25TH ANNUAL

U.S. AND EUROPE TAX PRACTICE TRENDS

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AMSTERDAM, THE NETHERLANDS

Who Really Has Beneficial Ownership? Anti-Abuse Provisions, CTA Updates and Other Beneficial Ownership Developments

Wealth Management Workshop session
9 April 2025

Introduction

- Beneficial ownership is a fundamental concept in domestic and international tax law and administration.
  - Who is the owner for “tax purposes”?
  - What factors determine whether someone is a “beneficial owner”?

- From operating companies to family offices, beneficial ownership implicates tax rules related to disclosure, withholding taxes, and applicability of double tax treaties.
  - For example, the imposition of domestic and international withholding taxes and qualifications for exemptions.

- These rules back up against the privacy concerns of individuals and family offices, but have become increasingly accepted as necessary to tax authorities to combat tax avoidance and to aid administration.
  - Examples of information reporting regimes include the U.S. Corporate Transparency Act, the EU UBO register and the French 3% tax.

- This panel will review current applications and developments across the United States and Europe related to the concept of beneficial ownership, including domestic and cross-border initiatives, the current state of the U.S. Corporate Transparency Act and European Union directives and considerations.

Corporate Transparency Act

- **Tax and revenue raising**
- **Disclosure – U.S. Corporate Transparency Act**

  - ‘Foreign Reporting Company’ Under the CTA
    - ✓ Any entity
    - ✓ Formed in a country other than the United States
    - ✓ That is registered to do business in any US state or tribal jurisdiction by filing a document with the secretary of state (or equivalent agency) under the laws of that US state

  - ‘Beneficial Owner’ Under the CTA
    - ✓ Any individual person who directly or indirectly controls 25% or more of the equity of the ‘foreign reporting company’
    - ✓ Any individual person who exercises ‘substantial control’ over the ‘foreign reporting company’

  - ‘United States persons’ are exempt from reporting: US citizen, permanent resident, substantially present in the United States, electing

  - Deadline for ‘foreign reporting company’ to file initial reports: April 25, 2025

When is a person considered a “beneficial owner”?

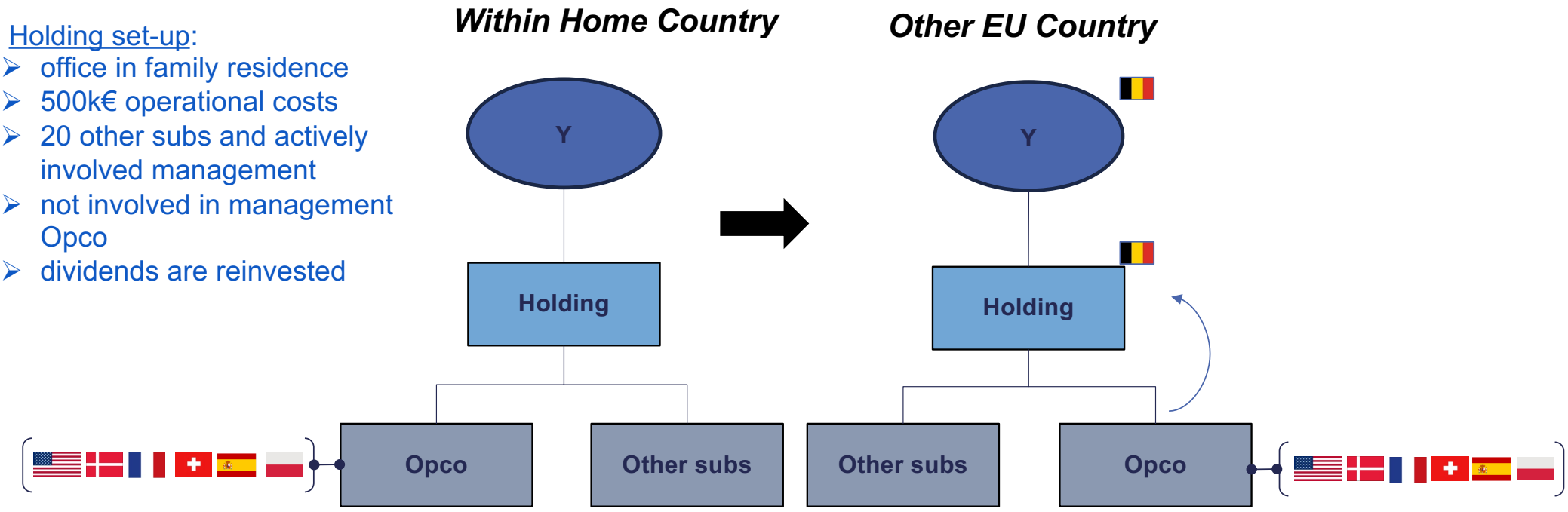
- Structure as a whole or transactional approach?
- What substance does a holding company need? What does other ‘in country presence’ change?
- What can a holding company do with proceeds it receives?
- How are non-tax reasons (e.g. personal reasons) relevant?
- Tax benefit to be assessed locally or for structure as a whole?
- Would it matter if the exemption becomes available only after the structure was created?
- How are companies that move to another jurisdiction viewed?
- How are jurisdictions that have a ‘tax haven’ flavor to it considered (*smell test*)?

Case Study

Cross-Border within the EU

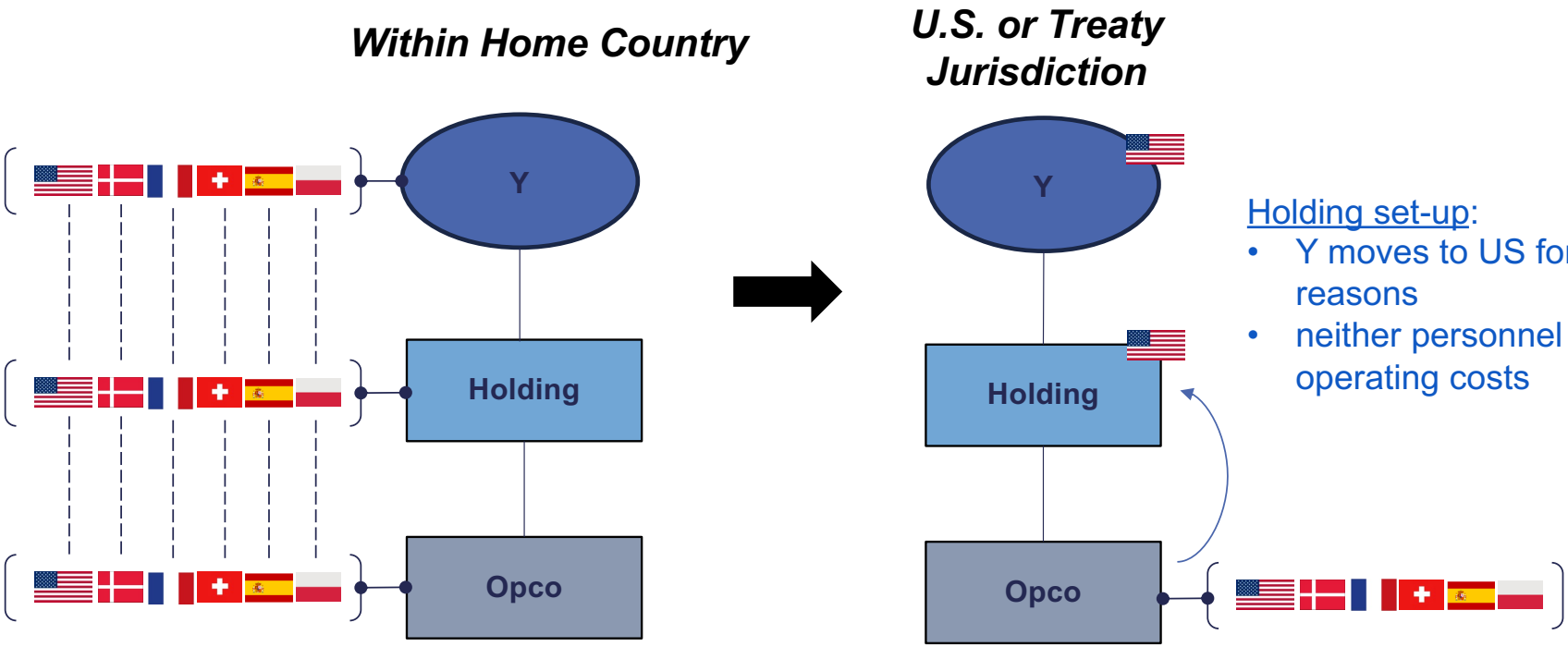
Holding set-up:

- office in family residence
- 500k€ operational costs
- 20 other subs and actively involved management
- not involved in management Opco
- dividends are reinvested



Case Study

Cross-Border with U.S. or Treaty Jurisdiction

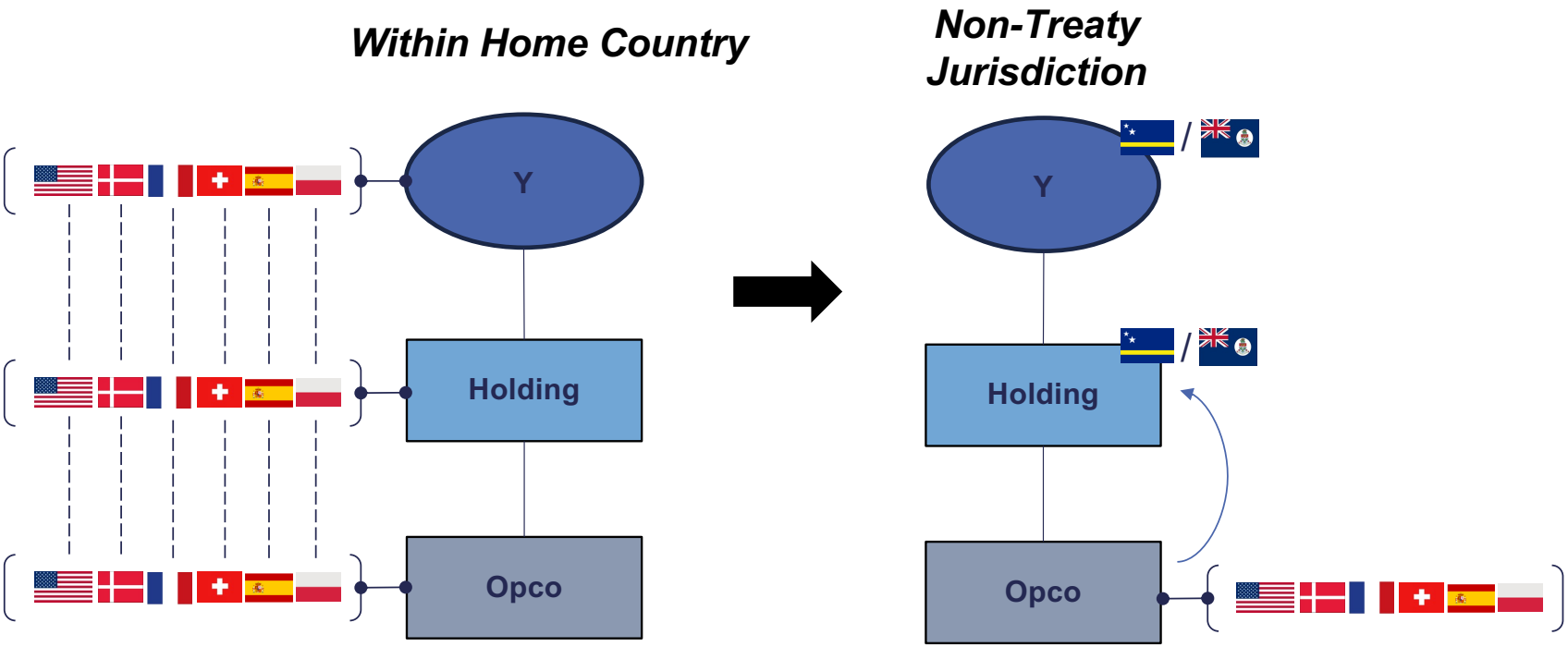


Holding set-up:

- Y moves to US for personal reasons
- neither personnel nor material operating costs

Case Study

Tax Haven



Questions?

The Panel

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Imme Kam, tax partner, is a member of the tax team in Amsterdam. He focuses on corporate clients and investment funds. He also is a member of the Region Team France and was resident partner in our Paris office from 2020-2024. Imme specializes in Dutch and international tax advice for, particularly French, corporate clients and investment funds. He has broad experience in tax advice for Dutch operations of foreign clients, M&A, joint ventures and real estate investments. Imme has a particular focus on Withholding Tax.

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Jacquie Duval is the Chair of Private Capital and Fund Formation at Perkins Coie LLP in New York. She works with fund managers, sophisticated family offices, and other private capital investors on tax and entity structuring, investment planning and execution, and private fund formation and management. In her role as trusted counsel for family offices, Jacquie guides the structuring and servicing of family offices and transactional work related to their investments. She also advises family offices and private foundations on such issues as social capital and grantmaking.

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Jakob Skaadstrup Andersen is heading the tax practice of Gorrissen Federspiel, ranked in Tier 1 in most directories and current holder of the Tax Dispute Law firm of the Year award by International Tax review. He advises Danish and foreign multinationals on their inbound and outbound investments, their controversies with the Danish Tax Agency and their Danish tax matters in general. Jakob is Chairman of The Association of Danish Tax Attorneys and a member of the Tax Committee in the International Bar Association, the Tax Committee of the Danish Chamber of Commerce and the Tax Committee of the Confederation of Danish Industry. He is a frequent speaker on Danish and international tax matters on Danish and international tax conferences. He is ranked in all legal directories: “Jakob Skaadstrup Andersen is extremely knowledgeable, a very good advocate in court, very client focused, very good working in a team” Source: Legal 500, 2024

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Daniel Bader is a partner at Bär & Karrer and co-heads the tax department and the St. Moritz office. With years of experience in the field, he has become a sought-after consultant for Swiss and international clients seeking guidance on tax law and private client matters. Daniel specializes in a range of tax and legal-related services, including inheritance tax matters, succession planning, and advising high net worth individuals on all aspects of their private and business activities. He also provides expertise in trusts, international estate planning, wealth structuring, private wealth planning and navigating in relation to various jurisdictions. He is a frequent speaker at national and international tax and private clients conferences, and acts as board member of Family Offices. Daniel is member of the Supervisory Board of the International Fiscal Association IFA and international fellow of the American College of Trust and Estate Counsel ACTEC. He is listed as a leading lawyer by Chambers, Legal 500 and Citywealth and was recognized by IFC Citywealth as Lawyer of the Year – Switzerland 2025.

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Luis is a Tax partner at Gómez-Acebo & Pombo. He has extensive experience advising on the tax consolidation regime and restructuring for family groups and multinationals. He has solid experience in private client / wealth management and tax inspection processes. He is specialised in advising on M&A operations and restructuring transactions for private equity funds, family groups and multinationals. He also advises private equity and venture capital houses in structuring their funds and investment platforms, as part of the Funds Formation team. He also advises family groups on their wealth and succession strategies, including complex cases with an international component. He holds a degree in Law and Business Administration and Management from Abat Oliba CEU University; Executive master's degree in business law from Garrigues Centre of Studies (Spain); Specialization Module in International Taxation by the Center for Financial Studies (CEF).

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Wojciech is a partner at Wardyński & Partners. Wojciech handles tax disputes, fiscal criminal matters, and international tax law. He advises on personal income tax and corporate income tax, including the consequences of changes in tax residency, tax planning, and transfer pricing.

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In September 2024, Emilie Lecomte joined SQUAIR as a Partner in Tax. Emilie was admitted to the Paris Bar in 2009 and has worked previously as an attorney-at-law in Tax for one of the Top French law firms from 2013 to 2024 where she passed all grades and was promoted as a Counsel in 2020. Previously she had worked for four years for other Top international and French law firms and also worked at the European Commission (GD TAXUD).

Emilie advises French and foreign companies as well as groups of companies on the day-to-day management of their national and international tax issues: tax audits, restructuring, international development, tax consolidation setting-up and monitoring, intra-group flows, employees benefits, international mobility of the global executives, PE issues. She has an extensive experience in managing tax audits and litigation, and is regularly involved in criminal and tax cases.

Emilie also regularly advises French and foreign individuals regarding their wealth management, estate and succession planning, the transfer of their tax residence in France or abroad (impatriation tax regime, exit tax..), structuration of their estate. Emilie also has a long-standing expertise in foundations and endowment funds.

Emilie Lecomte has been appointed National Rapporteur of the International Bar Association (IBA) for France for 2018 and 2019 and European Regional Forum Liaison Officer of the IBA Academic and Professional Development Committee for 2021 and 2022. She is a lecturer in Tax at the Dauphine Univesity and regularly writes articles on domestic and international tax issues. She is a regular speaker at international tax conferences and is included in the Best Lawyers ranking in Tax since 2023.

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Devan Patrick is a tax partner at K&L Gates, where he is a member of the corporate practice. For more than a decade, Devan has assisted clients on a wide range of United States tax matters associated with domestic and international business transactions and generally navigating the increasingly complex global tax environment.

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France focuses her practice on US federal and international tax matters, including partnership and corporate tax issues, mergers and acquisitions, dispositions, reorganizations, fund formation, and other tax-efficient planning opportunities. France routinely assists institutional investors with economic and tax aspects of investments in private equity funds and hedge funds.

Updates & Additional Information

United States – Overview

- Variety of beneficial ownership rules used in the United States: Treaties, US Caselaw, US Statutory Law

- Withholding Certificates (IRS Forms W-9 and W-8)

- Treaty Provisions:
  - ✓ Limitation-on-Benefits (LOB) Provisions
  - ✓ Ownership and Base Erosion Tests
  - ✓ Derivative Benefits Test
  - ✓ Active Trade or Business Test
  - ✓ Special Tax Regime Provisions (Shipping and Air Transport, Taxable Non-Stock Companies, Investment or Holding Companies, etc.)

- US Caselaw and Internal Revenue Code Provisions:
  - ✓ Anti-Conduit Regulations: IRC Section 7701(l)
  - ✓ Hybrid Entity Rules: IRC Section 894(c)
  - ✓ Qualified Residence Rules: IRC Section 884(e)
  - ✓ Special Tax Regime Provisions
  - ✓ Substance-Over-Form

- Competent Authority

United States – Corporate Transparency Act Update

- March 2025 updates from United States Department of the Treasury (Treasury) and Financial Crimes Enforcement Network (FinCEN)

- Interim Final Rule (March 2025)
  - ✓ Removes 'domestic reporting companies' from scope of US Corporate Transparency Act (CTA)
  - ✓ Removes US citizens
  - ✓ 'Foreign reporting companies' must still file beneficial owner reports

- 'Foreign Reporting Company' Under the CTA
  - ✓ Any entity
  - ✓ Formed in a country other than the United States
  - ✓ That is registered to do business in any US state or tribal jurisdiction by filing a document with the secretary of state (or equivalent agency) under the laws of that US state

- 'Beneficial Owner' Under the CTA
  - ✓ Any individual person who directly or indirectly controls 25% or more of the equity of the 'foreign reporting company'
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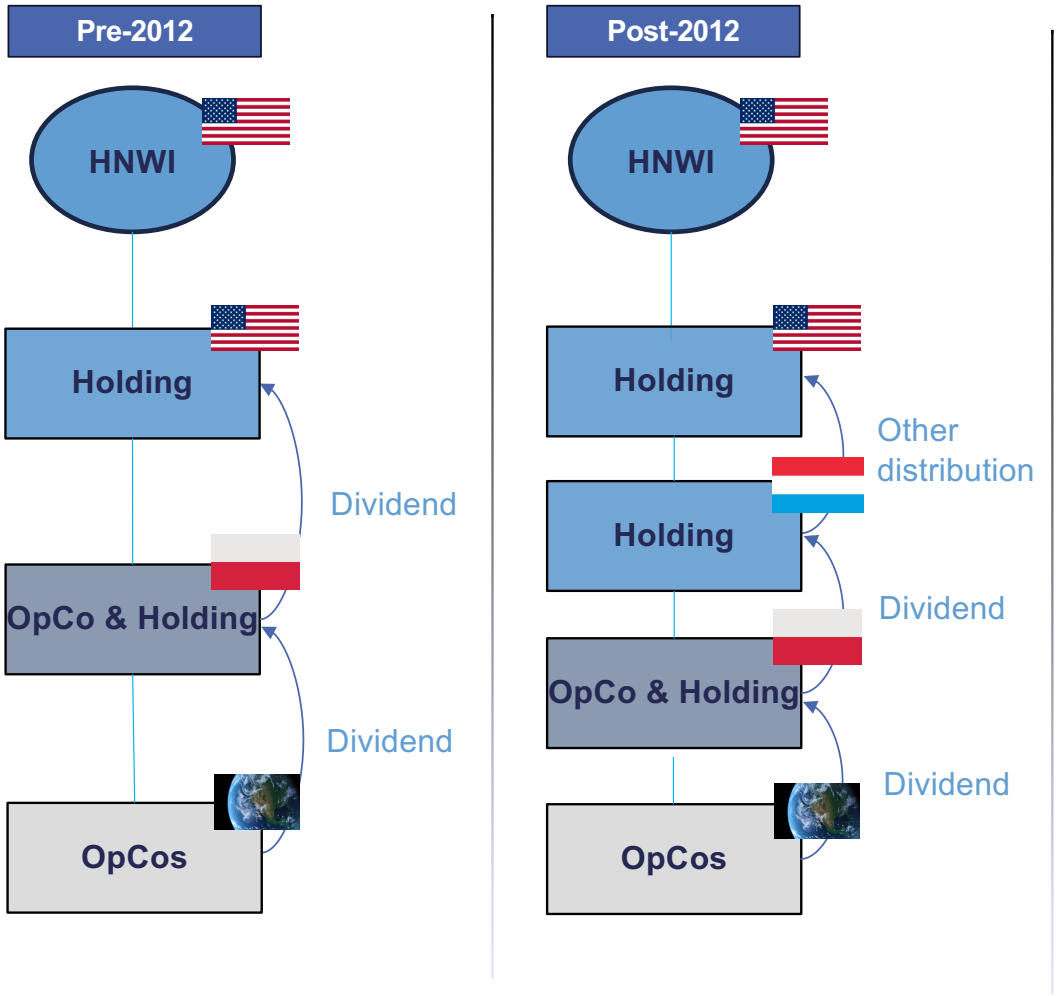
- 'United States persons' are exempt from reporting: US citizen, permanent resident, substantially present in the United States, electing

- Deadline for 'foreign reporting company' to file initial reports: April 25, 2025
- 'Company Applicant' rules still apply

HNWI holding structure [Poland]



Facts (simplified)

- HNWI owns multiple businesses, including the US Holding
- The US Holding owned a Polish Entity
- Restructuring in 2012 resulted in the US Holding setting up a Luxembourg Holding
- The Polish Entity has been paying dividends, taxable until 2012, and tax-exempt onwards

⇒ Does it matter if the structure has a jurisdiction with a specific flavour to it (*smell test*)?

⇒ What would retention of funds in / investment by Lux Holding do?

⇒ What level of substance at Lux Holding would support beneficial ownership?

⇒ Would the existence of OpCos in Luxembourg matter?

⇒ What would be the tax treatment if the restructuring took place in 1995?

⇒ Do non-tax reasons for the restructuring matter at all?

Poland - Update

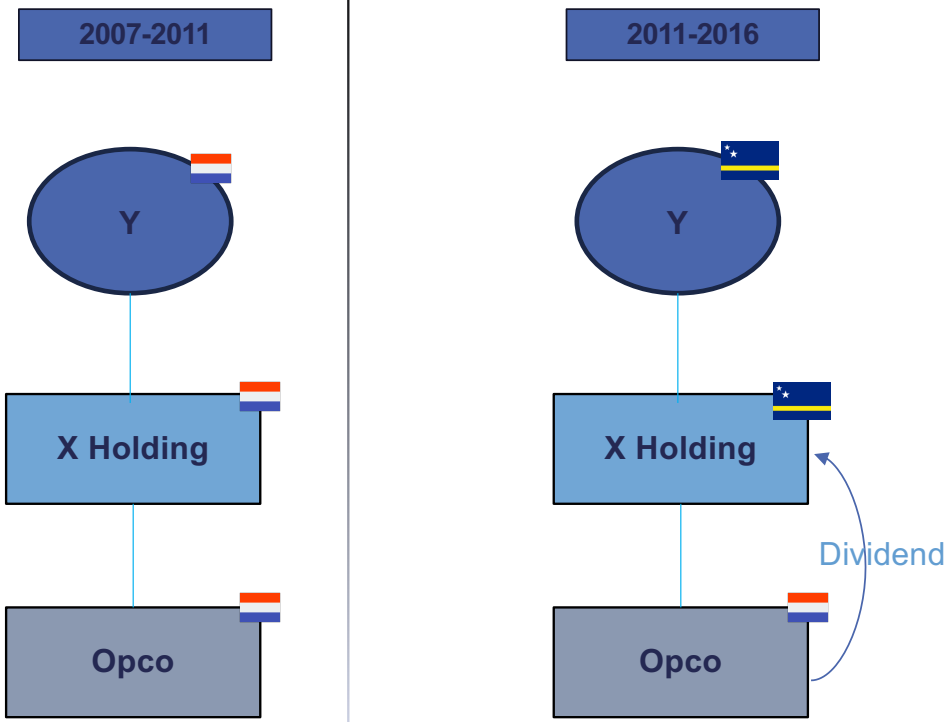
- Early BO disputes on payment of interest and enjoyment of tax treaty protection, particularly in cash pooling post-tax ruling cases
  - ✓ Supreme Administrative Court (”SAC”) judgments of 2 March 2016, II FSK 3666/13 and 16 September 2016, II FSK 2299/14

- Subsequent tax audits conducted against selected types of alleged tax treaty abuse related to interest payment
  - ✓ SAC judgment of 17 August 2022, II FSK 3101/19
  - ✓ Reasoning: Danish BO cases → Commentary to the OECD MC → Indofood case → Polish scholarship → Black’s Law Dictionary

- Post Danish BO cases heavy roll out of tax audits targeting interest and dividend payments to holdings in selected jurisdictions
  - ✓ SAC judgment of 6 October 2023, II FSK 1333/22
  - ✓ Reasoning: general tax remitter’s obligation to investigate the structure backed by the Danish BO cases, SAAR and LOB
  - ✓ Tax authority’s obligation to prove a tax benefit, subjective and objective elements of the abuses of law

- Where we stand:
  - ✓ Major tax reform increased tax compliance cost
  - ✓ Should we discuss the substance standard at all?
  - ✓ Long-awaited guidance from the Ministry of Finance – a game changer?
  - ✓ New judgments on look-through, e.g. SAC judgment of 11 June 2024, II FSK 1161/21
  - ✓ Tax authorities open to discussion

Migration to [Curaçao]



Facts (simplified)

- X Holding is a holding company owned by local resident Y.
- X Holding owns a local Opco
- In 2011 X Holding and Y 'migrate' to Curaçao.
- [1 January 2016: treaty becomes more favourable]
- In 2016 X Holding receives a dividend from Opco

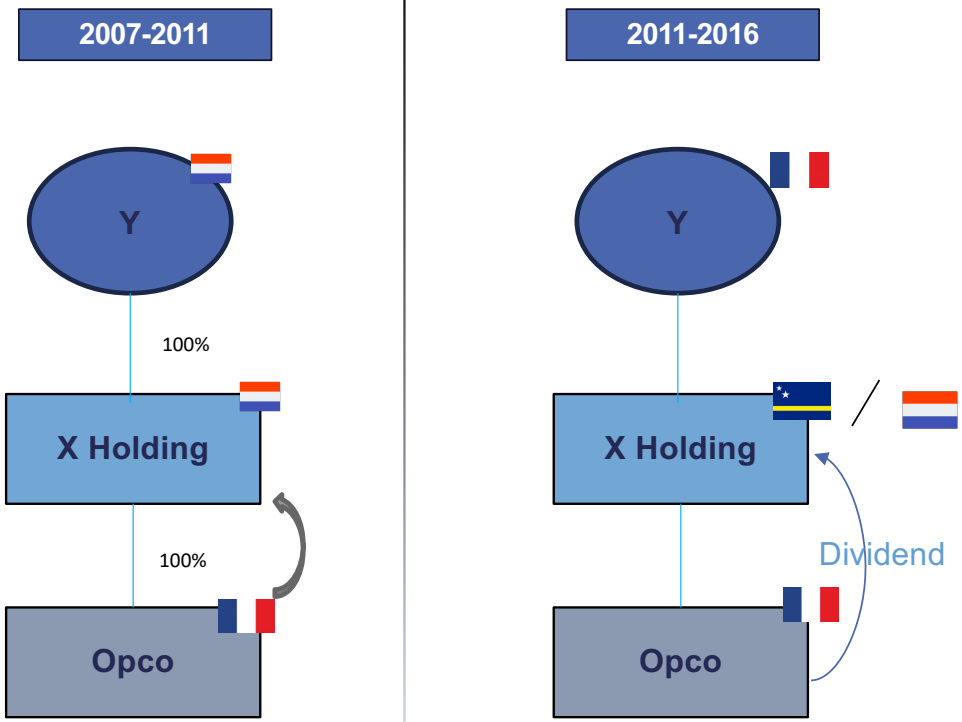
⇒ How would you view a migration to a jurisdiction that provides for an exemption ?

⇒ Does it matter if the jurisdiction has a 'tax haven' flavour to it (*smell test*) ?

⇒ Would it matter if the exemption becomes available only later ?

⇒ What would retaining funds in X Holding do ?

Migration to Curaçao – French perspective



X Holding:

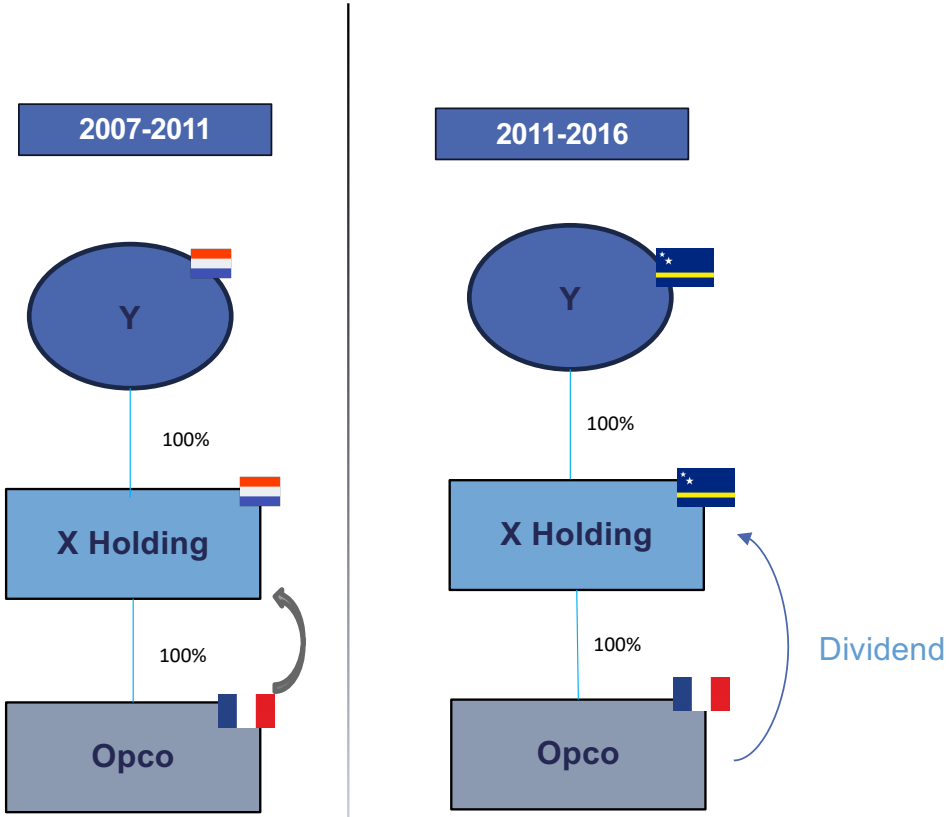
- *Registered for 36 years*
- *Effective activity as a holding company*
- *Cash management agreement in force to finance the Group operations*
- *Subsidiaries in several countries*
- *Dividends from all subsidiaries*

1- French Supreme Court, Alphatrad Company 11 March 2022 (no. 454980): very restricted approach.

→ Towards the end of pure holding companies?

2- Favourable « Planet » decision: French Supreme Court, 20 May 2022 (no. 444451)

Migration to Curaçao – French perspective



2007-2011

- WHT exemption (119 ter FTC - PSD) vs. 5% WHT (Tax treaty France-NTL - article 10, 2 a)

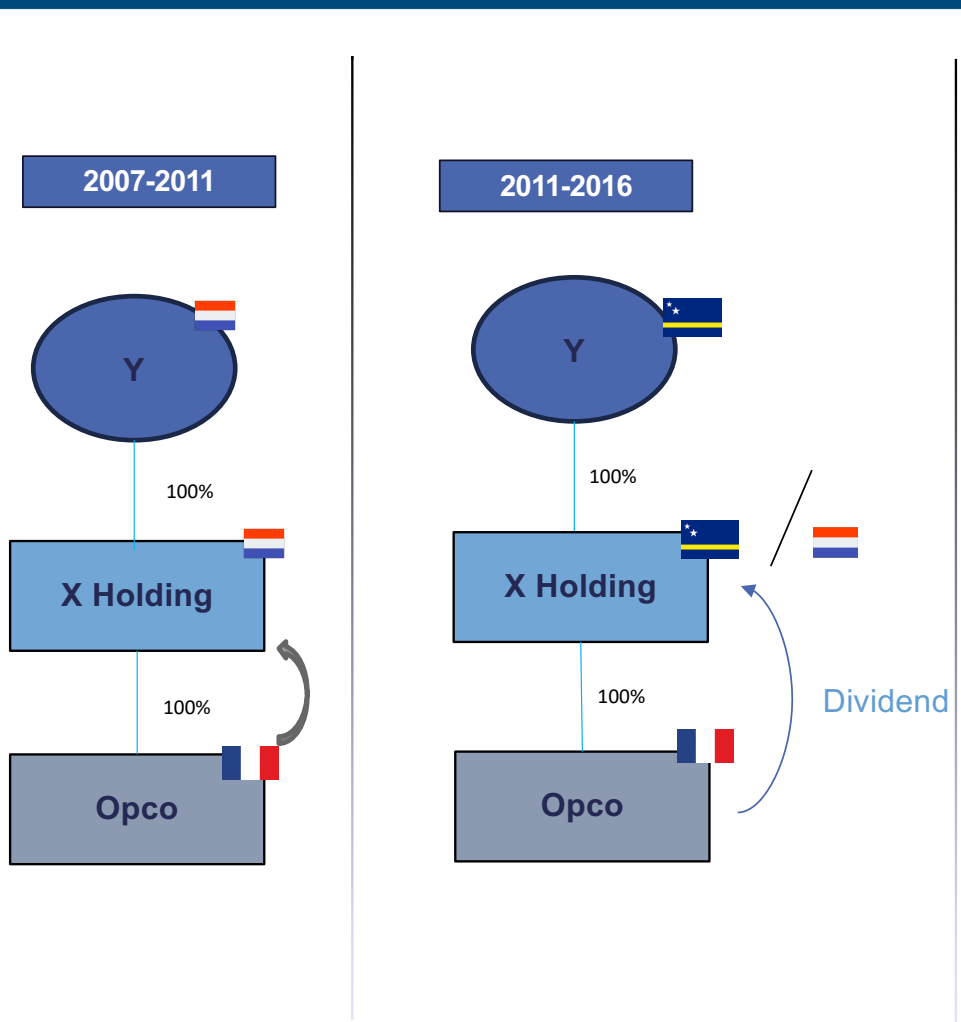
- **Is X Holding the Beneficial Owner of the dividends?**
  → **Bundles of clues**

1. A French OpCo wholly held by an offshore intermediary company (tax favorable regime);
2. An intermediary company with **no other activity than a holding activity** / **no premises nor employees**;
3. An intermediary company **wholly held** itself by a unique shareholder;
4. **Repayment of 100% of the received amount** (with no other funds available);
5. Timing of the redistribution.

→ **Is there an economic use of the funds by X Holding ?**

Reinvestment in operating activities? Retaining funds should not matter BUT application of the « Planet » decision (Tax Treaty FR – NTL applicable if Y is the BO and tax resident in the NTL – no risk of treaty shopping)

Migration to Curaçao – French perspective



2011-2016

- **No WHT exemption (PSD and Tax treaty France-NTL – not applicable to Curacao)** → 25% French WHT (75% WHT not applicable in principle).

→ **BUT if X Holding remains in the NTL : risk of treaty shopping** (5% WHT - Tax treaty France-NTL - article 10, 2 a)

- **Is X Holding the Beneficial Owner of the dividends?**

  - ✓ Application of the same bundles of clues
  - ✓ Is there an economic use of the funds by X Holding ?

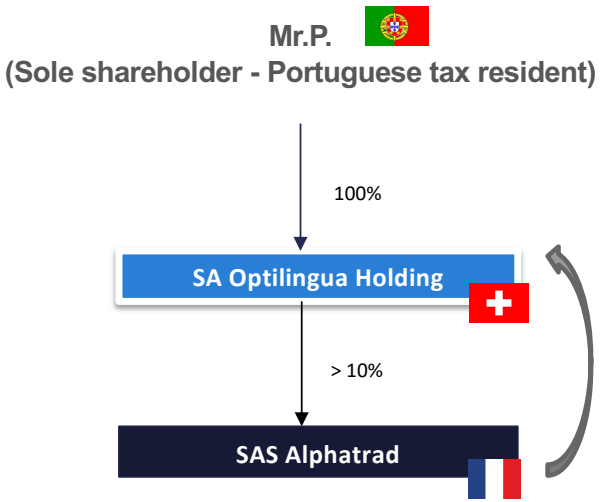
Reinvestment in operating activities (newly-developed locally…) ? Is there an economic use of the funds by X Holding ?

Retaining funds and rationale of the migration for family reasons should not matter (French Supreme Court Velizy Rose, 8 Nov. 2024).
« Planet » decision not helping (no tax treaty applicable with Curacao) → 25% WHT could be applied by the FTA.

Migration to Curaçao – French perspective
RELATED RECENT DECISIONS IN FRANCE (1 – ALPHATRAD COMPANY)

❑ **1- French Supreme Court, Alphatrad Company 11 March 2022 (no. 454980): (1/2)**

- *Registered for 36 years*
- *Effective activity as a holding company*
- *Cash management agreement in force to finance the Group operations*
- *Subsidiaries in several countries*
- *Dividends from all subsidiaries*



Dividend payment

WHT **exemption** in the event of ownership of more than 10% by the beneficial owner
(Tax treaty France-CH - article 11, 2b)

vs.

15% WHT
Where the Franco-Portuguese tax treaty applies

Migration to Curaçao – French perspective
Related recent decisions in France (1 – Alphatrad Company)

❑ 1- French Supreme Court, Alphatrad Company 11 March 2022 (no. 454980): (2/2)

➢ **Arguments put forward by the French tax authorities**

- **Lack of substance** (human and material resources)
- No operating activity

➔ No proof of the entity's actual, real activity

➢ **Position of the Versailles administrative court of appeal ➔ Very strict approach**

- the fact that (i) the dividends received by the Swiss company **had not been distributed to Mr P**, (ii) the profits available for distribution in respect of the years in question **had been automatically transferred to reserves or retained earnings**, and (iii) Mr P had only held a **directorship**, were not in themselves sufficient to establish that the Swiss company was the beneficial owner of the dividends;

- Production of the cash management agreement set up between the two companies, subsequent to the tax years in **question**, **does not justify the business activity** referred to, in the absence of any evidence of group management and development (in particular, intangible, tangible and human resources).

- **The failure to redistribute dividends to Mr P could be regarded as an act of disposal from the latter, the sole shareholder, who had moreover benefited from substantial advances in respect of the 2014 financial year, thus testifying to the fact that he had the Swiss company's corporate funds at his disposal.**

→ Positive acts must be demonstrated, showing that the parent company actually has the power to use the income earned and is not acting as a shell company : consistency with the functioning of a pure holding?

→ The absence of redistribution should be inoperative.

Migration to Curaçao – French perspective
RELATED RECENT DECISIONS IN FRANCE (2 – PLANET)

❑ **2- French Supreme Court, *Planet,* 20 May 2022 (no. 444451): The agent or representative may be located in a third country: possible application of the DTT concluded between the State of residence of the BO and the State of source of the income**

➢ **Formalist approach**: only the direct recipient of the income in question is taken into account, regardless of whether the beneficial owner is the parent company located in the same State (no "treaty shopping" risk).

➢ **Exception: French Supreme Court October 13, 1999, no. 191191, SA Diebold Courtage**

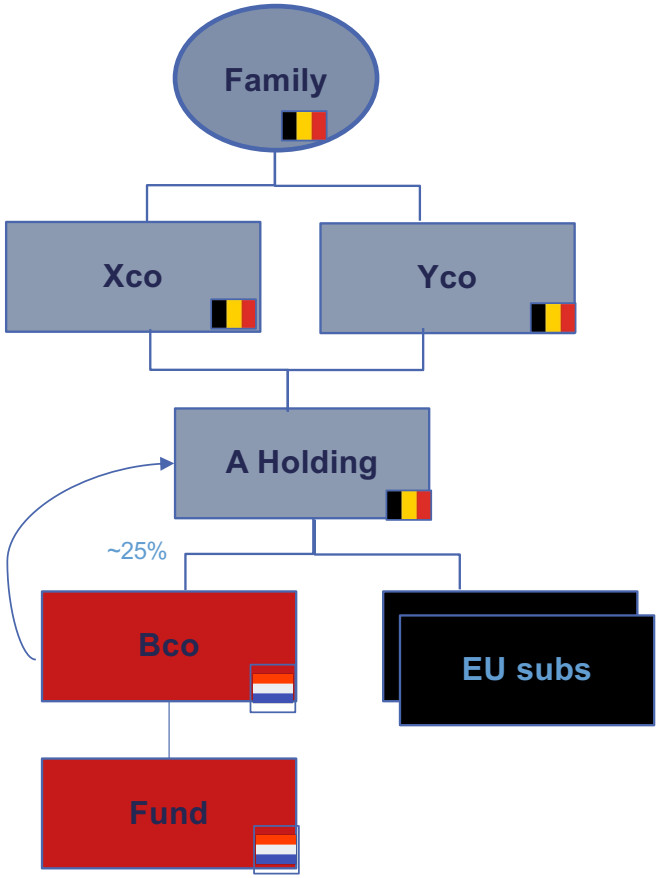
- Application of the Franco-Dutch bilateral tax treaty to a Dutch partnership, whose partners were Dutch resident entities (rental income paid by the French company Diebold Courtage to a Dutch partnership - subject to RAS in France).
- French Supreme Court decision: the Dutch partnership cannot be considered as resident in the Netherlands as it is not subject to corporate income tax there. However, **from the point of view of Dutch law, this partnership was transparent from both a legal and a tax point of view**, so the CAA verified whether the tax treaty could be applied to the partners.

  => Unique decision until the Planet ruling of 2022: the scope of the Diebold Courtage case law is considered, in practice, to be limited to entities without legal personality.

- **Treaty benefits must be granted by the French tax authorities to the beneficial owner provided that it can be easily/clearly identified: obligation for the French company to prove who the actual beneficial owner is;**
- **French judges obliged to grant WHT exemptions or reductions if the beneficial owner is identified + his tax residence is dully justified (French Supreme Court 8 November 2024, n°471147, Société Foncière Vélizy Rose)**

➔ **Only purely artificial arrangements should be excluded from tax treaties in order to avoid double non-taxation or tax evasion.**

Family holding structure [Belgium]



Facts

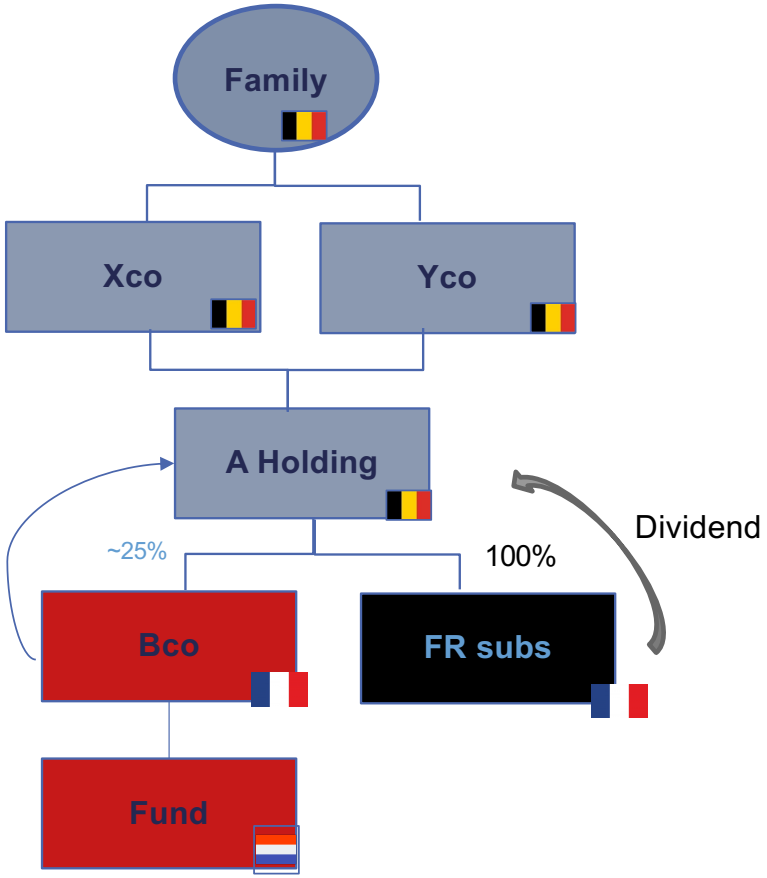
A Holding is a holding company that receives dividends from inter alia Bco

A Holding

- **has an office in the family residence**
- **has operational costs amounting to more than € 500,000**
- **has approx. 20 other subsidiaries and is involved in the active management of some of these subsidiaries**
- **is not involved in the management of Bco and/or Fund**
- **Dividends are not distributed up to the family, but reinvested**

⇒ **What if cash is distributed to family ?**
⇒ **What if cash was put into A Holding for this investment ?**
⇒ **What if reinvestment of proceeds is laid down as obligation in SHA ?**
⇒ **What if [2] family members are on the payroll of A Holding ?**

Family holding structure [Belgium] - French perspective



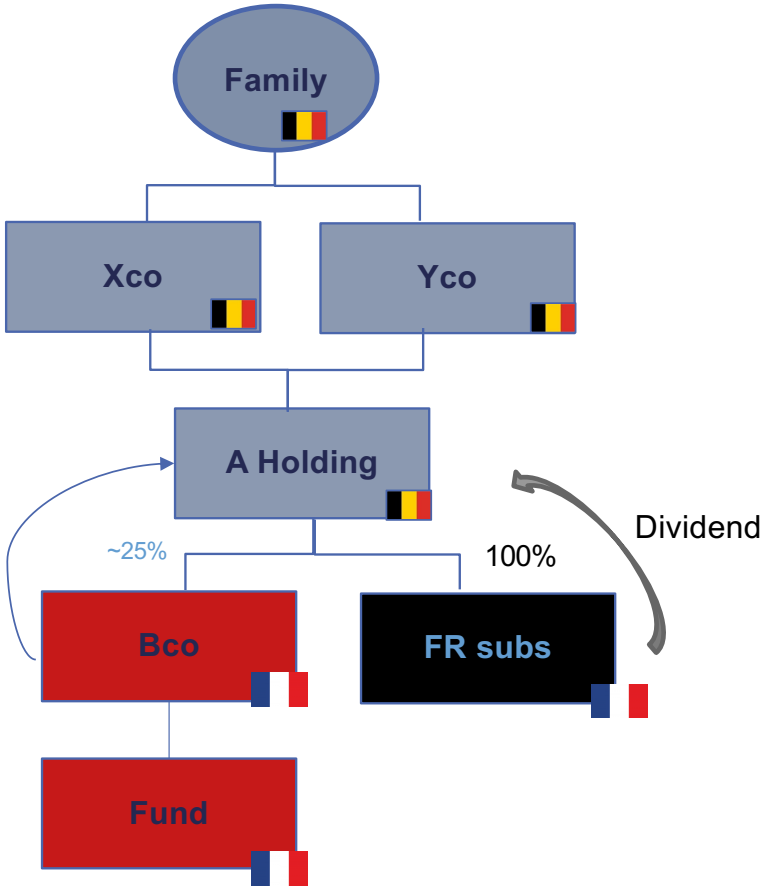
1) **<u>Regarding the dividends distributed to A Holding by FR Sub. :</u>**

- A Holding: No own premises, no substance (not a genuine scheme?)
- **BUT active management of FR Sub**
- **→ Risk of discussions with the FTA (abuse of law ? BO analysis?)**
  - PSD : WHT exemption possible ?
  - Tax Treaty FR-BEL: 10% WHT max. possible ?
- **Is A Holding the Beneficial Owner of the dividends?**
  - ✓ Application of a bundles of clues (see above)
  - ✓ Is there an economic use of the funds A Holding ?

Key criteria:

- **<u>Reinvestment in operating activities</u> / no distribution to family;**
- **<u>Economic use in practice</u> of the funds by A Holding;**
- **Cash put into A Holding by Family not helping;**
- **Taxation in Belgium of A Holding ?**
- **No risk of treaty shopping → Planet decision (if Family BO + Tax resident in BEL).**

Family holding structure [Belgium] - French perspective



2) Regarding the dividends distributed to A Holding by FR Bco :

- No own premises, no substance (not a genuine scheme?)
- **NO active management of FR Bco (A Holding is a passive shareholder)**

→ **High risk of discussions with the FTA** (application of PSD and Tax Treaty FR-BEL denied).

- **Is A Holding the Beneficial Owner of the dividends?**

→ **Practical analysis for each distribution (Bco case different from the FR Sub case)**

Criteria likely to increase the risk of tax audit :

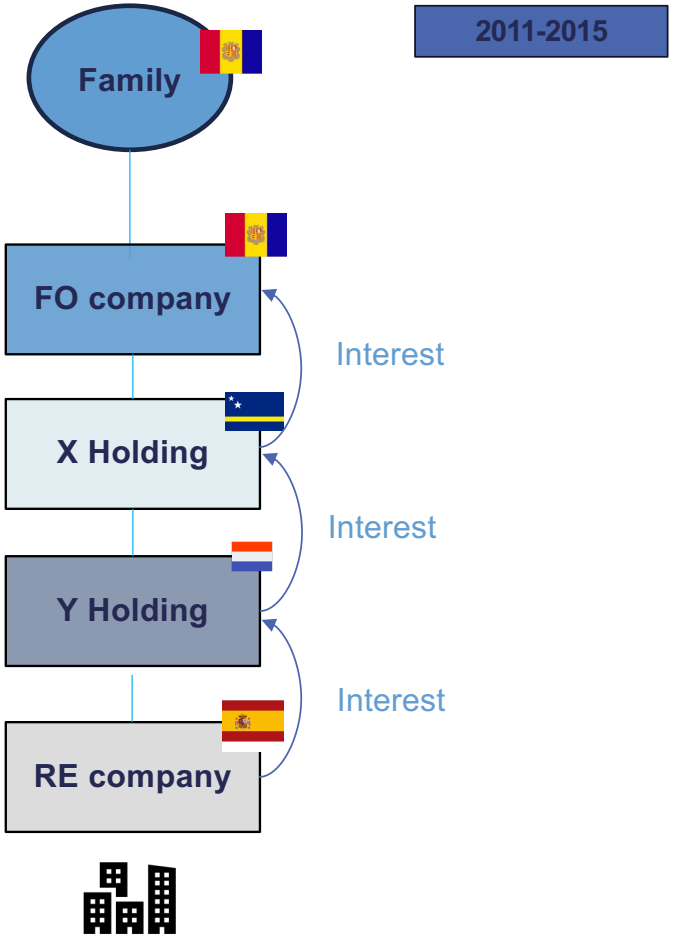
- **Distribution to family : *French Supreme Court Velizy Rose 8 Nov. 2024***

(no economic use of the funds by A Holding)

- **Timing of the redistribution (the day after?)**
- **Amount of the redistribution (100% of the Bco dividend?)**

Still, the *Planet* decision remains applicable if Family BO + Tax resident in BEL.

Family holding structure [Spain]



Facts (simplified)

- Family Office ("**FO**") company is an investment company owned by local family.
- FO company owns X holding in Curaçao.
- X holding owns Y holding in the Netherlands
- Y holding owns a Spanish real estate company
- Until 1 January 2016 Spain and Andorra did not have any tax treaty in force.
- Between 2011-2015 the Spanish company has paid interest from loans received to Y Holding.

⇒ Does it matter if the structure has a jurisdiction with a 'tax haven' flavour to it (*smell test*) ?

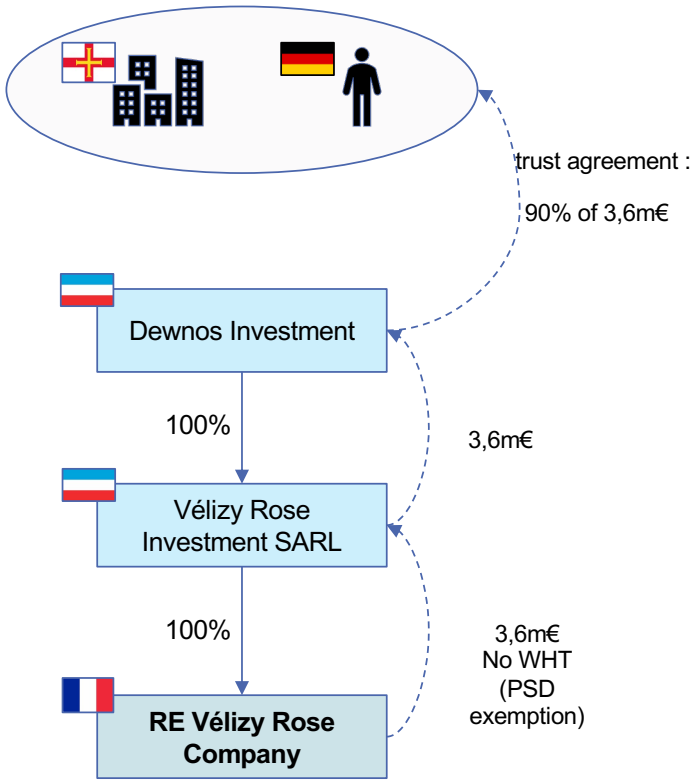
⇒ What would retaining funds in X or Y Holding do ?

⇒ What level of substance Y Holding or X Holding would need to be considered the beneficial owner of the interest?

⇒ What would be the tax treatment after 2016 with a tax treaty in force with the "ultimate BO"?

Family holding structure (cont'd) – French perspective

❑ Similar recent decision: French Supreme Court, Foncière Velizy Rose November 8, 2024 (n°471147) (1/2)



- Foncière Vélizy Rose is a French real estate leasing company.
- It is wholly owned by the Luxembourg company Vélizy Rose Investment, itself owned by the Luxembourg company Dewnos Investment.
- Dewnos Investment has entered into a trust agreement **with 4 companies resident in Guernsey for tax purposes,** and one individual resident in Germany for tax purposes, under which Dewnos Investment is responsible for paying 90% of the dividends it receives from Vélizy Rose Investment SARL to the trust's settlors.
- **2 July 2014:** Payment by Foncière Vélizy Rose of an interim dividend of €3.6m to Vélizy Rose Investment.
- **3 July 2014:** Repayment by Vélizy Rose Investment of the entire amount to Dewnos Investment.
- Foncière Vélizy Rose did not apply any withholding tax, in accordance with Article 119 *ter* FTC (PSD), which exempts dividends distributed to EU parent companies from withholding tax.

→ The tax authorities challenged the application of this exemption and applied the withholding tax provided for in article 119 *bis* of the CGI, increased by a 10% penalty (without abuse of law).

Family holding structure (cont'd) – French perspective

❑French Supreme Court, Foncière Velizy Rose November 8, 2024 (n°471147) (2/2)

- The applicant argued that Vélizy Rose Investment, which had real economic substance, could not be classified as a mere relay company:
  - it was the **full owner of the dividend**,
  - and had **freely redistributed** it in the exercise of its power of allocation to the Dewnos company,
  - with **no obligation to redistribute** (in particular, Vélizy Rose Investment did not pay out the dividend received in 2016),
  - the payment of €3.6m was **justified** by the fact that the members of the original consortium (i.e. the members of the trust) had not yet received any return on their initial investment of €25m made in 2011.

- The French Supreme Court based its decision on the facts of the case and found that the facts were sufficient to conclude that Vélizy Rose Investment was **not the beneficial owner**:
  - Vélizy Rose Investment had paid the interim dividend to its sole shareholder **the day after** it was paid, even though it had no other funds available,
  - Vélizy Rose Investment had **no activity other than holding the shares** of its French subsidiary.
  - The company's decisions were **totally controlled** by its sole shareholder and their joint managers.

→ The status of beneficial owner is assessed on the basis of a range of indicators (faisceau d'indices) and cannot be reduced to a single legal approach.

→ No application of the Planet decision : no certificate of tax residence provided by the BOs

→ A taxpayer may, despite the absence of a contractual obligation to repay the dividend, be denied the status of beneficial owner on the basis of factual and functional criteria leading him to be regarded as a mere relay without any economic rationale to retain the income, even if he is the legal owner.

Spain - Update

- The Spanish Tax Authorities, within the context of audits to international and domestic holding structures, are questioning the effective concurrence of valid economic reasons for their establishment. Sometimes based on GAAR domestic rules (arts. 15 and 16 LGT) or on the application of international principles and clauses (beneficial owner, doctrine of prohibition of abusive practices derived from the jurisprudence of the CJEU).

- The Spanish WHT exemptions on interest payments (domestic and not restricted to related parties) and dividends (coming from the Parent-Sub EU Directive) do not foresee a beneficial owner clause. However, the tax authorities (endorsed by the tax courts) apply it based on the criteria set forth in the Danish Cases.

- The jurisprudence of the Spanish Supreme Court (SSTS June 8, 21, and 22, 2023) requiring the Authorities to **bear the burden of proof** on abuse in relation to international intermediate structures is being neutralized in a formalistic way (RTEAC March 20, 2024 + National Court October 17, 2024).

- In particular, on interest payments the National Court has confirmed the tax authorities can deny the EU exemption based on the BO clause without the need to invoke GAAR domestic rules.
  - Very controversial → Pending issue to be resolved by the Supreme Court.
  - Also to non-related parties not in the scope of the Directive?

- In the above scenario, if the beneficial owner can be identified, the Spanish tax authorities should permit a look-through approach, for example, so as to grant any exemption available under a double tax treaty between Spain and the country where the beneficial owner is resident, but it is unclear whether they would take this approach in practice.

French - Update

- Lots of decisions on the abuse of law / notion of beneficial owner in recent years regarding the application of the WHT exemption / reduction (PSD / tax treaties) : not satisfying → analysis on a “case by case basis” / no legal certainty.
- Recent decision: **French Supreme Court, Foncière Velizy Rose November 8, 2024 (n°471147):**
  - The GAARs are clearly distinct from the notion of beneficial owner (autonomous notion) : choice very efficient for the FTA;
  - BO to be identifyed for the application of the PSD and tax treaties as well, regardless the presence (or not) of a Beneficial owner clause;
  - No hierachy provided between the relevant criteria at this stage but a « bundle of clues » (see above);
  - The Rationale of the scheme at hand (set-up at the request of the banks or many years before, etc.) and the absence of legal or contractual obligation to redistribute are not relevant;
  - Key criterion: is there an economic use of the fund by the intermediary company? (no substance : proof that there is no need to use the funds)
- However, if the beneficial owner can be clearly identified by the FTA, they should allow a look-through approach, (Planet decision) so as to grant the exemption available under a double tax treaty between France and the country where the beneficial owner is tax resident.

Beneficial Ownership – The Swiss Perspective

- **No standardized definition** of the beneficial owner (BO).
- The Code of Obligations (CO), the Anti-Money Laundering Act (AMLA) and the Financial Market Infrastructure Ordinance (FinMIO-FINMA) each contain a definition; the tax law does not.
- Art. 697j par. 1 CO: *"Any person who alone or by agreement with third parties acquires shares in a company whose participation rights are not listed on a stock exchange, and thus reaches or exceeds the threshold of **25 per cent of the share capital or right to vote** must within one month give notice to the company of the first name and surname and the address of the natural person for whom it is **ultimately acting** (the beneficial owner)."*
- Art. 2a par. 3 AMLA: "*The beneficial owners of an operating legal entity are the natural persons who **ultimately control the legal entity** in that they directly or indirectly, alone or in concert with third parties, hold at least 25 per cent of the capital or voting rights in the legal entity or otherwise control it. If the beneficial owners cannot be identified, the **most senior member** of the legal entity's executive body must be identified."*
- Art. 10 par. 1 FinMIO-FINMA: *"A beneficial owner is the party **controlling the voting rights** stemming from a shareholding and bearing the associated economic risk."*
- Common to all definitions is the **control** that the BO has.

Beneficial Ownership – The Swiss Perspective

- The purpose of accessing the BO is to prevent the **abuse of legal entities and trusts** to conceal assets for the purposes of money laundering, terrorist financing, corruption or circumvention of sanctions.

- There are also **criminal penalties** for persons who, as part of their profession, accept, hold on deposit, or assist in investing or transferring outside assets and fail to ascertain the identity of the beneficial owner of the assets with the care that is required in the circumstances (Art. 305ter of the Swiss Criminal Code).

- **Federal Act** on the Transparency of Legal Entities and the identification of beneficial owners ("LETA" (no official abbreviation), not in force yet; currently at the parliamentary stage)

  - **Aligned definition** of the term "Beneficial Owner" across all AML regulations in art. 4 par. 1 LETA: "The beneficial owner of a company is any natural person **who ultimately controls** the company by virtue of holding, directly or indirectly, alone or with others, a share of at least 25% of the capital or voting rights or controlling it in some other way."

  - If no individual meets the criteria of art. 4 par. 1 LETA, the **most senior executive** is registered as the BO (Art. 4 par. 2 LETA).

  - New "**transparency register of BO**"

  - Stricter due diligence requirements for consultants and lawyers.

Beneficial Ownership in Swiss Tax Law

- Art. 21 par. 1 lit. a of the Swiss Federal Law of 13 October 1965 on withholding tax (WHTL): *A creditor […] shall be entitled to a refund of the withholding tax deducted from the debtor on capital gains if he had the right to use the asset yielding the taxable income when the taxable benefit fell due*.
  - The authorization of use serves to identify the person entitled to a refund.
  - This is to ensure that the refund goes to **the actual recipient** of the services and that it is granted **only once**.
  - The BO is to be denied if the taxpayer is contractually or factually obliged to **pass** on the net income **to a third party**.
  - The BO can therefore **differ from the civil owner**.
- Relevance of the BO in relation to the Automatic Exchange of Information (AEOI)
  - Art. 8 par. 1 Ordinance on the International Automatic Exchange of Information in Tax Matters (AEOI Ordinance): *"Depository or custodial accounts held by lawyers or notaries licensed in Switzerland or by a firm of lawyers or notaries licensed in Switzerland that are organised in the form of a company on behalf **of clients as the beneficial owners** of the assets deposited are treated as excluded accounts."*

Beneficial Ownership in International Tax Law

- Decisions of the **Federal Supreme Court**, a.o. BGE 141 II 447 and 2C_880/2018.
- The question of the beneficial ownership is to be examined in an (economic) overall assessment of the specific circumstances ("**substance over form**").
- The BO is the person who is entitled to the **full use and benefit of the dividend**.
- If, on the other hand, the recipient is restricted in this use by a **contractual or legal obligation** because he has to pass on the dividend to another person under the contract or by law, he is **not** the BO.
- The recipient can also lose his status as a BO if he is forced to acquire the shares and forward the dividends received, and is therefore subject to a "**de facto forwarding obligation**".
- The **larger the portion** of the dividend that the recipient resident in the DTA state has to transfer, the more likely it is that he is not the BO.
- The beneficial ownership can already be lost if the recipient is only allowed to **keep a small percentage** (no further details in the decision) of it, which is to be classified as remuneration or compensation for forwarding it.

BO in the field of Anti-Money Laundering

- The AMLA has been in force since October 10, 1997 and was last revised in 2023.
- The financial intermediary is obliged to **identify the BO** with the due diligence required in the circumstances and to verify the BO's identity; exception if the contracting party is a listed company or a subsidiary that is majority-controlled by such a company (art. 4 par. 1 AMLA).
- In certain circumstances, a **written declaration** is even required (art. 4 par. 2 AMLA).
- With the latest revision of the AMLA, financial intermediaries must **verify** the identity of the BO instead of merely identify it. In addition, a **periodic check** of the required records to ensure that they are up to date is now required and update if necessary.
- When accepting **cash payments**, dealers as defined in art. 2 par. 1 lit. b AMLA must verify the identity of the beneficial owner if the amount of the payment exceeds CHF 100'000.
- As of today, there is **no "transparency register of BO"**.
- In principle, lawyers and consultants are **not subject to the AMLA** in their **typical consulting activities**.
- Increasing **international pressure** for transparency.

What's Next for Switzerland?

- **Federal Act** on the Transparency of Legal Entities and the identification of beneficial owners (not in force yet; come into force at the earliest in 2026)

- Creation of a **"transparency register of BO"** for Swiss legal entities and legal entities based abroad with a branch, that are effectively managed or with own real estate in Switzerland.

- The register should **not be publicly accessible**, but only for legally authorized authorities. Financial intermediaries and consultants subject to the AMLA may also access it, but only for the purpose of fulfilling their due diligence obligations under AML (still unclear).

- **Widening of due diligence duties** for certain consultancy activities, that carry an elevated risk of money laundering:
  - Structuring of companies or advice on corporate and real estate transactions.
  - Lawyers are also in the sights of the revision.

- **Lowering of the thresholds** for real estate business and precious metal and jewelry trade.

- **Fines up to CHF 500'000** possible for non-compliance.

Beneficial Ownership – The Danish Perspective

- **The recipient is a company:**

- No withholding tax on payment of dividends or interest to corporate recipients in the EU or in a country with a DTT with Denmark, if Denmark is to waive or reduce taxation under a EU-Directive or a DTT

  - **Dividends**
  - Section 2(1), litra c, 4th sentence, of the Companies Tax Act:
  - *"The tax liability does not include dividends from subsidiary shares [10% or more]…, when the taxation of dividends from the subsidiary must be waived or reduced in accordance with the provisions of Directive 2011/96/EU on a common system of taxation in the case of parent companies and subsidiaries from different Member States or in accordance with a double taxation agreement with the Faroe Islands, Greenland or the state where the parent company is domiciled."*

  - **Interest on controlled debt**
  - Section 2(1), litra d, 4th sentence, of the Companies Tax Act:
  - *"The tax liability does not include interest if the taxation of the interest is to be waived or reduced pursuant to Directive 2003/49/EC on a common system of taxation of interest and royalties paid between associated companies of different Member States, or pursuant to a double taxation agreement with the Faroe Islands, Greenland or the state where the receiving company, etc. is domiciled."*

- Hence, WHT is only levied, if the recipient is not protected by an EU-Directive or a DTT.

Beneficial Ownership – The Danish Perspective

- **The recipient is a natural person**

- Withholding tax on payment of dividends to natural persons

  - **Dividends**
  - Section 2(1), No. 3: Dividend withholding tax is levied at a rate of 27% (reduced to 15% under most treaties)

  - **Interest**
  - No WHT

Beneficial Ownership – The Danish Perspective

- **Beneficial owner requirements in Directives and DTTs**

- **Parent-/Subsidiary Directive** (2011/96)
- No beneficial owner requirement, but anti-abuse provision in article 1(2)

- **Interest-/Royalty Directive** (2003/49), article 1(1):
- "Payments of interest or royalties arising in a Member State shall be exempt from any tax in that State, whether levied by withholding at source or by assessment, provided that **the beneficial owner** of the interest or royalties in question is a company of another Member State or a permanent establishment situated in another Member State and belonging to a company of a Member State."
- Anti-abuse provision in article 5

- **OECD Model Convention, dividends, article10(2)**: Beneficial Owner requirement

- **OECD Model Convention, interest, article 11(2)**: Beneficial Owner requirement

Beneficial Ownership – The Danish Perspective

- Decisions of the Danish Supreme Court regarding **dividends**, U2023.1575 et al.
- “Exemption from tax liability requires fulfilment of the condition, that taxation must be waived or reduced under a Directive or a DTT.”
- “National authorities and courts must deny application of the tax exemption [in the Parent-/Subsidiary Directive] in the event of fraud or abuse”, referencing case C-116716 and C-117/16 of the CJEU (The Danish cases)
- On the DTTs:
- “The term "beneficial owner" is not defined in the agreements. Since the term delimits the mutual taxing competence of the contracting states, the Supreme Court finds that it follows from the context that the meaning cannot depend on the respective legislation of the contracting states.”
- “According to these [OECD] comments, the purpose of the term is to ensure that double taxation agreements do not facilitate tax evasion or avoidance through “artifices” and “artful legal arrangements” that make it “possible to take advantage of both the advantages of certain national laws and the tax reliefs provided by double taxation agreements.” The revised comments from 2003 elaborated and clarified this, stating, inter alia, that it would not be “in accordance with the object and purpose of the agreement if the source State were to grant relief or exemption from tax in cases where a person resident in a Contracting State acts, other than as an agent or intermediary, merely as a ‘conduit’ for another person who actually receives the income in question.”

Beneficial Ownership – The Danish Perspective

- Decisions of the Danish Supreme Court regarding **interest**, Case U2023.3198

- "The Court [CJEU in the Danish cases] held that Article 1(1) of the Interest/Royalty Directive, read in conjunction with Article 1(4), must be interpreted as meaning that the exemption from any form of tax on interest payments provided for therein is reserved solely for **the beneficial owners** of such interest, **that is** to say, **entities which, from an economic point of view, actually receive that interest and which therefore have the power to determine freely how it is to be used.** The Court further held that the general principle of EU law, according to which individuals may not rely on provisions of EU law in order to facilitate fraud or abuse, must be interpreted as meaning that, in cases of abuse, national authorities and courts must refuse to grant a taxable person the exemption from any form of tax on interest payments provided for in Article 1(1), even in the absence of national or treaty provisions providing for such refusal (paragraph 122)."

- On the DTTs:
- "These comments state, among other things, that the term "**beneficial owner**" is intended to ensure that double taxation agreements do not facilitate tax evasion or tax evasion through "artifices" and "artful legal constructions" that make it "possible to take advantage of both the advantages of certain national laws and the tax reliefs of double taxation agreements". The revised comments from 2003, which elaborate and clarify this, state, among other things, that it would not be "in accordance with the object and purpose of the agreement if the source State were to grant relief or exemption from tax in cases where a person resident in a Contracting State, other than as an agent or intermediary, merely acts as a "conduit" for another person who actually receives the income in question"."The term "beneficial owner" is not defined in the agreements. Since the term delimits the mutual taxing competence of the contracting states, the Supreme Court finds that it follows from the context that the meaning cannot depend on the respective legislation of the contracting states."

Beneficial Ownership – The Danish Perspective

- Decisions of 23 May 2023 of the Danish Supreme Court regarding **interest**, Case U2023.3198, continued

- "The Supreme Court assumes that the purpose of the restructuring of the group, as described in more detail in the High Court's judgment, was to reduce Nycomed A/S' taxable income in Denmark with deductible interest expenses, without the corresponding interest income being taxed within the group. The Supreme Court finds that the restructuring must be seen as a comprehensive and pre-arranged tax arrangement."
- "For the reasons stated by the High Court, the Supreme Court finds that it cannot be assumed that Nycomed Sweden Holding 2 or Nycomed Sweden Holding 1 had the authority to freely determine the use of the interest that was transferred from Nycomed A/S. The Supreme Court therefore accepts that none of these companies is the rightful owner of the interest, but that they must be considered to be flow-through companies that do not enjoy protection under the Interest/Royalty Directive."
- "The Supreme Court finds, for the same reasons, that neither Nycomed Sweden Holding 2 nor Nycomed Sweden Holding 1 can be considered the rightful owner of the interest under the double taxation agreement with the Nordic countries, and that the companies therefore do not enjoy protection under the agreement."