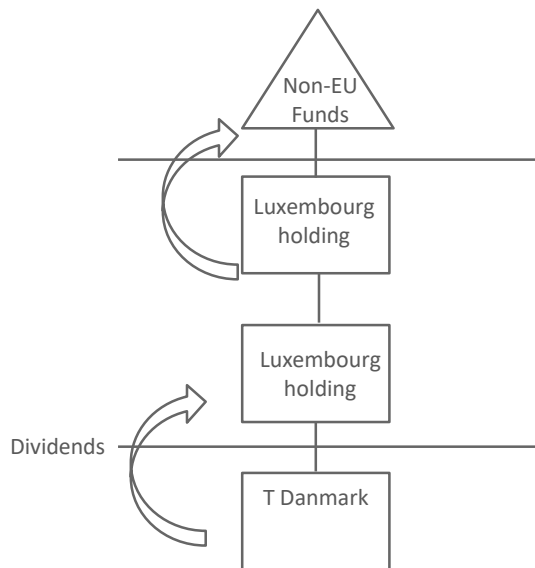


**Structuring in Europe against the background of T. Danmark
and the Principal Purpose Test**

TTN Conference Malta, 20 September 2019



- Lux holdings were mere holding/conduit companies.
- Danish domestic law does not contain relevant rules targeting abuse.

- EU law, as a principle, cannot be relied on for abusive or fraudulent ends.
- Where there is a fraudulent or abusive practice, the national authorities and courts are to refuse a taxpayer the exemption from withholding tax on profits distributed by a subsidiary to its parent company,
- (...) even if there are no domestic or agreement-based provisions providing for such a refusal.
- The (Danish) tax authorities are under **the obligation** to deny the benefits provided by the Directive in case of abuse.

T. Danmark: fraudulent or abusive practice?

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A lecture from the CJEU:

- “Proof of an abusive practice requires,
 - first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and,
 - second, 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.”

- “The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans.”

- T Danmark, para. 101. “Thus, it is an indication of the existence of an **arrangement intended to obtain improper entitlement to the exemption (...)** 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 for the application the exemption (...).**”
- Para. 104. “The fact that a company acts as a **conduit company** may be established where its sole activity is the receipt of dividends and their transmission to the beneficial owner or to other conduit companies. 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.”

In summary, where are we after T Danmark?

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- Fraudulent or abusive practice? Non-application of the EU Directives (and legislation based on these Directives)!
- The national authorities and courts are under **the obligation** to refuse a taxpayer the exemption from withholding tax on profits distributed by a subsidiary to its parent company.

Safe harbours?

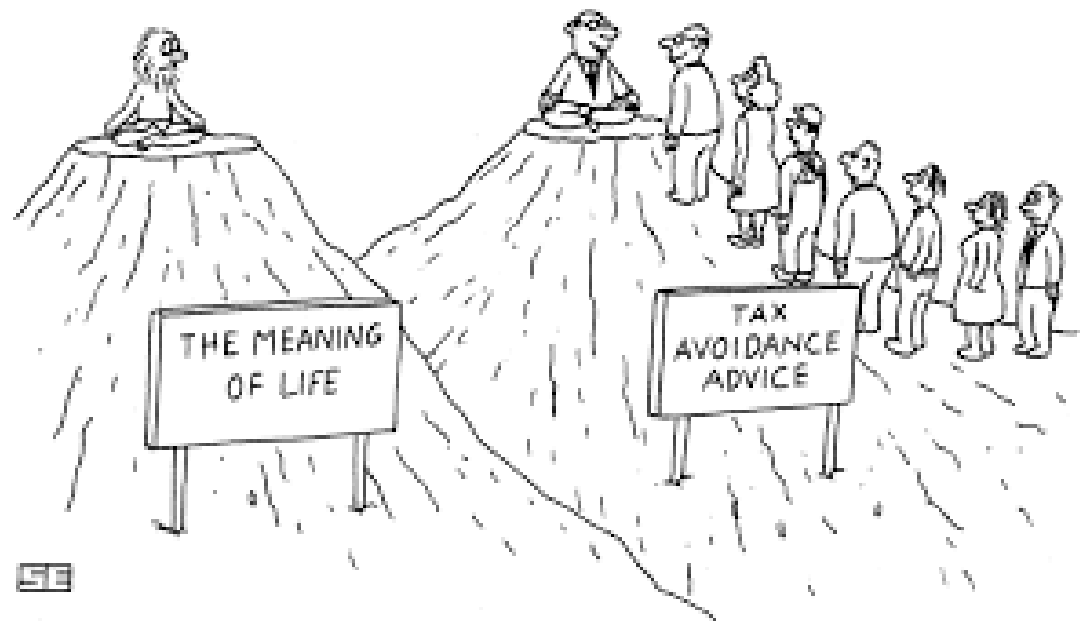
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- Domestic minimum substance requirements will only provide conditional protection.
- The same is true for Advance tax rulings.
- Tax authorities and governments may experience increasing pressure to take an aggressive position in fighting fraudulent or abusive practice.
- ...

- The Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting (MLI).
- Anti-abuse rule to prevent treaty benefits being granted under unintended circumstances.

- The PPT excludes an entity from treaty access if the access to the treaty was one of the principal purposes for establishing the transactions with that entity:
 - “Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.”
- The burden of proof under the PPT.

- Where does this leave us?



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