

La fraude fiscale en France, en Europe et à l'international

Contradictions, efficacité et nouvelles technologies

Beneficial Owner and Tax Audit on International Transactions

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Summary of the Presentation

- Beneficial ownership test in tax treaties ... and beyond the tax treaties;
- The function, the nature and the reach of the clause in International Law and in European Tax Law (similarities and differences with the *abuse of law* doctrine);
- Evidence from France and Italy (case law).



The Constitutional Foundations of the Beneficial Ownership Test

- Beneficial ownership test used to attribute the taxable base to the actual taxpayer;
 - Income;
 - Wealth;
 - ...
- *A priori* condition of the power to tax by the state.



Beneficial Ownership in International Tax Law

- Clause coherent with the purpose of the treaty: to attribute benefits to entities (actually) deserving them;
 - Uncertainty in its application as its understanding is anything but clear;
 - Nota rule, a principle...
- In literature: ultimate / real owner of the revenue;
 - Another application of the “*Substance over Form*” principle ?
 - Another epiphany of the “*Abuse of law*” clause ?



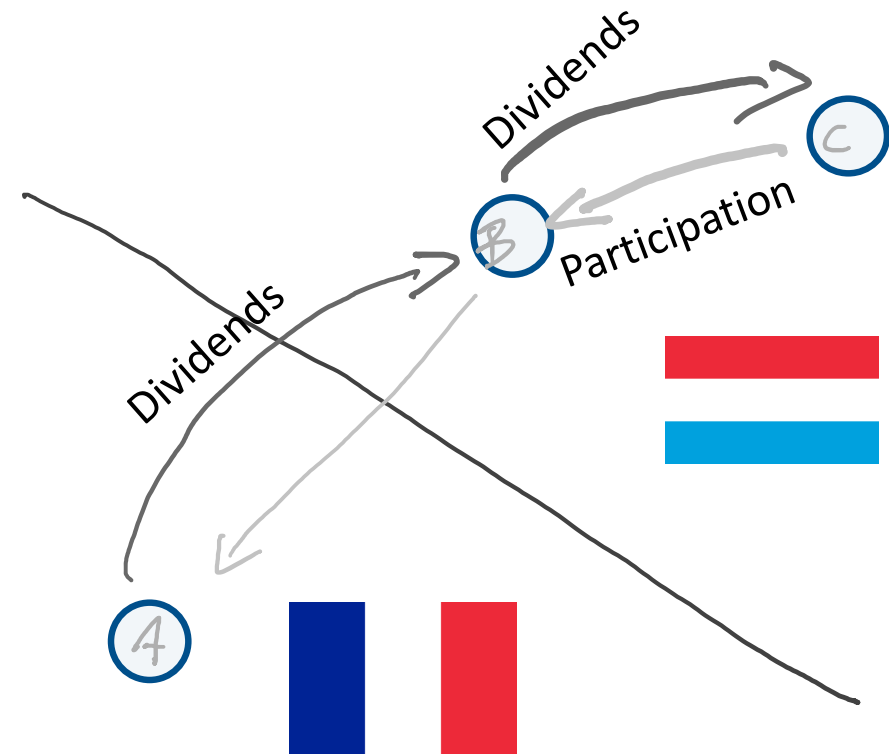
OECD Understanding of the Beneficial Ownership

- OECD Model Convention Commentary: definition of who beneficial owner is not;
 - List of situations where the condition is not met, including:
 1. Qualified entities acting as proxies / agents under the law;
 2. Cases where income is transferred to other entities as such a situation derives from a contractual obligations or a performance bond of any kind;
 - Gray area:
 - Interlocked directorate;
 - Qualified participation (control);
 - ...



Testing OECD Interpretive Guidelines: France and Italy

- Administrative Court of Appeal (Paris) 7 December 2022, *Foncière Vélizy Rose*, 21PA05986;
 - “Abuse” of treaty takes place when benefits are attributed to an entity which is not beneficial owner (Article 119 *ter* (3) CGI);
 - Dividends distributed to the sole shareholders immediately after the payment by the French subsidiary.



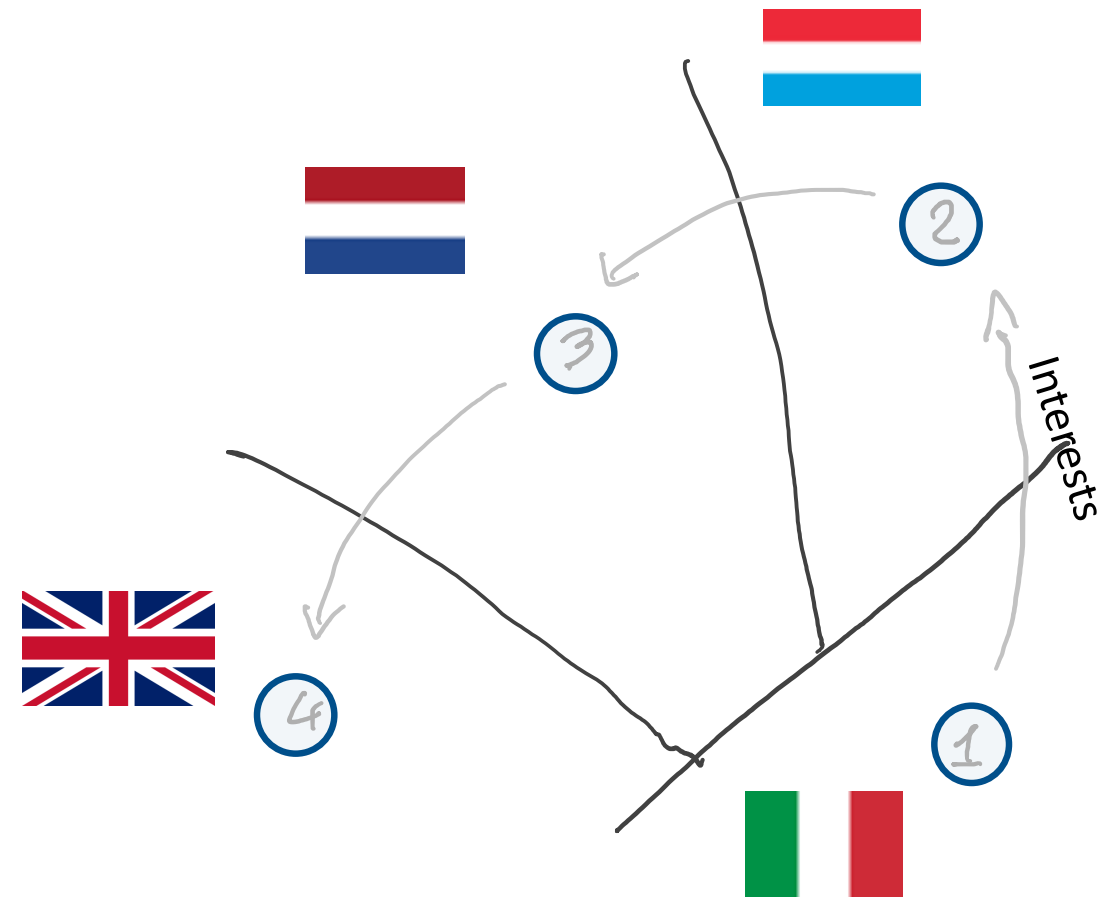


French Legal Background

- Decision coherent with the *Conseil D'Etat* ruling (5 June 2020, n.423809, *Eqiom*):
 - The beneficial ownership status of the recipient [of the dividends] must be regarded as a condition for benefitting of the withholding tax exemption of the Parent/Subsidiary directive (Article 5);
- See also (*contra*) the decision 20 may 2022, n. 444451, *Planet*) where the judiciary allows the “*constructive beneficial ownership*”.

Continued: the Italian Case

- Tax Court of Appeal (Milan) 3 February 2022, n. 295;
 - Beneficial ownership to be assessed along the chain of control of the company paying interests;
 - If conditions are met by the ultimate recipient, the benefit can be granted (as under the C-116/16(...) Cases by the CJEU (*Danish Cases*)).



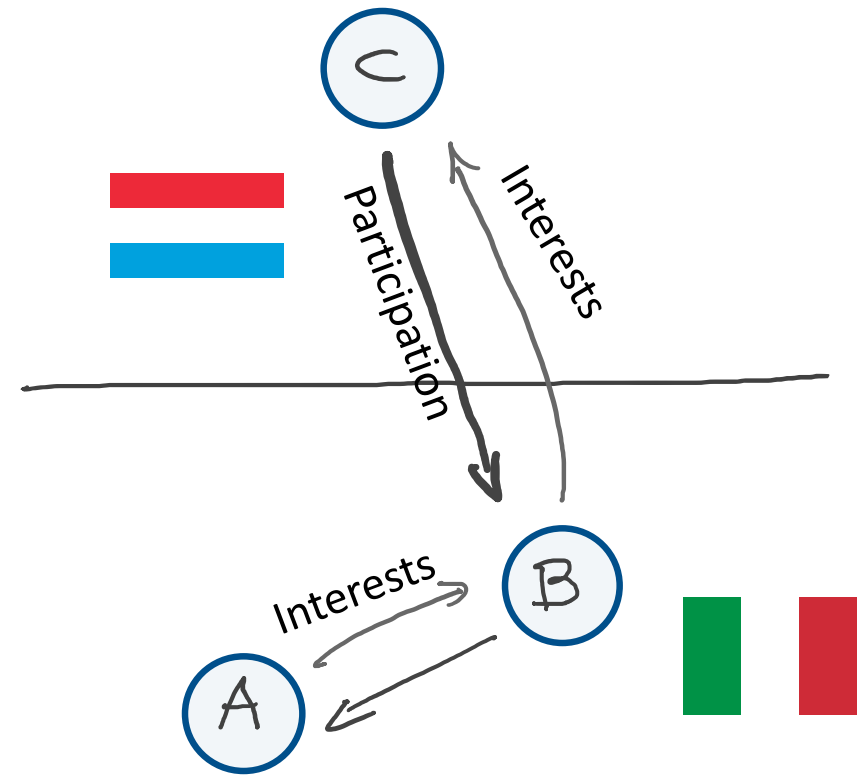


Continued: the Italian Case

- Italian Supreme Court:
 - A pure sub-Holding may be the beneficial owner insofar passive income received is recorded in the balance sheet and may be, because of this, seized by the possible creditors of the company (28 December 2016, n. 27112);
 - Moreover: a managerial independence might requested as well by the company (alleged to be) beneficial owner (see also 10 July 2020, n. 14756);
 - Such a condition is not explicitly introduced by the OECD commentary.

The Latest Frontier (in my Country)

- Italian Case: what if the “Beneficial owner” clause is used in a purely domestic scenario?
 - Case decided: Supreme Court 28 February 2023, n. 6050 (favourable to the taxpayer);



Simplified version of the case



Comparing the French and the Italian Approaches to Beneficial Ownership

- **France:** careful approach to the Beneficial ownership test, restrictive interpretation of the Danish cases;
 - Understanding that fundamental freedoms may not be used to override the beneficial ownership test.
- **Italy:** immediately compliant with the Danish doctrine (beneficial ownership test eventually weakened).



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Merci de votre attention

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