

The results of this factsheet are based on the input that was provided by the members of PwC's EU Direct Tax Group ("EUDTG") from 30 countries (Austria, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Gibraltar, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, Slovenia and the UK).

This latest BO factsheet looks not just at domestic legal developments associated with beneficial ownership, but also at evolving tax authority practice!

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The Beneficial Ownership factsheet (the "BO factsheet") has been prepared by the EU Beneficial Ownership network. This group seeks to enable colleagues in the EU Direct Tax Group and across the PwC European network to deliver high quality advice based on the latest insights on the beneficial ownership concept.

This concept has been the subject of increased attention since the Court of Justice of the European Union (CJEU) issued its decision in the so-called "Danish beneficial ownership cases" in February 2019 (Joined Cases C-116/16 and C-117/16 and Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16).

There are many different provisions across Europe (and more widely) that rely on the concept of Beneficial Ownership. The significance of the concept is further heightened by the introduction of the Multilateral Instrument (MLI) and specifically the principal purpose test (PPT).

The Danish cases precipitated changes in certain EU Member States' tax legislation but also heralded a change in approach by national tax authorities who have paid increasing attention to the question of beneficial ownership. As tax authorities look to raise revenue to compensate for the expense of emergency COVID-19 pandemic measures - this may be one area they focus on.

This latest BO factsheet looks not just at domestic legal developments associated with beneficial ownership, but also at evolving tax authority practice. Below we have summarized key findings.

## 1. Legislative information on beneficial ownership

In the infographic included in the second page we have visualized legislative information regarding beneficial ownership in the EU Member States, the United Kingdom, Gibraltar and Switzerland.

## 2. National developments following the Danish beneficial ownership cases

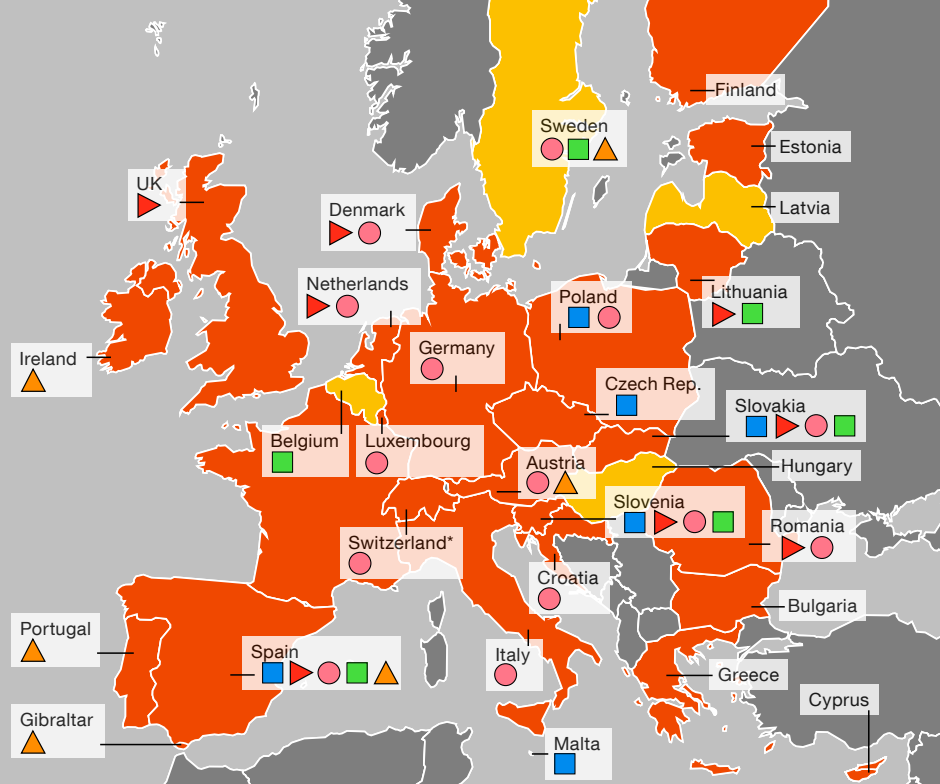
National courts of several EU Member States have referred to the Danish beneficial ownership cases in cases related to tax abuse. In the previous [issue](#) of the BO factsheet (version 12 March 2020) we highlighted such instances in **Italy, the Netherlands** and **Spain**.

- In **Italy**, the Italian tax authorities' [resolution](#) n.88/E, dated 18 October 2019, on the application of the Interest and Royalty Directive (IRD), it was stated that the Danish cases must also be considered for the purposes of the exemption regime. The resolution refers to the Danish BO cases by stating that "the exemption of interest payments from any taxes that is provided for by it is restricted solely to the beneficial owners of such interest, that is to say, the entities which actually benefit from that interest economically and accordingly have the power freely to determine the use to which it is put". In addition, the resolution lists all the indicators for the assessment of an abusive arrangement as outlined by the CJEU in the Danish BO case on the application of the IRD.
- In **the Netherlands**, the Dutch Supreme Court ("Court") in its judgment of 10 January 2020 referred to the Danish beneficial ownership cases when reviewing the compatibility of the Dutch substantial interest rules with EU law. More specifically, the Court stated that the application of the anti-abuse clause of the substantial interest rules is in line with the EU fundamental freedoms and the Parent Subsidiary Directive (PSD). In that regard, the Court ruled that, although the rule results in a restriction on the freedom of establishment, it can be justified by the need to combat tax abuse. In addition, the Court held that the fulfilment of the subjective condition of the tax abuse test only provides a presumption of evidence that tax abuse is present. This is also – according to the Court – confirmed in the Danish cases. More information on this judgment can be found [here](#).

## Key to symbols used

1. Colour of countries on map
  - countries that apply a BO concept
  - countries that do not apply a BO concept
2. Explicit domestic BO definition
3. Relevance of OECD's interpretation for both domestic and DTT purposes
4. Possible application of look-through approach
5. Application of IRD to both indirect and direct holdings
6. Application of PSD to both indirect and direct holdings

\* No application of the PSD or IRD but EU-Swiss Agreement



- In **Spain**, on 20 November 2019, the Spanish Central Administrative Tribunal issued a ruling in which it applied the Danish cases. More specifically, under the Spanish non-resident Income Tax Act, the withholding tax exemption on interest payments to EU lenders is granted regardless of whether the recipient is the beneficial owner of these payments. The Tribunal held the view that the withholding tax exemption on interest payments to EU lenders may be denied if the recipient does not qualify as the beneficial owner.

Since publication of the previous issue of that factsheet we note similar developments in **France** and **Switzerland** as well as further updates in **Spain**.

- In **France**, the French Supreme Administrative Court referred to the Danish cases in the context of a ruling on the French implementation of the PSD. To enjoy the tax exemption, the parent company had to justify to the subsidiary/paying agent that, in addition to fulfilling the other conditions expressly laid down by the PSD, it qualified as the beneficial owner of the dividends. See [EUDTG newsletter issue nr. 4 \(2020\)](#).
- In **Switzerland**, the Swiss Supreme Court also gave its own interpretation of the Danish cases in an outbound dividend case involving Article 15(1) of the Swiss-EU Savings Agreement. This Article provides an exemption comparable to that of Article 5 of the EU PSD.

- In **Spain**, a second ruling from the Spanish Central Administrative Tribunal was issued. In this case, the Tribunal denied the withholding tax exemption on a dividend payment to an EU parent company on the basis that the company was not the beneficial owner and a special anti-avoidance rule. The beneficial ownership requirement is not explicit in the Spanish rules but they addressed it as the taxpayer sought to rely on a provision allowing the exemption where the company was incorporated for valid economic reasons. See [EUDTG newsletter issue nr. 4 \(2020\)](#).

- Finally, in **Italy**, the Italian Supreme Court issued in July 2020 a judgment on the interpretation of the beneficial owner requirement in IRD as implemented in Italy. For the first time, the Italian Supreme Court referred to the principles outlined in the Danish beneficial ownership cases for the interpretation of the beneficial owner requirement in the context of the domestic implementation of the IRD. See [EUDTG newsletter issue nr. 5 \(2020\)](#).

### 3. Tax authorities' focus on beneficial ownership

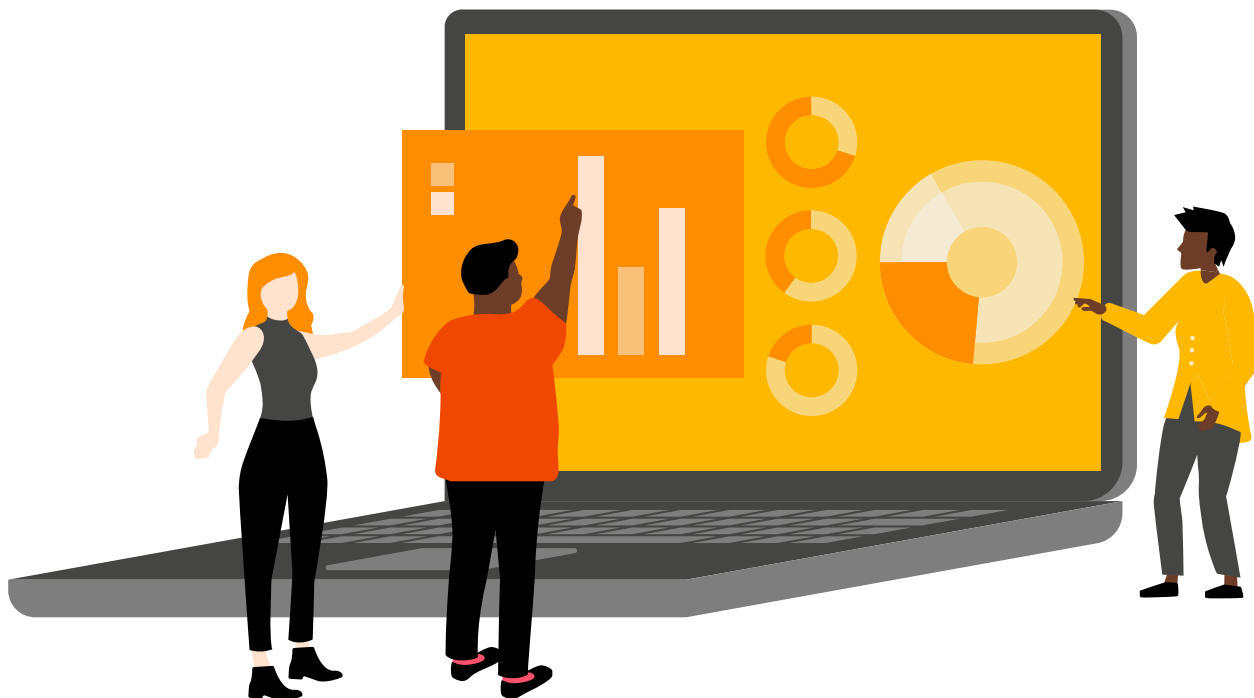
- Four countries report a high degree of focus on beneficial ownership (Belgium, Denmark, Italy and Spain).
  - **Belgium** has seen a significant increase in tax audits focused on passive income flows (dividends/interest/royalties) where the tax authorities allege abuse through the involvement of intermediary entities.
  - In **Spain**, the tax authorities are increasingly asking taxpayers questions targeting beneficial ownership and tax substance issues.



- While at the moment only a few countries have reported a high degree of focus on beneficial ownership, several countries indicate that they expect this will change soon.
  - For example, in **Austria**, the tax authorities are becoming more reluctant to grant a relief at source from the Austrian withholding tax on dividend payments to foreign low-substance holdings.
  - Although the current focus in **Czech Republic** was reported as low, it seems that the tax authorities are asking more questions related to beneficial ownership and substance requirements in cross-border situations.
  - In the **UK**, historically having a low focus, it is expected that the tax authority will pay greater attention to this area in future in light of recent developments (e.g. BO cases, MLI, and need for revenue in light of COVID-19). Although not particularly driven by the Danish cases, an increase in tax residence enquiries has been witnessed over the past 24 months.

#### Other observations

- PPT guidance
  - So far, in none of the countries, any stand-alone guidance on the interpretation of the PPT has been published.
  - Only a few countries have provided some guidance for specific areas, but these do not relate to EU law and the Danish beneficial ownership cases.
- Certainty in advance
  - In most countries it is possible to get certainty in advance through a binding ruling or agreement with the relevant competent authorities. In Bulgaria, Croatia, Czech Republic and Greece, getting upfront certainty is not possible.
  - However, on the application of the beneficial ownership rules, various countries indicate that it is either difficult or not even possible to obtain certainty in advance. In some countries the relevant competent authorities are reluctant because they do not have an overview of all the facts in order to decide on the BO status. In other countries, authorities do not comment on the BO status in principle and/or assume that the recipient is the BO. As a consequence, the BO status still can be challenged by the relevant competent authorities.



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