at the applicability of neither outbound taxation nor withholding taxes in the country of establishment. Recent Italian Supreme Court case law has also sustained that the following criteria should be considered when assessing the beneficial ownership requirement of a holding company: – right to use and enjoy the income perceived, unconstrained by any contractual or legal obligation to make payments to another entity; – capability of the board of directors of the parent company to independently manage and decide on the business activities of its subsidiaries; – fulfilment of institutional duties such as (i) general management activities, (ii) attendance at subsidiaries' board meetings and (iii) dividends collection; – place of effective management, defined as the place where strategic and administrative decisions regarding the subsidiaries are taken, according to the passive holding company nature of the parent.	In respect of the IRD, the FTA define the beneficial owner as the person receiving the payment as "final" beneficiary and not as another person's intermediary or paying agent. The FTA have specified, in the context of Double Tax Treaties (DTTs) that: – a person who acts only as an intermediary, such as an agent or other representative interposed between the debtor and the true creditor of the income, could not claim to be the beneficial owner of such income; – the FTA have added that the reference to beneficial ownership means that the source State is not required to grant the benefit of the relevant DTT article only because the income would be materially received by a resident of a State with which the source State has concluded the DTT, for example where the income passes through a financial institution involved in the payment circuit. – Furthermore, the FTA have added that a conduit company that acts on behalf of another person who actually benefits from the income cannot be considered as the beneficial owner of such income. Consequently, a conduit company, although formally the owner of the income, but having in practice very limited powers which make it a mere trustee acting on behalf of the parties, cannot be considered as the beneficial owner of the income. When assessing the beneficial ownership condition, the French courts mainly consider whether the intermediary company has direct authority to use and allocate the income earned.	Luxembourg currently does not levy a withholding tax on interest payments. As regards the concept of beneficial owner more generally, the Luxembourg case law has not detailed the definition but rather refers to the beneficial owner concept under tax treaties.	In Dutch tax legislation the term beneficial owner is defined as a negative, *i.e.*, under specific circumstances (for example, so-called dividend stripping), a recipient is not regarded as the beneficial owner. There is no specific guidance to determine whether an entity would be the beneficial owner of an income. In parliamentary documentation, however, it was indicated that the Dutch interpretation of beneficial ownership mainly targets conduit companies and artificial arrangements. It should be noted that the Netherlands also takes into account the OECD guidance on this topic.	The existing case law on the concept of beneficial owner is very limited. Regarding dividends, the STA confirmed in a tax ruling that Spanish holding companies (Entidades de Tenencia de Valores Extranjeros, or ETVE) should be considered the beneficial owners of the income for the purposes of the Double Tax Treaty (DTT) given that they are incorporated to manage shares in non-resident entities with a proper set of human and material means. On interest payments, the High Court confirmed that the application of the withholding exemption cannot be challenged by means of the application of the concept of beneficial ownership. As to royalties, the Spanish Courts have mainly interpreted the concept of beneficial owner in the context of the DTT signed by Spain. – In particular, the concept of beneficial owner was considered by the Spanish High Court in several cases concerning the application of the DTT signed with Hungary. In these cases, the Spanish Court had to decide whether Hungarian companies engaged in the management of image rights of sportspeople were the beneficial owners of the royalties paid by Spanish sport clubs, in order to apply the zero withholding tax rate included in said DTT. In these cases, the Spanish High Court did not consider the Hungarian companies to be the beneficial owners of the royalties received, given that they had no disposal power over such income and that they were forced, by contract, to immediately pass it along after reception, despite formally being the legal owners of said rights. – Further to these resolutions, the Spanish High Court interpreted the concept of beneficial owner in two cases concerning the right of a Spanish company for double taxation relief in Spain on dividends received from the United Kingdom. The Court concluded that the company claiming the tax credits was not the beneficial owner of the income since it was not the	The concept of beneficial owner was considered in detail by the Court of Appeal in the case of *Indofood International Finance Ltd v JPMorgan Chase Bank NA, London Branch* [2006] EWCA Civ 158, which is regarded as a binding precedent by HMRC despite the fact that the case was a commercial rather than a tax case. The case held that the concept of "beneficial ownership" in tax treaties has an international fiscal meaning, rather than the "narrow technical" meaning it has under domestic law (which derives from trust law). The test of beneficial ownership is whether the recipient "enjoy[s] the full privilege to directly benefit from the income" or whether they are bound in legal, commercial or practical terms to pass it on to someone else. HMRC's published guidance notes that double tax treaties have a stated object and purpose of preventing fiscal evasion and abuse, and that the meaning of "beneficial ownership" must be understood in that context. It will therefore normally only have practical application in cases of abuse (chiefly treaty-shopping cases). This means that where a UK company pays interest to a company in Country A, which then makes a back-to-back payment of interest to a company in Country B, HMRC will not seek to deny treaty relief on the interest payment to Country A if the UK company would have been entitled to claim equivalent benefits under the United Kingdom's treaty with Country B. HMRC has provided a number of examples of situations in which it will not seek to deny treaty relief by relying on the *Indofood* decision (including: capital market transactions involving special purpose vehicles, structures involving quoted Eurobonds, certain loan funds, and syndication arrangements), but these all relate to structured finance and capital markets transactions, and have limited relevance to intra-group structures as they are aimed

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					effective/real owner of the dividends received and said dividends were transferred to its parent company the day after they were received by the company. – More recently, the High Court concluded that the concept of beneficial ownership is also applicable even in relation to article 12 of a DTT that does not mention it. The Court grounded this conclusion on the evolution of the commentaries to the OECD model tax convention, even when the applicable DTT was signed prior to the introduction of the concept in the OECD model. Additionally, it is mentioned that the recipient of the royalties is not the beneficial owner of the royalties because, after carrying out an analysis of functions, assets and risks, the Court concluded that the recipient does not carry out any function nor take any risk in relation to the intangible assets.	primarily at providing certainty to the financial sector.
9. Does the country of reference provide for any general anti-abuse provision which may be applicable on payment of dividends/interest to non-resident recipients? Briefly summarise the relationship (if any) of such general abuse rule with specific anti-abuse provisions under the PSD/IRD implementing rules.	Italy provides for a general anti-abuse rule (see answer no. 3). **<u>DIVIDENDS</u>** As noted, this latter is directly applicable in relation to the PSD regime. **<u>INTEREST</u>** For IRD purposes, the ITA should limit its analysis on beneficial ownership. Nevertheless, the kind of analyses performed by the ITA may resemble, to a great extent, those carried out where general abuse of law is challenged.	France provides for at least three general anti-abuse rules: i. the FTA may disregard any legal transaction that (i) is fictitious (fictitious transaction), or (ii) seeking a literal application of tax laws that contradicts their objectives, has no other purpose than to avoid or reduce taxes or defer their payment (sham transaction); ii. as from 2021, the FTA may also disregard any legal transaction that, seeking a literal application of tax laws that contradicts their objectives, has for main purpose tax avoidance or tax reduction; iii. as from 2019, for the purposes of calculating the CIT liability, the FTA can disregard an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. **<u>DIVIDENDS</u>** According to the guidelines issued by the FTA, the PSD anti-abuse rule is a tax base rule: the FTA may first apply the PSD anti-abuse rule and subsequently apply the abovementioned (i) general anti-abuse rule (and the FTA are likely to adopt the same approach with the (ii) general anti-abuse rule). As for the (iii) general anti-abuse rule, it should not be applicable since a dividend is not a deductible expense for French corporate tax purposes. **<u>INTEREST</u>** The FTA could in practice only try to challenge an arrangement or a series of arrangements that aim at bypassing the WHT on interest and royalties paid to non-French residents on the ground of general anti-abuse rules (see above).	The most important general domestic anti-abuse rule in Luxembourg is the GAAR, which has recently been amended in the context of the implementation of ATAD I in Luxembourg. Based on the former definition (quite similar to the new one), case law lists four criteria that must be cumulatively fulfilled for an abuse of law to be recognised: i. the use of legal forms and institutions of private law; ii. a tax saving through the circumvention or reduction of the tax burden; iii. the use of an inappropriate path (*i.e.*, obtaining an advantage against the intention of the legislator, but at the same time taking into account the right of the taxpayer to choose the least taxed solution); and iv. the absence of valid non-tax reasons justifying the use of the chosen path.	The most important general domestic anti-abuse rule in the Netherlands is the abuse of law (*fraus legis*) doctrine. *Fraus legis* could be applied if the envisaged tax effects of a transaction or a combination of related transactions would (i) be in conflict with the purpose and intent of the legislation and (ii) the taxpayer's main or sole motive for undertaking the transaction is the avoidance of such tax. The Anti-Tax Avoidance Directive also contains a GAAR, which EU-members must implement in their national legislation. However, the Dutch Minister for Finance indicated that in the Netherlands, *fraus legis* will be interpreted in accordance with this GAAR.	Spain has a set of general anti-abuse rules whose conceptual boundaries are not clear. – Characterisation: tax obligations are required according to the legal nature of the act or business carried out, whatever the form or denomination that the parties would have given it, and regardless of the defects that could affect its validity. – Conflict in the application of tax rules: it arises when the taxpayer succeeds in avoiding the taxable event, or reducing its taxable basis or tax payable through acts or arrangements in which both the following circumstances are met: i. Said acts are artificial or improper considering the outcome. ii. No other legal or economic relevant consequences arise aside from the tax saving. If the GAAR is applied, the results that would normally be derived from the acts or arrangements are taxed. – Simulation: the real purpose of the parties is concealed behind an unreal transaction or a sham. The existence of such a simulation could lead to a deemed transaction (in line with the true purpose) to be taxed, together with interest and a penalty. Neither the domestic regulations provide for any guidelines on the relationship between GAAR and the Specific Anti-Abuse Rule (SAAR), nor have the Spanish Courts clear case law on the matter. However, the approach taken by the majority of the scholars and by the Courts in some poorly reasoned resolutions seems to be that in cases where the SAAR would be applicable at first sight, but it is not due to certain circumstances (e.g., use of safe harbours), the GAAR should not apply.	**<u>DIVIDENDS</u>** NA **<u>INTEREST</u>** The United Kingdom has a general anti-abuse rule (GAAR) which counteracts tax advantages of arrangements that are "abusive". Arrangements are "abusive" if they cannot reasonably be regarded as a reasonable course of action in relation to the relevant legislation, having regard to all the circumstances. The legislation specifies a number of factors which must be taken into consideration, and the courts must also consider the guidance on the GAAR published by the GAAR Advisory Panel. The GAAR is expressed in legislation to apply in priority to any other rules that are expressed to take priority over anything else (including the provision which states that double tax treaties take priority over domestic law). In any court proceedings, the burden of proof in relation to the operation of the GAAR lies with HMRC (which is the reverse of the normal position in tax cases). The GAAR guidance specifically confirms that the GAAR does not operate to change tax treaty principles governing the allocation of taxing rights. However, it can operate to counteract arrangements which "try to exploit particular provisions in a double tax treaty, or the way in which such provision interact with other provisions of UK tax law". In practice, however, HMRC is more likely to rely on concepts of beneficial ownership or specific anti-avoidance provisions when challenging what it regards as abusive transactions.

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FIRST CASE STUDY: COLLECTIVE INVESTMENT SCHEMES						
10. What is the level of risk that EU BidCo may not be regarded as the beneficial owner of the interest payments made by Target under the IRD? What are the main elements substantiating such risk? Would the conclusion above change in respect to the application of the relevant-Treaty provision?	There is a high/medium risk of EU BidCo not qualifying as beneficial owner. The conclusion is mainly driven by its insignificant operational structure and financial inflows almost mirroring the outflows. Such conclusion would not change in case of DTT application.	The risk of EU BidCo not qualifying as a beneficial owner is low since no WHT is applied on outbound interest payments. In practice, the FTA are unlikely to assess the beneficial ownership condition to the extent that there is no Non-Cooperative State or Territory in the chain of intermediaries or at the end of such chain. If a Non-Cooperative State or Territory is included in such chain or at the end of the chain, the existence of a back-to-back arrangement should not, in itself, be sufficient for the FTA to disregard EU BidCo as the beneficial owner of the interest payments. For the back-to-back arrangement not to qualify as artificial, both loan agreements shall not be mirrored on one another (different maturity dates and interest rates, existence of a margin earned by EU BidCo). Furthermore, EU BidCo shall not act as a nominee towards EU Master Holding Company but as an actual debtor towards such company and as an actual creditor towards the Target.	NA Luxembourg currently does not levy a withholding tax on interest payments.	NA The Netherlands currently does not levy a withholding tax on interest payments.	As previously mentioned (see questions no. 5 and no. 8), the Spanish WHT exemption on interest does not require the recipient to be the beneficial owner of the income, which has been confirmed by the High Court. This should prevent the STA from applying a beneficial owner test to this case, at least directly. The analysis should be carried out in the field of the Spanish GAAR, as mentioned. We are not aware of any precedent in which the STA have challenged the application of the interest withholding exemption based on the application of the Spanish GAAR. However, in principle, these GAAR will be considered the Spanish implementation of Article 6 of ATAD, and therefore, there will be a direct link between the Spanish GAAR and the concept of abuse in the European Union. Based on this, we are of the opinion that the relevant criteria for identifying abuse that is mentioned by the CJEU in the Danish Cases on interest may be relevant when assessing whether EU BidCo is part of an artificial arrangement subject to the application of the Spanish GAAR. To the extent that the background provided matches these criteria, the risk of EU BidCo being denied the application of the withholding exemption could be high. Most treaties signed by Spain include a beneficial owner clause in the provision applicable to interest (in general terms, article 11). In this case, the STA could conclude that EU BidCo is not the beneficial owner of the interest, and deny the applicability of the relevant Treaty provision. For these purposes, the STA and Spanish Courts normally follow the approach of the Commentaries to the OECD Model Tax Convention. However, according to the most recent case law, the referred conclusion could be grounded on the fact that EU BidCo does not carry out any function nor take any risk in relation to the assets. In such a case, according to the same case law, it would be possible to apply the DTT signed between Spain and the jurisdiction where EU Master Holding Company is resident if the taxpayer is able to give evidence that the interest actually flows to EU Master Holding Company.	Whilst there may be an argument that EU BidCo is not the beneficial owner of the interest payments if the *Indofood* decision is read literally, HMRC's guidance indicates that it is unlikely that it would pursue such an argument in practice. This is because EU Master Holding Company would be entitled to the benefit of the IRD if EU BidCo did not exist and EU Master Holding Company owned Target directly and made a loan directly to it. As the beneficial ownership definition is only raised in cases of abuse (such as treaty shopping) it would have no application here. Similar principles will apply to the Double Tax Treaty (DTT) analysis.
11. Would it be possible to disregard EU BidCo and sustain that EU Master Holding Company is the beneficial owner for IRD purposes?	EU BidCo cannot be disregarded as only the direct payee may claim the application of the exemption under the IRD.	Yes, based on the PSD anti-abuse rule and the French domestic general anti-abuse rules (see question no. 9) but in practice no WHT should be due.	NA Luxembourg currently does not levy a withholding tax on interest payments.	NA The Netherlands currently does not levy a withholding tax on interest payments.	Given that the Spanish WHT exemption on interest does not require the recipient to be the beneficial owner of the income, any challenge would be based on the application of the GAAR. Under this analysis, it should be possible to argue that no abuse exists if EU Master Holding Company is the actual recipient of the interest and this company could benefit from the withholding exemption, so that the existence of EU BidCo does not provide any actual tax advantage. However, the lack of relevant	EU BidCo cannot be disregarded, as it is the direct recipient of the interest and is regarded for UK tax purposes as an opaque entity (*i.e.*, as a taxable person). EU Master Holding Company cannot therefore make a claim in its own right. However, for the reasons given above, this should not be necessary. The fact that EU Master Holding Company would be able to claim the benefit of the IRD if it received interest directly from UKCo means that HMRC is less likely to regard the

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					substance at the level of EU Master Holding Company when compared to the indications provided by the CJEU in the Danish cases could lead to consider that EU Master Holding Company is also part of an artificial arrangement, especially if is not actually engaged in the financing of the EU BidCo and it carries out mere rubber-stamping functions.	arrangement as abusive, and thus less likely to deny relief under the IRD in respect of payments to EU BidCo.
12. Would the challenge of the tax authorities (if any) be based only on the beneficial owner test or could it be grounded on a more general anti-abuse provision/practice?	In principle, the ITA should limit its analysis on beneficial ownership. Nevertheless, the kind of analyses performed by the ITA may resemble, to a great extent, those carried out where general abuse of law is challenged.	The challenge is more likely to be based on the PSD anti-abuse rule and the French domestic general anti-abuse rules (see question no. 9).	NA Luxembourg currently does not levy a withholding tax on interest payments.	NA The Netherlands currently does not levy a withholding tax on interest payments.	See questions no. 10 and no. 11.	The challenge may be based on any or all of the beneficial ownership test, any specific anti-avoidance provisions in the relevant treaty and the domestic IRD anti-avoidance provisions discussed above. The majority of the United Kingdom's treaties have a main purpose test, which denies relief from withholding tax to arrangements which were put in place with a main purpose of securing the benefit of the relevant article, and similar provisions are included in the legislation implementing the IRD (see above). In practice, there is likely to be very little meaningful difference in the way that the mentioned rules are applied.
13. What are the main elements on which an intermediate EU vehicle may claim to have sufficient substance and avoid the application of anti-abuse rule (if any)?	See the criteria mentioned under question no. 8.	The main elements (apart from substance) would be (i) to serve a holding company in several jurisdictions, and/or (ii) to have several non-related shareholders.	NA Luxembourg currently does not levy a withholding tax on interest payments.	NA The Netherlands currently does not levy a withholding tax on interest payments.	When dealing with GAAR requirements in a cross-border context, we are of the opinion that the analysis of holding/financing companies under Spanish Law should take into account two concepts: the substance of the company claiming a particular tax benefit (*i.e.*, human and material means used by that company to carry out the activity) and the existence of sound business reasons (*i.e.*, the economic rationale behind the setting up of the company). Spanish tax law does not contain a clear definition of these two concepts which facilitates the analysis as to the validity of a particular corporate structure. Therefore, it cannot be ruled out that the Spanish tax authorities might follow a different approach in the course of an eventual tax audit. However, as explained below, and based on our experience, we have found these elements to be relevant drivers in the analysis and the lack of any of them may increase the possibility of the structure being challenged by the tax authorities.	There are no hard and fast rules. However, if the intermediate vehicle receives an appropriate "spread" on the inbound and outbound loans to enable it to make an appropriate profit after deduction of expenses, this may be sufficient. The greater the level of operational substance in the intermediate vehicle, the more robust the analysis, although in our view this needs only to be proportionate to the activities of the company—so need not be particularly great in the case of a pure financing company.
14. Would it be possible, under a look-through approach, to apply the tax regime available to the ultimate investors of the Collective Investment Scheme?	Yes, if the intermediate entities qualify as "transparent" from either tax or economic purposes. However, since such qualification is merely based on interpretative practice, it is generally advisable to obtain an advance clearance, by filing a request for tax ruling to the ITA.	No WHT should be due (see question no. 1 and question no. 10). If the Collective Investment Scheme is located in a Non-Cooperative State and Territory, the FTA could try to challenge the WHT-exempt interest payments made to the intermediary entities based on the general anti-abuse rules (see question no. 9).	As Luxembourg does not levy a withholding tax on interest payments, a look-through approach does not have any effect here. However, we do note that a look-through approach is relevant in relation to application of the Luxembourg domestic dividend withholding tax exemption (see question no. 3).	Since the Netherlands does not levy a withholding tax on interest payments, a look-through approach does not have any effect here. However, we do note that a look-through approach is relevant in relation to application of the Dutch domestic dividend withholding tax exemption (see question no. 3).	Such a look-through approach would be applicable if (i) the intermediate entities qualify as "transparent" for tax purposes, which in principle it is not the case, or (ii) under the application of the GAAR, it is understood that the Collective Investment Scheme is the actual taxable person that is derived income in Spain.	As EU Master Holding Company appears to have real operational substance and is not obliged to pay all the interest on to its investors, it seems unlikely to us that HMRC would seek to look through it and to treat the investors as the beneficial owners of the interest payment. It is particularly unlikely insofar as EU Master Holding Company is equity funded. Whilst it is perfectly possible to argue that EU Master Holding Company is not the beneficial owner of interest receipts to the extent that it is obliged to use them to discharge its own interest expense, this argument should not apply to interest receipts that are paid out as dividends. This is because dividends can generally only be paid at the discretion of the company, and to the extent that they are lawful.

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						On the assumption that EU BidCo and EU Master HoldCo are regarded as opaque for UK tax purposes, it will not be possible to treat the investors as the recipients of the interest (even if they could be characterised as the beneficial owner). It would therefore not be possible to make a treaty/IRD relief claim on their behalf.
15. Is there any risk that the financing granted by EU BidCo may qualify as equity contribution and the related payments be regarded as dividends rather than interest?	Yes. According to the interpretation provided by the ITA, financial resources for the acquisition of an Italian target, which have been granted by foreign shareholders by mean of interest-bearing loans, may be requalified as capital contributions, on the basis of an assessment of the economic rationale and the contractual provisions of the loans. Recent case law from a Tax Court of Second Instance (*i.e.*, one level below the Supreme Court) has however narrowed the scope of such requalification power to abusive situations only (*i.e.*, situations where there is a simulation of financing contract).	As a rule, the FTA are unlikely to recharacterise an interest payment as a dividend distribution, since no “substance over form” approach is undertaken under French law. However, some arrangements may be found abusive under general anti-abuse rules (see question no. 9), e.g., share capital reductions financed by bonds redeemable in shares. The FTA will therefore argue that the loan agreement has no other purpose than to avoid or reduce taxes or defer their payment. Furthermore, if the interest payments are taxed, in the hands of the recipient, at a rate lower than 25% of the French corporate income tax rate, such interest is not deductible from the French company’s taxable base. Please note that in case of a disallowed interest deduction (e.g., under French transfer pricing regulations or interest deduction limitations), such disallowed deduction would qualify as a constructive dividend subject to withholding tax.	In Luxembourg, the financing granted by EU BidCo may be requalified into an equity contribution if: 1) the (informal or TP-based) debt/equity ratio is exceeded, 2) the interest is above an arm’s length amount, or 3) the terms and conditions of the loan and the context in which it is granted lead to the conclusion that the loan should actually qualify as equity.	Dutch Supreme Court case law dictates that when a taxpayer provides funding (e.g., to a subsidiary), the qualification given to this funding pursuant to Dutch civil law is in principle followed for tax purposes. In other words, if a financing arrangement qualifies as a loan for Dutch civil law purposes (for which the most important condition is that there is a repayment obligation), it also qualifies as a loan for tax purposes. However, the Dutch Supreme Court considers that there are (only) three exceptions to this rule, which apply if a loan functions as equity, either as a Participating Loan, a Sham Loan or a Bottomless Pit Loan. If one of these three exceptions applies, value changes on the loan are eliminated from the taxable result and interest payments are treated as a remuneration on equity (*i.e.*, dividends). A loan qualifies as a Participating Loan if it meets the following three cumulative conditions: (i) the interest due on the loan is almost entirely dependent on the profit of the debtor; (ii) the loan is subordinated to all other creditors; and (iii) the loan does not have a fixed term, but is only claimable upon bankruptcy, suspension of payment, or liquidation, or the loan has a term of more than 50 calendar years. Further, a loan qualifies as a Sham Loan if the parties in fact intended to provide equity rather than debt. If it was clear from the outset that the loan would never be repaid, it qualifies as a Bottomless Pit Loan. In addition to the above requalification, the following should also be noted: if the interest rate on a loan between related parties is not in accordance with the ”at arm’s length” principle, the interest will be adjusted to an at arm’s length rate for tax purposes (*i.e.*, to a rate which would have been agreed between third parties in the open market). In determining the at arm’s length interest rate, the other conditions, terms and circumstances of the agreement remain unchanged (such as collateral and the maturity of the loan). Based on Dutch transfer pricing principles, such adjustment should also always have a secondary adjustment, either in the form of a hidden dividend, or an informal capital contribution.	The Spanish Corporate Income Tax qualifies interest derived from profit participating loans granted by entities of the same corporate group as dividends. However, this does not preclude that, under different circumstances, a different characterisation would also take place, as an equity contribution or even a taxable event. For example, case law refers to the documentation of the loans in private documents, lack of repayments, lack of interest payments, lack of debt claims, *etc*.	Not unless the loan granted by EU BidCo is treated as a distribution for UK tax purposes (*i.e.*, if the interest expense falls within the statutory definition of a distribution, which might be the case if, for example, the amount of interest is dependent on EU BidCo’s performance).

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SECOND CASE STUDY: EU HOLDING COMPANIES						
16. If the operating subsidiary resident in your country decides to distribute dividends to HOLDCO, is it possible/likely that the tax authorities of your country could challenge the WHT exemption regime provided under PSD on the basis of the anti-abuse clause?	Yes, very likely. According to our experience, ITA have demonstrated quite an aggressive approach in this regard (especially where structured multinational groups are involved). Please note that the certificate issued by the foreign tax administration stating that, *inter alia*, the recipient entity is resident for tax purposes in the related country and is effectively subject to tax there, is deemed not *per se* sufficient by the ITA to grant the application of the PSD. When the recipient of the dividends is an EU holding whose ultimate parent resides outside the European Union, in fact, the ITA normally carry out different tests (resembling the functional analysis of functions, assets and risks – FAR – and also aimed at identifying who is the effective holder of control powers on the group participated companies) to assess whether the group structure has an abusive nature or not. With regard to the proposed case study, the ITA would check, for example – whether HOLDCO is involved in the group core business and in the decisions related to the direction and coordination of the participated entities (or if, instead, all these functions are substantially carried out by USCO); – how many personnel are on the HOLDCO payroll; – whether HOLDCO owns tangible and/or intangible assets different from participations and receivables; – whether HOLDCO has its own financial resources and which are its main income items; – whether HOLDCO is also in charge of the group cash pooling (or if, instead, this is managed by another EU entity). Although those criteria are quite questionable, where on the basis of such an analysis the Revenue Agency should assess that HOLDCO does not carry out any substantial economic activity, the PSD regime would be generally denied. Moreover, as regards the fact that HOLDCO has never on-paid dividends to its US resident shareholder, we experienced a few cases where the ITA has not attributed any importance to such a circumstance during the assessment activity. It also must be noted, however, that case law has been proven to be more sensitive on this point by excluding the existence of an abuse also on the basis that no dividends were distributed by the EU holding to the non-EU ultimate parent entity. We reasonably expect that the Danish Cases decision re. joined cases C-116/16 and C-117/16 (the CJEU Decision) should not have any particular impact favourable to the taxpayer on	It is likely that the FTA inquire about the substance of HOLDCO, or the reasons for USCO to set up HOLDCO as an intermediate holding company. Depending on the circumstances, the FTA could challenge the WHT exemption based on the general anti-abuse rule (see question no. 9, point (i)) and the PSD anti-abuse rule if they consider that there is no apparent commercial reason for the interposition of HOLDCO. In this respect, the FTA have specified that the concept of "commercial reasons" is not limited to commercial activities, and therefore asset holding structures, structures undertaking financial activities and structures having an organisational purpose are likely to be considered as having valid commercial reasons. Case law in this respect is, to our knowledge, scarce. Considering the facts that HOLDCO has some substance, that it does not distribute the dividends received from France to USCO (*i.e.*, it is a beneficial owner) and that it has several other participations, which could evidence an organisational purpose, there should be good arguments to consider that HOLDCO was not set up for the main purpose of benefitting from the PSD.	This is unlikely, considering the facts and the substance in HOLDCO. Also, if USCO were to qualify for the (wider) domestic dividend withholding tax exemption, there would be no tax benefit of interposing HOLDCO, hence no abuse. Even if the PSD exemption were not applicable, there would still be the back-up of the Luxembourg domestic participation exemption, which would apply provided HOLDCO is subject to a tax that is comparable to the Luxembourg corporate income tax.	EUCO should in principle withhold 15% Dutch dividend withholding tax on its profit distributions. However, HOLDCO should be eligible for the Dutch domestic dividend withholding tax exemption (see questions no. 1 through no. 3). Subsequently, it should however be tested whether the structure should be considered abusive. **Avoidance Test** If USCO is indeed the head office/parent company of the group, and established in the United States (*i.e.*, not locally considered tax transparent), then there should be no avoidance motive. In other words, if USCO would have held the shares in EUCO directly (*i.e.*, without the interposition of HOLDCO), it could also have been eligible for the Dutch domestic dividend withholding exemption. On this basis, the structure should already not be considered abusive. Nevertheless, we will also outline application of the Artificial Arrangement Test (as if the Avoidance Test would have been met, for example in case USCO would be "passive", or tax transparent in the United States, whilst (for example) having (passive) investors in non-treaty jurisdictions). **Artificial Arrangement Test** In view of HOLDCO's substance and activities, it could qualify as an intermediate holding company with a linking function between the activities of USCO and EUCO. To fully qualify, HOLDCO however needs to continuously meet all the Dutch relevant substance requirements in its tax resident jurisdiction (*i.e.*, locally). These requirements include the Salary Requirement and Office Space Requirement (see question no. 3). In the case at hand, it seems that these requirements could be met. **Impact of the Danish Cases** While the safe harbour of the relevant substance requirements should still, in general, be accepted, it does not (*i.e.*, no longer) give 100% certainty that there is no abuse according to EU law as the substance must reflect the function of HOLDCO. In view of the above, HOLDCO should/could qualify for application of the Dutch domestic dividend withholding tax exemption (there are arguments that both the Avoidance Test and Artificial Arrangement Test should not be met, whereas meeting both tests is required in order for the structure to be qualified as abusive).	Yes, it is likely that the STA would apply the Spanish SAAR (see question no. 3) to challenge the application of the withholding exemption. Although not being compliant with the case law of the CJEU (*Eqiom*, *Deister-Jühler*, Danish Cases), note that as of today, if the EU holding company is controlled by non-EU investors, in practical terms the STA and the Courts have accepted shifting the burden of the proof on the absence of abuse to the taxpayer.	NA As there is no dividend withholding tax, the PSD has not been implemented into UK law.

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	the approach that has been followed by the ITA until today.					
17. Is it possible/likely that the tax authorities of your country would qualify HOLDCO as a wholly artificial arrangement in the sense clarified by the CJEU in the Danish Cases and/or as a conduit company (*i.e.*, not as the beneficial owner of the dividends distributed by the subsidiary)?	Yes, very likely. In our experience the ITA made reference to the notion of beneficial owner and conduit company to verify the existence of a PSD abuse. As the CJEU Decision did not hold that the beneficial ownership test has to be excluded in the assessment of PSD abuse but, instead, *de facto* referred to it as an *indicium* of such an abuse (see paragraphs 103–105), we expect that the ITA will not change their view in this regard. The Italian Revenue Agency has, for example, denied the application of the PSD regime on the assumption that an EU holding company was acting as a mere conduit entity with reference to a single dividend transaction due to the fact that, according to the Agency, it had no decision and direction powers in relation to such an income and was therefore entitled only to its formal ownership.	Given the fact that HOLDCO has never paid dividends to its US parent company and the fact that it uses the dividends received from its subsidiaries to fund other acquisitions (some of which are located outside the European Union), it could be argued that HOLDCO is not a conduit company and is consequently the beneficial owner of the dividends.	No, unlikely, also because HOLDCO is an EU-resident company and because HOLDCO has substance. Moreover, Luxembourg has also traditionally been a holding jurisdiction.	This is not very likely. In view of question no. 17, the interposition of HOLDCO does not seem to bring any tax benefit to the structure (*i.e.*, for USCO vis-à-vis EUCO). Furthermore, HOLDCO seems to avail of genuine substance (*i.e.*, personnel and office space) to fulfil its role as (European) holding platform for USCO.	In several tax rulings, the STA have accepted that the incorporation and activity of the company playing the role of HOLDCO could be grounded on business reasons (or at least, its incorporation is not merely tax driven), so that the SAAR should not apply. Some of the arguments used by the STA include the following: – Management of shares and other assets (*i.e.*, intangible assets of the group) and supply of services. – Rationalisation and optimisation of the costs related to the management. – Investment platform for different projects. – The holding company's existence before current shareholders took control. – The structure's establishment a long time ago, when no tax advantage existed. – Geographical arguments (*i.e.*, holding jurisdictions that are, physically and culturally, close to the target market) and the isolation of country risks. The characterisation of HOLDCO as an artificial arrangement (we no longer expect that the STA would refer to a "wholly" artificial arrangement, as the CJEU does not do so in the Danish Cases) would depend on the analysis of the case. For these purposes, we expect that the indications of abuse in the PSD provided by the CJEU would be relevant. However, in our opinion, the withholding exemption should not be denied if HOLDCO has substance and business rationale.	NA As there is no dividend withholding tax, the PSD has not been implemented into UK law.
18. Does the circumstance that HOLDCO was incorporated before the implementation of the PSD in EU Member States constitute a relevant aspect for (ruling out) the qualification of HOLDCO as a wholly artificial arrangement/conduit company?	Yes, it should represent a relevant element. As stated in the CJEU Decision, the proof of an abusive practice requires a combination of objective circumstances and also a subjective element "consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it". Where HOLDCO was incorporated before the implementation of the PSD it is harder to affirm that the principal objective or one of its principal objectives is to benefit from the PSD exemption regime. Please note that, in this regard, we experienced a case where the ITA did not take into consideration the fact that an EU holding company was incorporated before Italy implemented the PSD regime. Such a conclusion was then overruled by a judgment issued by Tax Court of First Instance (*i.e.*, the first level of the Italian tax jurisdiction), which ruled out the existence of an abusive group structure, founding its decision also on this aspect. Although in a different context—*i.e.*, in relation to the application of a DTT—the Italian Supreme Court took a decision in favour of the taxpayer (decision no. 27113 of 28 December 2016) by also considering that the foreign company, which was the recipient of the dividends and was qualified by the Revenue Agency as a conduit entity, had	Yes, it could represent a relevant element as the proof of an abusive practice requires a subjective element consisting "in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it". Such element could also be relevant under the domestic general anti-abuse rule (see question no. 9, point (i)) as it requires a subjective element: "the FTA may disregard any legal transaction that (i) is fictitious, or seeking a literal application of tax laws that contradicts their objectives, has no other purpose than to avoid or reduce taxes or defer their payment". Since HOLDCO was incorporated before the implementation of the PSD, it could be argued that it has not been put into place for the purpose of obtaining a tax advantage provided for under the parent-subsidiary regime. In this respect, the CJEU held that indications of an artificial arrangement "may be reinforced by the simultaneity or closeness in time of, on the one hand, the entry into force of major new tax legislation (…) and, on the other hand, the setting up of complex financial transactions and the grant of intragroup loans" (para. 106). It could be argued conversely that the incorporation of HOLDCO before the	No.	In the Netherlands, the consensus is that abuse is tested at the time of the actual distribution (regardless of when the structure was set up), on the basis of the rules and guidance applicable at that time.	The STA have explicitly considered, when ruling for the application of the WHT exemption, the fact that the PSD was not in force when the holding company applying the exemption was incorporated in the Netherlands. However, there are no resolutions considering the relevance of the parent company being incorporated before the implementation of the PSD in Spain, but after it was adopted.	NA As there is no dividend withholding tax, the PSD has not been implemented into UK law.

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	been included in the EU group structure before the conclusion of the relevant DTT.	implementation of the PSD reinforces the absence of artificial arrangement.				
19. Are the conclusions on the potential challenge above affected by the circumstance that HOLDCO's personnel is constituted by full-time employees or, as an alternative, by managers who act as directors of other companies of the group?	As noted under question no. 16, one of the elements that is also evaluated by the ITA is the number of employees on the payroll of the EU holding. Where, in particular, the holding does not have its own employees and is managed by the directors of another group company (e.g., the directors of one of the operative companies directly participated by this latter) it is likely that the Revenue Agency could challenge the absence of an effective corporate structure. As it was clarified by the Italian Supreme Court (decision no. 27113 of 28 December 2016), however, when the dividend recipient is a pure holding entity (*i.e.* a company whose purpose is only to detain and manage the participations in the group companies, along with the collection of the dividends distributed) ITA have to follow a approach different from the case where dividends are distributed to an operating company. More precisely, for a pure holding company, the presence of few or a minimum number of employees shall not have the same relevance as for an operating company in order to assess the existence of an abuse. The CJEU Decision seems also to follow this direction, as it states that the specific features of the economic activity must be taken into account: "the absence of actual economic activity must, in the light of the specific features of the economic activity in question, be inferred from an analysis of all the relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to expenditure actually incurred, to the staff that it employs and to the premises and equipment that it has" (para. 104). It goes without saying that the employees at hand shall be actually in charge of all the activities that constitute the main object of a pure holding company, so that the company cannot be challenged as being a formal (empty) structure (*i.e.*, they are not attributed to functions directly related to the business of the participated companies). However, if the personnel of the EU holding company is only represented by managers of other group entities that are, *inter alia*, in charge of the holding, it becomes harder to prove that this latter does not lack actual economic activity.	A small number of employees could be an element to deny HOLDCO an economic substance, but it is unlikely to be sufficient, as a holding activity does not necessarily involve the hiring of many employees. However, it is crucial that HOLDCO's employees/corporate officers actually perform the management activities of the company in the State where the company is resident so that the management of HOLDCO and its holding activity cannot be regarded as being essentially conducted by the US parent company. Additionally, it is high preferable that HOLDCO's employees or corporate officers be resident in the same State as HOLDCO. Having the employees of HOLDCO be managers of HOLDCO's subsidiaries is an additional element supporting that HOLDCO does not lack of economic substance. In this respect, the judgments rendered by the French Supreme Court pay close attention to the way a company is managed (e.g., management and investments mainly depending on the parent company, all its assets consisting of securities, no technical expertise in financial investments, shareholders not taking part in any of the statutory meetings). Such view seems to be shared by the CJEU in the Danish Cases: "the absence of actual economic activity must, in the light of the specific features of the economic activity in question, be inferred from an analysis of all the relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to expenditure actually incurred, to the staff that it employs and to the premises and equipment that it has" (see para. 104).	The conclusion should not be affected.	The Dutch relevant substance requirement (*i.e.*, Salary Requirement) in principle only takes into account wages paid to employees. However, if employees fulfil combined roles (*i.e.*, an employee that is also statutory director) then, based on informal guidance, the relevant substance requirements may still be met, as long as the remuneration is paid to the employee/director in person for his or her activities conducted for HOLDCO (at the premises of HOLDCO). The Dutch State Secretary for Finance has however indicated that (only) insourcing employees/directors from local/third-party service providers is not sufficient to meet the relevant substance requirements (*i.e.*, fees paid to these parties also do not count towards the Salary Requirement).	In case of holding companies, the STA require that the company have sufficient human and material means. In several tax rulings it has been accepted that the management of the shares can be carried out by employees or by directors; the crucial aspect is that there is an actual engagement in the activity.	NA As there is no dividend withholding tax, the PSD has not been implemented into UK law.
20. Are the conclusions on the potential challenge above affected by the circumstance that HOLDCO (which would still be a subholding company) is included in a group which also has a headquarter company located in another EU Member State	As anticipated under question no. 16, one of the tests normally carried out by ITA is to identify who is the effective holder of control powers on the group of participated companies (e.g., if it is exercised by the non-EU ultimate parent company or by the EU holding). This approach is quite disputable. In our opinion the fact that HOLDCO does not act as the EU headquarter company of the group, having no merit in the operation and the business of the subsidiaries, should not *per se* allow a	The fact that HOLDCO manages its participations and has no merit in the operations and the business of its subsidiaries should not constitute a decisive element in the qualification of an artificial arrangement, as a holding company does not necessarily have to play an active role in the conduct of the subsidiaries' businesses. Indeed, if the subsidiaries were to be managed by HOLDCO from its State of residence, the place of effective management of the subsidiaries could be located in that State. HOLDCO's core role, as a	No, the conclusion should not be affected.	This should in principle not alter the conclusion.	Yes, to the extent that it can be argued that it is actually a "European dividend". In this sense, there is one tax ruling in which the STA accepted the application of the withholding exemption in case where, despite the parent company been a letter-box company, actually the Spanish subsidiary was controlled by another EU company with substance and business rationale, so that the incorporation of the intermediate holding company would not be tax driven. On said tax ruling, a Canadian company controlled a Finnish company with substance	NA As there is no dividend withholding tax, the PSD has not been implemented into UK law.

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(different from the one where HOLDCO is resident) from where the business is coordinated? **HOLDCO clearly is a holding not a principal; it manages the participations but has no merit in the operations and business of the subsidiaries. What would the outcome be if HOLDCO acted both as a subholding and as a headquarter company of the group?**	conclusion that HOLDCO represents an artificial arrangement. The main scope of a pure holding company should not be, in fact, to have a role on the group business decisions that have an impact on the activity of the participated companies. Its purpose should, on the contrary, consist in managing and protecting the investments while also providing coordination and support to its subsidiaries (in the form, for example, of guarantees, intercompany lending, *etc.*). As anticipated under question no. 19, the Italian Supreme Court held that the specific features pertaining to the economic activity carried out by the relevant entity must be taken into account in the assessment of an abuse, and this seems to be an item of evaluation that was also considered in the CJEU Decision. We consequently believe that, if the headquarter company of the group is not HOLDCO, this should not *per se* constitute an element of abuse. Where, on the contrary, HOLDCO is also in charge of the EU group management, it is clear that the risk of the potential challenge regarding the existence of an artificial arrangement should be reduced, as there are fewer elements that the ITA could use to dispute the lack of economic activity.	holding company, is to manage its investment portfolio, and provide support to its subsidiaries. However, if HOLDCO's role was extended to the management of its subsidiaries, such element would reinforce the economic substance of HOLDCO and, hence, reduce the risk of qualifying an artificial arrangement.			and business rationale. The Finnish company, in turn, controlled a letter-box EU company which held the stake in the Spanish subsidiary. The STA admitted the application of the withholding exemption even when the EU parent company was a letter-box company, given that said EU parent company was not necessary to have a right to the exemption, as the same result could have been achieved if the investment in the Spanish subsidiary was directly held by the Finnish company.	
21. Are the conclusions on the potential challenge above affected if HOLDCO (rather than using all the cash resources deriving from the dividends distributed from its subsidiaries for the acquisition of participations) used such resources as follows: **– 33% for the acquisition of new participations, for equity injections in the subsidiaries and for intra-group financing activities;** **– 67% to pay back the loan entered into with its US parent company for the acquisition of participations or to distribute dividends to its US parent company.**	Yes. This seems to have an important role in the assessment of an abuse. The CJEU stated that an indication of an arrangement intended to obtain improper entitlement to the PSD exemption is represented by the fact that "all or almost all of the aforesaid dividends are, very soon after their receipt, passed on by the company that has received them to entities which do not fulfil the conditions" set forth by the PSD (para. 101). One of the elements that has to be carefully evaluated is therefore the amount of the dividends that are re-distributed to the non-EU non parent company ("all or almost all") as well as the timing of such a distribution. This could constitute, in fact, an *indicia* that the holding company is acting as a conduit entity in relation to those dividends.	Yes, as HOLDCO being qualified as a conduit company depends, according to the CJEU Danish Cases, on the fact that "all or almost all of the aforesaid dividends are, very soon after their receipt, passed on by the company that has received them to entities which do not fulfil the conditions" of the PSD regime. Consequently, two elements are to be considered: the amount of dividends redistributed and the timing of such redistribution. In the case at hand, we understand that only part of the dividends would be redistributed to the US parent company, as a third of the amount of the dividends earned is used for equity injections and intra-group financing activities, and a portion of the remaining two thirds would be used to pay back a loan granted by the US parent company. Consequently, there are good reasons to argue that the first condition (*i.e.*, "all or almost all") is not met to qualify HOLDCO as a conduit company.	No, the conclusion should not be affected.	This should in principle not alter the conclusion.	Yes. We think that the decision to reinvest the dividends should be considered an argument that supports the nature of HOLDCO as an investment platform and the existence of sound economic and substantial business reasons behind the incorporation of HOLDCO. This would be coherent with the indications provided by the CJEU in the Danish Cases.	NA As there is no dividend withholding tax, the PSD has not been implemented into UK law.
22. Are the conclusions on the potential challenge above affected if HOLDCO (rather than using cash resources	No. We believe that this should constitute a proper use of the dividends as it would be disputable to pretend that such resources have only to be used	No. The prerogative of the FTA to qualify an arrangement or a series of arrangement as artificial or abusive does not extend to the possibility for the FTA to decide what	No, the conclusion should not be affected.	This should in principle not alter the conclusion.	To the extent that HOLDCO has a treasurer and it can be argued that its activity as regional platform in Europe comprises intercompany lending, we are of the opinion that how this financing is made (*i.e.*, by way of equity	NA As there is no dividend withholding tax, the PSD has not been implemented into UK law.

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deriving from the dividends distributed from its subsidiaries for the acquisition of participations) uses such cash resources in the group cash pooling or intercompany lending?	to acquire new participations or to inject equities in the existing subsidiaries. Finally, it is also our opinion (although in our experience the ITA had a more aggressive approach) that the fact that HOLDCO does not act as pooler (the latter being, for example, a dedicated company resident in another EU State) should not affect such a conclusion, as the cash pooling activity should not be considered part of a pure holding core business.	management decisions are to be taken in lieu of the company's managers (e.g., the FTA should not be allowed to take the view that the cash resources should be used for the financing of new acquisitions instead of the intra-group financing).			contributions or loans) should not be a crucial aspect to assess whether HOLDCO is part of an artificial arrangement.	
23. Are the conclusions on the potential challenge above affected by the circumstance that HOLDCO's shareholder is (rather than USCO) an individual resident in an EU Member State?	No, it should not be in principle relevant. Firstly, as ruled by the CJEU in case C-6/16, *Eqiom*, the analysis on the fact that the EU parent company was established with the principal (or one of the principal) purpose to take advantage of the PSD exemption is not dependent on the circumstance that the parent company at issue is directly or indirectly controlled by one or more residents of third States. In this regard, the Court held that "it does not follow from any provision of the Parent-Subsidiary Directive that the origin of the shareholders of companies resident in the European Union affects the right of those companies to rely on tax advantages provided for by that directive" (para. 37). This implies that, in order to assess the existence of a PSD abuse, the residence of the ultimate controlling entity shall not be relevant. Secondly, having regard to the fact that an individual is the ultimate shareholder of the EU group, it is our understanding that the CJEU Decision did not draw any distinction in relation to the nature of such a shareholder, as the CJEU referred to all the potential cases of abuse: what is of relevance in the Court analysis is only the artificial character of the group structure itself. This means that an abuse cannot be in principle excluded only by considering who is at the head of the group (whether an investment fund, a trust, a partnership or an individual). It must however be noted that, where the dimensions of the EU group are relevant (as in the case of HOLDCO), it is questionable to assume that the same purpose of a holding company could be reached by an individual who owns directly all the relevant participations, and this should be an element to take into account in the assessment of an abuse.	If HOLDCO's shareholder is an individual resident in the same State as HOLDCO, such circumstance is very relevant as it could easily be argued that the holding company is only a vehicle set up for managing the investment portfolio of the individual. If HOLDCO's shareholder is a EU individual who is resident in a State that is different from the one where HOLDCO has its tax residence, such circumstance is relevant as (i) HOLDCO is a vehicle set up for managing the investment portfolio of the individual, which is not prohibited under EU or French law, and (ii) because had the EU individual resident not located his/her holding company in the State of HOLDCO but in his/her residence State, the holding company would have benefitted from the PSD in the same conditions as HOLDCO. Consequently, there would be good arguments in both cases to consider that the interposition of HOLDCO is not an artificial arrangement.	If EUCO is resident in Luxembourg and HOLDCO is resident in a jurisdiction that does not levy WHT on profit distributions to individuals, the tax authorities could argue that the interposition of HOLDCO is wholly artificial and has the sole purpose of circumventing the 15% dividend WHT. However, if the set-up can be justified by commercial or business reasons, such as that EUCO is not the only target company in which HOLDCO invests but has multiple subsidiaries or in order to benefit from the limited liability, then the risk of denying the WHT exemption on dividend payments made by EUCO to HOLDCO is lower.	It is likely that the Dutch domestic dividend withholding tax exemption does not apply. The Avoidance Test should then be met, as without the interposition of HOLDCO, the individual itself would not have been eligible for the withholding exemption if he/she would have held the shares in EUCO directly. Furthermore, HOLDCO may then no longer qualify as an intermediate holding company (as it cannot perform a linking function between the operational activities of EUCO and the individual, which has substituted USCO). Therefore, in principle, it would also meet the Artificial Arrangement Test. In the case at hand, there may however be arguments to sustain that HOLDCO qualifies as top holding company of the group and that it should therefore not meet the Artificial Arrangement Test (in view of its local substance/personnel/activities). This is however very fact specific and should be determined on a case-by-case basis. If on the basis of this argument, the Artificial Arrangement Test would not be met, then the Dutch domestic dividend withholding tax exemption should still apply (as it is a cumulative test to determine abuse).	In this case, the SAAR would not be applicable given that the ultimate shareholder would be resident in the European Union. Thus, the structure could be challenged by means of the GAAR (see question no. 9). In this sense, the incorporation of companies by individual shareholders so that double tax relief is granted has not been challenged on a regular basis by the STA, but there is one ruling in which this possibility is mentioned.	NA As there is no dividend withholding tax, the PSD has not been implemented into UK law.

CONTRIBUTORS

CARLO MARIA PAOLELLA
PARTNER, MILAN

cpaolella@mwe.com
+39 02 365 75701

ANDREA TEMPESTINI
PARTNER, MILAN

atempestini@mwe.com
+39 02 365 75701

EMIDIO CACCIAPUOTI
PARTNER, MILAN

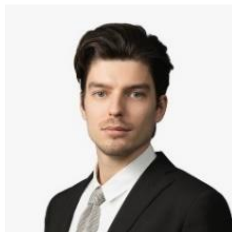
ecacciapuoti@mwe.com
+39 02 365 75701

ALESSIO PERSIANI
COUNSEL, MILAN

apersiani@mwe.com
+39 02 365 75701

DAVIDE MASSIGLIA
ASSOCIATE, MILAN

dmassiglia@mwe.com
+39 02 365 75701



LUCA ANGELINI
ASSOCIATE, MILAN

langelini@mwe.com
+39 02 365 75701

ENRICO SPINELLI
ASSOCIATE, MILAN

espinelli@mwe.com
+39 02 365 75701

McDermott
Will & Emery