Q&A Danish Cases: Translation of Dutch Parliamentary Q&A in response to CJEU Danish Beneficial Ownership Cases

UNOFFICIAL TRANSLATION

CONTENTS

Question and answers 2019Z08977 (submitted 2 May 2019, answered 14 June 2019)

Questions and answers 2019Z09124 (submitted on 8 May 2019, answered 14 June 2019)

Question and answers 2019Z08977 (submitted 2 May 2019, answered 14 June 2019)

Questions of member Van Raan (PvdD - Party for the Animals) to the State Secretary of Finance on the consequences of the judgments of the European Court of Justice of February 2019 on conduit companies. Answers of the State Secretary of Finance (received 17 June 2019).

QUESTION 1

Are you familiar with the newspaper articles 'European Court of Justice puts bomb under the Netherlands as a tax haven', 'Tax Authority leaves conduit companies alone for now' and 'Danish tax authority may levy tax on dividend that flows from Schiphol-Rijk to Cyprus'?

ANSWER QUESTION 1

Yes.

QUESTION 2

Do you remember your answers to questions during the parliamentary debate on Tax Avoidance on 28 March 2019 on this subject, where you indicated that: "when working out the details of the conditional withholding tax, I will come back to the issue of the consequences of
this judgment for our own laws and regulations. The bill will be sent to your House on our annual Budget Day (Prinsjesdag)?

**ANSWER TO QUESTION 2**

Yes.

**QUESTION 3**

Why is enforcement of the anti-abuse doctrine, as currently defined by the European Court of Justice, in the shortest possible time not appropriate and necessary? Why did your Ministry inform the Dutch newspaper Financieele Dagblad (FD) that "the judgments do not mean that the legal certainty offered by the Tax Authority to multinationals in so-called rulings 'immediately cease to have effect or must be reconsidered'? Does this explanation to the FD mean that you will by definition not reconsider the 'rulings', which include arrangements similar to the 'Danish arrangement' (see also questions 4 and 5 below)?

**ANSWER TO QUESTION 3**

Tackling tax evasion is one of the spearheads of this Cabinet. The possibilities that the Netherlands have in this respect are not unlimited and are partly limited by EU law.¹ In the judgments of 26 February 2019², the Court of Justice of the European Union (CJEU) ruled that Member States are under an obligation under EU law to refuse the benefits of a tax directive, such as the EU Parent-Subsidiary Directive³ and the EU Interest and Royalty Directive⁴ in the event of fraud or abuse. Also, the CJEU has again given more detailed guidance on the interpretation to the concept of abuse. Contrary to the opinions of the Advocate General (A-G), the CJEU has adopted a more substantive approach. The Cabinet is presently studying these judgments thoroughly, but it has already established that the national authority to combat abuse is certainly not unlimited. Although the CJEU in the above-mentioned judgment, with a number of indications, has given more substance to the concept of abuse, this does not mean that it is exactly clear after the judgements in which situation there is or is not abuse on the basis of EU law. That is why I will be working on the basis of the following frameworks.

In its judgments of 26 February 2019, the CJEU ruled, among other things, that Member States, invoking the doctrine of abuse of rights, can block taxpayers' reliance on the advantages of the EU Parent-Subsidiary Directive and the EU Interest and Royalties Directive, even in the absence of a national legal provision. This, however, is also possible on the basis of the anti-abuse provisions as included in our corporate income and dividend withholding tax laws. These anti-abuse provisions apply when there is an artificial arrangement or transaction which has tax avoidance as its main purpose or one of its main purposes. In the Cabinet's opinion, this provision is in line with the EU Parent-Subsidiary Directive and the

---

¹ See for example ECJ 12 September 2006 in C-196/04, ECLI:EU:C:2006:544 and ECJ EU 20 December 2017 in the joined cases C504/16 and C-613/16, ECLI:EU:C:2017:1009.
² ECJ 26 February 2019 in the joined cases C-115/16, C-118/16, C-119/16 and C-299/16 ECLI:EU:C:2019:134 and ECJ 26 February 2019 in the joined cases C-118/16 and C-117/16 ECLI:EU:C:2019:135.
implementation of the Principal Purpose Test (PPT) from action point 6 of the BEPS project.\textsuperscript{5} Currently, conditions have been introduced for the application of corporate income tax and dividend withholding tax in the form of substance requirements that an intermediary company with a linking role\textsuperscript{6} has to meet in order to be able to speak of valid business reasons that reflect economic reality. In that case there is no artificial arrangement.\textsuperscript{7} As a result of a judgment of the CJEU, since 1 January 2019 the taxpayer (corporate income tax), as well as the withholding agent and the beneficiary (dividend withholding tax), respectively, have been given an additional opportunity to demonstrate in another way that the aforementioned business reasons exist.\textsuperscript{8} Nevertheless, this does not seem to be the end of the matter after the judgments of the CJEU. The judgements seem to give rise to a further adaptation of the existing form of the anti-abuse provisions in the corporate income tax and dividend withholding tax. Because it cannot be excluded that in a situation in which the substance requirements have been met - as assessed on the basis of all facts and circumstances - there can still be abuse as set out in the judgments, the bill that is to be submitted on Budget Day will propose the introduction of a withholding tax on interest and royalties payments to low tax jurisdictions and, in situations of abuse, also amendments in corporate income tax and dividend withholding tax. As a result, the role of the current substance requirements will change as of 1 January 2020 and these substance requirements will become important in the allocation of the burden of proof.

The proposed amendments will also enable the Tax Authority - in contrast to what is currently the case - to tackle abuse in situations in which the substance requirements have been met, by making it plausible that there is abuse. However, there is an overlap between the current substance requirements and the indications in the CJEU judgments. I am thinking, for example, of the indications that relate to the actual costs incurred, the staff and the availability of office space. The current substance requirements concern not only a number of objective but also a number of more subjective requirements. It should also be kept in mind that the salary requirement of at least EUR 100,000 must form a compensation for the relevant activities. In the case of dividend withholding tax, this relates to compensation related to the holding of a participation and the performance of a linking role. The salary costs associated with other activities are thus not taken into account for this purpose. As a result, in situations of abuse in which an entity is interposed in order to evade Dutch dividend withholding tax, the substance requirements will, as a rule, not be met. On the basis of the above, I still consider it quite justifiable that the current Dutch anti-abuse provisions are broadly in line with the judgments of 26 February 2019. It is therefore not expected that it will be possible to take more often successfully the view that there has been abuse. Contrary to what seems to be suggested in some of the questions below, this is not different for some of the specific countries mentioned in those questions.

Nevertheless, the practice will be closely monitored. The Tax Authority will submit clear-cut cases to the court. I am thinking, for example, of situations in which, in business relationships,
salary costs of EUR 100,000 are disproportionate to the amount of dividends, interest or royalties received and paid by an intermediary company. I am also thinking of situations in which, on the basis of the facts and circumstances, it appears that an intermediary company generally pays or transfers the dividends, interest or royalties received very quickly. Further clarification on this point will need to be provided through further case law, either national or international. Therefore, I see no urgent reasons to take further measures. Tax rulings are concerned with the application of the legislation, policy and case law in force at the time. A ruling lapses if there is an amendment in the laws and regulations relevant to that ruling. This has been included in the settlement agreement between the taxpayer and the Tax Authority. In a number of situations, the question whether or not there is a relevant change in the law is closely related to the specific facts and circumstances of the case. Rulings issued in situations in which the substance requirements have been met, but which, under the new legislation, qualify as abuse, will in principle lapse by operation of law as of the intended date of entry into force of the legislative amendment, i.e. 1 January 2020. In those cases, the amendment of the law ensures that from now on this kind of abuse can be combated, if the Tax Authority makes the abuse plausible. If, after the proposed amendment of the law, an issued ruling does not lead to abuse, there is no relevant amendment of the law and the ruling will therefore not lapse by operation of law. As indicated above, I do not expect that it will be possible to take much more frequently successfully the view that there is abuse. This justifies the non-retroactive effect for the remainder of the period of validity of the rulings issued. I therefore confirm that taxpayers can continue to rely on current rulings until such time as the Tax Authority has notified the taxpayer that the ruling will lapse. This is in line with the nature of the amendment to the law, in which the broadening of the concept of abuse is accompanied by a burden of proof that will lie with the Tax Authority. In order to be able to assess whether there is a relevant amendment of the law, current rulings based on the current abuse provisions will be reassessed and risk-based action will be taken. In this, as mentioned above, the Tax Authority will focus on clear-cut cases. In addition, the policy relating to the new ruling practice will come into force on 1 July 2019. As a result, stricter requirements will be imposed on the issuing of rulings. When issuing new rulings, the indications from the judgments of 26 February 2019 will be taken into account when assessing whether a ruling can be issued.

**QUESTION 4**

Do you intend to use the judgments as an opportunity to impose tax assessments on companies that distribute dividends, interest and royalties to the EU via intermediary companies in the Netherlands? If not, why not?

**ANSWER TO QUESTION 4**

See the answer to question 3.

**QUESTION 5**

In particular, do you intend to seize the opportunity presented by the judgments to proceed as soon as possible with levying dividend withholding tax on dividend paid by a Dutch company or

---

9 See also the annex to Parliamentary Papers II 2016/17, 25087, no. 153, and paragraph 26(16)(g) of the Fiscal Administrative Law Decree (Decree of the State Secretary for Finance of 9 May 2017, no. 2017-1209, (Dutch Government Gazette 2017 28270)).
paid to a Luxembourg or Irish conduit company which benefits solely from the dividend withholding tax exemption under section 4(2) of the Dividend Withholding Tax Act 1969 on the ground that it satisfies the so-called substance requirements, including having an office for a minimum period of 24 months and salary expenses of EUR 100,000 or more?

ANSWER TO QUESTION 5

See the answer to question 3.

QUESTION 6

Do you intend to give priority in the reassessments to all tax rulings involving Irish and Luxembourg letterbox companies? If not, why not?

ANSWER TO QUESTION 6

See the answer to question 3.

QUESTION 7

Do you recognise risks of a European law nature if an EU Member State does not take action to combat the abuse of conduit companies?

ANSWER TO QUESTION 7

See the answer to question 3.

QUESTION 8

How soon do you intend to comply with the CJEU's instructions to the tax authorities to investigate whether exemptions from withholding tax for companies within the EU are being abused?

ANSWER TO QUESTION 8

See the answer to question 3.

QUESTION 9

Can you give a rough estimate of the amount of outbound flows of dividends, interest and royalties affected by these judgments? If not, can you report the House later on this?

ANSWER TO QUESTION 9

As far as outbound dividend payments are concerned, on the basis of our current understanding, abuse on the basis of the existing anti-abuse provisions is already combated effectively in virtually all situations. However, the recent judgments have led to a shift in emphasis in the existing anti-abuse provision. But I do not expect this to lead to substantial differences from the current situation. The announced withholding tax on interest and royalty
payments to low-tax jurisdictions and in situations of abuse as of 1 January 2021 aims to prevent the Netherlands from being used primarily to erode the tax base of other countries. The fight against such abuses is therefore being pursued in particular through the introduction of the announced withholding tax, rather than through the recent CJEU rulings. I am consulting De Nederlandsche Bank on how we can report annually on how the financial flows by special financial institutions are developing. I intend to inform your House of this in more detail before the parliamentary debate on the Tax Plan 2020.

Questions and answers 2019Z09124
(submitted on 8 May 2019, answered 14 June 2019)

Questions from Member Snels (Green Party) to the State Secretary for Finance on the judgments of the Court of Justice. Answers of the State Secretary of Finance (received 17 June 2019).

QUESTION 1

Are you aware of the judgments of the Court of Justice of the EU (hereinafter: CJEU) of 26 February 2019 in the Danish cases concerning companies with a conduit function for interest and dividends?

ANSWER TO QUESTION 1

Yes.

QUESTION 2

Do you accept the decision of the CJEU that an EU Member State, including the Netherlands, has the obligation to refuse to grant taxpayers the tax advantages resulting from the application of the Parent-Subsidiary Directive 90/435 if there is abuse within the meaning of the general prohibition of abuse under EU law?

ANSWER TO QUESTION 2

Yes.

QUESTION 3

As a result of these judgments, how many of the approximately 15,000 Dutch letterbox companies are expected to face withholding taxes on interest, royalties and dividend payments they receive from companies based in other EU Member States?

ANSWER TO QUESTION 3

If the Dutch internationally oriented tax system is abused to avoid withholding tax in other EU Member States, these other EU Member States can combat this on the basis of this and earlier case law of the CJEU. I do not know to what extent other EU Member States have already done so or are going to do so as a result of recent case law. I cannot, therefore,
indicate what the consequences will be for Dutch companies with regard to the foreign withholding tax on the interest, royalty and dividend payments they receive from companies established in other EU Member States.

QUESTION 4

Do you agree that there is abuse of the Parent-Subsidiary Directive 90/435 in the sense of the general prohibition of abuse under European Union law if (a) it is the intention of taxpayers to gain an advantage from the Directive by artificially creating the conditions under which the right to that tax advantage arises and (b) it is apparent from the entirety of the objective circumstances that, notwithstanding formal compliance with the conditions imposed by the Directive, the objective pursued by the Directive is not achieved?

ANSWER TO QUESTION 4

Yes.

QUESTION 5

Can you confirm that, in the Danish cases, the CJEU has given specific indications on the basis of which a group structure may be regarded as an artificial arrangement, in particular in cases where a conduit company has been added to the group structure in order to avoid the taxation of interest, royalties and dividends?

ANSWER TO QUESTION 5

Indeed, the CJEU has given guidance to the Danish courts as to the facts and circumstances which may be taken into account when assessing whether there has been abuse in the cases pending before them. It is also important that interested parties are given the opportunity to provide evidence to the contrary. The CJEU has this way again given further substance to the concept of abuse. Contrary to the opinions of the Advocate General (A-G), the CJEU has adopted a more substantive approach. The Cabinet is studying these judgments in detail, it has already established that the national authority to combat abuse is certainly not unlimited. Although the CJEU in the above-mentioned judgment, with a number of indications, has fleshed out the concept of abuse in more detail, this does not mean that it is exactly clear after the judgements in which situation there is or is not abuse on the basis of EU law.

QUESTION 6

Is it true that the CJEU has given, among other things, the following concrete indications to establish that a group structure is an artificial arrangement and that a company is a conduit company:

- the company which received the dividends passes them on, very soon after they are received, (almost) entirely to an entity that does not meet the conditions for the application of the Parent-Subsidiary Directive 90/435;
- the company which received the dividends must, in turn, pass on those dividends to an entity which does not meet the conditions for the application of the Parent-Subsidiary Directive 90/435;
● the company is exclusively engaged in receiving dividends and transferring them to the ultimate beneficiary or to other conduit companies;
● the company does not engage in any real economic activity, assessed in particular on the basis of the management, balance sheet, cost structure, actual costs incurred, employees, accommodation and equipment of the company;
● the company does not have the power to dispose freely, from an economic point of view, of the dividends received?

**ANSWER TO QUESTION 6**

Yes, within the framework of the relevant cases for the CJEU, as indicated in the answer to question 5.

**QUESTION 7**

Is it true that the CJEU subsequently ruled that the indications listed in question 6 (that there is an artificial arrangement) could be reinforced by the fact that complex financial transactions coincide with, or are carried out approximately in the same period as, the entry into force of significant new local tax legislation in an EU Member State?

**ANSWER TO QUESTION 7**

Yes.

**QUESTION 8**

Do you share the view that the withholding exemption of section 4(2) of the Dividend Withholding Tax 1965 may apply, even though one or more of the indications formulated by the CJEU are that there is a situation of abuse that must be combated and that those indications may also lead to the conclusion that there is actual abuse? Do you agree that this may be particularly the case if an interest in a company established in the Netherlands is held by a so-called linking intermediary holding company, for example, established in Luxembourg or in Ireland, which is deemed to have been set up for business reasons reflecting economic reality solely because that intermediary company satisfies the substance requirements of section 1a of the Implementing Decree Dividend Withholding Tax 1965, including having an office at its disposal for at least 24 months and an amount of salary costs of at least EUR 100,000?

**ANSWER TO QUESTION 8**

As indicated in my answer to question 5, the possibilities available to the Netherlands to combat abuse are not unlimited and are partly limited by EU law. In addition, the Cabinet perceives an overlap between the instructions of the CJEU and the current substance requirements. On that basis, I still consider it quite justifiable that the current Dutch anti-abuse provisions are broadly in line with the judgments of 26 February 2019. The judgements seem to give rise to a further adaptation of the existing form of the anti-abuse provisions in the corporate income tax and dividend withholding tax. Because it cannot be excluded that in a situation in which the substance requirements - assessed on the basis of all facts and circumstances - are met, there may still be abuse as set out in the judgments. In order to
obtain more guidance on the interpretation of the concept of abuse, the Tax Authority will, where necessary, submit clear-cut cases to the court.

QUESTION 9

Do you agree that the Dutch list of substance requirements is too simple in terms of the underlying economic reality? Does you also agree that even if a company established abroad operates a material business, so a permanent organisation of capital and labour which takes part in economic activity on a profit-making basis, there may be a situation of abuse, for example in cases where there is no relationship between the material business and the dividends received (see also the lack of operational functionality in example 4 in your letter of 23 April 2019 on the renewed ruling practice)?

ANSWER TO QUESTION 9

No. In general, according to current insights, the Dutch substance requirements are a good indicator for abuse. It is important to note that, in addition to a number of objective requirements, they have to concern relevant substance. For example, the salary requirement of at least EUR 100,000 must constitute compensation for the relevant activities. In the case of dividend withholding tax, this relates to compensation related to the holding of a participation and the performance of a linking role. The salary costs associated with other activities are thus not taken into account for this purpose. In cases where there is no relationship between a material business and the dividends received, this will generally not be the case.

QUESTION 10

Can you concretely confirm that in the privately sent example, which builds on the examples given in the explanatory memorandum to the Withholding Obligation for Holding Cooperatives and Expansion of the Withholding Exemption Act, Bulletin of Acts and Decrees 2017, 520, one or more of the indications formulated by the CJEU might occur of a situation of abuse that must be combated?

ANSWER TO QUESTION 10

In the example outlined in the question, the structure was as follows. In Chile, a material business is conducted. There is no tax treaty between the Netherlands and Chile. An intermediary holding company is established in Luxembourg. The relevant substance, including office space and personnel, was purchased by the Luxembourg intermediary holding company from a trust office.

As noted in the explanatory memorandum to the Withholding Obligation for Holding Cooperatives and Expansion of the Withholding Exemption Act, in such kind of example there is assumed to be a tax-avoidance motive because dividend withholding tax would have been withheld on a direct distribution to Chile. After all, the withholding exemption only applies nationally as well as in respect of EU/EEA countries and treaty countries. This means that, for the application of the subjective test, there is a tax-avoidance motive, which means that,

subsequently, the objective test must be applied. This means under current legislation that the withholding exemption applies if the intermediary holding company in Luxembourg meets the requirement of relevant substance.

In the example outlined in the question, one or more of the CJEU’s indications of abuse may arise. Whether the criteria for relevant substance are met will be assessed on a case-by-case basis. This also depends very much on the specific facts and circumstances of the case concerned. If only a trust office is used, it is likely that the substance requirements will not be met. Criteria for relevant substance also concern, for example, requirements for the board members and a salary requirement. Board members must have the necessary professional knowledge to carry out their duties properly and the salary criterion is not just about the quantitative requirement of EUR 100,000 in salary costs. The intermediary holding company must use its own personnel, made available or hired, to carry out the work, who must also have the necessary professional knowledge to carry out the work.

**QUESTION 11**

Can you confirm that the judgment of the CJEU in the Danish cases means that taxpayers cannot (also) invoke a tax treaty concluded by the Netherlands with another EU/EEA Member State in the case of abuse and where that situation falls within the scope of an EU tax directive, such as the Parent-Subsidiary Directive 90/435?  

**ANSWER TO QUESTION 11**

No, I cannot confirm that. In summary, the Danish cases mean that Member States have an obligation to combat abuse of the advantages deriving from EU law (including the tax directives). In my opinion, this does not mean that taxpayers can no longer invoke (comparable) advantages from a bilateral tax treaty.

**QUESTION 12**

Is it correct that the Dutch position until recently was that reliance on a tax treaty is possible in a situation of abuse if that tax treaty does not (yet) provide for a (general) anti-abuse provision, such as the Principal Purpose Test (PPT) of the multilateral OECD instrument?

**ANSWER TO QUESTION 12**

In my opinion, Supreme Court case law indeed suggests that it is not easy to rely on national rules on abuse under treaties which do not contain an anti-abuse provision. The Dutch choices under the Multilateral Treaty for the implementation of tax treaty-related measures to prevent the erosion of the tax base and the transfer of profits are designed to ensure that a Principal Purpose Test is included in all Dutch treaties. In the long run, this would only be a theoretical issue.

---

11 See also Parliamentary Papers 2017/18 34788, No. 6, page 17.
12 See point 83.
QUESTION 13

Can you confirm specifically that, in the example given in question 10, in the event of abuse, it is not possible to rely on Article 10(2)(a) of the Netherlands-Luxembourg Tax Convention, which permits the Netherlands to levy only a withholding tax of (just) 2.5%? Can you confirm that in situations of abuse you will proceed with levying dividend withholding tax over the remaining 12.5% (15% dividend withholding tax -/- 2.5% treaty percentage), even if the Luxembourg intermediary holding company is the 'ultimate beneficiary' of the dividends within the meaning of the judgment of the Supreme Court of 6 April 1994, no. 28 638, BNB 1994/217?

ANSWER TO QUESTION 13

As my answers to questions 11 and 12 shows, I cannot confirm this.

QUESTION 14

Can you confirm that the concept of 'ultimate beneficiary' for the application of the dividend withholding tax exemption and the tax treaties concluded by the Netherlands must be interpreted in accordance with the most recent comments on the OECD Model Convention, as the CJEU has indeed done in the Danish cases? Can you confirm that this interpretation is stricter for taxpayers than the interpretation chosen by the Supreme Court in its judgment of 6 April 1994, No 28 638, BNB 1994/217?

ANSWER TO QUESTION 14

The interpretation of the concept of 'ultimate beneficiary' in the treaties concluded by the Netherlands, insofar as the provisions are identical to those in the OECD Model Convention, must indeed be interpreted as described in the commentary to that Convention.

Also for the application of the dividend withholding tax exemption, the concept of 'ultimate beneficiary' - as referred to in section 4(4) of the Dividend Withholding Tax Act 1965 - is interpreted and applied by the Tax Authority in accordance with the (most recent) commentary on the OECD Model Convention. In addition, a beneficiary who meets the conditions set out in section 4(7) of the Dividend Withholding Tax Act 1965 will in any case not be regarded as an ultimate beneficiary. Said seventh subsection is about combating dividend stripping.

In my view, the wording in the OECD comments is so similar to the wording of the Supreme Court in said judgments that the conclusion cannot be drawn that the 'OECD interpretation' is stricter than that of the Supreme Court.

QUESTION 15

Is it correct that taxpayers cannot validly invoke a tax ruling in the case of abuse as referred to in the Danish cases? Are you prepared to (still) fully assess, on the basis of the indications of abuse as issued by CJEU, tax rulings that have already been issued and which confirm the application of the withholding exemption provided for in section 4(2) of the Dividend Withholding Act1965 because of their compliance with the substance requirements of section 1a of the Implementing Decree Dividend Withholding Tax 1965? Can you pay extra attention to tax rulings issued in light of the coming into force of the Withholding Obligation for Holding
Cooperatives and Expansion of the Withholding Exemption Act (Bulletin of Acts and Decrees 2017, 520) as of 1 January 2018, because of the fact that the CJEU has ruled that the coincidence of financial transactions with, or approximately in the same period as, the coming into force of important new tax legislation is an enhanced indication of abuse?

**ANSWER TO QUESTION 15**

Rulings provide certainty in advance about the application of the laws and regulations applicable at that time, including anti-abuse provisions. If there is a situation of abuse, no ruling will be concluded. In addition, a ruling lapses if there is an amendment of the laws and regulations relevant to that ruling. This is included in the settlement agreement between the taxpayer and the Tax Authority. In a number of situations, the question whether or not there is a relevant change in the law is closely related to the specific facts and circumstances of the case. Rulings issued in situations in which the substance requirements have been met, but which, under the new legislation, qualify as abuse, will in principle lapse by operation of law as of the intended date of entry into force of the legislative amendment, i.e. 1 January 2020. In those cases, the amendment of the law ensures that from now on this kind of abuse can be combated, if the Tax Authority makes the abuse plausible. If, after the proposed amendment of the law, there is no abuse with an issued ruling, there is no relevant amendment of the law and the ruling will therefore not lapse by operation of law. However, I do not expect that it will be possible to take much more frequently successfully the view that there has been abuse. This justifies the non-retroactive effect for the remainder of the period of validity of the rulings issued. I therefore confirm that taxpayers can continue to rely on current rulings until such time as the Tax Authority has notified the taxpayer that the ruling will lapse. This is in line with the nature of the amendment to the law, in which the broadening of the concept of abuse is accompanied by a burden of proof that will lie with the Tax Authority. In order to be able to assess whether there is a relevant amendment of the law, current rulings based on the current abuse provisions will be reassessed and risk-based action will be taken. The Tax Authority will focus on clear-cut cases. The above also applies to rulings issued after the entry into force on 1 January 2018 of the Withholding Obligation for Holding Cooperatives and Expansion of the Withholding Exemption Act. In addition, as of 1 July this year, the policy that relates to the new ruling practice will come into effect. As a result, stricter requirements will be imposed on the issuing of rulings. When issuing new rulings, the instructions from the judgments of 26 February 2019 will be taken into account when assessing whether a ruling can be issued.

**QUESTION 16**

Are you aware that the application of the dividend withholding tax exemption, merely because the substance requirements were met, poses a risk of providing state aid? Are you prepared, where appropriate, to levy an additional dividend withholding tax assessment or to proceed with the recovery of the tax benefit on the basis of section 7 of the State Aid Recovery Act?

**ANSWER TO QUESTION 16**

It is not certain that the application of the dividend withholding tax exemption leads to a selective benefit that qualifies as state aid. As a result, there can be no question of recovery or levying additional tax assessments on dividends.
**QUESTION 17**

Can you confirm that the indications given by the CJEU in the Danish cases regarding the existence of abuse apply both to the interpretation of the national anti-abuse provision of section 4(3)(c) of the Dividend Withholding Tax Act 1965 and to the Dutch interpretation of the PPT that, for example through the multilateral OECD instrument, has been included in tax treaties concluded by the Netherlands with countries other than EU/EEA Member States?

**ANSWER TO QUESTION 17**

It can be confirmed that the indications given by the CJEU in the Danish cases are relevant for the interpretation of section 4(3)(c) of the Dividend Withholding Tax Act 1965.

As the question indicates, the text of the PPT was drawn up in consultation between OECD member states. The opinion on the interpretation of the PPT provision in bilateral treaties is a matter to be decided by the national court where such case is submitted. These courts are, as regards this interpretation, not bound by a judgment of the CJEU. Of course, CJEU judgments can have an impact on the interpretation.

**QUESTION 18**

Can you confirm that you remain committed to the wish expressed during the parliamentary debate on the Withholding Obligation for Holding Cooperatives and Expansion of the Withholding Exemption Act to create a uniform policy, whereby the national anti-abuse provision is in line with the anti-abuse provision at European level and the anti-abuse provision in tax treaties?

**ANSWER TO QUESTION 18**

Yes, in my opinion, it remains of undiminished importance in practice that the same criteria for abuse are applied under national law, European law and treaties.

**QUESTION 19**

Can you confirm that uniform application of said anti-abuse provisions also follows from the CJEU judgment of 17 July 1997, C-28/95 (Leur-Bloem)? Can you confirm specifically that if the intermediary holding company, in the example given in question 10, would be established in Singapore (instead of in Luxembourg), the Netherlands would no longer by default waive levying dividend withholding tax if the list of substance requirements in section 1a of the Implementing Decree Dividend Withholding Tax 1965 is satisfied in Singapore?

**ANSWER TO QUESTION 19**

In my opinion, the case law of the CJEU does not provide a definite answer to the question to what extent the duty of the Member States under European Union law to refuse the benefits of a tax directive, such as the EU Parent-Subsidiary Directive or the EU Interest and Royalties Directive, in the event of fraud or abuse, also has an impact on situations with a third country. This does not alter the fact that, as a matter of policy, I have decided that the amendment to the existing form of the anti-abuse provisions in corporate income tax and dividend - as described above and to be included on the bill that is to be submitted on Budget Day for the
introduction of a withholding tax on interest and royalties payments to low taxing jurisdictions and, in abuse situations - should also have effect in respect of situations with third countries. An intermediary holding company is therefore always subject to the same national rules, regardless whether it is based in Singapore or Luxembourg.

QUESTION 20

Can you confirm that the application of the Dutch participation exemption to dividends received from an EU subsidiary must be regarded as the granting of a benefit under the Parent-Subsidiary Directive 90/435? Do you think that the judgment of the CJEU in the Danish cases could also have consequences for the application of the Dutch participation exemption? In your opinion, is it possible to identify situations of abuse of which the CJEU may consider that they should be combated by the EU member state of the parent company?

ANSWER TO QUESTION 20

In its judgments of 26 February 2019, the CJEU gave substance to the EU law principle of the prohibition of abuse of rights in the field of direct taxation. In joined cases C-116/16 and C-117/16, the CJEU applied this EU law principle in two cases relating to the exemption from withholding tax on profits distributed by a subsidiary to its parent company. This exemption follows from Article 5 of the EU Parent-Subsidiary Directive. In addition to the exemption from withholding tax, it follows from Article 4 of the EU Parent-Subsidiary Directive that the Member State of the parent company must, subject to conditions, apply an exemption or credit on the distributed profits received by a parent company from its subsidiary. In the Netherlands, such participation dividends are in principle exempted by application of the participation exemption. Contrary to the exemption from withholding tax, the CJEU did not in its judgments of 26 February 2019 express an opinion on the application of the EU law principle of the prohibition of abuse of rights to the exemption of distributed profits. Whether, and if so to what extent, conclusions can be drawn from these recent judgments as regards the application of the participation exemption does thus not directly follow from these judgments. I am currently examining this question and it may require further case law. In addition, I intend to include this in the announced investigation into the participation exemption.14

QUESTION 21

Is it correct that Denmark sounded the alarm in the European Code of Conduct Group about harmful tax competition already in 2010, so as to find a solution for the problem that its withholding taxes were circumvented by means of conduit companies in other EU Member States, including in the Netherlands?

ANSWER TO QUESTION 21

In the past, the Code of Conduct Group discussed 'outbound payments', looking at how a level playing field could be created with regard to interest and royalty payments from the European Union to countries outside the EU. The solution proposed at the time was an EU-wide withholding tax on outbound payments.

---

14 Parliamentary Papers II 2017/18, No. 188, page 11.
QUESTION 22

Is it correct that the Netherlands was the only EU Member State that denied the existence of this so-called European 'reversed gatekeeper' problem at the time and also afterwards refused to cooperate in a coordinated solution?

ANSWER TO QUESTION 22

The solution of an EU-wide withholding tax met with resistance among the Member States (including the Netherlands) because it would constitute an infringement of national tax policy towards third countries.

QUESTION 23

Are you prepared to still contribute in a constructive manner to solve this problem in the Code of Conduct Group, for example by coordinating substance requirements?

ANSWER TO QUESTION 23

As regards the tackling of conduit companies, major steps have been taken in the EU since the publication of Addressing Base Erosion & Profit Shifting (BEPS) in terms of protection of the tax base and the exchange of tax information. Also, the Netherlands have made progress in fleshing out substance requirements in more detail. I do not see any problem in having this discussion in the EU as well.

QUESTION 24

Do you agree that the CJEU judgments in the Danish cases call for the proposed withholding tax on interest and royalties not to be limited to interest and royalty payments to companies established outside the EU/EEA, but also to be introduced for interest and royalty payments to companies established in other EU/EEA Member States, to the extent there is abuse?

ANSWER TO QUESTION 24

As also indicated in the Fiscal Policy Agenda 2019, these recent CJEU rulings will of course also be taken into account in the design of the announced withholding tax on interest and royalty payments to low-tax jurisdictions and in situations of abuse as of 1 January 2021.15 This means that withholding tax will also be payable by an intermediary company, established within or outside the EU/EEA, if, put briefly, that intermediary company is entitled to the interest or royalty payment with the main purpose or one of the main purposes of avoiding the levying of withholding tax on another person and (2) there is an artificial arrangement or transaction.

15 Parliamentary Papers II 2018/19, 32140, No. 51.
QUESTION 25

Can you answer these questions one by one?

ANSWER TO QUESTION 25

Yes.